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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-29-2004

Reported in : (2004)(174)ELT25Tri(Mum.)bai

Judge : A Wadhwa, S T S.S., A M Moheb

Appellant : Godrej Soaps and ors.

Respondent : Commissioner of Central Excise

Judgement :

1. The referral bench doubted the correctness of the earlier decision of the Tribunal in the case of M/s. Alcobex Metals (P) Ltd. reported in 1992 (58) ELT. 108 (Tribunal) wherein it was held that as a consequence of the show cause notice being held to be without jurisdiction for the purposes of demand of duty, having been issued by an officer other than the Commissioner, under the proviso to Section 11-A, the entire proceedings for other purposes of imposition of penalty and confiscation would also be without jurisdiction. The referral Bench was of the view that a combined notice having been issued under two different provisions of law for recovery of duty under Section 11-A of the Central Excise Act, 1944 and for confiscation and levy of penalty under Section 124 of the Customs Act, 1962 read with Section 12 of Central Excise Act, 1944, even though part of the notice has been issued without jurisdiction, the other part could survive having been issued by an officer having jurisdiction. The above disputed issue has been referred to the Larger Bench.

2. We have heard the Id. Counsels appearing for the appellants and Shri Ajay Saxena, Id. SDR appearing for the Revenue. The Id. Advocates for the appellants have made references to the provisions of Section 11-A as also to the various decisions laying down that with the drop of demand of duty, the penalty also gets dropped and there can be no confiscation or penal action against the assessee in case there is no demand of duty. We propose to deal with the above decisions in the subsequent paragraphs.

3. Section 11A (1) as it stood at the relevant time can be considered in two parts. One, the main Section, which provided for notice within a period of six months, which read as under: "(i) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months 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." The second, the Proviso which provided for the invocation of the larger period of limitation, which read as under: "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 willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, by such person or his agent the provisions of this sub-section shall have effect, as if, for the words "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months", the words "five years" were substituted" (emphasis supplied).

It is seen that the proviso to Section 11-A requires show cause notice to be issued by the Commissioner where the contravention of provisions of the Act or of the rules is made there under with an intent to evade payment of duty. As such the scope of the proviso takes within its sweep not only a situation of non-levy or non-payment of duty but it also takes in contravention of the provisions of the act or the rules framed there under with intention to evade payment of duty. Imposition of penalty under Rule 173 Q or confiscation of the goods is consequential on infringement of the provisions of the act and the rules, with an intention to evade

payment of duty. That intention, under the proviso is necessarily required to be adjudicated by the Commissioner and such an intent cannot be segregated for the purposes of arriving at a liability of imposition of penalty. In cases where a show cause notice alleges contravention of the provisions of the act/rules with intent to evade payment of duty irrespective of whether the notices is only for demand of duty or for imposition of penalty or for confiscation of the goods, the same is required to be issued by the Commissioner in terms of the said provision. Therefore, we are of the view that de hors the provisions of the Customs Act as made applicable to the central excise matters under Section 12 of the Central Excise Act, the proviso to Section 11 A(1) itself provides for issuance of the notice by the Collector for determination of and imposition of penalty or for confiscation of goods before a demand of duty consequent to such an act and on such goods could be determined.

4. We are also not in agreement with the observations of the bench referring the matter to the Larger Bench that the order recorded in the case of Alcobex Metals (P) Ltd. is a cryptic order. After having gone through the said decision in the case of Alcobex Metals we find that the view of five members of the Tribunal are available and it was, by majority, held that the show cause notice cannot be segregated into portions for the purposes of demand of duty and for imposition of penalty and confiscation proceedings. It was held that once a show cause notice has been held without jurisdiction for the purposes of demand of duty the same would be invalid in its totality. Against the said order of the Tribunal appeal was filed by the Revenue before the Hon'ble Supreme Court as reported in 2003 (153) ELT 241 (S.C.).

Department's challenge was not successful. Though the point in dispute was not directly raised before the Supreme Court by the Revenue, but the ratio of the Supreme Court decision can be made applicable to the point in question. It is noticed that apart from the issue of imposition of penalty and confiscation, another issue as to whether the demand for the period of six months can be held to be valid having been raised by the proper officer having jurisdiction was also involved. The Hon'ble Supreme Court held that the notice having been issued by the Dy. Collector, Central Excise was wholly without jurisdiction and the same cannot

