M/S. LARSEN AND TUBRO LTD.

v.

THE COMMISSIONER OF CENTRAL EXCISE, PUNE-II

MAY 2, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Central Excise Act, 1944—s. 11A—Extended period of limitation—Invocation of, in the second show cause notice on the ground of suppression of facts—When original show cause notice demanding excise duty was withdrawn, where allegation of suppression was not made—Held: Extended period of limitation cannot be invoked subsequently as the facts alleged to have been suppressed by assessee were known to the Revenue—Also the assessee had pleaded bonafide.

Appellant undertook a contract for construction of bridges for Public Sector Undertaking. Appellant manufactured PSC Girders and used to transport them to the site of construction of bridges of the Railways. It did not register itself with the authorities of the Central Excise. Show Cause Notice was issued to the appellants alleging that it was involved in the manufacturing activity but did not pay any excise duty and the said notice was withdrawn. Another show cause notice was issued and extended period of limitation was invoked alleging suppression of fact on the part of the appellant. Commissioner of Central Excise held that the manufacturer of PSC Girders would come within the purview of construction of the bridges and the same would not be immovable property; and that the longer period of limitation has rightly been invoked as the appellant had suppressed the fact from the department that the goods were excisable articles. Appellant filed appeal which was dismissed. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. It was not a case where element of suppression extended to apply to extended period of limitation. It is also not a case where the appellant did not plead bona fide. It is furthermore not a case where the Tribunal and consequently this Court, could have arrived at a finding that the appellant took recourse to suppressio veri. [Para 13] [1146-E, F]

A 1.2. Acts of fraud or suppression, must be specifically pleaded. The allegations in regard to suppression of facts must be clear and explicit so as to enable the notice to reply thereto effectively. It was not the case of the Revenue that the activities of the appellant were not known to it.

[Para 14] [1146-G]

B 1.3. Admittedly, when the first show cause notice was issued, the extended period of limitation was not resorted to. A notice should ordinarily be issued within a period of six months (as the law then stood) i.e. within the prescribed period of limitation but only in exceptional cases, the said period could be extended to 5 years. When in the original notice, such an allegation C had not been made, that the same could not have been made subsequently as the facts alleged to have been suppressed by the appellant were known to them.

[Para 15] [1146-G; 1147-A]

1.4. Extension of the period of limitation entails both civil and criminal consequences and, therefore, must be specifically stated in the show cause D notice, in absence whereof the Court would be entitled to raise an inference that the case was not one where the extended period of limitation could be invoked. [Para 19] [1149-B, C]

1.5. Appellant as also the Public Sector Undertaking raised a definite plea of bona fide which had not been rejected. As a matter of fact, while E considering imposition of penalty under s. 11 A of the Central Excise Act, 1944 the Commissioner has refused to impose any penalty upon the appellant on the premise that it was not guilty of any act of mala fide. Therefore, in view of the facts and circumstances of this case, the impugned judgment cannot be sustained and is set aside. The Revenue was not justified in invoking the extended period of limitation in the instant case. [Para 20] [1149-D, E]

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P & B Pharmaceuticals (P) Ltd. v. *Collector of Central Excise,* [2003] 153 ELT 14 SC; *Nizam Sugar Factory* v. *Collector of Central Excise, A.P.* [2006] 197 ELT 465 SC; *ECE Industries Limited* v. *Commissioner of Central Excise,* [2004] 13 SCC 719 = [2004] 164 ELT 236; *Commissioner of Central Excise, Chandigarh* v. *M/s. Punjab Laminates Pvt. Ltd.,* [2006] 7 SCC 431, G referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2990 of 2006.

From the Final Order No. A/329/WZB/06/C-III/EB dated 16.02.2006 in Appeal No. E/3634/98-Mum passed by the Customs, Excise and Service Tax H Appellate Tribunal, West Zonal Bench at Mumbai.

N. Venkataraman, S. Nanda Kumar, Satish Kumar, Mayil Samy, Anandaselvam, Renuga Devi and V.N. Raghupathy for the Appellant.

