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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: May 9, 2016

Decision on: May 25, 2016

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W.P.(C) 3951/1998

DCM SHRIRAM INDUSTRIES LTD.

..... Petitioner

Through: Mr. C. Hari Shankar, Senior Advocate
with Mr. S. Sunil, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, Advocate
for R-1/UOI.

Ms. Sonia Sharma, Advocate for Respondents 2
&3

And

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W.P.(C) 1926/2000

DCM SHRIRAM INDUSTRIES LTD.

..... Petitioner

Through: Mr. C. Hari Shankar, Senior Advocate
with Mr. S. Sunil, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, Advocate
for R-1/UOI.

Ms. Sonia Sharma, Advocate for Respondents 2
and 3.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

25.05.2016

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Dr. S. Muralidhar, J.:

1. These are two writ petitions by the Petitioner, DCM Shriram Industries Ltd., challenging the orders dated 15th April 1998 and 14th March 2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal ('CEGAT'). While the first mentioned order dated 15th April 1998 of the CEGAT emanated from a Show Cause Notice (SCN) dated 19th February 1991 issued by the Central Excise Department ('Department') to the Petitioner, pertaining to the period 1st March 1986 to 31st December 1989, the second order dated 14th March 2000 of the CEGAT emanated from an SCN dated 5th July 1990 issued by the Department to the Petitioner pertaining to the period 1st January 1990 to 26th March 1990.

2. At the outset it was stated by Mr C. Hari Shankar, learned Senior counsel for the Petitioner on instructions that the Petitioner was not pressing W.P. (C) No. 1926 of 2000 which challenges the CEGAT's order dated 14th March 2000 emanating from the SCN dated 5th July 1990. Accordingly the present challenge is confined to the CEGAT's order dated 15th April 1998 emanating from the SCN dated 19th February 1991 pertaining to the period 1st March 1986 to 31st December 1989.

Background facts

3. The facts are that the Petitioner, *inter alia*, owns and operates a manufacturing unit in Meerut District, Uttar Pradesh and known as Daurala Sugar Works. The Petitioner has been operating a chemical plant at the said factory at Daurala where it is engaged in the manufacture and sale of various

chemicals falling under Chapters 28, 29 and 38 of the Schedule to Central Excise Tariff Act, 1985 ('CET Act'). One of the items manufactured by the Petitioner is Phenyl Acetic Acid ('PAA') classified under Chapter 29 of the CET. It is stated that in the manufacture of PAA two intermediate products are manufactured which are captively consumed viz., Benzyl Chloride ('BeCL') and Benzyl Cyanide ('BeCN'). BeCN is used as an input for the manufacture two final products: PAA, which is exempt from payment of excise duty and its 'Aqueous Layer' which is classified under the heading 38.23 of the CET and is subject to 15% excise duty chargeable ad valorem.

4. The Petitioner states that the manufacture of PAA involves the following process:

- (a) Toluene, Chlorine and Caustic Soda (all of which are inputs purchased from outside) are used to obtain BeCL (which is produced in-house)
- (b) BeCL (produced and captively consumed) along with Sodium Cyanide, Triethylamine, Bleaching Power and Caustic Soda (which are inputs bought from outside) are used to obtain BeCN
- (c) BeCN is reacted with Sulphuric acid (purchased from outside) to obtain PAA and its Aqueous Layer.

5. Thus BeCL was used captively to make BeCN which, in turn, was used captively to make PAA and its Aqueous Layer. It is further stated that the BeCN which is produced and used captively to produce PAA and Aqueous Layer is in a 'crude' form and is unstable and therefore cannot be marketed

as such. In an affidavit dated 14th January 1992 filed before the CEGAT by Mr. Ajay Gupta, Assistant Plant Superintendent of the Petitioner at its chemical plant at Daurala, it is explained that the crude BeCN that is captively consumed in the manufacture of PAA "is debited in the column for other purposes and for such removal, serial numbered captive gate passes of the Company is used. These gate passes are duly pre-authenticated by the Central Excise Officers." The affidavit proceeds to explain how some quantity of BeCN is also manufactured for the purpose of sale and the process used for the production of such marketable BeCN. It is stated that the saleable quantity of BeCN packed in drums/ 'carboys' are "accounted for in the Central Excise production records under the column pack." The quantity of BeCN is "removed on payment of duty against Central Excise gate pass in GP. 1 and accordingly shown under the column for removal on payment of duty for home use in the Central Excise daily stock account (RG. 1)."

