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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/534 /2006 - EX[DB]

Date 27/06/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
MODIPOON FIBRES COMPANY. U.P.
MODINAGAR (DISTT. GHAZIABAD)

MODIPOON FIBRES COMPANY. U.P. Appellant

Vs

C.C.E. GHAZIABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** A/728 **2012 EX[DB]** dated 19-6-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult SH. PRABHAT KUMAR, ADV, C/E
MR.P.C.JAIN
332, ARAVALI APARTMENTS, ALAKNANDA, NEW DELHI-19

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, COURT NO. I

DATE OF HEARING/DECISION : 19/06/2012.

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Appeal No. 534 of 2006

[Arising out of the Order-in-Appeal No. 171-172/CE/GZB/2005 dated 12/12/2005 passed by The Commissioner (Appeals), Customs & Central Excise, Meerut – I.]

M/s Modipon Fibres Company — Appellant

Versus

CCE, Ghaziabad — Respondent

Appearance

Shri Prabhat Kumar, Advocate – for the Appellant.
Shri R.K. Verma, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order No. A/728/2012-Ex(BR)

Shri Justice Ajit Bharihoke (Oral)

M/s Modipon Fibres Company, Modinagar, the appellant herein are engaged in manufacture of man made fibre and yarn falling under heading No. 54.04 of the schedule to the Central Excise Tariff Act, 1985.

2. During the period 2002-2003 and 2003-2004 (upto February 2004) the appellant while clearing the goods from its factory collected charity /Dharmada from the customers. The appellant however did not include the amount of charity/Dharmada collected from the customers in the valuation for the purpose of excise duty.

3. The Supreme court vide its judgement in civil appeal No. 7900-7902/95 in the matter of *CCE vs. Panchmukhi Engg. Works and Others* reported in *2003 (158) E.L.T. 550 (S.C.)* held that "Dharmada charges" collected by the manufacturer from the buyer would be included in the transaction value for the purpose of the excise duty. In view of the said judgement the Department issued a show cause notice raising a demand of Rs. 603998/- on account of short payment of duty. The penalty was also sought to be imposed on the appellant. The appellant contested the notice, the jurisdictional adjudicating authority vide order-in-original dated 26.09.2005 confirmed duty demand of Rs. 5,37,283/- with interest against the appellant and also imposed equal amount of penalty. Penalty of Rs.5,37,283/- was also imposed on Shri P.K. Sinha, Dy. G.M. (Legal) of the appellant company under Rule 26 of the Central Excise Rules, 2002. The

appellant feeling aggrieved by the order-in-original preferred appeal before the Commissioner (Appeals), the main plank of the said appeal was that the demand raised by the Department was barred by limitation and there was no justification for invoking the extended period of five years by the Department. Commissioner (Appeals) after hearing the appellant did not find merit in the appeal and dismissed the same. Shri P.K. Sinha is not in appeal before the Tribunal.

4. Learned Shri Prabhat Kumar, Advocate has submitted that the period of demand in this case is 2002-03 and 2003- February 2004. Undisputedly, show cause notice in this case was issued on 15.4.2005 invoking extended period of limitation. Ld. Counsel submitted that there was no justification for invoking extended period of limitation for the reason that the appellant have been paying the excise duty bonafide under the impression that "Dharmada charges" were not to be included in transaction value for the purpose of calculating the excise duty. Expanding on the argument, ld. Counsel for the appellant submitted that the earlier also the appellant was served with a show cause notice on the same ground for the period 1995-96 and 1999-2000. That matter was adjudicated by the Assistant Commissioner, Central Excise, Ghaziabad in favour of the appellant holding that "Dharmada charges" was not includible in the assessable value that order was not challenged by the Department and it attained finality. Thus, in view of the aforesaid finding the appellant, under the impression, that Dharmada was not includible in assessable value kept on paying excise duty

on that basis. Ld. Counsel submitted that in view of the aforesaid it cannot be said that the appellant had either committed fraud or suppressed or concealed the facts from the Department dishonestly with a view to evade payment of the excise duty. Ld. Counsel contended that in view of the aforesaid facts there was no occasion for invoking the extended period of five years under the proviso to Section 11A of the Excise Act.

5. Shri R.K. Verma, ld. AR for the Revenue on the contrary argued in support of the impugned order. He contended that the appellant has deliberately not included "Dharmada charges" in the assessable value for the purpose of excise duty and this fact came to light only during audit conducted by the Department. That the appellant never disclosed this fact in his ER-1 return, therefore, it is a clear case of suppression and concealment of the material facts by the appellant as such the Department was justified in invoking the extended period of five years.

