

(2013) 08 DEL CK 0088

In the Delhi High Court

Case No : Central Excise Act Case No's. 48 of 2012 and 49 of 2012

Hindustan Insecticides Ltd.

APPELLANT

Vs

Commissioner Central Excise

RESPONDENT

Date of Decision : 02-08-2013

Acts Referred:

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

Citation : (2013) 7 AD 125 : (2013) 199 ECR 285 : (2013) 297 ELT 332 :
(2014) 24 GSTR 394

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : A.R. Madhav Rao and Mr. Aditya Bhattacharya, for the Appellant;
Satish Kumar, Senior Standing Counsel, for the Respondent

Judgement

Sanjiv Khanna, J.—These two appeals by Hindustan Insecticides Limited emanate from a common order of the tribunal dated 17th August, 2012. As identical question of law arises for consideration and the facts are almost similar, we are disposing of these two appeals by this common order. Substantial question of law, which is to be adjudicated, was recorded in order dated 10th December, 2012 and reads:-

Whether the Tribunal fell into error in holding that for recovery of interest on account of retrospective revision of the prices, the extended period of limitation u/s 11A could be invoked vis-?-vis interest, especially in view of the decision of the Supreme Court in Commissioner v. T.V.S. Whirlpool Ltd., 2010 (119) ELT A177 (SC) and of this Court in Kwaliti Ice Cream Company and Anr. v. UOI and Others, W.P. (C) 14414-15/2006?.

The appellant herein is a manufacturer of DDT powder and Malathion TG. During the periods 2001-02, 2002-03, 2003-04 and 2004-05 they had sold DDT 50% WDP and Malathion TG to the Government, Department of Health under National Vector Borne Disease Control Programme (NVBDCP). The appellant calculated the assessable value on the sale price and accordingly duty and education cess was

paid at the time of removal.

2. Subsequently, the Ministry of Health and Welfare with retrospective effect revised and enhanced the prices for the supplies made in 2002 to 2005. On the basis of revised enhanced sale price, the petitioner paid differential duty as per details given below:-

3. The respondent issued two show cause notices both dated 4th September, 2008 for levy of interest for the belated deposit of the excise duty on the enhanced sale price. One show cause notice related to Financial Year 2001-02 and the second show cause notice related to Financial Years 2002-03 to 2004-05. These notices have been issued in exercise of power u/s 11A of the Excise Act, 1944 (Act, for short) and it was stated that the appellant herein was liable to pay interest on the belated deposit of the excise duty at appropriate rate u/s 11AB of the Act.

4. By two adjudication orders dated 3rd November, 2009, the contention of the appellant that interest should not be levied or the show cause notices were beyond limitation, was rejected. The appellant did not succeed in first appeal and then approached the Customs, Excise and Service Tax Appellate Tribunal. The tribunal by the impugned order dated 17th August, 2012 has rejected the contention of the appellant and has held that interest was payable. Tribunal in the impugned order has noticed that initially duty had been paid on provisional price but subsequently when the price was revised with retrospective effect, the appellant had issued supplementary invoices for the price difference and on the basis of those invoices they had also paid excise duty on the differential price. It is also recorded that the appellant had paid the differential excise duty on their own and suo motu without any notice or proceedings being initiated by the Revenue. Further, there cannot be any doubt that differential duty was payable as held by the Supreme Court in Commissioner of Central Excise Vs. International Auto Limited, . The said decision also observes that interest is charged to compensate for loss caused because of late payment of duty. The said loss should be compensated. Tribunal has held that interest chargeable u/s 11AB was payable on the duty paid u/s 11A(2B) under the supplementary invoice on the price differential on account of retrospective price escalation received by the assessee and if the same has not been paid, the same would be recovered from the assessee. Thus, the tribunal has given a finding and in our opinion has rightly held that interest was payable u/s 11AB of the Act.

