SUPREME COURT OF INDIA

Mallur Siddeswara Spinning Mills (P) Ltd.

Vs.

C.C.E., Coimbatore

(S.N. Variava and H.K. Sema JJ.)

18.03.2004

ORDER

1. This appeal is against the Judgment of the Customs, Excise and Gold (Control) Appellate Tribunal dated 27th May, 1996.

2. Briefly stated the facts are as follows:-

> "The Appellants are in the business of spinning cotton yarn. It is claimed that in Salem there is acute power shortage. Thus two generator sets were installed in their factory one on 13th March, 1991 and the second on 15th January, 1992. Show Cause Notice dated 2nd July, 1993 was issued to them claiming duty on manufacture of generating sets. The Collector confirmed the demand for duty holding that there was deliberate suppression of the fact of manufacture of generating sets. The Appeal preferred by the Appellants has been dismissed by the Tribunal by the impugned Judgment."

3. It is submitted that the extended period of limitation was not available as there was no wilful suppression and in any case generators being huge items, the Department was always aware of their installation. It was submitted that the Appellants and all the other people in the locality were aware of a Trade Notice issued by the Delhi Collectorate dated 24th December, 1986 which clarified that diesel generating sets if assembled at site, out of the duty paid components, and which are fixed to the ground as a fairly permanent fixture and are not ordinarily intended to be removed from the place of installation, would not attract excise duty. It was submitted that on the basis of this Trade Notice the Appellants were under a bona fide belief that no duty was payable on the generating sets. Reliance was placed upon the case of *Padmini Products v. Collector of C. Ex. reported in*[1] wherein it has been held that the extended period of five years is inapplicable if there is mere failure or negligence of the manufacturer to take out licence or pay duty when there was scope for doubt that goods were not dutiable. It was held that where by virtue of Trade Notice there is doubt whether a good is dutiable then it could not be said that there was any fraud, collusion, wilful mis-statement or suppression of facts or contravention of rules with intent to evade duty. It was held that in such cases the extended period of limitation would not be available. Reliance was also placed upon the authority of this Court in the case of Tamil Nadu Housing Board v. Collector of

Central Excise, Madras wherein also it has been held that the extended period of limitation would be invocable only if there was suppression, fraud, collusion and intent to evade payment of duty. It was held that the initial burden was on the department but once the department discharged that burden it shifted on the assessee.

4. Both the Collector as well as the Tribunal have held that this is not the case where by virtue of the Trade Notice issued by the Delhi Collectorale there could be a doubt. It has been found as a fact that there was wilful suppression of the fact of manufacture of the generating sets. It was only when the inspector inspected the premises on 17th March, 1992 that it was found that the generator sets had been manufactured. We are in agreement with these findings. The Trade Notice issued by the Delhi Collectorate is of 24th December, 1986. Thereafter the Central Collector had issued a Trade Notice dated 11th October, 1990. That Trade Notice is in respect of "Machines and Generating sets". This Notice clarifies that if the machine or the generator is superficially attached or bolted to the ground merely to ensure its operation is vibration free, it does not become immovable property as it can be unbolted and bought and sold. It clarifies that the question whether the generating set is dutiable would have to be examined in each individual case. Following this the Collector of Central Excise, Coimbatore issued a Trade Notice dated 15th November, 1990. The heading of this Trade Notice also shows that it is in respect of generating sets assembled at sites. This Trade Notice also clarifies that merely because the generating sets are bolted to the ground, so that the operation is vibration free, does not mean that they become immovable property as it is possible that they may be unbolted and bought and sold. In view of the subsequent Trade Notices which clarified the position very clearly no doubt remained any longer. It became necessary for the Appellants to disclose that they had assembled generating sets so that their sets could be examined in order to determine whether excise duty was payable or not. Admittedly, the Appellants never disclosed the fact that these generating sets had been manufactured and installed in their factory. This fact only came to the notice of the Department by virtue of the inspection carried out on 17th March, 1992. We are, therefore, in agreement with the findings that the extended period of limitation was available.

5. It is next submitted that even presuming there was a manufacture, the manufacture was by the supplier and it is the supplier who was liable to pay duty, if any, was payable. In support of this submission, reliance is placed upon a decision of the Tribunal in the case of *Kerala State Electricity Board v. Collector of Central Excise reported in*[2] (Tribunal) wherein it has been held, on facts of that case, that it was the contractor who had actually manufactured and that duty could not be demanded from the customer. It was pointed out that this Judgment was affirmed by this Court inasmuch as the Civil Appeal filed against that Judgment has been dismissed. Whether the supplier or the Appellant is the manufacturer is a question of fact. The Collector has, on the basis of inspection of the invoices, come to the conclusion that the Appellants had merely purchased the components from the supplier. The invoices did not show that the supplier was also to assemble and install the generating set. This finding has been confirmed by the Tribunal. This being a finding of fact and there being nothing to show that it is perverse or wrong we see no reason to interfere with the same.

6. It was next submitted that in any event the generating set was immovable property and thus no excise duty was payable on it. We are unable to accept this submission also. It is admitted position that the generating sets have been bolted on a frame. If the generating set is only bolted on a frame it is capable of being unbolted and being shifted from that place. It is then capable of being sold. Under these circumstances it could not be said that the generating sets manufactured by the Appellants are immovable property.

7. The last contention is that there has been discrimination against the Appellants. It is submitted that every other mill has got generating sets and that no other mill in that region is paying duty. It is submitted that only the Appellants have been singled out for payment of duty. In support of this submission, reliance was placed upon the authority of this Court in the case of *Damodar J. Malpani v. Collector of Central Excise reported in*[3] wherein same goods of another manufacturer were classified differently by the Department. This Court held that there cannot be any such discrimination and remitted the matter back for reconsideration. Reliance was also placed upon the authority of this Court in the case of *Steel Authority of India v. Collector of Customs, Bombay reported in*[4] wherein it has been held that different States Authorities could not take different stand in different States. It was held that a Trade Notice issued by one Custom House must bind all Customs authorities.

8. To these principles there can be no dispute. However, except for making a general statement that nobody else has paid duty, no particulars or details are given. On the contrary it has been pointed out to us that the Department had issued a show cause notice to another party also in respect of a generator set assembled and installed in their factory. However, in that case the Tribunal concluded that the longer period of limitation was not available and set aside the demand. Had the Appellants pointed out details of the other parties who been allowed, according to the Appellants, to install a generating set the Department may have been able to point out, whether or not, a notice had been issued to that party and whether or not any demand was made against that party also. No details have been given, merely on basis of general averment, it cannot be held that there has been discrimination.

9. It was further submitted that an element of profit at the rate of 10% has also been added in the amount of duty claimed from the Appellants. It was submitted that the Appellants had neither sold the generator sets nor made any profit on the generator sets. It was submitted that there was no question of paying an element of profit. We, however, find that this 10% profit, which has been added is under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975 which provides that if the value of excisable goods cannot be determined under Rules 4 and 5 then certain profits which the assessee would normally have earned on the sale of such goods can be added towards the value. This addition being under Rule 6(b)(ii) it could not be said that there was no fallacy in the same.

10. For the above reasons, we see no infirmity in the impugned Judgment. We see no reason to interfere. Accordingly, the Appeal is dismissed. There will be no order as to costs.

[1]*1989 (43) ELT 195 (SC)* [2]*1990 (47) ELT 62*
[3]*2002 (146) ELT 483 (SC)* [4]*2000 (115) ELT 42 (SC)*