IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28.8.2015.

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.371 of 2009

The Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai 600 035. Appellant/Respondent

vs.

1. M/s.NEPC India Limited,
36, Walajah Road,
Chennai 600 002.

2. The Customs, Excise and
Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan,
Annexe, 1st Floor,
No.26, Haddows Road,
Chennai 600 006. Respondents/Applicant

Civil Miscellaneous Appeal against the final order No.232/2008 dated 11.3.2008 in Appeal No.E/305/2001 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

against the order of the Commissioner of Central Excise (Appeals) Chennai dated 21.11.2000 and made in Appeal No.127/2000(M-II) and

against the order of the Commissioner of Central Excise(Appeals) Chennai-600 034 dated 29.04.99 and made in Appeal No.81/99(M-II)

For appellant : Mr.S.Haja Mohideen Gisthi

For R1 : No appearance.

JUDGMENT

(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

This appeal is filed under section 35G of the Central Excise Act, 1944 by the Revenue, challenging an order of the CESTAT, setting aside a demand of duty on the ground that the demand was barred by limitation under section 11A(1) of the Act.

2. Heard Mr.Haja Mohideen Gisthi, learned Senior Panel Counsel appearing for the appellant. Despite service of notice, the first respondent has not chosen to appear. Though the name of the first respondent is printed in the cause list, there is no appearance for them.

3. The appeal was admitted on 7.2.2009 on the following questions of law:-

> "Whether, in the facts and circumstances of the case, the second respondent, CESTAT was correct in holding that,
> a) the extended period of limitation under the proviso to Section 11A(1) of the Central Excise Act, 1944, was not invokable;
> b) there was no intent to evade payment of duty on the waste and scrap; and
> c) if the demand is sustained, modvat credit of duty paid on the inputs would take care of the entire demand of duty on the waste and scrap when the first respondent was not eligible for credit, the final product being exempted."

4. The assessee was engaged in the manufacture of windmills, during the relevant period. The ferrous waste and scrap that were generated in the course of manufacture of final product were cleared without payment of duty during the period from 1.3.1994 to 18.8.1994.

5. It is relevant to note that the waste and scrap were exempted from payment of duty by a Notification No.171/88-CE dated 13.5.1988. But, this exemption was rescinded by a Notification bearing No.64/94-CE dated 1.3.1994 with effect from 1.3.1994.

6. Subsequently, the exemption was re-introduced by a Notification bearing No.23/95-CE dated 16.3.1995. As a consequence, there was a period of little over one year during which, the waste and scrap were not exempted from payment of duty. To put in simple terms, no exemption was available during the period from 1.3.1994 to 16.3.1995.

7. However, the assessee cleared the goods without payment of duty, during the period from 1.3.1994 to 18.8.1994. The officers inspected the premises on 30.8.1994 and found out this aspect.

8. Thereafter, a show cause notice was issued on 16.3.1998. The show cause notice was followed by an order in original dated 21.9.1998, demanding a duty amount of Rs.9,76,941/- under section 11A(2). In the meantime, the assessee had paid a sum of Rs.8,10,927/-. Therefore, the said amount was adjusted towards the demand. Hence, a penalty of Rs.50,000/- alone was imposed by the order in original.

9. The assessee went on appeal to the Commissioner (Appeals), but, the Commissioner (Appeals) dismissed the appeal by an order dated 29.4.1999, on the short ground that the assessee failed to make a pre-deposit. Therefore, the assessee filed a further appeal before the CESTAT. The CESTAT found that the amount already paid to the extent of Rs.8,10,927/- was not taken note of by the Commissioner. Therefore, the CESTAT remanded the matter to the Commissioner.

10. Thereafter, the Commissioner of Central Excise (Appeals) passed a fresh order dated 21.11.2000 upholding the order in original.

