IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.08.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.31663 of 2003

M/s.K&I Distribution Services Pvt. Ltd.,
Rep. By its Director - Mr.Subbiah,
Rams Flats, III/IV, No.22 West Cott Road,
Royapettah, Chennai - 14. ... Petitioner

Vs.

1.Additional Commissioner (R&T),
Office of the Commissioner of Central Excise,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 35.

2.Joint Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 35. ... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India praying to issue Writ of certiorari to call for the records of the respondents herein culminated in the impugned order-in-original No.1 of 2003, dated 30.01.2003 passed by the second respondent and quash the same.

For Petitioner : Mr.Sivam Sivanandraj

For Respondents: Mr.A.P.Srinivas, SPC

ORDER

The petitioner engaged in importing and marketing of biscuits has approached this Court challenging the order-in-original dated 30.01.2003 passed by the second respondent, by which, the second respondent confirmed the demand of central excise duty to the tune of Rs.1,10,774/- in terms of proviso to Section 11A of the Central Excise Act, 1944 (in short “Act”); confirmed the demand of interest under Section 11AB of the Act and imposed the penalty of Rs.1,10,774/- under Section 11AC of the Act, and Rs.5,000/- under Rule 173Q of the Central Excise Rules, 1944.

2. Though the petitioner had an effective alternative remedy by preferring an appeal before the Commissioner of Central Excise (Appeals), the petitioner challenged the impugned order before this Court by way of this writ petition on the ground of total lack of jurisdiction as well as the claim being barred by limitation. This appears to be the reason for entertaining the writ petition by this Court and granting an interim order. Thus, at this juncture, it will be unfair for this Court to relegate the petitioner to avail the alternative remedy in the light of the grounds of challenge made by the petitioner to the impugned order.

3. The short issue which falls for consideration in the instant case is whether the petitioner, who had labelled the retail packs of biscuits for the purpose of complying the statutory obligation under the Standards of Weights and Measures Act, 1976, and under the Prevention of Food Adulteration Act, is said to have undertaken the process of manufacture and if so, whether the petitioner should have registered themselves with the respondent department and whether they are liable to pay the Central Excise Duty. If the petitioner is liable to be registered with the department and required to pay the Central Excise Duty, whether the impugned demand is sustainable in law having been made after expiry of the period of limitation by invoking the extended period of limitation under Section 11A of the Act. If this question is to be answered in favour of the revenue, then it has to be seen as to whether the petitioner product will fall under sub-heading 1905.11 under Clause 3 of Chapter 19 of the Central Excise Tariff, attracting the duty at the rate of 16%.

4. The factual aspect is not in dispute, that is to say that the petitioner had imported biscuits from Malaysia and at the time of marketing, they had affixed their labels denoting imported and marketed by the petitioner, the Maximum Retail Price (MRP) and Month of Import. According to the petitioner, they were required to do so to comply with the statutory obligation under the Standards of Weights and Measures Act, 1976, and under the Prevention of Food Adulteration Act.

5. The respondent issued a show cause notice dated 01.05.2002 by referring to Note 3, Chapter 19 of the Central Excise Tariff Act, 1985, and that labeling or relabeling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, of products of the said chapter, shall amount

to manufacture. According to the respondent, the activity of affixing the label mentioning the Maximum Retail Price (MRP) as per the Standards of Weights and Measures Act, 1976, at the time of sale by affixing it in the premises of the petitioner amount to be manufacture. The second respondent further alleged that the petitioner had not intimated the activity of labeling their products to the department nor had taken out the registration nor followed the procedures prescribed under the Act and Rules and therefore, it appears to be an act of suppression of facts with an intention to evade the payment of Central Excise Duty and hence, the extended period of limitation under provision of Section 11A(1) of the Act is applicable.

