

(2014) 12 MAD CK 0064
In the Madras High Court
Case No : C.M.A. No. 2117 of 2010

Commissioner of Central Excise

APPELLANT

Vs

CESTAT

RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11 AC, 11A, 11A(1), 11A(2), 11AC

Citation : (2015) 317 ELT 211 : (2015) 50 GST 324

Hon'ble Judges : R. Sudhakar, J;R. Karuppiiah, J

Bench : Division Bench

Advocate : S. Thirumavalavan, Standing Counsel, Advocates for the Appellant

Judgement

R. Sudhakar, J.—This Civil Miscellaneous Appeal, filed by the Department challenging the Final Order No. 1212 of 2008, dated 22-10-2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench at Chennai [2009 (245) E.L.T. 707 (Tri.-Chen.)], was admitted by this Court on the following substantial questions of law:

"1. Whether the first respondent is justified in vacating the demand of duty and penalty on the ground of limitation and allowed the appeal inasmuch as-

(a) the second respondent had not filed the necessary declaration under rule 173B *ibid*.

(b) the second respondent had suppressed the fact of manufacture of sugar syrup with intention to evade payment of duty.

(c) the invocation of the extended period under proviso to Section 11A of the Act *ibid* is valid and warranted.

2. Whether the order of the Tribunal is correct in finding that the levy of Central Excise Duty hit by limitation when the tribunal given finding that the sugar syrup is excisable one?

3. Whether the order of the Tribunal is correct in finding that the levy itself is barred by limitation when the assessee admittedly suppressed the manufacturing of sugar syrup?"

The second respondent/assessee is engaged in the manufacture of mango fruit pulp-based drinks, which they marketed under the brand name "slice". They also manufacture a variety of aerated waters, which are also cleared under different brand names. The issue that arose before the Tribunal was whether an intermediate product called "sugar syrup" emerging in the course of manufacture of the slice-branded product is marketable and if so, whether the demand of duty raised on the assessee for the period May, 1995 to April 1997 was time-barred.

2. The case of the Department was that sugar syrup, which emerged in the course of manufacture of slice branded final product, during the period of dispute, was stable and has adequate shelf-life. Hence the same was marketable and accordingly, dutiable under SH 1702.30 of the First Schedule to the Central Excise Tariff Act. Hence, show cause notice was issued to the assessee demanding duty under Section 11A(1) of the Central Excise Act and penalty under Section 11AC of the Central Excise Act and Rule 173Q of the Central Excise Rules. In response to the said show cause notice, the assessee filed a reply denying the allegations in the show cause notice stating that sugar syrup has no shelf life and hence the same is not marketable.

3. The Adjudicating Authority rejected the contention of the assessee and confirmed the demand of duty and levied penalty. The relevant portion of the order of the Adjudicating Authority reads as follows:

ORDER

"(1) The product Sugar Syrup manufactured and captively consumed is classified under Chapter Sub-Heading No. 1702.30 of Central Excise Tariff Act, 1985, with duty liability at the rate of 10% adv.

(2) I confirm and demand Central Excise Duty of Rs. 29,00,867/- (Rupees Twenty nine lakhs eight hundred sixty seven only) as shown in the Annexure to the Show Cause Notice under Section 11A(2) of Central Excise Act, 1944.

(3) PEPSICO are liable for a penalty of Rs. 8,70,606/- (Rupees Eight lakhs seventy thousand six hundred and six only) under Section 11 AC of the Central Excise Act, 1944.

(4) I impose a penalty of Rs. 20,30,261/- (Rupees Twenty lakhs thirty thousand two hundred and sixty one only) under Rule 173Q of the Central Excise Rules, 1944

(5) PEPSICO are also liable to pay interest under Section 11AB of Central Excise Act, 1944 for the demand of duty made in this order."

