CASE NO.:
Appeal (civil) 3638 of 1999

PETITIONER:
M.K. Kotecha

RESPONDENT:
Commissioner of Central Excise, Aurangabad

DATE OF JUDGMENT: 04/01/2005

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

JUDGMENT:
J U D G M E N T

KAPADIA, J.

This is an appeal under section 35L(b) of Central Excise Act, 1944, preferred by the assessee, against the judgment and order dated 16.2.1999 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai, confirming the demand made by the department for short-levy amounting to Rs.18,34,464/- together with a penalty of Rs.2 lacs.

The short question which arises for determination in this appeal is \026 whether the department was justified, on facts and circumstances of the case, in invoking the extended period of limitation under the proviso to section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to for the sake of brevity as "the 1944 Act").

The appellant, M.K. Kotecha, proprietor of M/s Tapi R.C.C. Pipe Product, M/s Bamnod Cement Pipe Product and M/s Sakri Cement Pipe Product, is a manufacturer of R.C.C. pipes and collars falling under Chapter Heading 6807.00. During the period April, 1990 to June, 1992, he cleared RCC pipes and collars to various Societies under the Lift Irrigation Scheme, by declaring that the RCC pipes and collars were not sold but were captively consumed in the projects undertaken by him under the works contract. Accordingly, he filed the price list together with the annexure thereto giving following particulars:-

PRICE LIST
Sl.
No
Excisable Goods

Descrip-
tion

Tariff
Classi-
fication

Comparable goods if known to Assessee

Descrip-tion Tariff Classifi-cation Assessable Value As Unit of Sale Pipe Collar	Difference if any in material characteristics of the goods & assessment of comparable goods Value of the Goods in Col.2 classified and approved	Pipe Collar	Value of the Goods in Col.2 as approved by the proper officer	Remarks
1	2	3	4	5
6	7	8	9	10
11				
RCC Pipe & Collar No.	6807.00			
Size in mm. & class				
1				
1200 mm NP3				
"				
-				
-				

2838 -

2838 -

2
1000 "
"

2060 -

2060 -

3
900 "
"

1674 -

1674 -

4
800 "
"

1378 -

1378 -

5
750 "
"

1282 -

1282 -

6
700 "
"

1175 -

1175 -

7
600 "
"

941 -

941 -

8
500 "
"

686 -

686 -

9
450 "
"

598 -

598 -

10
400 "
"

549 -

549 -

11
350 "
"

447 -

447 -

12
300 "
"

394 -

394 -

13
750 mm NP 2
"

1211 121

1211 121

14
700 "
"

1153 115

1153 115

15
600 "
"

908 91

908 91

16
500 "
"

635 64

635 64

17
450 "
"

517 52

517 52

18
400 "
"

459 46

459 46

19
350 "

"

359 36

359 36

20
300 "
"

278 28

278 28

The last 'questionnaire' is applicable to this Pricelist.
I/We declare that particulars herein furnished are complete & true to the best of my/our knowledge & belief.

Sd/-

Signature of Assessee

ANNEXURE
PRICE (COSTING DETAILS) OF R.C.C. PIPES & COLLARS : EFFECTIVE FROM 6.5.1989: PIPE LENGTH: 2.5 MTRS.

Sl. No.	Size of Pipe	Class	Steel	Rs. Cement	Rs. Sand & Metal	Rs. Electricity	Greased

Etc.
Rs.
Labour
Charges

Rs.
Super-
vision
Charges
Rs.
Total

Rs.
Profit
about
10%
Rs.
Cost of
Pipe

Rs.
Cost of
Collar

Rs.
1
1200
mm
NP3
1584
642
159
61
75
59
2580
258
2838
-
2
1000
"
"
1125
466
101
59
75
47
1873
187
2060
-
3
900
"
"
836
424
81
59
75
47
1522

152
1674
-
4
800
"
"
677
340
77
53
66
40
1253
125
1378
-
5
750
"
"
640
330
55
45
60
35
1165
116
1282
-
6
700
"
"
568
310
50
45
60
35
1068
107
1175
-
7
600
"
"
446
235
47
42
50
35
855
86
941
-
8
500
"
"
317
183

