

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

EXCISE APPEAL NO. 52953 OF 2018

(Arising out of Order-in-Appeal No. DDN/CE/000/APPL-DDN/RDR/135/2017-18 dated 31.05.2018 passed by the Commissioner (Appeal), Central Tax, Dehradun)

M/s. Delta Power Solutions India Pvt. Ltd. ...Appellant

VERSUS

**Commissioner, Customs, Central Excise ...Respondent
& Service Tax, Commissionerate, Hapur**

APPEARANCE:

Shri Sparsh Bhargava, Advocate for the Appellant

Shri Om Prakash Bisht, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J.MATHEW, MEMBER (TECHNICAL)**

DATE OF HEARING: 24/08/2021

DATE OF DECISION: 03/11/2021

FINAL ORDER NO. 51919/2021

JUSTICE DILIP GUPTA

M/s. Delta Power Solution India Pvt. Ltd.¹ has filed this appeal to assail the order dated May 31, 2018 passed by the Commissioner (Appeals), Central Tax, Dehradun², by which the appeal that was filed against the order dated August 02, 2016 passed by the Joint Commissioner, Central Excise, Hapur³ has been dismissed. The Adjudicating Authority confirmed the demand of Rs.24,91,162/- under

**1. the appellant
2. the Commissioner (Appeals)
3. the Adjudicating Authority**

rule 14 of the CENVAT Credit Rules 2004⁴ read with section 11A (4) of the Central Excise Act, 1944⁵ with interest and penalty.

2. The appellant is a manufacturer of Power Rectifier systems, UPS systems, industrial automation devices, video and audio display systems and electric motors etc. The appellant claims that for this purpose it has been procuring various inputs, capital goods and input services and also availed CENVAT Credit on excise duty and service tax paid on the said items. The appellant has also stated that during the period of dispute from April 2010 to March, 2011, it was also engaged in the manufacture of Solar Power Systems, but these goods were exempted from levy of excise duty under a Notification. During this period, the appellant manufactured 48 Solar Power Systems worth Rs.4,98,23,250/- and cleared the same from the factory without payment of excise duty.

3. The Audit Team reviewed the books and records maintained by the appellant from June 17, 2011 to June 22, 2011 and raised an objection that as the appellant was manufacturing both dutiable (UPS systems etc.) and exempted goods (Solar Power Systems), the appellant was required to comply with the condition contained in rule 6 of the 2004 Credit Rules. Objections were, therefore, raised by the audit team, to which the appellant filed a reply stating that principal inputs for solar power systems were exempted from excise duty and thus, no CENVAT Credit was available to them. On the remaining inputs, either the appellant did not avail CENVAT Credit and if it had taken them inadvertently, then the same was suo moto reversed by

4. 2004 Credit Rules
5. the Excise Act

the appellant on April 30, 2011 prior to the audit inspection. The appellant also stated that it had maintained separate records for exempted and taxable goods.

4. However, a show cause notice dated March 19, 2015 was issued mentioning therein that the appellant manufactured 48 Solar Power Systems during the financial year 2010-11 on which no excise duty was paid. The appellant also manufactured dutiable goods. Thus, the appellant manufactured both dutiable as well as exempted goods. However, the appellant has not been maintaining separate books of accounts and therefore, rule 6(3) of the 2004 Credit Rules would be attracted making the appellant liable to pay 5% of the total value of exempted goods sold by it. The show cause notice also stated that information relating to principal inputs in Form ER-5 under rules 9A(i) and 9A(ii) of the 2004 Credit Rules was not submitted for the financial year 2010-11 and that other returns like ER-6 and ER-7 were also not submitted by the appellant. Therefore, there was an intent on the part of the appellant to evade payment of excise duty. It was also stated in the show cause notice that separate stock register and RG 23-Part I for exempted goods was not maintained by the appellant.

