CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/241/2001

[Arising out of Order-in-Original No.22/2000 dt. 31.10.2000 passed by Commissioner of Central Excise, Chennai-II]

Velvette International Pharma Products Ltd. Appellant

Versus

Commissioner of Central Excise, Chennai-II Respondent

Appearance :

Shri R. Janardhanan Pillai, Consultant
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing : 14.11.2018
Date of pronouncement : 14.12.2018

FINAL ORDER No. 43094 / 2018

Per Bench

The facts of the matter are that M/s.Velvette International Pharma Products Ltd., the appellants herein were inter alia manufacturers of "NIVARAN 90 Herbal Cough Syrup". A show cause notice dt. 17.5.1996 was issued to the appellants inter alia proposing demand of Central Excise duty amounting to

Rs.78,14,418/- as liability for the period 01.05.1991 to 28.2.1994, invoking extending period of limitation on the grounds that declarations filed by the appellants over the years from 1990 onwards had misdeclared the method of manufacture of NIVARON 90 as if they were as per Ayurvedic text with intention to evade Central Excise duty and that they had suppressed the actual ingredients used by them in the said product with intention to evade Central evade Excise duty. Another supplementary show cause notice was issued on 25.07.1996 making a reference to the earlier SCN dt. 17.5.1996 proposing demand of Rs.78,14,418/-. The supplementary SCN, on similar grounds of the earlier SCN inter alia proposed demand of Special Excise Duty of Rs.6,29,868/-. In adjudication, the proposals made in the notices were confirmed vide Order-in-Original No.22/2000 dt.31.10.2000 confirmed total demand of Rs.84,44,286/- and also imposed a penalty of Rs.30 lakhs in terms of Rule 173Q of Central Excise Rules, 1944. On appeal, the CESTAT Chennai vide Final Order No.516, 517/2010 dt. 04.05.2010 inter alia, concurred with the adjudicating authority that impugned goods cannot be considered as Ayurvedic medicine nor could the same be extended exemption from excise duty; that appellants had not disclosed all the ingredients, hence charge of suppression has been rightly held to have been proved. The Tribunal in the said order extended the benefit of cum-duty assessment, however upheld the remaining portion of the adjudication order. On appeal, the appellants preferred a C.M.A. No.2759/2010 with the Hon'ble High Court of Madras who vide their order dt.19.10.2011 inter alia ordered as under :

> "11. We have perused the memorandum of grounds of appeal before the CESTAT. The appellant had raised the said ground in paragraph 2 (e) of the grounds of appeal. The CESTAT had considered and rejected the same solely on the ground of suppression. In our

opinion, the question of limitation should be considered with reference to the above provisions, which the CESTAT had not gone into, and for that reason, the contention of Mr. K. Jayachandran must be accepted. Though we are not inclined to interfere with the impugned order in regard to the substantial questions of law 2 & 3, we find that the challenge in the appeal on the first substantial question of law must be accepted. Accordingly, the civil miscellaneous appeal is partly allowed and the matter is remitted back to the CESTAT only for consideration on the first substantial question of law. Consequently, M.P.No.1 of 2010 is closed. No costs."

2. Taking note of the fact that the main issue regarding classification of the product "NIVARAN 90 Herbal Cough Syrup" is pending before the Hon'ble Supreme Court, vide Final Order No.41232/2017 dt.19.07.2017 the Tribunal closed the appeal for the purpose of statistics with liberty given to both sides to file application to reopen the matter as and when the case is disposed of by the Hon'ble Supreme Court or in case of any change of circumstances. On an appeal preferred by the department before the Hon'ble High Court of Madras, predominantly on the ground as to whether CESTAT was correct in closing the case for the purpose of statistics, the Hon'ble High Court vide their order dt. 20.06.2018 ordered as under :

"5. Going through the material on record, both Mrs. Aparna Nandakumar, learned Senior Standing Counsel for the appellant in C.M.A.No.1046 of 2018 and Mr. V.Sundareswaran, learned counsel for the appellant in C.M.A.No.1093 of 2018, and the learned counsel for the respondents, stated supra, consented that the orders impugned in both the appeals, be set aside, and matters be remanded to CESTAT, madras, either to dispose of the appeals filed before the Tribunal, on the basis of the decision made by the Tribunal/High Court, proximate to the case on hand, or to keep the appeals pending, till the final outcome of the issues raised.

6. Placing on record the submissions of both the parties, orders impugned in C.M.A.Nos.1046 and 1093 of 2018, are set aside. The

matters are remitted to CESTAT, Madras. Accordingly, as consented by parties, a direction is issued to the Tribunal.

7. With the above direction, the Civil Miscellaneous Appeals are disposed of. No costs."

Hence the matter has once again come up before the Tribunal.