44
26
33
21
624
62
686
-
9
450
"
"
285
158
35
20
30
16
644
64
598
-
10
400
"
"
258
147
29
20
29
16
499
50
549
-
11
350
"
"
200
140
21
9
26
10
406
41
447
-
12
300
"
"
182
119
18
8
22
9
358
38
394
-
13

```
750
"
P2
575
326
50
35
70
45
1101
110
1211
121
14
700
"
"
556
307
47
30
66
42
1048
105
1153
115
15
600
"
"
432
229
33
23
66
42
825
83
908
91
16
500
"
"
307
162
23
21
38
26
577
58
635
64
17
450
"
"
250
133
18
16
33
20
```

470
47
517
52
18
400
"
"
244
102
17
11
27
16
417
42
459
46
19
350
"
"
183
82
14
8
23
16
326
33
359
36
20
300
"
"
127
72
11
7
22
14
253
25
278
28

RCC Pipe of Class NP3 does not require collar in our L.T. Scheme.
Cost of each collar = 10% of Pipe Cost i.e. one pipe mouse of lengt
h 2.5 mm = 12 collars length.

This is to certify that the above cost of each pipe & collar is correctly calculated and the particulars herein
furnished are true & fully stated to the best of my knowledge & belief.

Sd/-

Signature of Assessee

On 19.8.1994, the Collector of Central Excise, Aurangabad issued show-cause notice to the appellant under section 11A(1) of the 1944 Act alleging clearance of RCC pipes and collars to various Societies for their projects

under the Lift Irrigation Scheme, during the period April 1990 to June 1992, by declaring their prices at the lower rates, by filing the price list in part VI(b) proforma, on the ground, that, the prices of comparable goods were not available and the goods cleared were not for sale but were for captive consumption. However, according to the show-cause notice, the contract price agreed upon by and between the parties indicated complete break-up of the charges, including the prices of RCC pipes & collars, consequently, it was alleged that the appellant had undervalued the prices of RCC pipes & collars by mis-declaring to the department that comparable prices were not available. Accordingly, the department called upon the appellant to show cause why differential duty of Rs.18,34,464/- should not be recovered under section 11A(1) and why for the period 1st April, 1990 to June, 1992, penalty under rule 173-C should not be imposed.

By reply dated 27.1.1995 to the show-cause notice, the appellant submitted that the RCC pipes and collars were not marketed but used in the Lift Irrigation Scheme; the appellant denied that the contract awarded indicated the break-up of the charges, including the prices of RCC pipes and collars; that in any event, these prices were lower than the prices of comparable goods and that the comparable prices were not available. It was submitted that contract awarded to the appellant indicated the price for the project comprising of cost of material and cost for joining of RCC pipes/collars besides job of excavation and, therefore, the appellant had invoked part VI(b) proforma supported by a certificate from his Chartered Accountant. It was further submitted that alleged comparable prices given by DSR and MSSIDC were not taken into account at the time of giving of tender; that independent costing was done and that the rates tendered covered the entire job work, hence, prices of comparable goods did not exist. It was further submitted that the RCC pipes and collars, manufactured by the appellant, were not sold as the appellant had undertaken a project on turnkey basis and hence, there was no sale, and, therefore, the appellant had filed the price list in part VI(b) proforma on cost basis, particularly, because there was no separate contract for sale of RCC pipes and collars. It was further submitted that the RCC pipes and collars were not sold but were used in the project and, therefore, the valuation of such pipes and collars was done on the cost basis.

By order dated 22.5.1995, the Collector came to the conclusion that the appellant was supplying pipes and collars to various Lift Irrigation Schemes; that in the project reports, the valuation data of such pipes and collars was available which was made known to the appellant at the time of negotiations and that there was substantial difference between the rates quoted by the appellant and the rates quoted in the project reports. It was held, that, the appellant had misled the department by declaring that RCC pipes and collars were captively consumed when he knew that part VI(b) speaks of consumption in the production of other articles. According to the Collector, the said pipes and collars were manufactured by the appellant in his factory and cleared therefrom. It was further held that the appellant had filed a consolidated tender giving costs estimates which included costs of material, labour, supervision etc.; that these estimates were based on the pricing of collars and pipes in the project reports and,

therefore, the Collector confirmed the demand in terms of the show-cause notice. The Collector further found that the Maharashtra State Sewerage and Water Board had made the rate analysis and had arrived at the value of the RCC pipes; that the said Board was a Government agency; that it was in the business of civil construction and, therefore, had a fairly good idea of the standard value of the RCC pipes. The Collector further found that Tenders Scales were drawn by the contractor on the above price guidelines of the Board. The Collector observed that the RCC pipes and collars were standardized products and that what was true of the pricing by the Board was also applicable to the rate contract price given by the Director of Industries. In the circumstances, it was held, that comparative prices were known to the appellant. Accordingly, the demand was made on above grounds for Rs.18,34,464/- with penalty of Rs.2 lacs.

