**SUPREME COURT OF INDIA**

The Commissioner of Central Excise, Aurangabad

Vs.

Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials)

C.A.No.3860 of 2006

(D.K.Jain and H.L.Dattu JJ.)

12.11.2010

**JUDGMENT**

**H.L.Dattu, J.**

1. The appellant, being aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai, (for short `Tribunal') in Appeal No.A/75-78/WZB/06/C-II/EB dated 13.01.2006, is before us in this appeal filed under Section 130-E of the *Customs Act, 1962 (hereinafter referred to as `the Act')*.

2. The issue in this appeal relates to the valuation of aluminum castings manufactured by M/s. Anurang Engineering Co. Ltd. (for short `Anurang') which in turn is based on the purchase price of aluminum ingots supplied by M/s. Bajaj Auto Ltd., Waluk, Aurangabad (for short `Bajaj'). Anurang, who is Respondent no. 4 in this appeal, is engaged in the manufacture of aluminium castings, commonly known as "handle bar body", "crank case clutch", and castings used as motor vehicle parts, classifiable under Chapter Sub-heading 8708.00 and 8714.00 of the Central Excise Tariff Act, 1985. Bajaj, the Respondent no.1, was supplying inputs - aluminum ingots after purchasing the same from other manufacturers to Anurang for the relevant period under the cover of invoices issued under Rule 57F(2) and Rule 57(3) of the *Central Excise Rules, 1994*, after reversing the MODVAT credit availed on the said input.

3. A show cause notice dated 05.03.2001 was issued by the Commissioner of Customs and Central Excise, Aurangabad, in which it was alleged that Anurang was receiving inputs from Bajaj at an under-valued landed cost by not including expenses on account of sales tax, octroi, freight, insurance, loading- unloading charges and handling charges, and that Bajaj was charging only the basic price of such inputs equal to the basic price charged by the original manufacturers of the said inputs to Bajaj, and since the additional cost of loading-unloading, freight etc. was not included in the input supplied to Anurang, there was consequent reduction in the landed cost of such inputs. It was also alleged that the price charged by Bajaj was depressed price although the same was coloured as negotiated price

and the price indicated in the purchase orders was influenced by the supply of inputs by Bajaj at a lower landed cost and by this business arrangement, Bajaj had compensated Anurang for depressed prices of Anurang's finished goods supplied to Bajaj. Thus, both of them were aiding each other for mutual business interest so that the production cost of each other was kept at minimum and the Central Excise Duty was discharged at lower value. The view of the adjudicating authority was that the price charged in the Central Excise invoices by Anurang for their finished goods was not the sole consideration for sale, since the proportionate landed cost charges were not included by Bajaj which is additional consideration under Rule 5 of the Central Excise (Valuation) Rules, 1975. Hence, expenses incurred by Bajaj, in addition to the price, were required to be loaded in the assessable value for payment of Central Excise Duty. It was in these circumstances that they were asked to show cause why differential duty amounting to `27,71,594/- due to undervalued clearances of the finished goods effected during the period with effect from 02.06.1998 to 30.09.1999 should not be recovered under Proviso to Section 11AC(1) of the Act read with Rule 5 of the Central Excise (Valuation) Rules, 1975, why penalty under Section 11AC and interest under Section 11AB of the Act should not be levied and recovered and penalty under Rule 209A of the Central Excise Rules, 1944, should not be imposed and recovered from Respondent Nos. 1 to 3 viz. Bajaj, Sh.Ranjit Gupta, Vice President (Materials) of Bajaj and Sh. Anurag Naresh Chandra, Director of Anurang.

4. In reply to the notice, Bajaj had stated that the sale of inputs - aluminum ingots to Anurang was on the basis of fair market price mutually agreed between the parties. It also claimed that there was no provision in Central Excise Laws which imposed an obligation on a person to sell his goods at a particular price in such transactions. They also claimed that the notice and the demand therein was time-barred as it had been issued beyond the time prescribed under Section 11A of the Act (since the notice was for the period June 1998 to September 1999, and the notice date was 05.03.2001 and was served by post on 22.03.2001), and that jurisdictional officers of the specific division of the Department were well aware of these facts, since both the units are situated under the jurisdiction of the same division. It was also contended that there was no deliberate suppression of facts, or mis-statements or intention to evade Central Excise Duty on their part. Anurang, in their reply, had stated that the price charged by Bajaj to them was for sale of ingots and similarly, final product sold by Anurang to Bajaj was contracted/negotiated prices and, therefore, they have not contravened any provisions of the Act and the Rules framed there under.