3. Today when the appeal came up for hearing, on behalf of the appellant, Shri R.Janardhanan Pillai, Ld.Consultant made oral and written submissions which can be summarized as under :

(i) The Hon'ble High Court vide para 11 of the judgement has accepted that the date of inspection has a bearing in deciding the period of limitation which means, show cause notice is issued within five years or not from the date of knowledge. The date of knowledge is attributable to 22.10.1990 on which date, the departmental officers visited the premises and accepted the 173B declaration and permitted clearance of the goods as per the declaration. (Copy of the letter addressed to the Assistant Commissioner by the assesse showing the following endorsement made by the Supdt enclosed).

"Received declaration. Permitted
Sd-/-
22.x.90"

(ii) It is this date which is the date of inspection and on this date the department has acquired knowledge about the activities of manufacture of the appellant. The Hon'ble High Court has found that the date of inspection has a bearing in deciding the period of limitation. The show cause notice also accepted that the assessee have filed declarations from the financial year 1990-91. Reliance is placed in the judgement of the Hon'ble Apex Court in the case of the Hon'ble Supreme Court in the case Mehta & Co reported in 2011 (264) ELT

481 (SC), wherein the Hon'ble Apex Court held that the relevant date for computation of extended period for show cause notice is date of knowledge.

(iii). As noted above in this case, show cause notice was originally issued on 17.5.1996**.** A supplementary show cause notice was issued on 25.7.1996 enhancing the demand by a substantial sum of Rs.6,29,868/-. It is admitted by the department that the supplementary show cause notice was issued to demand Special Excise duty which duty was not included inadvertently in the show cause notice originally issued on 17.5.1996. It is thus clear that the supplementary show cause notice is a corrigendum to the show cause notice dated 17.5.1991. When a corrigendum is issued to a show cause notice, substantially changing the show cause notice originally issued, the date of show cause notice should be taken as the date of issue of the corrigendum. There is no legal provision to issue a corrigendum to the show cause notice. We press into service the following judgements in support of our plea :

(a) 2017 (348) ELT 214 (Bom.) – Arihan Telecommunications vs. UOI. Held that limitation to be counted from date of corrigendum.

(b) 3013 (295) ELT 36 (Jhar.) – Fast Track Tour and Travels. Held that substantially changing the liability of the assesse, limitation should be counted from the date of service of corrigendum.

(c) 2005 (184) ELT 201 (Tri.Del.) – Somani Iron & Steel Ltd. – There is no legal provision to issue a corrigendum.

(d) 2006 (196) ELT 237 (CESTAT) – Mukesh Dye Works – Held that a corrigendum changing the basis of the show cause notice is fresh show cause notice.

(e) 1999 (107) ELT 467 – Wipro Information Technology – Held that increasing the demand and raising fresh grounds is treatable as a fresh show cause notice.

(iv) Taking into consideration the date of permitting clearance as the date of inspection and acquiring knowledge regarding the activities of the appellant and taking into consideration the date of corrigendum as the date of issue of the show cause notice, the demand is barred by limitation. Even otherwise both the show cause notices are barred by limitation taking the date of knowledge as 22.10.1990, as the period of dispute starts from 17.5.1991 only. In other words suppression can be alleged only upto 21.10.1990. Reliance is placed in the judgement of the Bombay High Court in the case of Dharampal Lalchand Chug reported in 2015 (323) ELT 753 (Bom.) wherein it is held that whatever may be the magnitude of suppression of fact, an authority has no power to issue show cause notice beyond the period of FIVE YEARS,. We also rely on the judgement of the Hon'ble Calcutta High Court in the case of Naresh Kumar reported in 2015 (37) STR 451 (Cal). Wherein it is held that an authority has no jurisdiction to issue a show cause notice, which is barred by limitation. Thus having issued the show cause notice, beyond the period of five years, the show cause notice is barred by limitation.

4. On the other hand, Ld.A.R Shri A. Cletus made a number of contentions which can be summarized as under :

i) Although the Tribunal had upheld the allegation of suppression against the appellant in their earlier Final Order dt.04.05.2010, the appellant also challenged the Tribunal having not considered the preliminary objection of jurisdiction of the

Commissioner of Central Excise in deciding the classification matter however on both these questions, the Hon'ble High Court in their order dt. 19.1.2011 have not interfered with the decision taken by the Tribunal in that regard.

ii) Ld. Advocate also made a contention that the date of inspection was 22.10.1990. However, it is seen that the date is actually the date of receipt of declaration on 22.10.1990 filed by the appellant before the Jurisdictional Divisional Officer and does not relate to any inspection carried out by any departmental officer. In the circumstances, the said date of 22.10.1990 cannot be considered as the relevant date for calculation of five years for invocation of extended period on the grounds of suppression.

