# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD

## REGIONAL BENCH, COURT NO. 3

### EXCISE APPEAL NO. 10196 OF 2018

[Arising out of OIA-CCESA-SRT-APPEALS-PS-210-2017-18 dated 15/11/2017 passed by Commissioner ( Appeals ) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

**SAVITA OIL TECHNOLOGIES LTD** **Appellant**
10/2, 10/1/1, Kharadpada, Naroli, Silvasa,
Dadra and Nagar Haveli

Vs.

**C.C.E. & S.T.- SILVASA** **Respondent**
Commissioner Central Excise, Customs & Service Tax,
Silvassa, 4th floor, Adarsh Dham Building,
Vapi Daman Road, Opp. Old Town Police Station
Vapi, Gujarat

**WITH**

### EXCISE APPEAL NO. 12109 OF 2018

[Arising out of OIA-CCESA-SRT-APPEALS-PS-561-2017-18 dated 05/02/2018 passed by Commissioner ( Appeals ) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

**CAPT A N KASHID** **Appellant**
C/o M/s Savita Oil Technologies Ltd., 10/2,
Kharadpada, Naroli, Silvassa,
Dadra Nagar, Haveli (UT)

Vs.

**C.C.E. & S.T.-SURAT-I** **Respondent**
New Building...Opp. Gandhi Baug, Chowk Bazar,
Surat, Gujarat-395001

**Appearance:**
Shri Mehul Jivani, Chartered Accountant for the Appellant
Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER ( JUDICIAL )**
**HON'BLE MR. C. L. MAHAR, MEMBER ( TECHNICAL )**

**FINAL ORDER NO. 12965-12966/2024**

Date of Hearing : 24.07.2024
Date of Decision : 22.11.2024

**C L MAHAR**

The brief facts of the matter are that the appellant are engaged in manufacture of lubricating oils falling under chapter 27 and other products falling under chapter 34 and 38 of the Central Excise Tariff Act, 1985. As per the sale practice of the appellant firm the Lubricating Oils packed in containers of capacity more than 20 ltr and in respect of other products the assessable value of their product was required to be determined in terms of Section 4 of the Central Excise Act, 1944 read with Rule 7 of Central Excise Valuation Rules, 2000. The appellant cleared some quantity of their Lubricating Oils and other products from their factory of manufacture to their C & F depots for further sale from such depot. The appellant are required to adopt the value as provided under Rules 7 of Central Excise Valuation Rules, 2000 read with section 4 of the Central Excise Act, 1944 for determination of assessable value of their Lubricating Oils and other products.

2. The appellant on their own vide their letters dated 18.11.2009, 04.04.2010, 12.08.2011, 23.12.2011, 05.09.2011 and 20.01.2012 have submitted relevant information to the jurisdictional assistant / deputy Commissioner of Central Excise for the period pertaining to April - 2008 to December – 2012. The appellant have submitted to the Jurisdictional Assistant Commissioner that in respect of certain goods they have made excess payment of the duty while clearing the goods from ex-C & F depot and in some cases the sale price ex-C & F was less than the price to adopted for ex-C & F depots. It has been contention of the appellant that there was excess payment of duty in respect of some goods cleared for sale ex-C & F depot. The appellant submitted that where they have paid excess duty amount, same has been adjusted against their short payment of duty. The learned advocate has relied upon Hon’ble High Court Karnataka decision in case of Toyota Kirloskar Auto Parts Pvt Ltd Vs. Union of India reported under 2012 (276) ELT 332 (Karnataka) on this issue. The department proceeded to issue a show cause notice dated 16.04.2013 demanding Central Excise Duty amounting to Rs. 9,42,727/- under section 11A (4) of the Central Excise Act, 1994 by invoking extended time proviso and penal provision under section

11AC as well as interest under section 11AB has also been invoked. Shri A N Kashid, Assistant General Manger has also been show caused of penalty under Rule 26 of the Central Excise Rules, 2002. The matter has got adjudicated vide impugned order-in-original dated 20.05.2014 whereunder Central Excise Duty amounting into Rs. 9,42,727/- has been confirmed by invoking the extended time proviso of the Central Excise Act, 1994 under section 11A(4) of Central Excise Act, 1944 and an equal amount of penalty has also been imposed under Section 11AC of Central Excise Act, 1944. A personal penalty of Rs. 95,000/- has been imposed of Shri A N Kashid, Assistant General Manager of the appellant firm under Rule 26 of Central Excise Rules, 2002. Appellant have approached Commissioner (Appeals) however, they did not succeed their also and the learned Commissioner (Appeals) vide his order dated 15.11.2017 has endorsed the findings of the impugned order-in-original dated 13.05.2014. The appellant are before us against the impugned order-in-appeal.

2.1 The learned advocate appearing for the appellant has submitted at the beginning that entire demand is barred by period of limitation as the department was fully aware about the sale practice of the appellant since very beginning and the appellant vide their first letter dated 18.11.2009 has informed the department regarding the price at which goods have been cleared form the factory gate, as well as the price at which goods have further been sold from their C & F depot. It is further been mentioned that there is no loss to the revenue as the appellant have paid the duty on excess price in some cases then the price charged by them for same goods from their C & F depot. It is further been mentioned that since the assessment of Central Excise Duty on which Central Excise Duty has been paid by them was not a provisional assessment and the department was in know of the things since 18.11.2009 the entire demand which have been issued by show cause notice dated 16.04.2013 is barred by normal period of limitation under section 11A (4) of the Central Excise Act, 1944 and therefore same legally not sustainable. The learned advocate has relied upon on the following decisions to support his case. Saying that since the department was fully aware about the sale pattern of their manufactured products and the appellant have informed them in detailed vide their letter dated 18.11.2009 to latter dated 20.01.2012 therefore entire period is barred by period of limitation. The learned advocate has relied upon following decision.

- Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise Appeal, Meerut [2005 (188) ELT 149 (SC)]
- Continental Foundation JT. Venture – 2007 (216 ELT 177 (SC)
- Nestle India Pvt Ltd V. CCE [2009-TIOL-26-SC-CX = 2009 (235) ELT 577 (SC)]
- Atul Kaushik 2015 (330) ELT 417 (Tri.-Del.)
- Commissioner V. Oracle India Pvt Ltd.- 2016 (342) ELT A40 (SC)
- Uniflex Cables Ltd. – 2011 (271) ELT 161 (SC)

3. We have also heard the departmental representative who has reiterated the findings given in the impugned order-in-appeal.

4.Having heard both the sides we take note of the fact that the learned advocate has pointed out that there is no case of the short payment of the duty rather adjustment of short payment with the excess payment of Central Excise Duty, which have been made by them on the goods cleared EX-C & F depot. It is a matter of record that they have adjusted the duty payments considering sale price on which Central Excise duty have been discharged at the factory gate and the sale price on which the goods have actually been cleared ex-C & F depot. There have been differences both on positive and negative sides, the appellant have paid excess Central Excise Duty on certain goods that is where the price at factory gate has been taken at higher side than the prices on which the goods ex-C & F depot have been cleared and that amount has been adjusted by them towards the short payment of duty taking ex-C & depot price. The appellant vide their letter dated 18.11.2009, 04.04.2010, 12.08.2011, 05.09.2011, 23.12.2011 and 20.01.2012 have submitted all the relevant information of the prices on which goods were cleared at the factory gate as well as the ex- C & F depot price. The show cause notice dated 16.04.2013 has been issued demanding short payment of Central Excise Duty for Financial year 2008-09 to December 2012. We are of the view that for invoking extended time proviso under section 11A(4), the elements of fraud, collusion, willfull mis-statemnt, suppression of facts or contravention of any provisions of this act or rules with an intention to evade payment of Central Excise Duty need to be presented. The facts of the matter clearly speak that the appellant on their own informed the department since 18.11.2009 giving all the details of ex-factory prices as well as ex-C & F depot prices. In such circumstances it is wrong on the part of the department to invoke the extended time proviso under section 11A(4) of the Central Excise Act, 1944. Thus, we are of the view that the impugned show cause notice and the orders issued confirming the show cause notices are legally not sustainable on the point of time limitation. Thus, we set aside the same being barred by the period of limitation. while holding the above view we take shelter of Hon'ble Supreme Court decision in case of Anand Nishikawa Co Ltd Vs. Commissioner of Central Excise, Meerut reported under 2005 (188) ELT 149 (SC).

> *"11. 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 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, the provisions of this sub-section shall have effect as if for the words one year' the words 'five years were substituted.*
>
> *12. A bare reading of the provisions made under Section 11A(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 11A 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 mis-statement or suppression of facts,*

*(4) contravention of the Excise Act or Rules with an intent to evade payment of duty.*

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

> *"Clause 106 seeks to valdaie certain action taken under section 11A of the Central Excise Act with retrospective effect from 17th November 1950, so as to prescribe that the notices issued under the said section for non-recovery or short-recovery or erroneous refind of duties for a period of six months or five years in certain situations will prevail notwithstanding any approval acceptance or assessment of duly under the provisions of the Central Excite Rules"*

*14. 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.*

*15. As discussed herein earlier, the changes made by the Legislature through the amendment in Section 11A of the Act was to confer power on the Central Excise Officer to initiate a recovery proceeding under Section 11A 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 11A of the Act, if the classification lists supplied by the assessee were approved by the department from time to time.*

*16. As noted herein earlier, the erstwhile Rule 10 of the Central Excise Rules and Section 11A 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 11A 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 v. Cotspur Ltd [1999 (113) ELT. 353 (S.C.)), it was held that the levy of excise duty on the basis of an approved classification list is not a short-levy and therefore the erstwhile Rule 10 of the Central Excise Rules or Section 11A 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 11A of the Act prior to the 2000 amendment. After the amendment in Section 11A 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.*

*17. 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.*

*18. In view of the decision in Cofspun Ltd 's case (supra) Section 11A 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 v 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. v. 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.*

*19. 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 contended 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 mis-statement 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*

*20. 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.*

*21. 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 11A 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 22. 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.*

*23. In the impugned order, CEGAT on perusal of the correspondence between the appellant and the appellant with respect to post-forming processes like department was unable to find any disclosure in writing by 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.*

*24. Furthermore, 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)*

*25. 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.*

*26. In Tata Iron & Steel Co. Ltd. v 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 Furthermore, 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 v 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, 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 mat he must have done, does not render if suppression"*

*27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. 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 v. 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 mis-statement or "suppression of facts. This view was also reiterated by this Court in Collector of Central Excise, Baroda v LMP Precision Engg. Co. Ltd. [2004 (9) SCC 703].*

*28. 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.*

*29. Similarly, in the case of Collector, Central Excise, Jamshedpur v 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 OK. Play (India) Ltd. v. Collector of Central Excise, Delhi-III (Gurgaon) [2005 (66) RLT 667 (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.*

*30. 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.*

*31. There will be no order as to costs in this appeal."*

Following the above decision and in view of the above discussions, we are of view that impugned order-in-appeal is not sustainable and therefore we set aside the same.

5. The appeals are accordingly allowed.

(Order pronounced in the open Court on 22.11.2024)

**(RAMESH NAIR)**
**MEMBER ( JUDICIAL )**

**(C. L. MAHAR)**
**MEMBER ( TECHNICAL )**

Dharmi