5. The tribunal thereafter examined the main issue whether or not notice for the recovery of interest is subject to and should be issued within the limitation period prescribed u/s 11A(1) of the Act. As noticed below, Section 11A(1) of the Act prescribes period of one year for recovery. This period of one year is for recovery of excise duty, which has not been levied or paid or has been short levied, short paid or erroneously refunded. Section 11A, as it then existed, in the proviso prescribed a longer period of five years where short levy, short payment or erroneous refund was by reason of fraud, collusion, wilful mis-statement,

suppression of facts or contravention of any provision of the Act or Rules with the intention to evade payment of duty. Section 11A, therefore, postulated two separate periods of limitation for recovery in cases of short-levy, short payment etc. Normal period was one year but in cases of fraud, collusion, wilful misstatement, suppression of facts or when there was contravention of the Act or Rules with the intent to evade duty, an enhanced or longer period of five years was provided/stipulated. A Division Bench of Delhi High Court in *Kwality ICE Cream Company and Another Vs. Union of India and Others*, has examined a similar contention. In the said case, the petitioner assessee had paid central excise duty of Rs. 75,16,661/- on 23rd October, 2001. The order in original was passed on 12th September, 2001. By notice/letter dated 19th October, 2005, Revenue had raised a demand of interest of Rs. 24,05,332/-. Referring to Section 11A and the different periods of limitation prescribed therein, the Division Bench held as under:-

4. The learned counsel for the petitioner drew our attention to a decision of the Tribunal reported in 1996 (66) ECR 345 entitled *Collector of Customs, Madras v. TVS Whirlpool Limited*, in which it was held that the lower authority was right in holding that the demand beyond the period of six months from the clearance of goods, was barred by limitation. This conclusion was arrived at based on the logic that the period of limitation for demanding interest ought to be the same as the period of limitation for demand of duty. This matter was carried in appeal to the Supreme Court. The matter was numbered as Civil Appeal No. 7299-7309/1997. The Supreme Court by an order dated 07.10.1999 held as under:-

It is only reasonable that the period of limitation that applies to a claim for the principal amount should also apply to the claim for interest thereon. We find no merit in the appeals and they are dismissed with costs.

5. It is, therefore, clear that the principle adopted by the Supreme Court was that the period of limitation, unless otherwise stipulated by the statute, which applies to a claim for the principal amount should also apply to the claim for interest thereon. If that be the position, the period of limitation prescribed for demand of duty u/s 11A is normally one year and, in exceptional circumstance of a case falling under the proviso to Section 11A(1), the period of limitation is five years. But that would be applicable only in case of misstatement, fraud, concealment etc., which is not the case here. As such, in the present case, the period of limitation for the demand for duty would be one year. By the same logic, the period of limitation for demand of interest thereon would be one year. Inasmuch as the demand for interest has been made beyond a period of one year, the demand would be clearly hit by the principle of limitation as laid down by the Supreme Court. Even if, we take the letter dated 25.10.2004 as the first demand of interest, although that letter was in respect of a demand for differential duty, the demand would still be beyond a period of three years.

6. In view of the fact that we have taken a decision, as indicated above, we are

not examining the other point raised by the learned counsel for the petitioner that the duty itself was not payable in view of the decisions of the Supreme Court in respect of its sister concerns in relation to common agreements. However, the learned counsel for the respondents in that regard has submitted that the Commissioner's order dated 12.09.2001 had become final and, therefore, that aspect of the matter ought not to be looked into. In any event, as we have indicated above, since we have decided this writ petition only on the question of limitation, we have not gone into the second aspect of the matter.

6. The aforesaid order makes reference to order of the Supreme Court in Commissioner versus TVS Whirlpool Limited, 2000 (119) ELT A177 (SC). The order passed by the Supreme Court is a short one and records that it is only reasonable that the period of limitation that applies to the claim for the principal amount should also apply to the claim for interest thereon. Appeal before the Supreme Court against the order of the tribunal was dismissed. The order of the tribunal, which was impugned before the Supreme Court is reported in 1996 (66) ECR 345 In the said decision, the question related to payment of interest under the Customs Act, 1962 wherein a similar provision of limitation exists in case of non-levy, short levy etc. and the issue was whether any limitation period was prescribed for initiation of proceedings for recovery of interest.

7. Delhi High Court in Kwaliti Ice Cream Company (supra) has held that the identical provision was *pari materia* to the present Act, i.e., Excise Act should be given same or similar interpretation.

8. The view taken by the Delhi High Court in the case of Kwaliti Ice Cream Company (supra) has been followed by the Punjab and Haryana High Court in Commissioner, Central Excise Commissionerate versus VAE VKN Industries Private Limited (CEA No. 67/2011 (O&M) decided on 17th April, 2012. In this decision, it has been held as under:-

6. There is no dispute that assessee has paid the differential duty on supplementary invoices regularly and has shown the same in the ER-I returns, which were filed regularly before the department, therefore, issuance of show cause notice for interest on the delayed payment should also be within a period of one year as stipulated u/s 11-A of the Act. Therefore, department has absolutely no jurisdiction to issue show cause notice after expiry of the period of limitation for interest on the delayed payment for the period from 2002-03 to 2005-06. Division Bench of Delhi High Court in the case of Kwaliti Ice Cream Company and another vs. Union of India and others, W.P.(C) 14414-15/2006 decided on 18.1.2012 has also held that period of limitation, unless otherwise stipulated by the statute, which applies to a claim for the principal amount should also apply to the claim for interest thereon.

