

(2010) 08 BOM CK 0078
In the Bombay High Court
Case No : Writ Petition No. 533 of 2005

Rajkumar Forge Limited and Mr. Rajkumar Shankarrao
Kothawale

APPELLANT

Vs

The Union of India (UOI) and Service Tax Appellate Tribunal,
West Zonal Bench

RESPONDENT

Date of Decision : 24-08-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 57F(3)
Central Excises and Salt Act, 1944 — Section 11A, 11A(1)
Constitution of India, 1950 — Article 226
Drugs (Prices Control) Order, 1979 — Section 2

Citation : (2010) 08 BOM CK 0078

Hon'ble Judges : V.C. Daga, J; R.M. Savant, J

Bench : Division Bench

Advocate : Pankaj Sutar and Agasti Vibhute, instructed by Khaitan and Jayakar, for the Appellant; R.V. Desai and R.B. Pardeshi, for the Respondent

Judgement

R.M. Savant, J.—By this Petition, filed under Article 226 of the Constitution of India, the Petitioners are challenging the order dated 28.11.1997 passed by the Respondent No. 2 herein i.e. the Commissioner of Central Excise, Pune-I, as also the order dated 21.05.2004 passed by the Respondent No. 3 herein i.e. the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in the facts and circumstances more appropriately mentioned herein under.

2. The Petition principally raises a question as to whether elongated period mentioned u/s 11A of the Central Excise and Salt Act, 1944 (herein after referred to as "the CESA Act 1944"), is available to the Respondent No. 1 herein for demanding central excise duty for the goods cleared by the Petitioner during the period from December 1992 to 15th March 1995.

3. The facts involved in the above Petition can be stated in a nutshell thus:

The Petitioner No. 1 is a Public Limited Company engaged in manufacturing

forgings which are used in the manufacture of Shfats, Gear, Pinion, Lever Coupling etc. The Petitioners in connection with the said manufacture had filed Classification Lists with the Respondents in respect of the said products claiming exemption under Notification No. 223/88 dated 23rd June 1988. The Petitioners had initially classified the said products as other articles of iron and steel under Head 7326.90 of the Central Excise Tariff Act, 1985 (hereinafter referred to as the "Tariff Act") and later on under Chapter 84 of the said Tariff. The manufacturing process involved in the manufacture of the said forge articles inter alia involves heating and beating of material (Ingots). Thereafter the process of machining is undertaken for which the Petitioners used to send the said goods to the job workers along with a drawing which is sent to the job workers with drawing is known as "proof machined job" for the guidance of the job workers. If the excess material is removed and the resultant shape is achieved, the Petitioners thereafter carry out proof machining and supply the forging to their customers. It is the case of the Petitioners that their buyers at their end subject the goods to various precision machinery process like grooving, teeth cutting, gear hobbing, key way machining, finish boring, finished threading, etc depending upon the part which is to be brought into existence and it is only thereafter, according to the Petitioners, that the forgings which are clear acquire a shape, precision, size and essential characteristic for being fit for use as a part of a machine.

4. In so far as the present Petition is concerned, it is required to be noted that a Central Excise Audit was conducted at the Petitioners' factory on 6th September 1993 and 1st November 1995 and a Central Excise Revenue Audit was conducted on 2nd September 1994. It appears that pursuant to the said audit, certain audit queries were raised by the audit party and after the said audit, the Petitioners by a letter dated 6th September 1993 inter alia dealt with the audit objections raised by the audit party and recorded that the officers of the audit party had verified the various processes and records of the Petitioners relating to the Purchase order, Despatch Gate Passes, Job Workers etc. By a further letter dated 5th July 1995, the Petitioners informed the Superintendent in the office of the Respondent No. 2 of the debiting by them in the RG-23A Register against scrap generation at the sub-contractor's end where the material was sent for processing for the period January 1994 to March 1995. It appears that during the period 1994-95, the Excise Department also recorded the statements of the various officers of the Petitioner No. 1 including its Managing Director.

