

Customs, Excise and Gold Tribunal - Delhi

Shree Shyam Filaments vs Cce on 28 March, 2002

Equivalent citations: 2002 (81) ECC 567, 2002 ECR 343 Tri Delhi, 2002 (148) ELT 434 Tri Del

Bench: K Usha, A T V.K.

ORDER V.K. Agrawal, Member (T)

1. The issue involved in this appeal, filed by M/s. Shree Shyam Filaments, is whether the refund claim filed by them is time barred under Section 11B of the Central Excise Act.

2. Shri K.K. Anand, learned Advocate, submitted that the Appellant manufactured Synthetic filament yarn; that under intense pressure of the Department they paid the differential duty during the period 6.12.95 to 22.10.1997 in respect of additions to the assessable value made on account of transportation, insurance, handling and delivery charges for the clearances made during the period from 1.3.1994 to 30.11.1996; that they filed a refund claim on 25.6.1998 which was rejected by the Deputy Commissioner, under Adjudication Order No. 55-Refd/99 dated 18.11.1999 being time barred holding that letters dated 5.10.95 and 5.12.95 were not letters of protest as these were merely letters of disapproval with the Superintendent on various issues and that the procedure specified under Rule 233B of the Central Excise Rules was not followed by them; that the Commissioner (Appeals), under the impugned Order dated 5.7.2001, rejected their appeal holding that there was no indication in the said letters that the duty was paid under protest.

3. The learned Advocate, further, submitted that the second proviso to Section 11B of the Act provides that the limitation shall not apply where any duty has been paid under protest; that under their letter dated 5.10.1995, the Appellants recorded their disagreement with the levy of differential duty on transportation/delivery charges; that as the Superintendent urged them to deposit the duty, they in their letter dated 5.12.95 clearly mentioned as under:

Differential Excise duty in case of Transportation/Delivery Charges and Insurance Charges is not leviable. These are indeed permissible deductions for the calculation of assessable values would request you not to insist upon recovery on short levied excise duty amount charged in case of transportation/delivery and insurance charges. Your continuous insistence and pressure for recovery of the same would be unjustified and against the principle of natural justice.

4. The learned Advocate mentioned that the Appellant has thus been contesting the legality of the levy from the very beginning and it was only under coercive threats that the duty was deposited; that this is nothing else but payment of duty under protest; that in *India Cements Ltd., v. C.C.E.* the Supreme Court considered such a letter as payment of duty under protest. He, further mentioned that even after introduction of Rule 233B, no form has been prescribed for lodging protest; that thus the decision in *India Cements* case is applicable to the present matter; that it has also been held by the Tribunal in the case of *Mahalakshmi Industries v. C.C.E. Chandigarh* that the procedure laid down under Rule 233B is only directory and, therefore, the procedural lapse cannot be a ground for denying the refund claim so long as there is a lodging of protest in the matter; that similar views were expressed in the case of *CCE, Baroda v. Gujarat Communication & Electronics Ltd.* wherein it was held that if the gate passes were endorsed with the mark 'payment under protest', it is deemed

to be a substantial compliance with the requirement of law since Rule 233B is only directory and not mandatory. Reliance has also been placed on the decision in the case of Jay Chemical Industries v. C.C.E., Ahmedabad wherein it was held that Rule 233B is directory and substantial compliance is sufficient.

5. Countering the arguments, Mrs. Neeta Lal Butalia, learned SDR, submitted that Rule 233B(1) provides that "Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest:" that phrase "to this effect" is very significant as the assessee, desirous of paying duty under protest, has to give a letter to this effect to the proper officer: that no such letter has been delivered by the Appellant in the present matter; that in both the letters dated 5.10.95 and 5.12.95, the Appellants have only given the reasons as to why differential duty was not demandable and after disputing the same, they paid the duty on 6.12.1995 voluntarily without delivering any letter of protest to this effect and went on paying the duty subsequently; that they had not challenged the levy of duty at any time either by way of filing the appeal or by way of making any representation. She further submitted that under letter dated 5.10.95 they mentioned in respect of demand of duty on account of insurance charges that they were preparing a complete detailed statement; that this by no stretch of imagination can be termed as 'protest': that in the said letter they were giving their views about the points raised by the Department and in letter dated 5.12.95 they only mentioned that insistence for recovery would be unjustified and against the principle of natural justice; that then from next day they went on paying the duty for over a period of almost two years without any objection, without asking for any show cause notice and without making any representation against the levy of duty. The learned SDR finally submitted that the Constitutional Bench of Nine Judges of the Supreme Court in the case of Mafattal Industries Ltd., v. Union of India has clearly held that "Any person paying the duty under protest has to follow the procedure prescribed by the Rule"; that in view of this, the procedure specified under Rule 233B has to be followed by the Appellants and since they have not followed the same, it can not be claimed by them that the duty was paid by them under protest and consequently the refund claim filed by them is time barred, being filed after the expiry of period specified in Section 11B of the Act. In reply, the learned Advocate referred to the decision in Superintending Engineer v. C.C.E., Trichy 2001(137)ELT 390(T), wherein it was held that mere letters of protest is sufficient compliance with requirement of Rule 233B.

6. We have considered the submission of both the sides. As per provisions of Section 11B (J) of the Act any person claiming of refund of any duty has to make an application before the expiry of six months from the date of payment of duty. As per second proviso to Sub-section (1) of Section 11B; the limitation of six months shall not apply where any duty has been paid under protest. Rule 233-B of the Central Excise Rules, 1944 prescribes the procedure for paying duty under protest. As per this Rule, the assessee has to deliver a letter for paying duty under protest giving the grounds thereof, an endorsement "Duty paid under protest" shall have to be made on all gate passes & RT12, either appeal is to be filed or he has to make a representation within three months of the delivery of the letter of protest and on service of the decision, he shall have no right to deposit the duty under protest. In the present matter the Appellants have placed reliance on two letters dated 5.10.95 and 5.12.95 which according to them were letters of protest. On a perusal of these two letters, we agree with the submissions of the learned SDR that these letters only conveyed their point of view and

these were not in effect letters of protest as the Appellants continued to make payment of duty for subsequent clearances also. Moreover, even if these two letters are regarded as letters of protest, they had not followed the procedure outlined in Rule 233B at all . In our view there was not even substantial compliance of the requirements of Rule 233B. In the decision relied upon by the learned Advocate, this Tribunal has held the payment of duty under protest as there was substantial compliance of the provisions of Rule 233B. The Apex Court in Mafatlal Industries case has clearly held that "A reading of the rule shows that the procedure as prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he has paid the duty under protest."

(Emphasis provided).

Rule 233B also contains the provision (Sub-rule 7) according to which "if any of the provisions of this rule has not been observed, it shall be deemed that the assessee has paid the duty without protest." In view of these facts we hold that the duty was not paid under protest and accordingly refund claim is hit by the time-limit specified in Section 11B of the Central Excise Act.

The appeal is thus rejected.