**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**CENTRAL EXCISE APPEAL NO. 88 OF 2018**

Rimi Profiles
A-32, Road No.12,
Wagle Industrial Estate,
Thane-400 604 ...Appellant

Versus

The Commissioner of CGST
& Central Excise
Thane Rural Commissionerate
(erstwhile Mumbai-III Commissionerate)
4th Floor, Kendriya Utpad Shulk Bhavan
Bandra Kurla Complex
Bandra (E), Mumbai-400 051 ...Respondent

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Ms. Mansi Patil a/w. Mr. Kiran Chavan for the Appellant.

Mr. Karan Adik a/w. Ms. Fenandes Genevieo for the Respondent.

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**CORAM: G. S. KULKARNI &**
**RAJESH S. PATIL, JJ**

**RESERVED ON: 8th JUNE, 2023**
**PRONOUNCED ON: 21st JULY, 2023**

**JUDGMENT : (PER RAJESH S. PATIL, J.)**

1. This Central Excise Appeal is filed under Section 35 G read with

Section 2 (f) and Section 11 (a) of the Central Excise Act, 1944, challenges the Final Order No.A/92039/2017 dated 15th December, 2007 passed in Appeal No. E/851/09- Mum, by Customs Excise and Service Tax Appellate Tribunal, Mumbai under Section 35 C(1) of the Central Excise Act, 1944.

2. The appellant has raised the following question of law:-

> "(a) Whether demand for the period February 1991 to July 1995 (out of total period of February 1991 to January 1996) covered under SCN dated 12th February, 1996, is barred by limitation."

3. The appellant is stated to be a Company, engaged in gas cutting, i.e., profile cutting of the M.S. Plates. According to the Appellant its tempo, carrying such materials, was intercepted on 14th August, 1995. Statements of the appellant's representative were recorded by taking recourse to the summons proceedings. Thereafter on 12th February, 1996 a Show Cause Notice was issued by the Commissioner proposing to recover duty of Rs.31,78,879/- along with interest and penalty on the entire clearances of the Appellant which also included traded goods.

4. By Order-in-Original dated 28th September, 2001, the Commissioner confirmed the demand covered under the said show cause

notice and also imposed penalty, based on his findings that profile cut plates were classifiable under Chapter 73 and amounted to manufacture and demand was not barred by limitation.

5. Being aggrieved by the order dated 28th September 2001, the Appellant filed Appeal before the Appellate Tribunal being Appeal No. E/124/02. By final order dated 27th February, 2007, The Appellate Tribunal was pleased to allow the Appeal by way of remand for considering SSI exemption, cum-duty, non-includibility of value of trading activity and the plea of limitation and modvat. However, the penalty as imposed was set aside.

6. On remand, the Commissioner by Order-in-Original dated 30th March, 2009, confirmed the demand of Rs.26,16,747/- and imposed penalty of Rs.4 Lakhs. Being dissatisfied the Appellant preferred an Appeal before the CESTAT (for short "Tribunal") being Appeal No.E/851/09.

7. The Appellate Tribunal by its Final Order No.A-9209/2017, dated 15th December, 2017 held that duty on profile cut plates was payable as the process on profile cutting would amount to manufacture. The penalty was reduced from Rs.4 Lakhs to Rs.1 Lakh. According to Appellant, the Tribunal also did not address the plea of the Appellant that the demand for the period February, 1991 to 11th August, 1995, was beyond the normal period of six

months, and hence barred by limitation.

8. It is on such backdrop the appellant challenges the final order dated 15th December 2017 passed by the Tribunal. The Appellant has contended that it was under a bonafide belief that the activity of profile cutting of plates did not amount to manufacture and accordingly the appellant was clearing goods without payment of duty, both profile cut plates as well as traded angles, challans, plates etc. So also the Show Cause Notice was issued beyond the period of limitation.

9. Ms. Mansi Patil, the learned counsel for the Appellant submitted that the entire trade was taking consistent stand that mere gas cutting of M.S. Plates is not a manufacturing activity, for which the traders had made correspondence with various commissionerates, and some commissionerates had even clarified that it does not amount to manufacture. Even in the public media viz regional daily newspaper “Vyapaar” certain legal opinions were published which stated that profile cutting activity was not manufacturing activity. Therefore, the Appellant believed that the process of mere gas cutting of plates, carried out by them, does not amount to manufacture and hence, did not pay any excise duty. So also, that the demand was for the period February, 1991 to July, 1995, and the show cause notice issued in February,

1996 was clearly barred by limitation under Section 11 A of the Central Excise Act, 1944.