6. The petitioner submitted their detailed reply on 28.01.2003 stating that they are not engaged in manufacture and the fact of labeling will not amount to manufacture and there is no repacking or relabeling and the allegation in the show cause notice is not sustainable. Further, it was pointed out that to fall within Note 3 of Chapter 19 of the Tariff Act, the second respondent should have established that labeling or relabeling of containers and repacking from bulk packs to retail packs should have been done and when the petitioner has not done so, the question of labeling them to pay the excise duty does not arise. Further, it was submitted that Section 11A of the Act cannot be invoked as there is no suppression of fact and non-intimation of their activities to the respondent department cannot amount to suppression and therefore, the proceedings are barred by limitation. Further, without prejudice to those contentions, it was submitted that the levy of Central Excise Duty at the rate of 16% is wholly unwarranted.

7. The respondent, after receiving the reply, referred to Note 3 of Chapter 19 of the Central Excise Tariff Act, 1985, and held that the process of affixing label to make the product marketable to the consumers amounts to manufacture, even if it is done to fulfill the requirements of some other statutes. With regard to invocation of extended period of limitation, the respondent held that the petitioner having not taken out the registration from the department under the Act, it amounts to suppression of facts with intention to evade the payment of Central Excise Duty. The said order-in-original dated 30.01.2003 is impugned in this writ petition.

8. Heard Mr.Sivam Sivanandraj, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Standing counsel for the respondents.

9. Two major issues arise for consideration in this writ petition; (i) whether the process of labeling of the imported retail biscuit packets done by the petitioner would amount to manufacture; and (ii) whether the respondent is

justified in invoking the extended period of limitation.

10. We need not labour much to decide the first issue in the light of the decision of the Hon'ble Apex Court in CCE, Mumbai Vs. Johnson and Johnson Limited reported in MANU/SC/2757/2005. In the said case, the product, which was involved, was imported medicines and the department took a stand as identical to that of the case on hand that labeling or relabeling would amount to manufacture. In this regard, revenue placed reliance on Note 5 of Chapter 30 of the Central Excise Tariff Act which is in paramateria to Note 3 of Chapter 19 of the Central Excise Tariff Act. The Hon'ble Supreme Court held that affixing stickers containing information like names and address of the importers, maximum retail price, net weight etc. cannot be termed as manufacture as contained in Chapter Note 3 in Chapters 18 and 19 of the Central Excise Tariff Act.

11. Recently, in the case of Servo-Med Industries Private Limited v. Commissioner of Central Excise, Mumbai [(2015) 14 SCC 47], the Hon'ble Supreme Court summarized the principles and held as follows:

> "27. The case law discussed above falls into four neat categories.
>
> (1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.
>
> (2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.
>
> (3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the Brakes India case and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.
>
> (4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category

that manufacture of goods can be said to take place."

12. The CESTAT, in the case of German Remedies Limited v. Commissioner of Central Excise [2003 (162)ELT429 (Tribunal-Delhi)], considered an identical issue with regard to medicines and after taking note of earlier decisions, held that affixing the sticker indicating the name of the importer and MRP as per the requirement under the Standard of Weights and Measures Act does not amount to labeling/re-labeling and does not amount manufacture in terms of Note 4 of Chapter 33 of the Tariff. Further, it was held that pasting of sticker on the imported product to indicate the name of the importer and MRP which is the requirement under the Standards of Weights and Measures Act would not attract the Chapter Note. This decision was affirmed by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai Vs. M/s.German Remedies Limited (I.A.No.3 in Civil Appeal No.145 of 2004, dated 19.10.2006). Thus, the first issue which falls for consideration has to be answered in favour of the petitioner and against the revenue.

13. In the light of the above finding, the necessity to consider the second issue has become academic, yet, this Court proceeds to consider the same as elaborate arguments were advanced. Section 11A of the Act deals with recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. Sub-section 1 of Section 11A states that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any willful 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, the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid, requiring him to show cause why he should not pay the amount specified in the notice. Under sub-section 4 of Section 11A, power has been given to recover the duty where any one of the circumstances set out therein are attracted and the period of limitation is five years. This is commonly known as extended period of limitation. For better appreciation, relevant provision is quoted below:

> "Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-
>
> (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any

reason, other than the reason of fraud or 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,--

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so 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;

(b) ....

(2) ....

(3) ....

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of ---

(a) fraud; or
(b) collusion; or
(c) any wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice."

