IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.E.A. No. 23 of 2004

DATE OF DECISION: January 29, 2009

Commissioner of Central Excise Commissionerate, Jalandhar

…Appellant

Versus

M/s Afcons Pauling Joint Venture

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE H.S. BHALLA

Present: Mr. Gurpreet Singh, Senior Standing Counsel
for Indirect Taxes,
for the appellant.

None for the respondent.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

M.M. KUMAR, J.

The revenue has approached this Court by filing the instant appeal under Section 35-G of the Central Excise Act, 1944 (for brevity, 'the Act') by challenging order dated 14.1.2004, passed

by the Custom, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi (for brevity, 'the Tribunal'). On 20.7.2006, the Division Bench admitted the appeal to consider the following substantial questions of law:-

> "(1) Whether in the facts and circumstances of the case, the Tribunal was right in accepting the plea of the assessee that provision of Section 11-A for extended period of limitation was not rightly invoked?
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> (2) Whether in cases where extended period of 5 years is not invokable under the proviso of Section 11-A of the Central Excise Act, 1944, demand even for normal period of limitation is not valid?"

2. Brief facts of the case are that the dealer-respondent was engaged in the manufacture of PCC Websole Panels and crushed aggregate stones (Buzri) classifiable under sub-heading 68.07 and sub-heading 2505.90 of the Central Excise Tariff Act, 1985 (for brevity, 'the Tariff Act'). The work places of the respondent for manufacture of Websole Panels were situated at Village Sherpur (Ludhiana), Chheheru (Phagwara), by use of fabricated steel moulds, whereas the crushed stones were manufactured in village Chandpur, Rurki, Tehsil Garshankar, District Hoshiarpur by installation of stone crushing plant. The Websole Panels manufactured by the respondent were used for construction of over bridges on roads and crushed stones were used for four-laning of the National Highway. Excise duty is leviable on both these items. It is claimed by the revenue that the respondent started the above mentioned activities without

obtaining Central Excise Registration under Rule 174 of the Central Excise Rules, 1944 (for brevity, 'the Rules') and no Central Excise duty was paid on the manufactured goods. The officers of the revenue seized 807 Websoles valued at Rs. 38,55,026.55 and crushed stones valued at Rs. 15,81,423/-.

3. On 31.3.1994, a show cause notice was issued raising a demand of Rs. 25,66,885.30 on the Websoles for the period from September, 1990 to February, 1994 and Rs. 51,31,484.55 on the crushed stones for the period March, 1989 to February, 1994. The Collector, Central Excise, Chandigarh, passed the order-in-original dated 25.10.1994 and goods were confiscated and Rs. 4.50 lacs towards websoles and Rs. 1.90 lacs on account of crushed stones were appropriated from the bank guarantees submitted by the respondent. A demand of Rs. 25,66,885.30 on websoles and Rs. 51,31,484.55 on crushed stones was confirmed. Besides this, a penalty of Rs. 20 lacs was also imposed.

4. The respondent filed an appeal against the order-in-original before the Tribunal. The Tribunal remanded the case back for de novo adjudication with respect to marketability of impugned goods, invocation of extended period of limitation and applicability of notification dated 20.3.1990. The Commissioner Central Excise, vide his order dated 1.4.2003 vacated the seizure dated 2.11.1993 in respect of websoles, valued at Rs. 38,55,026.55 and demand of Rs. 25,66,885.30 was dropped. Since the goods were provisionally released to the respondent, a redemption fine of Rs. 5,00,000/- in lieu of confiscation was imposed and demand of Rs. 51,31,484.55 in

respect of crushed stones, under Rule 9(2) of the Rules read with Section 11A of the Act was confirmed. A penalty of Rs. 15,00,000/- under Rule 9(2), 173Q and 226 of the Rules was also imposed.

5. The respondent preferred an appeal against the order-in-original, dated 1.4.2003, before the Tribunal, which has been allowed vide final order dated 14.1.2004, subject matter of present appeal.

6. The relevant part of the order passed by the Tribunal reads thus:

> "..... But the question remains as to whether there was suppression of facts on the part of the appellants with an intent to evade payment of duty. It has been held by the Supreme Court in Cosmic Dye Chemical vs. C.C.E., Bombay, 1995 (75) E.L.T. 721 (S.C.) that it is "not correct to say that there can be suppression or mis-statement of fact which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful." The Supreme Court considered the aspect of invocability of Proviso to Section 11A in similar facts in the case of Jaiprakash Industries Ltd., 2002 (146) E.L.T. 481 (S.C.) wherein also the appellants were engaged in construction activities and as part of their business they crushed boulders into "bajri" which is then used in the construction work. They did not consider the activities of crushing boulders into bajri to be a manufacturing activity. They, therefore, did not apply for any licence nor paid excise duty. The Supreme Court has held as under:
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> > "In this case, there was a divergent view of the various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to

> manufacture. In view of the divergent views, of the various High Courts, there was a bona fide doubt as to whether or not such an activity amounted to manufacture. This being the position, it cannot be said that merely because the appellants did not take out a licence and did not pay the duty the provisions of Section 11A got attracted. There is no evidence or proof that the licence was not taken out and/or duty not paid on account of any fraud, collusion, wilful mis-statement or suppression of fact. We, therefore, set aside the demand under the show cause notice dated 3rd May, 1993. The Appellate Tribunal also, in the case of Hindustan Construction Co., while upholding the excisability of crushed stones under Heading 25.05, did not uphold the invocation of extended period of limitation "as the issue cannot be said to have been free from doubt." In Larsen & Turbo case also, the Tribunal set aside the demand for the period beyond six months. In view of this, we hold that the larger period of limitation for demanding duty cannot be invoked as there is nothing to suggest that the appellants had not taken the Central Excise Licence/Registration or did not pay the duty on the impugned goods on account of any wilful suppression of facts."

