CUSTOMS, EXCISE & SERVICE TAX APPLELLATE TRIBUNAL,
NEW DELHI

PRINCIPAL BENCH COURT NO. 1

Excise Tax Appeal No. 50379 / 2017

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-450-16-17 dated 18 November, 2016 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Bhopal (MP).

M/s. Hershey India Pvt. Ltd. **Appellant**
Plot No. 5, New Industrial Area,
Mandideep; Dist. Raisen (MP)

VERSUS

Commissioner of Customs, Central Excise & Service Tax **Respondent**
Bhopal.

APPEARNANCE:
Shri Anandodaya Mishra, Advocate for the Appellant
Shri P Juneja, Authorized Representative for the Respondent

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50769 /2019

DATE OF HEARING/ DECISION: 01 /02/2019

PER C L MAHAR :

The brief facts of the matter are that the original appeal No. E/50379/2017-DB was filed against the Order in Appeal No. BHO-EXCUS-001-APP-450-16-17 dated 18 November, 2016 of learned Commissioner (Appeals). The appeal had been decided vide Final Order No.

50258/2018 dated 19 January, 2018 by this Tribunal. This Tribunal vide its above mentioned Final Order had decided the matter against the appellant, relevant extract of the Final Order is reproduced below:

> "6. The transaction between the appellant and M/s Zydus are governed by the agreement termed as "Manufacturing Agreement". The appellant has manufactured and supplied the goods in terms of the agreement, at prices included in the agreement as per the negotiation between the two parties. The claim of the appellant is that the goods have been manufactured and supplied on principal to principal basis whereas Revenue, after referring the various clauses of the agreement, have concluded that the transactions are in the nature of job work as outlined in Rule 10 A ibid.
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> 7. The term "job worker" has been assigned specifically meaning as per the Explanation inserted in Rule 10A. In terms of this Explanation any person to be a job worker should satisfy:
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> (i) He should manufacture or production goods;
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> (ii) He should do it on behalf of the principal manufacturer;
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> (iii) He should do it from any inputs or goods supplied by principal manufacturer or any other person authorized by him
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> 8. There is no dispute that the first condition has been satisfied. But dispute is whether the conditions (ii) and (iii) above are satisfied. In terms of the agreement, it is evident that the appellant is required to manufacture the goods exclusively for M/s Zydus, and using their specifications as an agent of M/s Zydus, and using the technical

knowhow relating to the product which will be supplied by M/s Zydus. It is further specified in clause 4.1 which is relevant is reproduced below :

> "4.1 GHL shall at its own cost, purchase such raw materials, ingredients, packs and packaging material of such standard, quality, specifications and grade for the manufacture of the Product as may be prescribed by ZWL. The pre-mix required for the Product shall be supplied by the supplier identified by ZWL."

9. It is evident from the above clause of the agreement that the goods are to be manufactured from inputs supplied by the suppliers identified by M/s Zydus which clearly satisfies as the third condition in the Explanation to Rule 10A. Further on perusal of the various clauses of the agreement read together leads to the conclusion that the goods have been manufactured by the appellant as a job worker on behalf of M/s Zydus.

10. The above conclusion is further reinforced by the fact that in a case of principal to principal transaction the goods are to be priced including all the elements of cost involved in the manufacture and sale of goods. In the present case, from the price agreed between two parties it is obvious that various elements of cost which clearly are required to be included in the selling price of manufactured product have not been included. In the present case, for example, the goods are to be manufactured using the technology, standard and technical knowhow relating to the product which will be supplied by M/s Zydus. But such elements of cost have escaped the agreed price between the appellant and M/s Zydus.

> 11. Once we conclude that the appellant has acted as a job worker for M/s Zydus the mischief of Rule 10A of the Valuation Rules becomes applicable and the goods are required to the valued on the basis of the price at which the principal manufacturer, M/s Zydus sells such goods from their depot.
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> 12. In view of above discussion, we are inclined to uphold the findings of the lower authorities which are on the above lines."

2. Thus, the appeal of the appellant was dismissed holding that the appellant needs to discharge the Central Excise duty on the value on which the goods were actually sold by the principal manufacturer namely M/s. Zydus Wellness Ltd. to their unrelated buyers.

3. In the above mentioned Final Order, the appellant have moved a Miscellaneous application for rectification of mistake and recall of the Final order on the ground that the Tribunal while deciding the appellant's appeal has failed to take into account all the issues on which the appeal was filed and the order of the lower authorities was contested. The main issue which has been raised by the appellant in the Misc. application is that while deciding the original appeal No. E/50379/2017, the Tribunal failed to give its judgement on the issue of limitation which was raised by them in their original appeal. The Misc. application regarding rectification of mistake was decided by this Tribunal vide Misc. Order

No. 50900/2018 dated 19 November, 2018 wherein it was held that –

> "4. Having considered the rival submissions, we are satisfied that the ground taken by the appellant as to limitation have not been decided by the Tribunal. We further hold that a ground of law can be taken up at any stage, even if not taken before the lower court, being a ground of law. Accordingly, we allow this ROM application and recall the Final Order dated 19.1.2018 for reconsideration. Put up for final hearing on 3.1.2019."

