IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Excise Appeal No. 4 - 5 of 2011

[Arising out of Order-in-Appeal No. IND-I/309 & 310/2010 dated 29.09.2010 passed by the Commissioner (Appeals), Central Excise, Indore]

M/s. Kshipra Drugs P Ltd. **Appellants**
Shri Jogendra Prasad

Vs.

Commissioner of Central Excise **Respondent**
Indore

Appearance:
Shri Manish Saharan, Advocate for the Appellants
Shri G R Singh, AR for the Respondent

CORAM:
Hon'ble Shri Ashok Jindal, Member (Judicial)

Date of Hearing : 30.08.2017
Date of decision : 04.10.2017

FINAL ORDER NO. 56903-56904 /2017

Per Ashok Jindal:

The appellants are in appeal against the impugned order wherein the demands have been raised by invoking the extended period of limitation.

2. Brief facts of the case are that the appellants are engaged in the manufacture of PP Medicines/ generic medicines. The appellant were availing the facility of SSI exemption under notification No. 8/2003 dated 01.03.2003. On 10.06.2006, the Preventive Branch of Central

Excise scrutinized the statutory records and conducted the physical stock verification. It was observed that during the period 2005-2006, the appellant has removed their goods without payment of duty despite crossing the SSI exemption limit of Rupees One Crore and appellants have not got themselves registered with the department and nor filed the returns. However scrutiny of record revealed that during the period 2005-06, the finished goods of Rs. 3,00,04,498/- were cleared which is exceeding the SSI exemption limit. Therefore, the show cause notice was issued to the appellant on 19.11.2008 alleging that the Appellants No.1 though were aware of their liability to pay the excise duty, they deliberately not paid the duty by suppressing the value of clearance with intent to evade payment of duty. Appellant No. 2 abated Appellant No. 1 in committing such activity. The matter was adjudicated and demand of duty was confirmed along with interest and penalties on the appellant have been imposed. The learned Counsel for the appellants submits the value of Rs.3,00,04,498/- includes the value of goods of Rs. 65,02,008/- which were goods returned and same has been cleared after removing the defect. Therefore, the amount of Rs.65,02,008/- has been taken twice. It is main contention of the learned counsel that investigation was conducted on 10.6.2006, whereas all the deponents have been summoned and produced before the authorities below through show cause notice dated 19.11.2008 is barred by limitation.

3. To support this contention, he relied on the decisions of

1. ***Orissa Bridge & Construction Corpn. Ltd. vs. CCE, Bhubaneswar***
[***2011 (264) ELT 14 (SC)]*** ;

2. ***Uniworth Textiles Ltd. vs CCE, Raipur***
[2013-TIOL-13-SC-Cus].;

3. Tamil Nadu Housing Board vs CCE, Madras
[2002-TIOL- 288- SC-CX];

4. M/s. Ragam Catering Services vs CCE,Pondicherry
[2016-TIOL-1433-CESTAT-Mad];

5. M/s. Manas Treads vs. CCE Visakhapatnam
[2016-TIOL-2460-CESTAT-Hyd].

4. On the other hand, learned AR opposed the contention of the learned Counsel and submits that all the appellants were knowing that their turnover has crossed the SSI exemption limit and deliberately did not get themselves registered with the department. Therefore, extended period is rightly invoked. It is further submission that the period of 5 years is to be accounted backwards from the date of issue of show cause notice. Therefore, extended period of limitation is righty invoked. He also submitted that the conditions specified under notification are to be complied strictly. In support of his contention, he relied on the decisions of

1. ***Eagle Flast Indus. Ltd. vs. CCE, Pune***
[***2004 (171) ELT 296 (SC)]*** ;

2. ***Kripa Fabs P Ltd.***
[2015-TIOL-1506-HC-MAD-CX]

3. ***Tejas Networks India Ltd. vs CCE***
[2014 (302) ELT 80 (Tri-Chennai)] affirmed by Hon'ble Apex Court as reported in ***[2015 (316) ELT A 157 (SC)].***

4. CCE vs. Mehta & Co.
[2011(264) ELT 481 (SC)]

5. Heard both sides and considered the submissions.

6. In this case, the facts not in dispute are that during the period 2005-06, the appellant availed SSI exemption and their sales turn over crossed the SSI exemption limit. It is a fact on record that in 2005, a search was conducted at the factory premises of the appellant and all relevant records have been scrutinized and it was found that appellant has crossed SSI exemption limit. Thereafter, the show cause notice has been issued on 19.11.08 by invoking the extended period of limitation.

7. In that circumstances, it is to be seen that extended period of limitation is invokable or not. Both the sides have cited contrary decisions in their support. In that circumstances, issue is to be analysed in the facts and circumstances of the case. In similar set of facts in the case of ***Amway India Enterprises Pvt. Ltd. vs CCE, New Delhi [Final Order No. 50651/2017 dated 06.02.2017]*** this Tribunal has held as under:

> *"6. The demand for extended period can be issued and confirmed only in case where the non-payment of tax is by reason of fraud/collusion/wilful mis-statement/suppression of*

fact/contravention of any statutory provision with intent to evade tax. In the present case, we note that the enquiry into the activities of the appellant were carried out in summon proceedings in 2005 itself. The materials/documents submitted by the appellants were with the Department. However, with the same set of facts/background and based on records maintained by the appellant, demand invoking suppression of fact was issued in 2009. While we are aware that the relevant date for issue of demand is with reference to periodical returns to be filed, the Department has to allege and establish with supporting evidence, the existence of factors indicating wilful mis-statement/suppression of facts. It should be a positive act of the appellant. The particulars, which formed basis of demand were all maintained and recorded in books of the appellant.

