

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.101 OF 2016

Commissioner of Central Excise
And Customs
Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nashik – 422 002.

.... Appellant

- Versus -

Mahindra & Mahindra Ltd.,
A Company incorporated under the
Companies Act, 1956, having its
Registered Office and works at
Plot No.89, MIDC, Satpur,
Nashik – 7.

.... Respondent

Mr. Swapnil Bangur with Ms Shalaka Gujar for
the Appellant.

Ms Anjali Hirawat with Mr. Jas Sanghavi i/by
PDS Legal for the Respondent.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : JANUARY 19, 2018

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. This appeal by the Revenue challenges an order

dated 25-3-2015, passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Mumbai.

2. It is time we indicate to the Revenue Officials and in the order of their hierarchy that at least the highest Court in the State is of the firm view that when the Revenue complains of pendency of cases, it is squarely to be blamed for the largest litigant before us is the Revenue itself. In matters after matters, where the Tribunal has taken a view on the point of limitation and applicability of Section 11A of the Central Excise Act, 1944 (“the Act” for short), rarely has the Tribunal's findings and conclusions been accepted with the required degree of grace and maturity by the Revenue Officials. Some of the Senior Revenue Officials may not feel anything about lack of the above, but we must express our strong displeasure when they doubt the correctness, authenticity of the findings and conclusions on such points or issues as also the *bona fides* of their own colleagues who occupy the position of an Adjudicating Authority or Officer. It is the Commissioner or the Commissioner (Appeals) or the Member (Technical) of the Tribunal who invariably, sitting as an

Adjudicator, finds it difficult to uphold the stand of the Revenue and when it is *ex facie* untenable in law. If it is not supported by facts and the provisions of law, he is bound to decide the matter in favour of the assessee and against the Revenue. When this happens, it is for the Revenue Officials to ponder and introspect whether they should challenge the order in the higher Court, waste the higher Court's precious time and which it desires to save for genuine litigation. When we find that conclusions on mixed question of fact and law like limitation are challenged, the Revenue Officials pursue the case with such vigour as is normally not reflected and exhibited when there is a question of interpretation of an enactment or a subordinate legislation. When the stakes are high and the Revenue must decide for itself in matters of moment as to whether its stand is correct and requires a look at or some sort of modification or approval from a higher Court, it neither initiates the litigation, or if initiated, does not pursue it with the required degree of competence and proficiency. We find that in such high stake matters, the assesseees are let off very lightly. There are incomplete

instructions, inadequate pleadings, insufficient arguments and absolutely no preparation. Such matters, which are very serious and have far reaching consequences, are left to Junior Advocates and we never find any Senior Advocate or a Senior Law functionary coming to Mumbai and arguing such cases for the Revenue. If the Revenue really feels that tax collection must increase or improve, it is time it revisits its Panel of Advocates and appoint competent and experienced members of the legal profession to represent it. That engaging them means paying them high fees is no reason for substituting them with incompetent Advocates. Then, all the more the Revenue ends up in losing cases. It is not as much about winning or losing but what is disturbing is the failure or any attempt to match the opponent's skill, expertise and efficiency. The cases are given up very easily and none feels anything about such performance. It is that aspect which must receive the foremost attention but we find that the Revenue Officials do not do this exercise or homework and every order of the nature that is challenged in the present proceedings, is then challenged. No Panel Advocate

for the Revenue seeks or desires to apply for leave to withdraw such proceedings when the Court in clear and loud terms says that it is not inclined to interfere with the orders under appeal. In this matter we repeatedly pointed out to the Revenue's Advocate that this is a frivolous and vexatious litigation and ought not to be pursued by the Revenue. He states he has no instructions to either withdraw or give it up. We warned him even during the course of the arguments that we will dismiss such appeals with heavy costs. We embark upon that exercise and this matter is the first in the line.

3. The respondents/Mahindra & Mahindra Limited carried on business of manufacturing of motor vehicles and parts thereof, falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985. During audit conducted in January, 2001, it was noticed that the assessee was clearing motor vehicles from the factory to the Regional Sales Office on payment of duty on the assessable value determined on the basis of sale value of identical vehicles from the same Regional Sales Office. In some cases, it was noticed that such vehicles were

transferred to another Regional Sales Office due to cancellation of orders at the earlier Regional Sales Office or due to requirement at the other Sales Office. The intra-depot transfers also take place in other exigencies. In such cases, it was noticed that the assessee was charging higher price from the customers, being higher than the value on which excise duty has been paid. This differential excise duty on the increased sale value after transfer to another Regional Sales Office and sales therefrom, according to the Revenue, results in evasion or short-payment of excise duty and which was required to be paid on the actual sales value.

