

Mrf Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jan-05-1996

Reported in : (1996)(63)LC471Tri(Chennai)

Judge : S Kalyanam, Vice-, G T V.P., R T Lajja

Appellant : Mrf Ltd.

Respondent : Cce

Judgement :

1. This appeal is against the order of the Collector of Central Excise (Appeals), Madras dated 25.5.1990. Under the impugned order the learned appellate authority has rejected the appellants' plea that duty in respect of which the appellants have claimed refund was paid under protest under Rule 233B and upheld the original authority's order that the refund claim is barred by limitation. The learned consultant pleaded that it was under peculiar circumstances the appellants came to pay the amount, as on merits this duty was actually not payable. He has pleaded that the period involved is 1.3.1986 to 31.10.1986 and the appellants paid the duty in respect of the goods in question consequent on the visit of the Assistant Collector to their factory on 28.10.1986 when it was pointed out to them that in respect of goods Vulcanising solution falling under Tariff Heading 4005.00, the appellants may not be eligible for benefit of exemption notification 377/86, which partially exempted the goods and they were only asked to pay the duty for the period of six months and the appellants, despite the previous approval of the classification list paid the differential duty on their own for

the past period 1.3.1986 to 31.10.1986 on 6.4.1987 amounting to Rs. 13,18,184.88 and they endorsed challans under which payment was made with the words "paid under protest". In the meantime, he pleaded the Department had also issued a show cause notice dated 31.3.1987 whereunder the appellants were asked to show cause as to why the goods in question should not be classified under tariff heading 4005.00 at the rate of 40% without giving partial exemption under notification 377/86 and also why the duty should not be demanded at the rate of 40% ad valorem on their past clearances Under Section 11A of the Central Excises & Salt Act, 1944. In pursuance to this show cause notice, after considering the appellants representation, the learned Asstt. Collector held the goods to be classifiable under tariff heading 4005.00 and demanded a differential duty of Rs. 25,61,791.72 for the period 1.11.1986 to 30.9.1987 vide his order dated 8.1.1988. On appeal against this order, the learned Collector (Appeals) vide his order dated 30.6.1988 held that the matter was covered by the ruling of the Tribunal in the case of Elgi Polytex Ltd. v. CCE, Coimbatore and allowed the appellants appeal in terms of that order. Appellant thereafter sought refund for the amounts already paid and the appellants claim for refund in the amount of Rs. 13,18,184.88 representing the differential duty which was paid for the period 1.3.1986 to 31.10.1986 stated to have been paid by the appellants on the oral instructions of the Asstt. Collector that the goods were classifiable under the tariff heading 4005.00 without being eligible for the benefit of notification 377/86, was rejected as time barred and the appellants plea that they had paid the duty under protest was not accepted as the payment was not held to have been made "under protest" in terms of Rule 233B of the Central Excise Rules, 1944. The reasoning of the learned lower authority is as under: My observation in this regard is that even if the protest letter was filed on 6.4.1987 the same could not have constituted a protest under Rule 233B for the simple reason that the payment in this case was made much after the period to which it was related.

Shri Ignatius, the learned representative of the appellants, for convenience of reference has filed a chart of various events in connection with the payment of duty which is claimed as refund as above which is reproduced below:2.

28.10.1986 Asstt. Collector visited the Factory and issued instructions to pay the differential duty be-3.

31.3.1987 The Department issued a Show Cause Notice dt. 31.3.1987 for classifying it under 4005.00 @4.

6.4.1987 Paid the differential duty of Rs. 13,18,184.88 for the period from 1.3.1986 to 31.10.1986 between5.

10.4.1987 Immediately following payment filed a Protest letter with Asstt. Collector quoting the autho-6.

20.7.1987 Record of Personal Hearing before Asstt. Collector.7.

8.1.1988 Asstt. Collector issued adjudicating order C. No. V/40/17/159/87-VC classifying the pro-duct8.

26.2.1988 Appeal filed by MRF before Collector (Appeals) against order dt. 8.1.1988.9.

30.6.1988 The Collector (Appeals), Madras issued Order No. 197/88 (M) classifying the product under10.

10.8.1988 Consequently the Appellants filed 3 Refund Claims with the Asstt. Collector, Madras VIII11.

5.5.1989 The Asstt. Collector, Madras VIII Division sanctioned the last two refund claims.12. 24.7.1989 The Asstt. Collector, Madras VIII Division re- jected the last refund claim.13.

28.8.1989 Appeal filed by MRF before the Collector (Appeals), Madras against order dt. 24.7.1989.14.

2.5.1990 Written Submission of MRF before Collector (Appeals).15.

25.5.1990 Order-in-Appeal passed by the Collector (Appeals), Shri K.K. Bhatia.

The learned representative referred us to the various events as set out in the chart above and pleaded that the appellants earlier had been paying duty at the rate of 15% till 31.10.1986 based on an approved price list. However, on a visit by the Asstt. Collector on 28.10.1986 they were informed by him that they were required to pay duty at the rate of 40% and not at 15% and orally asked them to pay the differential duty and thereafter the Asstt. Collector on 31.3.1987 issued a show cause notice asking them to show cause as to why duty at the rate of 40% should not be demanded from them denying the benefit of notification 377/86. As a law abiding assessee, he pleaded, since the Asstt. Collector had asked them orally to pay duty on 28.10.1986 on 6.4.1987 pending conclusion of the proceedings which had been initiated vide show cause notice dated 31.3.1987, they paid the differential duty for the period from 1.3.1986 to 31.10.1986 amounting to Rs. 13,18,184.88 and in the challan under which this differential duty was paid they made an endorsement to the effect as "paid under protest." Thereafter, on 10.4.1987 they followed it up with a letter addressed to the Asstt. Collector stating that they had paid this amount under protest. During the proceedings also he pleaded in their reply to the show cause notice the appellants had argued the matter on merits and made detailed submissions and were all along under the impression that the payment that they had made had been accepted by the authorities as having been made under protest under Rule 233B of the Central Excise Rules, 1944. In this connection, he referred us to their letter dated 10.4.1987 in the paperbook addressed to the Asstt. Collector of Central Excise, the relevant extracts of which are reproduced below: May we refer to your show cause notice No. V/40/17/159/86VC dt.

31.3.1987.

As per the Asstt. Collector's verbal instruction communicated on 28.10.1986 during his visit to our Thiruvottiyur factory, we have paid an amount of Rs. 13,18,184.88 being the differential duty between 40% and 15% ad valorem for the period from 1.3.1986 to 31.10.1986 under protest in terms of Rule 233B of the Central Excise Rules, 1944. The payment was made under challan No. 5/87-88 dt.

