A M/S. DUNCANS INDUSTRIES LTD., CALCUTTA

v.

COMMISSIONER OF CENTRAL EXCISE, NEW DELHI

AUGUST 22, 2006

B [ASHOK BHAN AND MARKANDEY KATJU, JJ.]

Central Excise Act, 1944—Sections 35E(2) and 11-A—Deletion of demand of duty short paid and levy of penalty—Show cause notices alleging
C *contravention of duty, one by Assistant Collector and other by Commissioner—Final adjudication of two notices by Assistant Collector, assessable value determined and demand raised—Thereafter, adjudication of second show cause by Commissioner, demand of duty short paid and penalty levied—Tribunal set aside duty liability as already been adjudicated in the earlier proceedings however, penalty levied upheld—On appeal held:*
D *Department could invoke right of appeal against the order u/s 35 E(2) or issue short levy notice u/s 11-A—Options having not invoked, order attained finality—Further, matter settled under the 1998 Scheme—Also no finding that goods removed clandestinely without assessment—Thus, determination of duty liable and levy of penalty do not arise—Kar Vivad Samadhan Scheme, 1998.*

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Assessee is engaged in manufacturing of cigarettes. Dispute arose as to whether excise duty was leviable on manufacturing cost plus manufacturing profit and post manufacturing cost and profits arising from post manufacturing operations. Provisional assessments were made from July, 1973 to February,
F **1983. Assistant Collector of Central Excise, Calcutta issued show-cause notice dated 8.5.1984 to the assessee for the period July, 1973 to February, 1983 alleging contravention of the central excise duty in respect of cigarettes manufactured and cleared from the factory. Collector of Central Excise, Delhi issued another show-cause notice on 1.10.1986 to the assessee for the period September, 1981 to February, 1983 alleging that the assessee had willfully**
G **mis-declared assessable value of cigarettes. Collector of Central Excise, Delhi passed an order directing the Assistant Collector, to make final assessment in the case taking into consideration the material contained in the show cause notice dated 1.10.1986. Assistant Collector Central Excise then issued addendum incorporating the contents of the show-cause notice dated 1.10.1986**

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in the show cause notice dated 8.5.1984. Thereafter, the Assistant Collector finally adjudicated the two show cause notices, determined the assessable value finalized assessments for the entire period, raised demand. On 3.7.1996 Assistant Collector Central Excise issued show cause cum demand notice quantifying the amount of short levy for the period. The same was confirmed on adjudication. Aggrieved assessee filed an appeal. Commissioner remanded the matter to the Assistant Collector Central Excise who recomputed the amount of duty short paid after adjusting pre-deposited amount. After finalization of the proceedings, Commissioner of Central Excise took up show-cause notice dated 1.10.1986 for adjudication and determined Rs. 17.67 crores due as duty liability and imposed a penalty of Rs. One crore. On appeal the tribunal set aside the duty liability as it had already been adjudicated in the earlier proceedings but upheld the levy of penalty. Hence the present cross appeals.

Disposing of the appeals, the Court

HELD: 1.1. For the period September, 1981 to February, 1983, the Commissioner of Central Excise, Delhi passed the order directing the Assistant Commissioner Central Excise, Calcutta to determine the assessable value taking into consideration the materials contained in show cause notice dated 1.10.1986. Thereafter, Assistant Collector Central Excise, Calcutta issued addendum incorporating the allegations made in show cause notice dated 1.10.1986 in the show-cause notice dated 8.5.1984. The effect of the order passed by the Commissioner of Central Excise, Delhi was that the Assistant Collector Central Excise alone had the jurisdiction to finally adjudicate and determine the assessable value of the goods cleared from the assessee's factory for the entire period and the consequent duty liability. The two show-cause notices were finally adjudicated by the Assistant Collector Central Excise on 11.01.1996. The assessable value was determined and consequent demand raised by finalizing assessments for the entire period July 1973 to February, 1983. If the revenue was aggrieved by the above proceedings it was incumbent upon them to either invoke the right of appeal against that order under Section 35 E (2) of the Central Excise Act, 1944 or issue a short levy notice under Section 11-A of the Act within six months. Neither of these two options having been invoked, the order attained finality as against the revenue. [868-E-H; 869-A-C]

