

**Samurai Electronics Pvt. Ltd. Vs. Commr. of Central Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Oct-17-1997

**Reported in :** (1998)(97)ELT85TriDel

**Appellant :** Samurai Electronics Pvt. Ltd.

**Respondent :** Commr. of Central Excise

**Judgement :**

1. In both these appeals, common question of law and facts are involved, hence they are taken up together for disposal as per law.

2. Both the authorities have rejected the refund claim of Rs. 78,694/-and Rs. 1,40,566.30 as not maintainable being barred by time under Section 11B of the Central Excise Act, 1944. The demands raised by the department in respect of these amounts which had been short paid in respect of product "Electronic Game Cartridges" was demanded and confirmed on the ground that the final product "Electronic Game Cartridges" fell under Chapter Heading 9504.00 of the Schedule to the Central Excise Tariff Act, 1985. The appellants had claimed benefit of Notification No. 96/86, dated 10-2-1986, which had been denied. On the basis of adjudication order, the appellants had agitated the previous adjudication proceedings at CEGAT which on appeal was allowed by remand. Those earlier matters pertaining to the same issue was on re-adjudication allowed in favour of the appellants granting refund. As regards these two claims, the appellants by their letter dated 11th February, 1989 paid the duty 'Under Protest.' By this letter, they indicated to the Assistant Collector that they have raised variety of the

grounds before Higher Authority in respect of earlier proceedings and therefore, these payments are required to be considered to be paid 'Under Protest'. This protest letter has been acknowledged and there has been no dispute about the payment of duty against the adjudication 'under protest'. The question that arises for consideration is as to whether this payment made in terms of the adjudication order under protest can be deemed to be payment made under protest and the claims being protected by limitation. In this regard the appellants have relied on several judgments, which are noted as under :-Fine Composite Pvt. Ltd. v. Collector of Central Excise, Bombay 1995 (78) E.L.T. 73 wherein it has been held that payment of duty to be treated under protest till the letter of protest is vacated by a speaking order.

2. DCM Data Products v. Collector of Central Excise 1993 (66) E.L.T. 635 wherein it has been held that the Assistant Collector is duty bound to dispose of the assessee's letter of protest by a speaking order.

3. In the case of Roche Products v. Union of India as reported in 1991 (51) E.L.T. 238, the Bombay High Court has held that the Company's intimation to the Assistant Collector that the duty was paid under protest pending revision petition was sufficient compliance with the requirement of Rule 233B. Collector of Central Excise v. Prestige Engg. India Pvt. Ltd. as reported in 1989 (41) E.L.T. 530, it has been held that once a protest has been lodged it becomes the duty of the Assistant Collector to dispose of the protest by an appealable order. In the absence of disposal of the protest in the aforesaid manner, the protest cannot be deemed to have subsided. Mahalakshmi Industries v. Collector of Central Excise as reported in 1995 (80) E.L.T. 352, it has been held that the procedure laid down under Rule 233B is only directory and not mandatory.

6. The learned DR pointed out that the appellants had not filed any appeal against the Adjudication Order No. 43/89, dated 13-6-1989 and No. 40/89, dated 10-4-1989 confirming the demands raised in the show cause, and therefore, their subsequent letter claiming refund claims on 19-8-1994 is barred by time and that the payment made under letter of protest cannot be deemed to be payment under protest.

7. On a careful consideration of the submission made by both the sides, it has to be seen now as to whether the payment made in terms of adjudication order dated 10-5-1989 vide letter dated 11-2-1989 is payment made under protest and limitation is saved in terms of proviso to Section 11B, which states :- "provided further that the limitation of six months shall not apply where any duty has been paid under protest".

