

Castrol Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-30-1984

Reported in : (1985)LC636Tri(Delhi)

Appellant : Castrol Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Aggrieved by the rejection of their appeal by the Appellate Collector by Order-in-Appeal No. 1138/Calcutta/81 dated 11-8-1981, the appellants have filed a Revision Application before the Government of India which, on transfer to the Tribunal, is being treated as an appeal.

2. The appellants carry on the business of processing blended and compounded lubricating oil in their factory at Calcutta. The appellants have cleared lubricating oil during 10-10-1975, 21-10-1975 and 31-10-1975 after payment of duty under the Central Excise Tariff Item 11 -B. The appellants were not aware that no excise duty was leviable on the said blended or compounded lubricating oil which was processed out of duty paid blended or compounded lubricating oil. The appellants also rely on the trade notices issued by the Calcutta Collectorate dated 29-4-1974 and 29-4-1976. The appellants submitted their claim for refund of Rs. 7,953.59p. on 30-5-1977. The Assistant Collector of the Central Excise, Calcutta, by his order dated 29-12-1977, rejected their claim as barred by limitation under Rule 11 of Central Excise Rules.

The Appellate Collector confirmed the order.

3. In the course of his arguments Mr. P.R. Biswas, Consultant, submitted that the claim was not barred by limitation. He stated that RT-12 for October, 1975 was provisionally assessed on 9-8-1976. But there was a final assessment only on 5-3-1980 as per the communication of the Superintendent, Central Excise, Range 2, Calcutta North. The learned Consultant relied on the Government of India decision in 1977-ELT-127 wherein it is stated that the debit to PLA was in the nature of deposit of duty without which the goods not be removed from the factory and that the actual assessment of the duty is made only on the RT-12. In such an event the date of finalisation of the assessment is the relevant date for computing the time limit. The Consultant pointed out that the lower authorities had passed the orders without adverting to the fact that there was only a provisional assessment.

4. Mr. V. Lakshmi Kumaran, SDR, submitted that Rule 11, as it stood then, did not provide for refund claims arising out of provisional assessment finalisation. The time-limit ran from the date of payment of duty. He said that the appellants herein had not protested against classification and hence it was not open to them to take advantage of their own omission. The provisional assessment was only in respect of valuation. He further stated that there was nothing in the Act or the Rules to enable refund of duty when there was no dispute regarding the classification and the provisional assessment was in respect of valuation. He urged that there was no provision in the rule for computing the time-limit for claiming refund from the date of finalisation of the RT. 12.

5. It is common case that the appellants have paid duty on 10-10-1975, 21-10-1975 and 31-10-1975 respectively. The quantum of the amount claimed as refund, namely, Rs. 7,953.59p. is also not questioned. The only point for determination would be whether the claim for refund made on 30-5-1977 was barred by limitation. On the facts of this case, we find from the RT. 12 (Annex-ure-D) in the paper book filed by the appellants, the assessment was made provisionally. The endorsement reads that the duty on the goods cleared under Gate Pass No. 517 to 575 and included in the Return had been assessed provisionally under Rule 9 (B) and the provisions of the said rule would apply for recovery of deficiency in or

refund of excise duty. (The learned Sr. D. R. after perusing the RT. 12 return confirmed that the assessment was provisional). On 5-3-1980, a communication was sent by the Superintendent, Central Excise to the appellants stating that the Returns were finalised "by assessment ad valorem at the differential rate". It is well settled that the term 'levy' is of wider import than the term 'assessment'. In this case, provisional assessment was made on 9-8-1976. The assessment was finalised on 5-3-1980. The refund application had been filed on 30-5-1977.

6. As the Senior Departmental Representative has pointed out, Rule II, as it stood at that time of making the Refund claim, did not specifically provide for claim for refund within a stipulated time-limit from the date of adjustment of duty after finalisation of provisional assessment. The Rule only provided as a reference date, the date of payment of duty or the date of adjustment of duty in the account current maintained with the Collector under Rule 9. While this is so, in the case of provisional assessment, there is always an inherent possibility of either deficiency or excess in the duty provisionally paid vis-a-vis the duty finally determined. Only when the provisional assessment is finalised, the actual duty liability is determined and the adjustment is made can it be said that duty on the goods has been paid in the manner required under the rules, and this date should be the relevant date for computing the time-limit.

7. In the present case, the finalisation of the duty took place on or about 5-3-1980. The limitation, according to the rule in force then, started running from that date. The application for refund having been filed anterior to the date of finalisation of the provisional assessment, it cannot be said to be hit by the limitation in Rule 11 as it stood on the date of finalisation of the provisional assessment.

8. Having regard to the facts of the case, it would not be unreasonable to say that the claim for refund in the present case, should be considered with reference to Rule 11 as it stood on 5-3-1980. In this view of the matter, the claim cannot be said to be hit by time-limit.

9. Shri Lakshmi Kumaran argued that Rule 11, as it stood on the date of final assessment, referred only to duty paid provisionally under the rules on the basis of the value or the rate of duty. He argued that the time-limit ran after the final

determination of the value of the rate of duty, as the case may be. In other words, if the provisional assessment was on account of value, no refund claim on account of rate of duty could be made within the extended period. We are unable to accept this argument as correct. The explanation to Rule 11(1) has the effect only of laying down that the time-limit in provisional assessment cases will run from the date on which the duty is adjusted after finally determining the value or the rate of duty, as the case may be, for which provisional assessment was resorted to. It does not, in our view, have the effect of shutting out claims for refund on account of rate of duty in a case where the provisional assessment was on account of value. For, according to Sub-rule (1) of Rule 11, a time-limit has been laid down but not the ground or grounds on which refund may be claimed. It could be for any reason. And, it is this time-limit which gets defined by the "explanation" with reference to provisional assessment cases. We cannot read anything more into the explanation, as the Senior Departmental Representative would have us do.