6. Initially chemicals that were classifiable under Tariff Item (TI) 68 in the Schedule to the Central Excise Act, 1944 (CE Act) were, in terms of Notification No. 118/75 dated 30th April 1975 exempt from payment of excise duty if they were captively used in the factory of production. It is stated that in 1976 and 1982, the Petitioner applied to the Assistant Collector of Central Excise, Meerut and the Superintendent of Central Excise, Modipuram, Meerut for renewal and amendment of the Central Excise Licence in Form L-6 enclosing the details of the manufacturing process of various products including BeCL, BeCN and PAA. The Petitioner paid 'Nil'

rate of duty on PAA in terms of Notification No. 147/84-CE dated 18th June 1984.

7. With the introduction of Modified Value Added Tax ('MODVAT') Scheme, the Petitioner applied to avail MODVAT credit on various inputs including the following:

- (a) Toluene
- (b) Chlorine
- (c) Sodium Cyanide
- (d) Sodium Hypo Chloride
- (e) Bleaching Powder
- (f) Triethylamine
- (g) Sulphuric Acid
- (h) Caustic Soda

8. The CET Act replaced the Schedule to the CE Act with effect from 28th February 1986. On 1st March 1986 chemicals that were hitherto classified under TI 68 in the Schedule to the CE Act were described in different Chapters of the CET. In terms of Notifications Nos. 171, 172 and 176 of 1986 dated 1st March 1986, BeCL and BeCN consumed captively for manufacture of dutiable products were exempt from payment of excise duty. In terms of Notification No. 217/86-CE dated 2nd April 1986 issued under Rule 8 (1) of the Central Excise Rules 1944 (CE Rules), the 'inputs' specified in Column 2 thereof used in the manufacture of dutiable 'outputs' mentioned in Column 3 were exempt from duty. PAA and Aqueous Layer figured in Column 3 of this notification. Under a proviso to Rule 57 A of the

CE Rules it was clarified that the exemption would not be available if the final products were exempt from duty.

9. On 7th March 1986 the Petitioner filed a Classification List in terms of Rule 173 B of the CE Rules. The Petitioner in the said list disclosed the following:

(a) Manufacture of PAA cleared upon Nil rate of duty under Notification No. 147/84.

(b) Production of the Aqueous Layer from PAA (classified under Chapter 38 to the Schedule) on which BED of 15% ad valorem was paid.

(c) Production of BeCL and BeCN for captive consumption, which were exempt from duty in terms of Notifications 171, 172 and 176 dated 1st March 1986.

(d) Manufacture of BeCL and BeCN on which 15% duty ad valorem was paid. This was consistent with the Petitioner's stand that some portion of the BeCN which was not captively consumed, and in marketable form, was being sold after clearance on payment of duty.

10. The Inspector of Central Excise by a letter dated 31st March 1986 directed that the MODVAT credit taken on the inputs should be reversed. In its reply dated 18th April 1986, the Petitioner clarified that the PAA was cleared after availing exemption from payment of duty in terms of Notification No. 147/84-CE dated 18th June 1984. The Petitioner undertook to reverse the MODVAT input credit qua the PAA and debit the amounts so

claimed in the RG-23A register on clearance of PAA and Benzyl Alcohol against credits already obtained on receipt of such inputs. In Annexures 1 and 2 to the said letter, the Petitioner gave the details of the inputs purchased from outside. The process of obtaining PAA through BeCL and BeCN was also explained. The Petitioner also sought permission from the Assistant Collector, Division-I, Meerut and the Collector, Meerut for purchasing BeCL from outside.

11. On 7th May 1986 the Petitioner filed a further classification list in which *inter alia* it disclosed the following information:

- (a) Manufacture of PAA cleared upon Nil rate of duty under Notification No. 147/84.
- (b) Production of the Aqueous Layer from PAA (classified under Chapter 38 to the Schedule) on which BED of 15% ad valorem was paid.
- (c) Production of BeCL and BeCN for captive consumption, which were exempt from duty in terms of Notifications 171, 172 and 176 dated 1st March 1986 as well as Notification No. 217/86 dated 2nd April 1986.
- (d) Manufacture of BeCL and BeCN on which 15% duty ad valorem was paid.

12. By letters dated 29th July 1986 and 4th August 1988, the Petitioner informed the Department that in the chemical plant it produced PAA from toluene and chlorine and that BeCL and BeCN were intermediate products

for the manufacture of PAA. The Petitioner also stated that it was also marketing BeCN apart from consuming it captively for the manufacture of PAA. It was clarified that the BeCN used captively was different from the one that was marketed. Another classification list was filed on 1st March 1989 in which again the information disclosed by the Petitioner in the lists filed on 7th March and 7th May 1986 was disclosed.