5. After adjudication, the adjudicating authority held that the prices charged by Anurang were depressed prices coloured as negotiated prices. Further, Bajaj was supplying drawings/designs/specifications free of cost to Anurang to get the goods manufactured according to their specifications from them, which the Department claimed was for aiding each other for mutual business interest so that the production cost of each other is kept at a minimum and the Central Excise Duty is discharged at a lower rate. The adjudicating authority has further observed that by providing inputs at lower landed cost and drawings and designs free of cost, Bajaj was incurring part of the production cost of the finished goods manufactured and supplied exclusively to it. Thus, the adjudicating authority has concluded

that Anurang contravened Rule 5 of Central Excise (Valuation) Rules, 1975 read with Section 4 of the CE Act, and Rule 9 read with Rules 52A, 54, 173F and 173G of the CE Rules. Accordingly, the adjudicating authority vide Order-in- Original No. 12/CEX/2002 dated 31.03.2002, levied duty of `27,71,594/- under Section 11A(1), penalty of `27,71,594/- under Section 11AC, and interest under Section 11AB against the assessee - Anurang. The adjudicating authority also imposed penalty on Bajaj of `2.7 lakhs, and personal penalties of `50,000 on Mr. Anurag Nareshchandra, Director, Anurang, and Mr. Ranjit Gupta, Vice-President, Bajaj, under Rule 209A of the Central Excise Rules, 1944.

6. Aggrieved by the said order, the parties before the adjudicating authority filed Appeal Nos.E/1817, 1879, 2142 and 2143/02 before the Tribunal. The Tribunal by its common Order No. A/75-78/WZB/06/C-II/EB dated 13.01.2006 has allowed the appeals and has set aside the order passed by the adjudicating authority. The Tribunal inter-alia adopted the following reasoning while allowing the appeal:

> "However, while adjudicating the matter the Commissioner, in para 16 of the order has observed that:
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> "In this case there is no allegation that while paying duty on ingots under Rule 57F(3) M/s. Bajaj Auto Ltd. have undervalued the ingots. The payment of duty under this rule is not the subject matter, therefore, on this account the pleadings of the assessee and other notices are not relevant. This matter is regarding under valuation of final product".
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> The above observations made by the Commissioner are in contrast to the findings arrived at by him. If the ingots have been sold at the correct value, how the value of the same can be enhanced at the manufacturers end by some hypothetical additions on various grounds. It is also on record that the statement of the Authorized Representative of M/s. Bajaj Auto Ltd. as also of M/S. Anurang Egg. Co. Ltd. are to the effect that the prices of ingots were negotiated prices. However the adjudicating authority has observed that though the prices were agreed but they were not genuine and were adopted for under valuation of the final product. This is nothing but self contradiction. In any case, we find that whatever duty was being paid by M/s. Anurang Engg. Co. Ltd. was being taken as credit by M/s. Bajaj Auto Ltd. thus leading to revenue neutral situation in which case the appellants cannot be attributed with any intention to evade payment of duty. The burden to prove under valuation is on the revenue and is required to be discharged by production of sufficient evidence. Ordinarily, the court, should proceed on the basis that the apparent tenor of the agreements reflected the real state of affairs and what is required to be examined is as to whether the revenue has succeeded in showing that the apparent is not real and the price shown in the invoice does not reflect the true price. Nothing has been shown in the present case. The entire case is based on assumptions and presumptions as such we are of the view that the confirmation of duty against M/s. Anurang Engg. Co. Ltd. is not sustainable."

7. Mr. V. Shekhar, learned senior counsel for the Revenue submitted that Bajaj has under-valued inputs which were being sold to Anurang by incurring all the landed costs such as freight charges, loading, unloading and handling charges etc: Anurang in turn has sold the manufactured goods in its factory only to Bajaj after paying the Excise Duty under the Act. Therefore, the learned senior counsel would submit that since the inputs were received at a lesser price, the manufacturing cost would also be less and thereby Anurang has paid the lesser Excise Duty. It is also contended that it is for this reason the adjudicating authority has come to the conclusion that the declarations filed by Anurang under the Rules is misstatement of facts. Alternatively, it is contended that Bajaj while supplying the inputs to Anurang has undervalued the goods without including certain expenses incurred by it, which has resulted in short payment of Excise Duty by Anurang on its supply of manufactured goods to Bajaj. The learned counsel, in aid of his submission, has relied on the principles settled by this Court regarding the importance of landed cost of raw materials in determining assessable value of the manufactured goods, and according to him the same must be included in the value of the final product. He further submits that the concept of `revenue neutrality' is not applicable in the present case, and that there were no contrary findings of the Commissioner in this regard. He also submits that the finding of the Tribunal that the findings and conclusions reached by the adjudicating authority is on mere assumptions and presumptions is erroneous.