1.2. There could not be two assessments for the same period. This apart, after the grant of certificate under the Kar Vivad Samadan Scheme, 1998 as

having settled the dispute and payment of the amount determined no further proceedings could be initiated or proceeded with for the period in question. Thus there is no substance in the appeals filed by the Revenue and are set aside. [870-B-D]

Union of India **v.** *Godrej & Boyce Mfg. Co. (Pvt) Ltd. Civil Appeal No.* **12824 of 1989 decided on 8.3.90 and** *Hira Lal Hari Lal Bhagwati* **v.** *CBI.* **[2003] 5 SCC 257, referred to.**

2. There is not even an allegation much less finding by the department that there has been any clandestine removal of goods without assessment. As such the penalty is liable to be set aside. The matter having been settled in the Kar Vivad Samadan Scheme, 1998 the question of determination of the duty payable or levy of penalty did not arise. [870-G-H; 871-A]

N.B. Sanjana **v.** *Elphinstone Spg. & Wvg Mills Co Ltd.,* **[1971] 1 SCC 337, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 754 of 2001.

From the Order No. 829 & 830/2000-A dated 4.10.2000 of the Customs, Excise and Gold (Control) Appellate Tribunal, (West Block, Bench-A) New Delhi in Appeal No. E/1622/99-A.

WITH

C.A. Nos. 4075-4076 of 2001.

Joseph Vellapally, U.A. Rana, Prashant Thakur, Raghvesh Singh and Srabonee Roy for (Gagrat & Co.) for the Appellant.

Mathai M. Paikeday, Kiran Bhardwaj and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

BHAN, J. These civil appeals are directed against the common impugned order Nos. 829 and 830 of 2000 dated 4.10.2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal") in Appeal Nos. E/1622/99-A and E/2095/2000-A. Revenue has filed Civil Appeal Nos. 4075, 4076 of 2001 against the deletion of duty demand of Rs. 17,67,13,315/- raised in the show-cause notice dated 1.10.1986 for the period September 1981 to February 1983 and the assessee has filed Civil Appeal No. 754 of 2001

against the levy of penalty of Rs. One crore. Since these appeals are directed against the common order passed by the Tribunal, we also propose to dispose them of by a common order. The facts are common in both the sets of appeals. A

This case has a chequered history and has had various round of litigation in different forums. In order to determine the controversy and the point involved in these appeals the following facts may be noticed. B

M/s National Tobacco Company Limited Agarpara, a manufacturer of cigarettes falling under erstwhile Central Excise Tariff Item No. 4 II(2), and holder of Central Excise Licence L-4 No. 3/84 for the manufacture of cigarettes, was merged with M/s Mirpara Tea Company effective from 1.4.1977. Consequent to this, it became a Division of newly formed M/s. Duncans Agro Industries Limited, Calcutta. Thereupon, Central Excise Licence L-4 No. 1-Cig/ I/V/78 dated 18.2.1978 for the manufacture of cigarettes was issued to M/s. National Tobacco Company. C

In April 1984, M/s. National Tobacco Company was de-merged from M/s. Duncans Agro Industries Limited and was made a wholly owned subsidiary of M/s. Duncans Agro Industries Limited in the name and style of M/s. New Tobacco Company. M/s. Duncans Agro Industries Limited, is the respondent in the two appeals filed by the Revenue and the appellant in Civil Appeal No. 754 of 2001 and would be referred to as the assessee. D

As a result of demerger, a new Central Excise Licence No. L-4 No.1/Cig/ IV/Khar/85 dated 9.3.1985 was issued to M/s. New Tobacco Company Limited for the manufacture of cigarettes. E

