SUPREME COURT OF INDIA

Continental Foundation Joint Venture Sholding, Nathpa H.P.

Vs.

Commissioner of Central Excise,Chandigarh-I

C.A.No.3139 of 2002

(Dr. Arijit Pasayat and S.H. Kapadia JJ.)

29.08.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. These appeals involve identical question of law and are, therefore, disposed of by this common judgment. The controversy relates to the financial year 1997-98. Post 1997- 98 the tariff entry provides that the rate is nil. The basic facts are noted in the appeal filed by Continental Foundation Joint Venture-the appellant in Civil Appeal No.3139 of 2002.

2. The appellant M/s Nathpa Jhakri Power Corporation (in short 'NJPC') is a Joint venture between the Government of India and Govt. of Himachal Pradesh, set up for the purpose of construction of a power-project between the towns of Nathpa- Jhakri in Himachal Pradesh known an Nathpa Jhakri Power Corporation funded by the World Bank. The civil work relating to the project was allotted to three construction companies viz. M/s Continental Foundation Joint Venture (in short 'CFJV'), M/s Nathpa Jhakri Joint Venture (in short 'NJJV') and M/s Jai Prakash Hyundai Consortium, (in short 'JPHC'). The agreement was entered into by M/s NJPC and the construction companies to provide inter alia 'mix concrete' for execution of various items of work under the contract.

3. The Commissioner of Central Excise, Chandigarh issued a show cause notice dated 20.1.1999 to all the above parties alleging that the construction companies employed by M/s NJPC were manufacturing Ready Mix Concrete (in short 'RMC') on which no central excise duty is being paid. Since the said RMC falls under Chapter Heading No.3824.20 of the Schedule to the Central Excise Tariff Act, 1985 (in short 'Tariff Act') and is subject to Central Excise duty under Central Excise Act, 1944 (in short the 'Act'), duty is payable. All the three parties are adopting the same method of manufacture of RMC for which the rock is blasted from the designated quarry of M/s NJPC. It is transported to the crusher and crushed to the specified sizes and specific quantity at the project site. Some aggregate, cement and sand are also produced from the crushing plant set up at the site. Some natura1 sand is also used. The aggregate and sand are transported and stored in bins adjacent to the automatic batching plant. The cement purchased from the market is stored in the cement silons at the site. The batching plant is an automatic plant which regulates and delivers the specified sizes and quantities of aggregate, sand and cement into the mixing drums through the built- in-conveyor. The admixture for water reduction or air entraining is incorporated in the concrete as per the approved

mix design given by the NJPC. The whole process is fully automatic and is electronically controlled. The concrete of approved mix design and the specified quantity is manufactured in the batching plant strictly in accordance with IS: 456-1978 as stipulated in the contract with M/s NJPC. The concrete so produced is transported by transit mixers upto the location of placement and is placed at the specified location by concrete pumps or placers before the setting time of concrete, which varies depending upon the type of cement used. Noticee companies are manufacturing RMC but with some motive, they are naming it as mixed concrete to evade the central excise duty. There is a difference between the process and method of manufacture of RMC provided in the Bureau of Indian Standards (in short 'BIS') literature under IS: 4926/1976 and the Board's letter No.368/l/98-CX dated 6.1.1998. In this Circular of the Board, the process of manufacture of RMC is spelt out and it is clarified that RMC is a dutiable product. The matter was referred to the BIS who vide their letter dated 23.10.1998 reported that the query raised by the department vide their letter dated 9.7.1998 was considered by the Concrete Sub Committee and its views are as follows:

"It is agreed that in so far as the process of manufacturing the concrete is involved, the process described in the letter of Central Excise is similar to the process given in IS;4926 specification for "Ready Mix Concrete'".

