(1998) 08 GAU CK 0021

Gauhati High Court (Shillong Bench)

Case No: C.R. No. 72 (SH) of 1997

Meghalaya Metals and Minerals (P) Ltd.		APPELLANT
	Vs	
The Union of India (UOI) and Others		RESPONDENT

Date of Decision: Aug. 10, 1998

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11, 11B, 12A, 12B
- Constitution of India, 1950 - Article 226, 265
- Contract Act, 1872 - Section 11C, 12C, 72
- Customs Act, 1962 - Section 27

Citation: (1998) 3 GLT 516

Hon'ble Judges: A.K. Patnaik, J

Bench: Single Bench

Judgement

A.K. Patnaik, J.

In this application under Article 226 of the Constitution of India, the petitioner has prayed for quashing the show-cause notice dated 25.4.97 issued by the Assistant Commissioner. Central Excise Division, Shillong, calling upon the petitioner to show cause as to why an amount of Rs. 1,41,670.74 should not be deposited with the Consumer Welfare Fund as defined in Section 12C of the Central Excise & Salt Act, 1944 (for short, "the Act"), and for a mandamus on the respondents to refund the said amount with interest to the petitioner.

2. The relevant facts are that the petitioner carries on the business of manufacturing conductors and P.V.C. wires and is liable to Central Excise duty under the Act on some of the items manufactured by it. During the period 1985-86, the petitioner removed different goods manufactured by it from its factory located in the Industrial Estate at Shillong on payment of Excise Duty. Subsequently, however, the

petitioner realised that under the notification No. 85/85-CE date 17.3.85, the petitioner, as a small-scale Industry, was entitled to exemptions from Excise Duty on its first clearances and subsequent clearances of goods from its factory at different rates and had paid an excess duty of Rs. 1,50,762,34 (1.43,583.24 as basic duty and Rs. 7,179.10 as special duty) during the aforesaid period 1985-86. In the circumstances, by application dated 10.3.86 before the Assistant Collector, Technical. Central Excise, Shillong Range, Shillong, the petitioner claimed refund of the said amount of Rs. 1.50,762.34. On the said claim of refund, the Superintendent of Central Excise, Shillong Range, Shillong, issued a show-cause notice dated 28.11.86 to the petitioner stating, inter alia, that the duty elements would be added to assessable value for ascertainment of the refund claimed and thus the amount claimed for refund would be reduced by Rs. 9.091.60 in total inclusive of basic and special excise duty, and asking the petitioner to show cause as to why the assessable value should not be re-fixed, as proposed. In reply to the said show-cause notice, the petitioner wrote in its letter dated 1.12.86 to the Assistant Collector (Technical), Central Excise, Shillong, that it was agreeable to reduction of refund claimed by Rs. 9,091.60 and that the balance amount of Rs. 1.41,670.74 which was long over due be refunded to the petitioner. The amount however was not refunded to the petitioner despite reminders having been sent by the petitioner both to the Assistant Collector (Technical), Central Excise, Shillong and the Collector of Central Excise, Shillong Collectorate, in its letters dated 24.187, 1.4.87 and 6.787. Instead, by order dated 9.12.87, the Assistant Collector (PREV), Customs & Central Excise, Shillong, rejected the claim for refund on various grounds stated in the said order. Aggrieved, the petitioner filed an appeal before the Collector of Central Excise (Appeals), Calcutta and by order dated 10.3.88, the Collector of Central Excise (Appeals), Calcutta, held that the grounds for rejection of refund claimed by the petitioner given by the Assistant Collector of Central Excise, Shillong, did not constitute valid grounds and set aside the aforesaid order of the Assistant Collector, Shillong, and directed him to grant consequential relief to the petitioner. Against the aforesaid order of the Collector of Central Excise (Appeals), Calcutta, the Department preferred appeal before the Customs, Excise and Gold (Control), Appellate Tribunal, New Delhi, (for short, "the Tribunal") and prayed for stay of the order of the Collector (Appeals), Calcutta. By order dated 4.4.90, the Tribunal rejected the prayer for stay and finally by order dated 1.4.97 the Tribunal found that there were no grounds to interfere in the appeal and, accordingly, dismissed the appeal. The petitioner then forwarded the said order of the Tribunal to the Central Excise Authorities at Shillong asking them to refund the sum of Rs. 1,41,670.74 along with interest in its letter dated 17.4.97. The amount however was not refunded and instead the impugned show cause notice dated 25.4.97 has been issued to the petitioner by the Assistant Commissioner. Central Excise Division, Shillong, calling upon the petitioner to show cause as to why the said amount of Rs. 1,41,670.74 should not be deposited with the Consumer Welfare Fund as defined in Section 12C of the Act.