4. According to the Revenue, based on this issue involved and the provisions of law which are applicable, it alleged that the assessee had failed to intimate the difference in the above values and make payment of the excise duty on the differential amount on its own. The Revenue's statement throughout has been that this short-payment and evasion was noticed during the audit conducted in January, 2001. This suppression was made by the assessee with a view to evade

payment of actual duty.

5. This resulted in issuance of Nine Show Cause Notices. For us, the details of these Show Cause Notices have to be set out hereinbelow and we set out the same:-

- “1) V(87) 15-119/Adj/Nsk-1/05 dated 19-7-2005;
- 2) V(87) 15-190/M&M/Adj/Nsk-1/05 dated 22-9-05;
- 3) V(87) 15-14/M&M/Adj/Nsk-1/06 dated 16-2-06;
- 4) V(87)-8/M&M/Adj/Nsk-1/07 dated 16-1-07;
- 5) V(87) 15-123/M&M/Adj/Nsk-1/07 dated 7-11-07;
- 6) V(87) 15-82/Nsk-1/M&M/Adj/08 dated 12-6-08;
- 7) V(87) 15-42/Nsk-1/M&M/Adj/09 dated 20-4-09;
- 8) V(87) 15-127/Nsk-1/M&M/Adj/09 dated 18-11-09;
- 9) V(87) 15-68/Nsk-1/M&M/Adj/10 dated 16-9-10.”

6. Pertinently, the Revenue adjudicated these Notices by a common Order-in-Original dated 9-3-2011.

7. Aggrieved and dissatisfied with the confirmation of the demand and the Order-in-Original, the assessee approached the Commissioner (Appeals). The Commissioner by a common

order confirmed the Order-in-Original but reduced the total amount of duty demanded on account of certain corrections pointed out by the assessee. Consequently, the penalty also was reduced.

8. The assessee being aggrieved and dissatisfied with the above orders approached the CESTAT. The CESTAT partly allowed the appeals. The demand of duty for the period February, 2001 to June, 2004 was dropped. The penalty levied on the duty demanded for the period July, 2004 to March, 2013 was also dropped.

9. It is common ground that the CESTAT held that, for the period July, 2000 to September, 2004 a Show Cause Notice issued on 19-7-2005 is clearly beyond the normal period of limitation. Once the Revenue detected the alleged suppression and in its audit concluded in January, 2001, then, it could not have waited till 19-7-2005 to issue a Show Cause Notice and seek to recover the sum of short-duty levied from July, 2000 to September, 2004. It could not have also collected and recovered

the duty from February, 2001 to June, 2004. Thus, the Show Cause Notices which are issued from 19-7-2005 to 16-9-2010, but seeking to recover amounts beyond the normal period of limitation, were held to be time barred on the reasoning that the suppression was detected in January, 2001 itself. The Revenue should have been vigilant and not negligent and issued the Show Cause Notices promptly. It allowed the normal period to lapse and thereafter issued the subject-notices.

10. It is such an order of the Revenue which according to Mr. Bangur, appearing for the appellant in support, raises as many as four substantial questions of law.

11. They are proposed at pages 8 and 9 of the paper-book. Mr. Bangur would submit that the Tribunal was not right in holding that the date of information received in the course of audit about suppression of sales value was the relevant date for determining the period of limitation. Mr. Bangur would submit that the observations of the Tribunal in that regard are contrary to law. The law is not as understood by it but otherwise.

12. Our attention has been invited to two Judgments, one delivered by the Hon'ble Supreme Court in the case of **Mathania Fabrics Vs. Commissioner of Central Excise, Jaipur**, reported in 2008 (221) E.L.T. 481 and the other by the High Court of Gujarat in **Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd.**, reported in 2010 (256) E.L.T. 369.