6.4.1987.

1) We claimed classification of vulcanising solution under sub-heading 4005.00 with exemption under notification No. 377/86 dt.

29.7.1986 @ 15% ad valorem without prejudice to our claims under sub-heading No. 4006.90.

2) The Asstt. Collector had not considered our claim for payment of duty @ 15% ad valorem and demanded duty @ 40% and asked us to pay the differential amount of duty for the period from 1.3.1986 to 31.10.1986 and also asked us to send a protest letter while paying the same.

He pleaded that once the matter was resolved in favour of the appellants by the order-in-appeal, the appellants claim for refund for the period in question should have been allowed without applying the limitation of six months as the duty was paid under protest. He pleaded that the learned lower appellate authority had not appreciated the purport and scope of Rule 233B. He pleaded that the Rule clearly envisages that where the assessee wants to pay the duty under protest he shall deliver to the proper officer a letter to the effect giving the grounds for payment of duty under protest and once this letter was acknowledged it shall be a proof that the assessee had paid the duty under protest. He pleaded, no doubt Sub-rule

(3) of Rule 233B makes this contingent upon the observance of Sub-rule

(4) which requires the endorsement of duty paid under protest on all copies of gate passes and also RT 12s this endorsement could not have been made in the appellants' case as the differential duty had been paid after the clearance of the goods. He pleaded that the matter was all along under consideration by the Asstt. Collector. Consequent on the order passed by the Asstt. Collector, the appellants went in appeal and got their relief from the appellate Collector and the amount which had been paid were rightfully claimed by them as refund. It was put to the learned representative of the appellants as to whether the way the Rule 233B was worded the event of paying the differential duty after the clearance of the goods could be taken to be covered by Rule 233B. He pleaded that the appellants had substantially complied with the provisions of Rule 233B by paying the duty under protest endorsing the same on the challan under which the duty was paid and

thereafter by also filing a letter of protest followed by the mechanism of adjudication and appeal as envisaged in Sub-rules

(6) &

(7) of Rule 233B. In support of his pleas he cited the following case laws:

(1) Pure Drinks (New Delhi) Ltd. v. Collector of Central Excise, New Delhi .

This Tribunal, when the procedure for payment of duty under protest had not been prescribed, has held that once the protest was made within the limitation period the claims flowing from that protest must be deemed alive till they are disposed of through adjudication proceedings.

The Single Member Bench has held in this case that where duty had been paid after the clearance of the goods and the endorsement as envisaged under Rule 233B(4) on the gate passes and RT-12 returns had not been made and also representation in terms of Rule 233B(5) had also not been made, that would not mean that duty had not been paid under protest, once the appellant had come on record that they had paid the duty demanded under protest. It was held that in the facts and circumstances of the case since duty was paid after clearance of goods the question of endorsing the gate passes and RT-12 returns with the words "under protest" would not arise and also that provisions for representation under Rule 233B(5) were only directory and not mandatory in nature and this being merely procedural would not vitiate the appellant's claim of having paid the duty under protest.

(3) 1992 (38) ECR 191 (Cegat-WRB) Bombay Dyeing & Manufacturing Co.

Ltd. v. CCE, Bombay-I. The West Regional Bench has held in this case that the duty deposited on a challan in compliance with the order of Asstt.

Collector and the endorsement made on the challan that payment was made under protest was substantial compliance with the procedure prescribed under Rule 233B. In this case, duty demand has been made on RT-12 returns and the appellant had addressed the authorities asking for the procedure for paying duty

under protest and the authorities had acknowledged this letter and did not give the reply. But the Asstt. Collector, when he passed the order in favour of the assessee, had acknowledged that duty had been paid under protest. The Tribunal has held that the Asstt. Collector's order had attained finality as it was not appealed against and the successor Asstt. Collector was not competent to hold that the procedure for payment of duty under protest had not been complied with. The learned representative of the appellant referred us to para 5 of the order, which is reproduced below for convenience of reference: 5. The short point that falls for consideration is whether the appellants by virtue of their endorsement at the time of payment that they have made the payment under protest, the payment can be taken to have been made under protest and for that reason whether the claim of the appellants would be hit by limitation. While considering this issue, the matter will have to be seen from another angle, i.e. the status of their refund claims filed and which were returned to them. We observe that as soon as the demand was raised on the RT-12 returns, the appellants had gone before the authorities protesting against the demand and stated their reasons as to why discounts have to be allowed. It is pertinent to note that the appellants made pointed plea for advice as to the procedure to be followed by them for debiting the duty demanded under protest. This was as far back as September 1981. The Assistant Collector thereafter has issued the order dated 4.7.1986. Among the facts set out in this order, the Assistant Collector has inter alia observed as under: As it was felt that the sale of machine tool accessories to their distributors amounts to sale of goods to or through related persons, the Superintendent of Central Excise, Kavadiyuda Range started demanding duty on that part of the value comprising of discounts while assessing the RT 12s from January, 1981 onwards. M/s. Praga Tools honoured these demands for some time under protest.

and has given reasons for taking up the matter for issue of the order as under: In view of this, the discounts passed on by M/s. Praga Tools to their distributors in the invoices is held to be correct. Having regard to the fact that discounts are permissible even in the case of assessment in terms of Notification No. 120/75,1 allow M/s. Praga Tools Limited to clear the machine tool accessories under invoice price after allowing the discounts.

wherein the Asstt. Collector after the duty had been paid under protest, has accepted that payment of duty was made under protest.

In the operative portion of the order the Tribunal had observed as under: Therefore, the question as to whether necessary endorsement to the effect that duty has been paid under protest, has been made, on gate passes and RT-12 in terms of Rule 233B does not arise as duty was demanded after removal of the goods filing of RT-12. The Assistant Collector has taken note of the provisions of Rule 233B and after considering the representation of the appellants in regard to the payment under protest by them, has issued an order. In view of this, it can be said that the requirements of Rule 233B of the Central Excise Rules, 1944 have been complied with so far as the appellants are concerned. The Hon'ble Supreme Court in the case has held that the burden was on the department to show how the assessee had failed to observe the prescribed procedure. In the present case, there is no doubt that the appellants have made payments under protest as soon as the demands were raised and they have also requested the authorities to intimate them the procedure to be followed under Rule 233B in this regard.