6. We have considered the rival contention and perused the record. The dispute which requires consideration in this appeal is whether or not the Department was justified in invoking extended period of five years for raising the duty demand. In order to find answer to this question, it would be useful to have a look on Section 11A(1) of the Central Excise Act which reads thus:-

> "[**SECTION 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 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 provision of this Act or of the rules made thereunder, a Central Excise Officer may, within (one year) 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;

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 for the words one year, the words "five years" were substituted".

7. On reading of the above provision, it is evident that normal period of limitation for raising duty demand is one year. It is, however, extendable to five years provided it is established that non levy or short levy of duty demand is by reason of fraud, collusion or any wilful mis-statement or suppression of facts with the intention to evade the payment of excise duty. On perusal of the impugned order, it is seen that while dealing with the issue of limitation Commissioner (Appeals) have noted that even for the earlier period the appellant was served with a show cause notice raising duty demand in respect of short payment of excise duty on account of non inclusion of Dharmada collected from the buyers for in the transaction value for the purpose of excise duty and in that matter the Assistant Commissioner decided the matter in favour of the appellant and the Department did not prefer appeal against the said order. From this, it is evident that the Department was well aware that the appellant has not been including the

"Dharmada charges" collected from the buyers in the transaction value for the purpose of excise duty. Not only this, the Department by allowing the adjudication order dated 27.02.2001 in respect of earlier proceedings to attain finality has have given an impression to the appellant that he was rightly refraining from including the "Dharmada charges" in the transaction value. Further, the Commissioner (Appeals) has noted in his order that in the case of *Mohan & Co., Madras vs. CCE, Madras* reported in *1987 (30) E.L.T. 624 (Tribunal)* also the Tribunal held that dharmada charges were not includible in the transaction value. We may note that aforesaid judgment of the Tribunal was challenged by the Department and the Supreme Court vide judgement reported in 1987 (91) ELT A232 (SC) dismissed the civil appeal of the Department. From the above it is apparent that the appellant was discharging his obligation to pay excise duty in accordance with legal interpretation of the transaction value as prevailing at the relevant time. Therefore, it cannot be said that the appellant had concealed or suppressed the facts with intention to evade the excise duty. No doubt the Supreme Court took a different view in the matter of CCE vs. Panchmukhi Engg. Works (supra) but this cannot be taken as a reason conclude that the appellant has deliberately not included the "Dharmada charges" collected from the buyer in the transaction value with dishonest intention to evade excise duty liability. Thus, in our view this is not a case of fraud, concealment or suppression of facts with dishonest intention to escape the excise duty liability. As such, there was no occasion for invoking the extended period of limitation for raising the demand. Admittedly, the demand notes have been issued beyond the period of one year from the period in question. As such, we are of the view that the demand is not sustainable being barred by limitation.

8. Shri R.K. Verma, ld. AR submitted that even if it is assumed for the sake of argument that the appellant was not including "Dharmada charges" in the transaction value for the purpose of excise duty under mistaken interpretation of law then also after the pronouncement of judgement of Supreme court in the matter of Panchmukhi Engg. Works (supra) on 20.11.2002 the appellant was required to include "Dharmada charges" in the transaction value from 28.11.2002 onwards. Admittedly, he failed to do so. Therefore, there is a justification for invoking extended period of limitation.

9. There is no merit in the above contention. A ordinary citizen, in our view, under the ordinary course of circumstances cannot be expected to keep track of the judgement of various Courts. He is not expected to know about the law laid down by judicial pronouncement unless he comes across the judgement itself. The judgement of Supreme Court in the matter of Panchmukhi Engineering Works was published in the year 2003 as it is apparent from its citation -2003 (158) ELT 550 (SC). Even Central Board of Excise & Customs issued clarificatory circular pursuant to aforesaid judgement on 21.11.2003, therefore, it would be unfair to infer that the appellant was aware the law laid down by the Supreme Court in the matter of Panchmukhi Engineering Works (supra) immediately after the pronouncement of judgement on 28.11.2002. Thus, we find it difficult to

subscribe to the contention of the ld. AR for the Revenue that after November 2002 the appellant deliberately concealed and suppressed the fact of non-inclusion of Dharmada charges in the transaction value with effect from November, 2002.

10. In view of the discussion above, we are of the view that there is no reason to impute malafide intention on the party of the appellant to evade the excise duty by deliberately not included the "Dharmada charges" in the transaction value. Undisputedly, it is not a case of fraud or dishonest concealment of fact. Thus, in our view the Department was not justified in invoking extended period of five years for raising the demand. Accordingly we hold that the demand raised by the Department is barred by limitation as such the impugned order cannot be sustained. The appeal is, therefore accepted and impugned order is set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

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