

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.2675-2677 OF 2001

COMMNR. OF CENTRAL EXCISE, VADODARA

Appellant(s)

VERSUS

M/S PIONEER SCIENTIFIC GLASS WORKS ETC.

Respondent(s)

(with application for permission to place addl. documents on record  
and with office report)

Date: 19/04/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Appellant(s)

Mr. Ashok Kr. Panda, Sr. Adv.

Ms. Shalini Kumar, Adv.

Mr. Rupesh Kumar, Adv. for

Mr. P.Parmeswaran, Adv.

For Respondent(s)

Mr. V.M. Doiphode, Adv.

Mr. Rajesh Kumar, Adv.

UPON hearing counsel the Court made the following

O R D E R

The Appeals are dismissed with costs.

(Parveen Kr. Chawla)

Court Master

(Kanwal Singh)

Court Master

[Signed Order is placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.2675-2677/2001

COMMISSIONER OF CENTRAL EXCISE, VADODARA

APPELLANT

VERSUS

M/S PIONEER SCIENTIFIC GLASS WORKS ETC.

RESPONDENTS

O R D E R

This is a batch of three Statutory Appeals which have been filed under

Section 35L(b) of the Central Excise Act, 1944 (for short 'the Act') a  
gainst the

Final Order No. CII/2605, 2609 and 2610 of 2000 dated 25.9.2000 in Appeal

Nos. E/937-R/97-Bom., E/925-R/97-Bom. and E/3279-R/99-Mum passed by

the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench

at Mumbai (for short 'the Tribunal'), whereby the Tribunal has allowed the

Appeals filed by the assesseees-respondents; set aside the order in original and

held that Laboratory Glassware manufactured by the respondents is classifiable

under heading 7012.10 of the Central Excise Tariff Act, 1985 (for short 'the Tariff

Act') and that the extended period of limitation was not available to the

department as all facts had been disclosed by the respondents and were in the

knowledge of the department. It was also held that there was no suppression of

facts by the respondents.

As all these appeals were disposed of by the Tribunal by a common

order, we also propose to dispose them of by passing a common order. For the

sake of convenience, the facts are taken from Civil Appeal No. 2676 of 2001

(Super Scientific Glass Industries).

Respondent-assessee filed declarations in terms of Rule 174 (2) and the

notification issued thereunder, during the period April, 1991 to April, 1995

claiming exemption from licensing control on the ground that the product

manufactured by them was exempted from payment of duty. The fact of filing of

these declarations has been acknowledged by the Commissioner in its order. In

each declaration the products manufactured by the respondent were described as

'Laboratory Glassware' classifiable under sub-heading 7012.10. For the above

years except one the tariff rate of duty under this heading was nil.

In the year 1994, respondent's premises was searched. The sales

literature and the catalogues were examined. Statements of their buyers were

also recorded. The authorities concluded on the basis of the investigation carried

out by them that what the respondent had manufactured and cleared were the

entire industrial units for manufacture of chemicals. It was ascertained that the

buyers had placed orders for such plants. It was claimed that in the

circumstances the goods could not be classified under heading 7012.10 but were

classifiable under the residual entry of tariff heading 7015.00.

M/s Super Scientific Glass Industries was issued three show cause

notices dated 6.6.1995 for duty amounting to Rs. 99,25,875/-; dated 6.12.1995

for Rs.10,35,988/-; and dated 15.3.1996 for Rs.11,13,799.40. Extended period

of limitation was invoked on the ground that the respondent had suppressed the material facts. Respondent filed its reply to the show cause notices controverting the allegations made against it.

The Commissioner after hearing the respondent confirmed the demand of duty amounting to Rs.1,20,75,662.40. Penalty of Rupees five lakhs was also imposed.

Aggrieved against the aforesaid order the respondent-assessee filed appeal before the Tribunal. The Tribunal by the impugned order has set aside the order-in-original on merits holding that the respondent had disclosed all material facts in the declarations filed by it; there was no suppression of facts and in these circumstances the department had erred in invoking the extended period of limitation.

