Collector Of Central Excise, Hyderabad vs Chemphar Drugs & Liniments, Hyderabad on 14 February, 1989

Equivalent citations: 1989 AIR 832, 1989 SCR (1) 711, AIR 1989 SUPREME COURT 832, (1989) 1 JT 417 (SC), (1990) 184 ITR 224, 1989 (1) JT 417, (1989) 1 KER LT 59, 1989 29 STL 186, (1989) 40 ELT 276, (1989) 21 ECC 66, (1989) 21 ECR 182, 1989 (2) SCC 127

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:
COLLECTOR OF CENTRAL EXCISE, HYDERABAD.

Vs.

RESPONDENT:
CHEMPHAR DRUGS & LINIMENTS, HYDERABAD.

DATE OF JUDGMENT14/02/1989

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1989 AIR 832 1989 SCR (1) 711
1989 SCC (2) 127 JT 1989 (1) 417
1989 SCALE (1)436
CITATOR INFO :
RF 1989 SC2278 (12)

ACT:
Central Excise and Salt Act, 1944/Central Excise Rules, 1944: Section 11A/Rules 10 and 173 Q--Manufacturer of patent and proprietary medicines--Levy and demand of excise duty--When arises-Limitation period of five years for rais-ing demand--Condition for applicability.

HEADNOTE:
The respondent-firm manufactured patent and proprietary (P & P) medicines failing under T.I. 14E and also pharmaco-poeial preparations falling under T.I. 68 of the Central

Excise Tariff of an aggregate value of Rs.20,59,338.60 and cleared the same during the period 1.4.79 to 31.3.80 without payment of duty, availing the benefit of exemption of excise duty under Notification No. 80 of 1980. The respondent also cleared, during the period from 1st April, 1980 to 29th October, 1980 (P & P) medicines failing under T.I.14E valued at Rs.4,32,050.09.

The respondent filed a declaration for exemption, under Notification No. 71 of 1978 dated 1.3.1978, and furnished particulars of only the value of P & P medicines manufactured and cleared during the preceding financial year 1979-80 and did not furnish the particulars of the value of the goods under Tariff Item 68 during that financial year. The manufacturer also did not file any declaration under Notification No. 111 of 1978 dated 9.5.1978, claiming exemption from the licensing control. However, on July 30, 1980 the firm filed a classification list in respect of P & P medicines claiming exemption under Notification No. 80/80.

The appellant issued a show cause notice to the respondent to explain as to why excise duty in respect of patent and proprietary medicines manufactured and cleared by it should not be demanded under proviso (a) to Rule 10(1) of the Central Excise Rules and why penalty should not be imposed under Rule 173Q of the Central Excise Rule, 1944 for having cleared the goods without payment of duty in contravention of Rule 173Q(a) and (d) of the Rules. On receipt of reply, the appellant held the respondent to be ineligible for the benefit of the

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two notifications and demanded duty in respect of the goods cleared by them for the period 1.4.1980 to 29.10.80. He also held that in view of the respondent's failure to reveal correct position, the firm was liable to pay the duty, and that the time limit for the recovery of the duty under Rule 10 (Section 11A) of the Central Excise Rules would run for five years.

The respondent filed an appeal before the Tribunal contending that the demand for the period beyond six months from the receipt of the show cause notice was time-barred inasmuch as there was no suppression or mis-statement of facts by the appellant with a view to evade payment of duty. The Revenue's plea was that there was suppression and/or misdeclaration and/or wrong information furnished in the declaration itself. Hence the appeal by the Revenue.

Dismissing the appeal,

HELD: 1.1 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-s. 11A of the Act, it has to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement 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, beyond the period of six months. [717A-C]

1.2 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. [717C-D]

In the instant case 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 the assessee 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

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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. The findings of the Tribunal have not been challenged before this Court. [717D-F]

The Tribunal also found that the facts of case did not warrant any inference of fraud. [717D]

Having regard to these, and in view of the requirements of s. 11A of the Act, the claim had to he limited to a period of six months, prior to the date of issue of show cause notice. The Tribunal was right in its conclusion. [717G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1632 of 1988.

From the Order dated 8.1.1988 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. SD SB/T 716/81-C (Order No. 17/88-C.) A.K. Ganguli, A. Subba Rao and Mrs. Sushma Suri for the Appellant.

A.N. Haksar, R. Karanjawala, Ms. M. Arora and Mrs. M. Karanjawala for the Respondent.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. This appeal is under section 35(L)(b) of the Central Excises and Salt Act, 1944 (herein- after called 'the Act') against the order dated 8th January, 1988 passed by the Customs, Excise & Gold (Control) Appel- late Tribunal. The issue involved in this appeal was whether in the facts and the circumstances of the case, the

Tribunal was legally justified in restricting the demand of duty to six months prior to the date of issue of show-cause notice, particularly in a case where longer period was invoked on the ground of suppression of information in the declaration furnished by the respondent.

The respondent manufactured patent and proprietary (P & P) medicines falling under T.I. 14E and also pharmacopoeial preparations falling under T.I. 68 of the Central Excise Tariff of an aggregate value of Rs.20,59,338.60 and cleared during the period of 1.4.1979 to 31.3.1980, the same without payment of duty, availing the benefit of exemption notification No. 80/80. Under the provisions of sub-clause (ii) of clause 2 of notification No. 80/80 dated 19th June, 1980 and sub-clause

(iii) of clause (a) of notification No. 71/78 dated 1.3.1978 the manufacturer would not be eligible for exemption under the two notifications in respect of clearance of patent or proprietary medicines from 1st April, 1980 since the notifi- cation would not apply to a manufacturer who manufactures excisable goods falling under more than one item of the 1st Schedule of the Act, and the aggregate value of the clear- ness of all such excisable goods by the manufacturer or on his behalf are cleared for home consumption from one or more factories during the preceding financial year had exceeded Rs.20 lakhs.

