

(2014) 03 AHC CK 0163

In the Allahabad High Court

Case No : Central Excise Appeal No. 370 of 2013 and Central Excise Appeal Defective No. 33 of 2014

Commissioner, Customs, Central Excise and Service Tax

APPELLANT

Vs

Monsanto Manufacturer Pvt. Ltd.

RESPONDENT

Date of Decision : 27-03-2014

Acts Referred:

Customs Act, 1962 — Section 28

Finance Act, 1994 — Section 65(72), 73, 73(1), 75A, 77

Citation : (2014) 45 GST 699 : (2014) 35 STR 177 : (2014) 71 VST 269

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Ashok Singh, Senior Standing Counsel, Advocate for the Appellant; Bharat Ji Agrawal, Praveen Kumar Misra and Piyush Agrawal, Advocate for the Respondent

Judgement

1. Two appeals have been filed against a judgment and order of the Customs, Excise and Service Tax Appellate Tribunal dated June 7, 2013 (2013 (200) ECR 523). The first appeal chronologically is by the Revenue, while the second appeal is by the assessee. The Tribunal held that the extended period of limitation of five years could not have been invoked by the Revenue u/s 73 of the Finance Act, 1994 on the ground that there was no suppression of facts by the assessee. Having held that the demand beyond a period of one year was time-barred, the Tribunal entered upon the merits of the appeal filed by the assessee and came to the conclusion that since storage of goods in the cold storage was an essential part of the clearing and forwarding operations of the assessee, cold storage charges are required to be added in the taxable value of services rendered. Consequently, two appeals have been filed. In the appeal filed by the Revenue, the finding of the Tribunal that the extended period of limitation could not have been invoked is called in question. On the other hand, in the appeal filed by the assessee, it has been urged that once the Tribunal had held that the demand was barred by time, there was no occasion for the Tribunal to enter into

the merits and, hence, that part of the reasoning of the Tribunal which deals with the merits of the dispute would have to be set aside. For convenience of reference, we will take up the appeal by the Revenue first before dealing with the appeal by the assessee.

Central Excise Appeal No. 370 of 2013

The Revenue has formulated the following question of law in assailing the order of the Tribunal:

Whether, in the facts and circumstances of the case, the Tribunal is correct in holding that the show-cause notice issued in the present case is barred by limitation?

2. A notice to show cause was issued to the assessee on July 21, 2006 by which an amount of Rs. 9,46,766 towards service tax along with interest was demanded. The case of the Department is that on a scrutiny of the balance-sheets for the years 2001-02 to 2004-05 and of relevant documents, the audit team noticed that the assessee had received cold storage fixed rent charges up to March 31, 2005 in the amount of Rs. 1.46 crores from Hindustan Lever Limited ("HLL") for storage of frozen products. The agreement between the assessee and HLL was for providing clearing and forwarding agent's service. The show-cause notice referred to the period between 2001-02 and 2004-05 ending on March 31, 2005. According to the Revenue, the assessee had an agreement with HLL dated May 1, 2001 under which it was to render services as a clearing and forwarding agent and, in addition, provide a facility for the storage of goods belonging to HLL in a cold storage owned by the assessee. The compensation structure stipulated that the assessee would receive a fixed charge of Rs. 3.50 lakhs per month for providing the facility of a cold storage and a reimbursement for clearing and forwarding agent expenses at a stipulated rate. The assessee was called upon to show cause as to why it should not be required to pay service tax amounting to Rs. 9,46,766 computed on rent charges received from HLL for cold storage/warehousing of frozen products.

3. An order of adjudication was passed by the assessing officer by which the demand for duty was confirmed together with interest and a penalty of Rs. 200 per day was imposed till the deposit of the duty subject to a maximum of Rs. 9,46,766. Penalties were also imposed on that amount to the extent of Rs. 500 u/s 75A and Rs. 1000 u/s 77. The assessee carried the matter in appeal. The Commissioner (Appeals), by an order dated September 24, 2008, reduced the penalty from Rs. 200 per day, which was subject to a ceiling of Rs. 9.46 lakhs to Rs. 2 lakhs. The other two penalties were also reduced from Rs. 500 to Rs. 200 and from Rs. 1,000 to Rs. 500. The demand for duty was, however, confirmed. The Commissioner (Appeals) held that the extended period of limitation had been rightly invoked u/s 73(1) of the Finance Act, 1994.

