

CASE NO.:
Appeal (civil) 1506-1508 of 2000

PETITIONER:
Dharampal Satyapal

RESPONDENT:
Commissioner of Central Excise, Delhi-I, New Delhi

DATE OF JUDGMENT: 21/04/2005

BENCH:
S.N. VARIAVA, Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

Whether, in the facts and circumstances of this case, the Tribunal was justified in upholding the order of the commissioner dated 28.4.1998 with respect to (a) the excisability of the kimam and classification thereof under sub-heading 2404.49 prior to 23.7.1996 and under sub-heading 2404.40 w.e.f. 23.7.1996; (b) rationale for invoking the extended period of limitation under the proviso to section 11A(1); and (c) eligibility for the benefit of proforma/modvat credit in respect of the chewing tobacco kimam, is the question which arises for determination in these civil appeals filed by the appellant - assessee under section 35-L(b) of the Central Excise Act, 1944 (hereinafter referred to for the sake of brevity as "the 1944 Act").

Briefly, the facts of the case are that M/s Dharampal Satyapal (assessee), having its head office at 7/22, Ansari Road, Darya Ganj, New Delhi and factories at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi was found engaged in the manufacture of compound (kimam) containing chewing tobacco under sub-heading 2404.40/2404.49. The assessee, a partnership firm, was not registered with the Central Excise department as a manufacturer. The assessee appeared to have been manufacturing and clearing the said compound (kimam) without the knowledge of the department.

During the investigations carried out by the department, the assessee claimed that the compound (kimam) manufactured by them was moved in "balties" on stock transferred basis to their three branded chewing tobacco manufacturing factories located at 68/2, Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwalla (HP). The assessee claimed that the compound (kimam) was an intermediate item, not marketable as such and was, therefore, not excisable. Enquiries were made by the department at Barotiwalla (HP), where the assessee claimed to have transferred the compound (kimam). The said enquiries indicated receipt of the said compound (kimam) in balties at Barotiwalla during the period 16.2.1995 to 20.12.1996.

Based on the above investigations carried out by the department, it appeared that the compound (kimam) was excisable and had been manufactured and cleared without

obtaining registration and without payment of duty on the clearances during the period 1.4.1994 to 3.10.1996.

Accordingly, a show-cause notice dated 19.6.1997 answerable to the commissioner was served upon the assessee demanding duty under rule 9(2) of the Central Excise Rules, 1944 read with proviso to section 11A(1) of the said 1944 Act with interest under section 11AB. By the said show-cause notice, penalty under rule 173Q and section 11AC was also proposed to be levied. The show-cause notice alleged suppression of material facts with intent to evade payment of duty. It referred to manufacture of the compound (kimam) without obtaining registration. It also referred to clandestine clearance of the said compound (kimam) without maintenance of statutory records.

After considering the defence put forth by the assessee, the commissioner held, vide order dated 28.4.1998, that sada kimam (raw-material) was purchased by the assessee and blended with saffron, spices, perfumes and menthol; that consequent upon such blending, a compound (kimam) emerged, which was a separate identifiable product; that from time to time, the assessee used to purchase from the market a similar compound (Lucknowi kimam) from M/s Globe Traders and M/s Laxmi Fragrances Pvt. Ltd.; that the compound (kimam) was used in the manufacture of the chewing tobacco which was sold under the brand name "Tulsi Zafrani Zarda". The commissioner further found that M/s Globe Traders and M/s Laxmi Fragrances Pvt. Ltd. were manufacturers of similar compound. That, the said M/s Globe Traders and M/s Laxmi Fragrances Pvt. Ltd. were manufacturing their compound in their registered units; they were license holders; they were maintaining records under the excise law. In the circumstances, the commissioner came to the conclusion that the compound (kimam) manufactured by the assessee in their unregistered/unlicensed factories at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi was excisable. By the impugned decision, the commissioner came to the conclusion that the assessee had deliberately and without any reason whatsoever suppressed its affairs and they had deliberately failed to obtain registration which circumstances constituted evidence of suppression and, therefore, the department was right in invoking the extended period of limitation.

