IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

CENTRAL EXCISE APPEAL NO. 1 OF 2020

Commissioner of Central Excise Aurangabad
(Now Commissioner of Central GST and
Service Tax, N-5, Town Center,
CIDCO, Aurangabad – 431003. **...Appellant**
(Original Respondent)

VERSUS

M/s Millennium Beer Industries Ltd.
"UB Tower", UBCT# 24,
Vittal Mallya Road, Bangalore
(Now amalgamated with
M/s United Breweries Ltd)
Situated at Plot No.L-10,
MIDC Waluj Industrial Area,
Aurangabad. **...Respondent**
(Original Appellant)

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Advocate for Appellant : Mr.Dwarkadas S. Ladda
Advocate for Respondent/Sole : Mr. A.P. Malani and Mr. A.P. Bhandari

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CORAM : NITIN B. SURYAWANSHI AND ABASAHEB D. SHINDE, JJ.

RESERVED ON : 22.07.2026
PRONOUNCED ON : 03.09.2026

JUDGMENT : (*PER : ABASAHEB D. SHINDE, J.*)

. This appeal under Section 35G of the Central Excise Act, 1944 (for short, 'the Excise Act') read with Section 83 of the Chapter V of the Finance Act, 1994 (for short, 'the Finance Act') filed by the Revenue is assailing the judgment and order dated 11.07.2019 bearing No. A/86241/2019 in Appeal No. ST/88407/ 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal at Mumbai (for short, 'the Appellate Tribunal'), thereby allowing the appeal filed by Respondent herein.

FACTUAL MATRIX OF THE CASE:-

2. Briefly stated, the facts of the case are that, during the period from 23.09.2009 to 15.11.2011, the Respondent/assessee, on the basis of an agreement/contract dated 01.04.2005 with M/s. United Breweries Ltd. (for short, "M/s. UBL"), manufactured and sold the alcoholic beverages to the customers/indenters of M/s. UBL, as per the instructions of M/s. UBL. The appellant claims that they gathered intelligence and started investigation in the year 2010 pursuant to which it has issued show-cause notice cum demand notice no. DGCEI/I&IS "D"/30-113/2012/11351 dated 19.12.2012 for Rs. 21,92,03,724/- alongwith interest under Section 75 of Ch.V of the Finance Act red with Sections 76,77 and 78 of the Finance Act.

3. The proceedings pursuant to the said show-cause notice cum demand notice were adjudicated by the appellant and vide Order-In-Original No.21/ST/COMMR.2014 dated 30.04.2014, the appellant confirmed the Service Tax demand for the aforesaid amount with interest and the penalty as contemplated under Sections 77 and 78 of the Finance Act. Being aggrieved, by the said order the Respondent filed an appeal under Section 35B (1) of the

Excise Act, before the Appellate Tribunal bearing Service Tax Appeal No. ST/88407/2014, which came to be allowed by the impugned order. Hence, this Appeal.

SUBMISSIONS:-

4. Learned counsel for the appellant strenuously submits that since the Service Tax was payable on services rendered by the Respondent to M/s. UBL from 01.04.2010 to 15.11.2011, the said liability cannot be extinguished because of merger deemed to have been applicable from the appointed date. The date of merger/amalgamation cannot be considered to be 01.04.2010. The appellant therefore, was justified in issuing demand notice invoking the extended period of limitation. He would submit that, the Appellate Tribunal has erred in holding that the appointed date under the scheme of amalgamation i.e., 01.04.2010 as approved by the BIFR needs to be considered as the date for imposing the service tax liability and not the effective date when the certificate of incorporation was issued by the Registrar of Companies (ROC) i.e., 16.11.2011. He therefore urged that, the Appellate Tribunal has committed an error in allowing the appeal filed by the Respondent on the ground that the demand raised by the appellant is barred by limitation.

5. According to the learned counsel for the appellant, this appeal involves the following substantial questions of law:

> "1. Whether on the basis of facts and circumstance of the case, the Ld. CESTAT is correct in holding that the demand is barred by limitation

when the arrangement between the assessee (the present Respondent) and M/s United Breweries Ltd for manufacture of branded beer on behalf of M/s United Breweries Ltd has never been disclosed to the Department?

2. Whether in the facts and circumstances of the case, the Tribunal is correct in holding that the appointed date i.e. 01/04/2010 in the Scheme of amalgamation be considered the effective date for service tax liability when the certificate of incorporation was issued by the Registrar of Companies on 16/11/2011 ?"

6. *Per contra*, learned counsel for the Respondent raised a preliminary objection about maintainability of the appeal *inter alia* contending that similarly circumstanced assessee M/s. SAB Miller Breweries Pvt.Ltd. (for short, M/s. SAB Pvt.Ltd.) to whom identical demand/show-cause notice was issued also preferred an appeal before the Appellate Tribunal bearing Appeal No. ST//85828/2014. The Appellate Tribunal allowed both the appeals filed by the Respondent as well as M/s. SAB Pvt. Ltd. on the same ground. The appellant accepted the judgment in the case of M/s. SAB Pvt. Ltd. whereas the same is challenged in the case of the Respondent. He therefore submits that, the revenue cannot take different stand when facts are almost identical. In support of his submission, he has relied on the following judgments :

i) **Birla Corporation Ltd. Vs. Commissioner of Central Excise** reported in **(2005) 6 SCC 95**,

ii) **Union of India (UOI) and Ors. vs. Kaumudini Narayan Dalal and Ors.** reported in **(2001) 10 SCC 231**.