From the above discussion, in our view, the appellants have complied with the necessary requirements under the Rules. In view of above, we hold that inasmuch as the Assistant Collector has taken the payments made by the appellants as "under protest" his order acquired finality and another authority namely another Assistant Collector before whom the refund claim was filed cannot hold otherwise on the same issue. In view of the above we hold that the appellants' case has to be considered on the ground that duty was paid under protest.

(5) in support of his plea that letter of protest can be treated as the refund claim.

In summing up, the learned representative of the appellants pleaded that duty had been paid after they had been informed by the Asstt.

Collector that the goods were required to be classified otherwise than what was approved in the classification list and the appellants had addressed the Asstt. Collector in the matter claiming assessment at 15% as against 40% as informed by the Asstt. Collector orally and later by the issue of the show cause notice and

the payment of duty was made under protest and informed to the Asstt. Collector so even though the Asstt. Collector may not have touched upon the same in the order passed in the classification issue. He pleaded that the appellants have substantially complied with the provisions of Rule 233B to the extent compliance could be made in the facts and circumstances of the case and right from the beginning the appellants had made their intention known that the payment of differential duty made by them for the period 1.3.1986 to 31.10.1986 was under protest.

2. The learned SDR for the Department pleaded that the appellants had paid the duty on 6.4.1987 much after the visit of the Asstt. Collector to the appellants' factory on 28.10.1986. The show cause notice for change of classification was issued only on 31.3.1987 and in the show cause notice as it is the issue projected was with reference to classification and an observation was also made that the appellants should pay differential duty on the basis of the proposed change in the classification for the past period also. No demand as such for the relevant period i.e. 1.3.1986 to 31.10.1986 had been raised. The appellants suo motu paid this amount on account of their own mistaken perspective and understanding of the law that they were required to pay differential duty. The order passed by the Asstt. Collector in pursuance to the show cause notice covered the period from 1.11.1986 onwards and the amount was also quantified for that period only. The appellate order passed also covered only the period dealt with by the Asstt. Collector in his order. The remedy, therefore, available to the appellants was only in terms of Section 11B of the Central Excises & Salt Act, 1944 and the appellants should have filed the refund claim for the payment made by them voluntarily suo motu. He pleaded there was no direction or order passed under the law compelling them to pay this differential duty. In case they chose to pay duty voluntarily they should have kept their rights alive by filing the refund claim as required under Section 11B within the limitation period of 6 months from the date of payment. He pleaded Rule 233B did not cover the contingency where the duty was paid after the clearance of the goods.

He pleaded admittedly all the requirements of Rule 233B had not been complied with by the appellants and, therefore, the said rule could not come to the

appellants' rescue.

3. The learned representative of the appellants pleaded that the payment made by the appellants was contemporary to the period of dispute and was made after a show cause notice for re-classifying the goods was issued and in which mention had also been made as to why the duty for the past period should not be demanded.

4. We have considered the pleas elaborately made by both the sides. The questions that falls for consideration are as to the scope of Rule 233B and whether the payment, the way it was made by the appellants, could be considered to have been made under protest in terms of this rule. We observe that in terms of Section 11B of the Central Excises & Salt Act, 1944 a refund claim for refund of any duty paid can be made by making an application for refund to the Asstt. Collector before the expiry of 6 months from the relevant date and in terms of the proviso it has been provided that the limitation of 6 months will not apply where any duty has been paid under protest. The proviso, therefore, provides for an exception to the main provision regarding the applicability of limitation of 6 months. To effectuate the purpose for which the proviso has been provided, Rule 233B has been incorporated providing for the procedure to be followed in cases where duty is paid under protest.

Necessarily proviso to Section 11B and Rule 233B have to be read together while considering whether the duty in a particular case has been paid under protest. Here it will also be relevant to consider as to the scope of the term "protest" which is defined as under in the various dictionaries: THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES--VOLUME II. To give formal expression to objection, dissent, or disapproval; to make a formal (often written) declaration against some proposal, decision, or section; The position, therefore, to be examined is whether in the facts and circumstances of this case, circumstances in law existed whereby the appellants were in a situation where they were required to make a payment and, therefore, had to register their protest and, if that be so, whether the scheme of the Act and Rules provided for the payment to be made under protest in the circumstances under which the

appellants made the payment. It is seen from the record that the appellants had filed earlier a classification list No. 3/85-86 dated 3.3.1986 classifying the goods under heading 4006.90 carrying a rate of duty of 15% ad valorem and this classification was approved by the Assistant Collector on 10.7.1986 with effect from 3.3.1986. Thereafter, the Asstt. Collector visited the appellants' factory on 28.10.1986 and during the course of the visit it was pointed out by him, as seen from the letter of the appellants dated 30.10.1986 written to the Asstt.

Collector as a follow-up on his visit, that as against the assessment claimed by the appellants under heading 4006.90 the item should be classified under Tariff Heading 4005.00 at 40% and the appellants have stated in that letter that benefit of Notification 377/86 dated 29.7.1986 would be available and the rate of duty in terms of this notification would be 15% ad valorem. The matter remained at that and thereafter neither the appellants paid the enhanced duty as suggested by the Asstt. Collector orally during his visit nor the appellants suo motu paid the duty at the rate of 40% while effecting the clearances.

Thereafter, they filed the next classification list No. 27/86-87 dated 31.3.1987 at the end of the financial year claiming assessment at 15% under exemption notification 377/86. The Asstt. Collector, however, issued a show cause notice dated 31.3.1987 asking why the item viz.

Vulcanising Solution should not be charged to duty at the rate of 40% under tariff heading 4005.00 and why the exemption under notification 377/86 should not be disallowed. It was also mentioned in the show cause notice as under: They are also required to show cause as to why duty on their past clearances should not be demanded at 40% ad valorem under Section 11A of the Central Excises and Salt Act, 1944.

It is pertinent to note that no period for demand as such has been set out in this show cause notice and only a mere mention has been made that why duty should not be demanded from them at 40% ad valorem for the past period. This show cause notice as such cannot be taken to be the show cause notice having been issued for recoveries in the past particularly beyond a period of six months in the absence of any time specified and also the amount said to be recovered. There

was no obligation cast on them nor the show cause notice could be construed as a direction for the appellant to pay up the amount for the clearances made prior to 31.3.1987. The appellants, it is pertinent to note, also did not start paying duty at the enhanced rate in terms of this show cause notice and in fact proceeded to contest the proposed classification. In the personal hearing before the Asstt. Collector their submission was that Vulcanising Solution would be classifiable under heading 4006.90 throughout the period of dispute i.e. to say from 1.3.1986 to date. This personal hearing is dated 20th July, 1987. It is seen that after the issue of the show cause notice dated 31.3.1987, the appellants on their own proceeded to pay the differential duty of Rs. 13,18,184.88 the amount in question for the period from 1.3.1986 to 31.10.1986 under a challan dated 6.4.1987 with the words "paid under protest" endorsed thereon. They followed it up with their letter dated 10th April, 1987 as filed in the paperbook before us. For proper appreciation of the facts the operative portion of this letter is reproduced below: May we refer to your show cause notice No. V/40/17/159/86 VC dt.