Aggrieved by the above order of the commissioner dated 28.4.1998, the assessee challenged it in Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as the "tribunal") inter-alia on the ground that the said compound (kimam) was neither chewing tobacco nor preparations for chewing tobacco; they were not capable of being used as such and could be used only after dilution; their manufacturing formula was secret and the said compound (kimam) was not sold in the market but it was sent to the assessee's own factories at 68/2, Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP). The order of the commissioner was also challenged on the ground that the assessee was under a bonafide impression that no duty was leviable on the compound (kimam); the full quantity of the compound (kimam) manufactured at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi was used captively and, therefore, proforma credit / modvat credit was available to the assessee and, therefore, there was no intention to evade payment of duty. That, the assessee was entitled to exemption under notification no.121/94-CE dated

11.8.1994 even though the assessee had not complied with the procedure under chapter-X.

After hearing both the sides, the tribunal upheld the commissioner's order dated 28.4.1998 with respect to : (a) the excisability of the goods in dispute and the classification thereof under sub-heading 2404.49/2404.40; (b) the rationale for invoking the extended period of time under proviso to section 11A; and (c) inadmissibility of proforma credit / modvat credit. However, as regards applicability of notification no.121/94, the tribunal observed that though the assessee had not followed the chapter-X procedure, if substantial compliance was shown regarding receipt and utilization of the input material then the rigours of chapter-X procedure could be diluted in the interest of the natural justice. The tribunal noted that the commissioner had not recorded any finding in his order to the extent of the compliance of the conditions mentioned in the notification no.121/94. Hence, the tribunal remanded the case back to the commissioner for re-examination of the limited question of applicability of the said notification no.121/94. The tribunal also directed the commissioner to give to the assessee an opportunity to present their case and reconsider the quantum of penalty, fine, interest etc. in the light of his findings as to the applicability of the notification no.121/94.

Being aggrieved by the impugned decision of the tribunal dated 1.10.1999, the assessee has come to this Court by way of civil appeals under section 35L(b) of the 1944 Act.

On the question of excisability, Mr. V. Lakshmikumaran, learned counsel appearing on behalf of the assessee submitted that the compound (kimam) which emerged on account of blending of sada kimam (raw-material) with spices, saffron, perfumes, menthol etc. had no use as such; it had no market; it was highly concentrated; that it was an intermediate product captively consumed in the three factories of the assessee at Okhla Industrial Estate, Phase-II, Noida (UP) and at Barotiwala (HP); that, the blending was based on a trade secret and that the said compound was neither a chewing tobacco nor a preparation thereof. It was further submitted that the said compound (kimam) was not akin to Lucknowi kimam; that the components thereof differed; that Lucknowi kimam was edible whereas the compound in question was not edible and, therefore, the same was not excisable. It was urged that though the assessee had bought Lucknowi kimam from the above traders the ratio of Lucknowi kimam in the final product, which contained tobacco leaves/flakes, was 1:1 whereas the ratio of the compound in question in the final product was 1:5. According to the learned counsel, the ability of the manufacturer to prepare a compound (kimam) and utilize the same for his own purpose would not make the said compound (kimam) a marketable commodity as the preparation was exclusive for the assessee's own use as an intermediate product. In the circumstances, it was urged that the said compound (kimam) was neither a chewing tobacco nor a preparation containing chewing tobacco and, therefore, it was neither marketable nor excisable.

On the rationale for invoking extended period, learned counsel submitted that the assessee was under a bonafide impression that the compound (kimam) was not excisable; the full quantity of the compound (kimam) was used captively and, therefore, proforma / modvat credit was available and, therefore, there was no intent to evade payment of duty. In this connection, it was submitted that prior to 1.3.1994, branded chewing tobacco including preparations therefrom came under 2404.41 and were made liable to duty whereas unbranded