In the classification list filed in the year 1991, the respondent had declared their goods to be 'Laboratory Glassware' covered under heading 7012.10 of the Tariff Act. Respondent also enclosed the list of products manufactured by



		Flange ends etc. of different dia/shapes & length Upto 18" dia.
10	Extractor	Soxhlet, Liquid/Liquid, Liquid/Solid, Upward, Downward of various types, shapes and capacities.
11	Misc. Fittings	Tees, Bends, Reducers, Adaptors, 'Y' types, Hose Connectors, Multineck Fittings, Evaporator, Freez, Drying, Cold Trap, Dewar Nitrogen Determination, Micro, Semi Micro, Vacuum, Guage etc. Burette, Pipette, Graduated & Volumetric Glass Items
12	Units	Distillation, Reaction, Stirring, Fractionation, Esterification, Vacuum Distillation, Refluxing, Evaporation, Determination, Overhead System, etc, of various types/shapes, sizes, capacities design. Upto 200 Ltr. Capacity
13	General	Any Glass Apparatus, Instrument, Equipment, Unit, System, item as per customers drg., specification, catalogue reference, technical journal/book reference, designs, predominately used for Laboratory Pilot Laboratory, Quality Control Laboratory, R & D Laboratory by Chemical/Pharmaceutical/ Drugs and other Industry, Research Institutes, Govt./Semi Govt./Private Laboratories

SUPER SCIENTIFIC GLASS INDUSTRIES"

The Central Excise Tariff Heading, namely 7012.00 and 7015.00 which

are relevant are reproduced below:

"70.12 Laboratory, hygienic or pharmaceutical glassware, whether or not graduated or calibrated

7012.10 - Laboratory glassware

7012.90 - Other glassware

7015.00 Other articles of glass including those of a kind used for table, kitchen, office, indoor decoration or similar purposes (other than that of heading No. 70.07 or 70.13)."

The Tariff Act is aligned to the international system of coding for commodities and their description based on the Harmonized System of Nomenclature (HSN). The alphabetical index to the H.C.D. and C.S. (HSN) for the goods in question distilling apparatus of class indicate that goods can merit classification either under heading No. 7017.00 or 70.20. Heading No. 7017 and 70.20 of HSN correspond to heading Nos. 70.12 and 70.15 respectively of the

Schedule to the Tariff Act. Explanatory Note 70.17 of HSN reads:

"70.17 - LABORATORY, HYGIENIC OR PHARMACEUTICAL GLASSWARE, WHETHER OR NOT GRADUATED OR CALIBRATED.

7017.10 - Of fused quartz or other fused silica

7017.20 - Of other glass having a linear coefficient of expansion not exceeding  $5 \times 10^{-6}$  per Kelvin within a temperature range of 0 degree Celsius to 300 degree Celsius.

7017.90 - Other

This heading covers glass articles of a kind in general use in laboratories (research, pharmaceutical, industrial etc.), including special bottles (gas washing, reagent, Woulf's, etc.), special tubes (gas washing, drying, condensation, filter, gas burettes, test-tubes, etc.), stirrers. Distilling flasks, graduated jars, culture

flasks (Kolle, Roux, etc.), burettes of all kinds, evaporating dishes, volumetric flasks, special bell-jars and receivers (vacuum, necked, etc.), special dropping bottles (calibrated, etc.), retorts, crystallising dishes, drying cylinders, filter plates and discs, spoons, desiccators, dialysers, adapters, condensers, receivers for distillation Apparatus, special funnels (with stop-cock, bulb-shaped funnels, etc.), cylinders, crucibles, filter crucibles, special flasks (conical, multi-necked, etc.), special spirit burners, mortars, weighing boats, pipettes, vacuum vessels of various specialized types (not falling in heading 96.17), wash-bottles, stop-cocks, spatulas, jars (filtering, precipitating, multinecked, etc.) muffles, crucible support plates, microscope slides and cover glasses, etc.

xx

xx

xx

The heading excludes:

(a) Containers for the conveyance or packing of goods (heading 70.10); ordinary curved watch glasses sometimes used in the laboratory (heading 70.15, see the Explanatory Note to that heading); chemists' special display bottles and glassware of a kind used for industrial purposes (heading 70.20).