4. Considering the reply of the notices, the Commissioner of Central Excise, Chandigarh-I confirmed the amounts of duty and also imposed penalty in terms of Rule 209A of the Central Excise Rules, 1944 (in short the 'Rules'). One of the stands taken by the appellant was that the extended period of limitation under Section 11A of the Act was not available. There were doubts raised and, in fact, at different points of time, circulars have been issued. This plea was turned down by the adjudicating authority with the following observations:

"Based on above discussions, it is evident that Mix Concrete manufactured and used at the site of construction is in fact Ready Mix Concrete and M/s NJPC alongwith three construction companies have concealed its nomenclature with an obvious intention to escape the duty on the said Ready Mix Concrete. M/s NJPC have apparently abetted the contravention of non payment of Duty, they are therefore, liable for penal action the said abetment."

5. In appeal, apart from the other challenges the plea relating to non-applicability of the extended period of limitation was also urged. The Tribunal did not accept the contention with the following observations:

"16. Another argument is about the time bar of demands. It is contended that, in view of the Board Circular dated 6.1.1998, since they were making the concrete at site and as per the standards prescribed in IS: 456-1978, they were under a bonafide belief that what they were manufacturing was mix concrete and not the RMC. The contention of bonafide belief is also advanced on their eligibility to the exemption under Notification No.4/97-CE dated 1.3.97. We find little force in this submission. A specific entry was made in the Central Excise Tariff for RMC under Heading 3824.20 with effect from 1.3.1997. The exemption under the notification was provided to mix concrete made at site and not to the RMC. None of the appellants sought any clarification from their jurisdictional central excise authorities or obtained any lea1 opinion as to the exigibility of their product, or its eligibility to the exemption under this notification. The Board Circular dated 6.1.1998 was issued much after the RMC was brought under the excise net. In the face of these facts, the plea of bonafide belief by the appellants is not supported by the evidence on record. Another contention raised is that the appellants could not have had any intention to evade payment of duty, since the

contract between the applicants and the Power Corporation specifically provided that any additional cost that was incurred as a result of any change in legislature or States statutes, regulations or by laws would be paid by the Power Corporation. It is contended that, where the excise duty is reimbursed by the buyer, there could not be any intention to evade payment of duty. It is observed that no such plea is raised before the adjudicating authority. The Power Corporation is also an appellant in this case and there is no plea of any such commitment on their behalf in their appeal. There is no evidence that the stated clause in the contract would bind the Power Corporation to reimburse the appellants even for the duty liability fastened on to the appellants on the ground of suppression and misrepresentation etc. and not on account of any change in legislation, regulation or by laws. The plea of bonafide belief is, therefore, rejected. The appellants are also claiming the benefit of modvat credit on the input material but this plea is also not raised before the original authority. However, in the interest of justice, they could be given an opportunity to establish their case before the original authority for eligibility to the modvat credit in respect of the duty paid on the input material used in the manufacture of RMC with the documentary proof."

6. Similar view was expressed by the CEGAT in other appeals which is the subject-matter in the other appeals.

7. Mr. Joseph Vellapally, learned senior counsel for the appellant submitted that there were various circulars operating at different points of time. There was no clarity or unanimity in the views expressed by the authorities themselves. In fact, correctness of the judgment by CEGAT in Continental Foundation Joint Venture's case (supra) was doubted and the matter was referred to larger bench. In Chief Engineer Ranjt Sagar Dam v. Commissioner of C.Ex., Jalandhar (2006 (198) E.L.T. 503 (Tri.-LB) larger bench of the Tribunal has held that the view expressed in Continental Foundation Joint Venture's case (supra) was not the correct view.

8. In response, learned counsel for the respondents submitted that the circulars dated 1.2.1996, 23.6.1997 and 6.1.1998 have no relevance and the judgment in Chief Engineer Ranjt's case (supra) does not reflect the correct position.

9. We are not really concerned with the other issues as according to us on the challenge to the extended period of limitation ground alone the appellants are bound to succeed. Section 11A of the Act postulates suppression and, therefore, involves in essence mens rea.

10. The expression 'suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

11. Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt

about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful.

13. That being so, the adjudicating authorities were not justified in raising the demand and CEGAT was not justified in dismissing the appeals.

14. On the ground of adjudication beyond the normal period of limitation and non-availability of the extended period of limitation, the appeals are allowed. No costs.