
(2015) 02 RAJ CK 0280
In the Rajasthan High Court
Case No : Excise Appeal No. 1 of 2013

Commissioner of Central Excise

APPELLANT

Vs

Shanker Products

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11AC, 35G

Citation : (2015) 33 GSTR 391

Hon'ble Judges : Sunil Ambwani, A.C.J;Prakash Gupta, J

Bench : Division Bench

Advocate : Sarvesh Jain, for the Appellant; Sameer Jain assisted by Mahi Yadav, Advocates for the Respondent

Judgement

1. We have heard learned counsel appearing for the parties. This Central excise appeal, under section 35G of the Central Excise Act, 1994 (hereinafter referred to as "the Act"), has been preferred by the Central Excise Department on the substantial question of law as follows:

"(i) Whether the Tribunal was justified in allowing appeal of the assessee on the ground of limitation holding that the extended period as provided under the proviso to section 11A of the Central Excise Act, 1944 is not applicable when the assessee has consciously and deliberately evaded tax by not taking registration, by not filing return and by suppressing information from the Department in spite of asking from the assessee from time to time?

(ii) Whether the Tribunal was justified in not considering Circular No. 879/17/2008-OC-1 dated December 5, 2008 , wherein it was specifically stated that the disputed goods are excisable and liable to charge Central excise duty up to December 4, 2008?

(iii) Whether the judgment of the apex court in Nizam Sugar Factory Vs. Collector of Central Excise, A.P., (2006) 197 ELT 465 : (2006) 11 SCC 573 is applicable under the present scheme of self assessment by the respondent?"

2. The assessee is engaged in the manufacture of boora, mishri and makhana. It was neither registered with the Central Excise Department, nor paid the excise duty for clearance. A show-cause notice was issued on August 28, 2008 demanding the duty, covering the period from April, 2004 to July, 2008. It is contended that the assessee did not give reply, and waited for the limitation to expire. Another notice was, thereafter, given on July 6, 2010 covering the period to July, 2008 to December, 2008. An assessment was made by an order-in-original dated September 28, 2011 confirming the demand of excise duty under section 11A(1) of the Act, amounting to Rs. 59,92,542, and its recovery along with interest under section 11AB of the Act. The Commissioner of Central Excise also imposed penalty of Rs. 59,92,542 under section 11AC of the Act.

3. The Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi allowed the appeal on the ground that the extended period of limitation under section 11A(1) could not be applied in pursuance to the notice dated July 6, 2010 by the Department in view of the earlier show-cause notice dated August 28, 2008 for the period April, 2004 to June, 2008. Relying on *Nizam Sugar Factory Vs. Collector of Central Excise, A.P.*, (2006) 197 ELT 465 : (2006) 11 SCC 573, it was held that where the Department had knowledge and had issued an earlier notice on the similar ground, it can not be said that there was any suppression. The extended period of limitation is not available in case the Department has knowledge and has given earlier show-cause notice, in pursuance to which the proceedings were not initiated.

4. In *Nizam Sugar Factory Vs. Collector of Central Excise, A.P.*, (2006) 197 ELT 465 : (2006) 11 SCC 573, the apex court has held as follows (page 601 of 7 RC):

"Without going into the question regarding classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This court in the case of *P and B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise*, AIR 2003 SC 4019 : (2003) 86 ECC 20 : (2003) 2 SCALE 390 : (2003) 3 SCC 599 : (2003) 2 SCR 252 : (2003) AIRSCW 2949 : (2003) 2 Supreme 224 has taken the view that in a case in which a show-cause notice has been issued for the earlier period on certain set of facts, then on the same set of facts another show-cause notice based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the Department. It was observed in paragraph 14 as follows (page 186 of 1 RC):

"We have indicated above the facts which make it clear that the question whether *M/s. Pharmachem Distributors* was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show-cause notice was issued in 1985 and also at the stage when the second and the third show-cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that *M/s. Pharmachem Distributors*

was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking the proviso to section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to section 11A of the Act for making the demand for the extended period."

This judgment was followed by this court in the case of ECE Industries Limited Vs. Commissioner of Central Excise, New Delhi, (2004) 164 ELT 236 , it was observed (page 720 of 3 RC):

"In the case of P and B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise, AIR 2003 SC 4019 : (2003) 86 ECC 20 : (2003) 2 SCALE 390 : (2003) 3 SCC 599 : (2003) 2 SCR 252 : (2003) AIRSCW 2949 : (2003) 2 Supreme 224 , the question was whether the extended period of limitation could be invoked where the Department has earlier issued show-cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any willful suppression or misstatement and that, therefore, the extended period under section 11A could not be invoked."

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. Vs. Commissioner of C. Ex., Hyderabad, (2004) 94 ECC 7 : (2004) 166 ELT 151 : (2006) 11 SCC 578 . It was observed in paragraph 6 (page 241 of 3 RC):

"On the ratio laid down in this judgment it must be held that once the earlier show-cause notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier show-cause notice for a subsequent period and/or it cannot be taken into consideration as it is not known when that show-cause notice was dropped. If the Department wanted to take up such contentions it is for them to show that show-cause notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that show-cause notice was on a similar issue and for an identical amount is not correct."

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."

5. We have examined the order-in-original as well as the order passed by the Tribunal, and find that the Department was aware of the activities of the assessee. It was not a case where the Department was not aware of the excisable manufacturing activity, as the assessee was already served show-cause notice on August 28, 2008. The assessee had not opted for registration, nor paid the duty for the alleged clearance showing deliberate avoidance in compliance of the law.

6. Section 11A(1) of the Act providing for extension of limitation which is applicable in case of suppression, fraud, collusion, willful, misstatement of facts for contravention of the provision of the Act or the Rules, where the Department was not aware of the activities of the assessee. Where a notice was served to the assessee for the earlier period, in pursuance to which no action was taken, the extended period of limitation on the notice issued subsequently cannot be applied.

7. A similar view has been taken in *The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others*, (2010) 182 ECR 7 : (2010) 260 ELT 17 : (2010) 12 JT 218 : (2010) 12 SCALE 56 : (2010) 13 SCC 117 : (2010) 29 STT 394 : (2010) 10 UJ 5130 .

8. The substantial question of law raised in the appeal, is thus covered by the judgments in *Nizam Sugar Factory Vs. Collector of Central Excise, A.P.*, (2006) 197 ELT 465 : (2006) 11 SCC 573 and *The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others*, (2010) 182 ECR 7 : (2010) 260 ELT 17 : (2010) 12 JT 218 : (2010) 12 SCALE 56 : (2010) 13 SCC 117 : (2010) 29 STT 394 : (2010) 10 UJ 5130 . The questions are thus, decided against the Department and in favour of the assessee. The appeal is, accordingly, dismissed.