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Dear Professional Colleague,

Mere non-payment of duties is not collusion or willful misstatement or suppression of facts

We are sharing with you an important judgement of the Hon'ble Supreme Court in the case of **M/s UNIWORTH TEXTILES LTD Versus COMMISSIONER OF CENTRAL EXCISE, RAIPUR [2013-TIOL-13-SC-CUS]** on the issue:

Issues:

Whether mere non-payment of duties is collusion or wilful misstatement or suppression of facts?

When can the extended period of five years be invoked in a Show Cause Notice for demand of duty?

Facts & Background:

M/s Uniworth Textiles Ltd. ("**the Appellant**" or "**Uniworth**"), is an Export Oriented Unit ("**EOU**") and is engaged in the manufacture of wool and poly-wool worsted grey fabrics. The Appellant was granted the status of EOU vide Letter of Permission dated 31.08.1992 by the respective authority.

Uniworth Ltd., a sister unit of the Appellant, another EOU, engaged in the generation of power from a captive power plant obtained a Letter of Permission ("**LOP**") dated 1.11.1994 which permitted usage of electricity generated by the captive power plant by both, Uniworth Ltd. and the Appellant. The Appellant purchased electricity from Uniworth Ltd. under an agreement which continued till 1999.

Later, Uniworth Ltd. informed the Appellant that it would be compelled to stop the supply of electricity to Uniworth. Consequently, as a temporary measure, the Appellant, while availing the benefit of Notification No. 53/97- Cus, procured furnace oil from Coastal Wartsila Petroleum Ltd., a Foreign Trade Zone unit. It supplied the same to Uniworth Ltd. for generation of electricity, which it continued to receive as before. Since the Appellant was procuring furnace oil for captive power plant of another unit, it wrote to the Development Commissioner seeking clarification that whether duty on the supply and receipt of furnace oil and electricity respectively was required to be paid.

The Development Commissioner, referring to a circular dated 12.10.1999 of the Ministry of Commerce clarified that as per the Exim Policy provision, one EOU may sell/ transfer surplus power to another EOU duty free in terms of Ministry of Commerce Letter No. 1/1/98-EP dated 12.10.1999 (sic).

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Yet, the Appellant received a show cause notice (“**SCN**”) from the Commissioner of Customs demanding duty for the period during which the Appellant imported furnace oil on behalf of Uniworth Ltd. and by invoking extended period of limitation. Section 28 of the Customs Act imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, wilful misstatement or suppression of facts. Since the SCN was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section i.e. extended period of limitation.

Both the appellate authorities, viz. the Commissioner of Customs and Central Excise (Appeals) and the Tribunal, rejected the claims of the Appellant and affirmed payment of duty and penalty. They reasoned that since the Appellant procured the furnace oil not for its own captive power plant, but for that of another, it could not claim exemption from payment of duty; entitlement of duty free import of fuel for its captive power plant lies with the owner of the captive power plant, and not the consumer of electricity generated from that power plant. The issue of limitation, which was the primary question for consideration in this case was not considered.

Hence, the Appellant filed an appeal before the Hon’ble Supreme Court.

Held:

It was held by the Hon’ble Supreme Court that ***mere non-payment of duties is NOT equivalent to collusion or willful misstatement or suppression of facts.*** The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, untenable. If that were to be true, the Court failed to understand which form of non-payment would amount to ordinary default.

Section 28 of the Customs Act, 1962 (“**the Customs Act**”) clearly contemplates two situations, viz. ***inadvertent non-payment and deliberate default.*** The former is canvassed in the main body of Section 28 of the Customs Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.

Construing mere non- payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. The main body of the Section, in fact, contemplates ***ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts,*** a smaller, specific and

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more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso.

Burden of proof of proving mala fide conduct under the proviso to Section 28 of the Customs Act lies with the Revenue. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it.

It was concluded in the present case that the Appellant has duly tried for adherence of law by intimating and seeking permission from the department. The Department even replied in favour of the Appellant. Therefore, the act of the Appellant was bona fide. Further, the Revenue had not made any specific implications in the show cause notice. ***The Court held that the extended period of limitation under the said provision could not be invoked against the Appellant as there was nothing which displays a wilful default on the part of the Appellant.***

Hence, the appeal of the Revenue was rejected and it was concluded that extended period of limitation cannot be invoked in the present case against the appellant as there were no specific averments made in the SCN and ***there was nothing on record to display a wilful default on part of the Appellant as mere non-payment of duties cannot be held as equivalent to collusion or wilful misstatement or suppression of facts.***

A Landmark Judgment

The Supreme Court had an occasion to consider this issue again recently in spite of following decisions on extended period of limitation:-

Cosmic Dye Chemical v. Collector of Central Excise, Bombay - 2002- TIOL-236-SC-CX → Intention to evade duty must be proved for invoking the proviso to section 11A(1) of the Central Excise Act, 1944 for extended period of limitation.

Pushpam Pharmaceuticals Company v. C.C.E 2002-TIOL-235-SC-CX, → The extended period of five years under the proviso to section 11A (1) is not applicable just for any omission on the part of the assessee , unless it is a deliberate attempt to escape from payment of duty. Where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact.

Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut - 2005- TIOL-118-SC-CX → 'In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty.'

Collector of Central Excise Vs. H.M.M. Ltd. - 2002-TIOL-120-SC-CX, → Mere non-disclosure of certain items assessable to duty does not tantamount to the mala fides elucidated in the proviso to Section 11A (1) of the Central Excise Act, 1944.

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Easland Combines, Coimbatore Vs. The Collector of Central Excise, Coimbatore - 2003-TIOL-26-SC-CX → “It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.”

The decision of the Hon’ble Apex Court is a welcome relief to the assessee as most of the SCN presently issued by the Department by invoking extended period of limitation against the assessee. The Revenue now will have to make necessary averments in the SCN to invoke extended period of limitation and the burden of proving the allegations against the assessee will lie on the Revenue.

Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards.

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