7. The show cause notice in this case has been issued by the Department alleging 'wilfull and intentional suppression' of facts by the appellant. It is trite in law that the suppression (intentional and deliberate) can never be said to exist when material and relevant fact forming the basis of the demand were already within the knowledge of the department. Accordingly, the pre-conditions for applicability of the proviso to Section 73 (1) ibid cannot be said to be made and in such eventuality, the extended period of limitation cannot be invoked and the demand to be confined to the normal period of one year.

8. In context with issuance of show cause notice, where there is no involvement of suppression on the part of the assessee, the Hon'ble Supreme Court in the case of Pragathi Concrete Products Ltd. (supra) have held that extended period of limitation not to be invoked where the show cause notice was issued in 2000 for the period from 1995-1999 as no case of *suppression could be made out when the Department had conducted several audits of the Appellant during the period prior to issue of show cause notice. Further, in the case of Blue Star Ltd.(supra), it has been held by the Hon'ble Supreme Court that no case of suppression could be made out where all the relevant facts were within the knowledge of the Department and consequently, the extended period of limitation could not be invoked. In the case of Shah Alloys Ltd. (supra), the SLP filed by Revenue was dismissed, holding that the extended period of limitation cannot be invoked, when it is established that the Department had knowledge of the facts. In the case of Monsanto Manufactures Pvt. Ltd. (supra), the Hon'ble Supreme Court held that the Appellant's transaction was on the basis of an agreement which was within the knowledge of the Department from 1995 and accordingly, the extended period of limitation under Section 11A of the Central Excise Act, 1944 could not be invoked vide show cause notice issued in 2000. In case of Kushal Fertilisers (supra), the Department carried out periodic inspections of the factories and was also intimated in 1991 by the Assessee of the details of its business. In this background, the Department issued a show cause notice to the assessee in 1994 invoking extended period of limitation. The Hon'ble Apex Court held that since the requisite information had always been provided to the Department when requested, no case of suppression could be made out against the assessee. Where the Department had inspected and collected necessary information and details from the assessee, the Hon'ble Supreme Court in the case of Damnet Chemicals Pvt. Ltd. (supra) held that the relevant facts were within the knowledge of Departmental Authorities and accordingly the extended period of limitation could not be invoked. Where the Assessee had filed declarations* *of the products manufactured and where the sales literature and catalogue were examined during search operations, the Hon'ble Supreme Court in the case of Pioneer Scientific Glass Works (supra) held that the Department could not have alleged suppression at a later date when all the relevant facts were within the knowledge of the Department. Further, in the case of Loyd Chiles Offshore Ltd. (supra), the Hon'ble Supreme Court held that since the Department was all throughout aware of the Appellant's operations, the extended period of limitation under proviso to Section 28 of the Customs Act cannot be invoked. In the case of Chemphar Drugs & Liniments (supra), it has been held by the Hon'ble Supreme Court that when the Department had full knowledge and the assessee's nondisclosure was based on its interpretation of the law, the extended period of limitation could not have been invoked.*

9. The judgment of Hon'ble Supreme Court and High Courts relied upon by the Revenue are distinguishable from the facts of the present case, inasmuch as the assessees in those cases were indulged in suppression, mis-statement, fraud, collusion etc., with intent to evade payment of duty and only on the basis of proceedings initiated by the Department, the desired information/particulars were furnished. In such circumstances, it has been held by the judicial forums that once it is established that pre-conditions of the proviso to Section 73(1) ibid/Section 11A ibid (i.e. fraud, suppression, collusion, wilful misstatement and contravention of any provisions with an intent to evade payment of tax), stand satisfied, then it becomes necessary to determine the date from which the extended period should be computed; and in such eventuality, the extended period of limitation should be computed from the date when the evasion of tax (fraud, suppression, collusion, wilful misstatement or *contravention of provisions) came to the knowledge of the Department.*

10. On a collective reading of the decisions cited by both the counsels, it is clear that the consistent position of law with regard to applicability of the proviso to Section 73(1)/Section 11A ibid has been that suppression cannot be established where material facts were within the knowledge of the Revenue. Accordingly, where there is no suppression, the precondition for applicability of proviso to Section 73(1) cannot be said to be met and hence, extended period of limitation contemplated therein cannot be invoked. On the contrary, where the ingredients for invoking proviso to Section 73(1) are established or admitted and thus the pre-conditions for applicability of such proviso stands satisfied, and only in such cases, the period of 5 years is required to be computed from the date when the evasion came to the knowledge of the Department.

11. In the case in hand, since the modus operandi adopted by the appellant for selling its products were known to the Department and based on the information/documents furnished by the appellant in 2005, the show cause proceedings were initiated by the Department on 12.03.2009, seeking confirmation of service tax demand under 'Franchise Service' for the period October' 2003 to March' 2007, we are of the considered view that the proceedings are barred by limitation of time. Thus, the appeal should succeed on the ground of limitation."

8. Considering the facts and circumsances of the facts in hand, I hold that extended period of limitation is not invokable as it was in the knowledge of the Revenue on 10.6.06 that the appellant has crossed the SSI exemption limit but no action was taken within time against

the appellant and no further inquiry was conducted after 10.6.2006 to issue the show cause notice. In that circumstances, I hold that extended period of limitation is not invokable and the impugned demands against the appellants are not sustainable. Accordingly, the penalties on the appellants are also not imposable.

9. With this analysis, I set aside the impugned order and allow the appeals with consequential relief, if any.

(pronounced in the open court on 04.10.2017)

(Ashok Jindal)
Member(Judicial)

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