

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.3044 of 2011
and M.P.No.1 of 2011

M/s.Micro Chem Products (India) Pvt. Ltd.
No.3, Muthial Reddy Street,
Alandur, Chennai - 16.

..... Appellant

Vs

1. Customs, Excise and Service Tax Appellate Tribunal,
Shastri Bhavan, 26, Haddows Road,
Chennai - 600 006.

2. The Commissioner of Central Excise
Chennai

..... Respondents

APPEAL filed under Section 35G of the Central Excise Act,
1944 against the order dated 10.05.2011 made in Final Order
No.582/2011, on the file of the Customs, Excise and Service Tax
Appellate Tribunal, Chennai Bench, Chennai.

For Appellant : Mr.G.Natarajan

For Respondents : Mr.A.P.Srinivas - R2

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal directed against the judgment and order dated 10.05.2011, passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, 'the Tribunal').

1.1. By virtue of the impugned judgment and order, the Tribunal allowed the Revenue's appeal and dismissed the Cross Objection filed by the Assessee, whereby, it reversed, both the Order-in-original dated 31.10.2000 and the order of the First

Appellate Authority dated 07.11.2003. Both these orders were passed in favour of the Assessee.

1.2. Being aggrieved, the Assessee has preferred the present appeal.

2. This appeal was admitted on 01.11.2011, when the following question of law was framed for consideration by this Court:

"Whether the Tribunal is correct in dismissing the cross-objection filed by the appellant raising the question of limitation for the Revenue to make a demand?"

3. In order to adjudicate upon the appeal, the following broad facts, are required to be noticed.

3.1. The Assessee, at the relevant point in time, manufactured chemicals for use in printing and photographic industry. In respect of the sale of its goods, it used the brand name "Micro", which was, admittedly, also the brand name of another family/sister concern, by the name, Micro Plates Private Limited (in short, "MPPL"). As would be evident from the cause title, the Assessee's name is Micro Chem Products (India) Pvt. Ltd. (in short, "MCPPL").

3.2. Since, the Assessee had been claiming exemption from excise duty, as it was a Small Scale Industrial Unit (in short, "SSI Unit"), it did not, as it appears, get itself registered with the Central Excise Authorities. The Assessee's claim is that, since, its clearances were, always, below the sum of Rs.30.00 lakhs, there is no need to register itself with the Central Excise Authorities.

3.3. The record shows that the Central Excise Authorities got wind of the fact that the Assessee had been clearing its goods under the brand name "Micro", which also the brand name that was being used by its family/sister concern, i.e., MPPL. Accordingly, a Show Cause Notice dated 08.11.2000 (in short, the "SCN") was served on the Assessee.

3.4. Via the said SCN, it was proposed to deny the Assessee, the exemption from excise duty, it enjoyed being an SSI Unit, by virtue of the various Notifications, issued from time to time, i.e., Notification No.7/97-CE dated 01.03.1997; Notification No.16/97-CE dated 01.04.1997; Notification No.8/98-CE dated 02.06.1998; Notification No.8/99-CE dated 28.02.1999 and Notification No.8/2000-CE dated 01.03.2000 (hereafter collectively referred to as 'Notifications').

Accordingly, the SCN proposed the following:

i) to levy duty, in the sum of Rs.4,19,575/-, for the period, spanning between June, 1997 and 25.10.2000

ii) to levy penalty under Section 11AC of the Central Excise Act, 1944 (in short, 'the 1944 Act').

3.5. In respect of the said SCN, a reply dated 05.01.2001 was filed by the Assessee, pursuant to which, the Order-in-Original dated 31.10.2000 (sic 31.10.2001), was passed by the Adjudicating Authority.

3.6. As indicated at the outset, the Order-in-Original, was in favour of the Assessee, and, hence, proceedings initiated via the aforementioned SCN were dropped.

3.7. The Revenue, being aggrieved, had preferred an appeal against the Order-in-Original dated 31.10.2001. The appeal met with the same fate. The First Appellate Authority, i.e., Commissioner of Central Excise (Appeals) vide order dated 07.11.2003, sustained the Order-in-Original and dismissed the Revenue's appeal.