13. On the other hand, the counsel for the assessee would submit that the language of Section 11A, as existing and prevailing at the time of issuance of the Show Cause Notices, was clear. Its plain and unambiguous language results in enabling the Revenue to recover the duty of excise not levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty and within the normal period of one year which stands substituted by five years. She would submit that if the very act of

suppression, as detected in the audit, was relied on to issue the subsequent Show Cause Notices, then, the extended period was not permissible to be invoked. She would submit that this is a finding of fact. One cannot make capital of some detection during audit and allege suppression but rely on such suppression once detected to recover the demands which are *ex facie* time barred. Once the suppression was detected, the law envisages prompt measures to recover and Section 11A does not ordinarily and normally permit invocation of the extended period. If the extended period is invoked, the burden is on the Revenue to establish and prove the facts alleged and particularly in this case of suppression. The Revenue could not bring any material to allege and prove suppression after January, 2001. This is also a finding of fact rendered by the Tribunal which cannot be termed as perverse, according to her. There are, therefore, no materials enabling the Revenue to recover these sums and merely because the assessee is a manufacturer of motor vehicles and virtually a market leader, does not mean that the Revenue can pursue the illegal demand. She would, therefore, submit that the correct

principles of law have been invoked and applied in allowing the assessee's appeals. She would submit that the present appeal be dismissed with heavy costs.

14. Upon perusal of the appeal paper-book with the assistance of both Advocates, we agree with the assessee's counsel.

15. It is not as if the five appeals brought before the Tribunal dealing with five orders of the Commissioner (Appeals) were decided unmindful of the factual position. The Tribunal proceeded appeal wise. In the first matter being Appeal No.E/120/2012, the period was July, 2000 to March, 2010. The duty proposed in the Show Cause Notices is Rs.2,39,39,010/-, confirmed in the sum of Rs.1,33,69,135/- with commensurate penalty. In the second matter being Appeal No.E/262/2012, the period is April, 2010 to September, 2010 where the duty demand is of Rs.2,24,467/-, confirmed in the sum of Rs.20,588/- with equal penalty. In the third matter being Appeal No.E/89435/2013, the period covered is October, 2010 to

August, 2011 and the amount as demanded is Rs.4,98,764/-, confirmed to the extent of Rs.1,45,202/- with equal penalty. In the fourth matter being Appeal No.E/87013/2013, the period is September, 2011 to August, 2012 and the duty demand is Rs.2,53,258/-, confirmed in the sum of Rs.1,41,997/- with equal penalty. The last and the fifth matter being Appeal No.E/87793/2014 covers a period from September, 2012 to August, 2013. The demand is of Rs.1,00,227/-, confirmed to the extent of Rs.70,777/- with equal penalty.

16. The Tribunal noted the arguments of both sides and particularly of the Revenue in para 3. From para 5 onwards, its reasoning commences and the Tribunal relying on the language of Rule 7 of the Central Excise Valuation Rules, 2000 and analysing it, came to the conclusion that the language of it says that the price prevailing at the place of sale of goods shall be the transaction value in respect of the goods cleared from the factory to depot. Therefore, the Tribunal held that the submission, that in some of the cases the motor vehicles were sold at higher price than the price prevailing at the depot of sale

and therefore the demand is not sustainable, cannot be accepted as those clearances are not subject matter of the present case. To that extent, the Tribunal did not agree with the assessee.

17. However, when it came to the question of invocation of the extended period, the Tribunal proceeded to analyse, in the backdrop of the language of Section 11A, the facts and held that the first Show Cause Notice dated 19-7-2005 alleging as above, clearly refers to the detection of the suppression by the audit team/officers. That is in January, 2001. The Tribunal held that if the suppression is detected as early as in January, 2001, the demand can be raised upto five years from such detection. Thus, the demand for the period prior to audit objection raised in January, 2001 can be raised upto five years as there was clear suppression during that period. The demand of duty for the period upto January, 2001 is correct and legal. In the Show Cause Notice dated 19-7-2005, the demand was raised for the period 1-7-2000 to 30-9-2004. Therefore, the Tribunal held that if the suppression came to light in January, 2001, subsequent to that it cannot be said that there was any further suppression or

there was continued suppression. There was no fresh act by which a suppression can be inferred nor is such material brought on record. If that is how the matter is brought by the Revenue Officials, then subsequent to that period it could not be alleged by the Revenue that there was a suppression on the part of the assessee. The demand for the period February, 2001 to June, 2004 becomes time barred. That is how the Tribunal dropped it. Then, the Tribunal considered the matter on equal penalty and relying on the language of Section 11AC it dropped the penalty as well.

