M/S. OSWAL CHEMICALS & FERTILIZERS LTD. A

v.

COMMISSIONER OF CENTRAL EXCISE, BOLPUR

(Civil Appeal No.2807 of 2004) B

MARCH 30, 2015

**[A.K. SIKRI AND R. F. NARIMAN, JJ.]**

*Central Excise Act, 1944 – s.11B – Application by purchaser of 'Naphtha' – For refund of duty paid by it to the manufacturer of 'Naphtha' – After obtaining CT-2 certificate – Entitlement of the purchaser for refund – Appellate Tribunal rejected the claim for refund on the grounds that the purchaser lacked* locus standi *to claim and that the claim was made before wrong authority – On appeal, held: Though the purchaser had the* locus standi *to make the claim and the claim was also made before the authority having requisite jurisdiction – But the purchaser is not entitled to the claim as the same was time-barred – Central Excise Rules, 1944 – r. 192 – Notification No.75/84-CE dated 01.03.1984 – Notification No.8/96-CE dated 23.07. 1996.* C D E F

**Dismissing the appeal, the Court**

**HELD: 1. Section 11B of the Central Excise Act which contains the provision for making a claim for refund of duty uses the expression "any person" who is eligible to claim refund of the duty. Though the duty u/s. 11B is payable by the manufacturer, a manufacturer would generally pass on the burden of the excise duty to the buyer or it may be some other** G

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A person. It is for this reason, a person who is ultimately aggrieved with the payment of the said duty and challenges the order successfully can seek the refund. This becomes apparent from the reading of clause (e) to Explanation (B) appended to s.11B which defines B "relevant date". This indicates that the person can be other than the manufacturer and Explanation (B) caters to such other person. Therefore, the appellant who had paid the excise duty to the manufacturer had the necessary *locus standi* to file the application claiming C the refund of the duty. [Paras 5, 6, 7 and 8] [491-G; 492-G-H; 493-A, D-F]

*Mafatlal Industries Ltd. and others v. Union of India and others* 1996 (10) Suppl. SCR 585: 1997(5) SCC 536 – followed. D

2. The reason given by the CESTAT that the appellant had preferred the application before a wrong authority, is factually incorrect. The purchases were from depot at Rajbandh under the IOCL refinery at E Durgapur and therefore, the Central Excise authorities at Durgapur had the requisite jurisdiction over IOCL Depot located at Rajbandh, as it comes under Durgapur Commissionerate. [Para 8] [494-C,F,G]

3. In terms of Section 11B, the application for F refund is to be made within six months. The assessee is claiming refund for the period from 25.09.1996 to 16.10.1996. An application for refund was made on 30.04.1999 which was beyond six months period. The protest as per Rule 233B refers only to a manufacturer G and therefore, a person like the appellant, who was only a purchaser could not have made any protest in terms of Rule 233B. Therefore, if protest is lodged in one form or the other that should be construed as satisfying the condition stipulated in second proviso to H

**Section 11B. In the present case, the appeal against order denying CT-2 certificate was filed only in September, 1997 or thereafter. Even if this appeal is treated as a form of protest, that was much beyond six months period from the date of purchase that is 25.09.1996 to 16.10.1996. Therefore, the so-called protest would not come to the aid of the appellant. Thus, the application for refund was time-barred and on this ground alone, the appellant will not be entitled to refund of the amount. [Paras 10 and 11] [495-B, C, 496-A-C, G-H, 496-A-C]**

**Case Law Reference**

**1996 (10) Suppl. SCR 585 Followed. Para 7**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2807 of 2004.

From the Judgment and Order dated 20.11.2003 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. E/41/2002-C.

V. Lakshmikumaran, M. P. Devanath, Vivek Sharma, L. Charanaya, Aditya Bhattacharya, R. Ramachandran, Hemant Bajaj, Ambarish Pandey, Rajesh Kumar, Anandh K., for the Appellant.