3.8. The Revenue did not stop there and, accordingly, preferred an appeal to the Tribunal. To be noted, the Assessee also preferred cross objections with the Tribunal raising the issue of limitation.

3.9. As alluded to above, the Tribunal reversed the view taken by the Adjudicating Authority and the First Appellate Authority.

4. It is, in this background, that arguments, on behalf of the Assessee, have been advanced by Mr.G.Natarajan, Advocate, while, on behalf of the Revenue, by Mr.A.P.Srinivas.

5. Mr.Natarajan, at the outset, submits, quite candidly, that the issue on merits, at this point in time, appears to be covered in favour of the Revenue, by virtue of the judgment of the Supreme Court rendered in the matter of: Commissioner of Central Excise, Trichy V. Grasim Industries Ltd., 2005 (183) E.L.t. 123 (S.C.).

5.1. Learned counsel, however, submits that the Tribunal failed to take into account, the fact that at the relevant point in time, there was a debate, as to whether or not, the Assessee was an infractor of the extant provisions of law, in failing to disclose that the brand name "Micro", which was affixed on its

goods, was also used by its family/sister concern, i.e., MPPL. In other words, learned counsel submitted that the extended period of limitation, provided under Section 11A(1) of the 1944 Act [as it obtained at the relevant point in time], could not have been applied to the Assessee. The contention of the learned counsel, is that, at the most, the Assessee could be held liable for payment of duty for a period six(6) months, prior to the date of issue of SCN. As indicated above, the SCN was issued on 08.11.2000.

5.2. In support of his submissions, learned counsel has relied upon the following judgments:

i) UOI V. Sonnenflex Abrasives Pvt. Ltd., 2016(343) E.L.T. 57 (Bom)

ii) CCE V. Wonderax Laboratories, IPL, 2010 (255) E.L.T. 60 (Del.)

iii) CCE, Chandigarh V. Fine Industries, 2002 (146) E.L.T. 53 (Tri.LB)

iv) Ashok India Engg. Works V. CCE, Aurangabad, 1999 (108) ELT 686

v) Maheswari Industries V. CCE, 2017 - TIOL - 880 HC- AP

vi) Rajdoot Paints Ltd. V. CCE, 2001 (134) ELT 281 Tri-Del.

vii) A.J.Bantex Pvt. Ltd. V. CCE, 2008 (229) E.L.T. 582 (Tri-Bang.)

5.3. Furthermore, Mr.G.Natarajan, relies upon the circular bearing No.52/52/94- CX, dated 01.09.1994, issued by Central Board of Excise and Customs, (in short, '1994 circular'). In particular, reliance is placed by the learned counsel on paragraph 4 of the 1994 Circular. Based on the provisions of paragraph 4, it is contended that since, none, other than the Assessee had claimed ownership in the brand name, "Micro", it could not be said that the Assessee was in violation of the exemption Notifications, issued from time to time, with respect to SSI Units.

6. On the other hand, Mr.Srinivas, who appears on behalf of the Revenue, says that, no interference is called for with the impugned judgment and order of the Tribunal. It is submitted that the issue was neither contentious nor debatable and, therefore, the extended period of limitation was applicable in the instant case.

6.1. In support of his submissions, learned counsel has relied upon the following judgments:

i) Commissioner of C.Ex., Pune, Vora Products, 2008 (221) E.L.T. 321 (S.C.)

ii) Commissioner of Central Excise, Raigad V. Ramply (India) Ltd., 2010 (249) E.L.T.31 (Bom.)

7. We heard the arguments of the learned counsel for the parties and perused the record.

7.1. According to us, what clearly emerges is as follows:

i) That the Assessee, during the period in issue, i.e., 1997 to 08.11.2000, had cleared its goods, under the brand name "Micro". The brand name "Micro" was also used by its family/sister concern MPPL.

ii) The brand name was coined/invented by Mr.N.C.Shroff, father of Nitin Shroff. Nitin Shroff is one of the Directors on the Board of the Assessee.

iii) The family/sister concern had been using the brand name "Micro", since 1984. The Assessee had commenced the use of the brand name "Micro", since June, 1997.

iv) At no point in time, the family/sister concern, i.e, MPPL made a claim on brand name "Micro".

v) The Assessee was not registered with the Central Excise Authorities and, therefore, had not filed any classification list.

vi) Both, the Adjudicating Authority and the First Appellate Authority had ruled in favour of the Assessee.