3. Ms. PD Buzarbaruah, learned Counsel for the petitioner, submitted at the hearing that the show cause notice dated 28.11.86 would show that the authorities have determined the amount of refund payable to the petitioner after deducting therefrom the amount that has been passed on by the petitioner to the consumers and at this late stage when the Tribunal had passed the order of refund claimed by the petitioner it was not open for the Assistant Commissioner of Central Excise Division, Shillong to again issue the impugned show cause notice dated 25.4.97. She submitted that the Asstt. Commr. has relied on the provisions of Sections 11B(2) and 11B(3) and Sections 12B and 12C of the Act for issuing the impugned show cause notice; but it has been held by the Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India, etc. etc. 1997 ECR 209, that in some situations, a refund claimed is not to be governed by the provisions of the Act. According to her therefore the claim of refund of the petitioner was one under Article 265 of the Constitution of India and Section 72 of the Contract Act and not u/s 11B of the Act to which only the provisions of Sections 11B(2) and 11B(3) and Sections 12B and 12C will apply. Ms. Buzarbaruah in particular relied on the judgment of Suhas C. Sen, J. in the aforesaid case reported in 1997 ECR 319, wherein His Lordship has held that if the court comes to a conclusion that a levy of tax is unlawful, the court will direct the Government to return the tax. In view of the aforesaid law as laid down by the Apex Court, Ms. Buzarbaruah submitted that a direction be issued to the respondents to refund the amount of Rs. 1,41,670.74 with interest to the petitioner forthwith.

4. Mr. H. Ahmed, learned Counsel for the respondents, on the other hand, submitted that u/s 11B(2) of the Act, the amount of Excise Duty found refundable is required to be credited to the Consumer Welfare Fund as defined in Section 12C of the Act. He further submitted that in the proviso to Section 11B(2) however specific cases have been stated in which the amount of duty of excise instead of being credited to the Fund can be paid to the applicant and one of the cases mentioned therein is where the duty of excise paid by the manufacturer has not been passed on to any other person. According to Mr. Ahmed therefore the amount of Rs. 1,41,670.74 can be refunded to the petitioner only if it is shown by the petitioner that the said amount has not been passed on to the buyers of its products. Mr. Ahmed further argued that Section 11B{3) made it abundantly clear that this would be the position notwithstanding anything to the contrary contained in the order of the Tribunal.

5. Sections 11B(1), 11B(2). 11-B(3). 12B and 12C of the Act. are quoted hereinbelow:

11B. Claim for refund of duty. (1) 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 six months from the relevant date in such form as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such

refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this Sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Collector of Central Excise under the foregoing provisions of this Sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:-

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant''s account current maintained with the Collector of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

12B. Presumption that incidence of duty has been passed on to the buyer: Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer Welfare Fund. (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed,--

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11:

(b) the amount of duty customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 23A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962) ;

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

The proviso to Section 11B quoted above would show that even an application for refund made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991. is to be dealt with in accordance with the provisions of Section 11B of the Act. In the case of Mafatlal Industries Ltd. v. Union of India, etc. etc. (supra), BP Jeevan Reddy, J. speaking for the majority, held, in paragraph-87 of his judgment that where refund proceedings have been finally terminated in the sense that the period prescribed for filing appeal against such order has also expired before commencement of the 1991 Amendment Act on September 19, 1991, they cannot be re-opened and/or be governed by Section 11B as amended by the 1991 Amendment Act: but where applications for refund have been made before the commencement of the 1991 Amendment Act on September 19, 1991 and the refund proceedings have not been finally terminated, they will be governed by Section 11B of the Act. In the instant case, it is true that the refund application was filed by the petitioner on 10.3.86 but the said claim for refund had not been finally terminated before September 19, 1991 in the sense that the appeal arising out of the said claim for refund filed by the Department was pending before the Tribunal. The claim of the petitioner for refund therefore was to be dealt with in accordance with the provisions of Section 11B of the Act.

6. The Tribunal, however, dismissed the aforesaid appeal of the Department by its order dated 1.4.97 after recording a finding that there was no ground to interfere with the order of the Collector (Appeals) Calcutta. But, Section 11B(3) of the Act quoted above made it abundantly clear that notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the Act or the rules made thereunder or any other law for the time being in force, no refund was to be made

except as provided in Section 11B(2) of the Act. In the aforesaid case of Mafatlal Industries Ltd. v. Union of India, etc. etc. (supra), in paragraph 82 of the judgment, majority of the judges of the Supreme Court speaking through BP Jeevan Reddy, J. observed that Section 11B(3) was emphatic and left no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. Hence, notwithstanding the said order dated 1.4.97 of the Tribunal in favour of the petitioner, no refund can be made to the petitioner amounting to Rs. 1,41,670.74 except as provided in Section 11B(2) of the Act.

