

Til Limited Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-09-1990

Reported in : (1992)LC234Tri(Delhi)

Appellant : Til Limited

Respondent : Collector of Central Excise

Judgement :

1. M/s. Spundish Engineers Ltd., Thane, have filed an appeal being aggrieved from the order passed by the Collector of Central Excise, Bombay. Thereafter, the appellants moved an application for the change of the cause title, and vide Misc. Order No. E/Misc./A No. 52/90 B1 dated 24th April, 1990, the cause title was changed. Shri J.S. Arora, learned Advocate with Shri G.K. Arora, Advocate has appeared on behalf of the appellant and pleaded that the demand pertains to the period starting from February 1977 to the financial year 1979-80 is hit by limitation. He pleaded that though there is dispute of assessibility of the goods manufactured by the appellant, but the matter can be disposed of on the basis of the plea of the limitation. He pleaded that the show cause notice was issued on 18th April, 1981, and there was no allegation of suppression of facts. There was no suppression on the part of the appellant in the show cause notice. He pleaded that the demand is hit by limitation as there was no suppression. In support of his arguments, he has referred to the followsssing judgments: (2) 1987 (32) ELT 234: M/s. J.K. Spinning & Weaving Mills Ltd. v. Union of India & OthersJ.K. Spinning & Weaving Mills Ltd. v. Union of India, the Hon'ble Supreme Court had held that there is no doubt if one

is to liable to penalty and confiscation or has to pay duty with retrospective effect from 1944 because of retrospective amendment of Rules 9 and 49 of the Central Excise Rules, 1944, it would really cause-great hardship, but in view of Section 11A of the Central Excises and Salt Act, 1944, there is no cause for such apprehensions as because of this section excise authorities cannot make recoveries beyond a period of six months, the proviso to Section 11A providing for five years limitation is was inapplicable. Similarly, in view of Explanation to Section 51 of the Finance Act, 1982, it was not possible either to impose a penalty or to confiscate the goods for an act of omission which was not unlawful when such act was performed or omission made.

Accordingly, Section 51 of the Finance Act, 1982, giving retrospective effect to the amendments of Rules 9 and 49 of the Central Excise Rules, 1944 by Notification No. 20/82-C.E. was neither arbitrary, nor unreasonable and there was no violation of the provisions of Articles 14 and 19(1)(g) of the Constitution of India. And the Supreme Court had held to be legal and valid. Shri Arora has stated that in the present matter the period involved is from 1977 to 1980 and the show cause notice is dated 18th April, 1981, and in any case proviso to Section 11A is not applicable in this case. He argued that Collector (Appeals) observations in respect of the retrospective amendment to Rules 9 and 49 are covered in favour of the appellant by the Supreme Court judgment in the case of J.K. Spg. & Wvg. Mills Ltd. v. Union of India reported in 1987 (32) ELT 234, and as such the appeal may be allowed.

2. Shri M. S. Arora, learned JDR, relies on the order passed by the lower authorities and pleads for the dismissal of the appeal. Shri Arora, learned JDR, on the aspect of limitation, leaves it to the discretion of the Bench.

3. We have heard both the sides and have gone through the facts and circumstances of the case. Since we have heard only on the point of limitation, for the proper disposal of the appeal reproduction of the show cause notice is very essential. Same is reproduced below: Whereas it appears that M/s. Spundish Engineers Ltd., Thane have contravened the provision of Rule 173F and Rule 173G of Central Excise Rules, 1944, inasmuch as they have fabricated and

installed the machinery falling under T.I. 68 in their factory premises situated at D-105, Thane Belapur Road, Thane. The details are as under: Sr.

Type of machinery & Unit Value in Rate Duty No. date of installation Rupees (Involved) 1.

Plate Bonding 1.

1,89,589.28 1% 1,859.89 Machine (28-2-1977) 3.

Hydraulic press 1.

2,59,147.24 1% 2,591.47 (30-4-1977) 4.

Hydraulic press 1.

3,35,694.00 8% 26,855.52 (1978-79) 5.

Hydraulic press 2.

5,94,841.24 8% 47,587.30 (1979-80) M/s. Spundish Engineers Ltd., Thane now therefore are hereby required to show cause to the Assistant Collector of Central Excise Thane Division II, "Gulmohar Building" Naupada Thane.