7.2. Given this background, one would have to advert to the findings of fact rendered by the Adjudicating Authority. The findings of fact, which were returned by the Adjudicating Authority were as follows:

i) That no particular person or company had claimed ownership of the brand name "Micro", either by way of usage or otherwise, before the Authorities, such as, those constituted under Trade Mark and Merchandise Marks Act.

ii) "Micro" was a common name, which was also affixed as a prefix in the Assessee's name.

iii) Though, the 1994 Circular was applicable in the Assessee's case, for the reason that, except for prior usage of the brand name "Micro", by another entity, the ownership in the brand name had not been conclusively proved.

8. As indicated above, the First Appellate Authority sustained the findings of the Adjudicating Authority. The reasons furnished were as follows:

"....I have examined the case records and written submissions. the name 'MICRO' used by the Respondents is not a brand name belonging to any other person. The name is short form of the name of their Company, viz., M/s. Micro Chem Products (India) Pvt. Ltd. which is a separate legal entity. The Respondent will be disentitled to SSI Exemption only if they use the Brand Name or Trade Name of another person. There is no claimant for the name "MICRO" before any Competent Legal Authority.

The Central Board of Excise & Customs letter MF (DR) Circular No.52/52/94- CX dated 01.09.1994 discusses the issue in detail and states (vide para 4 that

"If brand name is not owned by any particular person, the use thereof will not deprive a Unit of the benefit of the small scale exemption scheme. This applies not only to locks, but to all other goods specified in Notification No.1/93 CE."

When the Department has not established the ownership of the brand name as belonging to a particular person and also when no person has claimed ownership of the brand name, then it is immaterial for the purpose of claiming the benefit of SSI Exemption Scheme, whether the said brand name is being used on a similar product or different products. Thus, I do not find any infirmity in the impugned order. Revenue Appeal rejected....."

9. However, as alluded to above, the views held by the Adjudicating Authority and the First Appellate Authority have been reversed by the Tribunal.

10. The Supreme Court, in Grasim Industries case, has interpreted Notification No.5/98/C, dated 02.06.1998, which was

an exemption notification. The case did not involve an SSI unit. However, what required consideration was: as to whether the Assessee in that case, was entitled to exemption, in terms of the notification in issue, on account of having indicated on the packaging of its product, its connection with its holding company. The Assessee in that case was a subsidiary of Grasim Industries Limited. The bags in which cement manufactured by the Assessee was sold carried the following endorsement:

"Manufactured by Dharani Cements Ltd. A Subsidiary of Grasim Industries Ltd."

10.1. The Supreme Court, inter alia, was, thus, required to interpret the following provision contained in the exemption notification:

"(iii) The exemption under this notification shall not be applicable to—

(a) cement manufactured from such clinker which is not (a) manufactured within the same factory; and

(b) cement bearing a brand name or trade name (whether registered or not) of another person;

Explanation.—For the purposes of condition (ii), 'brand name' or 'trade name' means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, signature, or invented words or any writing which is used in relation to a product for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person."

10.2. It is, in this context, that the Supreme Court made the following observations. सत्यमेव जयते

".....In our view, the Tribunal has completely misdirected itself. The term "brand name or trade name" is qualified by the words "that is to say". Thus, even though under normal circumstances a brand name or a trade name may have the meaning as suggested by the Tribunal, for the purposes of such a notification the term "brand name or trade name" gets qualified by the words which follow. The words which follow are "a name or a mark". Thus even an ordinary name or an ordinary mark is sufficient. It is then elaborated that the "name or mark" such as a "symbol" or a "monogram" or a "label" or even a "signature of invented word" is a brand name or trade name. However, the contention is that they must be used in relation to the product

and for the purposes of indicating a connection with the other person. This is further made clear by the words "any writing". These words are wide enough to include the name of a company. The reasoning given by the Tribunal based on a dictionary meaning of the words "write" and "writing" is clearly erroneous. Even the name of some other company, if it is used for the purposes of indicating a connection between the product and that company, would be sufficient. It is not necessary that the name or the writing must always be a brand name or a trade name in the sense that it is normally understood. The exemption is only to such parties who do not associate their products with some other person. Of course this being a notification under the Excise Act, the connection must be of such a nature that it reflects on the aspect of manufacture and deal with quality of the products. No hard-and-fast rule can be laid down however it is possible that words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such a case we do not express any opinion on this aspect.

