Assistant Collector of C. Ex. Vs Calcutta Chemical Company Ltd.

Court: Calcutta High Court

Date of Decision: Aug. 13, 1992

Acts Referred: Central Excise Rules, 1944 â€" Rule 9, 9B
Central Excises and Salt Act, 1944 â€" Section 11B, 11B(1)

Citation: (1992) 62 ELT 511

Hon'ble Judges: K.M. Yusuf, J; Ajit Kumar Sengupta, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Ajit Kumar Sengupta, J.
This appeal by the Central Excise authorities is directed against the judgment and order dated 14th December,

1987, of the Court of the first instance directing the appellants to refund the sum which was due. to the respondent/writ petitioner because of

excess payment made allegedly due to mistake in calculation.

2. The facts leading to this appeal are briefly stated as under :

3. The respondent company carries on the business, inter alia, of manufacture and sale of Soaps and Cosmetics. For the said purpose the

respondent company has a factory at Tiljalla, Calcutta. One of the products manufactured by the respondent company is "Margo Soap."

4. Central Excise Duty is leviable on the products manufactured by the respondent company, including the said "Margo Soap" at the rate

prescribed therefore in the first Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the said Act) and/or the Central

Excise Tariff Act, 1985. The respondent is duly licenced for the manufacture of the aforesaid goods under the Central Excise Rules, 1944

(hereinafter referred to as the said Rules).

5. For determining the assessable value, inter alia, of "Margo Soap" the respondent from time to time filed before the Assistant Collector of

Central Excise price lists in the appropriate form and in the appropriate manner prescribed therefor. The said price lists were, however, pending

until the time hereinafter stated and the respondent company was allowed to clear the said goods upon provisional assessment being made thereon

under Rule 9B of the Central Excise Rules pending approval of the said price lists. The price lists were approved by the Assistant Collector on or

about 30th June, 1984.

6. Thereafter, during the period from September 11, 1984 upto 27/30th October, 1984, the concerned Range Superintendent purported to

demand differential duties of excise from the respondent company, on the basis of the price lists approved by the Assistant Collector on 30th June,

1984 to the tune of Rs. 36,08,161.14 in twelve instalments between 9th March, 1985 and 14th March, 1986. The said payments were made by

the respondent company without allegedly verifying the correctness of the said purported demand.

7. Later, on a scrutiny of the said demand notices, the respondent company was stated to have detected that due to a mistake in calculation of the

total quantity of the said goods cleared from its factory an excess sum of Rs. 5,97,343.98 was realised from the respondent company by the

appellant as and by way of purported duly of excise on the said goods on 15th January, 1986, 31st January, 1986 and 14th March, 1986 the

dates when the last three instalments of Rs. 3 lakhs each along with Rs. 8,161,14 in the last instalment were paid.

8. In the premises, on or about 28th May, 1986 the respondent filed a refund application in the appropriate form therefore before the Assistant

Collector seeking refund of the said sum of Rs. 5,97,343.98.

9. However, by a purported show cause notice dated 2nd July, 1986, the Assistant Collector alleging that it appeared that the aforesaid refund

claim of the respondent company was time barred having been allegedly filed beyond the prescribed period of six months as laid down in Section

11B of the said Act, called upon the respondent company to show cause why the said claim should not be rejected.

10. By a letter dated 8th July, 1986, the respondent duly replied to the said purported show cause notice dated 2nd July, 1986, denying the

allegations contained therein and pointing out that the refund application of the respondent was well within the period prescribed therefore u/s 11B

of the said Act. It was further contended by the respondent company that in any event the said sum of Rs. 5,97,343.98 was realised without the

authority of law by the appellants and thus it was incumbent upon the appellants to refund the same to the respondent company without taking

recourse to technicalities. Thereafter, a personal hearing was granted to the respondent by the Assistant Collector at which the representative of

the respondent duly appeared and made submissions reiterating that the refund claim of the respondent company was just, legal and valid and

requested the appellant No. 1 to pass appropriate order for refund of the said sum of Rs. 5,97,343.98. The submissions made by the

respondent''s representative at the said personal hearing was summarised in a written note which was filed with the Assistant Collector on or about

13th August, 1986.

11. On or about 29th August, 1986, the respondent received a copy of the purported order dated 25th August, 1986, passed by the Assistant

Collector, the first appellant before us, rejecting the said refund claim of the respondent on the ground that the same was time barred u/s 11B of

the said Act.