13. The Department states that on noticing that the name of the final product was not indicated in the Classification list dated 1st March 1989, a letter dated 1st March 1990 was addressed to the Petitioner asking it to furnish the name of the final product. The Petitioner by letter dated 13th March 1990 stated that the matter was being studied and it would revert shortly. The Department states that it suspected some "malafide intention on the part of the noticee" and the Petitioner was pressed hard to submit figures of production and clearance of the various products. It is stated that the List dated 1st March 1989 was returned to the Petitioner asking it to reveal the name of the final product. When no reply was forthcoming, the Superintendent of the Range and his team visited the factory of the Petitioner and since no responsible officer of the factory was present, the RG 1 registers for the period 1st March 1986 onwards were resumed. Thereafter, the Petitioner submitted a letter dated 27th March 1990 disclosing the process of manufacture and stating that BeCL and BeCN used in the manufacture of PAA were being cleared without payment of duty in terms of Notifications 171, 172 and 176/86 dated 1st March 1986, Notification No 147/84 dated 18th June 1984 and Notification No. 217/86 dated 2nd April 1986.

14. The Petitioner states that on 29th March 1990, the local Excise Inspector demanded payment of excise duty on BeCN for the period commencing 20th March 1990 and that the Petitioner was forced to pay it under protest. The Petitioner made a detailed representation on 29th May 1990 enclosing material to show that BeCN that was captively used in the manufacture of PAA was unmarketable. It was further explained that since BeCN was also used in the manufacture of Aqueous Layer, which was dutiable, the Petitioner would be entitled to claim exemption on BeCN under Notification No. 217/86. The said representation also mentioned the cases of other assesseees undertaking the same process of production and on whom there had been no levy of excise duty on BeCN.

The first SCN dated 5th July 1990

15. A show cause notice ('SCN') dated 5th July 1990 was issued to the Petitioner stating *inter alia* that during the period 1st January to 31st March 1990 BeCL produced as an intermediate product and captively consumed for producing BeCN had been cleared at Nil rate of duty by availing exemption under Notification Nos. 176/86 dated 1st March 1986 and 217/86 dated 2nd April 1986 whereas such exemption was available only if the BeCN so produced was dutiable. However, inasmuch as BeCN and thereafter PAA was also being cleared at Nil rate under Notification No. 217 dated 2nd April 1986, the Petitioner was asked to show cause why it should not be asked to pay BED and SED on the BeCL so cleared on payment of Nil duty. Likewise the Petitioner was also asked to show cause why it should not be asked to pay BED and SED on the BeCN cleared on payment of Nil Duty as

per Notification No. 217 dated 2nd April 1986 since such BeCN was used in the manufacture of PAA which was also cleared on payment of Nil duty under Notification No. 147/84 dated 18th June 1984. The demand on BeCL was Rs 5,73,598.44 and that on BeCN was a total of Rs 10,58,415.75. The computation included BED and SED at 15% ad valorem.

16. The Petitioner replied to the above SCN on 1st October 1990 pointing out that BeCL and BeCN were not marketable in their captive use and therefore not amenable to excise duty. In any event, as BeCL was used to make BeCN in the event that BeCN was considered dutiable, then BeCL could not be dutiable. Assuming without admitting that BeCN was dutiable, duty could only be levied on its manufacturing cost. Further, reversal of MODVAT credits on account of the exemption benefit to PAA should be restored in such a case. Since BeCN and BeCL were used in a composite process to produce PAA and the Aqueous Layer, and the latter being cleared on payment of duty, the benefit of Notification No. 217/86 could not be denied. It was further pointed out that all the above facts were in the knowledge of the Department, having been brought to its notice by the Petitioner itself, and therefore it could not subsequently raise demands on a whimsical basis.

The second SCN dated 19th February 1991

17. On 19th February 1991 another SCN was issued by the Collector of Central Excise, Meerut ('CCE') to the Petitioner for suppressing the facts with an intent to evade payment of duty, with reference to the use of benzyl chloride and benzyl cyanide manufactured and used within the factory of

production in the manufacture of PAA. This was for the period 1st March 1986 to 31st December 1989 and therefore, was by way of invocation of the extended period of limitation under the proviso to Section 11 A (1) of the CE Act as it stood prior to the passing of the Finance Act, 2011.