The factory had cleared during the period from 1st April, 1980 to 29th October, 1980 (P & P) medicines falling under T.I. 14E valued at Rs.4,32,050.09. The central excise duty payable on the goods removed was Rs.55,302.01. The respondent filed a declaration for exemption under notifica- tion No. 71/78 dated 1.3.1978, and furnished particulars of only the value of P & P medicines manufactured and cleared by it during the preceding financial year i.e. 1979-80, and the respondent did not furnish the particulars of the value of the goods cleared under Tariff item 68 during the finan- cial year 1979-80. It was noticed that the manufacturer did not file any declaration under Notification No. 111/ 78 dated 9.5. 1978 claiming exemption from the licensing con- trol.

However, on 30th July, 1980 the firm filed a classifica- tion list in respect of P & P medicines claiming exemption under notification No. 80/80. A show-cause notice was issued to the respondent who was asked to explain as to why excise-duty in respect of Patent & Proprietary medicines manufactured and cleared by it should not be demanded under proviso (a) to Rule 10(1) of the Central Excise Rules and why penalty should not be imposed on it under rule 173Q of the Central Excise Rules, 1944 for having cleared the goods without payment of duty in contravention of Rule 173Q (a) and (d) of the Central Excise Rules.

After submission of the reply by the respondents, the Collector of Central Excise held the respondents to be ineligible for the benefit of the two notifications and therefore duty was demanded from them in respect of the goods cleared by them for the period 1.4.1980 to 29.10. 1980. The Collector Was of the view that in view of the respondents' failure to reveal the correct position, they were liable. The Collector was of the view that the time limit under rule 10 (section 11A) would run for 5 years. The relevant portion of section 11A of the Act is as follows:

> "(11-A). Recovery of duties not levied or not paid or short-levied or short-paid or errone- ously refunded.--(1) when any duty of excise has not been levied or paid or

> has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months 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 misstatement 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 "Central Excise Officer", the words "Collector of Central Excise", and) for the words "six months", the words "five years"

were substituted."

The respondent filed an appeal before the Tribunal. The Tribunal considered the matter and noted that the appel- lant's case was that the demand for duty for the period beyond six months was time barred; and the respondent's case was that the demand for the period beyond 6 months from the receipt of show-cause notice, was time barred inasmuch as there was no suppression or misstatement of facts by the appellant with a view to evade payment of duty. In support of its claim the respondent produced classification list approved by the authorities during the period 1978-1979, and also produced extracts from the survey register showing that the officers had been visiting its factory from time to time and also taking note of the previous goods manufactured by the respondent. The plea of the revenue was that there was suppression and/or mis-declaration and/or wrong information furnished in the declaration itself. The Tribunal noted the facts as follows:

> "We observe it is not denied by the Revenue that the appellants had been submitting their classification lists from time to time showing the various products manufactured by them including those failing under 14E and 68 also these containing alcohol. The officer who visited the factory as seen from the survey register at the factory also took note of the various products being manufactured by the appellants. It cannot be said that the appel- lants had held back any information in regard to the range and the nature of the goods manufactured by them. The appellants have maintained that the value of the exempted goods under T.I. 68 and also value of medi- cines containing alcohol, according to their interpretation, were not required to be in- cluded for the purpose of reckoning of the total excisable goods cleared by them. There is nothing on record to show that the appel- lants non-bonafidely held back information about the total value of the goods cleared by them with a view to evade payment of duty. Their explanation that it was only on the basis of their interpretation that the value of the exempted goods were not required to be included that they did not include the value of the exempted goods which they manufactured at the relevant time and failing under T.I. 68 is acceptable in the facts of that case. The Departmental authorities were in full knowl- edge of the facts about manufacture

of all the goods manufactured by them when the declara- tion was filed by the appellants. That they did not include the value of the product other than these falling under T.I. 14E manufactured by the appellants has to be taken to be within the knowledge of the authorities. They could have taken corrective action in time. We therefore find there was no warrant in invok- ing longer time limit beyond six months avail- able for raising the demand. So far as the demand for the period within six months reck- oned from the date of receipt of the show cause notice is concerned, we observe that the appellant's case is that value of the goods under 68 was not required to be included but the Revenue's plea is that only value of the specified goods under notification No. 71/78 and 80/80 was not required to be excluded."

On the aforesaid view the Tribunal came to the conclu- sion that the demand raised on this for a period beyond 6 months was not maintainable.

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 sustain- able beyond a period of six months and up to a period of 5 years in view of the proviso to subsection 11A 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 erro- neously 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 manufactur- er or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is re- quired before it is saddled with any liability, beyond 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 provi- sion 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 hereinbe- fore 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 exempt- ed goods were not required to be included and these did not include the value of the exempted goods which they manufac- tured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Depart- ment had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the decla- ration 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 Tribunal itself as being based on no evidence.

In that view of the matter and in view of the require- ments of section 11A of the Act, the claim had to be limited to a period of six months as the Tribunal did. We are, therefore, of the opinion that the Tribunal was fight in its conclusion. The appeal therefore fails and is accordingly dismissed.

In the facts and the circumstances of the case, the parties will pay and bear their own costs.

N.P.V. Appeal dis-
missed.