Jayant Vitamins Ltd. Vs. Collector of Customs and C. Ex.

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SooperKanoon Citation : sooperkanoon.com/8876

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-09-1995

Reported in : (1996)(81)ELT421TriDel

Appellant : Jayant Vitamins Ltd.

Respondent : Collector of Customs and C. Ex.

Judgement :

1. The appellant is a limited company manufacturing ascerbic acid I.P., mannitol B.P. and sorbitol. These were exempted from duty till 1-3-1986. These become chargeable to duty on or after 3-4-1986. On 3-4-1986, Government of India issued a Notification exempting bulk drugs and chemicals coming under Chapters 28 and 29 of the Customs Tariff from payment of Excise Duty subject to certain conditions (see Notification 234/86C.E.). The appellant was paying the duty under protest during the period from 3-4-1986 to 26-4-1986. On 27-5-1986 the appellant applied for refund of Rs. 6,80,417.92 paid for the period. On 21st July, 1986, the Assistant Collector ordered refund subject to the deduction of Rs. 1,02,062.68. On 7-11-1986, the Assistant Collector concerned issued notice to the appellant stating that refund was wrongly granted and required the appellant to show cause why the refund amount should not be recovered under Section 11A of Central Excises and Salt Act, 1944. This was based on letter dated 16-10-1986 written by the appellant to the Assistant Collector informing the latter that some of its customers would claim benefit under modvat scheme for which he had taken the refund, from the appellant. The appellant resisted the show cause notice and the Assistant

Collector passed order confirming the show cause notice. The appeal preferred to the Collector (Appeals) was dismissed in this regard, and therefore present appeal is filed.

2. It is necessary to notice provisions of Sub-section (1) of Section 11A and the proviso in force at relevant time. It reads as follows : "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 reasons of fraud, collusion or any wilful mis-statement or suppression of fact, 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 provision of this Sub-section shall have effect, as if for words "six months", the words "five years" were substituted." 3. Section 11A(1) is the general provision relating to recovery of duties levied or not levied or short-paid or erroneously refunded.

Notice has to be first served by the Central Excise Officer within six months of the relevant date. The proviso is meant to deal with categories of cases which would otherwise have attracted provisions of Sub-section (1). These are cases where the non-levy, non-payment, short-levy, short-payment or erroneously refund are due to specific reasons mentioned in the proviso. Two of the grounds dealt with in the proviso are "wilful mis-statement" and "suppression of facts". If the defect of erroneous refund etc. is due to the reasons mentioned in the proviso, two consequences follow : First is that the person to issue notice is not any Central Excise officer but Collector of Central Excise. The second is availability of longer period of time for issue of show cause notice.

4. The records show that present is a case where action has been initiated by Central Excise officer on the basis of wilful mis-statement of facts and suppression of facts. The proviso is clearly attracted and only Collector of Central Excise has

jurisdiction to initiate the proceedings by issue of show cause notice. Therefore, the show cause notice issued in the case was issued by an officer who has no jurisdiction: the entire proceedings are illegal.

5. The DR pointed out that this ground was not taken either before the Assistant Collector or the Collector (Appeals) or even in the appeal memo presented before the Tribunal. The submission appears to be correct but it is seen that Tribunal has by specific order dated 1-3-1983 permitted the appellant to raise this. A plea that the proceeding is vitiated by lack of jurisdiction can be taken at any stage, for, lack of jurisdiction is not capable of waiver.

6. For reasons indicated above, we set aside the orders impugned herein.

7. The appeal is allowed. The Assistant Collector shall give effect to this order within three months from today.