18. The case of the Department in this SCN was similar to the first SCN dated 5th July 1990. The allegation was that the fact of the use of BeCL and BeCN in PAA exempted from payment of duty was suppressed by the Petitioner. The paragraphs of the first SCN were more or less repeated. There was an additional paragraph in which it was stated:

"It is also appears that the party has suppressed the facts that the final products is cleared at nil rate of duty in remark col. of their classification list submitted right from 1.3.86 onwards, by not disclosing the name of final product in this Col. It also appears that the party has mis-declared the rate of duty leviable on Benzyl Chloride and on Benzyl Cyanide used captively and misstated the facts by quoting wrong notification without declaring the actual name of the final products with the intention of evading central Excise duty. Therefore the provisions of the proviso to Section 11-A for demanding duty beyond six months also appears to be applicable in this case."

19. The Petitioner filed a reply to the above SCN on 19th April 1991. The Petitioner again pointed out that the Department was already aware of that BeCL and BeCN were manufactured in-house and used captively in the manufacture of PAA which was being cleared on payment of Nil duty. It was on that basis that the Petitioner had been asked by the letter dated 31st March 1986 to reverse the MODVAT credit availed on the inputs used in the manufacture of PAA. There was no demand at that stage for duty on BeCL and BeCN. The Petitioner's reiterated that BeCN made in-house and used

captively in the manufacture of PAA was in a crude form and not of marketable quality. This was different from that part of the BeCN which was subjected to further processing and thereafter packed for sale. On clearance of such marketable BeCN, duty was paid. The Petitioner submitted that the benefit of MODVAT credit taken on the inputs already reversed should be restored and adjusted towards the duty held to be payable on BeCN.

Order-in-original dated 12th August 1991

20. For some reason, the second SCN dated 19th February 1991 was adjudicated first by the Collector of Central Excise (CCE), Meerut by an order dated 12th August 1991 confirming the demand of Rs. 99,67,802.92 as far as BeCN used in the manufacture of PAA was concerned and imposing a penalty of Rs.20,00,000.

21. The CCE in the above order did not accept the Petitioner's submission that the value adopted for assessment could not be the same for crude BeCN crude and saleable BeCN. The CCE observed that the Petitioner had never declared the intermediate product as BeCN 'crude' in the classification list. However, the CCE agreed that in such event if BeCN was dutiable, then no duty could be demanded on BeCL used in its manufacture in terms of Notification No. 217/86. The CCE also rejected the contention that since one of the final products, i.e. Aqueous Layer was dutiable, the benefit of Notification 217/86 could not be denied on BeCN. It was observed that Aqueous Layer was only 'spent sulphuric acid' and had no BeCN content in it. BeCN used as a reactant was only found in PAA which was cleared at Nil rate of duty.

22. The CCE further held that the figure of the total quantity of BeCN produced and cleared for captive consumption as shown in the SCN had been worked out on the basis of the RG 1 registers and was, therefore, correct. It was held that the Petitioner had in the classification list quoted the wrong exemption notification availed for clearance of BeCL and BeCN and by not declaring the final product had suppressed the fact that the above intermediate products were used in manufacturing a exempted final product i.e. PAA.

Orders in the first SCN

23. Subsequently on 24th October 1991, the Assistant CCE (ACCE) passed an order-in-original in respect of the first SCN dated 5th July 1990. Incidentally, the discussion and findings in the said order were on the same lines as the order dated 12th August 1991 of the CCE in respect of the second SCN dated 19th February 1991. The ACCE therefore confirmed the demand of central excise duty on BeCN in the sum of Rs.10,58,415.75 and dropped the demand as far as BeCL was concerned.

24. The appeal by the Petitioner against the above order dated 24th October 1991 by the ACCE was dismissed by the CCE (Appeals) by an order dated 8th April 1993. The CCE (Appeals) confirmed the demand of Rs. Rs.10,58,415.75 as determined by the ACCE but remanded the matter to him to consider the limited question of the entitlement of the Petitioner to MODVAT credit in view of the conclusion that BeCN was dutiable.

CEGAT's order dated 15th April 1998

25. The Petitioner filed appeals against both orders in original before the CEGAT. By the final order dated 15th April 1998, CEGAT upheld the order dated 12th August 1991 of the CCE as regards the second SCN dated 19th February 1991 except for certain modifications. The conclusions reached by the CEGAT were as follows:

(i) The classification list filed on 1st March 1989 mentioned that the Petitioner availed the benefit of Notification No. 217/86 dated 2nd April 1986. In the said classification list the words “for manufacture of dutiable goods” were written by hand and therefore in so far as the inputs namely BeCN/BeCL was being used for manufacture of PAA, which was subjected to nil duty. A false claim had been made by the Assessee.