31.3.1987.

As per the Asstt. Collector's verbal instructions communicated on 28.10.1986 during his visit to our Thiruvottiyur factory, we have paid an amount of Rs. 13,18,184.88 being the differential duty between 40% and 15% ad valorem for the period from 1.3.1986 to 31.10.1986 under Protest in terms of Rule 233B of the Central Excise Rules, 1944. The payment was made under Challan No. 5/87-88 dt.

6.4.1987.

(1) We claimed classification of vulcanising solution under sub-heading 4005.00 with exemption under notification No. 377/86 dt.

29.7.1986 @ 15% ad valorem without prejudice to our claims under sub-heading No. 4006.90.

(2) The Asstt. Collector had not considered our claim for payment of duty @ 15% ad valorem and demanded duty @ 40% and asked us to pay the differential

amount of duty for the period from 1.3.1986 to 31.10.1986 and also asked us to send a protest letter while paying the same.

In the record of personal hearing, however, there is no mention about this payment under protest. An analysis of the facts as above shows that the genesis of the demand was the visit of the Asstt. Collector on 28.10.1986 when he discussed and pointed out that Vulcanising Solution was liable to pay duty at the rate of 40% and not 15% as per the classification list approved. The Asstt. Collector, however, did not take any action thereafter and the appellants on their own, vide their letter dated 30.10.1986, tried to explain that the goods were in fact chargeable to duty at the rate of 15% and referred to Notification 377/86. The matter rested there until a show cause notice dated 31.3.1987 was issued. Neither the appellants felt the necessity to pay the differential duty for the past period nor for their clearances after the visit of the Asstt. Collector at the higher rate of 40% nor the authority viz. the Asstt. Collector felt any urgency to issue a show cause notice asking them to file a fresh classification list or to raise a demand for the differential duty at the rate of 40% for the period from 1.3.1986 onwards. It is presumed, that RT 12 returns etc.

filed were assessed as per the earlier approved classification list. In such a situation it cannot be said that the authorities in any way raised any demand and created a situation in law whereby the appellants were required to pay the differential duty. The show cause notice dated 31.3.1987 merely asked the appellants to show cause as to why the classification should not be approved under heading 4005.00 without the benefit of Notification 377/86 and in passing made a mention asking the appellants to show cause why duty on the past clearances should not be demanded at 40% ad valorem. The position as it stood in law at that time was that there was neither a direction nor any compulsion cast under any law to pay duty at higher rate when they had an approved price-list whereunder duty at the rate of 15% was payable. The appellants on their own for the reasons best known to them chose to pay the differential duty on 6.4.1987 for the period 1.3.1986 to 31.10.1986 and they endorsed the challan with the words "duty paid under protest" and also wrote a letter dated 10th April, 1987 stating that they had paid this duty under protest and gave the grounds of protest also. The

question to be considered is: did any circumstance under the law exist which warranted payment by them whereby it could be said that the appellants had no choice but to pay contrary to what they felt was payable? We observe that the appellants after the visit of the Asstt.

Collector and even after the issue of show cause notice for their day-to-day clearances after these dates did not pay duty at the higher rate and continued to clear the goods without any intervention by the authorities by paying the lower rate of duty. The authorities, therefore, were reconciled to waiting out for the outcome of the proceedings drawn vide letter dated 31.3.1987. It is not understandable as to why the appellants suo motu chose to pay the duty for the period 1.3.1986 to 31.3.1987 on 4.6.1987, when as it is, going by the facts of this case the demand prior to 30th September, 1986 was barred by limitation as there was no suppression of facts etc. involved nor attributed in the show cause notice. There was no hostile situation under the law for the purpose of payment of the duty for the period 1.3.1986 to 31.10.1986 which warranted a protest. The word 'protest' has to be given a legal meaning. It is not as if any payment made by an assessee even though correctly can be endorsed as payment under protest. Protest can only arise in a situation where in law a duty in law is cast on the appellants to pay up a certain amount against their understanding of their liability to pay. In the present case in view of the above we are of the opinion that the circumstance did not warrant any payment of duty under protest. An oral request or a regular discussion cannot in law be taken cognisance of as casting any legal obligation on the appellants to pay the duty more so when even the issue was still at large. If any payment in a situation like this is made suo motu the appellants will have to look for other avenues other than the route by way of a protest for retrieving this amount in case they feel that ultimately they would be eligible to get it back.

5. The next point to be considered is whether a situation of the like where the goods have already been cleared, is covered by the provisions allowing payment of duty under protest. It is observed that Section 11B under which an exception has been carved out for the purpose of reckoning the limitation of 6 months for claiming the refund merely states "provided that limitation of 6 months shall not apply where any duty has been paid under protest". This provision of Section 11B

in regard to protest, as mentioned earlier, will have to be read together with the provisions of Rule 233B which for convenience of reference is reproduced 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 for Removal and Form RT 12 or Form RT 13, as the case may be.

(5) In cases where the remedy 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 Collector 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.

A duty paid under protest can be said to have been paid so only if the procedure set out under this rule is followed. This rule is very detailed as to the procedure to be followed and we can glean from the reading of the sub-rules as to the circumstances under which a duty can be paid under protest. Sub-rule (1) provides for filing a letter before the proper officer to the effect that the assessee desires to pay duty under protest and giving the grounds for payment of the same and an acknowledgement has to be given for this letter as set out under Sub-rule (2) and the duty would be taken to have been paid under protest from the date on which the letter of protest is delivered to the proper officer. A compendious reading of Sub-rule (1) to (3) shows that whenever a duty is to be paid under protest it has to be preceded by delivery of a letter to the Asstt. Collector and it is after the acknowledgement has been given that the payment of duty made thereafter can be taken to have been made under protest. In short payments of duty under protest are prospective to the date of the acknowledgement of the letter as envisaged under Sub-rule (1). In the present case the appellants paid the duty on 6.4.1987 and the letter of protest was filed only on 10.4.1987. There is nothing on record to show that the appellants had obtained an acknowledgement of the letter dated 10.4.1987 and in any case the payment having been made prior to the filing of this letter cannot be taken to have been made under protest.

