IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

CENTRAL EXCISE APPEAL No.14 OF 2016

Water Resources Development,
formerly known as Irrigation,
Through Executive Engineer,
having its office at Mechanical
Lift Irrigation Div. No.2,
Babu Peth, Chandrapur. : APPELLANT

...**VERSUS**...

Commissioner of Central Excise,
Nagpur. : RESPONDENT

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Smt. Sharda Wandile, Advocate for Appellant.
Shri S.N. Bhattad, Advocate for Respondent.
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CORAM : A.S.CHANDURKAR AND G.A. SANAP, JJ.
DATE : 1st DECEMBER, 2021.

ORAL JUDGMENT : (Per : A.S. Chandurkar, J.)

1. This appeal under Section 35G of the Central Excise Act, 1944 (for short, "the said Act") was admitted on 9.3.2017 on the following substantial question of law :

> Whether the Customs, Excise and Service Tax Appellate Tribunal was justified in law and in facts to hold that the demand under the show cause notice was not barred by law of limitation ?

2. The facts relevant for answering the aforesaid substantial question of law are that it is the case of the appellant that it is engaged in the manufacture of mechanical gates, parts and hoists that are required to be installed on dam constructed by the Government of Maharashtra. The work of construction of dams was undertaken by the Irrigation Department and as a part of that, the gates and hoists manufactured were supplied to the said Department. These goods were exempt from payment of excise duty in view of the exemption Notification No.74/1993 dated 28.2.1993. On 1.4.1996 Maharashtra Act No. XV of 1996 was enacted and the Vidarbha Irrigation Development Corporation was formed under that Act. According to the Revenue, the appellant lost benefit of exemption under Notification No.74/1993. With regard to the goods cleared for the period commencing from 1997-1998 to 2000-2001 a show cause notice was issued by the Office of the Directorate General of Central Excise Intelligence calling upon the appellant to show cause why central excise duty of Rs.29,17,879/- should not be demanded under Section 11A(1) of the said Act. Interest under Section 11AB as well as penalty under Section 11AC of the said Act was also sought to be imposed. This show cause notice was served on the appellant on 8.5.2001.

3. Reply was given by the appellant to the aforesaid show cause notice on 15.1.2002 in which it was stated that the appellant was a State Government Department and there was no transaction entered concerning payment of excise duty. There was no intention to evade payment of central excise duty. On this count, it was stated that the show cause notice be dropped. An order dated 25.3.2003 came to be passed by the Commissioner in which the show cause notice was confirmed and the amounts mentioned in the said notice were held to be recoverable from the appellant.

4. The appellant, being aggrieved by the aforesaid adjudication, filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short, "the Tribunal"). After hearing both sides the Tribunal on 31.1.2011 partly allowed that appeal by maintaining the demand of duty under Section 11A(1) as well as penalty imposed under Section 11AC of the said Act. The penalty imposed under Rule 173Q of the Central Excise Rules, 1944 (for short, "the said Rules") was, however, set aside. Being aggrieved by the aforesaid adjudication the appellant has preferred this appeal.

5. Smt. Sharda Wandile, learned counsel for the appellant submitted that the proviso to Section 11A(1) of the said Act had been wrongly invoked by the revenue for demanding central excise

duty for the period beyond one year. The proviso under Section 11A(1) of the said Act could be invoked only if there was any wilful mis-statement or suppression of facts with an intention to evade payment of duty. There was no material on record either before the Commissioner or before the Tribunal on the basis of which it could be said that the appellant had an intention of evading payment of duty. According to her, prior to 1.4.1996 the Department was entitled for exemption from payment of central excise duty in view of the exemption Notification bearing No.74/1993. The Corporation was established on 1.4.1996 and the appellant was under bona fide belief that being a Corporation constituted to discharge functions of the State, the exemption which was earlier granted continued to operate. The appellant was under such bona fide belief and immediately after being served with the show cause notice the appellant had registered itself with the concerned Excise Department. It was submitted by referring to the statement of facts that were annexed to the show cause notice that in the year 2000-2001 no excise duty was payable. The show cause notice pertained to demand for the years 1997-1998 to 1999-2000. Even if the provisions of Section 11A(1) of the said Act were considered, the show cause notice was served upon the appellant on 8.5.2001 and on that basis duty that was chargeable was for the period prior

to one year. It was not in dispute that in the year 2000-2001 the appellant was not liable to pay any excise duty and hence even the notice issued under Section 11A(1) of the said Act did not pertain to any liability incurred prior to one year from the date of service of the show cause notice.

Learned counsel by placing reliance upon the decision in **Collector of Central Excise, Hyderabad vs. M/s. Chemphar Drugs and Liniments, Hyderabad**, reported in **(1989) 2 SCC 127, M/s. Padmini Products vs. Collector of Central Excise, Bangalore**, reported in **AIR 1989 SC 2278** and **Cosmic Dye Chemical vs. Collector of Central Excise, Bombay**, reported in **(1995) 6 SCC 117** submitted that unless it was shown that there was any intention to evade central excise duty, the extended period of limitation of five years would not become available for initiating such proceedings. The Commissioner as well as Tribunal failed to take into consideration this vital aspect and merely by holding that the appellant was guilty of suppression of facts proceeded to uphold the show cause notice. On this count it was submitted that the order passed by the Tribunal was liable to be set aside and the show cause notice was liable to be quashed.

