Supreme Court of India
Coastal Gases And Chemicals Pvt. ... vs Assistant Collector Of Central ... on 1 April, 1997
Equivalent citations: 1997 (92) ELT 460 SC, JT 1997 (10) SC 679, (1997) 7 SCC 223
Bench: S V Manohar, V Khare
ORDER Sujata V. Manohar and V.N. Khare, JJ.

1. The appellants manufacture liquid pure carbon dioxide for use in softdrinks, fire extinguishers and other industrial uses. The appellants filed a classification list on 23rd March, 1978 claiming exemption from the payment of excise duty in respect of carbon dioxide manufactured and cleared by them on the basis of a Notification No. 71/78, dated 1st March, 1978 under which full exemption was granted upto an aggregate value not exceeding rupees five lakhs, in respect of certain goods specified in the said Notification which were cleared on or after 1st April of any financial year. Carbon dioxide is one of the commodities mentioned in the Notification.

2. The classification list filed by the appellants was kept pending and was not approved by the Assistant Collector of Customs since there was a dispute as to whether the appellants were to be considered as the manufacturers of the goods or whether Coromandal Fertilizers Ltd. were the manufacturers. Ultimately an order was passed in favour of the appellants by the Government of India being Revision Order No. 939/79, dated 30th October, 1979. In the meanwhile, on 5th July, 1979 the Superintendent of Central Excise informed the appellants that they were eligible for exemption under the said Notification. The appellants who had, in the meanwhile, cleared their goods on payment of duty, filed a refund claim on 4-1-1980 in respect of the duty paid by them from 1-4-1978 to 25-7-1978. After the filing of the refund claim, the classification list of 23rd March, 1978 was finally approved with effect from 1-4-1978 on 24th April, 1980.

3. The claim of the appellants for refund was rejected as time barred by the Assistant Collector in view of Rule 11 of the Central Excise Rules, 1944. On an appeal, the Collector (Appeals) by his order dated 4th August, 1981 upheld the order of the Assistant Collector. On further appeal to the Central Excise and Gold Control Appellate Tribunal (CEGAT), the CEGAT rejected the appeal of the appellants by its order dated 24th April, 1987 upholding the contention of the department that the refund claim having been filed beyond the period of six months from the date of payment of duty, it was barred by limitation under Rule 11 of the Central Excise Rules, 1944.

4. The appellants filed Writ Petition being No. 2155 of 1988 before the Andhra Pradesh High Court challenging the above order of CEGAT. In the said petition, the appellants had also challenged the vires of Section 11B of the Central Excises and Salt Act which was introduced by the Amending Act 40 of 1991. The High Court by its order dated 29th April, 1993 dismissed the said writ petition along with a group of other writ petitions. The present appeal arises from the above judgment of the High Court.

5. The question of vires of Section 11B is now settled by a decision of this Court in Mafatlal Industries Ltd. v. Union of India (S.C.). The appellants, however, contend that their claim for refund was not time barred inasmuch as on the date when they filed the claim for refund their classification list had not been approved. All payments made pending the approval of the classification list can

only be provisional payments. Hence their claim for refund which was made even prior to the approval of the classification list cannot be considered as time barred under Rule 11. The period provided by Rule 11 would run only from the date of approval of the classification list. The appellants have relied upon a decision of this Court in Samrat International (P) Ltd. v. Collector of Central Excise, Hyderabad 1992 Suppl. (1) SCC 293 where this Court said limitation under Rule 11 commences only from the date of final assessment. On the facts of that case, however, this Court had held that the payment of duty which was made by the appellants in that case was provisional and the procedure under Rule 9B had been followed. We have not been shown any material on record to indicate whether the appellants in the present case had cleared carbon dioxide manufactured by them by following the procedure laid down in Rule 9B or that the payment of excise duty which the appellants had made during the relevant period was provisional. This is a matter which the appellants will have to establish before the departmental authorities when the matter goes back to the departmental authorities for considering the claim of the appellants for refund under the ratio of Mafatlal Industries' case (supra). If the appellants succeed in establishing that the payment of duty which was made by them for the period in question was a provisional payment, they shall be entitled to the benefit of the ratio of the judgment of this Court in Samrat International's case (supra).

6. The appellants, however, contend that the provisions of Section 11B will not be attracted in their case. They rely upon the observations made by this Court in the case of Mafatlal Industries (supra) in Paragraph 95 which reads as under:

95. Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be. Any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under Sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation.

7. This Court has thus held that any adjustment which is made under Sub-rule (5) of Rule 9B dealing with provisional assessments is not governed by Section 11A or Section 11B. The Court has, however, observed that if ultimately the final order passed under Sub-rule (5) is questioned in a writ petition or a suit and ultimately the assessee succeeds, the refund claim which arises as a consequence of such decision would be covered by Section 11B. The present case is not a case of any adjustments in the payment of excise duty made under Sub-rule (5) of Rule 9B. The refund claim does not appear to

be a claim arising under Rule 9B(5). It is an independent claim for refund on the basis of Notification 71/78, dated 1st March, 1978. The appellants challenged the rejection of their claim for refund right upto CEGAT and filed a writ petition before the Andhra Pradesh High Court also. Therefore, the provisions of Section 11B are attracted and the appellants are governed by the ratio of Mafatlal Industries's case (supra) and the consequent format order framed by this Court. It is ordered accordingly.

8. The appeal is disposed of accordingly. No order as to costs.