ÒITEM NO.104 COURT NO.4 SECTION III

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

RECORD OF PROCEEDINGS

CIVIL APPEAL NO.2747/2001

M/S NIZAM SUGAR FACTORY Appellant(s)

VERSUS

COLLECTOR OF CENTRAL EXCISE, A.P. Respondent(s)

(with office report)

WITH

S.L.P.(C) NOS.9271-9278/2003

(with application for c/delay in filing SLP and with prayer for interim relief)

CIVIL APPEAL NO.6261/2003

(with application for ex-parte stay and with office report)

CIVIL APPEAL NO. 3017/2004

(with application for stay)

Date: 20/04/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Appellant(s)

in CA 2747/2001 Mr. J.V.Suryanarayana,Sr. Adv.

Mr. S.Udaya Kumar Sagar, Adv.

Ms. Bina Madhavan, Adv.

Mr. A.Venyagam, Adv.

in CA 6261/2003

Mr. A.P.Mathur, Adv.

Mr. Rajesh Kumar, Adv.

For Respondent(s)

in CA 2747/01, Mr. K.Radhakrishnan, Sr. Adv.

6261/03 and Ms. Shilpa Singh, Adv.

For Appellant(s) Ms. A.Sahani, Adv.

in SLP 9271-78/03

and CA 3017/2004

For Respondent(s) Mr. Alok Yadav, Adv.for

in CA 3017/2004 Mr. M.P.Devanath, Adv.

For Respondent(s) Mr. Devan Parikh, Adv.

in SLP 9271-78/03 Mr. Siddharth Bhatnagar, Adv.

Mr. R.N. Karanjawala, Adv.

Ms. Nandini Gore, Adv.

Ms. Pragya Singh, Adv.

Mr. D. Banerjee, Adv.

Mr. Jayant Mohan, Adv.for

Ms. Manik Karanjawala, Adv.

UPON hearing counsel the Court made the following

O R D E R

Delay condoned and Leave granted in SLP(C) Nos.9271-9278/2003.

For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal

No.6261 of 2003 filed by the assesses are accepted and the impugned orders are set aside on

the question of limitation only. The demands raised against them as well as the penalty, if a ny,

are dropped. Civil Appeals @ Special Leave Petition (C) Nos.9271-9278 of 2003 filed by th e

department are dismissed. Questions of classification and marketability are left open . Parties

shall bear their own costs.

Civil Appeal No. 3017 of 2004 is dismissed. No costs.

(Parveen Kr. Chawla) (Kanwal Singh)

Court Master Court Master

[Two separate Signed Orders are placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2747/2001

M/S NIZAM SUGAR FACTORY APPELLANT

VERSUS

COLLECTOR OF CENTRAL EXCISE, A.P. RESPONDENT

WITH

CIVIL APPEAL NO. 6261 OF 2003

AND

CIVIL APPEAL NO.2164 OF 2006

@ SLP(C) NOS.9271-9278 OF 2003

O R D E R

Delay condoned and Leave granted in SLP(C) Nos.9271-9278/2003.

This order shall dispose of Civil Appeal Nos. 2747 of 2001, Civil Appeal No. 6261 of 2003 filed by the assessees and the Civil Appeals @ Special Leave Petition(C) Nos.9271-9278 of 2003, filed by the revenue. The point of law canvassed is common in these appeals.

Civil Appeal No. 2747 of 2001 and Civil Appeal No.6261 of 2003 have been filed under Section 35L(b) of the Central Excise Act, 1944 (for short 'the Act') against the final order No. 326/2000 dated 19.7.2000 and final Order No. 462/2002-A dated 24.9.2002 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in Appeal No.E/801/89C and Appeal No. E/1250/2002-A whereby the Tribunal dismissed the Appeals filed by the assessee whereas the Civil Appeals @ Special Leave Petition (C) Nos.9271-78 of 2003 have been filed by the Revenue against the final order No. CI/2019-26/WZB/2002 dated 23.7.2002 passed by the Tribunal in Appeal No. E149 to 153 and 447 to 449/2001-Mum. whereby the Tribunal allowed the appeals filed by the respondents.

The facts are stated from Civil Appeal No.2747 of 2001 (M/s Nizam Sugar Factory).

The Department had issued a Show Cause Notice (for short 'the SCN') to the appellant on 28.2.1984 demanding duty for the period February, 1978 to September, 1982 on the production of impure Carbon dioxide emanating as a by-product during the process of fermentation of molasses in the appellants' factory. It was alleged that the assessee had cleared the said carbon dioxide without payment of duty to another unit in contravention of Rule 9(1) of the Central Excise Rules, 1944 (for short 'the Rules') and without obtaining licence for manufacture of carbon dioxide in their factory; without filing Classification/Price List and without maintaining accounts. Appellant in its reply dated 19.3.1994 relying on some earlier decisions contended that impure carbon dioxide was not exigible to duty. The case was heard on 16.4.1984 and thereafter no further action was taken in the matter.

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.

