
(2005) 01 SC CK 0025
In the Supreme Court Of India
Case No : Civil Appeal 3638 of 1999

M.K. Kotecha

APPELLANT

Vs

Commissioner of Central Excise, Aurangabad

RESPONDENT

Date of Decision : 04-01-2005

Acts Referred:

Central Excise (Valuation) Rules, 1975 — Rule 6, 7
Central Excise Rules, 1944 — Rule 173C, 173C(1)
Central Excises and Salt Act, 1944 — Section 11A(1), 11D, 35L, 4, 4(1)

Citation : (2005) 98 ECC 182 : (2005) 179 ELT 261 : (2005) 2 MLJ 157 : (2005) 1 SCC 728 : (2005) 1 SCR 42

Hon'ble Judges : S. N. Variava, J;S. H. Kapadia, J;AR. Lakshmanan, J

Bench : Full Bench

Advocate : C.N. Sree Kumar and M.L.Shyjatha, for the Appellant; Mohan Parasaran, A.S.G., A. Subba Rao, Nitesh Rana, Gaurav Dhingra, P.Parmeswaran and B. Krishna Prasad, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Kapadia, J.—This is an appeal u/s 35L(b) of Central Excise Act, 1944, preferred by the assessee, against the judgment and order dated 16.2.1999 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai, confirming the demand made by the department for short-levy amounting to Rs.18,34,464/- together with a penalty of Rs.2 lacs.

2. The short question which arises for determination in this appeal is whether the department was justified, on facts and circumstances of the case, in invoking the extended period of limitation under the proviso to section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to for the sake of brevity as "the 1944 Act").

3. The appellant, M.K. Kotecha, proprietor of M/s Tapi R.C.C. Pipe Product, M/s Bamnod Cement Pipe Product and M/s Sakri Cement Pipe Product, is a manufacturer of R.C.C. pipes and collars falling under Chapter Heading 6807.00.

During the period April, 1990 to June, 1992, he cleared RCC pipes and collars to various Societies under the Lift Irrigation Scheme, by declaring that the RCC pipes and collars were not sold but were captivity consumed in the projects undertaken by him under the works contract. Accordingly, he filed the price list together with the annexure thereto giving following particulars:-

PRICE LIST

Sl. No. Excisable Goods Comparable goods if known to Assessee Difference if any in material characteristics of the goods & assessment of comparable goods Value of the Goods in Col.2 classified and approved Value of the Goods in Col.2 as approved by the proper officer Remark

Description Tariff Classification Description Tariff Classification Assessable Value As Unit of Sale

Pipe Collar

Pipe Collar

1 2 3 4 5 6 7 8 9 10 11

RCR Pipe & Collar 6887.00 Size in mm & class

1 1200 mm NP3 " " " 2838 "

2838 "

2 1000 " "

2060 "

2060 "

3 900 " "

1674 "

1674 "

4 800 " "

1378 "

1378 "

5 750 " "

1282 "

1282 "

6 700 " "

1175 "

1175 "
7 600 " "
941 "
941 "
8 500 " "
686 "
686 "
9 450 " "
598 "
598 "
10 400 " "
549 "
549 "
11 350 " "
447 "
447 "
12 300 " "
394 "
394 "
13 750 mm NP 2 "
1211 121
1211 121
14 700 " "
1153 115
1153 115
15 600 " "
908 91
908 91
16 500 " "
635 64

635 64

17 450 " "

517 52

517 52

18 400 " "

459 46

459 46

19 350 " "

359 36

359 36

20 300 " "

278 28

278 28

The last 'questionnaire' is applicable to this Pricelist. I/We declared that particulars herein furnished are complete & true to the best of my/our knowledge & belief.

Sd/-

Signature of Assesse

ANNEXURE

PRICE (COSTING DETAILS) OF R.C.C. PIPES & COLLARS: EFFECTIVE FROM 8.5.1989; PIPE LENGTH : 2.5 MTRS.

Sl No. Size of pipe

Class Steel Cement Sand & Metal Electricity Greased Etc. Labour Charges Supervision Charges Total Profit about 10% Cost of pipe Cost of Collar

Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs.