10. To buttress her submission, Ms.Patil also has placed reliance upon the following decisions to submit that the ratio laid in these judgments is to the effect that the show cause notice when issued after a period of six months, the demand is beyond the normal period and imposition of penalty was not sustainable.

(i) Sanjay Industrial Corporation-2003 (155) ELT 369 (T).

(ii) Sanjay Industrial Corporation- 2015 (318) ELT 15 (SC).

(iii) Pioneer Profiles Industries- 2006 (200) ELT 588 (T)

11. Ms. Patil, also referred to the Full Bench judgment of this Court in the case of **Commissioner of CGST and Navi Mumbai Vs. Hindustan Petroleum Corporation Limited**[1] to contend that the Full Bench has held that the period of limitation for recovery of excise duty would not have any bearing or impact on rate of duty of excise or value of the goods for the purpose of assessment and no Appeal would lie to the Supreme Court under Section 35 L

1 2022(380) E.L.T.277(Bom)

of the Central Excise Act, 1944. Therefore, she prayed that the Appeal be allowed with cost.

12. On the other hand, Ms. Fernandes Genevieo, the learned advocate for the Respondent submitted that the judgment of the Supreme Court in Sanjay Industrial Corporation (Supra) is on completely different facts and the ratio laid down therein does not apply to the present case. So also the order in Pioneer Profile (Supra) passed by the Commissioner, there was confusion at the higher level of the department.

13. Ms. Fenandes, further argued that the Appellant had suppressed facts. The goods were misdeclared as against the actual goods. It is contended that the Appellant had never approached the department for any type of verification in the matter, however, there was deliberate suppression by the Appellant. She has further contended that in the present case, there was in fact no confusion nor any doubt in the Appellant's own mind that its activity amounts to manufacture. She further contended that the Appellant has forged the invoice to show the manufacture goods as trading activity only for the purpose to avail SSI (small scale industries) exemption benefits. She, therefore, prayed that the present Appeal should be dismissed.

14. We have heard learned counsel for the parties and have gone through the record.

15. The Appeal is admitted only on one question of law whether demand is barred by limitation. There is no disputes between the parties that the Show Cause Notice was issued on 12th February 1996, demanding duty along with interest and penalty for the period from February, 1991 to July, 1995.

16. Section 11A, of the Central Excise Act, deals with recovery of duties. Section 11(A) reads as under :

> SECTION 11A. **Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.**- (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, <u>within six months from the relevant date, serve notice on the person chargeable with the duty</u> which has not been levied or paid or which has been 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:
>
> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously

> refunded by reason of fraud. 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, by such person or his agent, the provisions of this sub-section shall have effect, [as if, [***]] for the words "six months", the words "five years were substituted
>
> [emphasis supplied]

17. The judgment of the Supreme Court referred by the learned counsel for the Appellant in Sanjay Industrial Corporation (supra) the facts pertained to raising a duty of business of cutting larger steal plates. So also, the trader had challenged the imposition of penalty, and amongst other grounds the issue of limitation was taken up. It was held that demand beyond normal period of 6 months was not sustainable. Paragraph No.7 of the said judgment reads as under :

> 7. In view thereof, if the appellant also had <u>nurtured this belief that the process carried out by him does not amount to manufacture and did not pay the Excise duty, we can safely infer that this conduct of the appellant was a bonafide conduct and cannot be treated as contumacious or willful suppression.</u> Thus, we are of the opinion that on the facts of this case,

> proviso to Section 11A(1) of the Act would not be attracted. Once that is held, it is obvious that the period of limitation for serving show cause notice shall be six months. In the present case, the show cause notice covered the period from October, 1991 to September, 1996 and the show cause notice was given on 1-11-1996. In the said show cause notice when only a period of six months could be covered from the date of show cause notice, it will go back to period from May, 1996 onwards.

(emphasis supplied)

In the present proceedings, the Show Cause Notice was issued on 12th February, 1996, for a period from February, 1991 to July, 1995, which is admittedly issued beyond a period of 6 months. At the relevant time the unamended Section 11A(1) mentioned a period of 6 months within which a notice could be served. Therefore, the Show Cause Notice can be sustained only if the department is able to show that there is suppression on the part of the Appellant. However, no material is available on record that the appellant indulged in suppression so as to attract any of the requirements as contended in the proviso to Section 11A of the Central Excise Act to apply the extended period of limitation.

18. Adverting to the principles of law as laid down by the Supreme Court in Sanjay Industrial Corporation (Supra), we are of the view that the

same are applicable to the case in hand, and considering the facts of present case, as discussed above, the question of law needs to be answered in favour of the Appellant, and against the respondent. We accordingly quash and set aside the impugned orders and allow the Appeal. No costs.

**(RAJESH S. PATIL, J.)** **(G. S. KULKARNI, J.)**