(1) Why a sum of Rs. 80,994.03 as details given above should not be recovered from them under Section 11 of Central Excises and Salt Act, 1944.

(2) Why penalty should not be imposed on them under Rule 173Q of Central Excise Rules, 1944.

The said M/s. Spundish Engineers Ltd., Thane, are further requested to state whether they would like to avail of the opportunity to be heard in person before the case is adjudicated. If no mention is made about this in their written explanation, it would be presumed that they do not desire a personal hearing.

If no cause is shown against the action proposed to be taken within Thirty days from the receipt of this notice or they do not appear before the adjudicating officer, when the case is posted for hearing the case will be decided ex parte.

A simple perusal of the show cause notice shows that there is no allegation of suppression of facts anywhere in the show cause notice.

In para No. 1, there is just mention of Section 11 of the Central Excises and Salt Act, 1944, though Section 11A was the correct section which should have been mentioned in the show cause notice. It is also settled law that wrong mentioning of the provisions of law shall not vitiate the proceedings. Reliance is based on the following cases :J.K. Steel Ltd. v. Union of India (Para In view of the judgments mentioned above, we are of the view that wrong mentioning of Section 11 shall not vitiate the proceedings and as such the show cause notice is valid.

4. Now, coming to the limitation aspect, during the year 1977-1980 Rule 10 was in force and Section 11A was effective from 17th November, 1980, and this Tribunal has occasion to deal with the same issue in the case of M/s. Atma Steel v. CCE, Chandigarh reported in 1984 (17) ELT 331 where the Tribunal had held that the proceedings initiated with reference to a rule or provision validly subsisting at the time of initiation of proceedings can continue in spite of repeal or substitution of original provisions. Para Nos. 68 and 101 from the said judgment are reproduced below : "We have, however, as against that, an authority of Madhya Pradesh High Court, where a Bench of equal strength, in a later judgment, and after taking full note of the above quoted Allahabad High Court case, expressed a contrary view, on similar facts, holding that there being continuity of provisions on the subject of demand, for short-levy or non-levy inasmuch as, on one occasion rules were replaced by another set of rules, and on the second occasion the contents of the rules got transferred to the statute and as such proceedings, already commenced by issuance of the show cause notice under Rule 10A could continue, irrespective of the fact that said rule was subsequently removed from the relevant provisions." "To sum up, our answer to the points raised and discussed above would be, that:- (a) It is fully within the competence of the President to constitute Larger Benches for resolution of conflicting views/decisions of different Benches of the Tribunal of concurrent jurisdiction; (b) The present Tribunal, in view of its all-India jurisdiction, and peculiar features, as highlighted in the preceding part of this Order, cannot be held bound to the views of any one particular High Court, but has the judicial freedom, to consider the conflicting views, reflected by different High Courts, and

adopt the one considered more appropriate to the facts of a given case before the Tribunal. This would be, irrespective of the fact, that one particular assessee was within the jurisdiction of a specified High Court or the original adjudicating authority was located there; (c) The proceedings initiated with reference to a rule or provision validly subsisting at the time of initiation of proceedings can continue in spite of repeal or substitution of the original provision; (d) Recourse can be had to the provisions as prevailing at the time of initiation of proceedings, and the period available would be the one as permissible under the provisions existing at the time of issuance of show cause notice, in spite of the fact that the short-levy or non-levy refers to the period when different period of limitation was available; and lastly.

(e) Concept of "breathing time", cannot be countenanced for such type of proceedings as are initiated by way of show cause notices for recovery of duty differential duty or amount opined to have been erroneously refunded.

Supreme Court in the case of J. K. Spinning & Weaving Milts Ltd. and Another v. Union of India and Others reported in 1987 (32) ELT 234 had held that the amendment to Rules 9 and 49 of the Central Excise Rules, 1944 was legal and valid, but had to be read keeping in view the provisions of Section 11A of the Central Excises and Salt Act, 1944.