.....
In our view, the Tribunal was clearly erroneous. As indicated above, the Explanation makes it clear that it need not be a trade name or brand name as commonly understood. Any name or mark or writing, even the name of a company is sufficient so long as it is used for the purpose of indicating a connection between the product and that company. The use of the words "A quality product from ITL group" clearly showed an intention to show a connection between the product and the ITL group. These words indicated that the quality of the product was the same as that of a product of ITL group. If use of such words did not disentitle a party from the benefit of the notification, we fail to understand what sort of words would disentitle a party. The decision of the Tribunal in this case is clearly erroneous and will stand overruled....."

10.3. Therefore, quite clearly, the Assessee cannot contend that in view of the observations of the Supreme Court in Grasim Industries case, that it was not in violation of the law. As indicated at the beginning, Mr.G.Natarajan, fairly conceded that this argument, after a decision rendered by the Supreme Court in Grasim Industries case, was not open to him.

11. The issue, which, therefore, we are confronted with is: whether given the state of law, the extended period of limitation would be applicable in the instant case.

11.1. As noted above, the Assessee was not registered with the Central Excise Authorities, on account of the fact that its clearances were below the monetary limit, specified in various Notifications, issued from time to time.

11.2. As would be evident, the limit of exempted clearances, increased, in this period, from Rs.30.00 lakhs to Rs.50.00 lakhs. The Assessee, therefore, in our view, was entitled to contend that there was no occasion, for it, to disclose the fact that the subject goods were being cleared under the brand name "Micro", (which was also the brand name used by another family/sister concern), since, it had no occasion to file a classification list.

11.3. The Tribunal appears to have, in our view, failed to appreciate this aspect of the matter and, therefore, applied the ratio of the judgment in Ramply (India) Ltd. case. This is evident from the following observations made by the Tribunal in the impugned judgment:

"..... In the case of Commissioner of Central Excise, Raigad Vs. Ramply (India) Ltd. [2010 (249) E.L.T. 31 (Bom.)], the Hon'ble Bombay High Court has held that the non-declaration of use of another's brand name despite having knowledge about the same, amounts to suppression, setting aside the Tribunal's order that non-disclosure of the use of another's brand name in the classification list did not tantamount to suppression. The submission of the learned counsel for the assessee is that the extended period cannot be invoked against the assessee as, during the period in dispute, in the present case, which is 1997 to 2000, there were decisions to the effect that the use of brand name on different products would not disentitle an assessee to avail SSI exemption and in these circumstances, it cannot be held that the assessee was guilty of suppression with intent to evade payment of duty. However, this stand was never taken before the authorities below and the reply to the show-cause notice discusses only the merits of the availability of the SSI benefit. Therefore, following the ratio of the decision of the Hon'ble Bombay High Court in Ramply cited supra, we agree with the contention of the Revenue that the demand is not barred by limitation....."

11.4. In Ramply (India) Ltd., case, the Bombay High Court held that the extended period of limitation was applicable, in view of the fact that, even though there was a factual finding against the Assessee, to the effect, that even though a classification list has been filed, the Assessee had failed to disclose the use of brand name, belonging to another person. (See paragraph 12 of the judgment).

11.5. It is, on account of this, that the Division Bench of the Bombay High Court, came to the conclusion that the extended period of limitation would be applicable, as it was, clearly, a case of suppression. In coming to this conclusion, the Bombay High Court had applied the ratio of the decision of the Supreme Court in Vora Products's case, which, again, was a case, where the Assessee had failed to disclose the factum of use of brand name of another person on its product in the classification list, filed with the Excise Authorities.