(b) Glass instruments and appliances of Chapter 90, for example, hypodermic syringes, special cannulae and other articles being medical, surgical, dental or veterinary instruments or appliances (heading 90.18); hydrometers and similar floating instruments, thermometers, pyrometers and barometers of heading 90.25, instruments and apparatus of heading 90.26 (for measuring or checking fluid flow, etc.) and instruments and apparatus for physical or chemical analysis, etc. of heading 90.27."

Explanatory Note 70.20 of HSN corresponding to Entry 70.15 of the Tariff

Act relating to "other articles of glass" reads:

"70.20 - OTHER ARTICLES OF GLASS

This heading covers glass articles (including glass parts of articles) not covered by other headings of this Chapter or of other Chapters of the Nomenclature.

These articles remain here even if combined with materials other than glass, provided they retain the essential character of glass articles. The heading includes:

(1) Industrial articles such as pots, bowls, cylinders or discs for glazing hides or skins; protectors for safety or other apparatus; greasing cups; thread guides; sight-holes and gauge-glasses; S-shaped tubes; coils; guttering and drains for corrosive products (often of fused quartz or other fused silica); absorption drums for hydrochloric acid and trickling columns.

(2) Articles for husbandry (tanks, troughs, etc.) and horticultural appliances (cloches, etc.)

(3) Letters, numbers, sign-plates and similar motifs for shop signs and shop windows, whether or not bearing a printed picture or text (other than those of heading 70.06, 70.09 or 70.14, or of heading 94.05, if illuminated).

(4) Miscellaneous articles such as floats for fishing nets; knobs and handles for doors, cistern chains, etc; pots for water colours; accessories for bird-cages (feeding or drinking troughs, etc.) display bottles for shops; dropping-tubes, spirit burners other than those of heading 70.17, base cups for piano or furniture feet; finished panels and other decorative motifs made from glass mosaic cubes, whether or not framed; life-buoys and life-belts.

The heading also excludes:

(a) Glass knobs, handles and the like, for umbrellas and walking-sticks (heading 66.03)

(b) Insulators and fittings of insulating material

of heading 85.46 or 85.47.

(c) Instruments, appliances and other articles of Chapter 90.

(d) Articles of Chapter 91 (e.g., glass clock cases, other than merely protective covers).

(e) Musical instruments, and parts and accessories therefor, of Chapter 92 (e.g. tuning forks of fused silica).

(f) Glass furniture, and parts thereof clearly recognisable as such (Chapter 94).

(g) Toys, games, Christmas tree decorations, fishing or hunting requisites and other glass articles of Chapter 95.

(h) Glass articles of Chapter 96 (e.g., buttons; pen-holders; pencil-holders; pen nibs; lighters; scent sprays; vacuum flasks and other vacuum vessels, complete with cases).

(i) Antiques, being articles of an age exceeding 100 years (heading 97.06)."

From the reading of the Explanatory Note 70.17 of the HSN it is apparent

that it covers glass articles of a kind in general use in the laboratories including

the ones enumerated there and excludes the containers for the conveyance or

packing of goods; ordinary curved watch glasses sometimes used in the laboratory

and special display bottles and glassware of a kind used for industrial purposes.

It also excludes glass instruments and appliances of Chapter 90. Explanatory

Note 70.20 of HSN corresponding to Entry 70.15 of the Tariff Act relating to "other

articles of glass" covers glass articles not covered by other headings of this Chapter

or other Chapters of the Nomenclature. It also includes industrial articles

articles for husbandry, letters, numbers, sign-plates and similar motifs for shop

signs and shop windows and miscellaneous articles such as floats for fishing nets;

knobs; handles; cistern chains etc. for water colours, spirit burners other than

those of heading 70.17 and excludes certain articles which are covered under

other headings of the Tariff Act.

In the background of the list of items manufactured by the respondent as

per its declaration under Rule 173(b) has to be examined. It will be seen that

certain items manufactured by the respondent are specifically covered by the list of

articles, which have been given in the HSN as articles of a kind in general use in

