M/S. Anand Nishikawa Co.Ltd vs Commissioner Of Central Excise,Meerut on 23 September, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3660, 2005 (7) SCC 749, 2005 AIR SCW 4923, 2005 (7) SLT 412, 2005 (7) SCALE 459, (2005) 8 JT 482 (SC), MANU/SC/641/2005, (2005) 127 ECR 1, (2005) 188 ELT 149, (2005) 7 SCJ 403, (2005) 7 SUPREME 335, (2005) 7 SCALE 459

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Bench: S.N. Variava, Tarun Chatterjee

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           CASE NO.:
Appeal (civil)  3158 of 2000

PETITIONER:
M/s. Anand Nishikawa Co.Ltd.

RESPONDENT:
Commissioner of Central Excise,Meerut

DATE OF JUDGMENT: 23/09/2005

BENCH:
S.N. Variava & Tarun Chatterjee

JUDGMENT:
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J U D G M E N T TARUN CHATTERJEE J.

Appellant M/s. Anand Nishikawa Co. Ltd. is a manufacturer of rubber profiles which product after extrusion is subject to notching or drilling of a few holes or slitting. The appellant had classified such extruded rubber profiles under sub- heading 4008.29 of the Central Excise Tariff which attracted Nil rate of duty. The Revenue, however, classified such rubber under heading 4016.19.

According to Revenue, the operations like notching, drilling and slitting are "further working" and in view of Note 9 to Chapter 40, these goods fall outside Heading 40.08. Accordingly, a show cause notice was issued in October, 1995 demanding duty of over Rs.2.18 crores for the period from September 1990 to February, 1994 under the proviso to Section 11A of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'). The Commissioner by his order dated 2nd August 1996 discharged the show cause notice, inter-alia, on the ground that proviso to Section 11A of the Act was inapplicable in the facts of the case. In his order, the Commissioner observed that the authority had knowledge of the manufacturing process of the appellant and was seized of the matter from the very beginning and on few occasions, the department officers visited the factory for collection of samples and study etc. Adverse inference was also drawn by the Commissioner in his order dated

2nd August, 1996 against the department as show cause notice did not deal with the correspondence exchanged between the appellant and the department on the issue of classification from the year 1988. An appeal was carried by the Department against the aforesaid order of the Commissioner before the Customs, Excise and Gold (Control) Appellate Tribunal, (hereinafter referred to as "CEGAT") New Delhi which was allowed by the CEGAT on the issue of limitation that is to say extended period of limitation under proviso to Section 11A of the Act would be available in the facts of this case. However, the matter was sent back to the Commissioner for a decision on the question of classification and availability of MODVAT credit etc. Against this order of remand, passed by the CEGAT, this appeal has been filed under section 35(L) of the Act in this Court which, on admission, was listed for final disposal.

We have heard Mr. V. Sridharan, learned counsel appearing for the Assessee/Appellant and Mr. Mohan Parasaran, the learned Additional Solicitor General for the Revenue. We have carefully examined the show cause notice, the order of the Commissioner discharging the show cause notice and the order of the CEGAT holding that the authority was entitled to invoke proviso to Section 11A of the Act in the facts of the case but remanding the case, as noted herein before, to the Commissioner for a fresh decision on the question which of the classifications, namely 4008.29 or 4016.19 of the Central Excise Tariff in respect of the product in question, would be attracted in the facts of this case and also whether MODVAT facilities would be available or not.

The only question that needs to be decided in this appeal is whether the extended period of limitation under proviso to Section 11-A of the Act would be available or not. Before we take up, for our consideration, this question, involved in this appeal, it would be fit and proper to refer to erstwhile Rule 10 of the Central Excise Rules and section 11 A of the Act prior to and after its amendment in 2000. On the question of recovery of duties not levied or not paid or short-levied or not paid in full or erroneously refunded, erstwhile Rule 10 of the Central Excise Rules as it read at the relevant point of time and so far as it is relevant for our purposes is set out as under :

> "Rule 10. Recovery of duties not levied or not paid, sort-levied or not paid in full or erroneously refunded. (1) Where any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with a duty which has not been levied or paid, or which has been short-levied or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice:"

Provided that

(a) where any duty has not been levied or paid, has been short-levied or has not been paid in full, by reason of fraud, collusion or any willful mis-

statement or suppression of facts by such person or his agent, or

(b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or

(c) where any duty has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words "six months", the words "five years" were substituted.

