

PETITIONER:
INDIA CEMENTS LTD.

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE

DATE OF JUDGMENT 25/04/1989

BENCH:
OZA, G.L. (J)
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OZA, G.L. (J)
SHETTY, K.J. (J)

CITATION:
1989 AIR 1496 1989 SCR (2) 715
1989 SCC (2) 676 JT 1989 Supl. 137
1989 SCALE (1) 1058
CITATOR INFO :
RF 1990 SC 977 (6)

ACT:

Central Excises and Salt Act Rules, 1944: Section 3--Excise duty on price of packing material used for packing superfine cement--Whether leviable--View taken by Government in similar case that duty was not leviable--Whether should be extended to all similar cases.

Central Excise Rules, 1944: Rule 11--Claim for refund of duty paid--Letter written by assessee raising objections against levy of duty--Whether amounts to protest--Whether period of limitation applicable.

HEADNOTE:

The appellant-Company, a manufacturer of superfine cement, preferred a claim for refund of duty on price of packing material of the product, paid by it during July 4, 1974 to March 1, 1974, on the ground that duty on packing charges on superfine cement was not leviable. But the claim was rejected by the Assistant Collector of Central Excise, the Appellate Collector and also the Appellate Tribunal on the ground of limitation under Rule 11 of the Central Excise Rules, 1944, since the duty was not paid under protest. The Tribunal also held that the letter dated July 11, 1974, in which the appellant had stated that the duty was not leviable on packing charges and if the department felt it was leviable they had no option but to suggest the rates fixed by Government from quarter to quarter as packing charges, was not a protest to save the period of limitation prescribed in Rule 11.

In the appeal before this Court, on behalf of the Company, it was submitted that a similar claim was allowed by the Central Government in the case of Birla Cement Works and that the Trade Notice dated 29.10.1979 by the Collectorate clearly stated that the cost of packing was not liable to be included in the assessable value.

While conceding that there was no particular form of protest, it was contended on behalf of the department that if the payments were held as made under protest, by treating the letter as a protest, then the period of limitation under Rule 11 of the Central Excise Rules, 1944 would not be

applicable but the Trade Notice of 20.1.1979 could not be
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given retrospective effect and, therefore, the matter had to be remitted to the Tribunal for disposal on other questions. Allowing the appeal,

HELD: The letter of the appellant clearly shows that all possible contentions which could be raised against the levy of duty on the value of packing material were raised, and that the appellant was not accepting the liability, without protest. Therefore, the letter was in the nature of protest. That being the position, the question of limitation does not arise for the refund of the duty. [718-H]

Giving the benefit without any Trade Notice in a similar case, the Central Government held, in their revisional order, that as superfine cement was capable of being sold without packing like grey portland cement, the cost of packing for superfine cement should not be added to the assessable value. The authorities ought to have, therefore, extended this view to all similar cases. [719A, D]

In these circumstances, the appellant is entitled to refund of the duty paid by it. [719F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 500 of 1985.

From the Judgment and Order dated 25.7.1984 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. 923/81-A in Order No. 559/84-A.

Soli J. Sorabjee, A.N. Haksar, Sanjay Grover and K.J. John for the Appellant.

G. Ramaswamy, Additional Solicitor General, Mrs. Indira Sawhney, Miss A. Subhashini and Mrs. Sushma Suri for the Respondent.

The Judgment of the Court was delivered by

OZA, J. This appeal involves the determination of the only question as to whether the appellant is entitled to refund of Rs.22,42,002.09 paid as excise duty on the price of packing material used for packing of superfine cement which according to the appellant was paid under protest whereas according to the respondent, it was not
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paid under protest and therefore, the claim of refund is barred by time.

The brief facts necessary for determination are.

The appellant-company is a manufacturer of superfine cement. The company preferred the claim for refund of Rs.22,43,002.09 alleged to be duty on price of packing material of the aforesaid product paid during July 4, 1974 to March 1, 1975.

