

(2015) 07 AHC CK 0120

In the Allahabad High Court

Case No : Central Excise Reference No. 8 of 2004

C.C.E., Meerut-II

APPELLANT

Vs

Dena Jee Sansthan

RESPONDENT

Date of Decision : 10-07-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11(AA), 11A, 11-A, 11A(1), 11A(i)

Citation : (2015) 7 ADJ 163 : (2015) 323 ELT 361 : (2015) 52 GST 1088

Hon'ble Judges : Arun Tandon, J; Surya Prakash Kesarwani, J

Bench : Division Bench

Advocate : B.K.S. Raghuvanshi, for the Appellant; S.D. Singh and R.R. Kapoor, Advocates for the Respondent

Judgement

1. Heard Sri B.K. Raghubansi, learned counsel for the applicant/department and Sri S.D. Singh, learned senior advocate assisted by Sri Rishi Raj Kapoor, learned counsel for the respondent-assessee. In this central excise reference, following questions of law has been referred by the Tribunal at the instance of the Central Excise Department, for opinion of the High Court:

"1. Whether demand of duty under Section 11-A for extended period on excisable goods manufactured and sold without informing the department/taking Registration Certificate is justified or not.

2. Whether penalty imposed on person solely responsible for evasion of duty by suppressing fact is correct in law or not.

3. Whether penalty equivalent to duty evaded is correct or not in terms of Section 11-AA of the Central Excise Act, 1944.

4. Whether interest on duty not paid is chargeable under Section 11-AB of the Central Excise Act or not."

2. Briefly stated the facts of the present case are that the respondent is engaged in manufacturing of shampoos. His business premises was visited by a team of

Central Excise Preventive Officer, Moradabad on 16.9.1996. During the course of checking it was found that the respondents were engaged in the manufacturing of excisable goods (shampoo) since the year 1989. They manufactured shampoos in various brand names, namely (i) Dena Ji Brand Satritha shampoo, (ii) Dena Ji Brand Harbal shampoo (iii) Dena Ji Brand Neem shampoo. These goods were being sold in plastic bottles of capacity 1000 ml, 500 ml, 300 ml, 280 ml, 150 ml and 100 ml. The department found the preparation of these shampoos as meant for use on hair and classifiable under chapter heading No. 3305.90 and subsequently under chapter heading No. 3305.99 of the Central Excise Tariff Act, 1985 and, therefore, liable to central excise duty at the rate applicable from time to time. Statement of Sri Ajai Kumar Gupta, Manager of the unit of the respondent was recorded, who inter alia stated that the unit was registered with the Uttar Pradesh Khadi and Gram Udyog Board and they had no central excise liability on these products. The respondents have neither filed any declaration nor applied for central excise registration. The respondent also took the stand that their product is not shampoo but an ayurvedic liquid soap. Certain quantity of final products (shampoos), found during the course of checking, were seized.

3. A show-cause notice dated 14th March, 1997 was issued to the respondents by the Commissioner of Central Excise, Meerut demanding central excise duty of Rs. 1,70,05,170.92/- under Rule 9(2) of the Central Excise Rule, 1944 read with the proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as the Act) on the goods clandestinely removed alongwith interest. Penalty was also proposed to be levied and seized goods were proposed to be confiscated under Rule 173Q of the Rules. In the said show-cause notice the Commissioner of Central Excise, Meerut clearly alleged that during the period March, 1992 to September, 1996 the respondent clandestinely removed excisable goods with sole intention to evade payment of Central Excise duty by deliberately suppressing the production and clearance of shampoos. The extended period of limitation as provided under Section 11A(i) of the Act was invoked.

4. The respondent filed their objection to the notice.

5. The aforesaid show-cause notice was adjudicated by the Commissioner of Central Excise, Meerut-II vide order in original dated 27th November, 1997. Finding on the question of classification and invoking extended period of limitation under the proviso to Section 11A(I) was recorded as under:

"In view of the foregoing discussion and findings, I hold that the product/preparation manufactured by M/s. DJS is Shampoo being used for use on hair and merits classification under chapter 3305.99 of the Central Excise Tariff Act, 1985. The product is, therefore, liable to Central Excise duty, M/s. DJS had not informed the department about the manufacture of these excisable goods. They had not obtained Central Excise Licence/Registration. They had thus deliberately suppressed material information from the department and cleared the goods clandestinely without payment of duty. Extended period of limitation has,

therefore, been rightly invoked. Therefore, Central Excise Duty amounting to Rs. 1,70,05,170.92/- on goods already cleared clandestinely without payment of duty is liable to be recovered from M/s. DJS. In addition M/s. DJS is also liable to pay interest under Section 11AB (though misquoted as Section 11(AA) of the Central Excise Act, 1944 since the substance of interest is mentioned in the SCR the interest liability can rightly be recovered from them as settled by Associated Provincial Picture Houses Limited v. Wednesbury Corporation, (1948) 1 K.B. 223 , Jay Engg. Works v. GOI, 1979 (4) ELT (6307) (AP) 5 etc. Further I find party has failed to inform the deptt. about the manufacture of excisable goods, did not obtain Central Excise licence/registration as required under rules and clandestinely removed excisable goods without due discharge of Central Excise duty liability leviable thereon and thus, failed to discharge their statutory obligation and is therefore liable for penal action under Rule 173 of the Central Excise Rules for contravention of the provisions of the Rules *ibid*. I also find that the seized goods manufactured in violation of rules as quoted in brief facts earlier as detailed in the notice are liable to confiscation under Rule 173 and S/Shri D.N. Gupta. Secretary, Ajay Kumar Gupta, Manager of M/s. DJS are liable for penal action under Rule 209A of the Central Excise Rules, 1944 for having dealt with the impugned goods."

6. Aggrieved by the order in original, the respondents filed an appeal before the Custom Excise & Gold (Control) Appellate Tribunal, New Delhi who passed the final order No. 267-269/2000-C dated 30th March, 2000 under Section 35(C)(1) of the Act. The tribunal allowed the appeal of the respondent solely on the ground that the extended period of limitation under the proviso to Section 11A(1) of the Act could not be invoked in the facts of the case. The conclusion was recorded by the Tribunal on the basis of a final order No. 812-813/99-C dated 18.8.1999 passed in the case of another assessee. The relevant part of the order is as under:

"Advocate A.R. Madhav Rao and Dr. Ravinder Babu, JDR for the department were heard and after considering the submissions it is found:

(a) the Advocate relied upon the final order No. 812-813/99-C dated 18.8.1999 in the case of M/s. Kshetria Shree Gandhi Ashram, Civil Lines, Moradabad, U.P. v. CCE Meerut, wherein a similar product was held by them to be herbal shampoo and not to be an Ayurvedic medicine. However, the demands were set aside for a period six months on the following findings:

"On the question of limitation, finding of the adjudicating authority is as follows:

".....I find that the party failed to inform the department about its manufacture and did not obtain registration during the impugned period under dispute as required under Rule 174 of the Central Excise Rules, 1944 and hence, failed to discharge their statutory duties and are liable for penal action under Rule 1730 of Central Excise Rules, 1944.....".

We observe that the findings of the adjudicating authority does not say that the

appellants herein wilfully misstated or suppressed anything or contravened any Rules with an intent to evade payment of duty. The finding is only that the appellants failed to inform the department about the manufacture of the product under consideration. This finding by itself is not sufficient to invoke the larger period of limitation of five years for demand of duty under Section 11A. Keeping in view the aforesaid finding, the demand of duty, if any, will be payable only for the period of six months, calculated from the date of show-cause notice. Consequently the demand of duty may be revised, if any".

(b) In the present case also in the Order-in-Original the Commissioner has observed as follows:

"M/s. DJS had not informed the Deptt., about the manufacture of these excisable goods. They had not obtained Central Excise Licence/registration. They had thus deliberately suppressed material information from the Deptt., and cleared the goods clandestinely without payment of duty. Extended period of limitation has therefore, been rightly invoked".

(c) Since the appellants are relying upon the order No. 812-813/99-C dated 18.8.1999 and we find that this order can be relied upon for the purpose of coming to the conclusion that in the fact of this case also, is no cause for us to defer as regards the classification and to find that there are no grounds to invoke the larger period of limitation.

7. In view of our findings the Order-in-Original is, therefore, set aside as regards the demand, the classification as determined in this order under heading 3305.99 of the Central Excise Tariff Act, 1985 is confirmed. The appeals are allowed in above terms."

7. Against the aforesaid order of the Tribunal, the applicant filed a Central Excise Reference Application (Defective) No. 23 of 2000 before this Court which was allowed by an order dated 29th October, 2003. The Tribunal was asked to refer the four questions of law as framed. In consequence to the said order of this Court, the Tribunal has referred the above noted four questions of law to this Court which are subject-matter of consideration in the present reference.