1 1200 mm NP3 1584 642 159 61 75 59 2580 258 2838 -

2 1000 " " 1125 466 101 59 75 47 1873 187 2060 -

3 900 " " 836 424 81 59 75 47 1522 152 1674 -

4 800 " " 677 340 77 53 66 40 1253 125 1378 -

5 750 " " 640 330 55 45 60 35 1165 116 1282 -

6 700 " " 568 310 50 45 60 35 1068 107 1175 -

7 600 " " 446 235 47 42 50 35 855 86 941 -
 8 500 " " 317 183 44 26 33 21 624 62 686 -
 9 450 " " 285 158 35 20 30 16 644 64 598 -
 10 400 " " 258 147 29 20 29 16 499 50 549 -
 11 350 " " 200 140 21 9 26 10 406 41 447 -
 12 300 " " 182 119 18 8 22 9 358 38 394 -
 13 750 " P2 575 326 50 35 70 45 1101 110 1211 121
 14 700 " " 556 307 47 30 66 42 1048 105 1153 115
 15 600 " " 432 229 33 23 66 42 825 83 908 91
 16 500 " " 307 162 23 21 38 26 577 58 635 64
 17 450 " " 250 133 18 16 33 20 470 47 517 52
 18 400 " " 244 102 17 11 27 16 417 42 459 46
 19 350 " " 183 82 14 8 23 16 326 33 359 36
 20 300 " " 127 72 11 7 22 14 253 25 278 28

RCC Pipe of Class NP3 does not require collar in our L.T. Scheme. Cost of each collar = 10% of Pipe Cost i.e. one pipe mouse of length 2.5 mm = 12 collars length.

This is to certify that the above cost of each pipe & collar is correctly calculated and the particulars herein furnished are true & fully stated to the best of my knowledge and belief.

Sd/- Signature of Assesses

4. On 19.8.1994, the Collector of Central Excise, Aurangabad issued show-cause notice to the appellant u/s 11A(1) of the 1944 Act alleging clearance of RCC pipes and collars to various Societies for their projects under the Lift Irrigation Scheme, during the period April 1990 to June 1992, by declaring their prices at the lower rates, by filing the price list in part VI(b) proforma, on the ground, that, the prices of comparable goods were not available and the goods cleared were not for sale but were for captive consumption. However, according to the show- cause notice, the contract price agreed upon by and between the parties indicated complete break-up of the charges, including the prices of RCC pipes & collars, consequently, it was alleged that the appellant had undervalued the prices of RCC pipes & collars by mis- declaring to the department that comparable prices were not available. Accordingly, the department called upon the appellant to show cause why differential duty of Rs.18,34,464/- should not be recovered u/s 11A(1) and why for the period 1st April, 1990 to June, 1992, penalty under rule 173-C should not be imposed.

5. By reply dated 27.1.1995 to the show-cause notice, the appellant submitted that the RCC pipes and collars were not marketed but used in the Lift Irrigation Scheme; the appellant denied that the contract awarded indicated the break-up of the charges, including the prices of RCC pipes and collars; that in any event, these prices were lower than the prices of comparable goods and that the comparable prices were not available. It was submitted that contract awarded to the appellant indicated the price for the project comprising of cost of material and cost for joining of RCC pipes/collars besides job of excavation and, therefore, the appellant had invoked part VI(b) proforma supported by a certificate from his Chartered Accountant. It was further submitted that alleged comparable prices given by DSR and MSSIDC were not taken into account at the time of giving of tender; that independent costing was done and that the rates tendered covered the entire job work, hence, prices of comparable goods did not exist. It was further submitted that the RCC pipes and collars, manufactured by the appellant, were not sold as the appellant had undertaken a project on turnkey basis and hence, there was no sale, and, therefore, the appellant had filed the price list in part VI(b) proforma on cost basis, particularly, because there was no separate contract for sale of RCC pipes and collars. It was further submitted that the RCC pipes and collars were not sold but were used in the project and, therefore, the valuation of such pipes and collars was done on the cost basis.

