

CASE NO.:
Appeal (civil) 1669-1679 of 2005

PETITIONER:
Commnr. Central Excise & Customs, Mumbai & Ors.

RESPONDENT:
M/s. I.T.C. Ltd. & Ors.

DATE OF JUDGMENT: 31/10/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G E M E N T

S.B. SINHA, J.

Completion of an assessment proceedings whether is a sine qua non for issuance of notice under Section 11-A of the Central Excise Act, 1944 (for short "the Act") is the question involved in this appeal which arises of a judgment and order dated 18.6.2004 as modified by an order dated 2.7.2004.

M/s. ITC Ltd., Respondent No. 1 herein manufactures cigarettes. It gets the work done also by way of job work through various factories. These factories inter alia belonged to M/s. Master Tobacco Company situated at 36/40, Mahalaxmi Birdege Arcade, Mahalaxmi Road, Mumbai and M/s. Crown Tobacco Co. situated at 9, St. John Baptist Road, Bandara, Mumbai. A provisional price list was issued by the Department for the period 1.3.1973 to 28.2.1983.

It appears that their existed a dispute as regards mode of valuation for the purpose of levy of excise duty. By a judgment and order dated 19.7.1995, this Court opined that excise duty should be paid on the wholesale dealers price to their customers and not on the price of Respondent No. 1 to its wholesale dealers.

A show cause notice was issued on 10.4.1986 as to why Respondent and its wholesale dealers, being related persons, the cost of Corrugated Fibre Containers (CFCs) should not be added to the manufacturing cost. A show cause notice was also issued on 10/11.8.1983 asking the respondent to show cause as to why differential duty of Rs. 57,22,63,857.70 for the period from 1.7.1980 to 31.3.1982 shall not be directed to be paid. Another notice was issued on 8.10.1984 demanding the differential duty of Rs. 43,53,137.70 for the period 1.4.1982 to 30.6.1983. One show cause notice was furthermore issued on 13.4.1987 demanding Rs. 34 crores claiming freight, administrative charges collected by Respondent herein to be added as additional consideration.

Indisputably, the issue between the parties as regards valuation of the goods was decided in favour of Respondent by CEGAT by an order dated 18.3.1994.

By reason of the order dated 30.8.1996, the assessee's contention that the show cause notices issued prior to finalization of the provisional assessment was invalid had been rejected by the adjudicating authority directing:

"(i) The contention of the noticees that the show cause under consideration is invalid on the ground that it has been issued prior to the

finalization of the provisional assessment is not sustainable in law or on facts and hence it is rejected.

(ii) The Assistant Commissioner of Central Excise concerned or any other officer who is competent to make final assessment in the case under the relevant provisions of the Central Excise & Salt Act read with the Rules made thereunder will finalize the pending provisional assessment in respect of each of the three notices as per law for the period covered in the show cause notice involved in the present proceedings. The said competent authority while finalizing the provisional assessment as aforesaid is entitled and at liberty to proceed with any enquiry for the purpose of making final assessment in this case. Nothing prevents the said competent authority for the purpose of making the final assessment from utilizing any material collected by the Deptt. and that such material does not cease to be available to the said competent authority by reason alone of the circumstances that such material had been referred to and incorporated in the show cause notice involved in the present proceedings. The material contained in the said notice can be used as independent material to support final assessment, after affording an opportunity to the noticees concerned to meet the case and after considering the cause shown. The finalization of provisional assessment as aforesaid should be completed as expeditiously as possible.

(iii) The said competent authority is further directed to intimate the Adjudicating Authority (CCE, Delhi) as soon as he completes the finalization of the said provisional assessment. After that, this show cause notice involved in the present proceedings will be taken up for adjudication by the said Adj. Authority."

Yet again on 13.9.1996, the adjudicating authority passed an order in Original No. 6/1996. The final order of assessment was passed on 16.12.1997. An appeal was preferred thereagainst which was marked as Appeal No. 267/M-I/98.

Yet again a show cause notice during pendency of the said appeal was issued on 31.3.1998, , purported to be in terms of order dated 16.12.1997 whereby Respondent No. 1 was asked to make payment of the differential duty amounting to Rs. 1,38,00,035.76. An appeal was preferred against the said second show cause notice as also the demand notice dated 31.3.1998 before the Commissioner (Appeals) which was registered as 571/M-I/98. On an application filed therein for waiver of the requirements of pre-deposit of duty demanded and stay of operation of the said notice of demand during pendency of the appeal, by an order dated 29.12.1998, the Commissioner (Appeals) directed Respondent to deposit an amount of 50% of the disputed duty demanded, as a condition precedent for entertaining the appeals within a period of 15 days therefor. Against the said order, a writ petition was filed before the High Court of Bombay which was allowed by an order dated 22.1.1999 directing the Commissioner (Appeals) to dispose of the stay application afresh by a speaking order within six weeks.

The Commissioner (Appeals) by a common order dated 26.2.1999 disposed of both the appeals and set aside the order of Assistant Commissioner and the Superintendent upon remitting the matter back to the Commissioner.

