

GST/Excise/ST/VAT : Where a manufacturer of goods paid excise duty under protest and after settlement of dispute by Supreme Court in favour of manufacturer, assessee, who was a buyer of goods from manufacturer, claimed for refund of duty paid by manufacturer under protest, period of limitation of six months as prescribed under section 11B would apply

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[2019] 103 taxmann.com 235 (SC)

SUPREME COURT OF INDIA

Western Coalfields Ltd.

v.

Commissioner of Central Excise, Trichy*

**A. M. KHANWILKAR AND AJAY RASTOGI, JJ.
CIVIL APPEAL NO(S). 807 OF 2006 AND OTHERS
FEBRUARY 20, 2019**

Section [54](#) of the Central Goods and Services Tax Act, 2017/Section [11B](#) of the Central Excise Act, 1944 - Refund - Tax, refund of - Period 20-7-1988 to 15-1-1994 - One F (manufacturer) cleared its finished goods viz. feneplast PVC impregnated conveyor beltings classifying same under sub-heading No. 3920.12 as suggested by department and paid duty under protest - Dispute with regard to classification of feneplast PVC impregnated conveyor beltings came to Supreme Court and finally decided vide judgment dated 28-3-1995 in favour of 'F' - Later on 20-12-1996, assessee, who was buyer of conveyor beltings from 'F', filed application for refund of excise duty for period 20-7-1988 to 15-1-1994 on premise that payment was made towards central excise duty by manufacturer 'F' under protest and limitation of six months would not apply where duty had been paid under protest - Whether period of limitation of six months as prescribed under section 11B would apply - Held, yes - Whether since application for refund was filed by assessee as a buyer of goods from 'F' much after a period of limitation (six months) as prescribed under mandate of law, it was not entitled to claim refund of duty paid under protest by 'F' - Held, yes [Paras 2 and 14] [In favour of revenue]

(OR)

FACTS

- One 'F' (manufacturer) cleared its finished goods viz. feneplast PVC impregnated conveyor beltings classifying the same under sub-heading No. 3920.12 as suggested by the department and paid the duty under protest.
- The dispute with regard to classification of feneplast PVC impregnated conveyor beltings came to the Supreme Court and finally decided vide judgment dated 28-3-1995 in favour of 'F'.
- 'F' never applied for refund of excise duty after the classification dispute was finally decided by the Supreme Court.
- Later on 20-12-1996, the assessee, who was the buyer of conveyor beltings from 'F',

filed application for refund of excise duty for the period 20-7-1988 to 15-1-1994 on the premise that the payment was made towards central excise duty by the manufacturer 'F' under protest and limitation of six months would not apply where duty had been paid under protest.

- The Adjudicating Authority rejecting the refund application filed by the assessee on the ground of limitation and also on unjust enrichment.
- The Appellate Authority rejected the appeal of the assessee on the ground of limitation.
- The Tribunal confirmed the order of the Appellate Authority.
- On appeal to Supreme Court:

HELD

- It is not disputed that the excise duty was paid by the manufacturer 'F' under protest to the department and the dispute with regard to the classification of the product finally came to be decided by the Supreme Court in *Fenner (India) Ltd. v. Collector of Central Excise* [1995 taxmann.com 368](#) and the manufacturer 'F' never moved any application for refund of the excise duty at any given point of time. The assessee is the buyer and purchased conveyor beltings from the manufacturer 'F' during the period 20-7-1988 to 15-1-1994. For the refund of excise duty, application has been filed by the assessee (buyer) much after the period of limitation which was six months from the date of purchase of goods at the time of filing of the application to claim refund under section 11B. [Para 11]
- Section 11B deals with the claim of refund of duty as paid on his own accord by any person for refund of such duty to the Competent Authority before the expiry of six months from the relevant date as prescribed, but where the duty was paid under protest in terms of the second proviso to section 11B(1), the period of limitation may not apply. Although the buyer can also apply for refund provided the duty of excise is borne by the buyer and he had not passed on the incidence of such duty to any other person as referred to under section 11B(2)(e) and the application has been moved within the period of six months from the relevant date of purchase of the goods by such person in terms of section 11B(5)(B)(e). The scheme of section 11B makes a distinction between right of the manufacturer to claim refund from right of the buyer to claim refund treating them separate and distinct for making an application for refund exercising their right under section 11B. It has been examined by the three-Judge Bench of the Supreme Court in the case of *CCE v. Allied Photographics India Ltd.* [\[2007\] 8 STT 365](#). [Para 12]
- It may be appropriate to notice that the view earlier expressed by the two-Judge Bench of the Supreme Court in the case of *National Winder v. CCE* [2003 taxmann.com 1545](#) was held to be *per incuriam* in the case of *Allied Photographics India Ltd.* (*supra*). [Para 13]
- In the instant case, indisputably the application was filed by the assessee as a buyer of the goods (conveyor belts) from 'F', who paid the duty under protest, much after a period of limitation (six months) as prescribed under the mandate of law. Hence, the assessee was not entitled to claim refund of duty paid under protest by the manufacturer. [Para 14]
- In view of the aforesaid, the appeal filed by the assessee was liable to be dismissed.

CASE REVIEW

CCE v. Allied Photographics India Ltd. [\[2007\] 8 STT 365 \(SC\)](#) (para 14) followed.

CASES REFERRED TO

Fenner (India) Ltd. v. Collector of Central Excise [1995 taxmann.com 368 \(SC\)](#) (para 4), *CCE v. Allied Photographics India Ltd.* [\[2007\] 8 STT 365 \(SC\)](#) (para 6) and *National Winder v. CCE* [2003 taxmann.com 1545 \(SC\)](#) (para 13).

Ambhaj Kumar Sinha, AOR, **T. Ramesh**, **Ms. Deepika Nandakumar**, **Naresh Kumar**, Advs., **V.N. Raghupathy**, AOR, **K. Radhakrishnan**, Sr. Adv., **Ms. Sunita Rani Singh**, **Ms. Shirin Khajuria**, Advs., **B. Krishna Prasad**, **Arvind Kumar Sharma** and **Mrs. Anil Katiyar**, AOR's for the Appearing Parties.

JUDGMENT

Ajay Rastogi, J. - The present batch of appeals are directed against the judgment and order passed by the Customs, Excise and Service Tax Appellate Tribunal, at South Zonal Bench, Chennai (hereinafter being referred to as "Tribunal") rejecting the claim of the appellant (buyer) for refund of the claim of the central excise duty under Section 11B of the Central Excise Act, 1944 (hereinafter being referred to as "the Act") which was paid under protest by the manufacturer (M/s. Fenner (India) Ltd.).

2. The short point for consideration in the present batch of appeals is whether the period of limitation of six months shall apply where the refund of central excise duty has been claimed by the buyer and paid by the manufacturer (M/s. Fenner (India) Ltd.) under protest.

3. With the consent of the parties, we are dealing with the facts of Civil Appeal No. 7625 of 2005 as all other are analogous on facts and law.

4. The appellant is a Public Sector Undertaking engaged in coal mining. The price of coal is fixed by the Coal Ministry and the appellants sell the goods on the price fixed by the Ministry and no central excise duty is payable on coal. M/s. Fenner (India) Ltd. (manufacturer) cleared their finished goods viz. fenepslat PVC impregnated conveyor beltings classifying the same under sub-heading 3920.12 on the Central Excise Tariff Act, 1985 as suggested by the department and paid the duty under protest. The dispute with regard to classification of fenepslat PVC impregnated conveyor beltings came to this Court and finally decided vide judgment dated 28th March, 1995 (M/s. *Fenner (India) Ltd. v. Collector of Central Excise* [1995 taxmann.com 368](#) holding that the conveyor beltings would be classifiable under sub-heading 3922.90 for the period from December 1986 to February 1987 and under sub-heading no. 3926.90 for the period from 10th February 1987 to June, 1987 and also for the later period. Indisputedly, M/s. Fenner (India) Ltd. pending classification deposited central excise duty under protest and had never applied for its refund after the classification dispute was finally decided by this Court of which a reference has been made.