Proviso to this Rule 10 as noted hereinabove, however, increases a period of six months to five years where there has been "suppression of facts" or the like on the part of the Assessee. Section 11A of the Act was introduced by Act No. 25 of 1978 w.e.f. 17.11.1980 in substitution of Rule 10 which was omitted. Section 11A of the Act was as under :-

> "11-A. 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, 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:
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> 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 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 "six months", the words "five years"

were substituted."

Section 11-A was further amended in the year 2000 and the amended provision runs as under:-

> "11-A. 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 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 "one year", the words "five years"

were substituted."

We have carefully examined the erstwhile Rule 10 of the Central Excise Rules, section 11A of the Act as introduced in the year 1980 and section 11-A of the Act after the amendment in the year 2000. From a plain reading of Rule 10 of Central Excise Rules, we find that the proper officer is conferred with power to recover duties not levied or not paid or short-levied or not paid in full or erroneously refunded to initiate recovery proceedings within six months from the relevant date. However, Rule 10 of the Central Excise Rules and Section 11-A of the Act prior to the 2000 amendment, did not say that recovery of duties not levied or not paid or short-levied or not paid in full or erroneously refunded could be done even where the classification of the goods was approved by the Department.

Section 11A of the Act as it stands today, however, confers powers not on the 'proper officer' but on a Central Excise Officer to initiate recovery proceedings when any duty of excise has not been levied or not paid or has not been short-levied or not paid in full or erroneously refunded whether or not such non-levy or non-payment or short-levy or short-payment or erroneous refund, as the case maybe, was on the basis of any approval etc., relating to the rate of duty on or valuation of excise goods within one year from the relevant date.

Again, from a comparative reading of erstwhile Rule 10 of the Central Excise Rules, section 11-A prior to its amendment of the year 2000, it is pellucid that by the introduction of section 11A of the Act in the year 1980, a central excise officer, instead of proper officer as indicated in erstwhile Rule 10, has been conferred with power to initiate proceedings for recovery of duty which has not been levied or paid or short-levied or not paid in full or has been erroneously refunded. The conferment of power to initiate a recovery proceeding on the Central Excise Officer instead of proper officer was vested only on the introduction of Section 11A of the Act. No substantial change was made by the Legislature from Rule 10 excepting the changes already noticed above.

By the 2000 amendment in section 11-A of the Act Legislature thought it fit to extend the power of the Central Excise Officer to initiate proceedings under section 11-A of the Act even where 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 approval of the classification list supplied by the assessee from time to time. That apart, the present section 11-A of the Act also fixes the period of limitation for initiating a recovery proceeding within one year from the relevant date which was six months under the erstwhile Rule 10 of the Central Excise Rules and section 11-A prior to the 2000 amendment. However, the amendment with respect to change in limitation period from "six months" to "one year" was made effective from 12.5.2000. Therefore, this amendment is not relevant for the purpose

of this case.

Let us now look into the proviso of Section 11A of the Act as it stands now. It clearly says that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful 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, the provisions of this sub-section shall have effect as if for the words 'one year' the words 'five years' were substituted.

A bare reading of the provisions made under Section 11-A (1) together with the proviso to it, it is abundantly clear that ordinarily notice to show cause has to be issued within one year from the relevant date. However, in order to attract proviso to section 11-A of the Act, that is to say, for extended period of limitation within 5 years from the relevant date, it is necessary to be satisfied that the non-levy, short-levy, or erroneous refund has occurred on account of either of the following:-

> (1) fraud, (2) collusion, (3) willful misstatement or suppression of facts, (4) contravention of the Excise Act or Rules with an intent to evade payment of duty.