It is observed that eligibility to pay duty under protest starts from the date on which the letter of protest is delivered to the proper officer. This date of eligibility has a bearing on the reckoning of the statutory limit of 6 months for claiming refund and, therefore, this has to be treated as mandatory. Thus filing of the letter and taking acknowledgement has to be taken as mandatory and not merely directory.

We have in a number of decisions held in the case of eligibility to MODVAT credit that this eligibility starts with the filing of the declaration under Rule 57G of the inputs and the final product and the acknowledgement taken thereof and in case

the same is not filed the appellants cannot take the MODVAT credit for the past period in terms of Rule 57G read with Rule 57A. The relevant portion of the wording of Rule 57G is reproduced below: Rule 57G. Procedure to be observed by the manufacturer.--(1) Every manufacturer intending to take credit of the duty paid on inputs under Rule 57A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgement of the said declaration.

(2) A manufacturer who has filed a declaration under Sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty paid on the inputs received by him.

It will be seen that so far as the eligibility to MOD VAT credit is concerned the provision regarding declaration is similar to the provision for letter for the purpose of payment of duty under protest under Rule 233B. A further reading of Rule 233B shows that in terms of Sub-rule (4) the duty paid under protest shall be made on all copies of the gate passes and also on the RT 12 returns filed for each month in regard to the clearances made. The appellants have pleaded that in the present case since the clearances had already been made, there was no question of endorsing of the gate passes and RT 12 returns and this requirement in this case would not apply. We, however, have a different view of the matter and we observe that the provision of Sub-rule (4) gives an indication as to the circumstances under which the payment can be made under protest. It is observed that, as we have held, in terms of Sub-rules (1), (2) and (3) the eligibility for payment of duty under protest from the date on which the letter of protest was delivered to the proper officer and thereafter it is applicable only to such cases where clearances have to be made on gate passes. In other words the payment of duty under protest is to cover such contingencies where the authorities under the law have put the assessee in a position where he is required to pay duty at a rate higher than what he understands is his liability and the clearances have to be made on an on going basis.

The facility is made available so that such an assessee is not called upon to file refund claims on an on-going basis and his protest would take care of the requirement to file these refund claims for every clearance on payment of duty and the limitation. Sub-rule (4) clearly brings out the fact that the provision for payment of duty under protest is only in contingencies where future ramifications are involved and day-to-day clearances have to be made and to obviate the need to file repetitive refund claims till the issue is finally decided in the matter of assessment. The payment of duty for past clearances under protest in the light of this cannot be taken to be provided for in law. If an assessee pays duty suo motu without being under the compulsion of law to do so, as is the case of the appellants as brought out above, the appellants after payment could have only filed a refund claim for claiming the amount back, a legal provision which is available. The appellants had the option not to pay this amount until the proceedings for demand of the amount had culminated after the issue of the show cause notice in the order of the Asstt. Collector. In the present case the order of the Asstt. Collector only demanded duty from the appellants from 1.11.1986 onwards and not for the past periods.

Sub-rules (5), (6) and (7) of Rule 233B provide for what the assessee is supposed to do after he starts paying duty under protest and when his right to pay the duty under protest comes to an end. These sub-rules point to the fact that the facility for payment of duty under protest on an on-going basis is provided for cases where on-going clearances were to be made and payment of duty have to be made, prospectively. Sub-rule (8) sets out that if any one of the provisions of this Rule have not been complied with, it shall be deemed the assessee has paid the duty without protest. A decision has been cited before us where it has been held that in case if there is any minor variation in the compliance of the rules the same can be ignored. The minor variation can be in the matter of going on record as to the payment of duty under protest in respect of each clearance and in respect of which case law has been cited. The provisions of Rule 233B, as pointed out earlier, are partly mandatory and partly directory and the deviation in respect of the compliance has to be read taking into consideration the deviation in a particular case. In the present case, as analysed above, there has been hardly any compliance with any of the provisions of this Rule.

6. The appellants have cited various case laws. The ruling of this Bench cited by the appellants in the case of Praga Tools Ltd. v. CCE is not relevant to the facts of this case as in that case we had taken into account the fact that when the Asstt. Collector passed orders he had accepted the fact that duty had been paid under protest and we have held that since that order had become final, notwithstanding the non-fulfilment of the requirements of Rule 233B, the appellants were entitled to the benefit flowing from the findings of the learned Asstt. Collector. The Single Member ruling of the East Regional Bench in the case of CCE v. Foundry Chemicals Industries (P) Ltd. , has been given on a reference application without examining the scope of the term 'protest' and also the Scheme of the Act and the Rules. With respect we are of the view that it does not have a binding effect as a precedent. In the case the ratio of the decision in the case of Bombay Dyeing & Manufacturing Co. Ltd. v. CCE Bombay-I 1992 (38) ECR 191 (CEGAT-WRB) it is also distinguishable as in that case there was an order of the Asstt. Collector and in pursuance to that duty was paid under protest. Here, as we have held, the appellants were not under any compulsion or legal obligation to pay the duty and they paid the duty suo tnotu and this circumstance cannot be taken to be covered by the Scheme of the Act and Rules under which provision for payment of duty under protest has been provided for.

Similar is the position in the case of Rotogravurs, Bombay v. UOI CCE Bombay 1992 (40) ECR 173 (Bombay). Here the appellants' goods had been classified under heading 84.62 and they recorded a protest by filing a letter stating that their clearances would be under protest and duty was paid by reserving the contention that the product was not excisable. Here again there was a legal obligation cast on the appellants to pay the duty at a particular rate against which the appellants filed the protest which is not the case in the facts of this case as brought out in the discussion above.

7. Therefore, taking into consideration the totality of the circumstances of the case, we hold that the learned lower authority has been right in holding that the appellants were not entitled to the refund on grounds of limitation and dismiss the appeal.

