

**Collector of C. Ex. Vs. U.P. Sheet and Metal Containers**

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

**Decided On :** Apr-20-1990

**Reported in :** (1991)LC100Tri(Delhi)

**Appellant :** Collector of C. Ex.

**Respondent :** U.P. Sheet and Metal Containers

**Judgement :**

1. This appeal by the revenue is directed against the impugned order dated 22-6-1984 passed by the Collector of Central Excise (Appeals), New Delhi, whereby he allowed the refund claim of the respondents by setting aside the order of the Assistant Collector dated 19-9-1980 (20-9-1980).

2. Shortly stated the facts of the case are that the appellant submitted their refund claim for Rs. 4,696.53 relating to the clearances of Metal containers during the period 22-4-1977 to 18-8-1977 on the ground that the value of the clearance during the year 1977-78 was Rs. 31,310.20 i.e. to say less than Rs. 1,00,000/- and as such enjoy total exemption from Central Excise duty under Notification No.97/70-C.E., dated 1-5-1970. The said claim was received in the office of the Assistant Collector on 1-9-1978. However, the Assistant Collector of Central Excise, Kanpur rejected the said claim of the respondents vide his Order-in-Original dated 19/20-9-1980 holding that "Since the clearances on which the refund has been claimed relate to the period from 22-4-1977 to 18-8-1977, the refund claim is clearly time-barred having been received much after the expiry of six months from the date of payment of duty", as laid down under erstwhile Rule

11 of the Central Excise Rules, 1944. Against the said order of the Assistant Collector, the respondents filed their appeal before the Collector of Central Excise (Appeals), who vide his impugned order-in-appeal allowed the appeal holding that the refund claim was within six months if counted from the close of the related financial year. Hence the present appeal by the Revenue.

3. Attacking the impugned order-in-appeal Shri L.C. Chakravarti, learned JDR vehemently contended that under erstwhile Rule 11 of the Central Excise Rules, the application for refund must be filed within six months from the date of the payment of duty and therefore, the Collector (Appeals) erred in holding that the period of limitation would commence only from the last date of the financial year and not from the date of the payment of duty. To buttress his submission he cited the judgment of a Division Bench of the Kerala High Court rendered in the case of Assistant Collector of Central Excise v. T. T.Pylunny, 1983 (14) ELT 2156, wherein the view taken by a Single Judge of the same High Court in the case of T.T. Pylunny Royal Smiths v.Union of India, 1978 (2) ELT (J.705) was overruled and it was held that the limitation of six months for claiming the refund under erstwhile Rule 11 of the Central Excise Rules, 1944 would run from the date of payment or adjustment of duty and not from the end of the financial year.

4. In reply Shri Rajesh Kumar, Advocate on behalf of the respondents cited the said case of T.T. Pylunny Royal Smiths v. Union of India, decided by a Single Judge of the Kerala High Court and reported in 1978 (2) ELT (J. 705) . On being pointed out by the Bench that the said judgment delivered by the Single Judge was overruled by a Division Bench of the same High Court on appeal by the Union of India (See Assistant Collector of Central Excise v. T.T. Pylunny Royal Smiths, (supra), he had no answer. However, he added that before rejecting the claim by the Assistant Collector of Central Excise no show cause notice was issued to the respondents which according to the learned counsel violated/the principle of natural justice. To support his contention he cited the case of Shri Ambica Khandsari Udyog v. Collector of Central Ex-cise, 1985 (21) ELT 281, wherein it was held that if the refund claim was rejected without any show cause notice, there was violation of natural justice inasmuch as had any such notice been given the assessee may have succeeded in satisfying the Assistant Collector that the

claim was not liable to De rejected.

5. Before we consider the rival contentions raised by the parties, it may be stated that at the time of hearing of the appeal the case of Auric Engineering Pvt. Ltd. v. Assistant Collector of Central Excise, 1980 (6) ELT 620 was also referred to wherein a Single Judge of the Andhra Pradesh High Court took the view that if the manufacturer could only know at the end of the financial year whether the production would exceed the exemption limit in terms of Notification No. 86/74-C.E., dated 1-5-1974, a refund claim made at the end of the financial year in pursuance to that notification was not barred by limitation under Rule 11 (erstwhile). With respect to this judgment of the Andhra Pradesh High Court it was contended by the learned JDR Shri L.C. Chakravarti that the said judgment is of a Single Judge and was delivered on 17-3-1978 whereas the judgment of the Kerala High Court supra is of a Division Bench and is of a subsequent date (i.e. to say 16-1-1979).