Gopal Subramaniam, ASG., Asheesh Jain and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. An order dated 16.2.2006 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in Appeal No.E/3634/98-Mum., is in question before us. The appellant is a company incorporated under the Companies Act. It undertook a contract for construction of bridges for M/s. Konkan Railway Corporation Ltd. ('Konkan Railway', for short), which is a public sector undertaking. Appellant manufactured Pre Stressed Concrete Girders (PSC Girders). It used to transport them to the site of construction of bridges of the Railways. It did not register itself with the authorities of the Central Excise.

2. Alleging that the appellant, for the period March 1993 and December 1994, although was involved in the manufacturing activity, by undertaking manufacture of 75 PSC Girders, but did not pay any excise duty thereupon.

3. A notice was issued to the appellant directing it to show cause as to why Central Excise duty to the tune of Rs.32,35,575/- should not be demanded and recovered from them in terms of the proviso appended to Rule 49(1) of the Central Excise Rules, 1944 (Rules) read with Section 11A of the Central Excise and Salt Act, 1944 (Act) and as to why penalty should not be imposed on them and the plant & machinery and the manufactured goods should not be confiscated. Cause was shown by the appellant *inter alia* stating that no excise duty was payable. The said notice was withdrawn stating:

> "The said Show Cause Notice has been issued without obtaining approval of the proper authority or by the proper officer. Accordingly, Show Cause Notice dated 27.1.94 hereby withdrawn.
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> The withdrawal of the Show Cause Notice is without prejudice to any action including issue of fresh Show Cause Notice which may be taken against M/s. Konkan Railway Corporation Ltd., Ratnagiri (North), Lanjekar Compound, Phansi Baug, Udyamnagar, Ratnagiri of Central Excise Law or any other law of the time being is force."

A 4. After a long time, namely, on 1.5.1996, another show cause notice was issued on the same premise for the period March 1993 and December, 1994. The extended period of limitation was invoked alleging suppression of fact on the part of the appellant. Appellant herein filed a show cause wherein *inter alia* the question of applicability of the extended period of limitation as contained in the proviso appended to Section 11A of the Act was specifically B raised. The Commissioner of Central Excise, Pune, in his judgment opined that basically following four issues were involved:

"(i) Whether a process of 'manufacture' is involved?

(ii) Whether the girders can be considered as immovable property or C not?

(iii) Whether the girders can be considered as marketable or not and whether exemption under Notification No.59/90 can be extended?

(iv) Whether there was suppression of facts on the part of the noticees so as to invoke extended period?"

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5. It was held that as construction of the bridges consists of many things, including foundation and super structure, manufacture of PSC Girders would come within the purview thereof; and the same would not be immoveable property. It was further held that the longer period of limitation has rightly been invoked as the appellant had suppressed the fact from the department E that the goods in question were excisable articles. It was opined:

"12. As regards penalty on KRCL under Rule 209A, since the manufacturing activity was undertaken by M/s. L & T and there is no evidence of their mala fides in the matter, further they have also F alerted the contracting party about discharge of central taxes etc. as seen from clause 47 of contract, I refrain from imposing any penalty on them.

13. As regards confiscation of 75 Nos. of PSC Girders, though M/s. L & T were given a notice in writing informing them the grounds on G which it is proposed to confiscate the goods and they were also given an opportunity of making a representation within reasonable time against the said proposed confiscation and a reasonable opportunity of being heard in the matter, they only stated that these were not liable for confiscation being permanently embedded in the earth, thus immoveable property. As already held since girders at the earth, they H came into existence were not embedded to the earth, they cannot be

considered as immoveable property and therefore I hold these 75 Nos. of PSC girders liable for confiscation under Rule 173Q read with Rule 226 of CER, 1944." A

6. The appeal preferred thereagainst by the appellant, as noticed hereinbefore, was dismissed by the Tribunal.

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7. Mr. Venkataraman, learned senior counsel appearing on behalf of the appellant would raise two contentions in support of this appeal:

(i) That earlier notice having been withdrawn wherein no allegation of suppression had been made, the same could not have been made in the second notice dated 1.5.1996. C

(ii) In any event, the question as to whether the activities of the appellant would attract excise duty or not having been decided for the first time by a larger Bench of the Tribunal in *Asian Techs Ltd.* v. *Commissioner of Central Excise, Pune-II*, (2005) 189 ELT 420 it was not a case where the extended period of limitation should have been invoked. D