(ii) In the earlier classification list filed on 7th March 1986, PAA was declared twice as ‘pharmaceutical grade’ and for the second time as ‘other grade’. In both the cases the basic duty claimed was nil in terms of Notification No. 147/84. The two substances i.e. BeCL and BeCN were shown to the attracting duty at 15%. There was no mention of either of these substances being captively consumed. In the classification list dated 7th May 1986, no exemption was claimed in respect of BeCL or BeCN. Therefore, it could not be said that the Department was aware of the captive consumption of the above substances.

(iii) The correspondence between the Department and the Petitioner

resulting in the Petitioner agreeing to reverse the MODVAT credit in respect of duty paid on inputs, would not benefit the Petitioner since it had no bearing on the clearance of the inputs manufactured by and cleared free of duty upon captive consumption.

(iv) Although the RG 1 register showed that the clearance of BeCN was made under the cover of serially numbered internal gate passes pre-authenticated by the Inspector of Central Excise, they mentioned Notification No.118/75 in which there was no condition as to the necessity of the final product being dutiable. The notification that applied was Notification No. 217/86 which had such a condition built into it.

(v) The contention that crude BeCN was not marketable and therefore not dutiable could not be accepted in the absence of any technical evidence to show the difference in the two products.

(vi) Since the demand was being confirmed, the MODVAT credit taken by the Petitioner which was earlier reversed was restored. Further the benefit of Notification No. 217/86 should be available for the BeCL used. The duty short levied was required to be reconsidered by making adjustments for the cost of packing.

(vii) As regards the BeCN sold outside the penalty imposed was not excessive, even if as a result of the re-calculation the duty figure was reduced to some extent.

CEGAT's order dated 18th November 1999

26. The Petitioner filed an application before the CEGAT seeking rectification of some factual errors in the above order dated 15th April 1998. Meanwhile the Petitioner also filed the present writ petition W.P. (C) No. 3951 of 1998 in this Court challenging the above order dated 15th April 1998 of the CEGAT. On 6th October 1998, while reserving the Department's objection to the maintainability of the petition in view of the remedy of appeal available to the Petitioner under Section 35 L of the CE Act, the Court directed notice to issue to the Department. On 21st September 1999 the Court issued rule in the writ petition. The recovery of the penalty of Rs. 20 lakhs was stayed subject to the Petitioner furnishing security to the satisfaction of the Registrar.

27. The rectification application was decided by the CEGAT by order dated 18th November 1999. A copy of the said order was placed on record by the Petitioner by an affidavit dated 11th May 1990. By the said order dated 18th November 1999, the CEGAT accepted the plea of the Petitioner and made the following corrections to page 4 its order dated 15th April 1998:

(i) The sentence "this price list does not speak of captive consumption of either of these two input s" shall be substituted with the sentence: "This classification list does not speak of captive consumption of either of the two inputs."

(ii) The sentence "In the next classification list dated 7.5.1986 bearing No. CHEM/DSW/86-87 also no exemption is claimed on either of the two substances in terms of any Notification exempting them free of duty when

used for captive consumption" with the following sentence: "In the next classification list dated 7.5.1986 bearing No. CHEM/DSW/86-87 exemption is claimed on both the substances in terms of Notification 217/86 for captive consumption."

(iii) In Internal page 8 of the order dated 15th April 1998 the sentence: "the claim was also made that part of the Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid went into the bye-products which were cleared free of duty" shall be substituted by the sentence: "The claim was also made that part of the Benzyl Cyanide used in the manufacture of Phenyl Acetic Acid went into the by-products which were cleared on payment of duty."

CEGAT's order dated 14th March 2000

28. The CEGAT disposed of the appeal filed by the Petitioner against the order dated 8th April 1993 of the CCE (Appeals) affirming the order dated 24th October 1991 of the ACCE in respect of the first SCN dated 5th July 1990. The CEGAT negated the plea of the Petitioner that since BeCN was also used in producing Aqueous Layer that was dutiable, the exemption under Notification No. 217/86 could not be denied only because it was used to produce PAA that was exempt from duty.