5. The appellant herein is the buyer of conveyor beltings from M/s. Fenner (India) Ltd. filed application for claim of refund on 20th December, 1996 for the period 20th July 1988 to 15th January 1994 on the premise that the payment was made towards central excise duty by the manufacturer (M/s. Fenner(India) Pvt. Limited, Madurai) under protest due to pending classification of PVC impregnated conveyor beltings dispute in the Court of law and after issue of classification has been settled by this Court in favour of the manufacturer M/s. Fenner (India) Ltd. by judgment dated 28th March, 1995, the central

excise duty collected should be refunded by the excise department and there is no bar in claiming of refund in terms of the amendment made under Section 11B of the Act and limitation of six months shall not apply where duty has been paid under protest.

6. In furtherance of the application, show cause notice dated 17th February, 1997 was served by the Department holding that since the appellant did not pay any duty and, therefore, is precluded from making any application under Section 11B of the Act and after affording opportunity of hearing order in original came to be passed by the Authority dated 4th August, 1997 rejecting the refund application filed by the appellant on the ground of limitation and also on unjust enrichment. The appeal preferred by the appellant against order dated 4th August, 1997 before the Appellate Authority, Chennai came to be rejected on the ground of limitation under Order dated 18th January, 1999 and confirmed by the Appellate Tribunal under order impugned dated 8th August, 2005 placing reliance on the judgment of this Court in *CCE v. Allied Photographics India Ltd.* [\[2007\] 8 STT 365](#). The subject matter of challenge is in appeal before us.

7. The main thrust of submission of learned counsel for the appellant is that since the manufacturer of the conveyor beltings had paid duty under protest, the restriction of limitation of six months under 2nd proviso to Section 11B(1) may not apply to the refund claim filed by the appellant buyer and further submitted that the only relevant question would be as to whether excise duty for which refund claim is made has been paid under protest or not and if the answer is in affirmative, the protest made by the manufacturer at the time of payment of duty has to be taken into consideration even to determine whether the buyer has filed the refund claim within time.

8. Learned counsel submits that when the duty paid by the manufacturer is permitted to be claimed by the buyer who ultimately bears the burden, protest made by such manufacturer at the time of paying the central excise duty for which the buyer can also apply for the refund and bar of limitation of six months may not apply to the buyer claiming refund of excise duty paid by the manufacturer under protest.

9. Per contra, learned counsel for the respondent while supporting the order of the Tribunal submits that although the buyer can move an application for refund of central excise duty under the provision of Section 11B of the Act provided the duty of excise borne by the buyer had not passed on the incidence of such duty to any other person and application is submitted for seeking refund claim within a period of six months from the date of purchase of the goods which indeed in the instant appeal is beyond the period of limitation and have been rightly rejected by the Tribunal placing reliance on the judgment of this Court in *Allied Photographics India Ltd's case (supra)* and further submitted that claim for refund under Section 11B, the right of the manufacturer and the right of the buyer are separate and distinct and indisputedly, the application was filed by the appellant (buyer) much after the period of six months from the date of purchase of goods which was time barred in terms of 2nd proviso to Section 11B(1) of the Act and rightly rejected by the competent authority and affirmed by the Tribunal and needs no further interference.

