
(2010) 07 KL CK 0078
In the High Court Of Kerala
Case No : Cus. Appeal No. 28 of 2009

The Commissioner of Customs	Vs	APPELLANT
Cochin Minerals and Rutils Ltd.		RESPONDENT

Date of Decision : 28-07-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11AC
Customs Act, 1962 — Section 130

Citation : (2010) 180 ECR 188

Hon'ble Judges : J. Chelameswar, C.J.; P.N. Ravindran, J

Bench : Division Bench

Advocate : John Varghese, SC, for the Appellant; E.K. Nandakumar, for the Respondent

Final Decision : Dismissed

Judgement

J. Chelameswar. C.J.

1. This is an appeal by the Revenue u/s 130 of the Customs Act, 1962 aggrieved by an order in Appeal No. Excise/840/04 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore.

2. The respondent Company is carrying on the activity of manufacture of Synthetic Rutile and Ferric Chloride. During the years 1996-97, 1997-98 and 1998-99 the respondent Company cleared 1003.75 Metric Tons of Synthetic Rutile concentrate valued approximately at Rs. 2.25 crores to Domestic Tariff Area (DTA) without payment of duty under the Central Excise Act which is now estimated at Rs. 18,07,997/-. The respondent did so because they claimed the benefit of notification No. 4/97 CE dated 1.3.1997. The said notification admittedly grants complete exemption of the duty payable under the provisions of the Central Excise Act read with the Central Excise Tariff Act to ores falling under Chapter 26, Tariff Items 2601 to 2617 of the Central Excise Tariff Act. The said claim of the respondent was initially accepted by the department.

3. However, by a show cause notice dated 8.7.1998 the respondent was called upon to explain as to why the duty of the central excise payable should not be recovered from the respondent. The said show cause notice is purportedly issued in exercise of the powers u/s 11A(1) of the Central Excise Act. Subsequently the notice was withdrawn by another communication dated 4.8.1998 and a fresh show cause notice dated 12.10.1998 was issued purporting to invoke the extended period of limitation provided under the proviso to Section 11A(1) of the said Act and also proposing to impose penalty u/s 11AC, etc. Eventually, after hearing the objections of the respondent, by order dated 7.6.2004 (marked as Annexure H) in the instant appeal, a final decision was taken not only to recover the excise duty on the product of the respondent cleared during the relevant period indicated in the said order along with interest and penalty also.

4. Aggrieved by the said decision, the respondent carried the matter in appeal to the Customs, Excise & Service Tax Appellate Tribunal. The Tribunal by the order under appeal dated 30th June, 2006 allowed the appeal of the respondent holding in substance that the extended period of limitation provided under the proviso to Section 11A(1) of the Central Excise Act could not have been invoked by the appellant in the facts and circumstances of the case. However, the Tribunal opined that the demand of tax prior to 12.10.1998 (the date of the show cause notice) has to be redetermined by the adjudicating authority whereas the demand for the remaining period was held to be illegal. Hence the present appeal.

5. Section 11A of the Central Excise Act provides for recovery of duties either not levied or not paid or short-levied or short-paid or erroneously refunded by the department. Such a recovery is permissible only after following the procedure prescribed under Sub-section (1) of Section 11A of the Act if the department issues a notice to the assessee within a period of six months (at the relevant point of time and now one year with effect from 12.5.2000) from the relevant date, varying upon the factor whether it is a case of non levy or short levy or refund, etc. However, the proviso to the said Section grants an enlarged period of limitation of five years in the various contingencies contemplated under the said proviso. Section 11A(1) of the Act and its proviso read as follows:

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 sub-section shall have effect, as if 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.

6. It can be seen from the language of the proviso to Section 11A(1) of the Act that the extended period of limitation is available to the department where the non-levy, short-levy, etc. which resulted in a loss to the Revenue is as a consequence of any fraud, collusion or any wilful mis-statement or suppression of facts with intent to evade payment of duty.

7. The case of the appellant is that there was wilful and deliberate mis-statement of facts by the respondent while claiming the benefit of the exemption notification referred to earlier. According to the appellant, the respondent who cleared Synthetic Rutile claimed that such a material is an "ore" within the meaning of the said expression occurring under the exemption notification, whereas according to the appellant, the material is only a "concentrate", but not an "ore".