6. By order dated 22.5.1995, the Collector came to the conclusion that the appellant was supplying pipes and collars to various Lift Irrigation Schemes; that in the project reports, the valuation data of such pipes and collars was available which was made known to the appellant at the time of negotiations and that there was substantial difference between the rates quoted by the appellant and the rates quoted in the project reports. It was held, that, the appellant had misled the department by declaring that RCC pipes and collars were captivity consumed when he knew that part VI(b) speaks of consumption in the production of other articles. According to the Collector, the said pipes and collars were manufactured by the appellant in his factory and cleared therefrom. It was further held that the appellant had filed a consolidated tender giving costs estimates which included costs of material, labour, supervision etc.; that these estimates were based on the pricing of collars and pipes in the project reports and, therefore, the Collector confirmed the demand in terms of the show-cause notice. The Collector further found that the Maharashtra State Sewerage and Water Board had made the rate analysis and had arrived at the value of the RCC pipes; that the said Board was a Government agency; that it was in the business of civil construction and, therefore, had a fairly good idea of the standard value of the RCC pipes. The Collector further found that Tenders Scales were drawn by the contractor on the above price guidelines of the Board. The Collector observed that the RCC pipes and collars were standardized products and that what was true of the pricing by the Board was also applicable to the rate contract price given by the Director of Industries. In the circumstances, it was held, that comparative prices were known to the appellant. Accordingly, the demand was

made on above grounds for Rs.18,34,464/- with penalty of Rs.2 lacs.

7. Aggrieved by the Order of the Collector, the assessee preferred appeal to the Tribunal which has been dismissed. Hence, this civil appeal.

8. Two questions arise for determination in this appeal, namely, whether the department was right in invoking rule 7 of Central Excise (Valuation) Rules, 1975 and whether on facts, the Collector was right in holding that the appellant had willfully misdeclared to the department that prices of comparable goods were not available and that the goods cleared were not for sale but for captive purpose.

9. In the present case, the department has invoked the proviso to section 11A(1) of the 1944 Act seeking to recover duty by invoking the extended period on account of willfully misstatement and suppression of facts resulting in short-levy of duty.

10. In the case of Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, , it has been held, that, in order to constitute willfully misstatement, some positive act other than inaction, omission or failure on the part of the manufacturer or conscious and deliberate withholding of information when the manufacturer knew otherwise, is required to be established before he is saddled with the liability. Whether in a particular set of facts and circumstances, there was willfully misstatement or suppression is a question of fact.

11. In the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay, , it has been held, that, in order to constitute suppression under the proviso to section 11A(1), there should be facts showing that correct information was not deliberately disclosed in order to escape from liability to pay duty. Mere omission is not a deliberate act.

12. In the case of Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay, , it has been held by this Court that the word "willfully" qualifies the words "misstatement or suppression of facts" in the proviso. That the word "willfully" precedes the word "misstatement". The word "willfully" means intention to evade. In the circumstances, it was held that the department has to establish the intention to evade duty in order to come within the expression "willfully misstatement or suppression of facts" as mentioned in the proviso to section 11A(1).

13. On facts, the basic question which arises for determination is whether the appellant knew of the comparability of his goods with those of other manufacturers and whether the appellant had misled the department by declaring that the RCC pipes and collars were captivity consumed, particularly, when the appellant as a contractor had drawn the Tenders Scales on the basis of pricing guidelines of Maharashtra State Sewerage and Water Board.

14. Chapter VIIA of the Central Excise Rules, 1944 refers to removal of excisable goods on determination of duty by producers and manufacturers. Rule 173-C

prescribes a procedure regarding valuation of goods assessable ad valorem. Under rule 173-C (1), every assessee who produces, manufactures or warehouses goods, which are chargeable with duty at a rate dependent on the value of the goods, and clears such goods, shall declare the value u/s 4 of the Act in the sale invoice, invoice-cum-challan or like documents used by him for sale or removal of goods. Under clause (iv) of the second proviso to rule 173C, where an assessee removes such goods, in any manner, which does not involve sale, shall file, with the proper officer, a declaration in the prescribed form.

15. The proforma for determination of value u/s 4 read as under:

Part VI.-- For excisable goods not for sale but for use or consumption by the assessee/related person for production or manufacture of other articles (cf. Rule 6 of the Central Excise (Valuation) Rules, 1975].

(a) If particulars of comparable goods are known--

Excisable Goods	Comparable goods, if known to Assessee	Difference if any in material characteristics of the goods under assessment & comparable goods	Value of the Goods in Col. 1 claimed for approval	Value of the Goods in Col.1 claimed for approval	Remarks
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Description	Tariff Classification	Description	Tariff Classification	Assessable value
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Rs. Unit of sale

1 2 3 4 5 6 7 8 9 10

(b) If particulars of comparable goods are not known--

Excisable Goods	Cost of production or manufacture, supported by detailed calculations, on a separate sheet how the cost has been worked out	Profits that would have been normality earned by the assessee on sale of such goods and the basis thereof.	Value Claimed for approval	Value approved	Remarks
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Description	Tariff Classification
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Rs. Unit

1 2 3 4 5 6 7 8

16. The above price-list proforma is prepared in terms of rule 6 of Central Excise (Valuation) Rules, 1975. We quote hereinbelow the entire rules 6 and 7 as the same is relevant for deciding this case.