5. Accordingly, the following amount was demanded from the appellant in terms of the above mentioned observations:

- (i) Amount of Rs.24,91,162/- calculated @5% of Rs.4,98,23,350/- under the provisions of rule 6(3)(i) of the 2004 Credit Rules read with section 11A(4) of the Excise Act and rule 14 of the 2004 Credit Rules;

- (ii) Interest at the appropriate rate on the said amount under rule 14 of the 2004 Credit Rules read with section 11AA of the Excise Act; and
- (iii) Penalty under Rule 15 of the 2004 Credit Rules read with section 11AC of the Excise Act.

6. The Adjudicating Authority, by order dated August 02, 2016, however, confirmed the demand.

7. The appellant filed an appeal which was also dismissed by the Commissioner (Appeals) by order dated May 31, 2018.

8. During the course of hearing of this appeal, Shri Sparsh Bhargava, learned counsel appearing for the appellant made submissions on the issue regarding invocation of the extended period of limitation contemplated under section 11A(4) of the Central Excise Act and submitted that if this issue is decided in favour the appellant, it would not be necessary to the appellant to make submissions on merits.

9. It is for this reason that on August 24, 2021 submissions relating to invocation of the extended period of limitation were only heard.

10. Learned counsel appearing for the appellant submitted that though the audit was undertaken between June 17, 2011 up to June 22, 2011 and audit objections were raised on September 09, 2011, but the show cause notice was issued to the appellant on January 28, 2013 alleging non-filing of ER-5, ER-6 and ER-7 for the period of 2010-11 and seeking to levy penalty for the same on the basis of audit observations, without making any allegation regarding non-maintenance of separate records. This show cause notice was

adjudicated upon by order dated January 28, 2013 by confirming the demand made on penalty. Thereafter, another show cause notice dated March 19, 2015 was issued to the appellant nearly four years from the audit inspection alleging non-maintenance of separate records. The appellant submitted a reply dated April 25, 2015 and thereafter, the order dated August 08, 2016 was passed by the Adjudicating Authority.

11. The submission of learned counsel for the appellant is that under section 11A (1), the Central Excise Officer could have served a notice upon the appellant within one year from the relevant date i.e. October 10, 2011 but in the instant case the show cause notice was issued on March 19, 2015 without there being any reason for invoking the extended period of limitation under sub-section (4) of section 11A of the Excise Act.

12. To appreciate this submission, it would be appropriate to reproduce the relevant provisions of sub-sections (1) and (4) of section 11A of the Excise Act and they are as follows:

"11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or 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,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so 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;

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice."

13. It would also be necessary to reproduce the relevant portions of the show cause notice dated March 19, 2015 and the order passed by the Commissioner (Appeals)

14. The relevant portion of the show cause notice is reproduced below:

"2. During the course of audit by the Audit Officers of AGUP Lucknow it has been observed in audit note No. 89/2011-2012 that the party has cleared Tele-power system and UPS system after payment of excise duty. The solar power system was exempted from excise duty vide notification No. 06/2006, Serial No. 84 list Nos. 05. The party produced 48 Nos of Solar Power System and cleared the same for Rs.4,98,23,250/- without payment of duty during the year 2010-11. **The party neither made a separate account nor reversed the proportionate credit availed on exempted goods.**

3. Whereas, as per Rule 6(3) of the CENVAT credit Rules, 2004, the manufacturer of goods or the provider of out-put service opting not to maintain separate accounts, shall follow, either of the following option, as applicable to him-

i. The manufacturer of goods shall pay an amount equal to 5% value of the exempted goods and the provider of the output service shall pay an amount equal as 5% of value of the exempted service or

ii. The manufacture of goods or the provider of out-put service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to the manufacturer of exempted goods or for provision of exempted services subject to the condition procedure specified in Rules 3(A).

4. It has also been observed that-

i. No separate account for exempted goods was maintained and submitted in Central Excise department on monthly basis.

ii. Information relating to principal inputs in form of ER-5 under rule 9A(i) and 9A(ii) of CENVAT credit rules 2004 has not been submitted in Financial Year 2010-11. Also, other returns like ER-6 and ER-7 had not been submitted by the assessee.

iii. Separate stock register and RG 23 Part-I for exempted goods had not been maintained by the assessee.

