(2019) 03 CAL CK 0106

In the Calcutta High Court

Case No : Appeal From Order (APO) No. 525 Of 2017 In Writ Petitions (WP) 1545 Of 2008

Commissioner Of Central Excise, Kolkata - V Commissionerate APPELLANT

Vs

Andrew Yule & Co. Ltd. & Ors. RESPONDENT

Date of Decision : 18-03-2019

Acts Referred:

Central Excises And Salt Act, 1944 — Section 11A
Central Excise Rules, 1944 — Rule 9(2), 173Q
Constitution Of India, 1950 — Article 226

Citation : (2019) 03 CAL CK 0106

Hon'ble Judges : Sanjib Banerjee, J;Suvra Ghosh, J

Bench : Division Bench

Advocate : Bhaskar Prasad Banerjee, J.P. Khaitan, S. Bhowmik, I. Banerjee

Final Decision : Disposed Off

Judgement

The Court : The Revenue is up in appeal against a judgment and order dated July 27, 2015 by which an order-in-original of December 6, 2005 has been set aside on the ground that the extended period of limitation was not available to the Central Excise authorities to penalise the respondent assessee.

The principal issue raised by the Revenue is that the writ petition could not have been entertained when the assessee had failed to avail of the appellate remedy because there was no jurisdictional issue involved and it could not have been the assessee's case that the assessee was condemned unheard.

The matter pertains to classification and at the relevant point of time, the appellant had furnished a declaration and claimed that the goods answered to a particular description that attracted 15% excise duty. Long after the period of six months envisaged under Section 11A of the Central Excises And Salt Act, 1944 had expired, a show-cause notice dated February 9, 1994 was issued to the assessee and the assessee was called upon to explain why short-levy of duty amounting to Rs.47,58, 863/- should not be demanded and extracted from the assessee under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the said Act and penalty should not be imposed under Rule 173Q of the Rules of 1944.

In response, the assessee claimed that the demand was barred by limitation as the period envisaged under Section 11A of the said Act was six months. Further, it was the case of the assessee that in terms of the declaration, the assessee had honestly described the goods but the declaration did not oblige the assessee to indicate the function of the goods, which was the basis of the show-cause notice.

By the relevant order dated December 6, 2005, the Additional Commissioner of the Central Excise found that since the relevant goods functioned mainly as transformers for supply of power at different voltage and amperage, the products had to be treated as transformers and they attracted the higher duty at the rate of 20%. The Additional Commissioner confirmed the demand and, in addition, imposed a penalty of Rs.5 lakh. Strangely, the order of December 6, 2005 was forwarded to the assessee under cover of a letter dated November 30, 2005, though it may have been received by the assessee only on December 12, 2005.

According to the assessee and as has been accepted by the judgment and order impugned herein, Section 11A of the Act of 1944 permitted short-levy of duty to be realised "within six months from the relevant date", by service of a notice on the person chargeable with the duty which had been short-levied. However, the proviso to Section 11A of the Act stretches the period from six months to five years in certain cases. For the purpose of the present proceedings, the proviso, as applicable, may be seen to provide for the extended period of five years if the duty had been short-levied or short paid "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty by such person..." The assessee refers to a judgment reported at 1995(75) ELT 721 (Cosmic Dye Chemical vs CCE, Bombay) that interpreted such proviso to imply that the word "wilful" would govern both "mis-statement" and "suppression of facts". In other words, according to the Supreme Court, the period of limitation would be stretched to five years instead of six months only if there was a case of wilful mis-statement or wilful suppression of facts made out in the absence of there being any case of fraud or collusion.

In the present case, the show-cause notice made out a case of mis-statement or suppression of facts since the underlying theme of such show-cause notice was that the assessee had not appropriately described its product or furnished the declaration as required. However, the show-cause notice did not refer to the mis-statement or the suppression of facts being wilful. In any event, the order impugned did not hold the assessee liable upon holding, as a matter of fact, that there was any mis-statement or suppression of facts which was made by the assessee and that such mis-statement or suppression of facts was wilful.

Paragraph 6 of the judgment in Cosmic Dye Chemical is clear on the proposition of law:

" 6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful."

The law as it stood at the relevant time was that the suppression or mis-statement was actionable only if such suppression or mis-statement was wilful. The law has been changed since and the word 'wilful' may not cover both mis-statement and suppression of facts, today.

Thus, it is evident that the order of the adjudicating authority assailed by the assessee in the petition under Article 226 of the Constitution was in error of jurisdiction as it disregarded the assessee's objection as to limitation without holding that the assessee's conduct was such that amounted to willful mis-statement or willful suppression of facts. In the light of the Supreme Court judgment on such aspect of the matter and the failure on the part of the adjudicating authority to find that the assessee's conduct was wilful in regard to the default, the period of limitation could not have been stretched beyond the six months as contained in Section 11A of the said Act. Accordingly, the Single Bench has appropriately noticed the error of jurisdiction on the part of the adjudicating authority in passing the order dated December 6, 2005.

For the reasons aforesaid, the judgment and order impugned do not call for any interference. APO No. 525 of 2017 is disposed of.

There will be no order as to costs.