laboratories. These articles are adapters, stopcocks, flasks; special tubes like

condensation tubes, condensers, stirrers, and various types of valves, distillation apparatus. Respondents obtain borosilicate glass tubing/laboratory Glassware which is cut, ground, softened, shaped, fused and graduated to make laboratory glassware and apparatus. According to HSN the Laboratory Glassware is frequently made of borosilicate glass, fused quartz or other used silica because of the greater chemical stability and low coefficient of expansion of such glass. In this context it is clear from the respondent's declaration given for the purpose of Notification No.13/92, wherein it has been stated that the starting material is duty paid/exempted borosilicate glass tubing while giving information against column 9 of the declaration giving the process of manufacture. The respondent's products satisfied the HSN guideline for the Laboratory Glassware in respect of the material of which it is made, which itself would qualify the product to be classified under 70.17 HSN or corresponding to 70.12 of the Tariff Act. The parameters of being made out borosilicate glass and linear coefficient expansion of distinguish Laboratory Glassware from other articles of glass and the appellant's product fulfils that criteria.

Apart from giving the list of individual products such as joint

s, flasks

etc., in their declarations the respondents had also declared "units". This

description covered fully functional pieces of machinery used for distillation,

fractionation etc. The Commissioner held against the respondents in the belief

that a complete unit capable of manufacturing products would cease to be

Laboratory Glassware falling under 70.12 and, therefore, must necessarily fall

under 70.15. Tribunal is right in observing that the individual pieces or parts

which could together form a complete unit are specifically listed as being included

in the HSN heading 70.17. The products excluded are "glassware of a kind used

for industrial purposes (heading 70.20)". The finding recorded by the

Commissioner that wherever any glassware is used for industrial use would cease

to classify as Laboratory Glassware cannot be accepted. Tariff entry 70.15 is a

residuary heading and cannot be resorted to unless a product is incapable of

falling under any of the predecessor headings. What is included in this residuary

entry is specified in the sub-notes. The specific products includable in the

residuary category would not cover Laboratory Glassware falling under headin

70.12. Heading 70.17 in the HSN does not keep out Laboratory Glassware merely

because it is put together in a single unit nor does the residuary heading admit

this inclusion. We agree with the finding recorded by the Tribunal that the

Laboratory Glassware manufactured by the respondents would not fall under tariff

entry 70.15.

Apart from merits, Tribunal has also recorded a finding in para 9 of its

order that the respondents had not suppressed any fact from the Department.

Assessee in its various declarations which were received and acknowledged by the

Department had declared the fact that they were manufacturing complete units as

well. When this fact was in the knowledge of the Department, the allegation as to

suppression can not be made. Demand made on the ground of suppression of

facts by the assessee by the Department therefore cannot be sustained. We agree

with the finding of the Tribunal that the respondents are not guilty of suppression

of any facts. In the declaration made by the respondents and from the list of

articles attached with the declaration clearly show that the respondent had

declared all the relevant facts. The Department after due enquiry had approved

the classification list. At a later date the Department could not allege that there

was a suppression of facts. This Court in M/s. Pushpam Pharmaceuticals vs.

Collector, 1995 (78) ELT 401, interpreted the expression 'suppression of facts'

occurring in the proviso to Section 11A of the Excise Act and held that where facts

are known to both the parties, the omission by one to do what he might have done

and not that he must have done does not render it to be suppression of fact. The

act has to be deliberate and not merely an omission. The suppression can be

inferred only if the correct information was not disclosed deliberately to escape

payment of duty. It was observed in para 4 as under:-

"4. Section 11A empowers the Department to reopen proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it

has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

In order to make the payment for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise was not levied or paid or short-levied or short-paid or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provisions of the Act or Rules made thereunder, with the intent to evade payment of duty. The act of withholding by the assessee has to be positive and deliberate to withhold the information to escape from payment of duty before it is saddled with any liability beyond the period of six months.

liniments [1989 (4) ELT 276(SC)] has observed as under:

".....Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself

as being based on no evidence.

9. In that view of the matter and in view of the requirements of Section 11A of the Act, the claim had to be limited for a period of six months as the Tribunal did. We are, therefore, of the opinion that the Tribunal was right in its conclusion. The appeal therefore fails and is accordingly dismissed."

For the reasons stated above, we find that the assessee had disclosed all

the relevant facts and where the facts were already known to both the parties the

omission by one to do what he might have done by itself does not render or

amount to suppression of facts.

Accordingly, we dismiss these appeals with costs.

.....J.

[ASHOK BHAN]

NEW DELHI; .....

APRIL 19, 2006 [MARKANDEY KATJU]