

PETITIONER:
COLLECTOR OF CENTRAL EXCISE

Vs.

RESPONDENT:
M/S. H.M.M. LIMITED

DATE OF JUDGMENT 18/01/1995

BENCH:
AHMADI A.M. (CJ)
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AHMADI A.M. (CJ)
SINGH N.P. (J)

CITATION:
1995 SCC Supl. (3) 322 JT 1995 (2) 517

ACT:

HEADNOTE:

JUDGMENT:
ORDER

1. In exercise of power conferred by Section 11-A of the Central Excise and Salt Act, 1944, (hereinafter called 'the Act') three show cause notices were issued to the respondent on the allegation that it had failed to pay the duty on coal cinders payable under Tariff Item No.68. The first notice is dated 17.10.1983 covering duty period from 1.4.1981 to 31.1.1983. The other two notices dated 7.11.1983 and 19.11.1983 are to show cause why penalty should not be imposed under Rule 9(2) read with Rule 173-Q of the Central Excise Rules, 1944. The question of penalty would arise only if the department is able to sustain its demand under the first notice dated 17.10.1983.

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2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11-A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11 A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11-A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11-A (1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11-A (1) it must be alleged in the show cause notice that the duty of excise had not

been levied or paid by reason of fraud, collusion or wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was a guilty or wilful misstatement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11-A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that sub-section. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section II -A(1) of the Act. 'Mere is considerable force in this contention. If the department proposes to invoke the proviso to Section II -A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the

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excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty.

3. For the above reasons, we see no merit in this appeal and dismiss the same with no order as to costs.

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