8. Learned counsel for the applicant submits that in the show-cause notice clear allegation of suppression of facts and clandestine removal of excisable goods with intention to evade payment of duty were made. The adjudicating authority has recorded a clear finding of fact with regard to deliberate suppression of facts, clandestine removal of goods with intention to evade payment of duty. The facts of the case in which findings recorded in the final order as relied by the tribunal were distinguishable inasmuch in that case the adjudicating authority had not recorded any finding with regard to willful misstatement/suppression of fact or contravention of rules with intention to evade payment of duty, it was only recorded that, the assessee failed to inform the department about the manufacture of the product under consideration. On the contrary in the case of the respondents the adjudicating authority has recorded a clear finding of fact

that the respondent had deliberately suppressed material information from the department and cleared excisable goods clandestinely without payment of duty and without obtaining central excise registration. Thus they failed to discharge their statutory obligation. He, therefore, submits that the final order of the tribunal in question is based on misreading of the adjudication order and the findings recorded therein and penalty and interest were rightly levied.

9. He, therefore, submits that the referred question of law deserves to be answered in favour of the applicant and against the respondent/assessee.

10. Learned Senior Counsel for the respondent-assessee supports the findings recorded in the order of the tribunal. He submits that the findings recorded by the tribunal are the findings of fact.

11. We have carefully considered the submissions of learned counsel for the parties.

12. It is undisputed that the respondents were engaged in the manufacture of excisable goods. In paragraph No. 7 of the final order, the tribunal itself upheld the classification of the product manufactured by respondent assessee to be covered under heading 3305.99 of the Central Excise Tariff Act, 1985. Thus it is undisputed that the goods in question were excisable and the clearances made attracted central excise duty of Rs. 1,70,05,170.92/-

13. The only ground on which the tribunal allowed the appeal of the respondent-assessee was that in case of another assessee a final order No. 812-813/99-C dated 18.9.1999 was passed in which the adjudicating authority of that assessee recorded a similar finding that the assessee failed to inform the department about the manufacture of product under consideration, which was not at part with suppression of material facts for evasion of duty. The Tribunal, although quoted a passage from the order in original in question of the respondent-assessee but did not apply its mind on the findings recorded by the adjudicating authority in the case of respondent-assessee. It mechanically followed the above referred final order dated 18.8.1999 passed in another case.

14. In the show-cause notice a clear allegation of deliberate suppression of production and clearance of excisable goods and evasion of central excise duty were made. In the order in original the adjudicating authority has clearly recorded a findings of fact in paragraph No. 11 on the points as under:

(i) The respondent-assessee failed to inform the department about the manufacture of excisable goods;

(ii) Respondent assessee did not obtain central excise license/registration as required under Rule

(iii) They clandestinely removed excisable goods without due discharge of central excise duty leviable thereon.

(iv) They failed to discharge their statutory obligation.

(v) They deliberately suppressed material information from the department and cleared the goods clandestinely without payment of duty.

15. Section 11A(1) of the Act as stood at the relevant time is reproduced below:

"(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show-cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect for the words "six months", the words "five years" were substituted."

16. Bare perusal of Section 11A(1) of the Act clearly shows that the extended period of limitation of five years may be invoked, if the central excise duty has not been levied or has not been paid or short levied or short paid or erroneously refunded by reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules made there under with intention to evade payment of duty.

17. In the order in original a clear findings of deliberate suppression of fact, clandestine removal of goods and evasion of central excise duty have been recorded. The Tribunal has not set aside those findings. In fact it has misread the findings recorded in the order in original. Under the circumstances the order of the Tribunal suffers from manifest error of law and the finding recorded with respect to the extended period of limitation is bad. It is also relevant to note that on the question of classification the Tribunal itself has found that the stand in regard of department is correct. There remained no dispute that the goods in question were excisable goods and therefore removal of such goods without paying duty was in contravention of the provisions of the Act and Rules applicable and, therefore, the conditions mentioned under Section 11A(1) of the Act were satisfied. Thus the extended period of limitation under the proviso to Section 11A(1) of the Act was lawfully invoked. The respondent-assessee is liable to interest and penalty in accordance with law.

18. In view of the above discussions, the questions of law No. 1 is answered in affirmative i.e. in favour of the applicant department and against the respondent-assessee.

19. Since the Tribunal has not recorded any finding in its final order on the questions of quantification of duty, penalty and interest and therefore, the

questions of law No. 2, 3 and 4 are returned unanswered leaving it open to the Tribunal to pass a fresh order in accordance with law after hearing the parties. Reference is disposed of as indicated above.