8. I have perused the order of my learned Brother and since I am not able to persuade myself to agree to the same I am recording a separate order.
9. Since the facts and the relevant provisions of law have been set out elaborately in the order of my learned Brother, I do not want to recapitulate them once again to avoid repetition. I, therefore, straightaway address myself to the issue arising for determination.
10. The appellants had filed a classification list effective from 1.3.1986 for the goods manufactured namely Vulcanising Solution falling under Central Excise Tariff Heading 4006.90 attracting duty at 15% ad valorem and were paying duty accordingly. On 28.10.1986, the Assistant Collector of Central Excise having jurisdiction over the appellants' factory visited the factory and directed the appellants to file a revised classification list for the aforesaid goods under Heading 40.05 attracting 40% ad valorem and further directed the appellants to pay the differential duty for the past period also. The Department thereafter issued a show cause notice on 31.3.1987 inter alia alleging that the Vulcanising Solution would be classifiable under sub-heading 4005 of the Central Excise Tariff and the exemption Notification No.377/86 dated 29.7.1986 would not be applicable to the appellants as the solution is used for re-treading tyres and called upon the appellants to show cause as to why they should not be denied the benefit of Notification 377/86-CE, dated 29.7.1986 claimed by them and goods classified under heading 40.05 of the Central Excise Tariff. The appellants were also called upon to show cause as to why the "duty on their past clearances should not be demanded at 40% ad valorem under Section 11A of the Central Excises and Salt Act, 1944". It was made clear that if the appellants did not show cause within 30 days from the date of receipt of the show cause notice or appear for personal hearing when the case was posted for personal hearing, the case would be decided ex-parte. After the receipt of the show-cause notice on 31.3.1987 and also the oral directions from the authorities to the appellants for paying the differential duty for the past period namely 1.3.1986 to 31.10.1986 with which we are concerned in the present appeal, and also on account of the pressure made on the appellants by the Assistant Collector of Central Excise, the appellants ultimately paid the differential duty in the aforesaid context in a sum of Rs. 13,18,184.88 by a

separate TR Challan dated 6.4.1987 with the following remarks: Payment of differential Excise duty for Vulcanising Solution for the period 1.3.1986 to 31.10.1986 as per Asstt. Collector's show cause notice No. V/40/17/259/86, dated 31.3.1987, Under Protest.

The appellants thereafter on 10.4.1987 filed also a letter of protest with the Assistant Collector which reads as under: As per the Asstt. Collector's verbal instruction communicated on 28.10.1986 during his visit to our Thiruvottiyur factory, we have paid an amount of Rs. 13,18,184.88 being the differential duty between 40% and 15% ad valorem for the period from 1.3.1986 to 31.10.1986 under Protest in terms of Rule 233B of the Central Excise Rules, 1944. The payment was made under Challan No. 5/87-88 dt.

6.4.1987.

The appellants thus paid the differential duty in respect of the past clearances for the period aforesaid. The show cause notice culminated in the order of adjudication by Assistant Collector dated 10.1.1988 wherein while he had confirmed the demand for the period 1.11.1986 to 30.9.1987 in a sum of Rs. 25,61,791.72, had not confirmed the demand of the amounts paid by the appellants under Protest for the earlier period namely 1.3.1986 to 31.10.1986 with which we are concerned in the present appeal. The appellants preferred an appeal before the appellate authority and the appellate authority by his order dated 30.6.1988 set aside the order of the original authority and following the ruling of the Special Bench in the case of Elgi Polytex Ltd. v. Collector of Central Excise, Coimbatore, reported in 1988 (18) ECR 54 (T) : 1988 (34) ELT 484 (sic) ordered re-classification of the goods as prayed for. After the classification issue was decided in favour of the appellants, the appellants preferred a refund claim in respect of the excise duty paid and the Assistant Collector of Central Excise, while permitting refund of the differential duty paid by the appellants in a sum of Rs. 25,61,792/- for the period 1.11.1986 to 30.9.1987 and also a further sum of Rs. 10,78,485.26 for the period 1.2.1988 to 20.7.1988 by his order dated 8.5.1989; rejected the appellants' refund claim for a sum of Rs. 13,18,184.88, by his order dated 24.7.1989, being the differential duty for the period 1.3.1986 to 31.10.1986

paid by the appellant on 6.4.1987, on the ground that "the duty was not paid under protest" in terms of Rule 233B of the Central Excise Rules. The appellants preferred an appeal against the same which was rejected under the impugned order of the Collector of Central Excise (Appeals) by his order dated 25.5.1990.

11. The crux of the issue is whether the appellants' claim for refund of the amount in question as stated above is liable to be rejected on the ground that it was not in conformity with Rule 233B of the Central Excise Rules, 1944 (and the same was therefore hit by limitation) and not a payment under protest and therefore subject to bar of limitation prescribed under Section 11B of the Act. In other words, whether the refund claim of the appellants is liable to be rejected on grounds of limitation in terms of Section 11B of the Central Excises and Salt Act, 1944.

12. In the present case, the indisputable fact remains that the appellants contested the classification right from the beginning and even pursuant to the show-cause notice would make the payment under protest. I should confess I do not understand that in the above factual background how it could be contended by the Department that Rule 233B could ever be pressed into service for sanctifying and solemnising the payment under protest. In other words it is plain as a pikestaff that Rule 233B would not have any application at all in the present context of the case. In other words, it would be practically impossible for the appellants to conform to the procedural formalities and niceties enunciated under Rule 233B for lodging a protest in the context of the admitted facts of this case. After all, 'protest' is only a formal declaration made by a person interested or concerned in some act about to be done, or already performed, whereby he expresses his dissent or disapproval, or affirms the act against his will. The object of such a declaration is generally to save some right which would be lost to him if his implied assent could be made out, or to exonerate himself from some responsibility which would attach to him unless he expressly negatived his assent. The formal statement, usually in writing, made by a person who is called upon by public authority to pay a sum of money, in which he declares that he does not concede the legality or justice of the claim or his duty to pay it, or that he disputes the amount demanded; the object being to save his right to recover or reclaim the amount, which right would be lost by his acquiescence. It should be borne in mind that the appellants were called upon to

pay duty on the past clearances. Therefore the question of the appellants making an endorsement as "duty paid under protest" on copies of Gate Passes, RT 12 returns etc. would hardly arise. The very purpose of the Rule 233B is only to let the Department know the grounds on which a manufacturer is paying duty under protest and the reasons therefor. In the present case when indisputably the dispute is about the classification and the Department has issued show cause notice calling upon the appellant to pay differential duty on the basis of the revised classification for the past period, the question of the appellants conforming to the procedural formalities enjoined under Rule 233B would hardly arise. It is also well settled that Rule 233B is procedural in nature and it would not be practically possible for manufacturer to pay duty under protest by conforming to all procedural formalities of Rule 233B invariably in all circumstances. It is well settled that the provisions of Rule 233B are not mandatory but are only directory and it would also be seen that Rule 233B is more a machinery provision laid down for procedural formality to be adhered to by a person paying duty under protest rather than creating a mandatory legal requirement for a party paying duty under protest to adhere to every letter of the rule for claiming refund without being hit by bar of limitation. I am afraid if one were to take such an extremely strict and rigid view in terms of Rule 233B, that would totally whittle down the substantive rights of a party to pay duty under protest to save the bar of limitation otherwise applicable. Such a strict construction of Rule 233B is neither called for either on the basis of the tenor of the language or the spirit underlying the same, nor such strict and rigid construction would advance the course and purpose for which the rule was brought into the statute book. Rule 233B cannot be consigned to the straight jacket of rigidity to deprive and whittle down the substantive rights of a person to pay duty under protest to save the bar of limitation.