8. Mr. Gopal Subramanium, learned Additional Solicitor General appearing on behalf of the Union of India, on the other hand, would submit:

(i) For construction of the notice dated 27.1.1994, the allegations made therein as a whole must be taken into consideration for the purpose of arriving at a conclusion as to whether a case for suppression had been made out or not. E

(ii) Withdrawal of the first notice per se would not disentitle the Department from issuing another notice as the same had been issued by an officer who had no authority in relation thereto. F

(iii) As the appellant had been seeking exemption from payment of excise duty, suppression of fact on its part must be inferred as it did not get itself registered for the purpose of payment of excise duty.

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9. Whether the activities carried out by the appellant would amount to manufacture or not was a debatable issue. Our attention has been drawn to several decisions of the Tribunal, namely, *Asian Techs Ltd.* (supra), *Rajeswari Enterprises (Constructions) Pvt. Ltd.* v. *CCE, Madurai,* (2005) 180 ELT 66 (Tri. - Chennai), *Tecco* v. *CCE, Madurai,* (2002) 149 ELT 133 (Tri.- Chennai); *Delhi Tourism and Transportation Development Corporation* v. *C.C.E.*, (1999) H

A 114 ELT 421 (Tri.-Delhi)]; *M. Ramachandra Rao* v. *CCE, Guntur,* (2005) 186 ELT 353 (Tr.-Bangalore); *Raghunath Ramachandra Shanbag* v. *CCE, Mumbai-VII,* (2004) 178 ELT 488 (Tr.-Mumbai); and *Gammon India Ltd.* v. *CCE, Goa,* (2002) 146 ELT 173, which held the field at the relevant point of time.

10. Questions involving similar cases came for consideration before the B Tribunal at different points of time. They were answered differently by different Benches.

11. The Tribunal in its order dated 25.4.2003, in the case of *M/s. B.E. Billimoria & Co. Pvt. Ltd.* opined that similar goods manufactured by others do not attract the provisions of the Central Excise Act. It is stated that the C same bench of the Tribunal in its judgment dated 10.5.2004, in *Ragunath Ramchandra Shanbhag* (supra), came to a similar conclusion.

12. During the period in question being 1993-94, no direct decision on the point involved was available. It was noticed that different benches of the D Tribunal in different cases had rendering their decisions differently. In the case of *Billimoria* (supra), it was categorically held that manufacture of PSC Girders would not attract the provisions of Central Excise Act, 1944.

13. Correctness of *Billimoria* (supra) was questioned by another Bench of the Tribunal and the matter was referred to a larger Bench. The larger E Bench in *Asian Techs Ltd.* (supra) relying upon or on the basis of a large number of decisions of this Court opined that the excise duty was payable and the principles of works contract would not be applicable in a case of this nature. We, therefore, accept the contention of the learned counsel that it was not a case where element of suppression extended to apply to extended period of limitation. It is also not a case where the appellant did not plead F *bona fide*. It is furthermore not a case where the Tribunal and consequently this Court, could have arrived at a finding that the appellant took recourse to *suppressio veri*.

14. Acts of fraud or suppression, it is well settled, must be specifically G pleaded. The allegations in regard to suppression of facts must be clear and explicit so as to enable the noticee to reply thereto effectively. It was not the case of the revenue that the activities of the appellant were not known to it.

15. Admittedly, when the first show cause notice was issued, the extended period of limitation was not resorted to. A notice should ordinarily be issued H within a period of six months (as the law then stood) i.e. within the prescribed

period of limitation but only in exceptional cases, the said period could be extended to 5 years. When in the original notice, such an allegation had not been made, we are of the opinion that the same could not have been made subsequently as the facts alleged to have been suppressed by the appellant were known to them.