5. In view of the forgoing paras the party have suppressed the facts with intent to evade the Central Excise duty and have disclosed only after detection by Audit."

(emphasis supplied)

15. The appeal filed by the appellant before the Commissioner (Appeals) notices the issue raised by the appellant regarding invocation of the extended period of limitation and the delay in issuing the show cause notice. The relevant portion of the order dated May 31, 2018 is reproduced below:

"(iv) SCN IS BARRED BY LIMITATION :- All the relevant facts were in the knowledge of the Department, there has been no willful misstatement or suppression of facts by the Appellant. That in the instant case the SCN has been issued on the basis of audit that was conducted in 2011-2012. The Appellant duly responded to the objections raised by the AGUP Lucknow and provided the information/ documents which were sought. The chain of correspondences involved in both the Impugned notices has already been provided above. The Appellant was diligent in responding to the letter issued by the AGUP. Thus, there was full and sufficient disclosure of all the facts and circumstances by the Appellant. That it is also not the case of the department that they have gathered information independently from some third party source. Rather entire information was submitted by the Appellant himself. Hence, there is no merit in the department's contention that the Appellant suppressed material facts from the department. **The stance of the Appellant from inception is very clear that they had either not availed any Cenvat credit on disputed goods. Thus, question of mis-representation or suppression of facts does not arise at all. The Department was always aware about the practice of the Appellant and there was no mis-representation or suppression by the Appellant. Further, the Department has failed to show any positive act of concealment or willful non-disclosure on the part of the Appellant. Thus, the issuance of the SCN invoking the extended period is unsustainable and therefore the SCN and Impugned Order should be quashed on this ground only.**

(v) SCN was issued after a period of more than three years from audit and hence, has been inordinately delayed Without prejudice, it is submitted that the SCN was issued by the Ld. Assistant Commissioner on 19.03.2015 and thus has been issued after a period of more than 3.5 years from the period of audit (i.e. 17.06.2011 to 22.06.2011). It may be noted that during this interim period, there was no challenge made to the method followed by the Appellant under Rule 6(2). However, the SCN alleging non- payment of excise duty on Solar Power Systems was issued by the Ld. Assistant Commissioner in 2015 after invoking the extended period of limitation. **It is submitted that the SCN was thus issued after an inordinate delay and is unsustainable."**

(emphasis supplied)

16. The Commissioner dealt with this issue in paragraphs 8 and 9 of the order and the said paragraphs are reproduced below:

"8. As a result, as discussed, as there exists liability on them in terms of the Impugned Order, its attendant consequences follow as a matter of course. Interest under Section 75 of the Finance Act, 1994 would be payable by them as ordered therein. **I further observe that in the present system of self-assessment documents like invoices and other transaction details are not supplied to the Department, the intention will have to be believed as that of evasion by way of suppression or mis-declaration. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with intent to evade payment of service tax is conspicuous by the peculiar facts and circumstances of the case as discussed above.** Therefore penalty is correctly imposed under section 78 of the Finance Act, 1994. The appellant has submitted various case laws in their support but facts of the impugned case are different and none of them is applicable.

9. **The appellant also contended that there was inordinate delay in issuance of Show cause notice.** I refer to case law of Ram Kishore Gupta v/s Y.S. Bisht 2004 (165) ELT 139 (Del.) wherein it was held that inordinate delay in adjudication depends on the fact of the case. Para 15 & 16 of the order is as below:

"15. It was observed by the Supreme Court in P. Ramachandra Rao v. State of Karnataka - JT 2002(4) SC 92] that the guidelines laid down in A.R. Antulay's case (supra) were not exhaustive but only illustrative and there cannot be any hard and fast rule or a strait-jacket formula for quashing the criminal proceeding on account of inordinate delay in the trial. It was further observed that each case will depend upon its own facts.