As there was some dispute as to whether excise was leviable on manufacturing cost plus manufacturing profit and post manufacturing cost and profits arising from post manufacturing operations, the provisional assessments were made from July, 1973 to February, 1983. Final assessments were to be made later. On 8.5.1984, Assistant Collector of Central Excise, Calcutta issued a show-cause notice to the assessee for the period July, 1973 to February, 1983 calling upon the assessee to show cause as to why: F G

> "...the deductions claimed on account of freight, interest on freight, rebate, octroi, interest on receivables and tariff rate of duty from the wholesale price should not be disallowed and why the charges on account of freight, interest on freight, rebate, octroi and interest on receivables should not be included in the assessable value and also H

A why the cost of C.F.C. packing charged and realized by them from the buyers should not be included in the assessable value under Section 4(1) (a) and Section 4 (4) (d) (i) of Central Excise & Salt Act, 1944 and why price of each product should not be approved accordingly.

Collector of Central Excise, Delhi issued another show-cause notice on B 1.10.1986 to the assessee for the period September, 1981 to February, 1983 alleging that the assessee has willfully mis-declared assessable value of cigarettes from time to time during the period from September, 1981 to February, 1983 in the Central Excise documents, Price Lists with fraudulent intent to evade the payment of correct amount of duty and thereby they have short C paid Central Excise duty amounting to Rs. 97,55,56,362/-. Accordingly, the assessee was called upon to show cause as to why:

"(a) the duty short paid amounting to Rs. 97,55,56,362.00 as per Annexure 'D' should not be demanded under Rule 9(2) of the Central Excise Rules, 1944 read with the proviso of sub-section D (1) to Section 11A of the Central Excise and Salt Act, 1944.

(b) Penalties should not be imposed on them under Rules 9(2), 52A(5), 210 & 226 of the Central Excise Rules, 1944."

Assessee being aggrieved filed a Civil Writ Petition No. 1708 of 1987 in the Delhi High Court on the ground that the show cause notice dated E 1.10.1986 issued to the assessee alleging contravention of the central excise duty in respect of cigarettes manufactured and cleared from the factory at Agarpara during the period September, 1981 to February, 1983 and also addendum to the show-cause notice dated 1.10.1986 was in excess of the jurisdiction and/or without authority of law inasmuch as the assessee had F been paying the excise duty on the basis of the provisional assessments pursuant to filing of provisional price lists and till the price lists and the assessments were finalized a show-cause notice could not be issued. According to the petitioner Section 11-A of the Central Excises Salt Act, 1944 (for short "the Act") could not be invoked in cases where duties are paid under provisional assessment made under Rule 9B of the Central Excise Rules, G 1944 (for short "the Rules") without first finalizing the assessment. The Division Bench of the High Court dismissed the writ petition by its order dated 12.8.1988 reported in *Duncans Agro Industries Ltd.* v. *Union of India & Ors.*, (1989) 39 ELT 511 (Del.). Contention of the assessee that the cause of action for invoking Section 11-A would accrue only from the relevant date H defined under Section 11-A which in case of provisional assessment means

the date of adjustment of duty after final assessment under Rule 9B was rejected. This judgment became final and is binding between the parties. This Court later took a contrary view in *Serai Kella Glass Workers Pvt. Ltd.* v. *Collector of Central Excise, Patna,* [1997] 4 SCC 641.

Collector of Central Excise, Delhi took up for hearing the proceedings arising from the show-cause notice dated 1.10.1986 and disposed of the same on 27.3.1991 with the interim directions, which are as under:

> "I direct the Divisional Assistant Collector, Kharda Division of Calcutta-II Collectorate to make final assessment in the case under Rule 9B(5) of the Central Excise Rules, 1944, for the period covered by the instant show cause notice as early as possible. He may use the material contained in the instant show cause notice as independent material to support the final assessment after according an opportunity to the manufacturer/other parties concerned to meet the case and after considering the cause show. He is further directed to intimate the undersigned as soon as he completes the said provisional assessment. Thereafter this show cause notice will be taken up for adjudication."