5. Thereafter the Respondents issued show cause notice dated 29th March 1996 to the Petitioners. The gravaman of the allegations in the said show cause notice was that the Petitioners had wrongly classified the goods under Entry CH.7326.19 whereas the goods were liable to be classified under Entry CHS.8483.00 of the Central Excise Tariff. It was further alleged that the Petitioners were not entitled to the exemption under Notification No. 223/88 dated 23rd June 1988. In so far as aspect of limitation is concerned, the Department had justified for invoking extended period of five years u/s 11A of

the CESA Act, 1944 on the ground that the Petitioner had misdeclared the products as "proof machined" and, the misstatement and suppression of facts appear to be totally intentional. It was further averred in the said show cause notice that the Petitioner has intentionally mis-stated/suppressed the facts in order to evade payment of duty and therefore the provisions of Section 11A of the CESA Act, 1944 were applicable. The Petitioners were therefore called upon to show cause as to why Differential Central Excise duty amounting to Rs. 20,05,042/- on the goods valued at Rs. 2,89,80,132/- cleared by the Petitioners during the Period December 1992 to 15th March 1995 should not be demanded and recovered from them and the differential duty amounting to Rs. 7,05,747/- involved in the clearances of scrap of iron and steel falling under CH.7204.30 of the Tariff during the period from December 1992 to 15th March 1995 should not be demanded and recovered from them.

6. The Petitioners replied to the said show cause notice by their letter dated 29th August 1996. Whilst denying the allegations as regards mis-declaration by them and their liability to pay differential duty and the penalty as demanded by the said show cause notice, the Petitioners raised a fundamental issue as regards maintainability of the said show cause notice on the ground that the demand which is the subject matter of the said show cause notice was issued beyond the period of limitation as prescribed in Section 11A of the CESA Act 1944. The Petitioners also denied suppression of any fact as alleged in the said show cause notice as there is no conscious or deliberate withholding of information by them which is necessary to invoke larger limitation of five years.

The said show cause notice was adjudicated upon by the Respondent No. 2 and by the impugned order in original dated 28th November 1997, the Respondent No. 2 confirmed the demand of the Central Excise duty amounting to Rs. 27,10,789 and imposed a penalty of Rs. 5,00,000/- on the Petitioner No. 1 under the relevant provisions of CESA Act, 1944 and the Central Excise Rules. However, the Respondent No. 2 granted an option to redeem the same on payment of fine of Rs. 1,00,000/- within three months of the receipt of the said order.

7. Aggrieved by the order in original dated 28th November 1997, the Petitioners carried the matter in Appeal before the Customs Excise and Service Tax, Appellate Tribunal West Zonal Bench, Mumbai by filing an Appeal which numbered as E/628/89 Bom. The said Appeal was rejected by the Tribunal by its order dated 21st May 2004 thereby confirming the order of the Respondent No. 2. As indicated above, it is against the said two orders that the instant Petition has been filed.

8. We have heard the learned Counsel for the parties. On behalf of the Petitioners the learned Counsel Mr. Sutar whilst justifying the classification made by the Petitioners of the goods in question under heading CH 7493.90 however submitted that fundamentally the issue that arises in the instant Petition is, as to whether the extended period of limitation as prescribed by the provisio of Section 11A of the CESA Act, 1944 is available to the Respondents. The learned Counsel

for the Petitioners submitted that considering the fact that audit of the Petitioners factory was carried out on three occasions between 1993 and 1995 which covered the period in question, it cannot be said that the Department was unaware of the activities of the Petitioners. The learned Counsel for the Petitioners further submitted that both the authorities below though have concurrently held that the Petitioners are liable to pay duty and penalty have not recorded a finding that there has been mis-statement or fraud which would entitle the Respondents to the extended period of limitation u/s 11A of the CESA Act, 1944. The learned Counsel for the Petitioner relied upon the judgment of the Apex Court reported in Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, in the matter of Collector of Central Excise, Jaipur v. Rajasthan Textile Mills and Sarabhai M. Chemicals Vs. Commissioner of Central Excise, Vadodara, . The said judgments of the Apex Court were relied upon by the learned Counsel for the Petitioners to buttress his submission that only in the event that the ingredients mentioned in Section 11A of the CESA Act, 1944 are available then the Respondents would be entitled to the extended period of limitation. However, according to the learned Counsel for the Petitioners, the facts of the present case do not meet the requirements of Section 11A of the CESA Act so as to entitle the Respondents to the extended period of limitation.