So far as the present case is concerned, we shall keep it in our mind that the present case concerns only with "suppression of facts". Statement of Objects and Reasons for amending Section 11-A would be necessary to refer at this stage which is as follows:

> "Clause 106 seeks to validate certain action taken under section 11-A of the Central Excise Act with retrospective effect from 17th November 1980, so as to prescribe that the notices issued under the said section for non-recovery or short-recovery or erroneous refund of duties for a period of six months or five years in certain situations will prevail notwithstanding any approval, acceptance or assessment of duty under the provisions of the Central Excise Rules."

If we read the statement of Objects and Reasons for such amendment, it is again abundantly clear that the amendment was to be made with retrospective effect from 17th November 1980 so as to prescribe that the notices issued under the said section for non-recovery or short-recovery or erroneous refund of duties for a period of 6 months or 5 years in certain situations will prevail notwithstanding any approval under the provisions of the Central Excise Rules. As noted herein earlier, the amendment with respect to change in limitation period from "six months" to "one year" was made effective only from 12.5.2000.

As discussed herein earlier, the changes made by the Legislature through the amendment in section 11-A of the Act was to confer power on the Central Excise Officer to initiate a recovery proceeding under section 11-A of the Act irrespective of the fact that the department had approved the classification list supplied by the assessee from time to time. This amendment was brought in order to negate certain decisions of this Court and also High Courts in India saying that it would not be open to the Central Excise Officer to initiate a recovery proceeding under section 11-A of the Act, if

the classification lists supplied by the assessee were approved by the department from time to time. As noted herein earlier, the erstwhile Rule 10 of the Central Excise Rules and section 11-A prior to the 2000 amendment did not postulate that, in cases of approval by the Department, a proceeding for recovery of duties, for non-levy or non-payment, short-levy or short-payment or erroneous refund, could be initiated within six months or one year or five years, as the case may be, from the relevant date but it is evident that by the amendment in section 11A of the Act in the year 2000, in cases of approval also of the classification lists supplied by the assessee and accepted by the department from time to time, it would be open to the Central Excise Officer to initiate a recovery proceeding against the assessee under section 11A of the Act within six months or one year or five years, as the case may be, from the relevant date. That being the position, we are, therefore, of the view that in spite of some decisions of this Court or other High Courts of India holding that a recovery proceeding under section 11A of the Act could not be initiated for recovery of duties when the classification lists supplied by the Assessee were approved by the Department from time to time, due to the 2000 amendment in section 11-A, recovery proceedings can now be initiated even when the classification lists supplied by the assessee were approved by the department from time to time. In the case of Collector of Central Excise, Baroda vs. Cotspun Ltd [1999 (113) ELT 353 (SC)], it was held that the levy of excise duty on the basis of an approved classification list is not a short-levy and therefore, differential duty cannot be recovered on the ground that it was a short levy and therefore, the erstwhile Rule 10 of the Central Excise Rules or section 11-A of the Act (prior to the 2000 amendment) had no application. This Constitution Bench decision of this Court was, however, concerned with the erstwhile Rule 10 of the Central Excise Rules and section 11-A of the Act prior to the 2000 amendment. After the amendment in section 11-A in 2000, it can be said that the approval of the classification list supplied by the assessee cannot take away the conferment of right on the Central Excise Officer to initiate a proceeding for recovery of duties not-levied or paid or short-levied or short-paid or erroneously refunded within six months or one year or five years, as the case may be, from the relevant date.

In Cotspun Ltd., (supra), we also find that this Court held that when the classification list had been approved by the Department, it remained valid and correct until its approval was challenged. If differential duty had to be recovered upon such successful challenge to classification by the Department, the demand would be prospective from the date of show cause notice. It is further evident from Cotspun Ltd's case (supra) that there was no retrospectivity to the revision of classification list. By the time, this landmark decision was rendered by this Court, the classification list system had changed to classification declaration system where approval was no longer required. Subsequently, in the Finance Act, 2000, the Parliament retrospectively validated actions taken under section 11A of the Act so as to overcome the decision insofar as past and concluded proceedings were concerned. Therefore, consequent to the retrospective amendment, the view that classification already settled due to attaining of finality cannot be disturbed is no longer valid law.