In this order the Collector of Central Excise, Delhi gave three fold directions to the Divisional Assistant Collector, Kharda Division of Calcutta II, namely, (1) To make final assessment in the case under Rule 9B(5) of the Rules for the period covered by the instant show-cause notice (1.10.1986) as early as possible; (2) He could use the material contained in the show-cause notice dated 1.0.1986 as independent material to support the final assessment after affording an opportunity to the manufacturer/other parties concerned to meet the case and after considering the show cause; (3) He was further directed to intimate the Collector of Central Excise, Delhi as soon as he completes the provisional assessment; and (4) The show-cause notice dated 1.10.1986 was to be taken up for adjudication thereafter.

The assessee being aggrieved filed an appeal before the Appellate Tribunal at New Delhi, which was disposed of on 9.12.1997. The assessee challenged the finding/observation made by the Collector of Central Excise, Delhi that "thereafter this show cause notice will be taken up for adjudication" on the ground that after finalizing of the assessment there would be nothing left for the Collector of Central Excise, Delhi for consideration or decision and therefore, this sentence in the order should be set aside. The appeal was disposed of by observing:

A ".....We do not understand the impugned order as recording a finding overruling the contention raised by the appellant the collector had no jurisdiction to adjudicate on the strength of show cause notice dated 1.10.86 or as to whether after finalisation of assessments anything would be left for the Collector to decide. Thereafter the appellant cannot have any grievance. *It is open to the appellant to raise these aspects if after finalisation of assessment, the Collector takes up the proceeding before him for adjudication in this matter.*

B With this observation, the appeal is disposed of."

[Emphasis supplied]

C Thus the liberty to take up this point was reserved with the assessee after the finalization of the proceedings.

In pursuance to the interim directions issued by the Collector of Central Excise, Delhi in its order dated 27.3.1991 the office of the Assistant Collector D Central Excise, Kharda Division, Calcutta issued addendum dated 20.2.1992 incorporating the contents of the show-cause notice dated 1.10.1986 in the show cause notice dated 8.5.1984 thereby assuming jurisdiction to adjudicate all issues raised in both the show cause notices.

E The two show cause notices were finally adjudicated by the Assistant Collector Central Excise, Kharda Division, Calcutta by its order dated 11.1.1996. The assessable value was determined and consequent thereupon demand was raised by finalizing assessments for the entire period from July 1973 to February, 1983.

F On 3.7.1996 show cause cum demand notice was issued by the Superintendent, Office of the Assistant Collector Central Excise, Kharda Division. Calcutta on the basis of adjudication order dated 11.1.1996 quantifying the amount of short levy for the period July 1973 to February, 1983. Assistant Collector Central Excise, Kharda Division, Calcutta adjudicated the show cause cum demand notice dated 3.7.1996 confirming the demands G (short levy) of Rs. 386,45,71,192.69 and Rs. 66,45,136.19 in respect of cigarettes and smoking mixtures respectively.

The assessee being aggrieved against the order of Assistant Collector Central Excise, Kharda Division. Calcutta filed an appeal before the Commissioner (Appeals) Central Excise, Calcutta. Commissioner of Appeals H

by his order in appeal dated 25.7.1997 accepted the appeal and remanded the matter to the Assistant Collector Central Excise, Kharda Division, Calcutta for recomputation of the duty afresh in the light of the decision of this Court in *Government of India* v. *Madras Rubber Factory,* [1995] 4 SCC 349. Assistant Collector Central Excise, Kharda Division. Calcutta in compliance of the order of remand dated 25.7.1997 of the Commissioner of Appeals Central Excise, Calcutta recomputed the amount of duty short paid as Rs. 16.6,94,320.34 and Rs. 8,13,683.29 after adjusting Rs. 5.97 crores pre-deposited in the light of the judgment of this Court in *Madras Rubber Factory's* case (supra). This order was later on corrected by issuing a corrigendum and the amount was reduced.

