(2011) 03 GUJ CK 0155

In the Gujarat High Court

Case No : Special Civil Application No. 8563 of 2002

Gujarat Ambuja Exports Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11AA, 14, 3
Constitution of India, 1950 — Article 226

Citation : (2011) 269 ELT 159

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; R.J. Oza, SSC, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—By this petition under Article 226 of the Constitution of India, the petitioners have challenged show cause notices dated 2-7-2002 calling upon the petitioners to show cause as to why excise duty to the extent stated therein should not be recovered u/s 11A of the Central Excise Act, 1944 (the Act); penalty should not be imposed under Rule 173Q of the Central Excise Rules, 1944 (the Rules) and interest at the prescribed rate should not be recovered u/s 11AA of the Act.

2. The petitioner No. 1, a Public Limited Company, is inter alia engaged in the business of manufacture of Deoiled cakes of Soyabean/Ground-nut/Mustard/ other edible oil seeds and has two units at Kadi in Mehsana district. The above units of the petitioner company have been permitted to work as 100% Export Oriented Undertakings, by the Government of India. The two units of the petitioner company are known as "Unit No. 1" and "Unit No. 2", where the petitioner company is manufacturing deoiled cakes of edible oil seeds for the purpose of their export to foreign countries. The petitioners have been granted necessary permissions by the Department of Industrial Development, Ministry of Industries, Government of India to work as a 100% Export Oriented Units.

Pursuant to the letter of permission issued by the above referred Ministry, the petitioner company has been producing deoiled cakes of edible oilseeds and such deoiled cakes which are classified under SH No. 2302.00 of the Schedule to the Central Excise Tariff Act, 1985, were being exported by the petitioner company to foreign countries.

3. During the manufacture of deoiled cakes, a by-product, namely. Soyabean Solvent Extraction Raw Oil/Crude Oil falling under SH No. 1503.00 of the Tariff emerges. The petitioners'' units are, however, allowed to operate as 100% EOUs for such product which is a fact also mentioned in the letter of permission issued in favour of the petitioners. According to the petitioners, the above referred types of Crude Oils falling under SH No. 1503.00 of the Tariff are chargeable to nil rate of central excise duty.

4. It is the case of the petitioners that they have been exporting the products like deoiled cakes in accordance with the above letter of permission, whereas the by-product, namely. Soyabean Solvent Extraction Raw Oil/Crude Oil was removed and disposed of in the domestic market. The by-product falling under SH No. 1503.00 is chargeable to nil rate of duty under the said classification of the Central Excise Tariff and accordingly, the petitioner company was removing the said by-product at nil rate of duty in accordance with law. It is further the case of the petitioners that the petitioner company has been following the central excise procedure as prescribed under the Central Excise Rules for removal of the said by-product from its factories. The petitioner company has been issuing central excise invoices as prescribed under the erstwhile Rule 52A of the Central Excise Rules, 1944 for each of the removals of such by-product and also been reporting the details like quantity of such by-product removed from the factories by filing monthly returns in form RT-13, on monthly basis, to the Range Superintendent of Central Excise, in-charge of the factories. Though the above referred invoices were thus issued in the prescribed form and removals of the said by-product at nil rate of duty were reported to the Range Officers on monthly basis in accordance with the Rules, the central excise officers in-charge of the petitioners'' factories never raised any objection of whatsoever nature against the petitioners'' action of removal of the by-product falling under SH No. 1503.00 at nil rate of duty. However, the Deputy Commissioner of Central Excise and Customs, Mehsana-II, the third respondent herein, issued six show cause notices to the petitioner company, three for each of the units, covering the period from September 1999 to December 2000/January 2001 for the above referred two units, thereby proposing to recover excise duties on Solvent Extraction Raw Oil/ Crude Oil removed by the petitioners from the above referred units, on the ground that the said by-products removed by the petitioner company in the Domestic Tariff Area (DTA) would attract excise duty under the proviso to Section 3 of the Central Excise Act, 1944, and accordingly, the petitioner No. 1 company was required to pay excise duties on the said by-product as per the rates of customs duty applicable to similar goods imported into India, although similar goods manufactured in India were chargeable to nil rate of duty under SH No.

1503.00 of the Tariff. The said six show cause notices came to be issued by the third respondent herein from time to time, firstly in May 2000, which was revised in December 2000, secondly in March 2001 and thirdly in September 2001. The show cause notices culminated into six separate orders confirming demand of duty totalling to Rs. 86,09,315/- for Unit No. 1 and Rs. 2,09,03,950/- for Unit No. 2, by holding that the petitioner company was obliged to pay excise duty on by-products in accordance with the rates of customs duties on similar goods imported into India. The petitioners have filed appeals against the above referred six orders along with stay applications which were pending before the Commissioner of Central Excise & Customs (Appeals) at the relevant time when the present petition came to be filed.