Aggrieved by the Order of the Collector, the assessee preferred appeal to the Tribunal which has been dismissed. Hence, this civil appeal.

Two questions arise for determination in this appeal, namely, whether the department was right in invoking rule 7 of Central Excise (Valuation) Rules, 1975 and whether on facts, the Collector was right in holding that the appellant had wilfully misdeclared to the department that prices of comparable goods were not available and that the goods cleared were not for sale but for captive purpose.

In the present case, the department has invoked the proviso to section 11A(1) of the 1944 Act seeking to recover duty by invoking the extended period on account of wilful misstatement and suppression of facts resulting in short-levy of duty.

In the case of Collector of Central Excise, Hyderabad v. M/s Chemphar Drugs & Liniments, Hyderabad reported in [(1989) 2 SCC 127], it has been held, that, in order to constitute wilful misstatement, some positive act other than inaction, omission or failure on the part of the manufacturer or conscious and deliberate withholding of information when the manufacturer knew otherwise, is required to be established before he is saddled with the liability. Whether in a particular set of facts and circumstances, there was wilful misstatement or suppression is a question of fact.

In the case of Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay reported in [1995 Suppl. (3) SCC 462], it has been held, that, in order to constitute suppression under the proviso to section 11A(1), there should be facts showing that correct information was not deliberately disclosed in order to escape from liability to pay duty. Mere omission is not a deliberate act.

In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay reported in [1995 (75) ELT 721], it has been held by this Court that the word "wilful" qualifies the words "misstatement or suppression of facts" in the proviso. That the word "wilful" precedes the word "misstatement". The word "wilful" means intention to evade. In the circumstances, it was held that the department has to establish the intention to evade duty in order to come within the expression "wilful misstatement or suppression of facts" as mentioned in the proviso to section 11A(1).

On facts, the basic question which arises for determination is \026 whether the appellant knew of the comparability of his goods with those of other manufacturers and whether the appellant had misled the department by declaring that the RCC pipes and collars were captively consumed, particularly, when the appellant as a contractor had drawn the Tenders Scales on the basis of pricing guidelines of Maharashtra State Sewerage and Water Board.

Chapter VIIA of the Central Excise Rules, 1944 refers to removal of excisable goods on determination of duty by producers and manufacturers. Rule 173-C prescribes a procedure regarding valuation of goods assessable ad valorem. Under rule 173-C (1), every assessee who produces, manufactures or warehouses goods, which are chargeable with duty at a rate dependent on the value of the goods, and clears such goods, shall declare the value under section 4 of the Act in the sale invoice, invoice-cum-challan or like documents used by him for sale or removal of goods. Under clause (iv) of the second proviso to rule 173C, where an assessee removes such goods, in any manner, which does not involve sale, shall file, with the proper officer, a declaration in the prescribed form.

The proforma for determination of value under section 4 read as under:

Part VI.\027 For excisable goods not for sale but for use or consumption by the assessee/related person for production or manufacture of other articles (cf. Rule 6 of the Central Excise (Valuation) Rules, 1975].

(a) If particulars of comparable goods are known\027

Excisable Goods

Descrip -tion

Tariff Classi- fication

Comparable goods, if known to Assessee

Descrip -tion

Taziff Classi- ficatio n Assessable value

Rs.

Unit of sale

Difference if any in material characteristics of the goods under assessment & comparable goods

Value of the Goods in Col.1 claimed for approval

Value of the Goods in Col.1 claimed for approval

Remarks

1
2
3
4
5
6
7
8
9
10

(b) If particulars of comparable goods are not known\027

Excisable Goods

Descrip -tion

Tariff Classi- fication

Cost of production or manufacture, supported by detailed calculations, on a

separate sheet how the cost has been worked out.

Rs.