9. Similar view has also been taken by Bombay High Court in Central Excise Appeal No. 116/2011, Commissioner of Central Excise Mumbai-III versus Supreme Petrochem Limited. Gujarat High Court in Tax Appeal No. 56/2011,

C.C.E. and C, Vadodara-II Vs. Gujarat Narmada Fertilizers Co. Ltd., referred to Section 11A including Explanation-2, which read:-

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, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year 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 reason of fraud, collusion or any wilful 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 subsection shall have effect, for the words one year, the words "five years" were substituted:

Explanation.--Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

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(2B) Where any duty or excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under subsection (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1.--Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any wilful 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.

Explanation 2.--For the removal of doubts, it is hereby declared that the interest u/s 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

10. Explanation 2 is also applicable to the present years with which we are concerned. It is clear from the Explanation that failure to pay interest u/s 11AB was also treated as short payment of duty. After referring to the provisions of Section 11A(1) and (2B), Gujarat High Court has held as under:-

From the perusal of the said statutory provision, it can be seen that under sub-section (1) period of limitation for issuing notice for recovery of duty not paid, short paid or erroneously refunded is one year unless, of course, such non-payment, short payment, or erroneous refund of duty arises by the reason of fraud, collusion or wilful misstatement or suppression of facts or contraventions of the provisions of the Act or the Rules with intent to evade payment of duty. In other words, in absence of such circumstances, normal period of limitation for issuance of notice for recovery of unpaid duty is 1 year.

8. Sub-Section (2B) of Section 11A of the Act provides that with respect to such unpaid, short paid or erroneously refunded duty, if the manufacturer pays the sum on the basis of his own ascertainment before issuance of notice by the Central Excise Officer, the Officer, on receipt of such information, shall not serve any notice under sub-section (1) in respect of duty so paid. In other words, upon voluntary payment of duty by the manufacturer, no show cause notice for recovery thereof would be issued to the extent of duty so paid.

Explanation-1 to sub-section (2B) of Section 11A makes it abundantly clear that the provisions contained therein would not apply in cases of unpaid duty on account of fraud, collusion, wilful misstatement or suppression of facts or contravention of statutory provisions with intent to evade duty.

Explanation-2 is in the nature of clarification declaring that interest u/s 11AB shall be payable on the amount paid by the person under sub-section (2B) and also on the amount of short-payment of duty as may be determined by the Central Excise Officer but for the said Sub-Section. Thus Explanation only clarifies that despite voluntary payment of duty by a manufacturer the liability to pay interest on such delayed payment of duty is not absolved. It, therefore, provides that the manufacturer shall still pay interest on the voluntarily paid duty to the extent of delay as also shall pay further interest on any excise duty demand confirmed by the Excise Officer, over and above what may have been voluntarily paid.

To our mind this Explanation cannot be used in interpreting the ambit of the main body of sub-section (2) of Section 11A. The Explanation itself is in the

nature of a clarification and is thus a clarificatory provision.

9. In essence, what sub-Section (2) of section 11A provides for is for non-issuance of notice by the Central Excise Officer to the extent a manufacturer might have voluntarily paid duty even before issuance of show cause notice. When Explanation-2 provides that said provision would not apply in case of fraud, collusion, wilful misstatement, suppression and intention to evade duty, it clearly means that sub-Section (2B) is applicable where the normal period of limitation of 1 year is provided.

10. In the present case, when the period of limitation had already expired and when the extended period beyond one year was not available to the department as held by the Commissioner himself in his order in original, to our mind the respondent was not liable to pay even the basic duty. But for the respondent voluntarily making payment of such duty short-paid, it was not open for the Department to recover the same under sub-Section (1) of Section 11A of the Act. In absence of any such voluntary payment, recovery of the unpaid duty would not have been possible. In that view of the matter, we do not find the case would fall under sub-Section (2B) of Section 11A of the Act. Sub-Section (2B) of Section 11A of the Act applies in a case where there is voluntary payment of unpaid duty before issuance of show cause notice under sub-Section (1) of Section 11A. When the provision refers to show cause notice, it means a show cause notice which could have been validly issued and surely not a notice which had become time barred. If by efflux of time and in absence of availability of extended period of limitation, such show cause notice itself had become time barred, any payment made voluntarily by the manufacturer cannot be viewed as one made under sub-Section (2B) of Section 11A of the Act.