10. Hence, on a careful consideration of the material placed before us, we are of the opinion that the refund claim made in this case was in time' and the rejection of the claim by the authorities below cannot be justified. In the result, the impugned order is set aside and the appeal is allowed. The refund, should be granted to the Respondents within three months from the date of issue of this order.

11. M/s. Castrol claimed a refund of Rs. 7,953.59 on 30-5-77 on the ground that it paid duty at 20% ad valorem under Item 11-B erroneously instead of 1% under Item 68, and not, as claimed in its revision application dated 10-11-81 on the ground that no excise duty was leviable on the product viz. blended/compounded lubricating oil, and that the duty was paid by mistake. The original claim of 30-5-77 was based on a circular letter dated 8-10-75 but the revision petition quotes two Bombay Collectorate trade notices dated 26-8-74 and 5-12-76, Calcutta Collectorate trade notice dated 29-4-76 as having led to the discovery of the wrong payment. But let it be noted the claim was filed only in May 1977, more than a year after the last of the trade notices the factory relied upon.

12. The claim, when it was first made, was for payment of duty of 1% under Item 68; the trade notices quoted by the appellant all say no further duty was payable

on the blended lubricating oil made from duty paid lubricating oil. It is evident the claimant changed its ground between the claim and the revision petition.

13. The appellant says there was provisional assessment and hence no time-bar can hit its claim. The learned counsel for the department said that at the relevant time, Rule 11 did not have any "explanation" providing for a time-limit for claiming refund in case of provisional assessment. The claim made in May 1977 is barred because the last payment of duty was in October, 1975. [I would like to point out that the time-limit provided by the "explanation" was from the day the duty is "adjusted after final determination of the value or the rate of duty" and not from the date of payment of duty].

14. During the argument, the counsel for M/s. Castrol was asked if a bond was taken, there having been according to him, provisional assessment. He replied that none was taken. The counsel for the department, however, agreed with Castrol's counsel when he said that the absence of a bond would not invalidate the provisional assessment.

15. Rule 9-B of the Central Excise Rules, 1944 provides for provisional assessment in certain stated circumstances. It also has a condition-"if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty provisionally assessed and as finally assessed". The difference arises because there are two values or rates of duty and the duty yields will be different. Since he is assessing at the lower of the two rates, the proper officer must, as part of his duty, secure by a bond the difference to enable him to recover it in the event that the test results or information or enquiries reveal that the correct duty is the higher duty. It is not within the power of the proper officer to choose to forego the bond and there is nothing to support the department counsel's contention that if he does, the officer has merely been guilty of inappropriate exercise of discretion.

I think the absence of a bond totally invalidates the provisional assessment. There can be no provisional assessment under Rule 9-B unless, among other things, a bond is taken to secure the difference of duty.

16. The R.T. 12 for October 1975, on which the assessor made an endorsement in August 1976 that gate passes 517 to 575 had been assessed provisionally, records that the provisional assessment was made on account of octroi between Bombay and Calcutta. But we do not know what was the difference in the amount of duty that was to be accounted by this provisional assessment, and, as we have seen, there was no bond.

17. A letter was written on 5-3-80 by the Superintendent Central Excise to tell Castrol that the final assessment had been completed pertaining to the period December 73 to December 77 and demanding a sum of Rs. 9,725.96. This demand was clearly time-barred because as I have said, there was no provisional assessment. The period being December 73 to December 77, a demand on 5-3-80 was far out of time. The so-called provisional assessment was only a device of which the central excise officer thought he could neutralize the time-bar. We have seen many such cases in which no bond was taken, where no record is visible to tell us what the reason for the provisional assessment was or to tell us what was the sum of dispute, but which are presented as genuine unadulterated provisional assessments. I am not able to accept this was a provisional assessment even if the appellant is. To accept the officer's power to decree provisional assessment without even following the law would entrust powers in his hands which can be easily misused.

18. This brings me to the first problem. The appellant says there was a provisional assessment. I have shown there has not been any provisional assessment in accordance with the law and an assessment does not become provisional simply because the officer of central excise says so, without observing the procedures laid down by law. The claim for duty was made on grounds different from what were advanced in revision petition. The claim suffers from several disabilities; but the chief one is that it is time-barred. It was presented in May 77 for duty paid on or before 31-10-75. It was on the ground that the correct amount was 1% under Item 68 and not 20% under Item 11B. (The so-called provisional assessment was on account of addition of octroi, or so the endorsement said). The claim, therefore, must be rejected and is rejected.

19 An interesting sidelight during the argument was a contention by the learned counsel for the department that the provisional assessment was made for valuation while the claim is based on assessment. That provisional assessment, he argued, was not valid for this claim. In other words, the claim on rate of duty is not protected by the provisional assessment on valuation. A provisional assessment for valuation cannot be a provisional assessment for classification-the two are separate.

20. However, after some time, the department's counsel changed his mind and said he would accept the position that a provisional assessment for valuation was valid for classification also. In short, once a provisional assessment is taken, it acts as a provisional assessment for all purposes, whether valuation or classification. I am not able to accept this because then, it would mean that if an officer takes recourse to Rule 9B for rate of duty, he can, when he belatedly discovers that the value needs to be revised upwards, demand duty and, in spite of the time-bar, say that the provisional assessment for classification protects even a demand that arises from a higher valuation.

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