11.6. In our view, these judgments are clearly distinguishable.

12. Mr.G.Natarajan's argument, therefore, is that the more apposite judgment is that of the Bombay High Court rendered in: UOI V. Sonnenflex Abrasives Pvt. Ltd., 2016(343) E.L.T. 57 (Bom).

12.1. In this case, the Assessee had cleared the goods by inscribing on the packaging the following words: "in technical collaboration with West German Company". The Court rejected the plea of the Revenue that this was a case of fraud or collusion or wilful misstatement or suppression of facts, as contemplated under Section 11AC of the 1944 Act. The relevant observations made by the Division Bench are contained in paragraph Nos.10 to 13, which are extracted herein below:

"10.According to the Revenue, inscribing the words "in technical collaboration with West German Company" on the manufactured goods itself constitutes user of the brand name. It may be noted that there were several decisions of the Tribunal as also the decision of the Apex Court in the case of Astra Pharmaceuticals (P) Ltd. v. Central Excise - MANU/SC/0641/1995 : 1995 (75) E.L.T. 214 wherein it was held that benefit of exemption notification is not lost by the assessee, merely because they affix/indicate on their product, the name of the holding Company. It is only when the Apex Court in the case of Grasim Industries Ltd. (supra) reversed the aforesaid decision of the Tribunal, and also distinguished the decision of the Apex Court in the

case of Astra Pharmaceuticals (P) Ltd. (supra) the issue has been finally settled in favour of the Revenue.

11. In these circumstances, in the facts of the present case, the argument that the assessee bonafidely believed that inscribing words "in technical collaboration with West German Company" would not constitute user of the brand name of the West German Company deserves acceptance, especially when there were several decisions of the Tribunal as also the decision of the Apex Court, which supported the argument of the assessee. The fact that the assessee did not disclose the 1975 agreement does not enhance the case of the Revenue, because the said agreement was only a technical know-how agreement and not an agreement for user of the brand name. If the assessee as also the Revenue at the material time in the light of various decisions were under the belief that inscribing the words 'in collaboration with the West German Company' on the manufactured goods did not constitute user of brand name, then merely because, the Apex Court subsequently in the case of Grasim Industries Ltd. (supra) ruled to the contrary, it could not be said that the assessee had suppressed material facts.

12. Accordingly we hold that in the facts of the present case, the Tribunal was justified in holding that the assessee was not guilty of any fraud or collusion or any wilful misstatement or suppression of facts and, therefore, the extended period of limitation could not be invoked in the present case.

13. Once it is held that there was no fraud or collusion or any wilful misstatement or suppression of facts, then, invoking the penal provisions contained in Section 11AC of the 1944 Act does not arise as the said section can be invoked only if the duty becomes payable on account of fraud or collusion or any wilful misstatement or suppression of facts. Therefore, in the facts of the present case, where the duty within the period of limitation has been sustained, the Tribunal in the absence of any fraud or collusion or any wilful misstatement or suppression of facts was justified in deleting the penalty levied under Section 11AC of the Act."

(emphasis is ours)

12.2. Similarly, in the case of CCE V. Wonderax Laboratories, IPL, 2010 (255) E.L.T. 60 (Del.), the Division Bench of the Delhi High Court rejected the plea of the Tribunal to apply the extended period of limitation.

12.3. This was a case, where the Assessee had used the name "Wonderax" on the shaving cream manufactured by it. The brand name was owned by a sister concern, which did not manufacture those goods. The Assessee was an SSI Unit. The Assessee took the plea that not only was it permissible for it, in law, to use the said brand name, but also it was under the bonafide belief, that it was exempted from payment of Central Excise Duty, even if, it had used the brand name of another person on the goods manufactured by it. The Court agreed to the stand of the Assessee that given this state of law and the conflicting views, the extended period of limitation would not apply to the Assessee. The observations made by the Court, in this behalf, being relevant, are extracted herein below:

".....4. It appears that there was conflict of views among different Benches of the Tribunal on the interpretation of the exemption Notification No. 1/93 dated 28th February, 1993 which dealt with this issue. Consequently, the dispute was referred to a larger Bench of the Tribunal and was ultimately settled in C.C.E. v. Fine Industries MANU/CE/0405/2002 : 2002 (146) E.L.T. 53 (Tri.). The Full Bench of the Tribunal held that for the denial of exemption, both the Assessee and the brand name owner, should manufacture identical goods. In the present case, the Assessee was using the brand name for a product other than shaving cream which was the product intended to be manufactured by the brand name owner. In these circumstances, the Tribunal took the view that the Assessee appears to have acted bona fide in making its clearances and claiming exemption from excise duty. Consequently, the Tribunal took the view that there was no warrant for extending the time of limitation beyond the period of one year under the proviso to Section 11A(1) of the Act.

5. We are of the view that opinion expressed by the Tribunal is well reasoned. There is no doubt that there was a conflict of views and that was resolved much later in the year 2002. The period with which we are concerned is 1998-1999 and 1999-2000 at which time the controversy had not been settled by the larger Bench of the Tribunal. The Assessee was

justified in proceeding on the basis that it was exempt from excise duty particularly during the pendency of controversy.

6. No substantial question of law arises for consideration.

7. The appeal is dismissed."

(emphasis is ours)

12.4. An appeal was preferred against the said judgment to the Supreme Court, which was numbered as S.L.P.No.CC.No.10153 of 2008. The S.L.P. was dismissed on 04.08.2008, after condoning the delay.

13. Therefore, what emanates from the facts obtaining in the present case is that, there was a non-disclosure of information by the Assessee. The Assessee has taken a stand that, since, it was always below the monetary limit fixed for clearances qua SSI Units, it never had an occasion to make any disclosure via a classification list.

13.1. In our view, this cannot be construed as suppression of fact, within the meaning of Section 11A(1) of the 1944 Act. Mere non-disclosure of facts, in such like circumstances, cannot constitute suppression of facts. Given the way the Section is framed, the expression "suppression of fact", appears in the company of words and expressions, such as, fraud, collusion, wilful misstatement. Therefore, the expression "suppression of facts", has to take colour from the words whose company, it appears in. A mere non-disclosure of information, when there is no obligation in law to furnish the same, will not amount to, in our opinion, fraud or collusion or even, wilful misstatement and, hence, trigger the extended period of limitation [See Collector of Central Excise, Hyderabad V. M/s.Chemphar Drugs and Liniments, Hyderabad, 1989 (40) ELT 276 (SC).; Padmini Products V. Collector of C.Ex., 1989 (43) ELT 195 (SC) and Pushpam Pharmaceuticals Company V. Collector of Central Excise, Bombay, 1995 (78) ELT 401 (SC)]

13.2. In view of the aforesaid conclusion, we are inclined to agree with the counsel for the Assessee that the Tribunal erred in not examining this aspect of the matter, which, clearly, emanated from the record.

13.3. The Tribunal, in our opinion, wrongly rejected the cross objections filed by the Assessee on the issue of limitation.

14. Having regard to the foregoing decision, the impugned judgment and order of the Tribunal is set aside. The question of law, as framed, is answered in favour of the Assessee and against the Revenue.

14.1. Having been said so, as indicated by the learned counsel for the Assessee, the Revenue would be entitled to recover duty for the period six (6) months prior to the date of issuance of the SCN, i.e., dated 08.11.2000, albeit, in accordance with law.

14.2. Therefore, since, the extended period of limitation is not applicable, in our view, the Revenue would also not be entitled to levy penalty under Section 11AC of the 1944 Act, save and except, demand duty, for a period of six (6) months, prior to the date of SCN.

15. Accordingly, the Civil Miscellaneous Appeal is disposed of in the aforementioned terms. Consequently, the connected Miscellaneous Petition is closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. Customs, Excise and Service Tax Appellate Tribunal,
Shastri Bhavan, 26, Haddows Road,
Chennai - 600 006.
2. The Commissioner of Central Excise
Chennai

+1cc to M/s.A.P.Srinivas, Advocate, S.R.No.41987
+1cc to M/s.S.Jaikumar, Advocate, S.R.No.41864

C.M.A.No.3044 of 2011
and M.P.No.1 of 2011

SKV(CO)
CU(06/07/2017)