CASE NO.:
Appeal (civil) 3969 of 1995

PETITIONER:
P & B PHARMACEUTICALS (P) LTD.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE

DATE OF JUDGMENT: 19/02/2003

BENCH:
SYED SHAH MOHAMMED QUADRI & ASHOK BHAN

JUDGMENT:
JUDGMENT

2003(2) SCR 252

The following Order of the Court was delivered :

This appeal, by the assessee, is from the final order No. 290/94-A of the Customs, Excise & Gold (Control) Appellate Tribunal in Appeal No.E/ 03/92-A, dated October 17, 1994.

The short point that arises for consideration is: whether the Tribunal erred, in upholding the order of the Excise authorities in invoking the proviso to Section 11-A of the Central Excise Act, 1944; if so, whether the order confirming penalty is sustainable.

It will be necessary to refer to the facts giving rise to this appeal.

The appellant-assessee is a registered small scale unit. It manufactures patent and proprietary medicines. It uses a logo "P/B". The assessee claims that the logo was assigned to it by M/s. P&B Laboratories Ltd. by a deed of assignment dated July 1, 1984. The dispute relates to the period from May 1, 1985 to December 31, 1989. On March 25, 1985 a show cause notice was issued to the assessee proposing to demand duty on the basis of the price at which its distributor, M/s. Pharmachem Distributors, sold the goods in the course of whole-sale trade on the ground that the said distributor was a related person. The assessee submitted its reply. The Assistant Collector of Customs & Central Excise, Nadiad dropped the proceedings by order dated May 10, 1985.

It is appropriate to note here that the Central Government issued Notification No. 175/36-CE, dated March 1, 1986 granting exemption to small scale units subject to the terms and conditions specified therein. That notification was subsequently amended and para 7 was inserted therein.

On January 27, 1988 and, thereafter, on July 26, 1988 show cause notices were issued to the assessee on the ground that the assessee and its distributor, M/s Pharmachem Distributors, have mutual interest and, therefore, the price at which the distributor sold the godds in the market ought to be adopted for the purposes of levy of excise duty on the assessee. The proceedings pursuant to these show cause notices were also dropped by the Assistant Collector, after considering the reply of the assessee, by order dated September 26, 1988.

A fourth show cause notice was issued to the assessee on June, 12, 1990. The present appeal arises out of those proceedings. The said notice is very lengthy but it is based mainly on two grounds:

The first ground is that the distributor of the appellant is a related person, therefore, there has been short levy of duty and inasmuch as there

has been suppression of this fact, proviso to Section 11-A of the Central Excise Act (for short, 'the Act') was attracted and the assessee was liable to pay duty for the extended period from May 1, 1985 to December 12, 1989.

The second ground is that after insertion of para 7 in Notification No. 175/86-CE, the assessee is not entitled to exemption as the assessee and M/s. P&B Laboratories Ltd. have been using the logo and it did not disclose this fact; duty was demanded for the period commencing from October 10, 1987 till the date of notice (12.6.1990) invoking the proviso to Section 11-A of the Act.

On both the grounds, the Collector confirmed the demand pursuant to the show cause notice dated June 12, 1990, and imposed a penalty of Rs. 20,00,000 on the assessee by his order dated October 21,1991.

Dissatisfied with the said order of the Collector, the assessee filed an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal (for short 'the CEGAT'). The CEGAT upheld the order of the Collector but for purposes of quantification of duty after allowing permissible deduction, the matter was remitted to the Collector. The penalty was, however, reduced to Rs. 15,00,000. The CEGAT thus allowed the appeal in part on October 17, 1994. That is the order which is under challenge before us.

Mr. Lakshmikumaran, the learned counsel appearing for the appellant, contends that so far as the demand of duty on the basis of the distributor being a related person is concerned, all facts in this regard were placed before the concerned authorities and, therefore, there has been no suppression of fact; in any event, submits the learned counsel, when the show cause notice was issued in 1985 and, thereafter, when two more show cause notices were issued in 1988, all these facts were before the concerned authorities, therefore, it was not open to the Central Excise authorities to invoke proviso to Section 11-A of the Act for making a demand of duty for the extended period.