5. It is the case of the petitioners that when the petitioner company was thus, contesting the above referred cases under which duties are demanded from the petitioner company without any justification as no excise duty is leviable and recoverable on such Crude/Raw Oil under SH No. 1503.00 of the Tariff, two further show cause notices came to be issued by the Commissioner of Central Excise for the period from July 1998/October 1998 to August 1999, invoking extended period of limitation against the petitioner company in respect of its above referred two units. By these two show cause notices dated 2-7-2002, an amount of Rs. 1,26,28,081/- was demanded for the clearance of the by-products from Unit No. 1, whereas an amount of Rs. 1,65,03,143/- was demanded for the clearance of by-product from Unit No. 2. Both the demands having been issued for the period from July 1998/October 1998 to August 1999. Being aggrieved, the petitioners have filed the present petition challenging the above referred two show cause notices.

6. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners vehemently assailed the impugned show cause notices, submitting that the action of issuing said show cause notices is wholly without jurisdiction. It was submitted that when six separate proceedings were already initiated against the petitioner company for the period from September 1999 to December 2000/ January 2001 for the same subject matter, it would not lie in the mouth of the revenue to now allege that there was any suppression of facts or misstatement on the part of the petitioners because the revenue was obviously aware about this controversy of excisability or otherwise of the by-product arising in the petitioners'' factories. It was submitted that, therefore, the action of the second respondent in issuing two show cause notices invoking larger period of limitation in the facts of the present case, is wholly without jurisdiction.

7. Inviting attention to the six show cause notices which had been issued earlier, it was pointed out that it has been alleged in the said show cause notices that the units had not filed declaration under Rule 173B of the Central Excise Rules, 1944. Referring to the impugned show cause notices, it was pointed out that the allegations contained in the said notices are more or less identical to the allegations contained in the earlier show cause notices. It was submitted that

when for the same subject matter which was within the knowledge of the Department, six show cause notices came to be issued from May 2000 onwards and six orders in original came to be passed thereafter, in July 2002, the Commissioner by issuing show cause notices in question has no power to allege suppression of facts to invoke larger period of limitation. It was submitted that there is nothing on record to indicate as to what was the new evidence that was noticed showing suppression, etc., for invoking the larger period of limitation. It was further submitted that the petitioners had duly filed declarations u/s 173B of the Act and as such, this is not a case of clandestine removal so as to invoke the extended period of limitation. Referring to the provisions of Section 11A of the Act, it was pointed out that the normal period of limitation for initiating the proceedings under the said provision is one year from the relevant date and that for the purpose of invoking the proviso thereto, there has to be a finding as regards the fraud, mis-statement, suppression, etc., with an intent to evade payment of duty. It was urged that when there were six show cause notices on the same reasoning covering normal period with the allegation that the petitioners have not filed declarations u/s 173B of the Act, means that the Department was aware of everything. According to the learned advocate when earlier show cause notices were issued, the relevant facts were in the knowledge of the authorities, hence, while issuing the show cause notices in question on the same/similar facts, it could not be alleged on the part of the revenue that there was suppression of facts on the part of the petitioner as the same was already within the knowledge of the authorities.

8. Reliance was placed upon the decisions of the Supreme Court in the case of Nizam Sugar Factory Vs. Collector of Central Excise, A.P., , in the case of Hyderabad Polymers (P) Ltd. Vs. Commissioner of C. Ex., Hyderabad, , in the case of ECE Industries Limited Vs. Commissioner of Central Excise, New Delhi, and in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise, 2003 (153) E.L.T. 14 (S.C.) to submit that the issue involved in the present case is directly covered by the above decisions and as such, the impugned notices are required to be quashed and set aside.

9. The petition was resisted by Mr. R.J. Oza, learned Senior Standing Counsel appearing on behalf of the respondent. It was submitted that in the impugned show cause notices, suppression has been alleged and that the extended period of limitation can be invoked up till the period of five years from the relevant date in the circumstances the contention that the extended period of limitation could not be invoked, is without any merit. Inviting attention to the impugned show cause notices, it was submitted that insofar as the earlier show cause notices are concerned, the same had been issued by the Deputy Commissioner. However, the present show cause notices have been issued by the Commissioner of Central Excise and that, on a plain reading of the show cause notices, it is apparent that the same have been issued pursuant to intelligence gathered that the said unit was evading central excise duty by misusing the facilities provided under Notification No. 8/97-C.E., dated 1-3-1997 and clearing the very by-product, that

is, Soyabean Solvent Extraction Raw Oil/Crude Oil falling under Sub Heading 1503.00 of the Central Excise Tariff Act, 1985 without payment of central excise duties. It was submitted that in the circumstances, the impugned show cause notices have been issued pursuant to intelligence gathered and investigation carried out pursuant thereto, in the circumstances, it cannot be said that the present show cause notices as well as the earlier show cause notices have been issued on a similar set of facts. According to the learned counsel if the Department had been aware of the above referred facts at the relevant time when the earlier show cause notices were issued, there was no reason for the Department not to have initiated proceedings in relation to the period in question. It was submitted that it was only pursuant to the investigation carried out, that the Department became aware of the illegality in respect of the period in question, in the circumstances, the ratio laid down in the case of Nizam Sugar Factory v. Collector of Central Excise, A.P. (supra) as well as the other decisions of the Supreme Court would not be applicable to the facts of the present case. It was further submitted that though the allegations in both the show cause notices are the same, there is additional material in the form of statements admitting that the declarations u/s 173B of the Act have not been filed. It was submitted that in the circumstances, the impugned show cause notices having been issued in a different set of facts and circumstances, no case is made out for any intervention by this Court.