Unit

Profits that would have been normally earned by the assessee on sale of such goods and the basis thereof.
Value Claimed for approval
Value approved
Remarks
1
2
3
4
5
6
7
8

The above price-list proforma is prepared in terms of rule 6 of Central Excise (Valuation) Rules, 1975. We quote hereinbelow the entire rules 6 and 7 as the same is relevant for deciding this case.

"Rule 6. If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and \026

a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person:

Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;

b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall

be based-

(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee:

Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;

(ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods;

c) where the assessee so arranges that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person and the value cannot be determined under clause (iii) of the proviso to clause (a) of sub-section (1) of section 4 of the Act, the value of the goods so sold shall be determined-

(i) in a case where the assessee sells the goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule;

(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule;

(iii) in a case where a related person sells the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers.

Rule 7. If the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules."

On reading rule 6(b) of the said Valuation Rules, it is clear that the said rule applies to excisable goods, not sold by the assessee but used or consumed by him in the production or manufacture of some other articles. Rule 6(b) refers to

valuation of goods which are captively consumed by the assessee. It is in two parts. Under rule 6(b)(i), the assessable value of goods captively consumed is determined on the price at which similar goods are sold by the assessee and by other manufacturers, subject to adjustment. On the other hand, under rule 6(b)(ii), the assessable value is determined on the basis of aggregate cost of raw materials, manufacturing cost and profit margin, if any. In short, under rule 6(b)(i) of the Valuation Rules, 1975, the value of goods captively consumed was the value of comparable goods produced by the assessee or any other manufacturer. In the absence of such a valuation, the assessable value had to be done under rule 6(b)(ii) on the basis of cost of production, including the profits which the assessee would normally earn on the sale of such goods [See: Gwalior Rayon Manufacturing (Weaving) Company v. Union of India & Others reported in [1982 ELT 844 (MP)].

On enquiry, learned counsel appearing on behalf of the appellant produced before us the Price List proforma alongwith the annexure. We have reproduced the relevant portion of the Price List proforma submitted by the appellant to the department in this case. Although, the appellant contended before the department that the prices of comparable goods in the present case was not known to him, the appellant filed the price list under part VI(a) of the price list proforma. However, the annexure to the price list indicates that the appellant had mischievously priced the said RCC pipes/collars on cost basis without estimating the profits. The Price List proforma in part VI(b) refers to cases where comparable prices are not available and consequently, the determination of assessable value was required to be done on the basis of the total cost. The particulars required to be given by the assessee under part VI(a) are different from the particulars under part VI(b) of proforma price list. Under part VI(a), the particulars are required to be given in respect of excisable goods not for sale but for captive consumption on the footing that the assessee is aware of comparable prices. In that respect, he is required to give assessable value of the comparable goods under part VI(a). Similarly, under part VI(a), the assessee is required to give particulars of the difference, if any, in the material characteristics of the goods under assessment and comparable goods. On the other hand, in cases falling under part VI(b), the assessee is required to furnish particulars of cost of production or manufacture on a separate sheet, annexed to the price list. The 3rd and the 4th column of part VI(b) refers to computation of assessable value of goods based on the aggregate cost, together with the profits that would normally accrue to the assessee. [See: Column (5) of Part VI(b)].

In this case, the appellant worked out the prices on total cost and used it as the basis of valuation in support of part VI(a) price list proforma. This hybrid system was adopted by the appellant, though not permissible, to mislead the department. In the circumstances, we are satisfied that the appellant had wilfully misdeclared the prices at the lower rate and consequently, the department was right in invoking the extended period of limitation under the proviso to section 11A(1).

Further, in the present case, the appellant submitted before the Collector that he had undertaken a composite contract (project) and, therefore, the prices of comparable goods were not available. However, as found by the Collector on evidence, the RCC pipes and collars were manufactured by the three units of the appellant. The contract price agreed upon was

based on complete break-up of the charges including the prices of the RCC pipes and collars. The said pipes were manufactured in the factory of the appellant. They were cleared therefrom. The pricing of RCC pipes and collars was indicated in the project reports. They were based on the pricing guidelines fixed by Maharashtra State Sewerage and Water Board. The said Board had made rate analysis to arrive at the value of the RCC pipes and collars. Therefore, the appellant knew of the comparability of his goods with those of other manufacturers. Hence, the Collector was right in coming to the conclusion that the appellant had wilfully misstated and suppressed the facts in order to mislead the department. Consequently, the department was right in invoking the larger period for demand of duty under the proviso to section 11A(1).