products falling under 2404.49 were chargeable to nil rate. However, after 1.3.1994, the nil rate on unbranded products was given a go by and consequently, the unbranded items falling under 2404.49 attracted duty and duty was again required to be paid on the branded item under 2404.41 which created an anomaly. Therefore, on and from 8.3.1994, the benefit of proforma credit was made available for the duty paid on the unbranded item, which was to be set-off against the payment of duty on the branded item. Learned counsel, therefore, submitted that the history of levy, exemption and benefit of modvat credit during the period 1.3.1994 up to 23.7.1996 indicated that the Government did not intend to collect duty on the unbranded item. Learned counsel submitted that w.e.f. 23.7.1996, chewing tobacco and preparations containing chewing tobacco, whether branded or unbranded, stood classified under sub-heading 2404.40 and modvat credit was also extended to the unbranded items. In the circumstances, learned counsel submitted that though the assessee was entitled to the benefit of proforma / modvat credits as well as to the benefit of exemption vide notification no.121/94 dated 11.8.1994, the assessee did not avail of such credit and, therefore, there was no intention to evade payment of duty, particularly when the assessee had paid much higher duty on the branded item, namely, Tulsi Zafrani Zarda, manufactured in the above three licensed units of the assessee at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP).

Mr. A. Subba Rao, learned counsel appearing on behalf of the department, on the other hand, submitted that the compound (kimam) which emerged on account of blending was identifiable, transportable and purchasable in the market; that, in fact it was captively consumed in the manufacture of chewing tobacco; that merely because the assessee had refused to sell the product, it was not open to the assessee to say that there was no market and that the item was not marketable. Learned counsel submitted that if such an argument was to be accepted, it would be open to all producers of monopoly products to contend that their item was not marketable since they have refused to sell the same in the market. Learned counsel further submitted that the compound in question was not a by-product.

On the question of limitation, learned counsel submitted on behalf of the department that the assessee had suppressed the following facts from the department. The assessee had manufacturing units at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi, which fact was not disclosed to the department. They had manufactured and cleared the impugned goods without informing the department and without payment of central excise duty. Further, the assessee had not obtained registration for their above units at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi. That, they have not filed declarations / returns required under the said 1944 Act and the rules framed thereunder. Learned counsel further submitted that in the original hand-written challans, the compound in question was indicated by the word "balties" whereas in the computerized challans, the word "balti" was replaced by "perfumed mixture + kimam poly bags". In this connection, it was submitted that the assessee was fully aware that if they had used the word "compound / additive mixture", it would have indicated "manufacture". That, to mislead the department, the assessee had changed the word "balti" and had replaced it by the words "perfumed mixture + kimam poly bags" to show that

perfumed mixture and kimam were dispatched in separate packings from the factory. According to the learned counsel, the entire exercise was to conceal the activity of manufacture and to evade payment of duty. Further, the assessee had failed to maintain statutory accounts for the manufacture of the compound at 96, Okhla Industrial Estate, Phase-III, New Delhi/ E-1, Maharani Bagh, New Delhi. They have also not maintained records of clearances from the above two unlicensed units. That, all these circumstances constituted evidence of suppression and, therefore, the department was right in invoking the extended period of limitation.

Learned counsel further submitted that the entire adjudication was regarding two issues, namely, excisability of the impugned compound and the clandestine manufacture and clearance of the compound without payment of duty from 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi units; that, despite opportunity, the assessee had failed to explain the reasons for not registering the above two units at 96, Okhla Industrial Estate, Phase-III, New Delhi and E-1, Maharani Bagh, New Delhi, particularly when they were in the trade buying similar compounds (kimam) from other traders who had licensed units.

In these civil appeals, four issues, namely, excisability and classification of the compound, quantum of duty confirmed, rationale for invoking the extended period of limitation, and inadmissibility of proforma and modvat credits, arise for determination.

At the outset, we may clarify that the investigations by the department were focussed on excisability and manufacture and clearance of the said "compound" without payment of duty from 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi.

EXCISABILITY & CLASSIFICATION:

The main contention advanced on behalf of the assessee herein was that the compound (kimam) was neither a chewing tobacco nor a preparation for chewing tobacco under chapter sub-heading 2404.49 prior to 23.7.1996 and under 2404.40 w.e.f. 23.7.1996; it was neither edible nor consumable; it was made by the assessee from a secret formula and that the entire production was captively consumed by their three factories at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP).