12. Being aggrieved by the said impugned order passed by the Assistant Collector, the respondent filed a writ petition in 1987 out of which

present appeal arises.

13. By a judgment and order dated 14th December, 1987, the Court at the first instance allowed the writ petition and set aside impugned order

passed by the Assistant Collector. The learned Judge also directed refund of the sum of Rs. 5,97,343.98 to the respondent within three months

from the date of the said judgment and order. This appeal by the Excise authorities is directed against the said judgment and order.

14. At the hearing before us it has been contended on behalf of the appellants that the claim made by the writ petitioner was barred by limitation

and in any event whether there was any mistake of fact in making the claim within the prescribed time is not for the Writ Court to decide.

15. On the other hand, it has been contended by the learned Advocate for the respondent that the refund claim of the respondent was well within

the period stipulation, u/s 11B of the said Act, it was made within six months from the relevant date as prescribed in the said Section.

16. The only question which calls for determination in whether having regard to the provision of Section 11B of the Act, the refund application was

made within the time allowed by the Act. At this stage, we may mention that there is no dispute that there was a mistake in calculation and the

respondent paid a sum of Rs. 5,97,3437- in excess.

17. Section 11B of the said Act provides that any person claiming refund of duty of excise would have to make an application for such refund to

the concerned Assistant Collector of Central Excise before the expiry of six months from the relevant date. Explanation (B) of Section 11B defines

the words ''relevant date'' as follows :-

(B) ''relevant date'' means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case

may be, the excisable materials used in the manufacture of such goods,

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of

entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside

India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by

notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has

made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in a case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final

assessment thereof;

if any other case, the date of payment of duty.

18. Thus, under sub-clause (f) of the said Explanation, the "relevant date" would mean in all cases except those provided in sub-clauses (a) to (e),

the date of payment of duty.

19. It has been recorded by the Assistant Collector in the order impugned in the writ petition that the excess amount of duty was paid by the

respondent between 15th January, 1986 and 14th March, 1986. Thus, the relevant date in terms of Section 11B(1) of the said Act read with

Explanation (B) (f) thereto would be six months from 15th January, 1986, 31st January, 1986 and 14th March, 1986, respectively, being the dates

of payment of the excess amount. The refund claim of the respondent company having been made admittedly on or about 28th May, 1986, the

said refund claim was well within the prescribed period of six months as enjoined in Section 11B of the said Act.

20. The Assistant Collector in rejecting the application as time barred u/s 11B of the Act observed as follows :-

The main question for determination in the present case is whether the relevant date from which the period of six months u/s 11B should be

computed will be the date when a particular instalment was paid or when the provisional assessments were finalised and demand raised by the

proper officer. It is an accepted fact that the assessments in the instant case were kept provisional under Rule 9(b) of Central Excise Rules, 1944

which were finalised between 11-9-1984 to 27/30-10-1.984. As such for the purpose of computation of six months period for filing refund claim

u/s 11B of the said Act the relevant date would be the date of raising demand of duty short paid after the adjustment of the duty already paid.

Judged on the above basis it would be clear in the instant case that the refund claim submitted on 28.5.1986 for the provisional assessment

finalised between 11-9-1984 to 27/30-10-1984 would be barred by limitation of time u/s 11B.

21. In our view, the Assistant Collector failed to appreciate that Explanation (B) (e) of Section 11B of the said Act has or can have no application

whatsoever in the instant case. The said sub-clause on a reading thereof would clearly show that the same relates to cases where the duty of excise

was paid provisionally and upon final assessment having been made, it is found that an excess amount had been realised from an assessee. In such

cases the ''relevant date'' would be the date of adjustment in the relevant records of the said excess payment found to have been made.

22. In the instant case, there was no question of adjustment in the relevant records as contemplated in sub-clause (e) of Explanation (B) of Section

11B of the said Act. No amount became refundable to the respondent because of any such adjustment. In this case, upon approval of the price

lists by the Asstt. Collector, demand notices for short-paid duties of excise were issued by the concerned Range Superintendent. Thereupon, the

respondent company duly made payment of the said demands and after making such payment it transpired that excess payment was made by the

respondent company between 15th January, 1986 and 14th March, 1986. It is, therefore, apparent that in this case the ''relevant date'' would be

the dates of payment of the said excess amount by the respondent company. On the admitted facts of this ease, we are unable to persuade

ourselves to hold that the relevant date would be the date of raising the demand of duty short-paid as has been erroneously observed in the said

impugned order. The said finding of the Asstt. Collector is contrary to the provisions of Section 11B of the Act.