9. Per contra, it was the submission of the learned senior Counsel for the Respondents Mr. Desai that the show cause notice spelt out the misstatement of facts on the basis of which the Petitioners had obtained the benefit of exemption under Notification No. 223/88. The learned senior Counsel for the Respondents submitted that the fact that the Petitioners had paid duty after the audit team had pointed out the deficiency in payment of duty by the Petitioners ex-facie demonstrated that the Petitioners had mis-declared the goods so as to avail of the benefit of lesser duty. The learned senior counsel further submitted that though the order in original as well as the order of the Tribunal do not contain a finding as regards the mis-statement of facts etc. since the said orders have confirmed the show cause notice wherein the said allegation finds place it would have to be held that the authorities i.e. the Respondent No. 2 and the Tribunal have confirmed that there was a mis-statement of fact by the Petitioners. The learned senior Counsel for the Department sought to rely upon the judgment of the Division Bench of this Court reported in 2010 (249) E.L.T. 31 (Bom) in the matter of Commissioner of Central Excise, Raigad v. Ramply (India) Ltd. as also the judgment of the Apex Court reported in Mercantile Company Vs. Commnr. of Central Excise, Calcutta, . The learned senior Counsel relied upon Para-30 of the said judgment to contend that though the Petitioners had addressed the said letters as mentioned in the instant Petition to the Respondents, merely on the said ground it cannot be said that knowledge can be attributed to the Respondents of the activities of the Petitioners. Para-30 of the said Judgment is reproduced herein under:

30. On the question of limitation, the submission made by the counsel for the

appellant that the letter dated 8th March, 1994 disclosed the entire facts to the authorities regarding the items manufactured by the appellant cannot be accepted. The letter dated 8th March, 1994 did not disclose the entire facts. The letter did not disclose the situation in its proper perspective. The authorities were not informed about the actual activity undertaken by the appellant. The authorities were also not informed that a new name has been given to the products. The applicability and functions of the new products was also not clearly stated. The new and distinct product which had come into existence was sold and known in the commercial world under a separate name having different and distinct qualities. The appellant had not produced sample of the subject goods along with the letter. For the afore-stated reasons, it cannot be held that the authorities had full knowledge about the activities undertaken by the appellant.

10. We have heard the learned Counsel for the parties and have given our anxious consideration to the rival contentions.

11. Though the issue of classification has been raised by the Respondents and though there is an allegation of the Respondents that there has been mis declaration by the Petitioners, since the Petitioners have raised issue as regards extended period of limitation u/s 11A of the CESA Act and whether the same is available to the Respondents, in our view, since the said issue goes to the root of the matter, is therefore, required to be addressed at the outset. It would apposite to reproduce Section 11A of the CESA Act, 1944 which is as under:

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 willful mis-statement or suppression of facts, or contravention of any 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 Sub-section shall have effect, as if for the words one year, the words "five years" were substituted.

(emphasis supplied)

12. As posited in the said section that only in the eventuality of the excise duty having not been levied or paid or has been short levied or short paid or

erroneously refunded by the reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of the CESA Act, 1944 or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, that the period of one year shall be substituted by the period of limitation of five years. In the said context it would be advantageous to refer to the judgments of the Apex Court cited on behalf of the Petitioners. In so far as the judgment in the case of Collector of Central Excise v. Chemphar Drugs & Liniments (Supra) is concerned, 1 Paras 8 and 9 of the said judgment are material and are reproduced herein under:

8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to Sub-section HA of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the the Tribunal itself as being based on no evidence.

9. In that view of the matter and in view of the requirements of Section 11A of the Act, the claim had to be limited for a period of six months as the Tribunal did. We are, therefore, of the opinion that the Tribunal was right in its conclusion. The appeal therefore fails and is accordingly dismissed.

In so far as the judgment in the case of Collector of Central Excise, Jaipur v. Rajasthan Textile Mills (Supra) is concerned, Para-4 of the said Judgment is

material and is reproduced herein under:

4. We have already mentioned that there was nothing in the show cause notice dated February 7, 1983 to indicate that the conditions prescribed in the proviso to Section 11A of the Central Excise Act for invoking the extended period of limitation were present. In the circumstances, it must be held that the proceedings initiated against the respondent on the basis of the show cause notice dated February 19, 1983 relating to payment of duty on single yarn manufacturing prior to February 28, 1983 was barred by limitation and were rightly dropped. On that view, it is not necessary to go into other questions raised in the appeal. The appeal is, therefore, dismissed. No order as to costs.