"Rule 6. If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and --

a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a

person other than a related person:

Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;

b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based-

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

c) where the assessee so arranges that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person and the value cannot be determined under clause (iii) of the proviso to clause (a) of sub-section (1) of section 4 of the Act, the value of the goods so sold shall be determined-

(i) in a case where the assessee sells the goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule;

(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule;

(iii) in a case where a related person sells the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers.

Rule 7. If the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules."

17. On reading rule 6(b) of the said Valuation Rules, it is clear that the said rule applies to excisable goods, not sold by the assessee but used or consumed by him in the production or manufacture of some other articles. Rule 6(b) refers to valuation of goods which are captivity consumed by the assessee. It is in two parts. Under rule 6(b)(i), the assessable value of goods captivity consumed is

determined on the price at which similar goods are sold by the assessee and by other manufacturers, subject to adjustment. On the other hand, under rule 6(b) (ii), the assessable value is determined on the basis of aggregate cost of raw materials, manufacturing cost and profit margin, if any. In short, under rule 6(b) (i) of the Valuation Rules, 1975, the value of goods captivity consumed was the value of comparable goods produced by the assessee or any other manufacturer. In the absence of such a valuation, the assessable value had to be done under rule 6(b)(ii) on the basis of cost of production, including the profits which the assessee would normally earn on the sale of such goods [See: Gwalior Rayon Manufacturing (Weaving) Company v. Union of India and Ors. reported in [1982 ELT 844 (MP)]].

18. On enquiry, learned counsel appearing on behalf of the appellant produced before us the Price List proforma alongwith the annexure. We have reproduced the relevant portion of the Price List proforma submitted by the appellant to the department in this case. Although, the appellant contended before the department that the prices of comparable goods in the present case was not known to him, the appellant filed the price list under part VI(a) of the price list proforma. However, the annexure to the price list indicates that the appellant had mischievously priced the said RCC pipes/collars on cost basis without estimating the profits. The Price List proforma in part VI(b) refers to cases where comparable prices are not available and consequently, the determination of assessable value was required to be done on the basis of the total cost. The particulars required to be given by the assessee under part VI(a) are different from the particulars under part VI(b) of proforma price list. Under part VI(a), the particulars are required to be given in respect of excisable goods not for sale but for captive consumption on the footing that the assessee is aware of comparable prices. In that respect, he is required to give assessable value of the comparable goods under part VI(a). Similarly, under part VI(a), the assessee is required to give particulars of the difference, if any, in the material characteristics of the goods under assessment and comparable goods. On the other hand, in cases falling under part VI(b), the assessee is required to furnish particulars of cost of production or manufacture on a separate sheet, annexed to the price list. The 3rd and the 4th column of part VI(b) refers to computation of assessable value of goods based on the aggregate cost, together with the profits that would normally accrue to the assessee. [See: Column (5) of Part VI(b)].

19. In this case, the appellant worked out the prices on total cost and used it as the basis of valuation in support of part VI(a) price list proforma. This hybrid system was adopted by the appellant, though not permissible, to mislead the department. In the circumstances, we are satisfied that the appellant had willfully misdeclared the prices at the lower rate and consequently, the department was right in invoking the extended period of limitation under the proviso to section 11A(1).

20. Further, in the present case, the appellant submitted before the Collector that

he had undertaken a composite contract (project) and, therefore, the prices of comparable goods were not available. However, as found by the Collector on evidence, the RCC pipes and collars were manufactured by the three units of the appellant. The contract price agreed upon was based on complete break-up of the charges including the prices of the RCC pipes and collars. The said pipes were manufactured in the factory of the appellant. They were cleared therefrom. The pricing of RCC pipes and collars was indicated in the project reports. They were based on the pricing guidelines fixed by Maharashtra State Sewerage and Water Board. The said Board had made rate analysis to arrive at the value of the RCC pipes and collars. therefore, the appellant knew of the comparability of his goods with those of other manufacturers. Hence, the Collector was right in coming to the conclusion that the appellant had willfully misstated and suppressed the facts in order to mislead the department. Consequently, the department was right in invoking the larger period for demand of duty under the proviso to section 11A(1).

