

▶ M/S. GEO TECH FOUNDATIONS & CONSTRUCTION A

v.

COMMNR. OF CENTRAL EXCISE. PUNE
(Civil Appeal No. 5305 of 2005)

MARCH 7, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.] B

▼ *Central Excise Act, 1944 – s.11-A – PSC Girders –*

Clearance of – Without payment of Excise duty – Show cause notice demanding duty issued beyond period of limitation – Held: Invocation of extended period of limitation is impermissible in the facts of the cases. C

▶ In Civil Appeal Nos 5305/2005, 7412/2005 and 7621/2005, PSC Girders were cleared without payment of duty. Show cause notice was issued demanding the duty. D
▼ Appellant-assessee contended that show cause notice was barred by limitation having been issued beyond the statutory period of six months prevalent at the relevant time. Alternatively it was contended that since the Girders were not marketable, it could not be subjected to levy of duty. Central Excise and Service Tax Appellate Tribunal (CESTAT) held that extended period of limitation was available to the Revenue. On the question of marketability, the matter was referred to larger Bench of CESTAT. The larger Bench of CESTAT held in its orders which are subject of Civil Appeal Nos. 7412/2005 and 7621/2005 that the articles were subject to excise duty as they are goods which are not manufactured at site for construction of buildings. E F

▼ Civil Appeal Nos. 1330/2008, 2383/2006 and 2385/2006 were also filed which bore the same issue. G

▶ In appeal to this court, appellant contended that this court in *Larsen & Turbo* case had held that since there was

A *bonafide* doubt as to whether the activities carried on amounted to manufacture or not, it was a debatable issue and the questions were answered differently by different Benches, therefore, extended period of limitation is not applicable.

B Allowing Civil Appeal Nos. 5305/2005, 7412/2005 and 7621/2005, and dismissing Civil Appeal Nos. 1330/2008, 2383/2006 and 2385/2006, the Court

C HELD: 1.1 Admittedly, in Civil Appeal No. 5305/2005, 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, the same could not have been made subsequently as the facts alleged to have been suppressed by the appellant were known to them. [Para 10] [579-D, E]

E *P and B Pharmaceuticals (P) Ltd v. Collector of Central Excise 2003 (153) E.L.T.14 (S.C.)* – relied on.

F 1.2 The plea of *bona fide* had not been rejected. On the contrary, 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 Central Excise Act, 1944 has no application. Invocation of Section 11-A, was impermissible. [Para 12] [580-E, F, G]

H 2. In view of the conclusions regarding non-availability of extended period of limitation, there is no

need to consider the question of marketability and/or excisability. The issue is academic. [Para 13] [580-H; 581-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No 5305 of 2005

From the final Judgment and Order dated 11.03.2005 of the Customs Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai in Appeal No. E/3048/98, Final Order No. W286, 287/WZB/2005/CII.

WITH

Civil Appeal Nos. 2383 & 2385 of 2006; 7412 & 7621 of 2005 & 1330 of 2008.

Joseph Vellapally, P. Vishwanatha Shetty and P.H. Parekh, Romy Chacko, Arpit Gupta, Rashmi Malhotra, B. Krishna Prasad, M.P. Vinod, Ajay K. Jain, Vimlesh Kumar, P. Parmeswaran, Atul Y. Chitale, Sunanina Dutta Suchitra Atul Chitale, L.P. Dhir, Maneesha Dhir, N. Keerti Singh, Kirti Singh, Pranab Kumar Mullick and Ajay Kumar Jha (for M/s. Parekh and Co.) for the Appearing parties.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J.

Civil Appeal Nos. 5305/2005, 7412 and 7621/2005.

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

A 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 cause 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. A
Ltd. was considered by this Court in *Larsen & Toubro Ltd. v.*
▲ *Commissioner of Central Excise, Pune-II* (2007 (211) E.L.T.
513 (S.C.)). 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 B
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 C
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 D
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. E
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* F
Excise (2003 (153) E.L.T.14 (S.C)) 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 C
favour of the assessee. We are unable to accept the
contention of the learned counsel. The tenor of the order,
"the assessee 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 H

A 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 B 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 assessee. C

20. In any event, the ground that the assessee 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." D E

12. 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. F G

H 13. In view of the conclusions in C.A.5305 of 2005 there is

no need to consider the question of marketability and/or excisability. 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. A

Civil Appeal 1330/2008

14. 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. B

Civil Appeal No.2383/2006

15. 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. C

Civil Appeal No 2385 of 2006

16. 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. D

K.K.T. C.A. Nos. 5305 of 2005, 7412 of 2005, 7621 of 2005 allowed and C.A. Nos. 1330 of 2008, 2383 of 2006, 2385 of 2006 dismissed. E