CASE NO.:
Appeal (civil) 3584-3588 of 2001

PETITIONER:
Aban Loyd Chiles Offshore Limited and Ors.

RESPONDENT:
Commissioner of Customs, Maharashtra

DATE OF JUDGMENT: 07/08/2006

BENCH:
Ashok Bhan & Markandey Katju

JUDGMENT:
JUDGMENT

BHAN, J.

These appeals have been filed by Aban Loyd Chiles Offshore Limited, Essar Oil Limited and Amarship Management Ltd. against the common order dated 15.01.2001 passed by the Customs Excise & Gold (Control) Appellate Tribunal, West Regional Branch at Mumbai (for short "the Tribunal") by which the Tribunal has allowed the appeals of the appellants in part. The appeals are directed against the part of the order which has gone against the appellants. Revenue has not come up in appeal against the part of the order which has gone against it.

FACTS

In the year 1970, Oil and Natural Gas Corporation (ONGC) commenced offshore operations of exploration and exploitation of oil and natural gas etc. ONGC entered into contracts with various companies, which were contractors acting for and on behalf of ONGC for the exploration and exploitation of oil and natural gas etc. The contractors carried on offshore operations with their oil rigs as per the directions and instructions of ONGC. Between 1970 and 1987, ONGC carried on operations from its facilities at 12, Victoria Docks, Mumbai. The customs department permitted the clearance of goods to and from 12, Victoria Docks and the oil rigs, without compliance of any customs formalities and without the payment of duty of customs, i.e., goods were permitted to be transferred to the rigs from 12, Victoria Docks and were permitted to be removed from the rigs to the shore, without payment of customs duty.

In the year 1987, ONGC shifted its offshore operations from 12, Victoria Docks to Nhava Base. This was done because the facilities at 12, Victoria Docks were not sufficient to meet the increased offshore operations being carried on by the ONGC. Operations at Nhava Base are large scale operations and are carried on from five berths. Large warehousing and other facilities are also available at Nhava Base.

Appellants entered into separate contracts with appellants between 27.5.1987 to 30.6.1987. The appellants were engaged in exploration and exploitation of offshore oil, gas and other related services as contractors for the ONGC. Pursuant to the contracts the appellants were to carry out offshore operations for and on behalf of the ONGC. These contracts were extended from time to time.

An oil rig is a floating vessel which is towed to its required drilling location (appointed by ONGC), and then is jacked up on four legs which rests on the ocean floor. An oil rig, as an integral part thereof, includes drilling machinery to penetrate and drill into the ocean floor. Appellants carried drilling operations with its oil rigs beyond 12 miles from India (i.e. outside the territorial waters of India), on the Continental Shelf.

The procedure which was being followed as culled out by the Tribunal in its judgment is as under:

> "The background to the notices that were issued to the appellants resulting into the impugned orders is the same. Each of the appellants was engaged in oil exploration in the waters of Bombay. They carried out exploration under contract with Oil and Natural Gas Commission (ONGC for short). Their rigs were positioned in areas referred to as Bombay High, Panna etc. There was considerable movement of goods between the shore and the rigs. The extensive machinery in the rigs often requires repair and replacement. It was the practice in the custom house to treat the replacement of parts or machinery on the rigs as shop stores and not to levy duty on them in terms of the provisions of the Act. Items which required repair or replacement were to be disposed from the rigs are also brought back from the rigs on to the main land. Such activities were carried out by a procedure centralized through the ONGC. ONGC was conducting such operations from shed No. 12 Victoria Docks. The goods which were repaired and required to be fitted as ship stores were cleared from customs without payment of duty on transshipment permits and generally escorted by an officer of the Customs to 12 Victoria Docks. From there the goods used to be sent by supply boats under the operation of the ONGC to the rigs in question. Similarly, these supply boats used to bring from the rigs unserviceable material or machinery requiring repair or replacement into the Victoria Docks according to law. For example, scrap which was to be disposed of on payment of duty, a machinery part requiring replacement was cleared on machinery passes issued by the department so as to enable it to be brought back to the rigs for use. Around July 1988 ONGC decided to shift its operations to Nhava, some distance away from Bombay Port. The procedure that was being followed at Nhava base is elaborated in the show cause notice. Essentially it is this. The contractor's, i.e., the operators of the oil rigs applied to the Chief Engineer of ONGC for permission to transport goods from the base to the rigs or to the base from the rigs. After obtaining his permission transport of the goods took place. The transport took place by the supply vessels. The ONGC issued gate passes on application by the contractor for movement of the goods from the base to the rigs after their receipt in the base. These gate passes indicated the name of the contractor, description of the material and name of the rig. They also signed by the personnel of the Central Industrial Security Force at the gate as also by the contractor's representative."