N. K. Kaul, ASG, Raghavendra M. Bajaj, Silpa Nair, Arijit Prasad, B. Krishna Prasad, for the Respondent.

The Judgment of the Court was delivered by

**A. K. SIKRI, J.** 1. In the present appeal filed by the assessee, it is seeking refund of duty which was initially paid by M/s.Bharat Petroleum Corporation Limited (hereinafter referred to as 'BPCL'). According to the appellant, this duty was paid by it to the BPCL on purchase of Naphtha from

A BPCL. The period involved is 25.09.1996 to 16.10.1996. Under Rule 192 of the Central Excise Rules 1944, Naphtha can be procured without payment of duty as provided under Notification No. 75/84-CE dated 01.03.1984 as well as B Notification No. 8/96-CE dated 23.07.1996, in case the purchaser is in possession of CT-2 certificate and an L6 licence issued by the Departmental authorities. The appellant did not have this certificate at the material time and that is why duty was paid. However, the appellant was C also simultaneously requesting the authorities to issue CT-2 certificate to enable it to procure Naphtha without payment of duty. This certificate was initially refused by the Departmental authorities vide Order-in-Original dated 08.07.1997 passed D by Assistant Commissioner of Central Excise, Sitapur Division. Against that order, the appellant had preferred the appeal before the Commissioner (Appeals) in which the appellant succeeded as the said appeal was allowed by the E Commissioner (Appeals) on 30.10.1998, thereby granting permission to the appellant to procure Naphtha without payment of duty.

2. It is not in dispute that, thereafter, armed with the said F certificate the appellant has been purchasing Naphtha without payment of duty. However, for the period from 25.09.1996 to 16.10.1996, which is the subject matter of the present appeal, since the appellant had paid the duty to BPCL and BPCL had paid the same, in turn, to the G respondent-authorities, the appellant sought refund of the said duty. This refund application was rejected by the Assistant Commissioner of Central Excise, Durgapur-I Division vide Order-in-Original dated 19.01.2000 on two H grounds. The first reason given by the authority was that

since it is the manufacturer which had paid the duty to the authorities, the appellant had no locus standi to claim the refund. The second reason given was that the application filed under Section 11B of the Central Excise Act, 1944 (hereinafter referred to as 'Act') was not preferred within six months and therefore, was time barred.

3. The appellant filed the appeal before the Commissioner of Central Excise (Appeals) challenging the aforesaid order. This appeal was, however, dismissed on 14.08.2001. Further appeal was preferred before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, (hereinafter referred to as 'CESTAT'). Again unsuccessfully, as by the impugned orders dated 20.11.2003, the appeal of the appellant has been dismissed.

4. The CESTAT has not decided the issue of limitation and authoritatively dismissed the appeal giving two other reasons. First reason is the same as which was the basis of the dismissal of appeal by the Commissioner (Appeals) as well, namely, the appellant lacked locus standi to file the refund claim. Another reason which had persuaded the CESTAT to dismiss the appeal was that the refund claim was preferred before a wrong authority.

5. Insofar as dismissing the application on the ground that the appellant did not have locus standi, we find that view taken by the authorities below is clearly erroneous in law. Section 11B of the Act which contains the provision for making a claim for refund of duty uses the expression "any person" who is eligible to claim refund of the duty. The relevant portion of Section 11B reads as under:

A "Section 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 Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner 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."

6. The said provision is made for obvious reasons. Though the duty under Section 11B of the Act is payable by the manufacturer, a manufacturer would generally pass on the burden of the excise duty to the buyer or it may be some other person. It is for this reason, a person who is ultimately aggrieved with the payment of the said duty and challenges the order successfully can seek the refund. This becomes apparent from the reading of clause (e) to Explanation (B)

appended to the aforesaid provision which is as under:

"Explanation. - For the purposes of this section, -

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.....

(B) "relevant date" means, -

.....

.....