7. A reading of Section 11B(2) of the Act quoted above would show that the amount to be refunded is to be credited to the Consumer Welfare Fund as defined in Section 12C of the Act. Under the first proviso to Section 11B(2) of the Act. It is stated that the amount of duty of excise instead of being credited to the Consumer Welfare Fund, be paid to the applicant, if such amount is relatable to certain categories stated under Sub-clauses (a) to (f) of the said proviso. Sub-clause (d) of the said proviso provided that where the incidence of duty of excise had not been passed on by the manufacturer to any other person, the amount determined as refundable shall, instead of being credited to the Consumer Welfare Fund, be paid to the applicant-manufacturer. Unless, therefore, it is established that the petitioner had not passed on the incidence of the amount of duty claimed by way of refund to any other person, the amount cannot be paid to the petitioner and has to be credited to the Consumer Welfare Fund. Section 12B of the Act quoted above further provides that every person who has paid the duty of excise on any goods under the Act shall, unless the contrary is proved by him. be deemed to have passed on the full incidence of such duly to the buyer of such goods. By virtue of the said provision of Section 12B of the Act, therefore, there is a presumption that the petitioner has passed on the full incidence of the amount of duty claimed by it for refund to its buyers and this presumption has to be rebutted by the petitioner by adducing materials before the authorities that it had not passed on the full incidence of the said duty claimed by it for refund to the buyers of its goods. On a reading of the show cause notice dated 28.11.86 as well as the orders passed by the Assistant Collector (PREV). Customs & Excise. Shillong on 9.12.87. the Collector of Central Excise (Appeals), Calcutta on 3.10.88 and the Tribunal on 1.4.97, I do not find that the authorities have recorded any finding that the petitioner has placed materials to rebut the presumption that the amount of excise duty claimed as refund was passed on to its buyers. Unless the said presumption is rebutted and it is established by the petitioner that it had not passed on the sum of Rs. 1,50,762.34 and/or any part thereof to its buyers, no refund can be granted to the petitioner under the first proviso to Section 11B(2) of the Act.

8. In the case of Mafatlal Industries Ltd. v. Union of India, etc. etc. (supra). BP Jeevan Reddy summing up the majority view, in paragraph 99 of the judgment, has held that while the jurisdiction of the High Court under Article 226 cannot be circumscribed by the provisions of the Act, it would exercise the jurisdiction

consistent with the provisions of the Act and that a writ petition will have to be considered and disposed of in the light of and in accordance with the provisions of Section 11B of the Act for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it. His Lordship further held that all refund claims on the ground that it had been collected from the petitioner by mis-interpreting and misapplying the provisions of the Act, rules, regulations or notifications thereunder must be filed and adjudicated under the provisions of the Act. Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition and would be maintainable by virtue of the declaration contained in Article 265 of the Constitution and also by virtue of Section 72 of the Contract Act and the refund claimed in such a situation cannot be governed by the provisions of the Act.

9. In the instant case, the refund claimed by the petitioner is not on the ground that the provision of the Act is or has been held to be unconstitutional, but on the ground that under the notification No. 85/85-CE dated 17.3.85, the petitioner as a small-scale industry was exempted from excise duty to the extent of the amount claimed as refund. Such a claim of the petitioner for refund, as per the aforesaid law laid down by the Apex Court in the case of Mafatlal Industries Ltd. v. Union of India, etc. etc. (supra), can only be allowed in accordance with the provisions of Sections 11B, 12B and 12C of the Act and to such a claim Article 265 of the Constitution and Section 72 of the Contract Act do not apply.

10. For the reasons stated above. I dispose of this writ petition with a direction that in case the petitioner establishes before the Assistant Commissioner, Central Excise Division, Shillong that the amount of Rs. 1,41,670.74 or any part thereof has not been passed on to its buyers, the Assistant Commissioner shall forthwith refund the said amount or any part thereof, as the case may be, to the petitioner. The petitioner will file its reply to the impugned show cause notice dated 25.4.97 for the aforesaid purpose as soon as possible and within two months from the date of receipt of the said reply of the petitioner, the Assistant Commissioner will pass final orders thereon in compliance with the directions of this Court in this judgment.

Considering the entire facts and circumstances of the case. I leave the parties to bear their own costs.