RE: QUESTION NO.1

7. Before dilating upon question No.1 some admitted facts may first be noticed. The dealer – respondent was issued a show cause notice raising demand on the websoles in respect of the period from September 1990 to February 1994 and in respect of crushed stones in respect of the period from March 1989 to February 1994. The notice to show cause admittedly was issued on 31-3-1994 which

was beyond the period of six months as envisaged by Section 11A (as it stood then) although covered by the period of 5 years as provided by the proviso which postulates that the intention to raise payment of duty and other related facts have been proved. It would be profitable to read the aforesaid provision 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 [1] [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 [2][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 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, [3][as if [4] [***]] for the words [5]["six months"], the words "five years" were substituted:"

8. The aforesaid provision was subject matter of consideration by Hon'ble the Supreme Court in the case of ***C.C.E. v. Chemphar Drugs and Liniments, Hyderabad (1989)2 SCC 127***. Hon'ble the Supreme Court had observed in Para No.9 of the judgment that in order to sustain an order of the Tribunal beyond a period of six months (as it stood then) and upto a period of five years in view of the proviso in sub-Section 1 of Section 11A of the Act, it is required 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 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. Hon'ble the Supreme Court had further observed that something positive other than mere inaction or failure on the part of the manufacturers or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established before it is saddled with any liability beyond the period of six months. It would of course be a question of fact depending upon the facts and circumstances of each case whether there was any fraud, collusion or wilful mis-statement or suppression or contravention of any provision of any Act.

9. The Tribunal in the present case has categorically held that the respondent did not consider the activities of crushing boulders into bajri to be a manufacturing activity. Therefore, they did not apply for any licence nor paid excise duty. In our view, the Tribunal has rightly placed reliance on the judgment of Hon'ble the

Supreme Court rendered in the case of ***Cosmic Dye Chemical v. C.C.E. Bombay 1995 (75) ELT 721 (SC)*** wherein it was held that it is "not correct to say that there can be suppression or mis-statement of facts which is not wilful and yet constitutes a permissible ground for the purpose of proviso to Section 11A. Mis-statement or suppression of facts must be wilful." We are also of the view that the Tribunal has correctly applied the principle concerning invocability of proviso to Section 11A of the Act by placing reliance on the judgment of Hon'ble the Supreme Court in ***Jaiprakash Industries Ltd. v. C.C.E. (2003) 1 SCC 67.*** Hon'ble the Supreme Court has approved its earlier view taken in the case of ***Padmini Products v. C.C.E. (1989) 4 SCC 275***. In Padmini Products the expression suppression of facts was interpreted to mean that it is not "failure to disclose the legal consequence of a certain provision" which would amount to suppression of facts. These principles have been applied and reliance has been placed on the judgment in Padmini Product's case and also on the latest judgment of Hon'ble the Supreme Court in the case of ***C.C.E. v. Karnataka Agro Chemicals (2008) 7 SCC 343.***

10. It has come on record as a fact that that there was divergence of opinion amongst various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. Accordingly, there was bona fide doubt as to whether or not such an activity could attract the payment of duty and the dealer – respondent did not apply for licence. Once the aforesaid factual position is clear then the judgment of Hon'ble the Supreme Court in Jaiprakash Industries Ltd. (supra) would fully apply to the case in

hand. The view of Hon'ble the Supreme Court as correctly quoted by the Tribunal reads thus:-

> "In this case, there was a divergent view of the various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. In view of the divergent views, of the various High Courts, there was a bona fide doubt as to whether or not such an activity amounted to manufacture. This being the position, it cannot be said that merely because the appellants did not take out a licence and did not pay the duty the provisions of Section 11A got attracted. There is no evidence or proof that the licence was not taken out and/or duty not paid on account of any fraud, collusion, wilful mis-statement or suppression of fact. We, therefore, set aside the demand under the show cause notice dated 3rd May, 1993."

11. The aforesaid discussion clearly spells out that extended period of limitation of five years provided by the proviso to Section 11A of the Act would not be attracted to the facts and circumstances of the instant case. Therefore it follows that the first question is liable to be decided against the revenue and in favour of the dealer-respondent.

RE: QUESTION NO.2

12. The second question raised by the revenue is that they should at least be entitled to make recovery of the amount which is within the normal period of limitation of six months. In other words, if the notice to show cause has been issued on 31-3-1994 then in respect of period preceding six months the date of issuance of show cause notice, recovery would be within the permissible limit.

Accordingly, it has been contended that the duty payable in respect of period of six months cannot be lost in the din of proviso which prohibits recovery of duties in respect of extended period of five years. The argument appears to be that the show cause notice should be considered valid in respect of the period which is validly covered by the notice. As a consequence to the show cause notice the revenue would become entitled to effect the recovery w.e.f. 1-10-1993 to 31-3-1994. It cannot be disputed that levy of duty in respect of crushed stone and websoles manufactured by the dealer – respondent is legally recoverable from the dealer – respondent and to that extent show cause notice would be valid. Therefore, in the facts and circumstances of the case, the duty in respect of the aforesaid period is recoverable from the dealer – respondent, if not already recovered. Accordingly question No.2 necessarily has to be answered against the dealer – respondent and in favour of the revenue.

13. As a sequel to the aforesaid discussion, the question No.1 is decided against the revenue and in favour of the dealer – assessee and question No.2 is answered against the dealer – assessee and in favour of the revenue.

(M.M. KUMAR)
JUDGE

(H.S. BHALLA)
JUDGE

January 29, 2009
Pkapoor/Manju