be treated as valid notice for the purposes of shorter period of six months. By applying the above ratio it can be safely concluded that once a show cause notice is held to be void having been issued by an officer who is not authorized to do so, the same is to be held as void in its totality and not in part inasmuch as the notice cannot be held to be severable. It is also noticed that though the Alcobex Metals decision of the Tribunal, also laid down that confiscation and penalty proceedings cannot continue in the absence of any demand of duty, the said point were never agitated by the Revenue before the Hon'ble Supreme Court and thus it is deemed to have been accepted by the department. It has been strongly argued before us that the Alcobex Metals decision having been upheld by the Hon'ble Supreme Court, cannot be doubted now by this Tribunal inasmuch as by applying 'Doctrine of merger' no issue remains open for further decision. We are fully in agreement with the above contention of the appellants that the Tribunal's decision stands merged with the Hon'ble Supreme Court decision and all the issues decided by the Tribunal, though not independently examined by the Hon'ble Supreme Court, attained the status of having been finally decided. As such we are of the view that the Alcobex Decision having been confirmed by the Apex Court settles the law on the disputed issue. We also refer to the Larger Bench decision in the case of Transcab International reported in 2003 (157) ELT 149 (Tri. Larger Bench) wherein it was observed that when earlier decision of the Tribunal was not challenged by the Revenue before the Supreme Court it is not proper for the Tribunal to attempt reconsideration of the view taken by the Larger Bench. Though the earlier decision in the case of Alcobex was not rendered by the designated Larger Bench but the same has the effect of having been delivered by a bench of five members who have discussed the point at length. As such we are not inclined to deviate from the ratio of Alcobex and take a view different than the one taken in Alcobex, Metals Pvt. Ltd. 5. (a) A reference here may be made to Tribunal's decision in the case of Northern India Woollen Mills v. Collector of Customs reported in 1991 (53) ELT. 81 (Tri.) wherein the Tribunal in para 4 of the Judgment observed that - "We are of the opinion that the demand for duty, confiscation and levy of penalty are to be done in a composite manner and duty demand cannot be segregated from the confiscation and penalty.

Severing the demand for duty from the levy of penalty and confiscation would amount to truncation and it would create an anomalous situation because there cannot be two parallel processes of adjudication, one for demand of duty and other for confiscation and penalty." Similarly in the case of Bakeman's Home Products Pvt. Ltd. v. Collector of Customs reported in 1997 (95) ELT 278 (Tri.) held that where a composite show cause notice comprehending three aspects viz. demand of differential duty, confiscation of imported goods and imposition of penalty is issued and notice relating to proposal for demand of differential duty is held to be without jurisdiction, the action for confiscation and penalty cannot survive.

(b) The Hon'ble Supreme Court in the case of CCE v. H.M.M. Ltd. reported in 1995 (76) ELT 497(S.C.) clarified that the question of penalty would arise when the department is able to sustain its demand under notice. The said decision of the Hon'ble Supreme Court was taken note by this Tribunal in the case of Eveready Industries India Ltd. reported in 2001 (138) ELT 1287 (Tri.) wherein originally there was difference between two members and the matter was referred to the third member. By majority, it was held that when the demand of duty is dropped on the point of limitation no penalty can be imposed as the proceedings are interlinked with the confirmation of demand of duty. P & B Pharmaceuticals (P) Ltd. v. CCE reported in 2003 (153) ELT 14 (S.C.) held as under in para 22 of the judgment:- "The last point that remains to be mentioned is about the penalty imposed on the assessee. It is not in dispute that if the proviso to Section 11A of the Act cannot be called in aid, imposition of penalty cannot be justified under Rule 173Q of the Central Excise Rules, 1944 (See: Collector of Central Excise v. H.M.M.Ltd. 1995 (76) E.L.T.497) and Nagpur Alloy Castings Ltd. v. Collector of Central Excise (2002 (142) E.L.T. 515). The order imposing penalty is thus unsustainable.

(d) We may also refer the Allahabad High Court decision in the case of H. Guru Investment (North India) Pvt. Ltd. reported in 1998 (104) ELT 8 (All.) wherein the Tribunal's order dropping the demand notice on the ground of limitation but upholding the penalty was set aside by observing that in the absence of any demand, no penalty can be levied.

We also make a reference to another decision in the case of LML Ltd. v.CCE reported in 2001 (130) ELT 480 (Tri.) wherein the appeal was allowed by observing that where demand of duty does not survive no penalty can be imposed. Similar decision was taken in the case of Bharat Aluminium Co. Ltd. reported in 2002 (148) E.L.T. 1054 (Tri.

Del).

6. In the light of above, we are of the view that when the demand gets dropped on any account, penal provisions cannot survive against the assessee. For the similar reason confiscation of the goods, which is penal in nature, cannot be upheld. The point referred to the Larger Bench is answered accordingly. The main appeals be placed before the Original Bench for passing appropriate orders.

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