4. Thus, the Miscellaneous application was listed for regular hearing on merits and same was heard on 01 February, 2019. It has been contested by the appellant that in the impugned Show cause notice dated 19 August, 2014, Central Excise duty has been demanded for the period covering March, 2010 to May, 2011 by invoking the extended period of limitation under the provisions of Section 11A (4) of Central Excise Act, 1944. The appellants have mentioned that they had been filing their ER-1 returns on regular basis and all the clearances made had been shown in ER 1 returns for the relevant period between April, 2010 to May, 2011. Since all the facts were before the Department, it cannot be alleged that the appellants have suppressed, mis-declared or indulged in any fraudulent practices with an intent to evade duty. It has therefore, been impressed that the extended time in the proviso to section

11A of the Central Excise Act, 1944 is not invokable in the facts of the present case. Learned advocate appearing on behalf of the appellant submitted that the transaction between them and M/s. Zydus Wellness Ltd. is a commercial transaction which does not involve any job work. It is in the nature of pure sale and purchase on principal to principal basis between two parties i.e. between the appellant and M/s. Zydus Wellness Ltd. It is contended that M/s. Zydus Wellness Ltd. has not paid any other price or consideration other than the price of goods which have been charged by them from M/s. Zydus Wellness Ltd. on Central Excise invoice raised by them. The learned advocate has further taken shelter of various decisions including that of Hon'ble Apex Court on the issue to support his case. The summary of certain decisions as submitted by learned advocate is reproduced hereinbelow:-

(i) The Central Board of Excise and Customs vide Circular No. 268/102/96-CX, dated 14.11.1996 has clearly directed that ingredients of suppression of facts, willful mis-statement etc. have to be clearly substantiated, as laid down by the Hon'ble Supreme Court in the case of CCE, vs. HMM Ltd. reported in [1995 (76) ELT 497 (SC)] for invoking extended time period for demand of Central Excise duty.

(ii) The Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. vs. CCE, Raipur reported in 2013-TIOL-13-SC-Cus has held that mere non-payment of duties is not equivalent to collusion or willful mis-statement or suppression of facts.

(iii) The Hon'ble Supreme Court in the case of Cosmic Dye Chemical vs CCE, Bombay reported in 1995 (75) ELT 721 (SC) has held that intent to evade duty, must be proved for invoking proviso to Section 11 A(1) of Central Excise and Salt Act, 1944, for extended period of limitation.

(iv) The Hon'ble Supreme Court in the case of CCE vs. Chemphar Drugs & Liniments reported in 1989 (40) ELT 276 (SC) has held that in order to make a demand, under section 11A of the Central Excise and Salt Act, 1944, beyond a period of six months and upto a period of five years something positive other than mere inaction or allure on the part of the Manufacturer or Producer of conscious or deliberate withholding of information, when the Manufacturer knew otherwise, is required to be established. Where Department, had full knowledge about the facts and the Manufacturer's action or inaction, is based on their belief that they were required or not required to carry out such action or inaction, the period beyond six months cannot be made applicable.

(v) The Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture vs. CCE Chandigarh – 2007 (216) ELT 177 (SC) has held that expression, "suppression", used in Proviso to Section 11 A of Central Excise Act, 1944, to be construed strictly – Mere omission to give correct information is not suppression of facts, unless it was deliberate act – suppression means failure to disclose full information, with intent to evade payment of duty – An incorrect statement, cannot be equated with a willful mis-statement – There cannot be a suppression or misstatement of fact, which is not willful and yet constitute a permissible ground, for purpose of Proviso to Section 11 A ibid – Mis-statement of fact, must be willful. – 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. As far as fraud and collusion are concerned, it is evident that the intent to evade duty, is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word, 'willful' preceding the words, "mis-statement or suppression of facts", which means with intent to evade duty. The next set of words, 'contravention of any of the provisions of this Act or Rules', are again qualified by the immediately following words, 'with intent to evade payment of duty."

(vi) If, all the facts are within the knowledge of Department, extended period of limitation, is not available as held by Honourable Apex Court, in case of Nizam Sugar Factory versus CCE, reported in [2006 (197) ELT 465 (SC)], enclosed marked as Annexure:18, hereto. The Central Board of Excise & Customs, vide Circular No.5/92-CX-4, dated 13.10.1992 (Annexure:19, hereto), has clarified that mere non-declaration, is not sufficient, for invoking longer period of limitation.

> Non payment of Excise duty, on waste and scrap of cables, is also due to the judgements, delivered by the Hon'ble Tribunals and Supreme Court, on the same subject and it cannot be said that these judgements and legal position, are not in the knowledge of the Department. It is therefore, respectfully submitted that the Show Cause Notice, is barred by limitation, as ingredients for invoking extended period, are absent."