6. Shri S.N. Bhattad, learned counsel for the respondent on

the other hand submitted that the Tribunal was justified in relying upon the proviso to Section 11A(1) of the said Act. According to him, the Office of the Directorate General of Central Excise Intelligence had first recorded the statements of the Executive Engineer of the appellant and only after being satisfied that the central excise duty had not been paid despite liability in that regard, the proviso to Section 11A(1) of the said Act was relied upon and the extended period of limitation was invoked. It was an admitted position that though such excise duty was payable by the appellant, the said amounts were not paid. In fact, the appellant got itself registered only after service of the show cause notice. He referred to the relevant observations as made by the Commissioner as well as the Tribunal in the impugned orders while upholding the show cause notice. He, therefore, submitted that no interference was called for with the order passed by the Tribunal.

7. We have heard learned counsel for the parties at length and we have given due consideration to their respective submissions. The facts on record indicate that prior to 1996 the appellant was engaged in the manufacture of gates and hoists that were supplied to the Irrigation Department. By virtue of exemption Notification No.74/1993 dated 28.2.1993 the goods falling under

the heading 73 and 84 of the Schedule were exempted from payment of central excise duty. On 1.4.1986 the Corporation came to be established and it is thereafter that the demand of central excise duty from 1997-1998 to 1999-2000 came to be raised by issuing show cause notice dated 30.3.2001. In the show cause notice it has been stated that the appellant suppressed the fact of manufacture and clearance of excisable goods with a view to evade payment of central excise duty. For this purpose the Directorate relied upon the statement of Executive Engineer, who stated about the procedure adopted by the appellant in this regard. In view of the fact that the appellant had not obtained necessary registration, the Directorate found it sufficient to invoke the proviso to Section 11A(1) of the said Act.

8. The Hon'ble Supreme Court in *M/s. Chemphar Drugs and Liniments, Hyderabad* (supra) has held that besides mere inaction or failure on the part of the manufacturer or producer as regards deliberate withholding of information, there ought to be an intention to evade payment of duty. If the explanation furnished by the manufacturer or producer is found to be plausible there would be no justification in concluding that there was any intention to evade payment of duty. Similar view has been taken by the Hon'ble

Supreme Court in *M/s. Padmini Products* (supra). In paragraph 12 thereof it has been observed as under :

> "*As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellants believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licenced, would not attract the penal provisions of Section 11A of the Act. If the facts are otherwise, then the position would be different.*"

9. This view has been reiterated by a larger Bench in *Cosmic Dye Chemical* (supra) while holding that mis-statement or suppression of facts must be wilful on the part of the manufacturer or producer. Mere suppression or mis-statement of facts if not wilful would not be a sufficient ground.

From the aforesaid it is clear that there has to be material on record to hold that with an intention to evade payment of central excise duty there has been mis-statement or suppression of facts.

10. When the material on record is perused it becomes clear that in the reply to the show cause notice itself the appellant had stated that in view of exemption Notification No.74/1993 which was applicable to it till 31.3.1996, the appellant was not aware of the procedure as regards charging and paying excise duty. It became a statutory Corporation and there was no intention to evade the payment of central excise duty in any manner whatsoever. While admitting that it was liable to pay central excise duty it was stated that the penalty or interest may not be imposed upon the appellant. The Tribunal while considering the aforesaid material has stated that the explanation furnished by the appellant was not sufficient and the plea of bona fide belief was not accepted. The Tribunal concluded that non-payment of excise duty was a deliberate act despite knowledge that the benefit of the exemption notification was not applicable to the appellant. There is no material on record to justify this conclusion of the Tribunal. Except for stating that the appellant was aware of its liability and non-payment of excise duty was deliberate, there is no basis to conclude that such non-payment was wilful and with a view to evade the payment of central excise duty. Except the statement of Executive Engineer there is no other material available on the basis of which it

could be said that the appellant had an intention of evading payment of central excise duty. Learned counsel for the appellant rightly submitted that being a department itself no individual was to benefit with the evasion of central excise duty which aspect could be distinguished when such liability is saddled on a private person. The fact that after 1.4.1996 the appellant did not immediately register itself to enable payment of central excise duty itself indicates the fact that the appellant was acting under its bona fide belief that such duty was not liable to be paid by it.

11. It is thus found that satisfaction recorded initially by the Commissioner and then by the Tribunal as regards the intention of appellant to evade payment of central excise duty is without any supporting material on record. As clarified in *Cosmic Dye Chemical* (supra) it could not be said that there could be suppression or mis-statement of facts which even though not wilful would still constitute a permissible ground for invoking the proviso to Section 11A(1) of the said Act. In absence of any material whatsoever to indicate wilful suppression of facts with intention of evading duty, the invocation of proviso to Section 11A(1) in these facts is totally unjustified. The judgment of the Tribunal is thus liable to be set aside on account of its failure to consider this jurisdictional aspect.

The substantial question of law as framed is answered by holding that the Tribunal was not justified in law and in facts in holding that the demand under the show cause notice was not barred by limitation. Consequently, the judgment dated 31.1.2011 is set aside and Appeal No.E/1670/2003 stands allowed. Needless to state that it is open for the appellant to seek refund under Section 11B of the said Act if so advised. If such proceedings are initiated the same shall be decided on their own merit and in accordance with law.

12. The Central Excise Appeal is allowed in the aforesaid terms leaving the parties to bear their own costs.

(G.A. Sanap, J.) **(A.S. Chandurkar, J.)**

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