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

Explanation (B) defines "relevant date". Though this date has reference to the calculation of limitation period for the purposes of seeking refund of the duty under the aforesaid provision. However, clause (e) while stating the "relevant date" clarifies that in case of a person, other than the manufacturer, the date of purchase of goods by other person would be the relevant date. This itself indicates that the person can be other than the manufacturer and Explanation (B) caters to such other person. It is not even necessary to embark on detailed discussion on this aspect inasmuch as we note that the Constitution Bench of this Court in 'Mafatlal Industries Ltd. and others v. Union of India and others' [1997(5) SCC 536] has already settled this aspect in the following words: "(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B

A is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."

7. We are, therefore, of the opinion that the appellant B who had paid the excise duty to the manufacturer, viz., M/s Indian Oil Corporation Ltd. (hereinafter referred to as 'IOCL') and BPCL in the instant case, had the necessary locus standi to file the application claiming the refund of the duty.

C 8. The second reason given by the CESTAT, as mentioned above, is that the appellant had preferred this application before a wrong authority. Here we find that the appellant had filed the refund claim before the Central Excise D Authorities at Durgapur. The appellant had purchased the material from IOCL which is having its refinery at Durgapur. The show cause notice was also issued by the Superintendent of Central Excise at Durgapur. It appears that E the CESTAT is influenced by the reason that the depot is located at Haldia and on that ground, it has come to the conclusion that the authorities at Durgapur had no jurisdiction. The aforesaid reason given by the CESTAT is factually incorrect. We find that the purchases were from F depot at Rajbandh under the IOCL refinery at Durgapur and therefore, the Central Excise authorities at Durgapur had the requisite jurisdiction over IOCL Depot located at Rajbandh, as it comes under Durgapur Commissionerate.

G 9. Our aforesaid discussion leads to the conclusion that the two reasons given by the CESTAT in dismissing the appeal of the assessee are not correct. As noted above, insofar as the question of limitation is concerned, the H CESTAT did not give final pronouncement thereupon. In

normal course, we could have remitted the case back to the CESTAT for decision on that issue. However, we have necessary factual details before us and as the matter is quite old, we deem it apposite to decide this issue of limitation in these proceedings itself rather than remanding the case back to the CESTAT.

10. It is not in dispute that in terms of Section 11B, the application for refund is to be made within six months. The assessee is claiming refund for the period from 25.09.1996 to 16.10.1996. An application for refund was made on 30.04.1999 which was beyond six months period. The appellant however, is relying upon the second proviso to Section 11B which stipulates that the limitation of six months would not apply where any duty has been paid under the protest. The question is as to whether the protest was lodged by the appellant. It is sought to be argued by the learned counsel for the appellant that the appellant had filed the appeal against the Order-in-Original passed by the Assistant Commissioner denying CT-2 certificate which should be treated as protest. It is argued that the protest as stipulated under Rule 233B of the Rules refers only to a manufacturer and since the appellant is not the manufacturer for whom no mode of protest is stipulated, even filing of the appeal should be treated as protest. That may be so and to that extent, we agree with Mr.Lakshmikumaran, learned counsel appearing for the appellant. He is right in his submission that protest as per Rule 233B refers only to a manufacturer and therefore, a person like the appellant, who was only a purchaser could not have made any protest in terms of Rule 233B. Therefore, if protest is lodged in one form or the other that should be construed as satisfying the

A condition stipulated in second proviso to Section 11B.

11. Having said that, in the present case, we find that the appeal was filed only in September, 1997 or thereafter, though exact date of filing the appeal is not disclosed. Even
B if this appeal is treated as a form of protest that was much beyond six months period from the date of purchase that is 25.09.1996 to 16.10.1996. Therefore, the so-called protest would not come to the aid of the appellant. We therefore, are
C of the opinion that application for refund was time barred and on this ground alone, the appellant will not be entitled to refund of the amount.

12. The appeal of the appellant therefore, stands
D dismissed, though, on a different ground than the reasons stated in the order of the CESTAT. No costs.

Kalpana K. Tripathy Appeal dismissed.

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