5. It has further stressed that the Tribunal while deciding the appeal vide its Final Order No. 50258/2018 dated 19 January, 2018 has not considered the above judicial pronouncements though same were pressed by them. It has further been submitted that all these documents are part of their written submissions in the appeal as well as same were mentioned during the arguments before the Hon'ble Bench. It has therefore been impressed that considering the above rulings of the Apex Court and facts of the matter, the demand of Central Excise duty is not sustainable on the ground of limitation and therefore, the appeal may be allowed on the ground of limitation.

6. We have also heard the learned DR who has generally supported the findings given in the Order-in-Appeal.

7. After hearing both the sides and on perusal of record of appeal, we find that the issue as to which price is to be taken for levy of Central Excise duty on the clearance effected by the appellant to M/s. Zydus Wellness Ltd., we find that same has already been decided by this Tribunal vide its Final Order No. 50258/2018 dated 19 January, 2018 and we have no ground to interfere with that finding of this Tribunal. However, since the issue of limitation was not discussed in the Final Order, the same is being taken up here for decision.

8. It is a matter of fact that Show cause notice demanding Central Excise duty amounting to Rs.21,56,949/- has been issued on 19 August, 2014 for the period covering March, 2010 to May, 2011. It is also a matter of fact that the appellants have been filing their ER 1 returns regularly to the Department. The subject show cause notice has been issued by invoking the extended period of limitation under section 11 A(4). The show cause notice has taken a ground that though the appellants have been manufacturing the goods on behalf of M/s. ZWL, they shrouded the sale of goods to M/s. ZWL as the normal sale of the goods without declaring the nature of relationship which existed between the appellant and M/s. ZWL, and, therefore, it has been alleged that the appellant have resorted to suppression and mis-declaration of facts with an intent

to evade payment of Central Excise duty and thus the extended time proviso have been invoked. The learned Commissioner (Appeals) in his impugned order-in-Appeal has not commented anything on the ground of limitation that the appellant has contested before him during personal hearing as well as vide their written submissions dated 20 July, 2015. We find that for invoking the extended period of limitation under section 11A(4) of Central Excise Act, 1944 one of the following ingredients need to be present in the activities of the assessee i.e. (a) fraud; (b) collusion; (c) willful mis-statement; or (d) suppression of facts or contravention of any of the provisions of this Act or rulings made thereunder with intent to evade payment of duty. We find that the appellants have been filing their ER 1 return regularly before the Department and declaring the price which have been charged by them from M/s. Zydus Wellness Ltd., on the invoices and the price on which the Central Excise duty has been paid. The Department has not challenged the authenticity, genuineness of such invoices neither they have proved that the appellants have received any other consideration other than the price which is indicated on the invoices for clearance of excisable goods. We feel that the ingredients which are the pre-requisite for invoking the extended time proviso under section 11A (4) of the Central Excise Act, 1944 are absent in the facts of this case. Thus, in the absence of element of mens area, the appellant's conduct cannot be construed to fall within the five elements as mentioned above required for invoking the extended time proviso. To us it appears that appellants' conduct has always been transparent and therefore, we feel that charges of willful suppression or mis-statement of facts cannot be invoked in given circumstances of this case. While holding this view, we also rely on the decisions of Hon'ble Apex Court in the following cases:

1. **Uniworth Textiles Ltd. vs. CCE, Raipur** 2013-TIOL-13-SC-Cus wherein it has been held as under -

   "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 willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

   11. Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in *Continental Foundation Joint Venture* case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects

correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful."

2. **Cosmic Dye Chemical vs CCE, Bombay** [1995 (75) ELT 721 (SC)] wherein it has been held as under:

"6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to

Section 11A. Mis-statement or suppression of fact must be wilful."

3. **CCE vs. Chemphar Drugs & Liniments** 1989 (40) ELT 276 (SC) wherein it has been held that –

24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of *bona fide* conduct, by observing that "the appellants had not brought anything on record" to prove their claim of *bona fide* conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. This Court observed in *Union of India* v. *Ashok Kumar & Ors.* - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the *fides* of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In *Aban Loyd Chiles Offshore Limited and Ors.* (supra), this Court made the following observations :

> "21. This Court while interpreting Section 11-A of the Central Excise Act in *Collector of Central Excise* v. *H.M.M. Ltd.* (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :
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> *'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the*

> *part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'*
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> *It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :*
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> *...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."*
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> (Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving *mala fide* conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action

under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."

4. Continental Foundation Jt. Venture vs. CCE Chandigarh – [2007 (216) ELT 177 (SC)] wherein it has been held that

"8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the

> respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence.
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> 9. In that view of the matter and in view of the requirements of Section 11A of the Act, the claim had to be limited for a period of six months as the Tribunal did. We are, therefore, of the opinion that the Tribunal was right in its conclusion. The appeal therefore fails and is accordingly dismissed."

9. In view of the above, without touching the findings of the Final Order No. 50258/2018 dated 19 January, 2018 on merits, we hold that show cause notice is barred by limitation and, therefore, we hold that the impugned order in appeal is legally not sustainable. Accordingly, we set aside the same and allow the appeal.

(operative part of the order pronounced in the open Court)

(C. L. Mahar)	**(Justice Dilip Gupta)**
Member(Technical)	**President**

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