23. There is another aspect of the matter. The question is, even assuming the claim for refund was barred by limitation, whether the appellants have

any right, authority or jurisdiction to refuse the refund of the amount in question as the same has been realised without any authority of law.

Collection of such excess excise duty was, therefore illegal.

24. There is no dispute, as none could be, that the said sum of Rs. 5,97,343.98 was neither .due nor payable by the respondent company as and

by way of Central Excise Duty under the said Act. In the premises, it was incumbent upon the Asstt. Collector lo direct refund of the said sum of

Rs. 5,97,343.98 to the respondent company without taking recourse to mere technicalities for denying the just claim of the respondent.

25. The realisation of excess duty under the said-Act can only be made if such imposition and realisation is authorised by the said Act. The

realisation of excise duty under the said Act on the said goods is on the manufacture thereof. In the event, there has been no manufacture of any

quantity of the said goods, there can be no levy of any Central Excise Duty under the said Act thereon. In the instant case as the records would

clearly show that there was during the relevant period manufacture and clearance of only 1,09,080 dozens of the said goods against 8,66,098

dozens alleged (which has not been disputed in the show cause notice or in the said impugned order). The imposition and/or realisation of excise

duly in respect of the excess quantity of 7,57,018 dozens of the said goods was, therefore, per se illegal. The respondent had made payment of the

said amount and the Asstt. Collector had demanded and realised the same under a mistake of law and/or fact which was common to both the

respondent and the Asstt. Collector.

26. As the realisation of excise duty in respect of the said 7,57,018 dozens of the said goods is completely without jurisdiction, the limitation period

provided in Sub-section (1) of Section 11B of the said Act can have no application. It is, therefore, incumbent upon the Asstt. Collector lo refund

to the respondent the said sum of Rs. 5,97,343.98 wrongly and illegally realised as purported duly of excise.

27. It is now well settled that if duly has been collected or realised illegally and unlawfully, the period of limitation prescribed in the relevant statute

for grant of refund thereof or for filing application therefore would not apply. The Courts have held that if recovery is illegal and without jurisdiction,

claim of refund would not be governed by the law of limitation prescribed by the statute and it is incumbent upon the authority concerned lo refund

the sum so realised.

28. If duly was realised in contravention of the Act, as has been done in the instant case, such realisation would be without authority of law and,

consequently, bad and the Government have a corresponding duty lo refund the duly so realised.

29. This aspect of the matter has been considered by one of us in Dilichand Shreelal Vs. Collector of Central Excise and Others, where after

considering the decisions of the Supreme Court and different High Courts, it was held that when duly has been collected unlawfully, the limitation

prescribed under the statute will not apply so as to defeat the claim of refund. If there be any unauthorised collection, it is incumbent upon the

Revenue authorities to refund the same. See also Gonterman Peipers (India) Limited Vs. Additional Secretary to the Government of India, ; L.D.

Textile Industries Ltd. and others Vs. Union of India and others, ; R. Parthasarathi v. Dipsi Chemicals Pvt. Ltd. 1988 (15) ECC 416; Agra

Beverages Corporation Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, and Kay Foam Limited Vs. Union of India (UOI),

30. For the reasons aforesaid, this appeal fails and is dismissed.

31. It is staled that the refund has not yet been made in terms of the order under appeal. We, therefore, direct the Asstt. Commissioner to refund

the sum of Rs. 5,97,343.98 within one month from the dale of communication of this order with interest at the rate of 12 per cent from 14th

December, 1987 till the date of payment If the collection made by the appellant was unauthorised, the appellants having retained and enjoyed the

benefit of such money for so long, are bound lo compensate for the use and retention of such money and accordingly the respondent is entitled lo

interest and such interest should be paid at the rate of 1.2 per cent per annum, although the Revenue authorities recover interest at the rate of 24

per cent per annum for delayed payment of tax and duties.

32. There will be no order as to costs.

K.M.Yusuf, J.

33. I agree.