18. Paras 5 and 5.1 of the order under appeal, to the extent relevant, read as under:-

“5. On consideration of submission on limitation and invocation of proviso to section 11A, we find that as regards first show cause notice dated 19.7.2005, the fact regarding moment of their vehicle, transfer to 2nd depot and sale of vehicle from 2nd depot was not disclosed to the Department. This fact was detected by the audit officers, therefore it is clear that there is suppression of fact on the part of the appellant. Once the fact during a period was suppressed, demand of that period can be raised up till 5 years. In the present case, the demand for the period prior to audit observation raised on January 2001, can be raised up to 5 years as there was clear suppression during that period. Hence, the demand of duty for the period up

to January 2001 is correct and legal. In the show cause notice dated 19.7.2005, the demand was raised for the period from 1.7.2000 to 30.9.2004. In this regard, we observe that when the fact of the issue came to the notice of the Department in January 2001, subsequent to that it cannot be said that there was suppression on the part of the appellant. It is admitted in the impugned order that the fact of movement of vehicles from factory to 1st depot and from there to 2nd depot and sale therefrom was revealed from audit of the appellant's record in January 2001. Therefore it cannot be said that subsequent to that period there was suppression of fact on the part of appellant. Therefore in our considered view the demand for the period February 2001 to June 2004 becomes time barred, hence the same is dropped. As regards the submissions of the learned Counsel that penalty under Section 11AC cannot be imposed in respect of normal period of 1st SCN and in all subsequent show cause notices issued covering the period July, 2004 to March, 2013 as the same were issued within normal period of one year. The fact of the modus operandi of the appellant came to the notice of the Department in January 2001 from the audit of the appellants' record, thereafter there was no suppression of fact on the part of the appellant. In this factual matrix, we are of the considered view that proviso to section 11A is not invokable in respect of the demand raised during the period July 2004 to March 2013. Consequently, penalty imposed under section 11AC for the said period is not correct and legal. Therefore the penalty imposed under section 11AC commensurate to the demand of duty for the period July, 2004 to March, 2013 is hereby dropped.

5.1 In view of our above discussions, we are of the considered view that though demand of duty for period involved in these appeals (except for the period February, 2001 to June, 2004) is sustainable on merit, however demand of duty pertaining to the period February 2001 to June 2004 is hereby dropped being time bar. Penalty imposed under Section 11AC commensurate to duty demand for the period July, 2004 to March, 2013 is

hereby dropped. Needless to say that the Ld. Adjudicating Authority shall re-quantify the duty, interest and penalty in terms of our above order and recover the same from the Appellant, in accordance with law. The Appeals are disposed of in the above terms.”

19. In the teeth of these observations, we do not see how Mr. Bangur can derive any support from the Judgment of the Hon'ble Supreme Court in **Mathania Fabrics** (supra).

20. The Tribunal in that case came to the conclusion that the appellants were engaged in the processing of cotton fabrics falling under Chapter 52. They claimed to be undertaking the processes of bleaching, etc., before the fabrics were packed and cleared. Their stand was that they were not using power in the processing of the fabrics and, therefore, they were availing of the benefit of Note 3 to Chapter 52. They had not used any power while undertaking the activities before the fabrics were packed and cleared. They also relied upon certain Notifications. The stand of the Revenue was that the amendment to the Notification was not retrospective. The CESTAT upheld this stand of the Revenue. Factually, it was held that power was used.

21. The assessee then could not have argued otherwise and claimed benefit of the exemption granted to cotton fabrics processed without the aid of power. Then, they altered their argument or stand and contended that use of power was only in certain ancillary and incidental areas and therefore the benefit could not have been denied. Once the Department denied the benefit on the ground of use of power, which was upheld by the Tribunal, then, it considered the other arguments on the applicability of Section 11A. That argument was that the position in law was not clear and the authorities had to issue a clarification. In the circumstances, Section 11A could not be invoked. The Hon'ble Supreme Court held that, the Commissioner wrote a letter does not mean there was doubt about the nature of the process involved. It is clear that the letter was written under some circumstances and best known to the Revenue. Therefore, the penalty amounts equivalent to the extra demand were scaled down by the Tribunal. The demand was thus reduced to Rs.25,00,000/-. We do not see how this Judgment has any application because what the issue involved is

and rightly contended by the assessee's counsel that the period from the date of issuance of the Show Cause Notice has to be reckoned backwards. That is precisely what is held in para 9 of the Judgment of the Hon'ble Supreme Court in Mathania Fabrics. Far from supporting the Revenue, these observations would run counter to its arguments canvassed before us when the attempt was to bring in the subsequent period and without there being any suppression.