Customs Department issued show cause notices dated 22.4.1994, 12.5.1994 and 12.5.1994 to the appellants wherein it was contended that there were unauthorized loading, unloading, storage or removal of imported, indigenous items and scrap from the Nhava Base. There were three annexures to the show cause notice, i.e., repair and return goods removed from Nhava Base and not sent back to the rigs; scrap removed from Nhava Base, storage and return goods removed from Nhava Base and not returned to the rigs. It was proposed to recover the escaped customs duty and levy penalty. Further, the extended period of limitation in terms of proviso to Section 28 of the Customs Act (for shot "the Act") was invoked. The appellants filed their replies to the show cause notices.

Customs Department issued two further show cause notices dated 15.2.1994 and 18.2.1994 to the two of the appellants, i.e. Aban Loyd Chiles Offshore Limited and Essar Oil Limited by which the appellants ship stores were sought to be confiscated and customs duty and penalty sought to be levied. These two appellants filed their replies to these show cause notices as well.

One of the points taken in replies to the show cause notices was that the

Department was aware all through that Nhava Base was being used by the ONGC for supply of goods to the rigs and then receive the goods from the rigs, and therefore, neither the demand for duty nor the levy of penalty was justified. Similarly, it was contended that the goods could not be confiscated as the Department was all through aware that Nhava Base was being used for loading and unloading of goods for being taken to the rigs and were being received from the rigs to the main land. It was also pointed out that in the present case the show cause notices did not contain an averment pointing out specifically as to which of the various omissions or commissions had been committed by the appellants to invoke the extended period of limitation thus depriving the appellants to meet the case of the Department. It was further contended that the show cause notice did not contain the averment that the duty had escaped or short levied or not charged because of any willful misstatement or suppression of facts on the part of the appellants.

Appellants were given personal hearing and they filed their written submissions as well.

The Commissioner of Customs by his order dated 29.9.1997 confirmed the demand as per show cause notices and rejected the contention raised on behalf of the appellants. Demand of duty of Rs. 10,16,35,914/- and a penalty amount of Rs. 50,00,000/- was levied on Essar Oil Limited in respect of show cause notice dated 12.5.1994; and levied a demand of duty of Rs. 5,06,12,412/- and a penalty amount of Rs. 25,00,000/- upon Aban Loyd Chiles Offshore Limited in respect of show cause notice dated 22.4.1994 and levied a demand of duty of Rs. 68,66,092/- and a penalty amount of Rs. 4,00,000/- upon Amarship Management Limited in respect of show cause notice dated 12.5.1994.

Commissioner of Customs of his Orders dated 28.11.1997 and 27.1.1998 ordered confiscation of the goods and levied duty of Rs. 4,95,406/- and penalty of Rs. 25,000/- upon Essar Oil Limited and duty of Rs. 4,69,104/- and penalty of Rs. 25,000/- upon Aban Loyd Chiles Offshore Limited.

Being aggrieved by the aforesaid orders the appellants filed five appeals before the Tribunal. The Tribunal by the impugned order disposed of all the aforesaid five appeals by the common order.

Tribunal accepted the two appeals filed by the Essar Oil Limited and Aban Loyd Chiles Offshore Limited directed against the order dated 29.9.1997 and 28.11.1997 by which the goods of the appellants were ordered to be confiscated and duty and penalty levied, by concluded thus:

"....However, we have to keep in mind the fact that it is not possible to conclude that the department was unaware of the operations of the ONGC at Nhava. The counsel for one of the appellants produced the correspondence between an Additional Collector of Customs and Nhava Sheva and the ONGC. This shows that the ONGC had intimated the department of its operations. Further, the department would in any case have been aware of the general nature of the activities at Nhava base from the fact that the goods which were imported as ship stores were escorted by the preventive officers of the customs. The notice was issued in 1994, six years after ONGC shifted its operations. It is difficult for us to conceive that the department would not be aware for six years that the ONGC was carrying out its operations. In fact the Commissioner himself records in his order that the department was aware of this fact, and fault lies with the ONGC and the department. In these circumstances we do not think that it would be appropriate to confirm confiscation or imposition of penalties for actions the general nature of which the department was aware, and could have taken steps to regulate."

The remaining three appeals directed against the order dated 29.9.1997 were dismissed. The orders of Commissioner of Customs were confirmed.