29. By order dated 27th April 2000 in W.P. (C) No. 1926 of 2000, while issuing Rule, the Court directed it to be heard along with W.P. No. 3951 of 1998. However, since the Petitioner has not pressed W.P. (C) No. 1926 of

2000, no further discussion of the said order dated 14th March 2000 of the CEGAT is necessary.

Preliminary Objection

30. A preliminary objection has been raised by Ms. Sonia Sharma, learned Standing counsel for the Department, to the maintainability of W.P. (C) 3951 of 1998. It is contended that the petition involves questions concerning the rate of duty and valuation and that there is an efficacious statutory remedy of an appeal before the Supreme Court of India against the impugned orders of the CEGAT under Section 107 (and now Section 35 L) of the CE Act. She placed reliance on the decision of this Court in ***Perfect Electric Concern Pvt. Ltd. v. Assistant Collector/CCE 2000 (118) ELT 578 (Del)*** and the decision dated 25th February 2014 in CEAC 12/2013 (***Commissioner of Service Tax v. Ernst & Young Pvt. Ltd.***). She accordingly urged that this Court should not entertain these petitions.

31. As far as the above preliminary objection is concerned, it requires to be noticed that W.P. (C) No. 3951 of 1998 was admitted on 21st September 1999 by issuing Rule DB. At the hearing previous to the said date, i.e., on 6th September 1999, the Court noted in its order as under:

“After some hearing learned counsel for the Parties request for some time to further look into the matter on the question of maintainability of the writ petition.

Adjourned to 21st September 1999.”

32. It was thereafter that on 21st September 1999 Rule DB was issued. In other words, the writ petition was admitted after the Division Bench

considered the question of maintainability of the writ petition. The said order admitting the writ petition was not challenged by the Department. The said writ petition has been pending in this Court for nearly two decades.

33. Consequently, this Court does not consider it appropriate at this stage to relegate the Petitioner to the alternate remedy of an appeal. Apart from interminably delaying the resolution of the dispute that started two decades ago, it will add to the burden of huge pendency of cases and would not serve any useful purpose. Consequently, the preliminary objection raised by Ms. Sonia Sharma is hereby rejected.

Was the extended period of limitation available to the Department?

34. As far as the SCN dated 19th February 1991 is concerned, since it pertains to the period 1st March 1986 to 31st December 1989, one of the main issues that arises is whether the Department was justified in invoking the extended period limitation in terms of the proviso to Section 11 A (1) of the CE Act?

35. Under Section 11 A (1) of the CE Act, notice can be served on an Assessee regarding the duty of excise that either has not been levied, or paid, or has been short-levied or short-paid or erroneously refunded. The normal period of limitation for the service of such notice is six months from the relevant date. In terms of the proviso to Section 11 A (1), “where any duty of excise has not been levied or paid, or has been short-levied or short-paid and erroneously refunded by reason of fraud, collusion or any wilful mis-statement 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” then the period of limitation is extended from six months to five years.

36. In the present case, the Department's stand is that in the Classification Lists filed by the Petitioner on 7th March 1986, 7th May 1986 and 1st March 1989, the name of the final product, i.e., PAA was not disclosed and that in any event, in the Classification List of 1st March 1989 the wrong Notification No. was shown. In short, the case of the Department is that the Petitioner was claiming the benefit of exemption in respect of the BeCL and BeCN captively consumed by paying Nil rate of duty without disclosing that they were being used to manufacture PAA which was not dutiable.

37. Mr. C. Hari Shankar, learned Senior counsel appearing for the Petitioner, contested the above stand of the Department and pointed out that the documents on record showed that the following facts were in the knowledge of the Department throughout:

- (a) The Petitioner was manufacturing PAA.
- (b) That such PAA was exempt from duty in terms of Notification 147/84 dated 18th June 1984.
- (c) BeCN manufactured in the plant was being captively consumed for the manufacture of PAA.

38. In this context, it requires to be noticed that at the time of renewal of licence way back on 26th April 1976 in Column 4 of the application which required the Petitioner to state “commodities to be manufactured and estimated output of each commodity during the year”, the Petitioner mentioned: ‘as per Annexure 1’. In Column 5 as regards “manner of

manufacture” the Petitioner filled up: ‘as per Annexure 2’. Annexure 1 set out the products that were proposed to be manufactured. As regards ‘the manner of manufacture’ it was stated as under:

“Toluene & Chlorine is reacted in all glass plant to produce Benzyl Chloride which is converted to Benzyl Cyanide on reaction with Sodium Cyanide.

