

COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH

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v.
M/S. PEPSI FOODS LTD.

MAY 29, 2007

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[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Central Excises Act, 1944 —s. 11-A—Dispute as to assessee's claim for sales tax exemption pending before High Court—Assessee re-assessed the clearance by including sales tax element originally excluded from price and paid differential duty of Rs. 67 lakhs—Issuance of show cause notice after four years on allegation that assessee evaded duty of Rs. 95 lakhs in regard to Rs. 2 Crores collected towards sales tax—Extended period of limitation—Invocation of—Held: Invocable as no information was given regarding deposit and about the claim of exemption and calculation.

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Respondent-assessee claimed sales tax exemption which was rejected. Sales Tax Authorities and also the Tribunal rejected the same. Thereafter, excise duty was assessed and paid on the value worked out after deducting the sales tax payable from the price during July 1995 to March 1996. While the dispute with the Authorities was pending before the High Court, assessee re-assessed the clearance by including the sales tax element originally excluded from the price and paid the differential duty of Rs. 67 lakhs in November 1996. Show cause notice was issued after four years alleging that assessee had evaded duty of Rs 95 lakhs in regard to Rs 2 crores collected towards sales tax and demand duty was made; and was confirmed. Demand for differential duty was made after adjusting the payment made and also penalty was imposed. Respondent challenged the order. Tribunal held that the demand was time barred. Hence the present appeal.

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Appellant contended that the exemption was claimed under the relevant sales tax laws but there was collection of sales tax which was admitted by the accountant on 26.10.1999 and also by the assessee; and that the assessee accepted that there was no intimation given about the sales tax exemption or the deposit made to the Ranve Officer or any other Authority.

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Partly allowing the appeal, the Court

A HELD: 1.1. The Commissioner found that there was no evidence of any intimation about sales tax exemption produced by the assessee. It was only indicated in the reply to the show-cause notice that the matter was pending.

[Para 4] [824-A]

B 1.2. Assessee submitted that the sales tax authorities denied the exemption and the matter was pending before the High Court. The deposit was made as there was a dispute. To a query made as to why the deposit was made even there was nothing payable as claimed, the reply was that it was paid due to pressure. There was no averment made at any stage taking such a plea. [Para 5] [824-E, F]

C 1.3. The extended period of limitation is applicable as no information was given regarding deposit and about the alleged claim of exemption and the calculation. [Para 6] [824-G]

D 1.4. Tribunal is to decide whether the benefit under section 4(4)(d)(ii) of the Central Excise Act, 1994 is available to be granted. It would take note of the decision if any rendered if any rendered in writ petition pending before the High Court. [Para 7] [824-G; 825-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5118 of 2002.

E From the Judgment and Order No. 403/2001-A dated 27.11.2001 of The Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/948/2001-A.

Nagendra Rai, Sr. Adv., K.K. Senthilvaran, K. Subba Rao and B.K. Prasad for the Appellant.

F M.P. Devnath and V. Balachandran for the Respondent.

The Judgment of the Court was delivered by

G DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the order passed by the Customs Excise and Gold (Control) Appellate Tribunal, West Block, New Delhi (in short 'CEGAT') allowing the appeal of the respondent (hereinafter referred to as the 'assessee'). By the impugned order, the CEGAT also held that the removal of goods and payment of duty took place between July 1995 to March 1996. The assessee had paid differential duty as worked out by them also in November 1996. In these circumstances, there is no

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factual basis to the allegation that the assessee suppressed any material facts. A Show-cause notice dated 1.6.2000 was issued almost four years after the payment of the differential duty by the assessee, well beyond the normal period allowed for duty demands under Section 11A of the Central Excise Act, 1944 (in short 'the Act'). Demand of duty for longer period upto 5 years is permissible only if the short levy of duty is on account of suppression, mis-declaration of facts, fraud etc. as provided in the proviso to Section 11A of the Act. These elements constituting contumacious conduct by the assessee are entirely lacking in the present case. Therefore, the appeal was allowed on the ground of time bar without going into the merits of the case. It was held that assessee was entitled to return of amount paid by them over and above the differential duty of Rs.67,88,027/- paid on 28.11.1996 C