5. Heard both sides and have gone through the facts.

6.1 This appeal has been taken up by the Tribunal in compliance with the Order dt. 20.06.2018 of the Hon'ble High Court of Madras in C.M.A.No.1093 and 1046 of 2018. In effect, this Tribunal will also have to consider only limited issue as per the remand order dt. 19.10.2011 of the High Court in C.M.A.No.2759 of 2010.

6.2 The C.M.A.No.2759/2010 had been admitted by the Hon'ble High Court on the following questions of law :

> (1) Whether in the facts and circumstances of the case, the date of inspection has any bearing in deciding the period of limitation to issue show cause notice in a case covered by the first proviso to Section 11-A of the Central Excise Act?
>
> (2) Whether in the facts and circumstances of the case, the Tribunal committed substantial error of law in not considering the preliminary objection of jurisdiction of the Commissioner of Central Excise in

deciding a classification matter when the proper officer is the Assistant Commissioner of Central Excise as per Rule 173-B of the erstwhile Central Excise Rules ?

(3) Whether in the facts and circumstances of the case, extended period is invokable when the impugned goods was an Ayurvedic product or not, under consideration in various courts involving interpretation, in the absence of the definition of "Ayurvedic Medicine" in the Central Excise Tariff Act, 1985?"

The Hon'ble High Court however did not interfere with the impugned order in regard to Sl.No.2 & 3 and only remanded the matter back on the question of law raised at Sl.No.1 as above. The relevant portion of the order of the High Court is as under :

"11. We have perused the memorandum of grounds of appeal before the CESTAT. The appellant had raised the said ground in paragraph 2 (e) of the grounds of appeal. The CESTAT had considered and rejected the same solely on the ground of suppression. In our opinion, the question of limitation should be considered with reference to the above provisions, which the CESTAT had not gone into, and for that reason, the contention of Mr.K.Jayachandran must be accepted. Though we are not inclined to interfere with the impugned order in regard to the substantial questions of law 2 &3 , we find that the challenge in the appeal on the first substantial question of law must be accepted. Accordingly, the civil miscellaneous appeal is partly allowed and the matter is remitted back to the CESTAT only for consideration on the first substantial question of law. Consequently, M.P.No.1 of 2010 is closed. No costs."

6.3 The limited issue to be addressed by this Bench therefore, is whether the date of inspection by departmental officers at the unit of the appellant has any bearing in deciding the period of limitation when issuing SCNs in the proceedings initiated against the latter.

7.1 As per the facts narrated in SCN dt. 17.05.1996 on the basis of intelligence, inter alia, the manufacturing units of the appellants were searched by surprise by the officers of the Central Excise department on 11.11.1993. In the list of documents relied upon in the SCN, the mahazar drawn on 11.11.1993 at the said manufacturing premises of the appellant has also been indicated. From the Annexure "C" to the SCN, at Sl.No.I, we find that vide said Mahazar a number of documents had been seized by the officers e.g. Goods Receipt Notes, Raw Material Issue Register, Inward Bill Register, Stock Register, General Lodgers, Purchase bills, Material consumption etc. It also evidences that the Marketing office of the appellant was searched subsequently on 23.11.93. Further, another office of the appellant at Dr. Ambedkar Road, Kodambakkam, Chennai was visited on 6.5.1996 and certain documents were recovered from that place also.

7.2 From the list of documents relied upon in the SCN, it is also evident that there was to and fro correspondence between the department and the appellant subsequent to the visit of the officers. There is also mention of letters dt. 11.2.1994 addressed to the Director, Drug Control Department, reply letter dt. 8..3.1994 of the Director, Drug Control. So also, there is a reference to a letter dt.11.5.94 to the Director of Indian Medicine & Homeopathy Department and another letter dt. 7.12.94 to the same authority, reply of the Director of Indian Medicine was issued on 1.12.95. There is also a reference of a certificate dt. 15.5.96 of Shri A.V.M. Unni, Vaidyan of Arya Vaidya Pharmacy, Madras.

7.3 Quite evidently, the said visit of the officers on11.11.93 only served to facilitate collection of a number of documents, registers etc. under a Mahazar drawn on the same date of the visit. So also, a larger number of documents were

also resumed under mahazar from other premises on the same date and on subsequent dates. There has also been correspondences between the appellant and the department and between the department and the authorities mentioned above. Obviously, the visit of the officers on 11.11.93 was only the starting point of the investigation. It cannot therefore be said that just because officers visited the premises of the appellant on 11.11.93, the department has automatically come to know about the alleged modus operandi as reflected in the SCN dt. 17.5.96. It is but evident that only after analysis and study of the documents seized under Mahazar on the date of visit, and subsequently has the department acquired reasonable belief that the appellant had, as indicated in para 3.0 of the SCN, filed wrong / false declarations; removed medicaments without payment of duty; no Central Excise Gate Passes were issued for removal of the excisable goods and no price lists were filed and no statutory accounts were maintained for the manufacture and clearance of goods. Only after arriving at such apparent findings, and on their basis, has the said SCN dt.17.5.96 inter alia, proposed demand of Central Excise duty of Rs.78,14,418/- on NIVARAN 90 Cough Syrup, allegedly removed without payment of duty during the period 1.5.1991 to 28.2.1994.

