

Proceedings initiated for overlapping period without any legal basis is misuse of statutory power- Calcutta HC

16 May 2022



Summary

The Calcutta High Court (HC) has held that the show cause notice (SCN) cannot be issued on the same ground for part of the relevant period when earlier the proceedings were dropped by the Commissioner after adjudication. The HC ruled that merely stating that the earlier order passed without calling for any conclusive evidence cannot be a ground to ignore the earlier order of adjudication. The Court applied the principles of consistency and opined that the order binds the department as the transaction is identical and there is no fresh material available with the Commissioner justifying the issuance of a second SCN. The HC further stated that the mere use of the words 'wilfully suppressed' cannot hold the assessee guilty and cannot validate the SCN.

Facts of the case

- The assessee¹ is a manufacturer of ball and roller bearings. Upon availing the CENVAT² credit of duty paid, the assessee had sent raw materials to job workers for processing. After processing, finished goods were bought back to the factory whereas the scrap and waste were sold directly from the job worker's premises. Accordingly, excise duty was paid on such a sale.
- The Commissioner issued SCN³ alleging a short payment of excise duty on account of wilful suppression of facts. The SCN was adjudicated and the Commissioner dropped the proceedings by passing a speaking order. However, after around three years, the new incumbent Commissioner issued a SCN with identical allegations and overlapping period.
- The aggrieved assessee filed appeal before the Tribunal. However, the Revenue filed a present appeal

challenging the order passed by the Tribunal.

Kolkata HC observations and ruling⁴:

- **Abdication of statutory responsibility:** The SCN⁵ with an overlapping period is an exact replica of SCN⁶, except for the period. The Commissioner who had issued SCN was aware of the order in which proceedings were dropped. In the original order, the Commissioner had provided reasons for dropping of proceeding. Thus, SCN cannot be issued on the same ground for the part of the relevant period when earlier proceedings were dropped by the Commissioner after adjudication.
- **Department cannot take a contra stand in the subsequent case:** The HC placed reliance upon various SC judgements⁷ wherein the SC took a view that the department having accepted the principles laid down in the earlier case

¹ Tata Steel Ltd

² Central Value Added Tax

³ Dated 31.03.2004

⁴ CEXA NO. 25 OF 2021

⁵ Dated 30.04.2007

⁶ Dated 31.03.2004

⁷ Jayaswal Neco Limited, Birla Corporation Ltd. and Hindustan Gas and Industries Ltd.

cannot be permitted to take a contra stand in the subsequent cases.

- **Extended period cannot be invoked:** The HC observed that in the present case earlier SCN was issued whose proceedings had dropped after adjudication. Another SCN was issued on the same subject matter along with overlapping period. The Apex court relied on a case⁸ and stated that the department can never bring the case of the assessee to be a wilful suppression or misstatement. Therefore, extended period⁹ of limitation cannot be invoked.
- **Mere use of 'wilfully suppressed' cannot hold guilty:** The transaction in the instant case is identical and there is no fresh material available with the Commissioner to justify the issuance of subsequent SCN. Thus, mere use of words 'wilfully suppressed' cannot hold the assessee guilty. Also, these words and expressions cannot validate the SCN. Therefore, initiation of proceedings is in itself bad by law.

Our comments

The Apex Court in case of Nizam Sugar Factory¹⁰ had held that the subsequent SCNs cannot be issued on similar facts as were there in the initial SCN. This cannot be considered as suppression of facts on part of the assessee as all the facts were in knowledge as per the first SCN.

Even, in the case of Birla Corporation Limited¹¹, the SC had opined that Revenue authorities cannot take a different stand subsequently when initially the question and facts are identical. This will lead to confusion in the law and will place the authorities and taxpayers in quandary.

This is a welcome judgment and an analogy can also be drawn under the GST regime in similar matters.

⁸ Nizam Sugar Factory Versus Collector of Central Excise, A.P. [2006 (197) E.L.T. 465 (S.C.)]

⁹ Section 11A

¹⁰ 2747 of 2001 with 6261 of 03 & 2164 of 06 dated 20.04.2006

¹¹ No.- 5118 of 2003 dated 26.07.2005

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