Benzyl Cyanide is then hydrolysed by using hydrochloric acid sulphuric acid to produce Phenyl Acetamide and Phenyl acetic acid respectively.

For the production of Benzyl Alcohol, Benzyl Acetate and Benzoate, Benzyl Chloride is reacted with sodium carbonate, sodium acetate and sodium benzoate respectively. Chilled water is used in the plant for condensers and coolers as well as direct consumption in the process.”

39. Again when it applied for change of the name of the licence from Daurala Chemical Industries to Daurala Sugar Works (Chemical Plant), in the application form the Petitioner stated that it may be granted licence to obtain (without payment of whole or part of the central excise duty thereon) Toluene to be used for the manufacture of BeCL, BeCN which were used for the manufacture of PAA and allied chemicals.

40. After the introduction of MODVAT Scheme, the Petitioner cleared PAA and BeCL without payment of any excise duty in terms of Notification No. 147/84-CE dated 18th June 1984. The Inspector of Central Excise by his letter dated 31st March 1986 informed the Petitioner that MODVAT credit was not available on the inputs used in the manufacture of PAA and asked it to reverse the MODVAT credit taken on such inputs. The Petitioner replied on 28th April 1986 admitting that PAA was being cleared after availing

exemption and that the inputs which were purchased from outside were indicated in Annexures 1 and 2. The Petitioner undertook that the incidence of excise duty on various inputs per tonne of phenyl acetic acid shall be debited back in the RG-23A register on clearance of PAA and Benzyl Alcohol against credit already obtained on receipt of such inputs. The Petitioner further undertook that the "debit entries will be commenced after we complete despatches of phenyl acetic acid and Benzyl Alcohol which were manufactured from inputs on which we have not obtained any credit under MODVAT. We shall make such debit entries so long as Phenyl Acetic Acid Benzyl Alcohol remain exempted from excise duty." Annexure 1 to this letter sets out the inputs which would be procured from the small-scale industries and therefore, MODVAT credit would not be taken in respect thereof. In a note in Annexure-I to it, a certificate of the Chartered Accountant was also appended wherein it was stated:

“Note – For manufacture of Phenyl acetic acid, Benzyl Cyanide and Sulphuric Acid are inputs.

- For manufacture of Benzyl Cyanide in the plant, Benzyl Chloride, Sodium Cyanide, Tri Ethyl Amine, Bleaching Powder and caustic soda are inputs.
- For manufacture of Benzyl Chloride in the plant, Toluene, Chlorine and caustic Soda are inputs.

We confirm that the figures mentioned in the above statement are correct to the best of our knowledge and belief.”

41. Significantly, while in the counter affidavit the Department has stated that the application submitted in 1976 does not contain the acknowledgment, there is no denial of the fact that by a letter dated 31st March 1986, the

Petitioner was asked to reverse the MODVAT credit and that by a reply dated 28th April 1986 the Petitioner agreed to abide by that request. Thus, the Department cannot now say that it was not aware that the inputs in the manufacture of PAA were being cleared without payment of duty or that PAA itself was being cleared with payment of Nil duty.

42. Further, the Petitioner had placed on record copies of the serially numbered gate passes pre-authenticated by the proper officer of the Department indicating how much BeCN was captively consumed in the manufacture of PAA and the quantity that was cleared on payment of duty. These gate passes in turn formed the basis of making entries in the statutory RG 1. The Petitioner is right in its contention that the gate passes were pre-authenticated in September 1986 and were issued in October 1986. Notification No. 118/75 was rescinded with effect from 28th February 1986. Therefore the question of the Petitioner claiming the benefit of Notification No. 118/75 did not arise. The pre-authentication was made and the documents accepted by the Department obviously by extending the benefit under Notification No. 118/75.

43. The copies of the classification lists dated 7th March 1986, 7th May 1986 and 1st March 1989 reveal that the first entry under the column describing the products manufactures mentions PAA and the fact that it was being cleared upon payment of Nil duty in terms of Notification 147/84 dated 18th June 1984. The CEGAT in its order dated 18th November 1999 corrected the error in the order dated 15th April 1998 and agreed that in the classification list dated 7th May 1986 "exemption is claimed on both the substances in

terms of Notification 217/86 for captive consumption". With this correction, the CEGAT's conclusion that there was a deliberate suppression of information by the Petitioner in the classification lists was untenable.

