M.R.F. LTD.

v.

COLLECTOR OF CENTRAL EXCISE, MADRAS.

JANUARY 27, 2004

[P. VENKATARAMA REDDI AND S.H. KAPADIA, JJ.]

Central Excise and Salt Act, 1944; Section 35-L and 11(B)(3)/Central Excise and Tariff Act; sub heading 4005.00 and 4006.90/Central Excise Rules, 1944; Rule 233B/Notification No. 377/86:

Classification—Payment of excise duty on vulcanizing solution as per approved classification list under sub-heading 4006.90—Issuance of Show cause notice by Revenue Department demanding excise duty as per re-classification under sub-heading 4005.00—Payment thereof by the assessee under protest—Revenue Department confirmed the demand—On appeal, reversed by the Appellate authority—Refund claims—All the claims except one allowed by the authority holding that differential amount of duty in one of the claims was not under protest in terms of Rule 233B—Appeals dismissed by the Appellate Authority and thereafter by the Tribunal—On appeal, Held: since assessee succeeded before the Appellate Authority in the re-classification dispute, Assessee entitled to claim refund of differential amount of duty in terms of Section 11B(3) of the Act—Revenue directed to refund the differential amount of duty with interest thereon—Directions issued.

Appellant-assessee manufactures "vulcanizing solution". It filed a classification list under sub-heading 4006.90 in respect of the product. The list was approved by the Revenue Department. Later, the Department had asked the assessee to submit revised classification list as the product was classifiable under sub-heading 4005.00 and thereby directed him to pay differential amount of duty for the relevant period. The Department also issued a show cause notice to him. Assessee paid the differential amount of duty under protest by endorsing the protest on the challan. Later, he filed a formal letter of protest stating that the product was classifiable under sub-heading 4005.00 r/w exemption Notification No.377/86. However, Department rejected his claim and confirmed the demand. On appeal, Appellate Authority reversed the order. Consequently, assessee preferred 3 refund claims. Allowing all except one refund claim, Assistant

A Collector, held that since duty was not paid under protest in terms of Rule 233(B) of the Central Excise Rules, appeals filed by the aggrieved assessee were dismissed by the Appellate Authority and thereafter by CEGAT. Hence the present appeal.

It was contended for the appellant-assessee that the differential B amount of duty was paid by the assessee under protest by making an endorsement on the challan to that effect and subsequently a protest letter had also been forwarded to the Department; that since the disputes in regard to payment of duty under the appropriate sub-heading of Central Excise and Tariff Act was resolved in his favour, refund claim thereto C should have been allowed; that in the facts and circumstances of the case, relevant provision of limitation could not have been applied; and that since differential amount of duty was paid much after the clearance of the goods, it was not possible to comply strictly with the provisions of Rule 233B of the Rules.

D On behalf of the Revenue, it was submitted that since the provisions of Rule 233B of the Rules have not been complied with, there was no protest by the assessee, and so the refund claim was not maintainable; and that since the refund claim was not made within 6 months from the date of payment of duty, it was barred by time.

E Allowing the appeal, the Court

HELD: 1.1. Tribunal has relied upon Rule 233B of the Central Excise Rules in support of its view that in order to put a protest payment the conditions and circumstances mentioned in Rule 233B should be complied F with, otherwise there could be no protest payment under the Central Excise and Salt Act. On this reasoning the Tribunal denied refund to the appellants. However, there was one more reason for denying the refund. According to the Tribunal the differential payment was not the result of demand or legal compulsion. [1123-E-F]

G 1.2. The decision on the larger issue of compliance of Rule 233B as condition precedent to the applicability of the proviso to Section 11B(1), as it stood at the material time, need not be gone into as the appellants are entitled to relief of refund on the facts of the case in terms of Section 11B(3) of the Act, as it stood at the material time. [1123-G]

H 1.3. The show cause notice issued by the Assistant Collector

demanding reclassification was in relation to the past clearances and when the appellants succeeded in the reclassification dispute before the Collector (Appeals), the appellants were entitled to refund of the differential amount of duty under Section 11B(3) of the Act. Hence, the Department is directed to refund the differential amount of duty for the period 1.3.86 to 31.10.86 with interest at 9% per annum till payment. [1124-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9044 of 1996.