In view of the decision in Cotspun Ltd's case (supra) Section 11-A by Act No. 10 of 2000 was amended with retrospective effect from 17.11.1980. The vires of the aforesaid amendment was, however, challenged. In a recent decision by this Court in the case of Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore [2003 (3) SCC 410], this Court has upheld the validity of the amendment and also held that on account of such amendment, the decision in Cotspun Ltd's

case (supra) has ceased to be a good law. However, another two-Judges Bench decision of this Court took a contrary view and held that the amendment had not altered the basis of the judgment in Cotspun Ltd's case (supra) and on a reference from that Bench, the matter came up for consideration in the case of ITW Signode India Ltd., vs. Collector of Central Excise [2004 (3) SCC 48], before a three-Judge Bench. In that decision, the amendment was not found to be ultra vires of the Constitution and it held that the amended section 11A of the Act is a valid piece of legislation.

On behalf of the Appellant, learned counsel Shri V. Sridharan had drawn our attention to proviso to section 11A of the Act which has already been noted herein earlier and contend ed that extended period of limitation as mentioned in proviso to section 11A of the Act in the facts of this case could not be attracted and the Central Excise Officer could not invoke proviso to section 11A of the Act. Before we examine this submission of the learned counsel for the appellant, we must note that the CEGAT in the impugned order held that the Central Excise Officer in the facts of this case was entitled to invoke extended period of limitation within the meaning of section 11A of the Act as there was "suppression of facts" while supplying the classification list. As noted herein earlier, proviso to section 11A clearly shows 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 misstatement or suppression of facts or contravention of any of the provisions of the Act or of the Rules made thereunder, as the case may be, to evade payment of duty by such person, the Central Excise Officer would be entitled to invoke proviso to section 11A of the Act, that is to say, extended period of limitation can be taken advantage of by him.

As noted herein earlier, from the facts of the present case, we find that the only question that arose before the CEGAT or the Commissioner was whether there was any "suppression of facts" for which the authorities were entitled to invoke proviso to Section 11A of the Act.

As noted herein earlier, the Commissioner while adjudicating the show cause notice confirmed the duty demand on goods found short and also imposed a penalty of Rs.10,000/- on the assessee but he dropped the rest of the proceedings on the ground that there was no "suppression of facts" on the part of the appellant herein and accordingly extended period of limitation was found by him not to be available to the department under the proviso to section 11A of the Act. In appeal, CEGAT, however, as noted herein earlier, reversed this finding of the Commissioner and found "suppression of facts" from the materials on record. If CEGAT was justified in holding that there was "suppression of facts" by the appellant either regarding their method of process of the product in question and applicability of different classification lists, then certainly CEGAT was correct in holding that extended period of limitation under proviso to section 11-A of the Act could be applied in the facts and circumstances of the case. In that event, this Court would not be in a position to interfere with the order impugned in this appeal.

Therefore, let us now examine whether CEGAT was justified in holding that there was "suppression of facts" in the matter of disclosure of manufacturing process or applicability of the classification lists supplied by the appellant or not. It is seen that Revenue alleged that the appellant had never disclosed to it that they were carrying on process of notching, slitting, punching, slotting etc. on rubber profiles and if they had done so it would amount to "further working" thereby rendering the

products classifiable under sub-heading 4016.19 and not classifiable under sub-heading 4008.29. It was also the case of the Revenue that these operations came to the knowledge of the Revenue only when an investigation commenced in the present matter by the Directorate General of Anti Evasion which resulted in the issue of the show-cause notice dated 19th October, 1995. In the impugned order, CEGAT on perusal of the correspondence between the appellant and the department was unable to find any disclosure in writing by the appellant with respect to post-forming processes like notching, drilling etc. From the materials on record which were produced before the authorities and also from the orders of the CEGAT and the Commissioner, it can be seen that the department had the opportunity to inspect the products of the appellants and in fact, the factory of the appellants was inspected by them. It may be true that the appellants might not have disclosed the post-forming process in detail but from the correspondence and other materials on record, it cannot be conceived that the authorities were not aware of the facts as, we gather from the materials on record, admittedly, samples were collected by the Department and even after the samples were collected and inspected, classification as supplied by the appellant in respect of the products in question was approved by them.