16. In *P & B Pharmaceuticals (P) Ltd.* v. *Collector of Central Excise*, (2003) 153 ELT 14 SC, this Court held as under:

> "19. However, Mr. Jaideep Gupta submits that the Tribunal did not accept that here has been assignment of logo in favour of the assessee. We are unable to accept the contention of the learned counsel. The tenor of the order, 'the assessee had produced certain documents such as registration form, trade mark authorities assigning the trade mark to them but the fact remains that there was material evidence by way of seizure of goods manufactured by M/s. P & B Laboratories bearing the same logo much after the alleged transfer of trade mark to the appellants" discloses that the Tribunal accepted that there has been an assignment but proceeded to deal with the case of inapplicability of the exemption under the notification on the ground that the logo was being used by M/s. P & B Laboratories also. We have already indicated above that use of logo of the manufacturer by third parties is alien for purposes of denial of exemption on the strength of para 7 of the notification. In this view of the matter, we are unable to uphold the order of the Tribunal denying the exemption to the assessee.
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> 20. In any event, the ground that the assessee has suppressed the fact that M/s. P & B Laboratories was also using the logo for availing the benefit under the notification cannot be a valid reason to invoke the proviso to Section 11A of the Act. There is no obligation on the owner of a logo to make a roving enquiry to ascertain whether any other person is also using his logo and disclose it to the authorities to avert a possible allegation of suppression of fact for purposes of invoking the proviso."

17. Yet again in *Nizam Sugar Factory* v. *Collector of Central Excise, A.P.*, (2006) 197 ELT 465 SC the ratio rendered in P & B Pharmaceuticals Ltd. (supra) has been reiterated stating:

> "Allegation of suppression of facts against the appellant cannot be

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sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

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18. In the said decision, this Court followed the earlier judgment of the Division Bench of this Court in *ECE Industries Limited* v. *Commissioner of Central Excise,* [2004] 13 SCC 719 = (2004) 164 ELT 236, wherein it was categorically stated:

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"6. Appellant was served with a second SCN by the Collector on 16.7.1987 alleging that the appellant was supplying carbon dioxide to another unit as per agreement dated 19.3.1983; that they had not taken necessary licence; had not followed the procedure prescribed under the rules; and had not discharged duty liability. The said SCN covered the period of assessment years 1982-83 to 1986-87. Appellant responded to the second SCN and took the plea that the SCN under consideration was practically a repetition of the allegations contained in the SCN dated 28.2.1984 and for the period April, 1982 to September, 1982 the department had raised demands under two different SCNs. It was pointed out that carbon dioxide in the impure form was not marketable as it also contained carbon monoxide in lethal proportions. It was contended that they were under bona fide belief that since such impure carbon dioxide was not exigible to payment of duty, they were not required to file either Classification List or the Price List or take out licence. It was submitted that resorting to extended period of limitation under Section 11A(1) was not justified in the circumstances of the case. Appellant was served with the third SCN on 12.9.1988 for the period 16.3.1988 to 27.6.1988 on the same allegations. Assessee filed its reply in terms of the earlier replies i.e. reply to SCN dated 16.7.1987. The adjudicating authority did not accept the appellant's contention and the demands raised in the SCN were confirmed.

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8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the

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appeals on the point of limitation only. This Court in the case of *P & B Pharmaceuticals (P) Ltd.* v. *Collector of Central Excise* reported, in [2003] 3 SCC 599 = (2003) 153 ELT 14 (SC) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department........."

19. Furthermore, extension of the period of limitation entails both civil and criminal consequences and, therefore, must be specifically stated in the show cause notice, in absence whereof the Court would be entitled to raise an inference that the case was not one where the extended period of limitation could be invoked.

[See *Commissioner of Central Excise, Chandigarh* v. *M/s. Punjab Laminates Pvt. Ltd.*, [2006] 7 SCC 431]

20. Another aspect of the matter cannot also be lost sight of. Appellant as also the Konkan Railawy raised a definite plea of bona fide. Such a plea had not been rejected. As a matter of fact, while considering imposition of penalty under Section 11A of the Act, the Commissioner has refused to impose any penalty upon the appellant on the premise that it was not guilty of any act of *mala fide*. We, therefore, keeping in view the facts and circumstances of this case, are of the considered view that the impugned judgment cannot be sustained. It is set aside accordingly. We hold that the Revenue was not justified in invoking the extended period of limitation in the instant case.

21. For the reasons aforementioned, the impugned judgment cannot be sustained and it is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeal allowed.