CASE NO.:
Appeal (civil) 5747-5749 of 2000

PETITIONER:
M/s Gopal Zarda Udyog etc.

RESPONDENT:
The Commissioner of Central Excise,New Delhi.

DATE OF JUDGMENT: 30/09/2005

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 the case, the tribunal was justified in holding that the 'additive mixture' processed by the three appellants herein was excisable and classifiable under chapter sub-heading 2404.49 of Central Excise Tariff Act, 1985 and that the department was right in invoking the extended period of limitation under the proviso to section 11A(1) of Central Excise Act, 1944 (hereinafter referred to as "the Act").

Briefly, the facts of the case are that M/s Hari Chand Shri Gopal, M/s Gopal Industries and M/s Gopal Zarda Udyog were the three assessees engaged in the manufacture of Chewing Tobacco (Final Product) falling under sub-heading 2404.40 of Tariff Act, 1985. In the manufacture of the final product, they were using an inter-mediate product known as "additive mixture". An intelligence was collected by the officers of the preventive wing of the Commissionerate to the effect that the appellants were manufacturing the said "additive mixture" without obtaining registration certificate under section 6 of the 1944 Act read with rule 174 of the Central Excise Rules, 1944; that they have been removing the said goods clandestinely from their factories situated in Delhi; that they were unauthorisedly clearing the said goods under transfer challans to their factories in UP and HP (where the final product was manufactured). On the basis of the aforestated intelligence, various premises belonging to the three appellants were searched. Enquiries were also made from traders dealing in the kimams as well as from the manufacturers and the suppliers of the raw material. The partners of the three appellant firms were also examined. The department was informed that the said "additive mixture" consisted of various ingredients like raw-kimam, menthol, aromatic chemicals, spices, gulab jal, attar and perfumes etc. The process of preparing additive mixture was explained in detail by the partners. On the aforestated investigations, three separate show-cause notices were issued, all dated 25.3.1997. In the said show-cause notices, it was alleged that the appellants were clandestinely manufacturing and clearing additive mixture falling under sub-heading 2404.49 (up to 22.7.1996) and falling under sub-heading 2404.40 on and after 22.7.1996, in contravention of the provisions of the said 1944 Act and the Rules with intention to evade duty/assessment. The show-cause notices further record that on 15.10.1996 M/s Gopal Industries and M/s Hari Chand Shri Gopal voluntarily obtained registration certificates for the manufacture of the said mixture under rule 174. The three show-cause notices were in respect of the period 18.3.1994 to 26.9.1996 under the proviso to

section 11A(1) of the 1944 Act. In the case of M/s Gopal Zarda Udyog, the department demanded duty for the period 18.3.1994 to 15.4.1995; in the case of Hari Chand Shri Gopal, the demand was for the period 14.6.1995 to 24.9.1996; but in the case of M/s Gopal Industries, the department demanded duty for the period 16.6.1995 to 26.9.1996.

On dated 21.11.1997, replies were given to the three show-cause notices. The appellants submitted that they were engaged in the activity of manufacturing chewing tobacco, which was an excisable product on which they have been paying duty. In the reply, the appellants explained at length the process by which the additive mixture came to be produced in the three factories in Delhi. According to the appellants, the additive mixture was not a final product; that it was a transient product; it was not noticeable to the naked eye and that it was unsaleable and useless for any other purpose. According to the appellants, the composition of additive mixture was known only to the blender. According to the appellants, the entire process was shrouded in secrecy and was known only to the blender. In the said reply, the appellants alleged that the details of the process of manufacturing the final product as well as the formulation of the additive mixture at the intermediate stage was known to the department since 1992-93; that their records and registers stood verified by the department since 1992-93; that the said records indicated the receipt and utilization of the additive mixture in the manufacture of the branded chewing tobacco (final product) and that the said records were duly checked by the department from time to time. That, the partners of the appellants were also examined in 1992 by Superintendent of Central Excise, New Delhi, when the entire process of mixing and blending of the raw-material and the status of transfer of the additive mixture from their units in New Delhi to their factories in UP and HP was explained. In support of what is stated above, the appellants placed reliance on the panchnama dated 20.10.1992, under which their units were searched by the department and which indicated the stock position of the raw-material, additive mixture and the branded chewing tobacco. According to the department, in 1993, the Superintendent of Central Excise had personally visited their factories and had also studied in detail the process of manufacturing the branded chewing tobacco. The appellants further contended that there was no intent to evade as the said mixture was non-dutiable. In this connection, they relied on the notification no.121/94-CE dated 11.8.1994 under which additive mixture (input) falling under chapter sub-heading 2404.49 captively consumed in the manufacture of chewing tobacco (final product) stood exempted from payment of duty. That, the department had not denied their entitlement to exemption under the said notification in the show-cause notices. That, in fact, after seizure the said mixture was released/cleared under the above notification without levy of duty and, therefore, the department was not entitled to invoke the extended period of limitation.