13. The Bombay High Court in the case of Roche Products Ltd. v. UOI has held that the rules are only procedural and by no stretch of imagination be treated as mandatory.

The Supreme Court in the case of India Cements Ltd. v. Collector of Central Excise arising under Rule 11 prior to incorporation of Rule 233B of the Central Excises Rules, 1944, referring to the letter of a party in that case dated 11th June,

1974, observed as under: We gave our anxious considerations to the rival submissions. A perusal of the letter dated June 11, 1974 clearly shows that all possible contentions which could be raised against the levy of duty on the value of packing material were raised. If this could not be said to be a protest one fails to understand what else it could be.

It does not require much time to analyse the contents of the letter.

An ordinary reading with common sense will reveal to anybody that the appellant was not accepting the liability without protest. We have no hesitation to hold that the letter was in the nature of protest. That being the position, the question of limitation does not arise for refund of the duty.

14. The Special Bench of the Tribunal in the case of Shri Baidyanath Ayurvedic Pharmaceuticals Ltd. v. Collector of Central Excise , following the Supreme Court ruling in the India Cements Ltd. case held that if the appellant had paid duty under compulsion and addressed a letter of protest even if actual protest endorsements are not made on duty paying documents such as deposit challan, monthly assessment return etc. and other related documents that would not detract from the position that the appellants were paying duty under compulsion.

15. The Special Bench of the Tribunal in the case of Icem Engineering Co. P. Ltd. v. Collector of Central Excise dealing with the scope of Rule 233B observed as under: Rule 233B(1) gives liberty to the assessee the choice to pay the duty under protest by the use of words "desire" in Sub-section (1).

There is no pre-condition of any demand for payment of duty under protest nor does it pre-suppose existence of undue advantageous' position or coercion or duress to pay duty under protest. They may constitute circumstances to pay the duty under protest but one cannot pre-suppose such existence of circumstances alone to pay the duty under protest. The law casts a duty on citizens to obtain licence, file classification lists, declaration and voluntarily pay the duty. Non-observance of any provisions of law will attract penal provisions. There is always the existence of fear of consequences of not following the procedures. This by itself is a circumstance to enable a party to choose the time and liberty to pay the

duty under protest and to lodge his claim by making proper grounds for refund of duty as provided for in Rule 233B. The only procedure contemplated in Sub-rule (1) is that in the letter there should be a clear indication that the party will be paying the duty under protest and give grounds for payment of the duty under protest. In other words, although he is not entitled to pay duty but yet he is doing so to safeguard his rights as well as to protest himself from the consequences of penal provisions. The party has in furtherance of his act of lodging the letter of protest shall also put the words "Duty paid under protest" on all copies of the gate pass, the application for removal and Form RT 12 (or Form RT 13, as the case may be) as per Sub-rule (4) of Rule 233B. This is only to indicate that he is disagreeable to the payment of duty and that he is keeping his claim for refund alive or in other words indicating his right of contest and of refund. There is no pre-supposition in excise law that persons who are likely to get exemption need not pay duty or pay under protest when demanded or pay under coercion alone.

The excise law covers all those doing any manufacturing activity and producing or processing goods. The question of exemption arises only later. There is always an element of uncertainty in the mind of the party as to whether he is exempted or not. The fear is lurking always in his mind of the consequences of non-payment. These factors are sufficient to make the party to choose to pay or protest. The desire and liberty or the pleasure of paying the duty under protest is, therefore, left to the party. It is a weapon to arm himself against dangers of non-payment of duty. In the instant case, the appellant felt that he was entitled to exemption from payment of duty as long as he was under the ceiling limit of Rs. 30 lakhs. This by itself does not make him a non-assessee or that it can be presumed that excise laws are not applicable to him. He is duty bound to pay, when he is likely to cross the limit. The law gives him liberty to pay under protest and claim refund by working out the grounds for refund but, however, he will not be entitled to claim refund if he does not keep the claim or dispute alive by writing the words 'duty paid under protest' on the relevant and stated documents. This is to enable the department to initiate adjudication proceedings and give a final verdict on the dispute raised. If it is not done this way, it would appear that the protest is too flimsy and party has acquiesced his right. The contention of Shri L.C. Chakraborty that there is no coercion or demand or something of disadvantage

available to the party to lodge letter of protest is not a sound and tenable argument. The consequences of non-compliance of demand is in-built in the consequences of penal provisions.

Hence, the law has given that advantage and liberty to the party to pay duty under protest when he so desires. *Andhra Cement Co. Ltd. v. Collector of Central Excise* held that "the provisions of Rule 233B in regard to the endorsement on gate passes and RT 12 returns are directory and not mandatory in nature". As per the ratio of the ruling, the letter of protest would save a claim covered by protest from the operation of time bar and that the payment of duty under protest could be made even after the approval of the price list. *Bombay Dyeing & Manufacturing Co. Ltd. v. Collector of Central Excise* dealing with Rule 233B, observed as under: Taking the first ground about duty having been paid under protest, the challans under which the amounts had been paid bear the endorsement of payment 'under protest'. Payment was made in pursuance of the order-in-original of the AC. It is an undisputed position that the said order was taken in appeal before the Collector (Appeals). Rule 233B of the Central Excise Rules provide for the procedure laid down for raising the protest and the essence behind the same is that the party paying should not raise a protest just for the sake of raising but should have some ground to agitate upon and that some proceedings in relation thereto are being initiated. It has been practically a settled position that the provisions of Rule 233B are procedural in nature and substantial compliance thereof is called for.

18. The Bombay High Court in the case of *Rotogravurs v. Union of India* reported in 1992 (40) ECR 173 dealing with Rule 233B of Central Excise Rules has held that "the rule is clearly procedural in nature and the occasion to obtain refund does not arise out of procedural provisions of the Rules. The substantive right to get refund arises in view of the order passed by the appellate Collector and even assuming that the procedure prescribed under Rule 233B was not complied with, still that would not dis-entitle the tax payer from recovering back the duty that was paid and recovered by the Department in contravention of law".