Lastly, on facts, we find that rules 1 to 6 of the Valuation Rules, 1975 had no application. As stated above, rule 6(b) was applicable to captive consumption. In this case, rule 6(b) was not attracted. Therefore, the department was right in making best judgment assessment under the aforestated rule 7 of the Valuation Rules, 1975.

In the case of United Glass v. Collector of Central Excise reported in [1995 (75) ELT 209], this Court held that rule 7 of the Valuation Rules, 1975 was in the nature of a residuary rule, applicable only when valuation cannot be decided under other rules. In the present case, the department was, therefore, right in invoking rule 7.

Mr. C.N. Sree Kumar, learned counsel for the appellant submitted that since the classification lists and the price list were earlier approved, subsequently found to be erroneous or defective, reclassification and liability to pay duty would commence only from the date of show-cause notice and not for the period prior thereto. He further submitted that the omission to enter correct prices in the price list did not amount to contravention of rule 173-C. In support, he relied upon several authorities.

In the case of Universal Cables Ltd., Satna v. Union of India & Others reported in [1977 (1) ELT page J.92], on which reliance was placed on behalf of the appellant, it was held that omission to enter correct price in the price list was not a contravention of rule 173-C within the meaning of rule 173Q. However, on facts, the High Court found that the assessee had filed a list in the proper form and in the manner prescribed under rule 173-C showing the price of the goods and, therefore, there was no contravention of that rule. In the present case, as stated above, there is a contravention of rule 6(b) of the Valuation Rules, 1975 read with part VI(a) of the price list proforma. Hence, the judgment in the case of Universal Cables Ltd.(supra) is not applicable to the present case.

In the case of Collector of Central Excise, Baroda v. Cotspun Limited reported in [1999 (113) ELT 353], this Court held that the word "short-levy" in section 11A(1) will not apply to cases where excise duty was levied on the basis of approved classification list. Learned counsel for the appellant heavily relied upon on this authority. In our view, the said judgment has no application to the present case for two reasons: firstly, the basis of the said judgment is obliterated in view of the Amendment Act No.10 of 2000 by which the expression "short-levy" has been redefined to include levy resulting from mistaken approval granted to the classification list. The validity of this amendment has been upheld in a recent

judgment of this Court in the case of ITW Signode India Ltd. v. Collector of Central Excise reported in [(2004) 3 SCC 48], to which one of us [Dr. AR. Lakshmanan, J.] was a party. Secondly, the decision in Cotspun Limited's (supra) was confined to interpretation of the word "short-levy" in section 11A(1). That judgment was not concerned with the proviso to section 11A(1). In fact, vide para 67 of the judgment of this Court in ITW Signode India Ltd. (supra), it has been observed that the extended period of limitation under the proviso can be invoked in cases of positive acts of fraud, collusion, wilful misstatement or suppression of fact on the part of the assessee and that such a positive act must be in contradistinction to mere inaction. The present case is not a case of simple omission. It is a case of wilful misstatement leading to under-estimation of value of goods cleared by the appellant. In the circumstances, we do not find any merit in this appeal.

Before concluding, we may point out that under the show-cause notice, the department had alleged that the appellant had collected extra amount to the tune of Rs.21,74,963/- in the guise of central excise duty over and above the duty actually paid to the department. The Collector found that the appellant had collected the said amount under the guise of central excise duty from his clients, who were billed for full quantum of duty paid whereas under the relevant notification, the appellant had paid duty at nil rate or at lower rate. Despite this finding, the Collector came to the conclusion that the said finding was based on presumptions and not on evidence and consequently, the Collector dropped the demand for Rs.21,74,963/- made under section 11-D as not capable of being substantiated. Surprisingly, no appeal was preferred by the department to the Tribunal in respect of the demand for Rs.21,74,963/-. Even the Collector did not make further enquiries to substantiate such demand. We are conscious of the rising revenue deficit. In several matters, we find slippages of revenue on such counts. Therefore, we expect, Mr. Mohan Parasaran, Additional Solicitor General, to bring our present judgment and order to the notice of the Finance Ministry.

For the aforestated reasons, we do not find any infirmity in the judgment of the Tribunal dated 16.2.1999 passed in Appeal No.E/776-V/95-Bombay, and, accordingly, the appeal stands dismissed, with no order as to costs.