Mr. Jaideep Gupta, the learned senior counsel for the Revenue has, on the other hand, contended that insofar as the question of related person is concerned, as the assessee had failed to give such a declaration in a separate form along with the classification list, there is, in that, suppression of fact and the authorities were justified in invoking the proviso to section 11-A of the Act for demand of duty for the extended period.

We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11-A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard to M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11-A of the Act for making the demand for the extended period.

The second question relates to availing of exemption after the insertion of para 7 in Notification No. 175/86-CE, dated March 1, 1986. Para 7 reads as follows:

"7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification.

We may also refer to Explanation VIII to the notification on which reliance is placed by Mr. Jaideep Gupta. Explanation VIII runs thus:

"Explanation VIII.-"Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or man with or without any indication of the identity of that person."

From a perusal of para 7 of Notification No. 175/86-CE, it is clear that the exemption granted by the notification is not applicable to the specified goods where a manufacturer affixes the specified good with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under the said notification. There is no dispute that the assignor M/s. P & B Laboratories Ltd. is not entitled to exemption under the notification. It is evident that the test mentioned in para 7 to deny the benefit of exemption is, use of a logo by a manufacturer of which he is not the owner. It is only when a manufacturer of the specified goods affixes them with a logo-brand name or trade name-of another person who is not eligible for the exemption that he becomes ineligible to avail the benefit under the notification. Use of the logo of the manufacturer by other person, whether a assignor or a third party, has no relevance for purposes of para 7. That is not the import of Explanation VIII.

Insofar as the order of the Collector, Central Excise, is concerned, it appears that documents were filed before the Collector to prove assignment of the "logo" in favour of the appellant but on the ground that they were not legible, the Collector declined to take note of them. In any event, he did not accept the assignment of logo-and proceeded on the footing that the assignment of logo in favour of the appellant was not proved. Therefore, on the basis that logo was of M/s. P&B Laboratories Ltd., he came to the conclusion that the assessee was not entitled to the exemption. The appellant filed in the appeal before the CEGAT, by way of additional evidence, the order passed by the trade mark authorities. The additional evidence was allowed by the CEGAT; it accepted the assignment of logo in favour of the appellant but denied the exemption on the ground that it was being used by the assignor as well.

However, Mr. Jaideep Gupta submits that the Tribunal did not accept that there has been assignment of logo in favour of the assessee. We are unable to accept the contention of the learned counsel. The tenor of the order, "the assessee had produced certain documents such as registration form, trade mark authorities assigning the trade mark to them but the fact remains that there was material evidence by way of seizure of goods manufactured by M/s. P&B Laboratories bearing the same Logo much after the alleged transfer of trade mark to the appellants'* discloses that the Tribunal accepted that there has been an assignment but proceeded to deal with the case of inapplicability of the exemption under the notification on the ground that the logo was being used by M/s P&B Laboratories also. We have already indicated above that use of logo of the manufacturer by third parties is alien for purposes of denial of exemption on the strength of para 7 of the notification. In this view of the matter, we are unable to uphold the order of the Tribunal denying the exemption to the assessee.

In any event, the ground that the assessee has suppressed the fact that M/s. P&B Laboratories was also using the logo for availing the benefit under the notification cannot be a valid reason to invoke the proviso to Section 11-A of the Act. There is no obligation on the owner of a logo to make a roving enquiry to ascertain whether any other person is also using his logo and disclose it to the authorities to avert a possible allegation of suppression of fact for purposes of invoking the proviso.

For all these reasons, we are of the view that the proviso to Section 11-A is not available to the Revenue. Consequently, we hold that the CEGAT erred in confirming the order of the Collector.

The last point that remains to be mentioned is about the penalty imposed on the assessee. It is not in dispute that if the proviso to Section 11-A of the Act cannot be called in aid, imposition of penalty can not be justified under Rule 173Q of the Central Excise Rules, 1944. See: Collector of Central Excise v. H.M.M. Ltd., (1995) 76 ELT 497 and Nagpur Alloy Castings Ltd. v. Collector of Central Excise (2002) 142 ELT 515. The order imposing penalty is thus unsustainable.

The appeal is, accordingly, allowed and the order of the CEGAT under challenge is set aside. In the circumstances of the case, the parties are directed to bear their own costs.