7. On merits, learned counsel for the Respondent submits that the Appellate Tribunal has recorded findings of fact that the

transaction between the Respondent and M/s. UBL prior to amalgamation was disclosed to the revenue and the amount of Service Tax for consideration of Rs. 5/- per case in relations to 'Intellectual Property Service' had already been paid. The said finding of fact is duly supported by the evidence on record and the correctness of the same is not under challenge. The same conclusion in the case of M/s. SAB Pvt. Ltd. has already been accepted by the appellant.

8. Learned counsel for the Respondent further submits that, the date of amalgamation w.e.f. 01.04.2010 is not in dispute. The period of demand notice was from 23.09.2009 to 15.11.2011. In that view of the matter, the relevant date would be substituted from 23.09.2009 to 01.04.2010, as such, the notice of demand ought to have been issued within a period of one year, whereas the same has been issued on 19.12.2012, almost after a period of thirty months from the date of subject transaction which is impermissible. He, therefore, urged that the appeal deserves to be dismissed.

CONSIDERATION:-

9. We have heard learned Counsel for the appellant, learned Counsel appearing for the Respondent and perused the record.

10. As far as preliminarily objection raised by learned counsel for the Respondent is concerned, while comparing the facts of M/s. SAB Pvt.Ltd. with those of the present Respondent, it is evident that the date of issuance of the Show Cause Notice, the date of

Order-in-Original, the date of amalgamation, the period of demand, and the computation of the demand by the Original Authority are substantially identical. Even the ground for allowing their appeals by the Appellate Tribunal is also same. In that view of the matter, it can be safely inferred that the appellant has applied different yardstick by challenging the judgment of the Appellate Tribunal in the case of Respondent and accepting the same in the case of M/s. SAB Pvt. Ltd. In this regard, it would be profitable to rely on the observations of the Apex Court in case of **Birla Corporation Ltd.** (supra) which reads thus:

> "5.In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. (supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."

11. The Hon'ble Apex Court in the case of **Kaumudini Narayan Dalal and Ors**, (supra) has observed thus :

> '2.If the Revenue did not accept the correctness of the judgment in the case of Pradip Ramanlal Sheth (1993)204 ITR866 (Guj), it should have preferred an appeal there against and instructed counsel as to what the fate of that appeal was or why no appeal was filed. It is not open to the Revenue to accept that Judgment in the case of the assessee in that case and challenge its correctness in the case of other assessees without just cause. For this reason, we decline to consider the correctness of the decision of the High Court in this matter and dismiss the civil appeal."

12. In the light of ratio laid down by the Hon'ble Apex Court in

cases of **Birla Corporation Ltd.** (supra) and **Kaumudini Narayan Dalal and Ors**, (supra), we are of the considered view that the Principle of Consistency is sacrosanct in revenue matters and the revenue cannot be permitted to take different stand when the facts are almost identical, if they are permitted to do so the same would be contrary to the principles of fairness and equity.

13. So far as merit part is concerned, before adverting to the same, it would be apt to consider the provisions of Section 35G of the Excise Act which reads thus :

"**Section 35G. Appeal to High Court.** -

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

[(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.]

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the

respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or a bridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

14. In short, the provision of Section 35G of the Excise Act, explicitly provides that an appeal against the order passed by the Appellate Tribunal would lie to this court, provided, it involves substantial question of law.

15. The only question that arises for consideration in this appeal is whether the appellant could have exhausted the extended period of limitation. In that regard it would be profitable to rely upon the judgment of the Hon'ble Apex Court in the case of **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur**

reported in **(2013) 9 SCC 753** wherein while considering the provision of Section 28 of the Customs Act, 1962 which is analogous to Section 11A of Excise Act, the Hon'ble Apex Court observed thus:

> "*25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the Assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In* ***Aban Loyd Chiles Offshore Limited and Ors. (supra)****, this Court made the following observations:*
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> > *21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed:*
> >
> > > *...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the Assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the Assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.*

It was held that the show cause notice must put the Assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the Assessee is put to notice the Assessee would have no opportunity to meet the case of the Department. It was held:

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the Assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the Assessee is put to notice, the Assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said Sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the Assessee falling within the four corners of the said proviso....

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a wilful default on the part of the Appellant, we hold that the extended period of limitation under the said provision could not be invoked against the Appellant."

16. In light of ratio laid down by the Hon'ble Apex Court in the case of **Uniworth Textiles Ltd.** (supra), and having regard to the fact that, the appellant has not been able to prove that any fraud, collusion or suppression of facts is attributed to the Respondent with intent to evade the payment of excise duty, the appellant could not have

invoked the extended period of limitation against the Respondent. In this view of the matter, what emerges from the above discussion is that the Demand-cum-Show Cause Notice issued by the appellant on 19.12.2012, i.e., after almost two years from the date of the subject transaction, is barred by limitation.

CONCLUSION:-

17. We, therefore, are of the view that, the Appellate Tribunal, after appreciation of evidence, has arrived at a finding of fact that, the demand raised by appellant is barred by limitation, which can neither be termed as erroneous nor perverse. The instant appeal does not involve a substantial question of law, much less a question of law. Moreover by applying the principle of consistency, we find that the present appeal deserves to be dismissed.

18. In the result, the Appeal is dismissed.

(ABASAHEB D. SHINDE, J.) **(NITIN B. SURYAWANSHI , J.)**

vsj..