4. The assessee filed an appeal before the Tribunal in order to question the confirmation of the demand for duty and the imposition of interest and penalties.

On the other hand, the Revenue filed an appeal in order to question the reduction in the penalties which were imposed by the assessing officer.

5. The Tribunal held that the extended period of limitation could not be invoked by the Revenue since the condition precedent u/s 73(1) of the Finance Act had not been fulfilled. The relevant part of the reasoning of the Tribunal is as follows (pages 62 and 63 in 65 VST):

13. Coining to issue of limitation, we find that for the first time the Revenue wrote a letter dated September 27, 2002 asking the assessee to pay tax for the period September, 2001 to July, 2002. The assessee replied this letter vide their letter dated November 8, 2002. Thereafter there was correspondence on November 20, 2002 from the Department and replied by the assessee on December 9, 2002. We find that the fact that the assessee is not paying duty on cold storage charges was known to Department in 2002. Quantum of cold storage charges is already part of agreement and is fixed on monthly basis. We are therefore of the view extended period based on suppression of fact cannot be invoked in the present case and therefore demand beyond period of one year is time-barred in the present case. The decisions relied on by learned departmental representative do not support the case of the Department as those decisions are in respect of clandestine removal of goods where one cannot ascertain the relevant dates defined u/s 11A of the Act.

6. On behalf of the Revenue, reliance has been placed on a judgment of a Division Bench of the Gujarat High Court in Commissioner of Central Excise Vs. Neminath Fabrics Pvt. Ltd., and it has been urged that in the present case, the extended period of limitation was validly invoked since the assessee had failed to furnish to the Department information that would indicate that the fixed charges that were levied for the use of a cold storage facility were part of the same agreement under which the assessee had agreed to provide clearing and forwarding agent services to HLL.

7. Now, the admitted facts would indicate that on September 27, 2002, a communication was addressed to the assessee by the Superintendent, Central Excise, Range VI, Ghaziabad in which it was stated:

...You are having contract with M/s. Hindustan Lever Ltd. for payment of (1) Rs. 3.50 lakhs per month as fixed charge towards cold storage, power cost and other relevant expenses and (2) reimbursement at 0.50 per ltr. volume handled during the month as handling charges out of which you are paying service tax only on the handling charges. As per clause (J) to section 65(72) of the Finance Act, 1994 (Chapter V) taxable service means any service provided to a client by a clearing and forwarding agent in relation to clearing and forwarding operations in any manner.

Since the storage is also a part of obligation to the assessee, the amount charged as fixed charge by you amounting to Rs. 38,50,000 from HLL should attract service tax at five per cent. Therefore you are directed to deposit Rs.

1,92,500 immediately on account of S.T. on the fixed charges received from HLL....

8. The assessee submitted a reply to this letter on November 8, 2002 stating that the amount which was realised towards use of the cold storage was not in respect of providing services and was not covered by the value of the taxable service. The assessee stated that it was rendering service of handling for which it was realising service charges and on which service tax was paid on the gross amount charged for the service of handling. Consequently, the assessee disputed the payment of service tax towards the fixed monthly charges that had been received for the use of the cold storage facility.

9. On these facts, it is clear that the fact that the assessee was not paying service tax on the fixed monthly charges was known to the Department on September 27, 2002. The Department evidently had knowledge of the agreement between the assessee and HLL under which the payment of cold storage charges on a fixed monthly basis was part of the agreement. In this view of the matter, the Tribunal, in our view, was justified in coming to the conclusion that the extended period of limitation could not be invoked since there was no suppression of facts on the part of the assessee.

10. Section 73 of the Finance Act, 1994 provides a period of one year for service of notice where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded. The extended period of limitation of five years applies where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or of the Rules with intent to evade payment of service tax.

11. The law on the subject has been amply clarified in several judgments of the Supreme Court. In *Nizam Sugar Factory Vs. Collector of Central Excise, A.P.*, the Supreme Court held as follows (pages 602 and 603 in 7 RC):

The allegation of suppression of facts against the appellant cannot be sustained. When the first show-cause notice was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show-cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.