10. Before we proceed to examine the question, it would be apposite to take note of relevant provision of Section 11B of the Act applicable at the relevant time (pre-amended) which reads as under:—

"SECTION 11B. Claim for refund of duty. —

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [six months] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid

by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:]

[Provided further that] the limitation of [six months] shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) to (d). ** ** *

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f), (3) & (4). ** ** *

(5) For the removal of any notification issued under clause (f) of doubts, it is hereby declared that the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]

[Explanation. — For the purposes of this section, —

(A). ** ** *

(B) "relevant date" means, —

(a) to (d) & (i) & (iii). ** ** *

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

in the case of goods which are exempt from payment of duty

(ed) to (ec) & (f). ** ** *

11. It is not disputed that the excise duty was paid by the manufacturer (M/s. Fenner (India) Ltd.) under protest to the department and the dispute with regard to the classification of the product finally came to be decided by this Court in *Fenner India's* case (*supra*) and the manufacturer M/s. Fenner (India) Ltd. never moved any application for refund of the excise duty at any given point of time. The appellant herein is the buyer and purchased conveyor beltings from the manufacturer M/s. *Fenner (India) Ltd.* during the period 20th July, 1988 to 15th January, 1994 indicated in Civil Appeal No. 7625 of 2005. The period for which the refund of excise duty has been claimed differs but in all the cases, applications have been filed by the appellant (buyer) much after the period of limitation which was six months from the date of purchase of goods at the time of filing of the application to claim refund under Section 11B of the Act.

12. Section 11B deals with the claim of refund of duty as paid on his own accord by any person for refund of such duty to the competent authority before the expiry of six months from the relevant date as prescribed but where the duty was paid under protest in terms of the 2nd proviso to Section 11B(1), the period of limitation may not apply. Although the buyer can also apply for refund provided the duty of excise is borne by the buyer and he had not passed on the incidence of such duty to any other person as referred to under Section 11B(2)(e) and the application has been moved within the period of six months from the relevant date of purchase of the goods by such person in terms of Section 11B(5)(B)(e) of the Act. The scheme of Section 11B makes a distinction between right of the manufacturer to claim refund from right of the buyer to claim refund treating them separate and distinct for making an application for refund exercising their right under Section 11B of the Act and it has been examined by the three-Judge Bench of this Court in *Allied Photographics India Ltd.* case (*supra*) as under:—

"Therefore, Section 11-B(3) stated that no refund shall be made except in terms of Section 11-B(2). Section 11-B(2)(e) conferred a right on the buyer to claim refund in cases where he proved that he had not passed on the duty to any other person. The entire scheme of Section 11-B showed the difference between the rights of a manufacturer to claim refund and the right of the buyer to claim refund as separate and distinct. Moreover, under Section 4 of the said Act, every payment by the manufacturer whether under protest or under provisional assessment was on his own account. The accounts of the manufacturer are different from the accounts of a buyer (distributor). Consequently, there is no merit in the argument advanced on behalf of the respondent that the distributor was entitled to claim refund of "on-account" payment made under protest by the manufacturer without complying with Section 11-B of the Act."

It was further held as under:—

"Having come to the conclusion that the respondent was bound to comply with Section 11B of the Act and having come to the conclusion that the refund application dated 11-2-1997 was time-barred in terms of Section 11B of the Act, we are not required to go into the merits of the claim for refund by the respondent who has alleged that it has not passed on the burden of duty to its dealers."

13. It may be appropriate to notice that the view earlier expressed by the two-Judge Bench of this Court in *National Winder v. CCE* [2003 taxmann.com 1545](#) was held to be per incuriam in *Allied Photographics India Ltd.* case (*supra*).

14. In the instant case, indisputedly the application was filed by the appellant as a buyer of the goods (conveyor belts) from M/s. Fenner (India) Ltd. who paid the duty under protest much after a period of limitation (six months) as prescribed under the mandate of law disentitles the claim of refund to the appellant as prayed for in view of the judgment of this Court in *Allied Photographics India Ltd.* case (*supra*) holding that the purchaser of the goods was not entitled to claim refund of duty made under protest by the manufacturer without complying the mandate of Section 11B of the Act, 1944.

15. In our considered view, the appeals are without substance and deserve to be rejected. Consequently, the appeals fail and are accordingly dismissed.

s.k. jain

*In favour of revenue.