

(2008) 09 PAT CK 0076
In the Patna High Court
Case No : Tax Cases No. 1 of 2001

Commissioner of Central Excise

APPELLANT

Vs

Tubex India (Pvt.) Limited

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173
Central Excises and Salt Act, 1944 — Section 11(A), 35H(I)

Citation : (2009) 57 BLJR 396 : (2011) 271 ELT 181 : (2009) 2 PLJR 865

Hon'ble Judges : Ravi Ranjan, J; Chandramauli Kumar Prasad, J

Bench : Division Bench

Advocate : Rakesh Kumar Singh, Central Govt, for the Appellant; Satyabir Bharti, for the Respondent

Final Decision : Dismissed

Judgement

Chandramauli Kumar Prasad and Ravi Ranjan, JJ.—M/s Tubex India (Pvt.) Limited manufactures Galvanized Flexible Metallic Hose Tube. It is not in dispute that the manufacturer had given correct description of the product in the return. It prayed for clearing the product under notification dated 20th of May, 1988 and it was so cleared by the Superintendent. However, show cause notice dated 7.7.1994 was issued raising demand of duty for the year 1991-92 and upto 24th of July, 1992 of the year 1992-93 on the ground that the manufacturer was not entitled to small scale exemption benefit of notification dated 20.5.1988.

2. During the adjudication proceeding, the manufacturer contested the matter on merit as also on the point of limitation. The demand of duty was confirmed by the Commissioner of Central Excise vide its Order dated 2.9.1996. The manufacturer carried the matter in appeal before the Customs Excise & Gold (Control) Appellate Tribunal, hereinafter referred to as the "Tribunal". The Tribunal allowed the appeal and while doing so, it observed as follows:

xxx It is well settled that mis-classifying under different headings based upon interpretation as understood by the assessee does not amount to misdeclaration

of the description of the product. We find from the earlier order in appeal of the Commissioner (Appeals) relied upon by the learned Advocate that the declaration filed by them were also granted permission by the jurisdictional Superintendent. As such it cannot be said that appellant suppressed any factual position from the Department with the intent to evade payment of duty.

3. Aggrieved by the same, commissioner of Central Excise has preferred this application u/s 35-H(I) of the Central Excise Act, 1944 praying to this Court to direct the appellate Tribunal to refer the question of law arising from the order of the Tribunal. By order dated 4.4.2008, this Court directed the Tribunal to draw statement of case and refer following question of law to this Court:

Whether in the facts and circumstances, misinterpretation and misclassification of tariff head under Central Excise Tariff will provide valid defence to the assessee and manufacturer of Excise goods is entitled to exemption from payment of duty on the basis of declaration made before the authority not vested with a power to entertain declaration?

4. Accordingly, the Tribunal has drawn the statement of case and referred the aforesaid question for our determination.

5. Mr. Rakesh Kumar, Central Government Counsel, appearing on behalf of the petitioner, contends that under Rule 173 of the Central Excise Rules, it was obligatory on part of the manufacturer to get the return cleared by the Assistant Collector of Central Excise and admittedly, it had not done so and got it cleared by an incompetent authority, i.e. the superintendent and therefore, it had acted in contravention of the provisions of the Rules and as such, action in terms of Section 11(A) of the Central Excise Act was possible to be taken within five years.

6. Mr. Satyabir Bharti, learned Counsel appearing on behalf of the manufacturer, however, contends that suppression of any fact or contravention of the provisions of the Rules itself does not extend the period to five years so as to entitle the authority to proceed in the matter within the extended period. He contends that the condition precedent for exercise of power u/s 11(A) of the Act in the extended period is that the contravention of the Rules has been made with intent to evade payment of duty. He points out that admittedly the manufacturer had given correct description of the product and from that it can safely be inferred that there was no intention to evade payment of duty.

7. Having appreciated the rival submission, we do not find any substance in the submission of Mr. Singh. Section 11A of the Central Excise Act as existing then, which is relevant for the purpose reads as follows:

11A. -Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.- (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 reasons of fraud, collusion of 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 as if for the words "six months", the words "five years" were substituted.

8. From a plain reading of Section 11A of the Act, it is evident that Central Excise Officer within six months serve notice on the person chargeable for payment of duty or short payment of duty etc, but in case of non-levy or short levy of any account of an act to evade payment of duty, proviso extends the period to five years. In this case, notice has been given beyond the period of six months and therefore one has to see as to whether the case shall be covered under the proviso and the extended period of five years is available to the Central Excise Officer.

9. It is not in dispute that the manufacturer had given correct description of the product. It claimed and got exemption and the product was cleared in the light of the notification dated 20th of May, 1988. The Tribunal, while allowing the appeal, had observed that from an "earlier order in appeal of the Commissioner (Appeals)," it is evident that permission was granted by the jurisdictional Superintendent. In the face of aforesaid, the Tribunal concluded that it cannot be said that the manufacturer suppressed any factual position from the department with the intent to evade payment of duty. We are of the opinion that the Tribunal came to the aforesaid conclusion on the basis of the materials on record and correct interpretation of law. As the manufacturer's act was not intended to evade payment of duty, the proviso will not govern the field and extended period of five years shall not be available to the Central Excise Officer. Accordingly, we are of the opinion that the Tribunal did not err in passing the impugned order.

10. In the result, we do not find any merit in the application and it is dismissed accordingly, but without any order as to cost.