11. As against the said order, the assessee filed appeal in E-305/2001 before the CESTAT. Before the Tribunal, two questions arose. One was on the merits and another on the point of limitation. Though CESTAT answered the issue on merits in favour of the Department, the CESTAT held that the demand was beyond the ordinary period of limitation stipulated in section 11A(1). Therefore, the Tribunal allowed the appeal and set aside the order in original and the order in appeal. Hence, the Revenue has come up before us.

12. Out of the three questions framed by this court at the time of admission on 17.2.2009, the second question as to whether there was an intention to evade payment of duty on the waste and scrap, has relevance only for the purpose of finding out whether the ordinary period of limitation or the extended period of limitation would apply to the case on hand. Therefore, we shall take up questions 1 and 2 together as they revolve around the fundamental issue as to whether the period of limitation would be one year or five years.

13. Section 11A(1) of the Central Excise Act, 1944 obliges the Central Excise Officer to serve a notice within one year, whenever any duty of excise has not been levied or paid or short levied or short paid or erroneously refunded for any reason other than the reason of fraud or collusion or any other

wilful misstatement or suppression of fact or contravention of any of the provisions of the Act or the Rules, with intent to evade payment of duty.

14. Sub-section (4) of section 11A gives an extended period of limitation of five years, in cases where the non-levy or non-payment or short levy or short payment or erroneous refund, has arisen on account of any following five reasons:- (1) Fraud (2) Collusion (3 Any wilful misstatement (4) Suppression of fact (5) Contravention of any of the provision of Act or the Rules with intent to evade payment of duty.

15. In this case, the original show cause notice alleged that the assessee cleared ferrous waste and scrap during the period from 1.3.1994 to 18.3.1995, without payment of duty. The invoices and delivery challans carried the description "M.S. Scrap" and "M.S. Plates". Apart from describing the waste as "M.S. Scrap" and "M.S. Plates", the assessee had also sold the left out pieces, after cutting the plates into required sizes for the manufacture of Wind Turbine Generators. Thereafter, they were sold as scrap even without raising any bills as evidenced from file No.15 of the list of documents handed over by the Factory Manager of NEPC.

16. Therefore, the very allegation in para 6 of the show cause notice was that there was suppression of facts as well as intention to evade payment of excise duty.

17. In response to this show cause notice, the assessee submitted a reply simply feigning ignorance about the withdrawal of duty exemption during the period from 1.3.1994 to 18.3.1995. Insofar as the allegation of intention to evade payment of duty is concerned, the assessee had stated that if they had taken modvat credit on the input used in the manufacture of waste and scrap, then, it would have resulted in surplus credit even after paying duty on waste and scrap. The assessee did not show as to why there was some sale without raising any bills, as evidenced from file Number 15. Therefore, we are of the considered view that the original authority and the appellate authority were right in holding on a question of fact that there was intention to evade payment of duty. Without carefully appreciating the above facts, the Tribunal came to a conclusion, devoid of any material, that there was no intention to evade payment of duty. Therefore, the second question of law has to be answered in favour of the Revenue.

18. Once the second question of law is answered in favour of the Revenue, it evolves as a corollary that the Revenue is entitled to invoke sub-section 4 of section 11A and seek the benefit of extended period of limitation from the relevant date.

Therefore, the first question of law should also be answered in favour of the Revenue.

19. The third question of law, in our considered view, does not arise for consideration, in view of the fact that on merits, the Tribunal has found in favour of the Revenue. Hence, questions 1 and 2 are answered in favour of the Revenue. The third question does not arise for consideration as the Tribunal has held in favour of the Revenue. Hence, the civil miscellaneous appeal is allowed. The order of the Tribunal is set aside and the order of the original authority and the appellate Commissioner are restored.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssk.

To

1.The Customs, Excise and
Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan,
Annexe, 1st Floor,
No.26, Haddows Road,
Chennai 600 006.

2.The Commissioner of Central Excise
Chennai (Appeals)

C.M.A.No.371 of 2009

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