Further more, it is also evident from the record that the flow-chart of manufacturing process which was submitted to the Superintendent of Central Excise, Rampur on 17.5.1990 clearly mentioned the fact of post forming process on the rubber [See page 15 of the Order of CEGAT]. The CEGAT in its order has also recognized the fact of collection of some relevant samples by the excise authorities on 25.9.1985 and 22.1.1988. [See paragraphs 7.1 & Page 14 of the Order of CEGAT].

In this view of the matter, we are unable to persuade ourselves to agree with the finding of the CEGAT as admittedly, the products of the appellant were inspected from time to time and the department was aware of the manufacturing process of the products although the appellant might not have disclosed the post forming process in detail.

In Tata Iron & Steel Co. Ltd. vs. Union of India & Ors [1988 (35) ELT 605 (SC)], this Court held that when the classification list continued to have been approved regularly by the department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the excise authorities and only in the year 1995, the department found that there was "suppression of facts" in the matter of post forming manufacturing process of the products in question. Further more, in view of our discussion made herein earlier, that the department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17.5.1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of the CEGAT cannot be approved by us. This Court in the case of Pushpam Pharmaceutical Company vs. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while dealing with the meaning of the expression "suppression of facts" in proviso to section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held : -

> "In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik vs. Collector of Central Excise [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful misstatement or "suppression of facts". This view was also reiterated by this Court in Collector of Central Excise, Baroda, vs. LMP Precision Engg.Co.Ltd. [2004 (9) SCC 703] However, in the case of LMP Precision Engg. Co. Ltd. (supra), this Court came to the conclusion that the manufacturer was guilty of "suppression of facts". In that decision, manufacturer did not make any attempt to describe the products while seeking an approval of classification list and in that background of facts, it was held that it amounted to "suppression of facts" and therefore, excise authorities were entitled to invoke proviso to section 11A of the Act. It also appears from that decision that this Court also held that if any classification was due to mis-interpretation of the classification list, suppression of facts could not be alleged. From this judgment, it is therefore clear that since the excise authorities had collected samples of the products manufactured by the appellant and inspected the products and the relevant facts were very much in the knowledge of the excise authorities and nothing could be shown by the excise authorities that there was any deliberate attempt of non- disclosure to escape duty, no claim as to "suppression of facts"

> could be entertained for the purpose of invoking the extended period of limitation within the meaning of proviso to section 11A of the Act.
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> Similarly, in the case of Collector Central Excise, Jamshedpur Vs. Dabur India Ltd., [2005 (121) ECR 129 (SC)], this Court held that the extended period of limitation was not available to the Department as classification lists filed by the Assessee were duly approved by the authorities from time to time. In that decision this Court followed its earlier judgment in O.K. Play (India) Ltd., vs. Collector of Central Excise, Delhi-

III, (Gurgaon) [2005 (66) RLT 657 (SC)], held that in cases where classification lists filed by the Assessee were duly approved, the extended period of limitation would not be available to the

Department.

For the reasons aforesaid, we are of the view that the CEGAT was not justified in holding that the extended period of limitation would be available to the Department for initiating the recovery proceedings under section 11A of the Act on a finding that there was suppression of facts by the appellant. Accordingly, it was not open to the excise authorities to invoke proviso to section 11A of the Act and therefore, the demand of the Revenue must be restricted to six months prior to the issue of notice dated 19.10.1995 instead of five years. In view of this conclusion, it is not necessary for us to consider the question of applicability of the classification lists namely of 4008.29 and 4016.19 and the question of MODVAT facilities. Accordingly, in our opinion, CEGAT came to a wrong conclusion for wrong reasons and therefore, we allow this appeal and set aside the judgment and order of the CEGAT and restore the order of the Commissioner. There will be no order as to costs in this appeal.