16. The law laid down by the Supreme Court in A.R. Antulay's case (supra) together with the proposition of law which have been laid down in P. Ramachandra Rao's that there is no escape from holding that in the present case though there is delay of 13 years in concluding the pre-charge evidence, but keeping in view of the nature of the offence which has been committed by the petitioner and the reasons for delay, it will be travesty of justice if the criminal proceedings are truncated at the conclusion of the pre-charge evidence and when the case is fixed for hearing of the arguments on charge. The Court, in fact, could render justice to the petitioner by giving appropriate directions to the ACMM for expeditious disposal of the case in a time bound schedule."

Hence, I do not agree with the appellant contention on this issue"

(emphasis supplied)

17. Learned counsel for the appellant submitted, which fact is not disputed by the Department, that the period of one year would commence from October 09, 2011 and so the notice that was issued on March 19, 2015 was beyond the period of one year. It has, therefore, to be seen whether the extended period of five years could be invoked in the facts and circumstances of the case.

18. A perusal of section 11A (1) of the Excise Act shows that where any duty of excise has not been paid for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Excise Act with intent to evade payment of duty, the Central Excise Officer shall, within one year from the relevant date, serve notice on the person requiring him to show cause why he should not pay the amount specified in the notice. However, sub-section (4) of section 11A of the Excise Act provides that where any duty of excise has not been levied or short paid by reason of fraud or collusion or any wilful mis-statement, the notice can be issued by the Central Excise Officer within five years from the relevant date.

19. The provisions of section 11A of the Central Excise Act came up for interpretation before the Supreme Court in **Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay**⁶. The Supreme Court observed that section 11A empowers the Department to reopen the proceedings if levy has been short levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the

6 1995 (78) ELT 401 (SC)

circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the Supreme Court observed-

"2. ***** The Department invoked extended period of limitation of five years as according to it the duty was short-levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.

4. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. **It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from 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."

(emphasis supplied)

20. It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.

21. This decision of the Supreme Court in **Pushpam Pharmaceuticals** was followed by the Supreme Court in **Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut**⁷ and the relevant paragraph is as follows:-

"27. Relying on the aforesaid observations of this Court in the case of **Pushpam Pharmaceuticals Co. v. CCE** 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 and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made hereinabove 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 the proviso to Section 11-A 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 CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."

(emphasis supplied)

22. In **Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore**⁸, the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

23. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur**⁹ and the relevant portion of the judgment is reproduced below:

"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. **The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable.** If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. **In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.**"

(emphasis supplied)

24. The Supreme Court in **Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh**¹⁰ also observed

8 (2003) 3 SCC 410
 9 2013 (288) ELT 161 (SC)
 10 2007 (216) ELT 177 (SC)

in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:-

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct."

(emphasis supplied)

25. In the present case, what is seen is that the audit was conducted between June 17, 2011 to June 22, 2011 and the show cause notice refers to this audit only. The notice, therefore, should have been issued within one year from the relevant date and there is no good reason as to why the Central Excise Officer should have waited till March 19, 2015 to issue the show cause notice. The extended period of limitation, for this reason alone, could not have been invoked. Even in a case of self-assessment, the Department can always call upon an assessee and seek information and in this case an audit objection was raised, to which a reply was submitted. The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment. This apart, an assessee is called upon to provide only that information that is required to be furnished in the self-assessment form. There is no averment in the show cause notice, nor there is any finding in the order passed by the Commissioner (Appeals) that the appellant had provided incorrect information to any matter required to be stated in the self-assessment form with intent to

evade payment of service tax. All that has been stated is that the transaction details were not supplied to the Department and merely because of this, it has been assumed that the appellant suppressed facts with intent to evade payment of service tax. Suppression in self-assessment matters can arise only when information sought in the prescribed form is not supplied or incorrect information is supplied.

26. Thus, in view of the aforesaid discussions, it cannot be said that the appellant had suppressed any information with intent to evade payment of tax.

27. It would, therefore, not to be necessary to consider submissions on the merit of the order.

28. The impugned order dated May 31, 2013 passed by the Commissioner (Appeals), for this reason alone, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **03.11.2021**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J.MATHEW)
MEMBER (TECHNICAL)