CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Excise Appeal No: 2803 of 2006
With
Excise Cross-Objection No: 450 of 2006

[Arising out of Order-in-Original No: 178/COMMR(AH)/05 dated 23rd December 2015 passed by the Commissioner of Central Excise (Adjudication), Mumbai.]

Commissioner of Central Excise … ***Appellant***
Belapur
1st Floor, CGO Complex, CBD Belapur
Navi Mumbai – 400 614

versus

Kellog India Pvt Ltd ***…Respondent***
Plot No. L-2, & L-3, MIDC Industrial Area, Taloja
Dist: Raigad

APPEARANCE:

Shri DS Chauhan, Superintendent (AR) for the appellant

Shri Bharat Raichandani, Advocate for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR P DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 88586 / 2018

DATE OF HEARING: 07/05/2018
DATE OF DECISION: 07/05/2018

PER: C J MATHEW

This appeal of Revenue against order-in-original no.

178/COMMR(AH)/05 dated 23rd December 2015 of Commissioner of Central Excise (Adjudication), Mumbai arises from the relief granted to the respondent herein by accepting their claim that limitation comes in the way of recovery beyond the normal period of limitation. The issue relates to denial of the claim of classification under heading no. 1904 of the First Schedule to the Central Excise Tariff Act, 1985 consequent to amending of specifications in note 2 to chapter 19 with effect from 1st March 1997 and assessment at the rate of duty attached to heading no. 1804 of the First Schedule to the Central Excise Tariff Act, 1985.

2. The show cause notice dated 30th May 2000 demanding differential duty of ₹ 66,19,823/- for the period from September 1996 to July 1997 was dropped on acceptance of the ground that another show cause notice with the same purpose had been adjudicated upon by order of 22nd July 2005 and that samples of the goods listed in classification list filed on 29th August 1996 and also on 4th March 1997 had been drawn in February 1998.

3. It is the contention of Learned Authorised Representative that the earlier order was in favor of Revenue and that, despite such order, the respondent continued with an incorrect classification. It was also alleged that the aspects of willful mis-declaration and suppression of the fact had not been taken into consideration by the adjudicating

authority.

4. We find that the issue adjudicated upon in the two show cause notices are directly, and more particularly, limited to classification arising from the notes to chapter 19. In *Nizam Sugar Factory v. Collector of Central Excise, Andhra Pradesh [2006 (197) ELT 465 (SC)]* it has been held by the Hon'ble Supreme Court that

> *8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) ELT 14 (SC) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :*
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> > *"14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were*

> *not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."*

This judgment was followed by this Court in the case of ECE Industries Limited v. Commissioner of Central Excise, New Delhi reported in (2004) 13 SCC 719 = 2004 (164) ELT 236 (S.C.). In para 4, it was observed :

> *"4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."*

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in [2004 (166) ELT 151 (SC)]. It was observed in para 6 :

> *".......... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."*

9. Allegation of suppression of facts against the appellant *cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.,*

5. It is also seen hat the dispute pertains to the period when rule 173B of Central Excise Rules, 1944 was in operation. By the acceptance of the classification list by the competent authority empowered with sufficient leverage for ascertaining the composition of the manufactured product, the scope for alleging mis-declaration or suppression of facts is marginalized. There is no allegation of any deliberate subterfuge in the declaration or in the dismissal of sample.

6. Accordingly, we find no merits in this appeal which is dismissed. The cross-objection is also disposed off.

(Pronounced in open court)

(C J Mathew)
Member (Technical)

(P Dinesha)
Member (Judicial)

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