

K. Manibhai and Co. Vs. C.C.E.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-11-1988

Reported in : (1988)(17)LC133Tri(Delhi)

Appellant : K. Manibhai and Co.

Respondent : C.C.E.

Judgement :

1. In terms of the benefit available under Notification 198/76-CE, dated 16-6-1976 the appellants, M/s. Manibhai and Company, submitted 3 refund claims to the Assistant Collector through the Superintendent.

The refund claims related to the periods July 77 to March 78; April 78 to December 78 and Jan 79 to March 79. The claims had been received in the office of the Superintendent on 5-8-1979 and, on transmission by him, in the office of the Assistant Collector on 18-9-1979. Under his order dated 25-3-1980 the Assistant Collector rejected all the 3 claims as barred by limitation. On appeal therefrom the appellate Collector under his order dated 1-2-1982 allowed the claim for refund in respect of the period subsequent to 18-3-1979 but upheld the order of the Assistant Collector in respect of the earlier periods. The revision petition preferred to the Central Government against the said order is, on transfer, now before us as this deemed appeal.

2. We have heard Shri K.K. Banerjee, advocate for the appellants and Smt. Zutshi for the department.

3. The lower authorities have applied the period of limitation of six months under Rule 11 of the Central Excise Rules (as was applicable to the 3 refund claims) computing limitation to commence from the dates of payment of duty. So computed the first two refund claims would be certainly wholly barred by time. Depending on the question whether the submission to the Superintendent (.of the refund claim addressed to the Assistant Collector) should be deemed to have been properly presented on the date it was received in the office of the Superintendent or in the office of the Assistant Collector, the 3rd refund claim would be partly barred by time and partly within time. But the contention of the appellants is that all the 3 claims were wholly within time in so far as limitation in respect of all the refund claims would have commenced to run only from the date when the Assistant Collector passed orders fixing the base clearances with reference to which benefit was to be claimed under Notification 198/76. It is claimed that since the said order was passed by the Assistant Collector on 25-5-1979 only, the refund claims which were presented (either to the Superintendent or to the Assistant Collector) within six months from that date were all within time. Reliance for this proposition is placed on the decision of this Tribunal in the case of K.B. Foams Pvt. Ltd. (1985 Vol.19 ELT 476) as also the decision of the Madras High Court in the case of Carborandum Universal Ltd. (1988 Vol.15 ECC 33).

4. The procedure under the notification was that the assessee claiming benefit thereunder was required to file a declaration giving all necessary figures in order to enable the Assistant Collector to fix the quantum of base clearances. It was in respect of clearances in excess of that base figure that the benefit of concessional duty was available to the assessee. That is to say, it was only on the fixation of the base clearance by the Assistant Collector that the assessee himself would be in a position to know from what date he could be held to have crossed the base clearance in order to entitle himself to the benefit of payment of duty at the concessional rate. Taking note of this situation this Tribunal held in a series of decisions that once the declaration is filed by the assessee he must be deemed to have staked a claim for refund in respect of excess clearances above the base clearances and, therefore, the date of . the filing of the actual claims for refund would not be relevant for finding out whether the said claim was within time. The decisions to this effect are New Jatiaga .Valley Tea Estate (1983 E.L.T. 1274);

Neelamalai Tea and Coffee Estates (1983 E.L.T. 2426); George Williamson (Assam) Ltd. (1985 Vol.3 E.T.R. 681); and Kothari Planatation and Industries Ltd. (1985 Vol. 22 E.L.T. 431).

5. In K.B. Foam Pvt. Ltd. (supra) the Tribunal observed in paragraph 6 that the date of approval of the declaration should be taken as the starting point for the purpose of determining the eligibility for the relief accorded under the notification. In Carborandum Universal Ltd. (supra) it is observed (at page 35 of the report) that limitation will run only from the date of determination and approval of the base period and base clearance. It may be noted that in the said case no order at all had been passed for determination and approval of the base period and base clearance and the matter was, therefore, being remitted to the lower authority for passing orders on that matter. When the decision in K.B. Foams was subsequently cited in the case of Collector of Central Excise v. Hindustan Fertilizer Corporation (1986 Vol. 26 E.L.T. 575) the Tribunal observed that the decision in the said case was rendered on the peculiar facts of the said case and the said case could not be taken as a precedent. When the same decision was again cited before this Tribunal in the case of Tata Finlay Ltd. (1987 Vol.29 E.L.T. 144) the Tribunal again observed that the decision of the said case arose out of facts which were peculiar.

6. In fact in taking note of the submission based on the ratio of the judgment in the case of K.B. Foams Pvt. Ltd., this Tribunal observed (paragraph 7) as follows :-
"We are convinced that adoption of the date of approval of the case clearance as the starting point for limitation would not be proper.

