SUPREME COURT OF INDIA

Geo Tech Foundations & Construction

Vs.

Commnr. of Central Excise, Pune

C.A.No.5305 OF 2005

(Arijit Pasayat and P. Sathasivam JJ.)

07.03.2008

JUDGMENT

Arijit Pasayat, J.

1. These appeals are directed against separate judgments of the Customs, Excise and Service Tax Appellate Tribunal, Mumbai Central (in short 'CESTAT'). The factual background needs to be noted in brief.

2. Factual scenario is noted in respect of Civil Appeal No.5305 of 2005. But the conclusions on the legal issues will cover the other appeals.

3. Appellant manufactures PSC girders at site to be used in the construction of Railway Bridge for Konkan Railways. The period involved is June 1994 to February, 1995. These articles were cleared without payment of central excise duty under Central Excise Act, 1944 (in short the 'Act'). A show cause notice was issued on 8.5.1996 and the appellant was asked to show cause as to why duty amounting to Rs.53,91,498/- should not be demanded from it, as the girders were cleared without payment of duty, why they should not be confiscated and why penalty should not be imposed on the person concerned.

4. The Commissioner adjudicated the case demanding duty and confiscating the girders which were by then removed to be placed on the bridge and imposed penalties.

5. The stand of the appellant before the CESTAT was that the show because notice was barred by limitation, inasmuch as it was issued beyond the statutory period of 6 months as provided at the relevant time. Further, the department had knowledge of the fact that the appellant manufactured PSC girders in 1994 itself. The show cause notice was issued in 1996 i.e. after the period of limitation. It was further submitted that even on merits there was no scope for demanding duty. In the alternative, it was pleaded that there was no marketability

of PSC girders and since the girders are not marketable, therefore, the question of levying any excise duty under the Act did not arise.

6. The CESTAT held that the larger period of limitation was available. On the question of marketability the matter was referred to a larger Bench of the CESTAT.

7. In C.A. Nos.7412/2005 and 7621/2005, challenge is to the final order of CESTAT rendered by a larger Bench holding that the benefit of Notification No.59/90-CE cannot be extended to PSC girders as they are goods which are not manufactured at site for construction of buildings. Therefore, the articles were held to be subject to excise duty.

8. In support of the appeals, Mr. Joseph Vellapally, learned senior counsel for the appellant submitted that two appeals were decided by CESTAT on the question of manufacture. One related to the present appellants and the other to M/s Asian Techs. Ltd. Correctness of the judgment in M/s Asian Techs. Ltd. Was considered by this *Court in Larsen & Toubro Ltd. v. Commissioner of Central Excise, Pune-II*[1] This Court held that since there was bona fide doubt as to whether the activities carried on amounted to manufacture or not, same was a debatable issue and the questions were answered differently by different Benches and, therefore, the extended period of limitation in terms of Section 11-A of the Act cannot be applied.

9. It is to be noted that in the facts of the present case, earlier notice was issued which was withdrawn and the second notice was issued on 8.5.1996. Prior to the amendment by Act 10 of 2000 w.e.f. 12.5.2000 the extended period of limitation was one year. After the 2000 amendment the period has become 5 years.

10. Admittedly, when the first show cause notice was issued, the extended period of limitation was not resorted to. A notice should ordinarily be issued within a period of six months (as the law then stood) i.e. within the prescribed period of limitation but only in exceptional cases, the said period could be extended to one year or five years, as the case may be. When in the original notice, such an allegation had not been made; we are of the opinion that the same could not have been made subsequently as the facts alleged to have been suppressed by the appellant were known to them.

11. In *P & B Pharmaceuticals (P) Ltd v. Collector of Central Excise*[2] this Court held as under:

> "19. However, Mr. Jaideep Gupta submits that the Tribunal did not accept that here has been assignment of logo in favor of the assesses. We are unable to accept the contention of the learned counsel. The tenor of the order, "the assesses had produced certain documents such as registration form, trade mark authorities assigning the trade mark to them but the fact remains that there was material evidence by way of seizure of goods manufactured by M/s P & B Laboratories bearing the same logo much after

> the alleged transfer of trade mark to the appellants' discloses that the Tribunal accepted that there has been an assignment but proceeded to deal with the case of inapplicability of the exemption under the notification on the ground that the logo was being used by M/s P & B Laboratories also. We have already indicated above that use of logo of the manufacturer by third parties is alien for purposes of denial of exemption on the strength of Para 7 of the notification. In this view of the matter, we are unable to uphold the order of the Tribunal denying the exemption to the assesses."

12. In any event, the ground that the assesses has suppressed the fact that M/s P & B Laboratories was also using the logo for availing the benefit under the notification cannot be a valid reason to invoke the proviso to Section 11A of the Act. There is no obligation on the owner of a logo to make a roving enquiry to ascertain whether any other person is also using his logo and disclose it to the authorities to avert a possible allegation of suppression of fact for purposes of invoking the proviso.

13. One further aspect cannot be lost sight of. The appellant as well as Konkan Railways raised a definite plea of bona fide. Such a plea had not been rejected. On the contrary, as noted above, there was diversion of views and the issue was answered by different Benches of the CESTAT. That being so, the extended period of limitation could not have been invoked. As the facts alleged to have been suppressed by the appellant were known to the department, in that view of the matter the extended period of limitation under Section 11-A of the Act has no application. Invocation of Section 11-A, was impermissible, and therefore, we set aside the order of CESTAT which is the subject matter of challenge in Civil Appeal No.5305 of 2005. The appeal is allowed.

14. In view of the conclusions in C.A.5305 of 2005 there is no need to consider the question of marketability and/or excitability. The issue is academic. In view of the decision in connected Civil Appeal No.5305 of 2005, Civil Appeal Nos.7412 of 2005 and 7621 of 2005 are allowed. Civil Appeal 1330/2008

15. The show cause notice was issued on 30.5.1996. In view of what has been decided in C.A. No.5305/2005, the appeal deserves to be dismissed only on the ground of limitation. Civil Appeal No.2383/2006

16. The dispute relates to the period from April 1993 to July, 1993. A show cause notice was issued on 8.5.1996. In view of what has been stated in C.A.No.5305 of 2005 decided today, the appeal deserves to be dismissed only on the ground of limitation. Civil Appeal No 2385 of 2006

17. The period involved is November, 1993 to December, 1994 and the show cause notice was issued on 3.12.1996. In view of what has been stated in C.A.No.5305 of 2005 decided today, this appeal deserves to be dismissed which we direct.

[1]*(200) 211 E.L.T. 513 S.C*

[2](2003) 153 E.L.T.14 S.C