

**SUPREME COURT OF INDIA**

Ascu Arch Timber Protection Limited

Vs.

Commissioner of Central Excise, Calcutta

C.A.No.5192 of 1998

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

07.04.2004

**ORDER**

1. All these Appeals can be disposed of by this common Order.
2. Briefly stated the facts are as follows:-

“The Appellants in Civil Appeal No. 5192 of 1998 will hereinafter be referred to as ASCU. They manufacture preservatives for the purpose, of preserving wood and timber against insects and other natural hazards. In respect of the preservatives there is no dispute. However, ASCU also put wood through a process and then impregnate it with their own preservatives. The question which arises is whether "densified wood" has come into existence by virtue of the process undertaken by them.”

3. The Collector held in favour of the assessee and held that "densified wood" had not come into existence. The Collector also so held in favour of two other parties who are Respondent Nos. 2 and 3 in Civil Appeal Nos. 3228-3230 of 1999. The Department filed three Appeals before the Tribunal. The Tribunal took up all the Appeals together and passed a common Order. In passing a common Order, the Tribunal relied on statements made by the Director of ASCU. It also relied upon the literature of ASCU and on two test reports, which pertained to samples taken from the other two parties. Based on these materials, the Tribunal held that "densified wood" had been manufactured. The Tribunal, however, dismissed the Appeal of the Department on the ground of limitation. It did so again only on the basis of correspondence exchanged between the Department and ASCU.

4. The other two parties have not challenged the Tribunal's Order at all. ASCU filed Civil Appeal No. 5192 of 1998 challenging the finding that "densified wood" was manufactured. Revenue filed Civil Appeal Nos. 3228-3230 of 1999 challenging the finding that the extended period of limitation was not available. ASCU also filed a Rectification Application before the Tribunal on the basis that there was an error apparent on the face of the record. There was difference of opinion amongst the Members and therefore the matter was referred to a Third Member. By majority it was held that as the test reports pertaining to the other two

parties were relied upon for arriving at a finding against ASCU there was an error apparent on the face of the record. The Tribunal had thus set aside its own order. As the Tribunal had set aside its earlier order these Appeals stood disposed off as infructuous. Against that Order an Appeal was filed to this Court. This Court by its Judgment in the case of Commissioner of Central Excise, Calcutta v. ASCU Limited, Calcutta reported in 1[ 6] held that in effect the Tribunal had reviewed its own Order. It was held that the Tribunal had no power to review. This Court thus set aside the order reviewing the earlier order. These Appeals were revived by this Court.

5. We have heard the parties at great length. We find that the Tribunal has, in considering three Appeals, used materials, which pertained to one party to arrive at a finding against another party. This the Tribunal could not have done. It was submitted that even if the test reports pertaining to the other parties are ignored, the order of the Tribunal discloses that there is sufficient material to arrive at the conclusion that ASCU is manufacturing "densified wood". We find ourselves unable to accept this argument. As noted above, the Tribunal had itself set aside its Order, inter alia, on the ground that they strongly relied on material, which they could not have relied upon. It is not possible for us to conclude whether or not in the absence of the test reports the Tribunal would have still arrived at the same conclusion. In our view, the following observations of this Court in the case of Dhirajlal Girdharilal v. Commissioner of Income Tax, Bombay reported in apply with full force to this case:-

"The learned Attorney-General frankly conceded that it could not be denied that to a certain extent the Tribunal had drawn upon its own imagination and had made use of a number of surmises and conjectures in reaching its result. He, however, contended that eliminating the irrelevant material employed by the Tribunal in arriving at its conclusion, there was sufficient material on which the finding of fact could be supported. In our opinion, this contention is not well founded. It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises."

As it is not possible for us to arrive at a conclusion, we set aside the order of the Tribunal and remit the matter back to the Tribunal. We, however, clarify that we are setting aside the order only qua ASCU and not qua the other two parties who have not challenged that order at all.

6. Before we part there is one aspect, which we must clarify. In the course of argument before us, it was sought to be submitted that even if it is held that the Appellants' product is "densified wood" even then there would be no manufacture. This is not a point, which has been taken up at any stage and will not be allowed to be urged before the Tribunal. The Tribunal will restrict itself to the material, which is already on record and decide on the basis of that material whether or not the department has shown that "densified wood" has come into existence and whether or not the extended period of limitation could be invoked.

7. In Civil Appeal Nos. 3228-3230 of 1999 i.e. Revenue Appeals on the aspect of limitation we find from the Tribunal Judgment that it was decided against the Revenue only on the basis of material produced by ASCU. There is no material to show that the claim against the others was also time barred. Therefore, in their case there was no justification for holding that the demand against them was barred by limitation. To this extent, the Civil Appeal Nos. 3228-3230 of 1999 succeed. The finding of the Tribunal that the claim was barred by limitation as against Respondent Nos. 2 and 3 therein is set aside.

8. The Appeals are disposed of accordingly. There will be no order as to costs.