22. In the case of **Neminath Fabrics** (supra), the paragraph 20 is being relied upon is completely out of context. There the factual position was that a Show Cause Notice dated 9-5-2009 came to be issued and it was adjudicated on 22-2-2006. The demand of duty was confirmed with interest under Section 11AB of the Central Excise Act, 1944 and penalty under Section 11AC was also imposed. The Commissioner (Appeals) dismissed the appeal and confirmed the Order-in-Original. However, the assessee carried the matter in further appeal to the Tribunal and the Tribunal allowed it only on the ground of limitation. That is how the Revenue, aggrieved by that

exercise of the Tribunal, carried the matter to the High Court of Gujarat. The proviso to Section 11A was pressed into service and the suppression was established. Thus, once the suppression is established, then, the consequence as set out in law would follow. The period stands extended to five years from the relevant date. Merely because the Department acquires knowledge of the irregularity, the suppression would not be obliterated. Pertinently, there is no observation in this Judgment on a point of law that once such suppression was detected as before us, the Revenue can raise and sustain the demand for the period subsequent to issuance of the Show Cause Notice in the absence of any fresh act of the above nature. The observations in para 20 of the Judgment of the High Court of Gujarat, therefore, emphasises that merely because the Department acquires knowledge of the irregularities, the suppression cannot be obliterated. The Tribunal's reasoning was therefore not upheld. This is not a controversy before us. The controversy before us is not about the Tribunal understanding the matter erroneously or even construing the provision of law otherwise than consistently

interpreted by the Hon'ble Supreme Court. The argument before us is that all the Show Cause Notices and the demands raised therein were not sustainable as they were within the extended period. The relevant date in the case before us should be reckoned, according to the Revenue by reference to the provision as prevailing on that date and its express definition. That has not been done.

23. We do not think even this argument has any merit for the Tribunal has understood the matter in the correct perspective. It has found the definition of the term “relevant date” to mean the date on which the duty is to be paid under the Act or the Rules made thereunder. It is that part of the definition of the term “relevant date” which is applicable. In the present case, the extended period could not have been invoked and because of the factual position noted above. Hence, reliance on this Judgment of the High Court of Gujarat is misplaced.

24. To our mind, the issue is squarely covered by a series of Judgments to be found in the compilation handed over by the

assessee's Advocate. Consistently the Hon'ble Supreme Court has been holding that the extended period can be invoked when all preconditions for such invocation are satisfied. In the case of **ECE Industries Limited Vs. Commissioner of Central Excise, New Delhi**, reported in 2004 (164) E.L.T. 236, the Hon'ble Supreme Court clearly held that the extended period of limitation cannot be invoked where the Department has earlier issued Show Cause Notice in respect of the same subject-matter. It could not be said that there was wilful suppression or mis-statement. Then, the extended period cannot be invoked. Similar is the position in the matters of **Nizam Sugar Factory Vs. Collector of Central Excise, A.P.**, reported in 2006 (197) E.L.T. 465 and **Caprihans India Ltd. Vs. Commissioner of Central Excise, Surat**, reported in 2015 (324) E.L.T. 8.

25. In **Caprihans India Ltd.** (supra), the Hon'ble Supreme Court once again reiterated the principle that a Show Cause Notice issued way back on 18-2-1994 called upon the assessee to reclassify the goods. All relevant facts were within the knowledge of the Department. Therefore, the subsequent

Show Cause Notice issued five years thereafter seeking classification under same tariff heading which was sought earlier also, and invoking the extended period, cannot be sustained.

26. We do not think, therefore, that the legal position was in any way unclear or ambiguous. Throughout, the Hon'ble Supreme Court has been emphasising that the Revenue cannot resort to what it has repeatedly done in matters after matters. It cannot cover up its own fault or error by such erroneous application of law. Once the legal position was clear and throughout, we do not see any justification for the Revenue bringing this appeal. We have reproduced the relevant portion of the order of the Tribunal in extenso only to demonstrate that its findings are in no way perverse or vitiated by any error of law apparent on the face of the record. The legal principles have also been summarised by us only to emphasise that filing of such appeals and questioning the findings on the issue of limitation does not serve any purpose but wasting the time of a higher judicial forum. It is precisely that which compels us to term this litigation as frivolous and a clear waste of time. Since this is a

clear waste of our precious judicial time, we can also safely term the exercise as an abuse of the process of the Court by the Revenue. No abuse can go unpunished and, therefore, while dismissing this appeal, we impose costs of Rs.1,00,000/- (Rupees One Lakh only) on the Revenue. The costs to be paid within four weeks from today, after which the assessee can recover the same by treating the Department to be in default of payment of arrears of land revenue.

(SMT. BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI, J.)