By order dated 20.5.1998, the commissioner confirmed the demand. On the question of excisability, the commissioner found that the additive mixture was a kimam, which was manufactured by mixing sada kimam with spices, menthol, aromatic chemical and perfumes etc. Further, the commissioner found that the said kimam was marketable as a distinct identifiable product. In this connection, he relied upon the statements recorded under section 14 of M/s Globe Traders, M/s Laxmi Fragrances (P) Ltd., M/s Gulab Gandhi Tobacco Co. etc. That, after 1994, the said mixture (kimam) became

classifiable under chapter sub-heading 2404.49/2404.40 and that despite the said changes, the appellants failed to get their units registered with the department. That, the evidence brought forth by the appellants regarding inspection of their factories pertained to the years 1992 and 1993, during which period the said mixture was not chargeable to duty. That, the appellants were in the business of manufacturing and marketing of chewing tobacco and, therefore, the fact that kimam was chargeable to duty must have been in their knowledge and that by bringing the above facts on record, the department had discharged its initial burden of proving the conditions mentioned in the proviso to section 11A(1) of the Act.

Aggrieved by the decision of the commissioner dated 20.5.1998, the matter was carried in appeal by the assessees to the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as "the tribunal"). The appeals filed by the appellants herein were heard along with the appeals filed by M/s Dharampal Satyapal.

By judgment dated 1.10.1999, the tribunal held that the said additive mixture was a kimam; that it was excisable under chapter sub-heading 2404.49/2404.40 of 1985 Tariff Act and that the appellants had failed to disclose their activities in their Delhi Units. In this connection, the tribunal expressly relied upon the statement of Shailender Kumar Aggarwal, partner of M/s Gopal Industries dated 28.9.1996 recorded under section 14 of the Act in which he has stated that M/s Gopal Industries did not obtain registration certificates under a mistaken belief that the activity of mixing/blending did not constitute "manufacture". The tribunal further found that the manufacturing activities in Delhi units were suppressed from the department; that the appellants had failed to obtain excise registration; and that the appellants had not fully complied with the procedure of chapter X of 1944 rules subject to which the benefit of exemption under notification no.121/94-CE was available. The tribunal thereafter took note of the various decisions of the tribunal which has taken the view that even substantial compliance of the chapter X procedure was sufficient for exemption and accordingly, the tribunal remitted the matter to the commissioner to ascertain the question of substantial compliance.

On remand, the commissioner came to the conclusion vide his order dated 16.7.2002 that there was no substantial compliance of the procedure under chapter X of 1944 rules.

Aggrieved by the said decision dated 16.7.2002, the appellants herein preferred appeals to the tribunal. By judgment and order dated 7.7.2003, the tribunal held that there was substantial compliance of chapter X as there was evidence on record indicating receipt and utilization of additive mixture (input) in the manufacture of branded chewing tobacco (final product) and following the judgment of this court in the case of Thermax Private Ltd. v. Collector of Customs reported in 1992 (61) ELT 352, the tribunal held that the said additive mixture was entitled to exemption under notification no.121/94-CE.

