

COLLECTOR OF CENTRAL EXCISE, JAIPUR

A

v

ALCOBEX METALS

MARCH 12, 2003

[SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.]

B

Central Excises and Salt Act, 1944

S.11 A(1), Proviso—Show cause notice—Authority competent to issue Show cause notice issued by Deputy Collector Central Excise invoking proviso to s.11-A(1) for extended period—Assessee challenging the notice as invalid—Held, Proviso to s.11-A(1) postulates satisfaction of the Collector on the question of fraud, collusion, or wilful mis-statement or suppression of fact or contravention of the Act and the Rules made thereunder for invoking a larger period of five years—During the relevant period such a notice could have been issued only by the Collector, Central Excise—Notice issued by Deputy Collector is wholly without jurisdiction—Even for shorter period notice based on the grounds contained in the proviso could be issued only by the Collector—Contention to treat the show cause notice for shorter period of six months cannot be accepted—Central Board of Excise and Customs, Circular No.8/87—CX-1 dated July 21,1987—Notice—Issuing authority.

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Collector of Central Excise v. Oil and Natural Gas Commission, (1998) 103 E.L.T. 3, relied on.

Collector of Central Excise, New Delhi v. M/s. Frick India Limited, [2003] 4 SCC 634, followed.

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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4230-4231 of 1996.

From the Judgment and Order dated 25.3.1991 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in A. No. E/2488/89-NRB in F.O. No. Misc/59/90-NRB and A/182/91-NRB.

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T.L.V. Iyer, Sanjiv Sen and B. Krishna Prasad for the Appellant.

A.R. Madhav Rao, Alok Yadav and V. Balachandran for the Respondent.

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A The following Order of the Court was delivered :

SYED SHAH MOHAMMED QUADRI. J. The short point that arises in these appeals by the Revenue, against the order of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, is whether show cause notice dated March 6, 1998 issued by the Deputy Collector, Central Excise, Jaipur, invoking proviso to Section 11-A of the Central Excise Act, 1944 is valid in law?

C The respondent-assessee manufacturers goods of copper and copper alloys. Shells and blanks manufactured by it were cleared without payment of excise duty and were captively consumed as in manufacture of pipes and tubes during the period March 1, 1981 to December 5, 1985. The Deputy Collector, Central Excise, Jaipur, issued notice to the assessee on March 6, 1986 invoking the proviso to Section 11-A of the Central Excise Act, 1944 (for short, 'the Act') to show cause why duty amounting to Rs. 11,83,19476.94 leviable on shells and blanks for the period between March 1, 1981 to D December 5, 1985 should not be recovered, seized goods should not be confiscated and penalty should not be imposed. In reply, the assessee, *inter alia*, challenged the validity of the notice to show cause issued by the Deputy Collector, Central Excise, Jaipur. By his order dated April 12, 1989, the Collector, Central Excise Jaipur, upheld the validity of the said notice, partly E upheld the demand of duty, ordered confiscation of seized goods and imposed a penalty of Rs. 25 lakhs. The order of the Collector upholding the validity of the said show-cause notice dated March 6, 1986 was assailed before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (for short, 'the Tribunal'). On March 25, 1991, the Tribunal, by majority, held the show cause notice to be invalid. It is from that order of the Tribunal that the F present appeals have arisen.

Mr. T.L.V. Iyer, learned senior counsel appearing for the appellant-Revenue, contends that even if the notice is held to be invalid for the extended period under the proviso, it has to be treated as valid for the shorter period of six months.

G To appreciate the contention of the learned counsel, it will be useful to read Section 11-A of the Act, as it stood at the material date, insofar as it is relevant here :

H "11-A Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded - "When any duty of excise has

not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

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 mis-statement 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', for the words 'six months', the words 'five years' were substituted.

Explanation-Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be."

From a perusal of the aforementioned section, it is clear that a Central Excise Officer is empowered to issue notice to the person chargeable with the duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded within six months from the relevant dated requiring him to show cause why he should not pay the amount specified in the notice. The proviso enables the Collector of Central Excise to issue such a notice in respect of a period of five years instead of six months, if the non-levy or non-payment or short-levy or short-payment or erroneous refund was by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with an intent to evade payment of duty by such persons or his agent. It is obvious that at the material date, the authority to issue the notice to show cause under the proviso to Section 11-A of the Act, was the Collector of Central Excise.