Against the said order also Respondent preferred an appeal before the Tribunal bearing No. E/3234/99 which was dismissed as withdrawn on 15.11.2000. Respondent No. 1 and M/s. Master Tobacco Co. thereafter filed appeals for setting aside :

- (i) Show Cause Notice dated 21.10.1987 issued to Respondent No. 1 for undervaluation during the period from 1.11.1979 to 28.2.1983;
- (ii) Order in Original No. 5/1996 dated 30.8.1996 and 6/96 dated 13.9.1996 directing jurisdiction Assistant Commissioner to finalize provisional assessment;
- (iii) Order in Original No. 38/2000 of the Commissioner (Appeals) Delhi dated 29.12.2000 issued in respect of Show Cause Notice dated 21.10.1987;
- (iv) Show Cause Notices dated 10/11.8.1983 and 8.10.1984 for under valuation;
- (v) Order in Original No. 6/96 dated 13.9.1996 directing Asst. Commissioner to finalise provisional assessment;
- (vi) Order in Original No. 8/99 of the Commissioner (Appeals), Delhi dated 30.9.1999 issued in respect of show cause notices dated 10/11.8.1983 and 8.10.1984;
- (vii) Order of the Commissioner (Appeals) dated 31.7.2002 on the grounds that Show Cause Notices were issued during pendency of provisional assessment.

Appellant also preferred an appeal before the Tribunal against the order dated 31.7.2002 of the Commissioner (Appeals) whereby the appeal by the Department against the order in Original No. 254/2000 dated 22.9.2000 for finalization of provisional assessment in respect of Respondent No. 1 whereby and whereunder it was held that Respondent had paid a sum of Rs. 85 lakhs duty in excess was dismissed.

These appeals were heard by the Tribunal and by a final order dated 18.6.2004, it set aside the show causes notices issued and orders in Original inter alia on a finding that the same could not have been done during pendency of proceedings for final assessment.

Appellants are, thus, before us.

Sub-section (1) of Section 11-A of the Act reads as under:

"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, within six months from the relevant date, serve notice on the person chargeable with the duty 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 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,

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"

Rule 9B of Central Excise Rules, 1944 (for short "the Rules") reads as under:

"Rule 9B. Provisional assessment to duty \026 (1)
Notwithstanding anything contained in these rules,

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(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further inquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal) for assessing the duty;

The proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed.

(4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of, the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund as the case may be."

It is not in dispute that now final assessment proceedings are complete.

The learned Additional Solicitor General appearing on behalf of

Appellant raised a short contention in support of this appeal. A provisional assessment being also an order of assessment and keeping in view the purport and object for which Section 11-A of the Act was enacted and read with the definition of "relevant date", the jurisdiction thereunder can be invoked even after a provisional assessment is made and before a final assessment is completed.

Mr. Ravinder Narain, learned counsel appearing on behalf of Respondents, however, would submit that a bare perusal of Section 11-A of the Act would clearly show that the impugned show cause notices were illegal.

Section 11-A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11-A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of Sub-section (3)(ii)(b) of Section 11-A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11-A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

Ranganathan, J. in *Ujjagar Prints (II) v. Union of India* [(1989) 3 SCC 488] defined the word "levied" in the following terms:

"\005The word "levied" is a wide and generic expression. One can say with as much appropriateness that the Income Tax Act levies a tax on income as that the Income Tax Officer levies the tax in accordance with the provisions of the Act. It is an expression of wide import and takes in all the stages of charge, quantification and recovery of duty, though in certain contexts it may have a restricted meaning\005"

The question as to non-levy or short-levy of an excise duty would arise only when the levy had been laid in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable.

In *New Delhi Municipal Committee v. Kalu Ram* [(1976) 3 SCC 407], the word "payable" has been defined in the following terms:

"The word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. "payable" generally means that which should be paid."

Concededly, in terms of the provisions of the Act and the Rules framed thereunder, the amount becomes payable only in the event, the assessee does not deposit the amount levied within a period of ten days from the date of completion of the order of assessment. A provisional assessment is made in terms of Rule 9B inter alia at the instance of the assessee. Such a recourse is resorted to only when the conditions laid down therein are satisfied, viz., where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable good.

Whereas provisional duty is levied in terms of Sub-Rule (1) of Rule 9B, final assessment is contemplated under Sub-Rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty

finally assessed and in the event, the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the case may be. Ultimately, thus, the liability of the assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

On a plain reading of the provisions of the Act and the Rules framed thereunder, we have no doubt in our mind that the Tribunal was correct in its finding that the impugned show cause notices were illegal.

The question came up for consideration before this Court in *Serai Kella Glass Works Pvt. Ltd. v. Collector of C. Excise, Patna* [1997 (91) ELT 497: (1997) 4 SCC 641] wherein this Court clearly opined:

"Section 11-A deals with recovery of duty not levied or not paid or short-levied or short-paid or erroneously refunded. Proceedings under Section 11-A have to be commenced with a show-cause notice issued within six months from the relevant date. "Relevant date" has been defined under sub-section (3)(ii) to mean in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof.

After final assessment, a copy of the order on the return filed by the assessee has to be sent to him. Duty has to be paid by the assessee on the basis of the final assessment within ten days' time from the receipt of the return. No question of giving any notice under Section 11-A arises in such a case. It is only when even after final assessment and payment of duties, it is found that there has been a short-levy or non-levy of duty, the Excise Officer is empowered to take proceedings under Section 11-A within the period of limitation after issuing a show-cause notice. In such a case, limitation period will run from the date of the final assessment. The scope of Section 11-A and Rule 173-I are quite different. In this case, the provisional assessment earlier made by the proper officer has been quashed and pursuant to the direction of the High Court, the proper officer has made the final assessment. No question of failure of issuance of show-cause notice under Section 11-A arises in this case. Even otherwise, we do not find any infirmity in the order of the Tribunal."

The said decision has been relied upon by the Tribunal in arriving at its finding. The learned Additional Solicitor General would contend that the said decision was rendered in a different fact situation. We do not agree, as the ratio is clearly decipherable therefrom.

The said decision was noticed by a Division Bench of this Court in *M/s. Duncans Industries Ltd., Calcutta v. Commissioner of Central Excise, New Delhi* [2006 (8) SCALE 463].

For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly. No costs.