2. Background facts in a nutshell are as follows:-

Assessee claimed certain deductions from the price towards sales tax as their claim for exemption from the sales tax was turn down by the sales tax authorities including the Tribunal in 1995. Duty was accordingly assessed and paid on the value worked out after deducting the sales tax payable from the price. While the dispute with sales tax authorities was pending before the Punjab and Haryana High Court assessee re-assessed the clearance by including the sales tax element originally excluded from the price. Assessee paid the differential duty of Rs.67,88,027/- on 28.11.1996. On 1.6.2000 Commissioner of Central Excise issued show cause notice alleging that assessee had evaded duty of Rs.95,03,238/- in regard to Rs.2,37,58,095/- collected towards sales tax. The demand was confirmed by the order in original passed by the Commissioner of Central Excise, Chandigarh II. A demand for differential duty of Rs.27,15,211/- was made after adjusting the payment made. Penalty of Rs.10 lakhs was also imposed. Said order was challenged before the CEGAT who held that the demand was barred by time as the period of assessment was between July 1995 to March 1996 and payment of differential duty was made on 28.11.1996 of Rs.67,88,027/-.

3. In support of the appeal, learned counsel for the appellant submitted that the exemption was claimed under the relevant sales tax laws but there was G collection of sales tax as was admitted by the accountant on 26.10.1999. The assessee also admitted about the collection on 10.11.1999. The amount collected was Rs.2,37,58,095/-. It has been fairly accepted by the assessee that there was no intimation given about the sales tax exemption or the deposit made to the range officer or any other authority. H

A 4. It has been categorically found by the Commissioner that there was no evidence of any intimation produced by the assessee. It was only indicated in the reply to the show-cause notice that the matter was pending. The Commissioner recorded the following finding:

B "3.6 In their reply dated 8.2.2001 to the show cause notice, the Noticee accepted that the amount collected by them towards sales tax and not deposited with the sales tax department would form part of the price of soft drink concentrate. They have further contended that in such an event the duty payable has to be deducted to arrive at the assessable value in terms of Section 4(4)(d)(ii) i.e. the total amount of duty payable has to be deducted from cum-duty price to arrive at the assessable value in order to calculate the total duty payable. In other words, the Noticee has calculated Excise duty by considering the total amount of sales tax collected as cum-duty price and after taking into consideration the provisions of Section 4(4)(d)(ii) calculated the amount of duty payable and subsequently deposited the Central Excise duty amounting to Rs.67,88,027/- . The Noticee has relied upon the Hon'ble Tribunal's judgment in the case of *Sri Chakra Tyres Ltd. v. Collector of Central Excise, Madras* (1999) 108 ELT 361 (Tribunal).

E The quoted judgment is not relevant in this case as the Noticee has not collected the disputed amount as wholesale price of the goods, but has collected the same as amount of sales tax payable. In case sales tax had been paid to the concerned department no Central Excise duty would have been leviable thereon."

F 5. It is to be noted that the assessee submitted that the sales tax authorities denied the exemption and the matter was pending before the High Court. The deposit was made as there was a dispute. To a query made as to why the deposit was made even there was nothing payable as claimed, the reply was that it was paid due to pressure. There was no averment made at any stage taking such a plea.

G 6. The extended period of limitation is applicable as (a) no information was given regarding deposit and (b) no information was given about the alleged claim of exemption and the calculation.

H 7. In the aforesaid background, the CEGAT presently known as Customs, Excise and Service Tax Tribunal has to decide whether the benefit under

Section 4(4)(d)(ii) is available to be granted. In that regard, we express no **A** opinion. It is stated that the writ petition No.17685/94 is pending before the Punjab and Haryana High Court. It is for the Tribunal to take note of the decision if any rendered in that petition. The appeal is allowed to that extent. There will be no order as to costs.

N.J.

Appeal partly allowed. **B**