Notwithstanding the letter dt. 10.4.1987, in which the appellants have said that they were making the payment under protest in terms of Rule 233B, the payment

was not and could not have been made under protest in terms of this rule. Though there is some force in the contention of the appellants that the observation of the lower authority that to constitute a protest it should have been made either on 6.4.1987 or before that date--is not entirely valid. My observation in this regard is that even if the protest letter was filed on 6.4.1987 the same could not have constituted a protest under Rule 233B for the simple reason that the payment in this case was made much after the period to which it was related. A bare reading of Rule 233B would make it very clear that the applicability of Sub-rules (1) to (7) is either concurrent or prospective, i.e. it is in respect of the payments relating to the clearances being made or yet to be made. For example, Sub-rule (4) relates to the endorsement 'duty paid under protest' to be made on all copies of the gate passes and RT 12s etc. Compliance with this rule would not be possible but for the current or future clearances. Similar are the Sub-rules (5), (6) and (7). Sub-rule (8) clearly stipulates that 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.

As already stated by me above the protest in this case was not made and could not have been made in terms of Rule 233B. Therefore this is clearly a case falling within the mischief of Sub-rule (8). Under the circumstances the gratuitous payment made by the appellants, which they were legally not called upon to make, could have been occurred only by their filing a refund claim within six months of making the payment so as to bring it within the scope of Section 11B. The above reasoning is not in consonance or in conformity with the ruling of the High Court or ruling of the Tribunal much less based on a proper and correct interpretation of Rule 233B and its procedural nature not affecting the substantive rights.

20. In the present case it would be seen that the appellants admittedly did not make the payment voluntarily nor is the case of the Department that the payment was made voluntarily. When the payment was made involuntarily under official compulsion or direction whether it is overt or covert, express or implied the involuntary nature of the payment by the appellant is evident in the facts of the case. The payment was involuntary is also clear from the endorsement of protest in the TR 5 challan. The Department did join with the appellant on the issue relating to the classification and threatened the appellants, as it were, through a

show cause notice, calling upon them to pay the differential duty for the PAST CLEARANCES of the goods or to face legal consequences on non-compliance. The question of making endorsement either in the Gate Passes or RT 12 assessment or other related documents on past clearances would hardly arise in the above factual context when a person is paying differential duty in obedience to an official direction pursuant to a show-cause notice issued by a competent authority and the only conceivable mode of protest possible is by endorsing protest in the challan, which the Appellant did. The specific letters and correspondence would also amply bear out that the appellant was not voluntarily making the payment but was only out to secure their interests against bar of limitation by lodging their protest in all conceivable manner and the only way by which the same can be done is to register their protest to the authorities concerned whenever possible while paying the differential duty and this is precisely what the appellants have done. Therefore, to deny the appellants' claim of refund in the above facts and circumstances when admittedly the amount is not due to the Government which amount is also not admittedly payable under law, would be a patent injustice and it is axiomatic that Government should not on grounds of threatening on non-compliance of procedural formalities and niceties defeat and whittle down the substantive rights. Therefore from any view of the matter the impugned order is not sustainable either in law or on the peculiar facts of this case. Therefore for the reasons stated above I hold that the impugned order is not sustainable and the same accordingly is dismissed and the appeal allowed. Dt. 5.7.1995 (S. Kalyanam) Whether in the facts and circumstances of this case the appellant is entitled to grant of refund for the reasons given by Member (J) on the scope and interpretation of Rule 233B and the letter of protest of the appellants upholding the appellants' right and entitlement to refund as not hit by bar of limitation under Section 11B of the Act.

The reasons given by Member (T) with reference to the scope and nature of Rule 233B and its purport read with Section 11B of the Act, and the reasons given by him in his order for not accepting the differential payment of the duty by the appellants as payment under protest under law to save bar of limitation (V.P. Gulati) (S. Kalyanam) Member (T) Vice-President Whether in the facts and circumstances of this case the appellant is entitled to grant of refund for the

reasons given by Member (J) on the scope and interpretation of Rule 233B and the letter of protest of the appellants upholding the appellants' right and entitlement to refund as not hit by bar of limitation Under Section 11B of the Act., the reasons given by Member (T) with reference to the scope and nature of Rule 233B and its purport read with Section 1 IB of the Act, and the reasons given by him in his order for not accepting the differential payment of the duty by the appellants as payment under protest under law to save bar of limitation.

22. The facts of the case have been referred to by the learned Member (Technical) and the Hon'ble Vice-President in their respective orders proposed. I will, however, briefly recapitulate the relevant facts. The period involved is from 1.3.1986 to 31.10.1986. During this period the appellant M/s. MRF Ltd. paid the Central Excise duty as per their own understanding at the lower rates. The department issued a show cause notice on 31.3.1987 proposing a different classification and proposing a higher rate of duty. On 6.4.1987, the appellant deposited the differential duty in the bank. On 10.4.1987, they wrote a letter that the differential duty deposited may be taken as payment of duty under protest. Thus, it is seen that during the relevant period duty had been paid at the lower rate; subsequently, the differential duty was deposited although at that time there was only a show cause notice and there was no authoritative order for payment/depositing of the differential duty. The letter of protest was only after the date of the depositing of the differential duty.

23. Under Section 11B of the Central Excises & Salt Act, 1944, it is provided that the limitation of six months shall not apply when any duty has been paid under protest. Under Rule 233B of the Central Excise Rules, 1944, a procedure has been prescribed in cases where duty is paid under protest. The Central Excise Rules have been framed Under Section 37 of the Act and for all practical purposes it is a part of the Act. The procedure with regard to payment of duty under protest provides that the payment of duty under protest shall be taken as from the date on which the letter of protest was delivered to the proper officer. There is no copy of the refund claim on record and it is seen that the claim was filed on 10.8.1988. As in this case the duty had been paid earlier than the date of the letter of protest, it is not covered by the provisions of law and the view taken by the learned Member (Technical) according to him is correct and based on law.

24. The various case law cited by the learned Corporate Manager does not cover the situation in this case, as on the date of depositing the differential] duty there was no order for such deposit; the goods had already been cleared earlier at the lower rate of duty. A letter of protest has been filed after the differential duty were deposited.

25. Taking all the relevant considerations into account, I agree with the learned Member (Technical) that the lower authorities were right in holding that the appellants were not entitled to the refund on grounds of limitation and that the appeal merited to be dismissed.

26. The file may now be placed before the original Bench for passing an appropriate order.

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