We do not find merit in the above submissions. Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of classification is, how are the goods known in the market. These tests have been laid down by this Court in a number of judgments including *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad* [1995 (76) ELT 241]; *Union of India v. Delhi Cloth & General Mills Co. Ltd.* [1997 (92) ELT 315]; *Cadila Laboratories Pvt. Ltd. v. Commissioner of Central Excise, Vadodara* [2003 (152) ELT 262].

Applying the above tests to the facts of this case, we find that sada kimam was bought by the assessee as a raw material which was then blended with saffron, perfumes, menthol etc. to

form a compound which was then packed in "balties" and cleared to the above three licensed units at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP), where Tulsi Zafrani Zarda was manufactured. That, the assessee used to buy a similar compound (Lucknowi kimam) from the market from time to time and used in the manufacture of their final product. That, the compound (kimam) prepared by the assessee at 96, Okhla Industrial Estate, Phase-III, New Delhi and at E-1, Maharani Bagh, New Delhi, in the highly concentrated form, was cleared therefrom and taken to the above three licensed factories where it was diluted and used in the manufacture of Tulsi Zafrani Zarda. In their reply to the show-cause notice, the assessee admitted that the said "compound" was not capable of being used for any purpose, other than for manufacture of branded chewing tobacco (underline supplied by us). This statement of the assessee in reply to the show-cause notice establishes that the said compound (kimam) was not edible, it was not capable of consumption as such, however, it was used as preparation in the manufacture of Tulsi Zafrani Zarda which was a branded chewing tobacco manufactured in the licensed factories of the assessee at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP). Further, from time to time, the assessee herein bought from the market a similar compound (Lucknowi kimam) and used it in the manufacture of the final product which indicated that on blending of sada kimam with saffron, spices, menthol etc., the compound in question (kimam) which emerged was a distinct, identifiable product, known to the market as kimam. Hence, we do not find any infirmity in the impugned judgment of the tribunal which has held that the said compound (kimam) was marketable and classifiable as chewing tobacco or a preparation for chewing tobacco under chapter sub-heading 2404.49/2404.40.

**INVOCATION OF THE EXTENDED PERIOD OF
LIMITATION AND ADMISSIBILITY OF PROFORMA &
MODVAT CREDITS:**

At the outset, it may be stated that the investigation in this case was focussed on the excisability, manufacture and clearance of the compound (kimam) without payment of duty from the said two unlicensed units at 96, Okhla Industrial Estate, Phase-III, New Delhi and E-1, Maharani Bagh, New Delhi. That, the admissibility of the proforma / modvat credits, which could have warranted an enquiry at the end of the above three factories at Okhla Industrial Estate, Phase-II, New Delhi, Noida (UP) and Barotiwala (HP) as to receipt and utilization of the said compound, was not the subject of investigation. Therefore, the show-cause notice was confined to demand for duty on the goods manufactured and cleared from the two unlicensed and unregistered units at 96, Okhla Industrial Estate, Phase-III, New Delhi and E-1, Maharani Bagh, New Delhi.

As stated above, assessee was in the business of manufacturing Tulsi Zafrani Zarda for couple of years. It used to buy similar compounds from the market from time to time. That, other traders, namely, M/s Globe Traders and M/s Laxmi Fragrances Pvt. Ltd. used to manufacture compounds similar to the compound manufactured by the assessee; that they had their units duly licensed / registered with the excise department; that they had maintained their books and documents in accordance with the rules under the said 1944 Act; and that they paid duty on clearances of their compound. On the other hand, the assessee carried on their business of manufacturing the said compound without disclosing the existence of their units; they

did not get their units licensed / registered; they did not maintain any records under the excise law; that they clandestinely manufactured their compound without informing the department; and in the circumstances, the department was right in invoking the extended period of limitation.

It was urged that the assessee was under a bonafide impression that no duty was leviable on the goods; the full quantity of disputed goods was used captively and, therefore, proforma credit / modvat credit was available in respect thereof and, therefore, there was no intent to evade payment of duty. In support of the aforestated submissions, it was urged that suppression or breach of rules by itself would not amount to intention to evade; that some positive act of deliberate suppression or breach of rules was required to be shown by the department; that, if the assessee showed that credit available to it was equal to the demand then there may not be the case of intention to evade payment of duty. In this connection, reliance was also placed on the judgments of this Court in *Amco Batteries Ltd. v. Collector of Central Excise, Bangalore* reported in 2003 (153) ELT 7; *Padmini Products v. Collector of Central Excise* reported in 1989 (43) ELT 195; and *Formica India Division v. Collector of Central Excise* reported in 1995 (77) ELT 511.