After finalization of the proceedings by the Assistant Collector Central Excise, Kharda Division. Calcutta the Commissioner of Central Excise, Delhi passed an order in original in show-cause notice dated 1.10.1986 determining Rs. 17.67 crores as due as duty liability and imposing a penalty of Rs. One crore.

Assessee being aggrieved filed Appeal No. E/1622/99-A/92E/2095/2000A which has culminated in the impugned order. Tribunal accepted the appeal partly. Duty liability was set aside as it had already been adjudicated in the earlier proceedings but upheld the levy of penalty. While deleting the duty liability the Tribunal observed thus:

> "From this, it is clear that the Collector had left the duty demand raised in the show cause notice dated 1-10-1986 also to be included in the finalisation of the provisional assessment which was pending from 1973. The Revenue had not challenged that order. Pursuant to that order, the Assistant Collector had issued an Addendum to the assessees on 20-2-1992 making the materials relied upon in the show cause notice dated 1-10-1986 as part of the materials for finalising the assessments and the duty demand was finalised after assessees made their representations. That duty demand became final as the Revenue did not challenge it. The order passed on the assessees' appeal against that duty demand was also not challenged by both sides. We, therefore, hold that the duty demand made by the Assistant Collector was a consolidated demand and that demand having become final, no second demand could be made in another adjudication proceeding by the Commissioner. Accordingly, we set aside the duty demand of over Rs. 17 crores made in the impugned order."

Revenue being aggrieved has filed Civil Appeal Nos. 4075-4076 of 2001

A against the deletion of the duty liability and the assessee has filed the Civil Appeal No. 754 of 2001 against the order maintaining the levy of penalty.

Another fact which needs to be noticed is that after the Assistant Collector Central Excise, Kharda Division, Calcutta finalized the assessment order dated 3.12.1996, the Assistant Collector Central Excise, issued show B cause notice dated 27.5.1998 stating therein that the order in original dated 12.12.1997 the extra amounts realized as "additional consideration" was not taken into consideration and accordingly a demand of Rs. 21.58 crores was made on the assessee. In the meantime, Kar Vivad Samadhan Scheme, 1998 (for short "the KVS Scheme") was introduced by Finance (No. 2) Act, 1998. C Pursuant to the said scheme the assessee filed a declaration under Section 89 of the Finance (No. 2) Act, 1998 in respect of the KVS Scheme. An order under the KVS Scheme was passed in pursuance to which the assessee paid the demand raised under the said scheme.

Counsel for the parties have been heard at great length.

D

The issue before the Assistant Collector Central Excise, Kharda Division, Calcutta was for the determination of the assessable value of the goods for the period July, 1973 to February, 1983 i.e. the period covered by the show cause notice dated 8.5.84. The issue before the Commissioner of Central Excise, Delhi was also for determination of the assessable value of the goods E for the period September, 1981 to February, 1983, the period covered by show cause notice dated 1.10.1986. The show cause notice dated 1.10.1986 was issued against 20 persons including the assessee company. As regards the assessee, for the period September, 1981 to February, 1983, the Commissioner of Central Excise passed the order dated 27.3.1991 directing the Assistant Commissioner to determine the assessable value taking into consideration the F materials contained in show cause notice dated 1.10.1986. This he did by noticing the correct position of law laid down by this Court in the case of *Union of India* v. *Godrej & Boyce Mfg. Co. (Pvt.) Ltd.,* (Civil Appeal No.12824 of 1989 decided on 8.3.90). The Assistant Collector Central Excise, Kharda Division, Calcutta thereafter issued addendum dated 20.2.1992 incorporating G the allegations made in show cause notice dated 1.10.1986 in the show-cause notice dated 8.5.1984. The effect of the order passed by the Commissioner of Central Excise, Delhi was that the Assistant Collector Central Excise, Kharda Division, Calcutta alone had the jurisdiction to finally adjudicate and determine the assessable value of the goods cleared from the assessee's factory for the entire period and the consequent duty liability. Either party wishing to dispute H