> "According to the learned counsel, the findings of the adjudicating authority was after thorough enquiry and investigation of the records of the assessee and also based on the statements of the Vice President of Bajaj and Director of Anurang during investigation. The learned counsel further points out that the extended period of limitation as provided under Section 11 A(1) of the Act would come to the aid of the Department since the respondents did not disclose the correct facts before the Department with intention to evade payment of duty under the Act."

8. Per contra, Mr. Joseph Vellapally, learned senior counsel for the respondents would contend that the assumption of adjudicating authority that Anurang in their invoices has not given true and correct declaration, is not only contradictory but also not based on any evidence whatsoever. It is further contended that on mere presumption and assumption, the adjudicating authority cannot create demands under the Act and then proceed to recover them by adopting coercive measures. It is also contended that Bajaj and Anurang are under the jurisdiction of the same division and as such, it cannot be reasonable to conclude that the revenue was not aware of the transactions of both the units and therefore, the revenue cannot invoke the extended period of limitation to demand of duty under the Act.

9. The Tribunal, while considering the issue of limitation in the impugned order has concluded as under:-

> "Apart from the merit of the case we also note that the demand is hopelessly barred by limitation. Notice for the period June 1998 to September, 1999was issued on

05.03.2001. The ingots were being cleared by M/s Bajaj Auto Ltd. on their invoices and the final casting products were being cleared by M/s Anurag Engg. Co. Ltd. on proper invoices. Both the units are situated under the jurisdiction of same division and as such it cannot be reasonable concluded that revenue was not aware of the said transactions and the value of the same. As such we are of the view that the demand is also barred by limitation."

10. In our view, the aforesaid issue was one of the important issues that fell for the consideration before the Tribunal. The Tribunal, in our view, while considering and deciding the same, has overlooked the language employed in the Statute. Therefore, we deem it proper to remand the entire matter to the Tribunal for reconsideration and decision not only on this issue, but also the other issues which were canvassed before us by learned senior counsel for the parties. Therefore, we now take up that issue for our consideration and decision.

11. As we have already observed, the Tribunal, while considering this issue, has neither looked into the ingredients of Section 11A of the Act nor the construction placed by this Court on this Section. Section 11A of the Act reads:-

"Section 11A. - Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. – (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year 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 or 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 willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under 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 one year, 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 [one year] or five years, as the case may be. (1A) When 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 the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the

> proviso to sub- section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice."

12. 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 the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is 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.

> "The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section."

13. Interpreting this provision, this Court in *Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments, Hyderabad*[1], held: (when the period prescribed was six months prior to it being made one year by the Finance Act, 2000, with effect from 12.05.2000): "In order to make the demand 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 (1) of Section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. 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 the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful mis-statement 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."

14. In the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay*[2], it is held: "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" is again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and

yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Mis-statement or suppression of fact must be willful."

15. In *Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut*[3], this Court has observed: "...we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression."

16. In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section 11A(1) of the Act, can only be invoked when there is a conscious act of either fraud, collusion, wilful mis-statement, suppression of fact, or contravention of the provisions of the Act or any of the rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the present case, the Tribunal while considering this issue has not stated whether or not there were any such circumstances which would not allow the revenue to invoke extended period of limitation. It only observes in its order since both the assessees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the revenue was not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal.

17. In view of the above, we set aside the order passed by the Tribunal, and remand the matter to the Tribunal to determine whether on the facts of the case, any of the grounds enumerated in the proviso to sub-section (1) of Section 11A of the Act are made out by the Revenue and thereby the Revenue is justified in invoking the extended period of limitation to make demand of duty under the Act.

18. In so far as other issue that was canvassed by learned counsel for the Revenue, in our view, those are all disputed facts which require to be re-examined by the Tribunal, since the Tribunal under the Statute is the final fact finding authority.

19 In view of the above discussion, we allow this appeal and set aside the impugned order passed by the Tribunal and remand the matter for fresh consideration of all the issues raised by both the parties. Liberty is reserved to both the parties to place on record such other material, which is available in their possession in support of their case. We clarify that we have not expressed any opinion on the merits of the claim of either of the parties in this appeal. In the facts and circumstances of the case, parties are directed to bear their own costs.

*[1](1989) 2 SCC 127* *[2](1995) 6 SCC 117* *[3](2005) 7 SCC 749*