The notification in question is of the year .1976. It will be open to any assessee claiming benefit under the said notification to furnish figures of the clearances of the earlier years as soon as possible after the issue of the notification in order to have the benefit under that notification. A series of decisions cited in the earlier portion of this order make it clear that once an assessee has taken this action he must be deemed to have staked a claim for refund and therefore, that date should be taken as the date of claim for refund and not the date of the actual claim containing the quantified amount. If the date of approval of base clearance is to be accepted as the date for commencement of limitation that would mean that the

assessee could wait for any length of period after the date of the Notification No. 198/76 and then file his declaration at his convenience and there after claim that no limitation has commenced to run against his claim for refund till the approval is granted and hence any refund claim filed within 6 months from the date of approval would be wholly within time for all the past period. That would in effect grant the assessee a licence to take advantage of his own laches. This would not be a proper legal principle. Just as it had been held in the decisions cited supra that the department cannot by its own inaction (by not approving of the base clearance for a long time) defeat the claim of the assessee for the refund, the assessee also cannot be allowed to take advantage of his own inaction (in filing the declaration for approval) and take advantage of the date of declaration as the point from which alone limitation is to run against him. The date of approval of the base clearance would be relevant only for this purpose that after that date every payment of duty would give rise to a cause of action for refund in terms of the approval granted and therefore refund claimed in respect of such payments after the date of approval of base clearance will have to be made within the normal period of limitation calculated from the date of payment of duty (vide the decision in *Mcleod Russel (India) Ltd. v. Collector of Central Excise, Calcutta* (1986 Vol. 9 ECR 612). In respect of such payments the assessee cannot take advantage of the date of his declaration in terms of the principles laid down in the decisions cited earlier" 7. We may observe that the situation contemplated in the passage extracted above is exactly the situation that has arisen in the present case. The notification is of the year 1976. The refund claims related to the period July 1977 to March 1979. The declaration appears to have been filed on 2-2-1979 only. The order thereon had been passed on 25-5-1979. It is thereafter that the 3 refund claims had been presented. If the declarations had been filed in 1976 or 1977 itself the authorities may have passed orders thereon and, depending upon the order, the appellants would have been entitled to pay duty at the concessional rate at least with reference to the clearances after receipt of the said order, keeping open their option to file claims in respect of payments made earlier, commencing from the date of crossing of the base clearance. As mentioned in the passage extracted supra the appellants would have been entitled only to the normal period of limitation (six months from the dates of payments of duty) with reference to

payments made subsequent to the date of the order fixing the base clearance. The appellants, on the other hand did not file the declaration in 1977 or 1978 but filed it only on 2-2-1979. The appellants had thus failed to avail themselves in time of the opportunity that was available to them in law of filing the declaration and thus making the claim for payment of duty at the concessional rate and then, in accordance with the orders thereon, commence payment of duty at the concessional rate.

8. It is in these circumstances that it was observed in the decision in the Tata Finlays case (supra) that to permit limitation to be computed from the date of the order on the declaration for fixing base clearance would be to allow the assessee to take advantage of his own laches and gain a benefit therefrom.

9. Limitation would commence to run from the date of payment of duty, as that is the date specified in the Rule. The said relevant date cannot be postponed to any other date. But, at the same time, it would be inequitable to permit the department to take advantage of its own lapses in passing orders on the declaration filed and, by delaying the said order, defeat the right of the assessee to make the refund claim within six months from the relevant date. It was taking note of this situation that the Tribunal had held in the series of decisions cited earlier that the date of filing of the declaration under the notification would be the date when the refund claim could be said to have been staked and, therefore, limitation would stop running on that date. It was, therefore, held that the refund claim will have to be considered not with reference to the date when the actual claim was made but with reference to the date when the declaration was filed. We hold that the claim of the appellants that limitation will have to be computed only from the date of the order on the declaration (fixing the base clearance) cannot be accepted.

10. The declaration in this case was filed on 2-2-1979. We, therefore, hold that the refund claims will have to be held to be within time so far as duty paid on and after 2-8-1978 but barred by time in respect of payments made prior to that date.

11. In the above circumstances it is unnecessary to consider the issue whether the date of receipt of the refund claim in the office of the Superintendent would be relevant or the date of the receipt thereof in the Office of the Assistant Collector.

12 Accordingly the orders of the lower authorities are modified. We hold that in the instant three claims the appellants would be entitled to refund of the differential duty in respect of duty paid on and after 2-8-1978 only. The appeal is accordingly allowed on the above terms.

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