This claim of refund was rejected by Assistant Collector of Central Excise Tirunelveli on the ground that Rule 11 of the Central Excise Rules 1944 was applicable as duty was not paid under protest and the claim was barred by time. On appeal, the Appellate Collector of Custom and Central Excise by the judgment dated February 7, 1981 maintained the order passed by the Assistant Collector on the same ground of limitation, as the merits of the claim was not disputed by the department. This is clear from the following observations in the Appellate Collector's order:

"They based their claim on the Trade Notice No. 232/79 dated 29.10.79 of Madras Collector-ate declaring that the said cement is not the variety of cement requiring packing to prevent

deterioration, and the cost of packing of such cement is not liable to be included in the assessable value. The ground on which the claim was made are not disputed in this appeal."

Thereafter, the appellant unsuccessfully approached the Customs, Excise and Gold (Control) Appellate Tribunal. Before the Tribunal also, only the question of limitation was put against the appellant. The Tribunal by its order dated July 25, 1984 has stated:

"Before us, the only question argued was the question of limitation. It was urged that the letter dated 11.6.74 amounted to a protest so that the period of limitation prescribed in Rule 11 of the Rules ceased to be applicable."

The Tribunal also took the view that the letter dated June 11, 1974 was not a protest to save the period of limitation.

Hence this appeal.

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We heard learned counsel for parties. It is not in dispute that the duty was paid for the period from July 4, 1974 to March 1, 1975. If it was paid under protest, the orders of the authorities cannot be sustained. It is, therefore, necessary to refer to the contents of the letter dated June 11, 1974. The letter raised many objections against the levy of packing charges. It was stated that the duty on packing charges on superfine cement was not leviable. The appellant finally said:

"If the department feels that the duty is leviable on packing charges, we have no option, but to suggest the rates fixed by the Government of India from quarter to quarter, as packing charges."

The counsel also referred to us the decision of the Central Government in the case of Birla Cement Works where a similar claim was allowed by order dated December 31, 1980. Counsel further referred to us the Trade Notice dated October 29, 1979 issued by the Collectorate, Madras wherein it was clearly indicated that the costs of packing was not liable to be included in the assessable value.

Learned Additional Solicitor General frankly conceded that at the material time, there was no particular form prescribed for protesting against the levy or paying under protest. He also contended that if the letter is treated as a protest and the payments are held to be payments under protest then the limitation prescribed under Rule 11 admittedly would not be applicable, but the Trade Notice issued by the Madras Collectorate on October 29, 1979 could not be given retrospective effect and, therefore, the matter should go back to the Tribunal for disposal on other questions.

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.

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It is rather strange that learned Additional Solicitor General wants the matter to go back to the Tribunal for considering the effect of Trade Notice. The Central Government in their revisional order dated December 31, 1980 in the case of Birla Cement Works gave the benefit without any Trade Notice. There it was observed:

"In the circumstances Government accepted the petitioner's pleas and observe that superfine cement is nothing other than ordinary portland which is grounded to a very high fineness of not less than 3500 CM 2/gm and that this higher fineness does not lead' to its deterioration without packing. The Government, therefore, accept the contention of the petitioners and hold that the impugned good being capable of being sold without packing like ordinary gray portland cement the cost of packing for superfine cement should not be added to the assessable value."

The authorities ought to have extended the view taken by the Central Government in the case of Birla Cement Works to all similar cases. Moreover, the Appellate Collector and the Tribunal clearly stated that the only question agitated before them was the question of limitation. The order does not indicate that the counsel for the Department or the departmental representative raised any other question on merits. Indeed no objection could have been raised on the merits of the matter in view of the order of the Central Government in the Birla Cement Works.

In these circumstances, the appeal is allowed, the orders passed by the Tribunal and Other authorities are set aside. It is declared that the appellant is entitled to refund of the amount. The appellant shall be paid interest at the rate of six per cent from the date of refusal of refund with costs of this appeal quantified at Rs. 10,000.

N.P.V.

Appeal al-

lowed.

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