Mr. Joseph Vellapally, learned Senior counsel appearing for the appellants submitted at the outset that the appellants are prepared to pay the duty for the last six months immediately prior to the issuance of the show cause notice, treating the show cause notice to be valid to that extent but challenge the invocation of the proviso to Section 28 of the Act to extend the period of limitation. In view of this submission, we are disposing of these appeals only on the point as to whether the Department could invoke the extended period of limitation under proviso to Section 28 of the Act.

Mr. Joseph Vellapally, learned Senior counsel appearing for the appellants, contends that the Tribunal erred in holding that the extended period of limitation of five years as provided under the proviso to Section 28 of the Act could be invoked in the facts and circumstances of the case. That the Customs Department at all relevant time was in full and complete knowledge of all the activities being carried out by the appellants and ONGC at Nhava Base and prior thereto by ONGC at 12 Victoria Docks. That there is no allegation in the show cause notice that the appellants had evaded the payment of duty either in collusion with the officers of the customs Department or were guilty of making willful misstatement or for willfully suppressed facts. Relying upon the judgment of this Court in Collector of Central Excise v. H.M.M. Limited., [1995] Supp 3 SCC 322, it was contended that the notice must contain an averment pointing out specifically as to which of the various omissions or commissions had been committed by the noticee so as to invoke the extended period of limitation. It was submitted that the show cause notice in the present case did not contain the averment pointing out specifically as to which of the various omissions or commissions had been committed by the appellants so as to invoke the extended period of limitation. It was further contended that the extended period of limitation could not be invoked in the present case as there was nothing more positive than mere inaction or failure on the part of the appellants. There was no conscious or deliberate withholding of information on the part of the appellants. It was also contended that Section 11-A of the Central Excise Act is pari materia with the Section 28 of the Customs Act.

As against this Shri M.M. Paikanday, learned Senior counsel appearing for the Department took us through the show cause notice in the case of Essar Oil Limited (as the show-cause notices in the other cases are similar). He contended that though there is no averment in the show cause notice that the appellants were guilty of either collusion or willful mis-statement or willful suppression of facts but if show cause notice is read as a whole it clearly points out that the appellants were guilty of willful suppression of facts.

Though it is contended that Section 28 of the Customs Act is pari materia with Section 11-A of the Central Excise Act we find that there is material difference between the two provisions. The word "fraud" and the words "with intent to evade payment of duty" occurring in the proviso to Section 11-A of the Central Excise Act are missing in Section 28(1) of the Customs Act and the proviso in particular. Section 28 of the Customs Act reads as under:

"28. Notice for payment of duties, interest etc.-

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty

or interest which has not been levied or charged or which has been so short-levied or part 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 has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", 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 six months or five years, as the case may be."

The proviso to Section 28 can be invoked where the payment of duty has escaped by reason of collusion or any willful mis-statement or suppression of facts. So far as 'mi-statement or suppression of facts' are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty.

This Court while interpreting Section 11-A of the Customs 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...."

In the present case we find that in the show cause notice it is not alleged that duty of custom could not been levied or paid by reason of collusion or willful mis-statement or willful suppression of facts. The appellants were not put to notice which of the various omissions or commissions stated in the proviso were committed by them to extend the period of limitation from six months to five years. The appellants having not been put to notice did not have the opportunity to meet the case of the Department.

Tribunal in its order while accepting the appeals filed by Aban Loyd Chiles Offshore Limited and Essar Oil Limited (two of the appellants) and dealing with the point regarding confiscation of goods has held that the ONGC had intimated the department of its operations from the Nhava Base. That the Department would in any case have been aware of the general nature of the activities at Nhava base from the fact that the goods which were imported as ship stores were escorted by the preventive officers of the customs. That Commissioner himself in his order has recorded that the Department was aware of this fact and fault lies with the ONGC and the Department. If that be the case, the appellants who were working on behalf of ONGC and as per its directions cannot be accused of willful suppression of facts. All these facts were already to the knowledge of the Department. If all these facts were to the knowledge of the Department then the Department was not justified in invoking the extended period of limitation. Accordingly, it is held that the Department would not be entitled to invoke the proviso to Section 28 of the Customs Act and avail of extended period of limitation.

For the reasons stated above, the appeals are partly accepted. The appellants would be liable to pay the duty for a period of six months prior to the date of issuance of the show cause notice and not for the subsequent period. The demand for the subsequent period is held to be beyond the period of limitation. Accordingly, the demand of duty and levy of penalty for the subsequent period is quashed.

Penalty, if any, for the period of six months immediately preceding the issuance of notice, for which the assessee has agreed to pay the duty, is also waived.

The point on merits is left open. Parties will bear their own costs.