14. In Commissioner of Central Excise, Chandigarh Vs. Punjab Laminates (P) Ltd. [(2006) 7SCC 431], the Hon'ble Supreme Court pointed out that if the proviso provides for an exception, it is not the Rule and a case, therefore, has to be made out for attracting the proviso to Section 11-A(1). The said decision was followed and quoted with approval in Larsen & Toubro Ltd. Vs. Commissioner of Central Excise, Pune II [(2007) 9 SCC 617], wherein it was pointed out that allegation in regard to the suppression of facts must be clear and explicit so as to enable the noticee to reply thereto effectively. For better appreciation, paragraph No.14 thereof is extracted below:

> "14. Acts of fraud or suppression, it is well settled, must be specifically pleaded. The allegations in regard to suppression of facts must be clear and explicit so as to enable the noticee to reply thereto effectively. It was not the case of the Revenue that the activities of the appellant were not known to it."

15. In the case of Commissioner of Central Excise Vs. Supreme Industries Limited [(2014) 303 ELT 513], the Division Bench of this Court considered as to when the provisions of Section 11-AC of the Act would stand attractive and held as follows:

> "9. The Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning and Weaving Mills (supra) pointed out that the decision in the case of Union of India vs. Dharmendra Textile Processors reported in (2008) 13 SCC 369, cannot be said to hold that Section 11AC of the Act would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in Section 11AC for its application. It was further pointed out that the decision in the case of Dharmendra Textile Processors(supra) must be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the Section, once the Section is applicable in a case, the authority concerned would have no discretion in quantifying the amount and penalty must be imposed equal to duty determined under sub-section (2) of Section 11A of the Act. Thus, the issue would be as to whether Section 11AC would stand attracted to the facts of the present case.
>
> 10. We have perused the show cause notice, the order in original, the order passed by the Appellate Authority and the impugned order passed by the Tribunal. In the show cause notice dated 10.10.2001, except for stating that the respondent/assessee has contravened the provisions of the Rules, there is no specific allegation so as to hold the respondent/assessee guilty of having committed fraud, collusion or suppression of

facts or made any willful misstatement with an intent to evade payment of duty. In terms of the provision of section 11AC of the Act, the authority is bound to record a prima facie finding that there was an intent to evade payment of duty by suppressing the materials facts or by making willful mis-statement or by committing fraud or collusion. Thus, in the absence of any such specific allegation in the show cause notice, the authorities cannot mechanically impose penalty under Section 11AC of the Act. After the assessee submitted their explanation, the Adjudicating Authority while passing the order dated 24.09.2002, only observed that there is possible manipulation of scrap accounts to show higher production than what would have been normally produced and there is no finding that the first respondent/assessee was guilty of willful mis-statement or suppression of facts or act of fraud with an intention to evade payment of duty. The first Appellate Authority also did not go into the said aspect and rejected the appeal by merely observing that the order of the Original Authority is just, fair, and calls for no interference. The Tribunal while confirming the demand, set aside the penalty and interest. In paragraph 4 of the impugned order passed by the Tribunal, the Tribunal, by relying upon its earlier decision, observed that the duty amount is paid by assessee before issuance of show cause notice, therefore no penalty can be imposed under Section 11AC. The said finding cannot be sustained in the light of the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills (supra)."

16. Thus, the law having been well settled on the above terms, it has to be seen as to whether the impugned demand makes out a case for invoking extended period of limitation under Section 11-A of the Act. As noticed earlier, there is no specific allegation of fraud made out by the second respondent at the time of issuance of the show cause notice. The allegation is that non-intimation of activities to the department, which according to the respondent, amounts to suppression. However, to invoke the extended period of limitation, something more is required to be on record and the statute mandates the same which has been explained in the

aforementioned decisions. Thus, it is a clear case where the extended period of limitation could not have been invoked under the facts and circumstances of the case. Thus, the issue No.2 is also answered in favour of the petitioner and against the Revenue.

17. In fine, for the reasons stated above, the writ petition is allowed and the impugned order is quashed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

rkm

To

1.Additional Commissioner (R&T),
Office of the Commissioner of Central Excise,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 35.

2.Joint Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 35.

+1 cc to M/s.J.Sivam Sivanandraj Advocate sr 57611

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