Para Nos. 30 to 36 and 45 from the said judgment are reproduced below : "The apprehension of the appellants is that the amendments to Rules 9 and 49 having been made irrespective from the date the Rules were framed, that is, from February 28, 1944, the appellants and others similarly situated may be called upon to pay enormous amounts of duty in respect of intermediate goods which have come into existence and again consumed in the integrated process of manufacture of another commodity. There can be no doubt that if one has to pay duty with retrospective effect from 1944, it would really cause great hardship but, in our opinion, in view of Section 11A of the Act, there is no cause for such apprehension. Section 11A(1) of the Act provides as follows:- "Section 11A - (1) When 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: 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 misstatement 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, as if for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be." "Under Section 11A(1) the Excise authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the provision of Section 11A not being applicable in the present case. Thus although Section 51 of the Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11A of the Act. We are unable to accept the contention of learned Attorney General that as Section 51 has made the amendments retrospective in operation since February 28, 1944, it should be held that it overrides the provision of Section 11A. If the intention of the Legislature was to nullify the effect of Section 11A, in that case, the Legislature would have specifically provided for the same. Section 51 does not contain any non obstante clause, nor does it refer to the provision of Section 11A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11A." "It is, however, contended by the learned Attorney General that as the law was amended for the first time on February 20, 1982, the cause of action for the Excise authorities to demand Excise duty in terms of the amended provision, arose on that day, that is, on February 20, 1982 and, accordingly, the authorities are entitled to make such demand with retrospective effect beyond the period of six months. But such demand, though it may include within it demand for more than six months, must be made within a period of six months from the date of the amendment." "There is no provision in the Act or in the Rules enabling the Excise authorities to make any demand beyond the periods mentioned in Section

11A of the Act on the ground of the accrual of cause of action. The question that is really involved is whether in view of Section 51 of the Finance Act, 1982, Section 11A should be ignored or not. In our view Section 51 does not, in any manner, affect the provision of Section 11A of the Act. In the absence of any specific provision overriding Section 11A, it will be consistent with rules of harmonious construction to hold that Section 51 of the Finance Act, 1982 insofar as it gives retrospective effect to the amendments made to Rules 9 and 49 of the Rules, is subject to the provision of Section 11A." "In the circumstances, there is no question of the amended provision of Rule 9 and Rule 49 being arbitrary, unreasonable or violative of the provision of Article 14 and Article 19(l)(g) of the Constitution of India." "We may now deal with the challenge made to the retrospective operation of amendments of Rules 9 and 49 on another ground. In order to appreciate the ground of such challenge, we may once more refer to Section 51 of the Finance Act, 1982. The Explanation to Section 51 provides as follows:- "Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force." Under the Explanation, although Rules 9 and 49 have been given retrospective effect, an act or omission which was not punishable before the amendment of the Rules, will not be punishable after amendment. The Explanation does not, however, provide for the penalties and confiscation of goods. It is the contention of the appellants that as the appellants had not complied with the requirements of the amended Rules 9 and 49, they would be subjected to penalties and their goods would be confiscated under the amended Rules 9 & 49 read with Rule 173Q of the Rules with retrospective effect. It is, accordingly, submitted on behalf of the appellants that the amendment of these two rules with retrospective effect is arbitrary and unreasonable and should be struck down as violative of Article 14 of the Constitution." "Attractive though the argument, is, we regret we are unable to accept the same. It is true that Explanation to Section 51 has not mentioned anything about the penalties confiscation of goods but we do not think that in view of such non-mention in the Explanation excluding imposition of penalties for acts or omissions before amendment, such penalties can be imposed or goods can be confiscated by virtue of the amended provisions of Rules 9 and 49. It will be

against all principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made but subsequently made unlawful by virtue of any provision of law. The contention made on behalf of the appellants is founded on the assumption that under the Explanation to Section 51 the penalties can be imposed and goods can be confiscated with retrospective effect. In the circumstances, the challenge to the amendments of Rules 9 & 49, founded on the provision of the Explanation to Section 51 of the Finance Act, 1982, is without any substance and is rejected." "In view of the discussion made above, we hold that the amendments to Rules 9 and 49 are quite, legal and valid. Further, Section 51 of the Finance Act, 1982, giving retropective effect to the said amendments is also legal and valid." 5. In the metter before us, there is no allegation of suppression and, accordingly, we are of the view that extened period of limitation cannot be invoked, and we hold that the demand it hit by limitation.

The appeal is allowed. Revenue authorities are directed to give consequential effect to this order. Since no period is involved which comes within six months from the date of issue of show cause notice, the demand is hit by limitation. Before we part with this matter, we would like to observe that we are allowing the appeal on the point of limitation and we are not giving any observation on the merits of the appeal."

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