Aggrieved against the aforesaid orders of the adjudicating authority, the appellant filed appeals before the Tribunal relating to the second and third SCNs which were clubbed together and disposed of by a common order. The Tribunal did not record any finding regarding the marketability but held that the impure carbon dioxide emanating as a by-product during the process of fermentation of molasses would be covered under Chapter heading No. 28.11 of Central Excise Tariff Act, 1986 (for short 'the Tariff Act'). Counsel for the appellant had contended before the Tribunal that in a case where the Department issued a show cause notice on the basis of certain set of facts to an assessee, then, it cannot allege in another show cause notice issued subsequently for a later period, suppression on the part of the assessee as it was fully aware of the facts even at the time of the issuance of the first show cause notice. Extended period of limitation could not therefore be evoked. In support of this contention reliance was placed upon the following six judgments of the Tribunal viz. Hindustan

Development Corporation Ltd. vs. CCE [1990 (50) ELT 165(T)]; Khatao Makanji Spg. & Wvg. Co. vs. CCE, Bombay [1999 (108) ELT 378 (T)]; Sonarome Chemicals Pvt. Ltd. vs. CCE, Bangalore [1998 (101) ELT 328(T)]; Mettur Chemical & Indus. Corpn. Ltd. vs. CCE, Coimbatore [1996 (87) ELT 114(T)]; Wipro Information Technology vs. CCE Bangalore [1999 (107) ELT 467(T)]; and Nicholas Piramal India Ltd. vs. CCE, Mumbai [1998 (101) ELT 314(T)].

Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. vs. 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. It was observed in para 14 as follows:

"14. We have indicated above the facts which make it clear that the question whether M/s.

Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s.

Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."

This judgment was followed by this Court in the case of ECE Industrie
s

Limited vs. Commissioner of Central Excise, New Delhi reported in (2004) 13 SCC 719 = 2004 (164) ELT 236(SC). In para 4, it was observed:

> "4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. vs. Commissioner of Central Excise, Hyderabad reported in [2004 (166) ELT 151(SC)]. It was observed in para 6:

> ".......... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and / or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore,

the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."

Allegation of suppression of facts against the appellant cannot be 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.

For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No.6261 of 2003 filed by the assessees are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals @ Special Leave Petition (C) Nos.9271-9278 of 2003 filed by the department

are dismissed. Questions of classification and marketability are left open.

Parties shall bear their own costs.

....J.

[ASHOK BHAN]

NEW DELHI; ....J.

APRIL 20, 2006 [MARKANDEY KATJU]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3017 OF 2004

COMMISSIONER OF CENTRAL EXCISE, JALANDHAR APPELLANT

VERSUS

M/S ROYAL ENTERPRISES, KAPURTHALA RESPONDENT

O R D E R

This is a statutory appeal under Section 35L(b) of the Central Excise

Act, 1944 against the judgment and order dated 22.07.2003 passed by the

Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short 'the

Tribunal') in final Order No. 342/2003-NB(A) in Appeal No. E/395/2003-NB (A).

In this case parties addressed only on the point of limitation. It was contended before the adjudicating authority as well as the Tribunal that the department could not invoke the extended period of limitation as all facts were already to the knowledge of the department. On this the Tribunal in para 6 has recorded the following finding:

> "6. It is clear that details of the appellant's fabrication work for Railway Coach Factory including supply of raw material by the Coach Factory were known to the Revenue authorities for quite some time. As early as 1992, the appellant's contracts, sales invoices etc. relating to his work for Railway Coach Factory had been summoned and obtained by the Revenue authorities. All these contracts indicated issue of raw materials by the Railway Coach Factory to the appellant upon the appellant executing bank guarantee. The orders for fabricating bottom side wall sheet was also on the same basis. Order number were being indicated in the invoices under which the goods were cleared. It would appear that a mere look at the rates for fabrication should have alerted the excise authorities to the fact that such a low rate (Rs.590/- per set etc.) could not include the cost of raw materials. Be that as it may, this is not a case where a charge of suppression of facts with intent to evade

payment of duty could reasonably be made. If reasonable care had been taken by the Revenue authorities to scrutinize the contracts and other documents produced, they would have known in time that fabrication charges alone was being treated as assessable value. May be, Revenue was also of the opinion that fabrication charges alone was liable to duty. In either case, fault is not of the appellant. Relevant facts had been disclosed."

This Court, in the case of Collector of Central Excise vs. C hemphar Drugs & Liniments [1989 (40) ELT 276 (SC)], has held that 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 has not been paid or levied or short-paid or short-levied 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 intent to evade payment of duty. It was observed:

"..........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."

Similarly, in the case of Pushpam Pharmaceuticals Company vs. Collector

of Central Excise, Bombay [1995 (78) ELT 401(SC)], it was held that mere omission to disclose the correct information would not amount to suppression of facts unless there was a deliberate attempt made to escape the payment of duty. Where facts are known to both the parties it cannot be held that there was suppression of facts. It was observed in para 4 as follows:

> "4. Section 11A empowers the Department to re-open 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."

We agree with the view taken by the Tribunal that there was no suppression of facts on the part of the respondent-assessee and the department was not entitled to invoke the extended period of limitation. Accordingly, this appeal is dismissed. No costs.

....J.

[ASHOK BHAN]

NEW DELHI;

....J.

APRIL 20, 2006

[MARKANDEY KATJU]