11. In the present case, we have already held that time for issuing such a notice was one year, which period had already expired.

12. Accepting the stand of the Department that even in such a case once the payment of duty is made, interest liability would follow would bring about an incongruent situation. The recovery of the unpaid or short paid duty would become time barred. If the manufacturer does not pay it voluntarily, it would not be possible for the Department to recover the same. But if he does it voluntarily despite completion of period of limitation, he would, further be saddled with the liability to pay statutory interest. Surely, this was not the intention of the Legislature while sub-Section (2B) was introduced in Section 11A of the Act.

11. In the present case there is no allegation and it cannot be held that the longer period of limitation of five years is applicable. It cannot be said that the short payment was due to fraud, collusion etc. which means intentional, deliberate or deceitful means. In view of the aforesaid position, it has to be held that the period of limitation of one year would apply to the present cases and the show cause notices were belated and barred by limitation.

12. Tribunal in the impugned decision has referred to the decision of the

Supreme Court in Commissioner of Trade Tax, Lucknow Vs. Kanhai Ram Thekedar, The said decision arose out of proceedings initiated under the U.P. Sales Tax Act, 1948 (subsequently known as U.P. Trade Tax Act, 1948). After referring to the applicable provisions it was held that levy of interest was automatic under the provisions of the said Act, interest should have been paid voluntarily and by non-payment the respondent therein had become a defaulter. In these circumstances, it was observed by the Supreme Court as under:-

17. Thus, we are of the opinion that the High Court was not justified for deleting the interest levied by the authorities on the ground that no notice was served. In this view, the impugned judgment would normally be unsustainable. However, as already noticed, the respondent-assessee has specifically urged that the subsequent proceedings to the assessment is barred by limitation and that even though the order was passed on 6.6.1986 imposing tax liability etc., the assessing authority had passed another order only on 30.7.1990 holding that on admitted amount of tax, the assessee was liable to pay interest at 24% p.a. from 1.5.1978 and, therefore, on the question of delay in demanding interest, the demand has to be set aside. This argument of the learned counsel appearing for the respondent merits acceptance. In this case, the assessment relates to the assessment years 1977-78. The respondent furnished his return to the assessing authority and the assessing authority passed an assessment order against the respondent and in accordance with the assessment order, the assessee has deposited the entire amount of tax amounting to Rs. 15,236.98 paise on 30.8.1986 and Rs. 2,817/- on 26.6.1982. However, on 30.7.1990, the assessing authority passed an order imposing interest against the respondent. Thus the demand was after nearly four years. There was no demand of interest in the assessment order which, in our opinion, form part of the assessment order. As the assessment order did not include a claim for interest, the demand for interest had to be made within a reasonable period thereafter. To be noted that for rectification of the assessment order, a limitation period of three years is laid down. Since the demand of interest was made after almost four years, we hold that the demand is not within a reasonable period and the assessee is not liable to pay the interest as demanded. The Department is not entitled to recover the interest from the assessee-respondent but is at liberty to recover the amount of interest demanded from the Assessing Officer concerned who have not taken steps for four years.

A reading of the aforesaid paragraph would show that in the said case notice of payment for interest was issued after four years and it was held that it was beyond a reasonable period and the department could recover the amount from the Assessing Officer, who had not taken steps for four years and not from the respondent assessee therein. The finding of the Supreme Court on interpreting the applicable Act was that no limitation period was prescribed, therefore, proceedings for recovery could be initiated within a reasonable time. The ratio in the said case is distinguishable for the reason that payment of interest is to be made u/s 11A and, therefore, the period of limitation prescribed therein would

equally apply as has been held by the Delhi High Court in the case of Kwaliti Ice Cream Company (supra), Punjab and Haryana High Court in the case of M/s. VAE VKN Industries Private Limited (supra) and Gujarat High Court in Gujarat Narmada Fertilizers Company Limited (supra). These judgments have relied upon the decision of the Supreme Court approving the view of the tribunal in TVS Whirlpool Limited (supra) wherein pari materia provisions of the Customs Act were considered. This being a distinguishing feature, we feel that the appellant is entitled to succeed in the present appeals. The question of law is accordingly answered in affirmative, i.e., in favour of the appellant and against the respondent Revenue.

The appeals are disposed of. There will be no order as to costs.