
(2006) 04 SC CK 0014

In the Supreme Court Of India

Case No : Civil Appeal No's. 2747 of 2001, 6261 of 2003 and C.A. No. 2164 of 2006 (Arising out of SLP (C) No's. 9271-9278 of 2003)

Nizam Sugar Factory

APPELLANT

Vs

Collector of Central Excise, A.P.

RESPONDENT

Date of Decision : 20-04-2006

Acts Referred:

Central Excise Rules, 1944 — Rule 9(1)

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 35L(b)

Citation : (2006) 197 ELT 465 : (2006) 11 SCC 573

Hon'ble Judges : Markandey Katju, J; Ashok Bhan, J

Bench : Division Bench

Advocate : J.V. Suryanarayana, S. Udaya Kumar Sagar, Bina Madhavan, A. Venyagam, A.P. Mathur, Rajesh Kumar and A. Sahani, for the Appellant; K. Radhakrishnan Shilpa Singh, Alok Yadav, M.P. Devanath, Devan Parikh, Siddharth Bhatnagar, R.N. Karanjawala, Nandini Gore, Pragya Singh, D. Banerjee, Jayant Mohan and Manik Karanjawala, for the Respondent

Final Decision : Allowed

Judgement

1. Delay condoned and Leave granted in SLP(C) Nos. 9271-9278/2003.
2. This order shall dispose of Civil Appeal Nos. 2747 of 2001, Civil Appeal No. 6261 of 2003 filed by the assesseees and the Civil Appeals @ SLP (C) Nos. 9271-9278 of 2003, filed by the revenue. The point of law canvassed is common in these appeals.
3. Civil Appeal No. 2747 of 2001 and Civil Appeal No. 6261 of 2003 have been filed u/s 35L(b) of the Central Excise Act, 1944 (for short 'the Act') against the Final Order No. 326/2000 dated 19-7-2000 and Final Order No. 462/2002-A dated 24-9-2002 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in Appeal No. E/801/89C and Appeal No. E/1250/2002-A whereby the Tribunal dismissed the Appeals filed by the assessee whereas the Civil Appeals @ SLP (C) Nos. 9271-78 of 2003 have been

filed by the Revenue against the Final Order No. C1/2019-26/WZB/2002 dated 23-7-2002 passed by the Tribunal in Appeal No. E/149 to 153 and 447 to 449/2001-Mum. whereby the Tribunal allowed the appeals filed by the respondents.

4. The facts are stated from Civil Appeal No. 2747 of 2001 (M/s. Nizam Sugar Factory).

5. The Department had issued a Show Cause Notice (for short 'the SCN') to the appellant on 28-2-1984 demanding duty for the period February, 1978 to September, 1982 on the production of impure Carbon dioxide emanating as a by-product during the process of fermentation of molasses in the appellants' factory. It was alleged that the assessee had cleared the said carbon dioxide without payment of duty to another unit in contravention of Rule 9(1) of the Central Excise Rules, 1944 (for short 'the Rules') and without obtaining licence for manufacture of carbon dioxide in their factory; without filing Classification/Price List and without maintaining accounts. Appellant in its reply dated 19-3-1994 relying on some earlier decisions contended that impure carbon dioxide was not exigible to duty. The case was heard on 16-4-1984 and thereafter no further action was taken in the matter.

6. Appellant was served with a second SCN by the Collector on 16-7-1987 alleging that the appellant was supplying carbon dioxide to another unit as per agreement dated 19-3-1983; that they had not taken necessary license; had not followed the procedure prescribed under the rules; and had not discharged duty liability. The said SCN covered the period of assessment years 1982-83 to 1986-87. Appellant responded to the second SCN and took the plea that the SCN under consideration was practically a repetition of the allegations contained in the SCN dated 28-2-1984 and for the period April, 1982 to September, 1982 the department had raised demands under two different SCNs. It was pointed out that carbon dioxide in the impure form was not marketable as it also contained carbon monoxide in lethal proportions. It was contended that they were under bonafide belief that since such impure carbon dioxide was not exigible to payment of duty, they were not required to file either Classification List or the Price List or take out licence. It was submitted that resorting to extended period of limitation u/s 11A(1) was not justified in the circumstances of the case. Appellant was served with the third SCN on 12-9-1988 for the period 16-3-1988 to 27-6-1988 on the same allegations. Assessee filed its reply in terms of the earlier replies i.e. reply to SCN dated 16-7-1987. The adjudicating authority did not accept the appellant's contention and the demands raised in the SCN were confirmed.

7. Aggrieved against the aforesaid orders of the adjudicating authority, the appellant filed appeals before the Tribunal relating to the second and third SCNs which were clubbed together and disposed of by a common order. The Tribunal did not record any finding regarding the marketability but held that the impure carbon dioxide emanating as a by-product during the process of fermentation of

molasses would be covered under Chapter Heading No. 28.11 of Central Excise Tariff Act, 1986 (for short 'the Tariff Act'). Counsel for the appellant had contended before the Tribunal that in a case where the Department issued a show cause notice on the basis of certain set of facts to an assessee, then, it cannot allege in another show cause notice issued subsequently for a later period, suppression on the part of the assessee as it was fully aware of the facts even at the time of the issuance of the first show cause notice. Extended period of limitation could not therefore be evoked. In support of this contention reliance was placed upon the following six judgments of the Tribunal viz. 1990 (50) ELT 165; 1999 (108) ELT 378; 1998 (77) ECR 1 53; 1996 (67) ECR 37; 1999 (81) ECR 71; 1998 (101) ELT 314 .

8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P and B Pharmaceuticals (P) Ltd. Vs. Collector of Central Excise, has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows:

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 the 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.

This judgment was followed by this Court in the case of ECE Industries Limited Vs. Commissioner of Central Excise, New Delhi, . In para 4, it was observed.

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 wilful suppression or mis-statement and that therefore, the extended period u/s 11A could not be invoked.

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. Vs. Commissioner of C. Ex., Hyderabad, . It was observed in para 6:

...On the ratio laid down in this judgment it must be 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. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct.

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. 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. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.

10. For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No. 6261 of 2003 filed by the assesseees are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals @ SLP (C) Nos. 9271-9278 of 2003 filed by the department are dismissed. Questions of classification and marketability are left open. Parties shall bear their own costs.