Against the said decision of the tribunal dated 7.7.2003, the department has come to this Court by way of Civil Appeals No.1878-1880 of 2004, which is a matter of separate judgment. Therefore, the present civil appeals are filed by the assessees on the question of excisability and limitation whereas the Civil Appeals No.1878-1880 of 2004 are filed by the department on the question of compliance of exemption notification

no.121/94-CE.

At the outset, we may point out that in the case of Dharampal Satyapal v. Commissioner of Central Excise, New Delhi reported in 2005 (183) ELT 241, this Court held that the compound manufactured by M/s Dharampal Satyapal was a kimam which was moved in balties on stock transfer basis to their branded chewing tobacco factories located in UP and HP constituted independent, distinct and identifiable product known to the market as such and, therefore, the said kimam was excisable and classifiable under sub-heading 2404.49/2404.40. On the question of limitation, this Court on examination of facts found that M/s Dharampal Satyapal used to buy from the market a compound, similar to the compound which it used to manufacture in its own units, and such similar compound was used in the manufacture of Tulsi Zafrani Zarda (final product). This court further found that M/s Dharampal Satyapal had failed to disclose the existence of their units, they did not maintain any records under the excise law, 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 argued on behalf of the assessee in that case that there was no intent to evade duty as the entire quantity of kimam was captively consumed; that the assessee was entitled to modvat credit equal to the demand and, therefore, the department was not entitled to invoke the extended period. This argument was rejected by this Court on the ground that no explanation was given by the assessee for not disclosing the affairs of the units in which kimam was manufactured; no explanation was given for not getting the units registered or licensed; and no explanation was given for failure to maintain the records under the 1944 Act. In the circumstances, this Court found in the case of M/s Dharampal Satyapal total non-compliance of the 1944 rules. This Court observed that it was for M/s Dharampal Satyapal to explain the basis of its alleged bona fide impression. It was further found in that case that there was no evidence of receipt and utilization of the kimam in the manufacture of Tulsi Zafrani Zarda. In the circumstances, this Court dismissed the civil appeals filed by M/s Dharampal Satyapal. This court held that the burden to prove the defence of bona fides was on the assessee and that the assessee in that case, M/s Dharampal Satyapal, had failed to prove its bona fides. However, on the question of applicability of notification no.121/94-CE dated 11.8.1994, this Court upheld the directions of the tribunal remanding the case back to the commissioner for re-examination. This remand was made by the tribunal because it was argued on behalf of M/s Dharampal Satyapal, as by the appellants herein, that there was no revenue implication as the assessee was entitled to the benefit of the exemption under the notification no.121/94.

The main point which arises for determination in these civil appeals is whether the department was right in the facts and circumstances of this case in invoking the extended period of limitation.

In the case of Padmini Products v. Collector of Central Excise reported in 1989 (43) ELT 195, this Court held that in a given case where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken then the extended period of limitation was inapplicable. Mere failure or negligence on the part of the

manufacturer either not to take out the licence or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a licence, there is no scope to invoke the proviso to section 11A(1). For invoking the extended period of limitation, duty should not have been paid or short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful suppression or mis-statement of facts or wilful contravention of the Act or the Rules with the intention to evade payment of duty. These ingredients postulate a positive act, therefore, failure to pay duty or to take out a licence is not necessary due to fraud, collusion etc. Likewise, suppression of facts is not a failure to disclose the legal consequences of a certain provision.

In case of M/s Dharampal Satyapal (supra), the assessee used to buy Lucknowi Kimam from the market from time to time and used the same in the manufacture of branded chewing tobacco (final product). In the case of M/s Dharampal Satyapal, apart from compound prepared in its unit, it used to buy Lucknowi Kimam from the market which was similar to the compound produced by the assessee and the same was cleared to the licensed factories in UP and HP, where it was diluted and used in the manufacture of Tulsi Zafrani Zarda. In that matter, the commissioner had recorded a categorical finding that the assessee M/s Dharampal Satyapal knew that kimam was liable to duty and that it was required to obtain 'L-6' licence because M/s Dharampal Satyapal used to buy Lucknowi Kimam from the other manufacturers, who used to manufacture Lucknowi Kimam after obtaining registration and the requisite licence. There is no such finding by the commissioner in the present case. In the circumstances, on the question of invocation of extended period of limitation, the judgment of this Court in the case of M/s Dharampal Satyapal (supra) will not apply.