In so far as the judgment in the case of *Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara* (supra) is concerned, para 21 of the said judgment is material and is reproduced herein under:

21. A bare reading of the notification No. 234/86 indicates that the exemption in favour of bulk drugs falling under chapter 28 or chapter 29 of the schedule annexed to the Central Excise Tariff Act, 1985 is not an unconditional exemption. The said notification had a proviso. Under the proviso, the manufacturer was required to furnish to the Competent Authority a certificate from the Drugs Controller to the effect that the drug for which exemption was claimed was a "bulk drug" within the meaning of the expression "bulk drug" given in the explanation to the notification and, which was normally used for diagnosis, treatment etc. in human beings or animals and used as such or as an ingredient in any formulation. The explanation to the notification defines "bulk drugs" to mean any chemical, biological or plant product, normally used for diagnosis, treatment etc. in human beings or animals and used as such or as an ingredient in any formulation. The question is -whether in the said exemption notification, end use of the bulk drug was made imperative. According to the appellant, mere production of the certificate from the Drugs Controller was sufficient to attract the benefit of the exemption notification. We do not find any merit in this argument. The bulk drug is defined u/s 2(a) of the Drugs (Prices Control) Order, 1979 to mean any substance including pharmaceutical, chemical, biological or plant product which is used as such or as an ingredient in any formulation. A substance may have several uses other than in drugs/pharmaceuticals. The eligibility for exemption under notification No. 234/86-CE dated 3.4.1986 requires the substance (sorbitol solution) to be actually used in manufacture of drugs/medicines/pharmaceuticals. In other words, sorbitol solution may have different uses. However, sorbitol solution got the benefit of exemption only when it was used actually in manufacture of drugs/medicines/pharmaceuticals. The exemption was given to a drug. It was not given to a sorbitol solution, which has uses other than in pharmaceuticals. A sorbitol solution could be called a drug for the purposes of exemption only when it was actually used as drug or as an ingredient in any formulation. The notification No. 234/86 gave exemption to only those substances, which are, in reality, drugs and not to the substances,

which are not drugs even though they are capable of acting as drugs. Therefore, the exemption was extendable to sorbitol solution, cleared by the appellant, when used in the manufacture of drugs, medicines, pharmaceuticals. By diverting a specified quantity of sorbitol solution etc. to liquor units, cigarettes units, soap units etc., the appellant lost the benefit of exemption and in the circumstances, the department was right in raising the afore stated demand.

13. As can be seen from the reading of the said judgments the underlying thread of the said judgments is that for the Department to have benefit of extended period of limitation, the requirements of Section 11A of the CESA Act have to be satisfied inasmuch as there has to be a willful mis-statement or suppression of facts or fraud or contravention of any of the provisions of CESA Act, 1944 or of the rules made thereunder. It would be therefore have to be seen whether in the instant case the requirements for availing of the benefit of the extended period five years is available to the Respondents.

14. It is an undisputed fact that in so far as the Petitioners are concerned, audit of the Petitioners' factory was carried out on three dates i.e. 6th September 1993, 1st November 1995 and 2nd September 1994. The Petitioners vide their letter dated 6th September 1993 have recorded the visit of the audit party and have also replied to the audit objections raised by the said audit party in respect of scrap generated and have informed the authorities that they were debiting Rs. 80,000/- at the rate of Rs. 1,000/- per Metric Tonne and that they were also debiting differential duty totaling to Rs. 63,318/- in respect of Mill Rollers which was debited under PLA dated 3rd September 1993. Therefore, the Petitioners vide their letter dated 5th July 1995 have informed the Superintendent of the Respondents that they had debited Rs. 2,08,760/- against the Scrap Generation at Sub-contractor end, where material is sent for processing under Rule 57F(3) for the period January 94 to March 95. Therefore by the said letters the Petitioner had made the Respondents aware of the payment of duty on the scrap as well as on the Mill Rollers and considering the fact that the Respondents had carried out audit on the dates mentioned herein above, the said fact is conclusive in so far as the knowledge of the Petitioners' activities to the Respondents is concerned. Therefore, in our view, in the light of the audit carried out by the Respondents of the Petitioners' factory and the correspondence that is addressed by the Petitioners to the Respondents, it cannot be said that the Petitioners have mis-stated the facts or there is a fraud practiced by the Petitioners.

15. Now coming to the show cause notice and the impugned orders in the present Petition, no doubt in the show cause notice there is a specific averment in Para 18 of the Annexure-I of the said show cause notice that there is mis-statement and suppression of facts and appears to be totally intentional on the part of the Petitioners. However, coming to the 1st impugned order dated 28th November 1997, whilst passing the said order, the Respondent No. 2 has not recorded any finding in that behalf. Para-9 of the said order of the Respondent No. 2, according to us, wherein a finding is recorded against the Petitioners, is

relevant. The said para-9 is reproduced herein under:

9. There is no force in their submissions that the extended period of time for issuing the show-cause-notice as provided u/s 11A(1) of the Central Excise Act is not invocable in their case as they have filed classification list, price list, etc. It is not in dispute that they had claimed the benefit Notification No. 223/88 even though the process carried out by them were not mentioned in the said notification. It was not mentioned by them in their classification list that they were carrying out the process other than mentioned in Notification No. 223/88. It has been contended by them that in their application for removal of goods under Rule 57F(3) they had mentioned the process of turning, milling there. Mention of these processes in the application for removal of goods under Rule 57F(3) cannot amount to bring to the knowledge of the Department that they are carrying out these processes and claiming concessional rate of duty under Notification No. 223/88. Any reference to anything anywhere will not put the Department on notice as their application under Rule 57F(3) is dealt with for a specific purpose and not for the purpose of classification, etc. It is not their case that they have mentioned these processes in their classification list. Further, their claim itself that in their 57F(3) application, they have mentioned in clear manner various processes like turning, milling, grinding, proof machining, etc. is wrong. Against the column, Nature of Manufacture/Process operations to be done, they had simply mentioned "machining, checking, grooving, etc." The statement made by them in their reply to the show-cause-notice is therefore absolutely wrong. It has also been claimed by them that the Department was informed of the fact of generation of scrap at job worker's end as they have mentioned in their 57F(3) application, "NO", in answer to the question whether scrap, if any, arising during the manufacturing process would be returned to the factory or not. They have nowhere mentioned that the duty would be paid by them at the job process of inputs in respect of which credit has been taken may be removed on payment of duty as if such waste is manufactured in the factory. Once M/s. Rajkumar Forge Ltd. has availed of MODVAT credit on the inputs the duty is payable by them on the scrap which is dutiable under the Central Excise Tariff. In view of this, they are liable to pay the duty on scrap for the extended period.

The Respondent No. 2, after recording that any reference to anything anywhere will not put the Department on notice, has not thereafter recorded that there is mis-statement of facts by the Petitioners.

16. In so far as order passed by the Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai dated 21st May 2004 is concerned, Para-5 of the said order is material for the purpose of the said issue and is reproduced herein under:

5. The issue of time bar pleaded has been dealt with by the Commissioner. The non mention of the alleged process on classification list which were in fact done would contribute deliberate misdeclaration. The fact of mentioning the same in Rule 57F(3) challans cannot absolve the appellant. The mere reading of the

finding in bar of limitation as arrived by the Ld. Commissioner in para 9 of the impugned order confirms the view that the plea of limitation is required to be rejected. We order the same.

The Tribunal has accordingly confirmed the order of the Respondent No. 1 - Commissioner in so far as the said issue of time bar is concerned and, has thereafter observed that the view of the Commissioner-Respondent No. 2 on the plea of limitation is required to be rejected.

17. Thus, both the Respondent No. 2 as well as the Tribunal have failed to record a clear finding and thereby a conclusion that there has been a mis-statement of facts by the Petitioners in classifying the goods and claiming the exemption of duty. Both the authorities have therefore failed to record that the requirements mentioned in Section 11A of the CESA Act, which are sine quo non for the benefit of the extended period of limitation, are present in the instant case.

18. In so far as the judgment cited on behalf of the Department by the learned senior Counsel is concerned, in the facts of the case in *Mercantile Co. v. Commissioner of Central Excise Calcutta* before the Apex Court, that the Apex Court recorded a finding that the authorities cannot be said to have full knowledge about the activities undertaken by the Appellant in the said case. In so far as judgment of the Division Bench of this Court in the case of *Commissioner of Central Excise Raigad v. Ramply (India) Ltd.* is concerned, the Division Bench of this Court relied upon the judgment of the Apex Court in *Commissioner of Central Excise v. Vora Products* reported in 2008(221) E.L.T. 321 wherein the Apex Court, in the facts of the said case, an assessee was using the brand name of another and had not disclosed the same in the classification list and had contended that it was done in ignorance of law, has held that the predicates were satisfied and that the assessee was liable. Thus the judgment cited on behalf of the Respondents were revolving on the facts of the respective cases which were before the Apex Court.

19. In the instant case, as indicated herein above, on the basis of the material on record, it cannot be said that there was any mis-statement of facts by the Petitioners as the Department was fully aware of the activities of the Petitioners. The said material being before the Respondent No. 2 as well as before the Tribunal and, in view of the fact that the Respondent No. 2 as well as the Tribunal have not recorded a finding as regards the predicates for availing of the extended period of limitation, in our view, both the impugned orders are required to be set aside and are accordingly set aside.

20. Since we have held in favour of the Petitioner on the point of limitation, it is not necessary for us to go into the aspect of classification of goods in question. For the aforesaid reasons, the above Petition is allowed. Rule is accordingly made absolute in terms of prayer Clause (a).