21. Lastly, on facts, we find that rules 1 to 6 of the Valuation Rules, 1975 had no application. As stated above, rule 6(b) was applicable to captive consumption. In this case, rule 6(b) was not attracted. therefore, the department was right in making best judgment assessment under the aforesaid rule 7 of the Valuation Rules, 1975.

22. In the case of M/s. United Glass, Bangalore Vs. Collector of Central Excise, this Court held that rule 7 of the Valuation Rules, 1975 was in the nature of a residuary rule, applicable only when valuation cannot be decided under other rules. In the present case, the department was, therefore, right in invoking rule 7.

23. Mr. C.N. Sree Kumar, learned counsel for the appellant submitted that since the classification lists and the price list were earlier approved, subsequently found to be erroneous or defective, reclassification and liability to pay duty would commence only from the date of show-cause notice and not for the period prior thereto. He further submitted that the omission to enter correct prices in the price list did not amount to contravention of rule 173-C. In support, he relied upon several authorities.

24. In the case of Universal Cables Ltd. Vs. Union of India (UOI) and Others, , on which reliance was placed on behalf of the appellant, it was held that omission to enter correct price in the price list was not a contravention of rule 173-C within the meaning of rule 173Q. However, on facts, the High Court found that the assessee had filed a list in the proper form and in the manner prescribed under rule 173-C showing the price of the goods and, therefore, there was no contravention of that rule. In the present case, as stated above, there is a contravention of rule 6(b) of the Valuation Rules, 1975 read with part VI(a) of the price list proforma. Hence, the judgment in the case of Universal Cables Ltd. (supra) is not applicable to the present case.

25. In the case of Collector of Central Excise, Baroda Vs. M/s Cotspun Ltd., this Court held that the word "short-levy" in section 11A(1) will not apply to cases where excise duty was levied on the basis of approved classification list. Learned counsel for the appellant heavily relied upon on this authority. In our view, the said judgment has no application to the present case for two reasons: firstly, the basis of the said judgment is obliterated in view of the Amendment Act No.10 of 2000 by which the expression "short- levy" has been redefined to include levy resulting from mistaken approval granted to the classification list. The validity of this amendment has been upheld in a recent judgment of this Court in the case of ITW Signode India Ltd. Vs. Collector of Central Excise, to which one of us [Dr. AR. Lakshmanan, J.] was a party. Secondly, the decision in Cotspun Limited's (supra) was confined to interpretation of the word "short-levy" in section 11A(1). That judgment was not concerned with the proviso to section 11A(1). In fact, vide para 67 of the judgment of this Court in ITW Signode India Ltd. (supra), it has been observed that the extended period of limitation under the proviso can be invoked in cases of positive acts of fraud, collusion, willful misstatement or suppression of fact on the part of the assessee and that such a positive act must be in contradistinction to mere inaction. The present case is not a case of simple omission. It is a case of willfully misstatement leading to under-estimation of value of goods cleared by the appellant. In the circumstances, we do not find any merit in this appeal.

26. Before concluding, we may point out that under the show-cause notice, the department had alleged that the appellant had collected extra amount to the tune of Rs.21,74,963/- in the guise of central excise duty over and above the duty actually paid to the department. The Collector found that the appellant had collected the said amount under the guise of central excise duty from his clients, who were billed for full quantum of duty paid whereas under the relevant notification, the appellant had paid duty at nil rate or at lower rate. Despite this finding, the Collector came to the conclusion that the said finding was based on presumptions and not on evidence and consequently, the Collector dropped the demand for Rs.21,74,963/- made u/s 11D as not capable of being substantiated. Surprisingly, no appeal was preferred by the department to the Tribunal in respect of the demand for Rs.21,74,963/-. Even the Collector did not make further enquiries to substantiate such demand. We are conscious of the rising revenue deficit. In several matters, we find slippages of revenue on such counts. therefore, we expect, Mr. Mohan Parasaran, Additional Solicitor General, to bring our present judgment and order to the notice of the Finance Ministry.

27. For the aforesaid reasons, we do not find any infirmity in the judgment of the Tribunal dated 16.2.1999 passed in Appeal No.E/776-V/95-Bombay, and, accordingly, the appeal stands dismissed, with no order as to costs.