We do not find merit in the above contentions. In this matter, we are concerned with the application of the above judgments to the facts of this case. The words "wilfulness" and "intent" in section 11A are expressions of mental state at the time of manufacture and clearance of the goods. The situs of the levy of central excise is on manufacture. Pricing and value of clearances are matters specially within the knowledge of the assessee. As stated above, the assessee herein was in the business of manufacture of chewing tobacco and its preparations for last couple of years. In the course of business, the assessee had dealt with similarly situated traders. It was fully aware that those traders who produced similar compounds had their units licensed or registered and yet the assessee herein did not take steps to get the above two units, in which the impugned compound (kimam) was manufactured, registered or licensed. As stated above, it has been buying a similar kimam from various traders. These circumstances constituted evidence of suppression brought on record by the department in answer to which it was contended on behalf of the assessee that they were under a bonafide impression that the compound was not excisable and that the benefit of proforma and modvat credit together with the benefit of exemption under notification no.121/94 dated 11.8.1994 was substantially equal to the demand for duty herein and, therefore, there was no intention to evade payment of duty.

We do not find any merit in these submissions. As stated above, the adjudication in this case was confined to the question of excisability and concealment of the existence of two units in which the compound (kimam) was manufactured. No explanation has been given by the assessee for not disclosing the affairs of these units, particularly when the assessee was in business for couple of years and when the assessee had been dealing with other traders who operated from licensed factories. It was for the assessee to explain the reasons for not getting the units registered or licensed. It was for the assessee to explain its failure to maintain the records under the 1944 Act and rules thereunder. In each of the above decisions, we find that there was substantial compliance of the rules under the said Act. In each of the decisions the findings indicate technical non-

compliance and not total non-compliance of the rules. It was for the assessee to explain the basis of its alleged bonafide impression. In this connection, no evidence was put before the commissioner about receipt and utilization of the compound in the manufacture of Tulsi Zafrani Zarda. No evidence was led to show that the amount of proforma / modvat credits was equal to the duty demanded, although it was urged that after 3/94, the liability to duty on inputs stood shifted to the final product.

Modvat is basically a duty collecting procedure which provides relief to the manufacturer on the duty element borne by him in respect of the inputs used by him. The relief is given under the modvat scheme on the actual payment of duty on the input. On such payment, the assessee gets a right to claim adjustment/set-off against the duty on the final product. The question of duty adjustment/set-off against duty on the final product was not in issue. In any event, no record on credit entitlement was produced. A right to claim proforma/modvat credit against duty on final product was different from the defence of bonafides in a case where circumstances mentioned in the proviso to section 11A(1) stands proved by the department for invoking larger period of limitation. The burden to prove the defence of bonafides was on the assessee and the assessee in this case has failed to prove its bonafides. Under modvat, excisable finished products made out of duty-paid inputs are given relief of excise duty to the extent of duty paid on inputs. In the circumstances, we are satisfied that the department was justified in invoking the extended period of limitation under the proviso to section 11A(1).

On the applicability of the notification no.121/94 dated 11.8.1994, the tribunal remanded the case back to the commissioner for re-examination of the limited question of its applicability. The tribunal also directed the commissioner to reconsider the quantum of penalty, fine etc. in the light of its findings on the applicability of the said notification. We do not wish to express any opinion on the applicability of the notification dated 11.8.1994. Suffice it to state, that, on the issue of excisability and clandestine manufacture and removal of the compound (kimam) from the two unlicensed/unregistered units at 96, Okhla Industrial Estate, Phase-III, New Delhi / E-1, Maharani Bagh, New Delhi, we do not find any infirmity in the impugned judgment.

Accordingly, these civil appeals filed by the assessees are dismissed with no order as to costs.