6. We have considered the submissions. At the outset we may take up the argument relating to the non-issue of show cause notice prior to the rejection of the refund claim by the Assistant Collector. Before we do so, it may be stated that at the time of hearing we asked the learned counsel for the respondents as to what purpose would be served if the case is remanded to the Assistant Collector when the facts relating to the controversy as to whether the refund claim was barred or not are admitted to the respondents and no further investigation or evidence is necessary to decide the said controversy, he had no answer except to say that the case may be remanded. After giving our due consideration to the submission made by the learned counsel for the respondents and the case of Shri Ambica Khiandsari Udyog v. Collector of Central Excise supra, we find that the request of the learned counsel for the respondents that the case may be remanded has no substance. In the case of Stewarts and Lloyds of India Ltd. v. Collector of Central Excise, Madras, 1985 (22) ELT 805, it was held that Section 11B of the Act (which is similar to erstwhile Rule 11) does not contain any express provision for the issue of a show cause notice before the rejection of a claim for refund either in part or in full and further that such a notice is required in case of demand/recovery is understandable as the department has to explain why a

particular sum is due to the assessee and the assessee has to rebut it. As against it the claimant has already given the ground for refund in his refund claim. Therefore, show cause notice in case of refund is not necessary nor its absence leads to any denial of natural justice. While observing so it was also stated that when the claim is rejected in part or in full, an order of the rejection passed by the Assistant Collector is appealable to the Collector (Appeals) and thereafter to the Tribunal and the assessee has ample scope for canvassing his points of view in the light of the points made by the Assistant Collector and to counter any views expressed by the Assistant Collector in not accepting his stand. In the instant case also the same happened. After the rejection of the claim by the Assistant Collector the respondents took the matter in appeal before the Collector (Appeals) and canvassed his points and before this Tribunal also he canvassed his points and got an opportunity to counter the views taken by the Assistant Collector. In these circumstances we think that there was no violation of principle of natural justice. That apart, remand is not called for in the peculiar facts and circumstances of the case. As regards the case of *Shri Ambica khandsari Udyog v. Collector of Central Excise*, supra, cited by the learned counsel for the respondents it may be stated that in the facts and circumstances of that case it was held that had the show cause notice been issued, the appellant would have succeeded in satisfying the Assistant Collector that there was existing practice to submit the refund claim to the Superintendent and therefore their claim was not liable to be rejected.

In the instant case there is no such dispute.

7. As regards the computation of limitation of six months it may be stated that a Single Judge of the Andhra Pradesh High Court in the case of *Auric Engineering Pvt. Ltd v. Assistant Collector of Central Excise*, supra, held that the limitation would be counted from the end of the financial year because whether the production during a financial year would exceed the prescribed limit or not would be known only at the end of the financial year i.e. to say it is only at the end of the Financial Year that the assessee could properly claim refund on the basis of the notification. However, in the case of *Assistant Collector of Central Excise v. T. T. Pylunny* supra, a Division Bench of the Kerala High Court repelled the said hardship of the assessee in these terms - ...It was argued that whether the limit of

two lakhs had been exceeded or not, would be known only at the close of the year in question; and therefore, to insist on an application for refund or exemption being made with reference to the earlier point of time in the year on the mere ground that the duty had been paid during that period, would be inequitable and unjust; and would oblige the writ petitioner to make an application for refund irrespective of whether he was or was not hoping to fall within the limit for obtaining exemption for refund of duty. At the first blush, the argument did cause us some concern. But we are satisfied that there is no ground or scope for apprehension or uneasiness. Although the realisation that the goods cleared do not exceed the two lakhs limit which alone would qualify for exemption, may come only at the end of the assessment year, the claim for refund has to be limited to goods worth not more than Rs. 50,000. There is nothing in Rule 173-J or Rule 11 which obliges a person to confine his claim for refund to the articles removed in the earlier part of the year rather than to the later portions thereof; so that, the hardship and the inequity of having to prefer a claim or application for refund with respect to the earlier purchases and removals of steel furniture are more imaginary than real, in case of dealers regularly buying and clearing throughout the year. And, as for exceptional case of heavy concentration of clearance and removal in the early part of the year, with a rule of the type here involved, there is no reason why an application for refund should not be made each time clearance is made, upto the limit of Rs. 50,000 leaving the authorities to reject the same, if the ceiling of Rs. 2 lakhs for obtaining refund had been exceeded." This Tribunal has also taken a consistent view that the limitation for refund is to be counted under erstwhile Rule 11 from the date of clearances and from the end of the assessment year/financial year.

8. In view of the above we allow the appeal, set aside the impugned order-in-appeal passed by the Collector (Appeals) and restore the order dated 19-9-1980 (20-9-1980) passed by the Assistant Collector, Central Excise Division-II, Kanpur.

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