4. Aggrieved by the said order of the Adjudicating Authority, the assessee preferred an appeal before the Tribunal.

5. After hearing both sides, the Tribunal came to hold that it is a dutiable goods till the date when exemption was granted. However, for the period in question, the Tribunal accepted the plea of limitation raised by the assessee. Accordingly, the Tribunal set aside the order of the Adjudicating Authority holding as follows:

"4. Now we turn to the surviving issue of limitation. The learned counsel has submitted that all the material facts were presented before the Department by the Shift Engineer of the appellants as early as in 1994. The veracity of this claim is beyond doubt inasmuch as, in one of the Annexures to the show cause notice, the statement of Shri K. Muthusamy was reproduced, wherein he had stated that sugar syrup was prepared in a separate tank by adding sugar and water and by heating at 85C. He had also stated the further process on syrup. The processes were stated in detail in the appellant's letter dated 8-9-1995 also. From these documents, it should have occurred to the Department that sugar syrup was an intermediate product which emerged in the process of manufacture of aerated waters and the mango pulp-based product and that the marketability of the commodity had to be looked into. It was in the show cause notice dated 15-5-2000 that the Department suddenly came up with a case against the assessee in relation to sugar syrup and that too for an old period (May 1995 to April 1997). We also note that there was fluctuation of views in the departmental circles over a long period. The period of dispute in this case is comprised in that period. In this connection, the reliance placed by the learned counsel on *Duke & Sons Pvt. Ltd. v. Commissioner - 2004 (178) E.L.T. 190 (Tri.-Mumbai)* is apposite. In that case, though sugar syrup was held to be excisable, the demand of duty thereon was set aside as time-barred having regard to the change of departmental view on the question of marketability of the product. We think that the appellants have made out a good case against the demand of duty on the ground of limitation.

5. In the result, the demand of duty and the penalty are vacated on the ground of limitation and the appeal is allowed to this extent."

6. The Tribunal, to come to the above conclusion, was guided by the fact that the Department has knowledge about the product as early as 1994 when all the material facts were placed before the Department. The Tribunal relied upon the letter of the assessee dated 8-9-1995, which clearly shows that the Department was aware that sugar syrup was an intermediate product emerged in the process of manufacture of the final product.

7. Yet another factor which weighed the mind of the Tribunal was the confusion that arose in the mind of the Department from time to time, namely, C.B.E. & C. circular dated 25-7-1989, in which it is stated that sugar syrup had very short shelf-life and it is not marketable. The Board's view was changed subsequently and issued another circular dated 7-11-1994, wherein it was held that sugar syrup produced in the intermediate stage in the manufacture of aerated water/ayurvedic medicines was an excisable item, liable to duty under SH 1702-30.

8. The assessee challenged the circular dated 7-11-1994 on the ground that no preservative was added in the sugar syrup used as intermediate product in the manufacture of aerated water. Thereafter another circular dated 3-7-1996 was issued, which also in favour of the Revenue. Again another circular dated 12-3-2004 was issued clarifying the issue on the ground of "test of marketability".

9. In view of the above circulars, the Tribunal came to hold that there was no marketing of the sugar syrup by the assessee. Hence, based on the various circulars issued from time to time by the Board based on the doubts raised from time to time, the Tribunal came to hold that the Department had knowledge as early as 1994 and therefore, for the period May, 1995 to May, 1997 there cannot be a case of suppression. Since the period in dispute is relatable to the period where there were number of clarifications on account of this issue, the Tribunal thought it fit to allow the assessee's appeal on the plea of limitation.

10. We have perused the order of the Tribunal and the facts narrated above. We find that the Tribunal upheld the issue relating to the merits of the case that the intermediate product is marketable, but on the ground of limitation, it is held in favour of the assessee.

11. We find that there is substantial merit in the reasoning of the Tribunal and there is no case of suppression of fact for invoking the extended period of limitation under proviso to Section 11A(1) of the Central Excise Act. The issue relating to limitation is distinct and separate and there cannot be a demand if there is a clear finding that there is no case of suppression falling under proviso to Section 11A(1). We, therefore, confirm the order of the Tribunal answering the questions of law in favour of the assessee and against the Revenue. In the result, this Civil Miscellaneous Appeal stands dismissed. No costs.