8. The Hon'ble Calcutta High Court in the case of ITC v. Union of India as reported in 1988 (34) E.L.T. 473 (Cal.) has held that the provisions of Section 11A and provisions of Section 11B are independent provisions. Therefore, the appellants' non-filing of appeal against the adjudication order on the ground that the issue in terms of previous adjudication order was pending before the Appellate Authorities and therefore, the payment made by protest should save the limitation in order to avoid multiplicity of proceedings is a sound proposition and cannot be rejected by lower authorities on the ground that the appellants have not exhausted their appellate remedy against the order-in-original. The proviso to Section 11B(i) saves limitation of 6 months, if the duty has been paid under protest. In several judgments of the Hon'ble Supreme Court payment made by protest letter has been held to be sufficient to save the period of limitation as has been held in the case of India Cements Ltd. v. Collector of Central Excise as reported in 1989 (41) E.L.T. 358. This has since been reiterated and confirmed by Hon'ble Supreme Court in the case of Ex. Engr. Workshop Divn., M.P. Electricity Board v. Collector of Central Excise, as reported in 1997 (94) E.L.T. 445, wherein the Hon'ble Supreme Court set aside the Tribunal's order which had held that the letter of protest in respect of taking out licence in response to inspector's letter cannot be deemed to be letter of protest for payment of duty. The Hon'ble Supreme Court has held that the inspectors' letter and workshops reply ought to be read together not in isolation, so read the workshops' letter must be construed to mean that protest was lodged therein both against obtaining the licence as well as against liability to payment of excise duty.

9. The adjudicating authorities have not subsequently rejected the payment made under protest in terms of Rule 233B of Central Excise Rules, 1944. However, another question arises, as has been raised by the lower authorities, as to whether

the duty under protest by against adjudication order passed by the Assistant Collector is required to be appealed under specific provisions of the Act. Rule 233B is noted herein below :- "Rule 233B. Procedure to be followed in cases where duty is paid under protest. - (1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.

(2) On receipt of the said letter, the proper officer shall give an acknowledgement to it.

(3) The acknowledgement so given shall, subject to the provisions of Sub-rule (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer.

(4) An endorsement "Duty paid under protest" shall be made on all copies of the gate pass, the Application of Removal and Form RT 12 or Form RT 13, as the case may be.

(5) In cases where the redemy of an appeal or revision is not available to the assessee against an order or decision which necessitated him to deposit the duty under protest, he may, within three months of the date of delivery of the letter of protest, give a detailed representation to the Assistant Commissioner of Central Excise.

(6) In cases where the remedy of an appeal or revision is available to the assessee against an order or decision which necessitated him to deposit the duty under protest, he may file an appeal or revision within the period specified for filing such appeal or revision, as the case may be.

(7) On service of the decision on the representation referred to in Sub-rule (5) or of the appeal or revision referred to in Sub-rule (6) the assessee shall have no right to deposit the duty under protest: Provided that an assessee shall be allowed to deposit the duty under protest during the period available to him for filing an appeal or revision, as the case may be, and during the pendency of such appeal or revision, as the case may be.

(8) If any of the provisions of this rule has not been observed, it shall be deemed that the assessee has paid the duty without protest.

Note :- A letter of protest or a representation under this rule shall not constitute a claim for refund." 10. Rule 6 states that where the remedy of appeal or revision is available to the assessee against an order or decision which necessitated him to deposit duty under protest, he may file an appeal or revision within the period specified for filing such appeal or revision as the case may be. On reading of the Rule 7 noted above, it is seen that on the appeal or revision being served by the assessee, then in such circumstances, the assessee shall have no right to deposit the duty under protest. However, proviso says that the assessee shall be allowed to deposit the duty under protest during the period available to him for filing an appeal or revision, as the case may be, and during the pendency of such appeal or revision, as the case may be.

11. In this present case, it is seen that the appellants had already filed the appeal against the previous adjudication on the same issue pertaining to exemption of goods in question. Therefore, their plea that their payment was accepted under protest and hence the appeal or revision against the impugned order was saved by their payment of protest is an acceptable proposition in the light of provisions of Section 11B read with Rule 233B of Central Excise Rules. On examining the ratio of the judgment, the appellants have a case on merits, therefore, their plea is accepted. However, the aspect of unjust enrichment is required to be adjudicated in terms of Hon'ble Supreme Court's judgment rendered in the case of Mafatlal Industries Ltd. v. Union of India as reported in 1997 (89) E.L.T. 247. Hence the lower authorities are directed to determine the aspect pertaining to unjust enrichment by giving due opportunity of hearing to the appellants.

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