In the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay reported in [1995 (75) ELT 721], this Court held that so far as fraud and collusion are concerned, intent to evade duty is built into these words. However, so far as "mis-statement" or "suppression of facts" are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts", which means "with the intent to evade duty". It was further observed that the next set of words in the proviso to section 11A(1) which refers to contravention of the provisions of the Act or the Rules are qualified by the words "with intent to evade payment of duty". Therefore, this Court has held that there cannot be a suppression or mis-statement of fact which is not wilful. Mis-statement or suppression of facts must be wilful. In that case, on facts, this court found that the assessee was under a bona fide impression that the value of its product was not includible in its declaration for the reason that the said product was exempt from duty under the notification dated 23.11.1961, because two High Courts have taken the view that the product was exempt from duty whereas two other High Courts had taken contra-view. In the aforestated circumstances, this court held that the mis-statement in the declaration filed by the assessee or the suppression of facts therein was not wilful.

Applying the above test to the facts of the present case, we find that the substance of the show-cause notices issued in the present case was based on clandestine removal of the kimam from the units in Delhi with an intention to evade payment of excise duty or assessment. The show-cause notices

also alleged contravention of the provisions of the Act and the Rules on the part of the appellants in failing to get their units registered under section 6 read with rule 174 of the 1944 Rules. However, we find from the facts that on 14.7.1992, stock verification was carried out by the department inside the premises of the appellants by anti-evasion department as also by the jurisdictional central excise officer. On 20.10.1992, the partner of the appellant was required to remain present before the Superintendent, Central Excise, New Delhi. His statement was recorded under section 14. In that statement, he has stated that in their units in New Delhi, there were three rooms in which raw-material was stored. In the said statement, he has further stated that the appellants were blending and mixing the additive mixture which was then transferred to their factories at UP and HP for manufacture of branded chewing tobacco. In the panchnama dated 20.10.1992, under which the premises of the appellants in Delhi were searched, the manufacturing process of additive mixture was specifically indicated. Even at that time, there was stock verification of the various raw-materials used in the manufacture of chewing tobacco. Under item 59 of that panchnama, the stock of additive mixture has been specifically indicated. Further, on 30.4.1993, the Superintendent of Central Excise had also visited the factory of the appellants and had actually studied the process of manufacture in Delhi. On 3.5.1993, a letter was addressed to the appellants in which the appellants were called upon to supply all information regarding the process of obtaining additive mixture which was used in the manufacture of chewing tobacco. On receipt of the said letter, the appellants clearly indicated the ingredients used by them in the manufacture of additive mixture. On 20.9.1993, the officers of the department again visited the various premises of the appellants. They conducted physical stock checking. They saw registers maintained by the appellant in respect of different types of additive mixtures. All the registers were checked and verified on that day. There is no finding in the present case that the appellants did not answer the queries made by the department. Moreover, the tribunal in the connected appeal has recorded a finding that the appellants were maintaining transfer challans under which the said kimam was transferred to other units. The tribunal has further recorded a finding in the connected civil appeals no.1878-1880 of 2004 that the appellants were maintaining form-IV register as well stock register regarding receipt of kimam in their factories in UP and HP from their factories in Delhi. That, after the change in the entries in 1994, no show-cause notice was ever issued. In the circumstances, although there was contravention of the provisions of section 6 read with rule 174 and although there was contravention in not obtaining registration of the units in Delhi, we are of the view that there was no intent to evade payment of duty.

For the aforestated reasons, we hold that "additive mixture" (kimam) was excisable and classifiable under chapter sub-heading 2404.49/2404.40 of 1985 Tariff Act, as held in the case of Dharampal Satyapal (supra), however, on the facts and circumstances of this case, the department was not entitled to invoke the extended period of limitation under the proviso to section 11A(1) of the said Act. Accordingly, these civil appeals are partly allowed, with no order as to costs.