From the Judgment and Order dated 5.1.96 of the Central Excise Customs and Gold (Control) Appellate Tribunal, South Regional Bench at Madras in A.No.E/436/90/MAS.

Joseph Vellapally, S.Ignatius, Krishnan Venugopal, ThomasVellapally and K.R. Nambiar for the Appellant.

R.P. Bhat, Rajiv Nanda and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

KAPADIA, J. 1. Being aggrieved by majority decision dated 5th January 1996 of the Customs, Excise and Gold (Control) Appellate Tribunal South Regional Bench at Madras in Appeal No. E/436/90/MAS, the original assessee has come by way of appeal under Section 35-L of Central Excise and Salt Act, 1944. By the impugned judgment and order, the assessee's claim for refund of Rs. 13,18,184.88 paid as differential duty on 6th April, 1987 in relation to period 1.3.1986 to 31.10.1986 came to be dismissed on the ground that it was paid voluntarily and *suo moto* and that the alleged protest was not in terms of Rule 233 B of Central Excise Rules, 1944.

2. Appellants manufacture "Vulcanising Solution" at their factory in Madras. On 3rd March, 1986, appellants filed the classification list under sub-heading 4006.90 carrying rate of duty at 15%. The said list approved on 10.7.86. Appellants paid the duty at 15% accordingly from 1.3.86 onwards. However, on 28.10.86 the Assistant Collector visited the appellant's factory and directed the appellants to give a revised classification list for the aforestated product under sub-heading 4005.00 carrying the rate of 40% advalorem and further directed the appellants to pay the differential duty for the past period i.e. 1.3.86 to 31.10.86. On 31.3.87, the Department issued a show cause notice alleging that said product was classifiable under sub-heading 4005 of

A Central Excise Tariff and further that exemption Notification No. 377/86 was not applicable. By the show cause notice issued by the Assistant Collector, the appellants were asked to show cause why duty for their past clearances should not be demanded at 40% advalorem under Section 11A of Central Excise Act, 1944. On 6.4.87 the appellants paid the differential duty of Rs. 13,18,184.88 with the endorsement on the Challan stating that it was paid B under protest. Thereafter on 10.4.87 the appellants filed a letter of protest with the Assistant Collector. In the said protest letter the appellants claimed that the product was classifiable under sub-heading 4005.00 read with exemption Notification No. 377/86 dated 29.7.86 at 15%. The show cause notice resulted in the order of adjudication by the Assistant Collector dated C 10.1.88 wherein he confirmed the demand only from 1.11.86 to 30.9.87 amounting to Rs. 25,61,791.72 as the appellants had paid Rs. 13,18,184.88 on 6.4.87. Being aggrieved, the appellants preferred an appeal to the Collector (Appeals). By order dated 30.6.88, the Collector (Appeals) set aside the impugned adjudication order and allowed the classification at 15% as prayed for by the appellants. After the classification dispute ended in favour of the D appellants they preferred 3 refund claims for the excise duty paid and the Assistant Collector while permitting refund of the differential duty paid by the appellants in Rs. 25.61,792/- for the period 1.11.86 to 30.9.87 and further sum of Rs. 10,78,485.76 for the period 1.2.88 to 20.7.88 rejected claim for refund for Rs. 13,18,184.88 for the period 1.3.86 to 31.10.86 on the ground E that duty was not paid under protest in terms of Rule 233 B of Central Excise Rules, 1944. The appeals preferred by the appellants were dismissed by the Collector (Appeals) and by the majority view of Central Excise & Gold (Control) Appellate Tribunal (in short 'CEGAT'). Hence the appellants have come by way of appeal under Section 35L of the Central Excise Act, 1944.