10. The Supreme Court in P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise (supra) has held thus :

[14] 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 be 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 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.

11. In Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad (supra), the Court 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.

12. In ECE Industries Ltd. v. Commissioner of Central Excise, New Delhi (supra), the Supreme Court held thus :

[4] In the case of P and B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise, 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 mis-statement and that therefore, the extended period u/s 11A could not be invoked.

[5] In our view, the principles laid down in above case fully apply here. As earlier proceedings in respect of same subject matter were pending adjudication, it could not be said that there was any suppression and the extended period u/s 11A was not available.

13. In Nizam Sugar Factory v. Collector of Central Excise, A.P. (supra), the Supreme Court after considering the decisions referred to above, held that the allegation of suppression of facts against the appellant therein could not be sustained. The Court held that when the first show cause notice was issued, all the relevant facts were in the knowledge of the authority. 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. The Court agreed that the view taken in the aforesaid judgments and following the same held that there was no suppression of facts on the part of the assessee therein.

14. Examining the facts of the present case in the light of the above referred decisions, earlier six show cause notices came to be issued on more or less the same grounds alleging that the unit had not filed declarations u/s 173B of the Central Excise Act and that the benefit of Notification No. 8/1997 -C.E., dated 1-3-1997 was not available to the petitioners. In the fourth paragraph of the said show cause notices, it has been alleged that the petitioners have contravened the provisions of Rules 9(1), 9(2) and Rule 49 read with Rule 100(D), 100(E) and Rule 173-F of the Central Excise Rules, 1944 inasmuch as the said unit had failed to determine and pay central excise duty for clearance of their byproduct in the Domestic Tariff Area. The above acts of contravention by the said unit are alleged to have been committed by wrongful availment of benefit under Notification No. 8/1997 -CE., dated 1-3-1997 on the by-product, that is, Soyabean Raw Oil/Crude Oil.

15. In the impugned show cause notices, it has been alleged that by not filing the declarations under the erstwhile Rule 173-B and by not declaring the facts to the Department, the petitioners have contravened the provisions of the erstwhile

Rules 9(1), 9(2) and Rule 49 read with Rule 100(D), 100(E) and Rule 173-F of the Central Excise Rules, 1944, now Rule 4(1) read with Rule 8(1) and Rule 17 of the Central Excise Rules, 2002, hence, such act amounts to mis-statement/ suppression of facts on the part of the assessee and as such, proviso to Section 11A(1) of the Central Excise Act, 1944 for extended period of five years would be invokable in this case.

16. On a conjoint reading of the earlier show cause notices and the present show cause notices, it is apparent that the facts stated therein as well as the allegations made therein are more or less similar. The only difference, as pointed out by the learned counsel for the respondents is that in the impugned show cause notices, there is a reference to intelligence gathered by the central excise authorities and statements recorded. However, though there is a reference to visit by the central excise officers to the factory of the petitioners, the date of such visit has not been mentioned. However, the statements of the authorized signatory have been recorded on 17-1-2000 and 23-3-2000, statement of the President (Works) of the Unit No. 1 had been recorded on 21-3-2000 and 24-5-2000 u/s 14 of the Central Excise Act and statement of the Director had been recorded on 19-12-2000. In this regard, it may be pertinent to note that the earlier show cause notices came to be issued on 4-5-2000, 12-1-2001 and 26-6-2001, that is after most of the statements were recorded and as such, the reference to intelligence in the impugned show cause notices is of no consequence, since all the said facts were already before the central excise authorities at the time when the earlier show cause notices came to be issued. Therefore, it cannot be said that the impugned show cause notices are based on new or different facts than the earlier ones. Thus, the present case would stand squarely covered by the above referred decisions of the Supreme Court inasmuch as, when the earlier show cause notices had been issued for the later period on the same set of facts, the facts were within the knowledge of the Department. In the circumstances while issuing the present show cause notices, the same/ similar set of 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. In the circumstances, the respondents were not justified in invoking the extended period of limitation in respect of earlier periods by issuing the impugned show cause notices, on the plea of suppression of facts by the petitioners, as the facts were already in the knowledge of the Department.

17. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned show cause notices F. No. V.15/15-60/OA/2002 and F.No. V.15/15-61/OA/2002, both dated 2-7-2002 (Annexure "E" collectively) are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