12. The same view has been taken by the Supreme Court in *Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut*, while construing the provisions of the Central Excise Act, 1944 and the observations are (page 518 in 5 RC):

Relying on the aforesaid observations of this court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise [1995] Suppl. 3 SCC 462, we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In *Densons Pultretaknik Vs. Commissioner of Central Excise*, , this court held that mere classification under a different sub-heading by the manufacturer cannot be said to be wilful misstatement or "suppression of facts". This view was also reiterated by this court in *Collector of Central Excise, Baroda Vs. L.M.P. Precision Eng. Co. Ltd.*, .

13. This view has been followed by the Supreme Court in *Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur*, , wherein it has been held as follows (pages 254 and 255 in 19 GSTR):

12.....We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

14. Moreover, the Supreme Court has held that the burden of proof of proving mala fide conduct under the proviso to section 28 of the Customs Act 1962, which is an equivalent provision, is on the Revenue and specific averments must be made in the show-cause notice for initiation of an action under the proviso. In the present case, the Tribunal was justified in coming to the conclusion that the facts had been duly disclosed by the assessee to the Department and were within the knowledge of the Department in 2002.

15. It has, however, been urged on behalf of the Revenue that at least a part of the demand would fall within the original period of limitation of one year. The

admitted facts are that a notice was issued on July 21, 2006 u/s 73 for the period between 2001-02 and 2004-05 ending on March 31, 2005. The notice has to be issued within one year of the relevant date. The expression "relevant date" is defined in sub-section (6) of section 73 of the Finance Act, 1994 which is as follows:

73(6) For the purposes of this section, "relevant date" means,--

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid-

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.

16. Now in the present case, it is admitted that under the Rules, a half yearly return is required to be filed by the assessee by the 25th of the month following the particular half year. The terminal date of the period governed by the show-cause notice is March 31, 2005 for which the assessee was required to file a return by April 25, 2005. Consequently, the notice to show cause dated July 21, 2006 was even beyond the original period of one year of the relevant date.

17. For the reasons that we have already indicated above, we come to the conclusion that the extended period of limitation was not warranted. Thus, in so far as the appeal of the Revenue is concerned, no substantial question of law would arise for consideration. The appeal by the Revenue is dismissed.

Central Excise Appeal Defective No. 33 of 2014

18. We have granted leave to the assessee to amend the questions of law.

19. Though in the appeal by the assessee several questions of law have been framed, the following question has been pressed at the hearing:

Whether the Tribunal having held that proceeding were barred by limitation and proceedings were liable to be quashed on the ground of limitation, the Tribunal committed an illegality in deciding the question on merits. Hence is the finding of Tribunal on merits liable to be set aside?

20. The appeal is admitted on the following question of law and is by consent taken up for final hearing.

21. The Tribunal came to the conclusion that the demand by the Revenue was beyond the period of limitation of one year prescribed u/s 73(1) of the Finance Act, 1994 and that the period of five years could not have been invoked. That part of the judgment of the Tribunal has been confirmed in the companion appeal. Once that be the position and the Tribunal having come to the conclusion that the extended period of limitation could not have been validly applied, the Tribunal, in our view, acted outside its jurisdiction in entering upon the merits of the dispute on whether the demand for duty should be confirmed. Once it is held that the demand is time-barred, there would be no occasion for the Tribunal to enquire into the merits of the issues raised by the Revenue.

22. In *State Bank of India Vs. B.S. Agricultural Industries (I)*, , the Supreme Court dealt with a situation where the consumer forum had held that the complaint was barred by limitation but had nonetheless proceeded to decide the issue on merits. Holding that this would amount to an illegality, the Supreme Court observed:

12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of section 24A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside.

23. Consequently, since the Tribunal was justified, as we have held, in coming to the conclusion that the demand was time-barred, there was no occasion for the Tribunal to enter upon the merits of the dispute. We, accordingly, answer the question of law as framed by the assessee in the affirmative and in favour of the assessee. The appeal by the assessee shall stand disposed of in the aforesaid terms.