F 3. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the appellants contended that the appellants had been paying excise duty @ 15% till 31st October, 1986 based on an approved price list. However, on a visit by the Assistant Collector on 28th October, 1986, the appellants were informed that they were required to pay excise duty @ 40% and accordingly G the appellants were directed to pay the differential duty. That thereafter on 31st March, 1987 the Assistant Collector had issued a show-cause notice asking the appellants to show cause why duty @ 40% should not be demanded denying the benefit of Notification No. 377/86 for all past clearances. That consequently the assessee paid the duty amount on 6.4.87, pending conclusion of adjudication proceedings initiated vide show-cause notice dated 31st March, H 1987. That the differential duty was paid accordingly on 6.4.87 amounting to

Rs. 13,18,184.88 for the period 1.3.86 to 31.10.86 and while making the said payment an endorsement was made on the challan indicating payment under protest. It was further pointed out that after making payment under protest on 6.4.87, a letter was also addressed by the appellant to the Assistant Collector in reply to the show-cause notice dated 31st March, 1987. In the said letter the appellants indicated the ground of protest. Learned counsel for the appellants contended that ultimately the appellants succeeded in their case before the Collector (Appeals) and the adjudication order was set aside and the case of the appellants that their product was subject to levy of duty @ 15% advalorem was accepted by the appellate authority. It was argued that once the matter was resolved in favour of the appellants, their claim for refund for the period in question should have been allowed without applying the limitation of 6 months as the duty was paid under protest. It was argued that in the facts and circumstances of this case Rule 233 B was not applicable as the said Rule contemplates that where the assessee wants to pay the duty under protest, he shall deliver a letter to the competent authority giving grounds for payment of duty under protest and once the said letter was acknowledged, it constituted a proof that the assessee had paid the duty under protest. It was argued that although Rule 233B(3) was contingent upon compliance of sub-Rule (4) which requires an endorsement of duty paid under protest on copies of gate passes and RT 12 forms, in this case, such endorsement could not have been made because the differential duty has been paid much after the clearance of the goods. It was further argued on behalf of the appellants that there was substantial compliance of the Rule 233 B as the duty under protest was paid by making an endorsement on the challan. He contened that the appellants paid duty after they were asked to do so by the Assistant Collector that goods were required to be classified otherwise than what was approved in the classification list. He, therefore, contended that the Tribunal erred in coming to the conclusion that the protect was not in terms of Rule 233 B of the Central Excise Rules.

4. *Per contra*, Mr. R.P. Bhatt, learned senior counsel for the Department pleaded that under Section 11B(1) of the Central Excise Act, 1944, any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of 6 months from the relevant date. That under the proviso to Section 11 B(1) an exception is culled out to the effect that the limitation of 6 months shall not apply where any duty has been paid under protest. Learned counsel for the Department submitted that the appellant in this case seeks to fall under the proviso to Section 11B(1). He submitted that on their own showing

A the appellant applied for refund of differential duty for the period 1.3.86 to 31.10.86 vide refund application dated 10th August, 1988 purporting to comply with Rule 233B. He contended that in this case Rule 233 B has not been complied with by the appellants as the payment was made on 6.4.87 for the period 1.3.86 to 31.10.86 whereas Rule 233B required payment of duty proceeded by a letter of protest. It was pointed out that in the present case B payment was made on 6th April, 1987 and it was no preceded by protest letter. That on the contrary the letter of protest was lodged after payment on 6.4.87, hence there was non compliance of Rule 233B(1). That on the date of payment there was no protest. It was further argued on behalf of the Department that under Rule 233 B(4), the duty paid under protest shall be C endorsed on the copies of the gate passes and on RT-12 returns. That in the present case since the clearance have been made there was no question of endorsement of the gate passes and RT-12 returns and, therefore, there was no non-compliance of Rule 233 B(4). That since there was non-compliance of Rule 233 B(4), there was no protest which is the consequence indicated in Rule 233 B(8). It was argued that payment of duty under protest was D required to be made only in terms of Rule 233 B so that an assessee is not required to file refund claims on an ongoing basis and and his protest under that rule would absolve the appellants from filing refund claims for every clearance. That Rule 233 B(4) was procedural and mandatory and that it excluded all other forms of payment under protest except the one mentioned E in the said rule. It was argued that in the present case there was no demand from the Department calling upon the assessee to make payment of the differential duty for the period 1.3.86 to 31.10.86. That the assessee had made the payment *suo moto* on 6.4.87 in respect of the products cleared in the past during the period 1.3.86 to 31.10.86. Learned counsel for the Department submitted that claim of the appellant-assessee was time barred as F the claim was not made within six months from the date of payment and therefore the appellant has invoked the proviso to Section 11 B(1) which proviso would stand attracted only if the appellant satisfies the provisions of Rule 233 B. That the said Rule was applicable only to concurrent and future clearances and not to past clearances and hence Rule 233B was not applicable G and therefore the Assistant Collector was right in rejecting the claim of the appellant as not maintainable.