7.4 The Hon'ble High Court of Madras in their remand order dt. 19.10.2011 in C.M.A. No.2579 of 2010 has only remanded the matter to the Tribunal for the limited purpose of adjudging whether "date of inspection" has any bearing in deciding the period of limitation to issue SCN. From the analysis of the facts on record and findings and discussions herein above, we have no hesitation in concluding that the date of inspection of 11.11.1993 will not have any bearing for

being considered as the relevant date for issue of SCN within the period of limitation.

7.5 Viewed in the background of the aforesaid order dt. 19.10.2011 of the Hon'ble High Court, we are unable to fathom how Ld. Consultant, during the course of hearing, has contended that the relevant date should be attributable to 22.10.1990, on which date Rule 173B declaration had been accepted by the department. This is not certainly within the scope of the remand directions of the Hon'ble High Court. On a perusal of the said letter dt. 20.10.1990 endorsing the said acknowledgement dt. 22.10.1990 is only a letter of the appellants dt.20.10.1990 informing that their Herbal Cough Syrup "Nivaran 90" is being classified as Ayurvedic Medicine, and also giving the list of ingredients for its manufacture. It is very obvious that the said letter has been acknowledged by the concerned Superintendent of the department in good faith, however that by itself cannot coat the said declaration with the stamp of finality or infallibility. In fact, the very averments made in the said declaration have been found incorrect and misstated which by itself is a recognized *raison d'etre* for invoking extended period of limitation. This is what has been done in the impugned SCN. The attempt by Ld. Consultant to take us on a journey not contemplated by the order of the Hon'ble High Court not only fails but has been found incorrect.

7.6 The SCN has also alleged that appellants had mis-declared the process of manufacture and formula of the product, suppressed from the department the use of non-ayurvedic ingredients which was other than declared, with intention to evade payment of duty and hence have invoked extending time limit of five years as provided in proviso to sub-section (1) of Section 11A of the then Central Excise & Salt Act, 1994.

7.7 Viewed in this context, the period of demand namely 1.5.1991 to 28.2.1994 is well within the extended period of limitation invoked under proviso to sub-section (1) of Section 11A ibid, with respect to the date of SCN, namely, 17.5.1996. We therefore hold that in the facts and circumstances of the case, the date of inspection by the officers on 11.11.93 will not have any bearing in deciding the period of limitation to issue SCN dt. 17.5.96.

7.8 The appellants have also objected to the issue of supplementary SCN dt. 25.7.96 which, according to them, has substantially changed the SCN originally issued; hence the date of issue of SCN should be taken as the date of issue of the supplementary SCN. On an analysis of this contention, we find that whereas SCN dt. 17.5.96 had only proposed demand of Central Excise duty, the supplementary SCN proposed that on similar grounds contained in the said SCN, "Special Excise Duty of Rs.6,29,868/-" is also liable to be paid for the period 1.5.91 to 28.2.94 again invoking the extended period of limitation under Section 11A 91) ibid. The Supplementary SCN has not changed the quantum of excise duty, demanded in the earlier SCN dt.17.5.96, but has only sought to propose demand another duty of excise, namely, Special Excise Duty which may have been inadvertently omitted to have been included in the first SCN. In any case, for the very reason that date of inspection 11.11.93 cannot be taken as the date of department having acquired knowledge of the activities of the appellant, the demand proposed in the supplementary SCN dt. 25.7.96 is also found to be well within the extended period of limited invoked therein.

8. For these reasons, we are unable to find any merit in the arguments put forth by the Ld. Consultant for the appellant. The date of inspection of 11.11.93 will not have any bearing in deciding the period of limitation to issue SCN dt. 17.5.96 and the supplementary SCN dt. 25.7.96. In consequence, we do not find any reason to deviate from the findings of the Tribunal in the earlier order dt. 4.5.2010 that the demand is not time-barred and the charge of suppression has been rightly held to have been proved by the authorities below. In the result, Appeal is dismissed.

9. The limited issue at Sl.No. (1) of the remand order dated 19.10.2011 by the Hon'ble High Court of Madras in C.M.A.No.2759 of 2010 dt. 19.10.2011 is therefore considered and disposed of on the above terms.

(pronounced in court on 14.12.2018)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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