the determination made by the Assistant Collector Central Excise, Kharda Division, Calcutta had to do so by invoking the right of appeal to the Commissioner of Appeals, Tribunal and the Supreme Court. In addition the Department could have invoked the short levy provision under Section 11-A within a period of six months or invoked the extended period of limitation of 5 years under proviso to Section 11-A provided the conditions laid down in the proviso were satisfied. The two show-cause notices were finally adjudicated by the Assistant Collector Central Excise, Kharda Division, Calcutta on 11.01.1996. The assessable value determined and consequent demand was raised by finalizing assessments for the entire period July 1973 to February, 1983. If the revenue was aggrieved by the above proceedings it was incumbent upon them to either invoke the right of appeal against that order under Section 35 E (2) or issue a short levy notice under Section 11-A within six months. Neither of these two options having been invoked, the order attained finality as against the revenue.

It need not be emphasized that there could not be two assessments for the same period.

This apart finally determined as due for the entire period of 10 years from the assessee having been settled under the Kar Vivad Samadan Scheme, 1998, there is no scope for any further review or determination of that issue by any authority under the Act.

In *Hira Lal Hari Lal Bhagwati* v. *CBI,* [2003] 5 SCC 257, at page 274 this Court observed:

> "We have carefully gone through the Kar Vivad Samadhan Scheme, 1998 and the certificate issued by the Customs Authorities. In our opinion, the GCS is immune from any criminal proceedings pursuant to the certificates issued under the said Scheme and the appellants are being prosecuted in their capacity as office-bearers of the GCS. As the customs duty has already been paid, the Central Government has not suffered any financial loss. Moreover, as per the Kar Vivad Samadhan Scheme, 1998, whoever is granted the benefit under the said Scheme is granted immunity from prosecution from any offence under the Customs Act, 1962 including the offence of evasion of duty. In the circumstances, the complaint filed against the appellants is unsustainable."

And at page 280 it was observed:

A "The Kar Vivad Samadhan Scheme certificate along with *CBI* v. *Duncans Agro Industgries Ltd.*, [1996] 5 SCC 591, and *Sushila Rani* v. *C.I.T.*, [2002] 2 SCC 697, judgments clearly absolve the appellants herein from *all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has* B *been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process."*

Thus, after the grant of certificate under the Kar Vivad Samadan Scheme, C 1998 as having settled the dispute and payment of the amount determined no further proceedings could be initiated or proceeded with for the period in question.

For the reasons stated above, we do not find any substance in the appeals filed by the Revenue. Accordingly, Civil Appeal Nos. 4075-4076 of D 2001 are dismissed and the order passed by the Tribunal in this respect is affirmed.

Taking up the appeal of the assessee, it may be noted that the proposed penalty was under Rule 9(2) and 52-A. This Court in *N.B. Sanjana* v. *Elphinstone Spg. & Wvg. Mills Co. Ltd.*, [1971] 1 SCC 337, at page 348 held E as under:

".....To attract sub-rule (2) of Rule 9, the goods should have been removed in contravention of sub-rule (1). It is not the case of the appellants that the respondents have not complied with the provisions of sub-rule (1). We are of the opinion that in order to attract sub-rule F (2), the goods should have been removed clandestinely and without assessment. In this case there is no such clandestine removal without assessment. On the other hand, goods had been removed with the express permission of the Excise authorities and after order of assessment was made. No doubt the duty payable under the G assessment order was nil. That, in our opinion, will not bring the case under sub-rule (2). "

In the present case there is not even an allegation much less finding by the department that there has been any clandestine removal of goods without assessment. As such the penalty is liable to be set aside. The matter H having been settled in the Kar Vivad Samadan Scheme, 1998 the question of

determination of the duty payable or levy of penalty did not arise. In our view, the Tribunal clearly erred in upholding the levy of penalty. Accordingly, Civil Appeal No. 754 of 2001 filed by the assessee is accepted and the penalty levied is ordered to be deleted. A

These two sets of appeals are disposed of in the above terms leaving the parties to bear their own costs. B

N.J. Appeals disposed of.