5. In rejoinder, learned counsel for the appellants raised an alternative contention, which in our view, merits acceptance. It was argued that ultimately in the classification dispute, the appellant-assessee has succeeded and the H case of the appellant has been accepted by the appellate authority and duty

has been levied @ 15% as contended by the appellant. It was argued that under the circumstances the appellant-assessee was entitled to refund of duty paid after the classification dispute cropped up. A

6. Learned counsel on both sides agreed that compliance of Rule 233 B as condition precedent to the proviso to Section 11 B(1) of the Act is not required in cases falling under Section 11 B(3) of the Central Excises & Salt Act, 1944. In such cases the Assistant Collector is bound to give effect to the orders passed in appeal or revision under the Act while granting refund of excise duty which becomes due and payable to the applicant without his having to make any claim in that behalf. B

7. In the normal course, two points would have fallen for determination- Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the payment of differential duty of Rs. 13,18,184.88 cannot be regarded as payment made under protest and therefore, the refund was not admissible by virtue of the time bar under Section 11 B of the Act and whether in the fact and circumstances of the case, the Tribunal was right in holding that compliance of Rule 233 B of Central Excise Rules, 1944 was a condition precedent to the applicability of the proviso to Section 11 B(1) of Central Excises & Salt Act, 1944 (as it stood at the relevant time)? C D

8. The above two points are inter-linked and it has bearing on the core issue whether the duty was paid under protest. In this case the Tribunal has relied upon Rule 233 B in support of its view that in order to put a protest payment the conditions and circumstances mentioned in Rule 233 B should be complied with, otherwise there could be no protest payment under the Act. On this reasoning the Tribunal denied refund to the appellants. However, there was one more reason for denying the refund. According to the Tribunal the differential payment was not the result of demand or legal compulsion. E F

9. In our view the decision on the larger issue of compliance of rule 233 B as condition precedent to the applicability of the proviso to Section 11B(1) need not be gone into as the appellants are entitled to relief of refund on the facts of this case in terms of Section 11B (3) G

which reads as follows:-

"(3). Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the H

A amount to such person without his having to make any claim in the behalf."

10. In the present case the show cause notice issued by the Assistant Collector demanding reclassification was in relation to the past clearances and when the appellants succeeded in the reclassification dispute before the B Collector (Appeals) on 30th June, 1988, the appellants were entitled to refund of the differential amount of Rs. 13,18,184.88 under Section 11 B(3) of the Act.

It is not in dispute that cases falling under Section 11 B(3) refer to consequential relief which an assessee is entitled to on his succeeding in C appeal/revision. In the present case the appellants have succeeded before the Collector (Appeals) on 30th June, 1988 and consequently the appellants herein were entitled to refund under Section 11 B(3) of the Central Excise & Salt Act, 1944. Therefore, on facts of this case we are not required to examine the aforestated larger question arising in the matter since the appellants are entitled D to relief under Section 11 B(3) of the said Act of 1944.

11. In the circumstances, Civil Appeal No. 9044 of 1996 stands allowed and the judgment and order of CEGAT dated 5.1.1996 in Appeal No. E/436/90/MAS is hereby set aside with a direction to the Department to refund the differential duty of Rs. 13,18,184.88 for the period 1.3.86 to 31.10.86 with E interest at 9% per annum from date of the receipt of the copy of this judgment by the Competent Authority till payment.

However in view of the facts and circumstances of this case there will be no order as to costs.

S.K.S. Appeals allowed.