A M/S. TAMIL NADU HOUSING BOARD

v.

THE COLLECTOR OF CENTRAL EXCISE, MADRAS AND ANR.

SEPTEMBER 28, 1994

B [R.M. SAHAI AND N. VENKATACHALA, JJ.]

Central Excises and Salt Act. 1944 :

Proviso to S.11A—Scope of—Exception to principal clause—Existence C *of situations visualised such as fraud, collision coupled and intention to evade payment of duty—Both must concur with invoking the exceptional power under the proviso—Initial burden on the department—Once material is brought in by the Department to show assessee's guilt onus shifts on the assessee.*

D **The appellant Board, a statutory body, obtained registration under the Factories Act for a concrete unit and a wood unit, both manufacturing finished products. While the items manufactured in the Wood working unit were exclusively used in the buildings constructed by the Board, the finished products manufactured in the concrete unit were sold to out-** E **siders. Licence was obtained for the concrete unit and not for the Wood Unit, as allegedly the appellant was advised that no licence was needed for it.**

The officers of the Central Excise Department visited the premises and issued a show cause notice. In reply the appellant stated that there F **was no suppression of facts nor there was an intention to evade payment of duty. This was rejected. In appeal the Customs, Excise and Gold (Control) Appellant Tribunal held that even though the manufacture of wood products was for captive consumption yet the claim of the appellant that it was not required to take any licence, was not correct as it was** G **carrying on manufacturing activity. The plea of honest belief on the basis of alleged consultation with the Excise authorities was rejected. It also drew an inference that though the appellant was non- profit making body, it could not be held that it did not intend to evade payment of duty.**

Against the Tribunal's order, the Board preferred the present ap- H **peal.**

Allowing the appeal, this Court A

HELD : 1. A bare reading of the proviso to Section 11A of the Central Excises and Salt Act, 1944 indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally. [65-F, G] B C

2. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'. [65-H, 66A] D E

Padmini Products v. *Collector of Central Excise*, **(1989) 43 E.L.T. 195 relied on.**

3. In the instant case, it would have been better if the appellant examined the officer who was advised not to take licence. But mere non-examination of the officer could not give rise to an inference that the appellant was intentionally evading payment of duty. When the appellant was found not to have been making any profit and it had taken out licence for concrete unit then in the absence of any other material to prove any deliberate act of the appellant the presumption of reasonable doubt of the appellant cannot be said to have been successfully rebutted. The finding of the Tribunal that there was an intention on the part of the appellant to evade payment of duty, is not based on any material. It was an inference drawn for which there was no basis. [66-C, D] F G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. H

A 2081(NM) of 1986.

From the Judgment and Order dated 15.1.86 of the Central Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi in A. No. ED (SB) A. No. 2284/85-D.

B A.K. Ganguli, A. Mariarputham and Ms. Aruna Mathur for the Appellant.

M. Chandershekar, Additional Solicitor General, Pradeep Kumar Jain, V.K. Verma and P. Parmeswaran for the Respondents.

C The following Order of the Court was delivered :

This Appeal filed by a statutory body, registered under the Factories Act, raises an important question of law relating to scope of the proviso to Section 11A of the Central Excises & Salt Act, 1944 (in brief 'the Act').

D The Board obtained registration under the Factories Act, 1948 for two units, one, a concrete unit and other wood unit. Both the units manufactured finished products. But the wood frames, shutters etc. manufactured in the Wood Working Unit were not sold. They were fixed in the buildings constructed by the Board. Licence under the Act was E obtained for the concrete unit as the finished products manufactured in this unit were sold to outsiders. But no licence was obtained for the Wood Unit as the appellant was advised that no licence was needed for the wood unit. The officers of Central Excise Department visited the premises on 11th May, 1984. On 29th June 1984 notice to show cause under Rule 173 F of the Central Excise Rules, 1944 was issued. In reply one of the objections, amongst others, raised was that there was no suppression of facts nor there was any intention to evade payment of duty and the notice issued was liable to be quashed on this ground alone. The objection was rejected. In appeal it was held by the Tribunal that the appellant had taken a licence for manufacturing concrete products, as sale of them was made even to G outsiders. But in respect of wood products it held that even though the manufacture was for captive consumption yet the claim of the appellant that it was not required to take any licence, was not correct as it was carrying on manufacturing activity. The plea of honest belief was not accepted as there was no proof that it acted with normal diligence. It was H further held that the Board failed to produce any person in-charge of

Wood Working Unit who consulted the Excise Authorities, as claimed by the appellant, and assured that the wood manufacturing unit was not exigible to any duty. From these, an inference was drawn that even though the appellant was a non-profit making body it could not be held that it did not intend to evade payment of duty.

Section 11A of the Act empowers the Central Excise Officer to initiate proceedings where duty has not been levied or short-levied within six months from the relevant date. But this period to commence proceedings under proviso to the Section stands extended to five years if the duty could not be levied or it was short-levied due to fraud, collusion, wilful misstatement or suppression of facts etc. The proviso to Section 11A reads as under :

> "Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder, with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months", the words "five years" were substituted."

A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the

A duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law. In *Padmini Products* v. *Collector of Central Excise*, (1989) 43 E.L.T. 195, it was held that where there was scope for doubt B whether case for duty was made out or not the proviso to Section 11A of the Act would not be attracted. The appellant is a statutory body. It had taken out licence for concrete as it was being sold to outsiders. No licence was taken out for wood products as according to it it was advised so by the Excise Department itself. It would have been better if the appellant C would have examined the officer who was advised not to take licence. But mere non-examination of officer could not give rise to an inference that the appellant was intentionally evading payment of duty. When the appellant was found not to have been making any profit and it had taken out licence for concrete unit then in absence of any other material to prove D any deliberate act of the appellant the presumption of reasonable doubt of the appellant cannot be said to have been successfully rebutted. The finding of the Tribunal that there was an intention on the part of the appellant to evade payment of duty, is not based on any material. It was an inference drawn for which there was no basis.

E In the result, this appeal succeeds and is allowed. The order passed by the Tribunal is set aside and the notice issued by the Department for levy of duty and penalty shall stand quashed. There shall be no order as to costs.

G.N. Appeal allowed.