44. As observed in ***Hindustan Heavy Chemicals v. CCE 2009 (240) ELT 14 (Cal)***, every failure to pay tax is not a justification for imposition of penalty. Also, the word 'suppression' in the proviso to Section 11 A (1) of the CE Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in ***Uniworth Textiles Ltd. v. CCE (2013) 9 SCC 753*** the word "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the Assessee to avoid paying excise duty. The mere fact that the wrong notification number may have been mentioned will not *ipso facto* attract the proviso to Section 11 A (1) of the CE Act. As pointed out by Mr Hari Shankar, the Department was aware of the factual situation and therefore was not justified in invoking the extended period of limitation. Further in the second SCN dated 19th February 1991, the entire facts on the basis of which suppression and wilful misstatement was alleged were not set out.

45. Ms. Sonia Sharma, appearing for the Department, relied on the decision of the CEGAT in ***Saraswati Air Products v. Collector of Central Excise 1998 (98) ELT 391 (Tribunal Del)*** which was upheld by the Supreme Court by dismissal of CA No. 2661 of 1998 on 9th November 1998. However, the facts in that case were different. The fact that the Assessee there was

registered with the DGTD, which would disentitle it to exemption, was not disclosed to the Department and no revised classification list was filed. In the instant case, however, the order dated 18th November 1999 of the CEGAT itself acknowledges that the relevant information about BeCL and BeCN that were captively consumed were being cleared on payment of nil duty and that PAA was also being cleared after availing exemption from payment of duty were disclosed in the Classification List.

46. Mr Hari Shankar referred to the decision in *Nizam Sugar Factory v. CCE (2006) 11 SCC 573* and submitted that the second SCN for the extended period was a virtual repetition of the first SCN and did not point to any new material that the Department came across to conclude that the conditions for attracting the extended period of limitation were fulfilled. On the other hand, Ms Sonia Sharma submitted that the Department was within its right to issue the second SCN for an earlier extended period since at the time of the first SCN, the investigation was still in progress and “more and more facts” remained to be unearthed. She stated that prior to the issuance of the SCN dated 5th July 1990, the Department was not aware of the process being adopted by the Petitioner to manufacture PAA. She sought to distinguish the decision in *Nizam Sugar Factor (supra)* by pointing out that the subsequent SCN in the aforementioned decision pertained to a later period than the first SCN, whereas in the present case it pertained to an earlier period.

47. As already noticed, the Department was indeed aware of the fact that the Petitioner was clearing PAA, made from captively consumed BeCN cleared

by paying nil duty and further that PAA was also being cleared upon payment of nil duty. The fact that it asked the Petitioner to reverse the MODVAT credit on inputs purchased from outside and the Petitioner complied, belies the Department's case to the contrary. Secondly, a comparison of the two SCNs shows that the second SCN for the extended earlier period 1st March 1986 till 31st December 1989 is a virtual repeat of the first SCN dated 19th February 1991 except for one paragraph extracted hereinbefore. This merely sets out the language of the proviso to Section 11 A (1) and makes no reference to material that was not already available with the Department when the first SCN was issued. In such circumstances, the ratio of the decision in *Nizam Sugar Factory (supra)* applies. The decisions in *Pushpam Pharmaceuticals Co v. CCE 1995 Supp (3) SCC 462, Gujarat Ambuja Exports Limited v. Union of India 2012 (26) STR 165 (Guj)* and *Commissioner of Central Excise, Delhi-IV v. Escorts Limited, Faridabad 2009 (235) ELT 55 (P&H)* also appear to support the case of the Petitioner in this regard.

48. For all of the above reasons the Court holds that in the present case, the conditions for invoking the extended period of limitation in terms of the proviso to Section 11 A (1) of the CE Act were not fulfilled and that the demand raised in respect of the BeCN used in the manufacture of PAA for the extended period of 1st March 1986 till 31st December 1989 was barred by limitation.

Conclusion

49. The impugned order of the CEGAT dated 15th April 1998 as corrected

by the order dated 18th November 1999 to the extent it upholds the above demand in respect of BeCN and the corresponding order dated 12th August 1991 of the CCE as regards the second SCN dated 19th February 1991 confirming the above demand are hereby set aside. The penalty of Rs. 20 lakhs imposed by the CCE by the aforementioned order dated 12th August 1991 is also set aside.

50. W.P. (C) No. 3951 of 1998 is allowed in the above terms but, in the facts and circumstances of the case, with no orders as to costs. W.P. (C) No. 1926 of 2000 is dismissed as not pressed.

MAY 25, 2016
Mg/Rm

S. MURALIDHAR, J

VIBHU BAKHRU, J