Admittedly, the impugned notice was issued by the Deputy Collector, Central Excise invoking the proviso to Section 11-A for the extended period which postulates satisfaction of the Collector on the question of fraud, collusion or wilful mis-statement or supersession of fact or contravention of any

- A provisions of the Act and the Rules made thereunder for invoking a larger period of five years, i.e., from March 1, 1981 to December 5, 1985. It follows that such a notice could have been issued only by the Collector, Central Excise as such the impugned notice issued by the Deputy Collector is wholly without jurisdiction. This is the view taken by a Bench of two learned Judges of this Court in *Collector of Central Excise v. Oil and Natural Gas Commission*, (1998) 103 E.L.T 3. This position is not seriously disputed by the learned senior counsel.

- C The contention that the impugned notice be treated as valid in regard to shorter period of six months is devoid of merit. Once the notice is issued under the proviso for the larger period, it cannot be treated as notice under main Section 11-A for shorter period of six months To enable this Court to ascertain the content of the impugned notice issued to find out whether it is severable as contended by the learned counsel, time was granted to the Revenue to produce a copy thereof. In spite of the fact that a period of about eleven months has elapsed from the last date of hearing, a copy of the notice has not been produced. A perusal of the order of the Collector shows that he recorded the finding of suppression of fact. Even for shorter period notice based on the grounds contained in the proviso could be issued only by the Collector, therefore, the contention to treat the show cause notice for shorter period of six months cannot be accepted. This point was considered by a three-Judge Bench of this Court in the case of *Collector of Central Excise, New Delhi v. M/s.Frick India Limited* in Civil Appeal Nos. 4421-4422 of 2000 on December 14, 2000 wherein the judgment in *Oil and Natural Gas Commission* (supra) was confirmed and central instructions of August 1987 were also referred to.

- F We may now advert to the Circular issued by the Central Board of Excise and Customs, Circular No. 8/87-CX-I dated July 21, 1987 here. It seems a doubt was entertained by the excise authorities as to the validity of the notice issued by an authority lower in rank than the Collector necessitating issuance of the Circular which reads as under:

- G **“Interpretation of amended Section 11-A of the Central Excises & Salt Act, 1944 - Regarding.**

- H A reference is invited to the amendment carried out in Section 11-A of the Central Excises & Salt Act, 1944 by the Amendment Act of 1985. In terms of the amended section, in cases where short levy etc. has occurred by reason of fraud, collusion etc., it is provided that instead of a ‘Central Excise Officer’, the ‘Collector’ may, within

five years From the relevant date, serve notice on the person chargeable to duty which has not been levied or paid etc. A

2. A doubt has been raised as to whether the proper officer for serving the show-cause notice and deciding cases where, the period involved is below six months, but fraud, collusion, mis-statement of fact etc. are alleged, would be the Collector, or the Assistant Collector of Central Excise in terms of the amended Section 11-A. The matter has been examined in consultation with the Law Ministry. The relevant portion of the opinion of the Law Ministry is reproduced below :- B

‘Where the non-levy, short levy, erroneous refund etc. is due to fraud, collusion etc. the case will fall in the proviso to Section 11-A(1) and not in main sub-section of Sec. 11-A(1). The period of limitation and the authority competent to issue the notice will be the ones provides in the proviso. If fraud etc. is the ground for issue of notice, the Competent Authority to issue such a notice would be the Collector of Central Excise irrespective of the fact whether the notice is issued within six months or thereafter.’ C D

3. The Board has accepted the aforesaid opinion of the Law Ministry. Action in such matters may be taken in accordance with the said law Ministry’s opinion.”

A perusal of the above-mentioned Circular shows that the Central Board of Excise and Customs also expressed the same view. E

We, therefore, do not find any reason to interfere with the order under challenge. The Civil Appeals are accordingly dismissed with costs.

R.P.

Appeals dismissed. F