8. We may point out that under the Central Excise Tariff Act, the product of the respondent is classified under Chapter 26, item 2614 which reads as follows:

2614 Titanium ores and concentrates 2614 00 Titanium ores and concentrates:
2614 00 10 Limenite, unprocessed kg. 10% 2614 00 20 Limenite, upgraded (Beneficiated limenite including limenite ground).... kg. 10% Rutile: 2614 00 31 Rare earth oxides including rutile sand.... kg. 10% 2614 00 39 Other kg. 10% 2614 00 90 Other kg. 10%

9. It can be noticed from the above, that Rutile is also part of the Chapter. Though the Chapter deals with both ores and concentrates, neither of the expressions is defined under the Act. According to the learned counsel for the appellant, the distinction between ores and concentrates depends upon the chemical composition of the material. As a matter of fact, in the instant case, when recovery proceedings were initiated against the respondent, the product of the respondent was subjected to chemical analysis and on the basis of the opinion of the Chemical Analyst the department reached the conclusion that the product of the respondent is a "concentrate", but not an "ore".

10. The learned counsel for the appellant therefore very strenuously argued that the Tribunal erred in allowing the appeal of the respondent herein. The learned counsel placed reliance on the following judgments of the Supreme Court. In Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of

Central Excise, Chandigarh-I, at paragraph 10, the Supreme Court considered the meaning of the expression "suppression" occurring under the proviso to Section 11A(1) of the Central Excise Act and held as follows:

10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation u/s 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

Similarly, in Nestle India Ltd. Vs. Commr. of Central Excise, Chandigarh, , at paragraph

17. the Supreme Court considered the question as to when the extended period of limitation is invocable and held as follows:

17. On the question as to whether the Department was entitled to invoke the extended period of limitation, we are in agreement with the view expressed by the Tribunal that the extended period of limitation was not invocable in this case for two reasons. Firstly, the assessee has been clearing the said intermixture of vitamins for last more than twenty years prior to the issuance of show cause notice. In fact, during adjudication, the assessee offered demonstration to the Department. The Department did not avail of that opportunity to find out whether there is manufacture in the first instance, conceptually. Secondly, as held in the judgment of this Court in the case of Padmini Products Vs. Collector of Central Excise, Bangalore, , as well as in the case of Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, , extended period of limitation is applicable only when there is some positive act other than mere inaction or failure on the part of the manufacturer. There must be conscious or deliberate withholding of information by the manufacturer to invoke larger period of limitation. In view of the aforesaid two decisions, we see no infirmity in the decision rendered by the Tribunal on the question of extended period of limitation.

Coming to the third judgment, i.e. Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, , at paragraph 11, the Supreme Court held as follows:

In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priori the period for which duty can be demanded gets extended to five years.

11. An examination of the above three judgments makes it abundantly clear that it is not in every case where there is short levy or short payment or non levy, etc. that the extended period of limitation is made available to the department for recovery of the amount of tax which escaped assessment. It is only in those cases where there is wilful and deliberate suppression of the fact, such extended period of limitation is available to the department. An "element of deception or malpractice" is a necessary concomitant of wilful and deliberate suppression of fact. The Supreme Court also opined that in order to invoke the extended period of limitation under the proviso to Section 11A(1) of the Act, there must be some positive act other than mere inaction or failure on the part of the manufacturer.

12. In the instant case, we do not see any such wilful or deliberate suppression of the fact. We are of the opinion that whether the respondent is entitled for the benefit of the exemption notification or not depends on the interpretation of the exemption notification. The notification admittedly seeks to exempt ores from the central excise liability. The product of the respondent is classified, as already noticed, under Chapter 26, item 2614 under the title Titanium ores and concentrates. What constitutes an "ore" and what constitutes a "concentrate" is not statutorily described. Even according to the department, it is the opinion of the Chemical Analyst which made them to believe that the product of the respondent is not an "ore" but a "concentrate". If a conclusion is dependent upon the opinion of an expert (like that of the Chemical Analyst), but not discernible by an ordinary man, failure to mention such a conclusion, in our view, cannot be said to be tantamount to suppression of facts. It may also be remembered that the view of the respondent that his product is only "ore", was initially found favour with even by the department, but the department subsequently changed its view on the said question.

We do not see any reason to interfere with the order under appeal. The Customs Appeal is therefore dismissed at the admission stage.