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M/S. IBEX GALLAGHER PVT. LTD. AND ANR.

v.

COMMISSIONER OF CENTRAL EXCISE, BANGALORE

AUGUST 17, 2007

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[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

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Central Excise Act, 1944; Ss. 2(b) and 11AC; Circular No. 58/1/2002-CX dated January 15, 2002 issued thereunder by the Central Board of Excise and Customs/Central Excise Tariff Act, 1985; sub-heading 8543.90:

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Excisability of plants and machinery—Assessee assembling 'Solar Electric Power Fencing System'—Issuance of show-cause Notice by Revenue demanding certain amount of excise duty—Demand of duty confirmed by the Authorities—Assessee filing appeal before Tribunal—Tribunal held that the item in question is goods satisfying tariff description under sub-heading 8543.90 and thus liable for excise duty—On appeal, Held: On the issue of excisability of goods assembled at site, a Circular clarifying on the question of excisability of such goods in terms of various decisions of the Supreme Court on the subject of excisability has already been issued by the Central Board of Excise and Customs—Since factual aspects not considered by the Tribunal, it would be proper to remit the matter to it for consideration afresh in terms of the Circular and in the light of judgments of Supreme Court in CCE, Indore v. Vidhi Brothers and CCE, Indore v. Cethar Vessels—Directions issued.

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The Commissioner, Revenue, while examining the excisability of the Solar Electric Power Fencing System in terms of Section 2(b) of the Act held that assembling of the said item at the site by the assessee will bring into existence a new product distinct from all its parts/product used in it, thus liable for excise duty. Accordingly, a show-cause Notice was issued to the assessee. The assessee contended that the goods in question are not classifiable under the tariff sub-heading 8543.90 of the Customs Excise Tariff Act as electrical machines and apparatus, and thus, not liable for duty. The authorities invoked larger period in terms of Section 11A of the Central Excise Act, 1944 and confirmed the duty demanded and also imposed like sum as penalty under Section 11AC of the Act. A sum of rupees five lakhs was also

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levied as penalty on the Managing Director of the Company. Aggrieved, the assessee filed an appeal, which was allowed by the Tribunal holding that goods in question are liable to Excise duty and remanding the matter to Revenue for recounting the duty in terms of the directions, and the penalty against the Managing Director reduced to Rs.50,000/-. Hence the present appeals.

Appellant-assessee contended that the view taken by the CESTAT is untenable as the adjudicating authority was not justified in holding that fabrication of the plants in question out of duty paid bought out items amounts to manufacture of a new marketable commodity and therefore dutiable.

Allowing the appeals, the Court

HELD:1.1. The issue relating to excisability of plants and machinery assembled at site has been determined by this Court in several cases. As a matter of fact taking into account these decisions Circular No.58/1/2002-CX dated 15th January, 2002 has been issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi. The Circular indicates that it was intended to clarify the question of excisability of plant and machinery assembled at site.

Quality Steel Tubes Pvt. Ltd. v. CCE, (1995) 75 E.L.T. 17 (SC); *Mittal Engineering Works Pvt. Ltd. v. CCE, Meerut*, (1996) 88 E.L.T. 622 (SC); *Sirpur Paper Mills Ltd. v. CCE, Hyderabad*, (1998) 97 E.L.T. 3 (SC); *Duncan Industries Ltd. v. CCE, Mumbai*, (2000) 88 ECR 19 (SC); *Triveni Engineering & Industries Ltd. v. CCE*, (2000) 120 E.L.T. 273 (SC); *CCE, Jaipur v. Man Structural Ltd.*, (2001) 130 E.L.T. 401 (S.C.) and *Silica Metallurgical Ltd. v. CCE, Cochin*, (1999) 106 E.L.T. 439 (Tribunal), referred to.

[Para 7 and 8] [74-G-H; 75-A]

1.2. As the basic factual aspects were not considered by the CESTAT, it would be proper to remit the matter to it for a fresh consideration in the light of the judgment in the case of *CCE, Indore v. Viridi Brothers* and *CCE, Indore v. Cethar Vessels'* and Circular No.58/1/2002 CX dated January 15, 2002 issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs. [Para 9] [77-G]

Commissioner of Central Excise, Indore v. Viridi Brothers, (2007) 207 ELT 321 (SC) and *Commissioner of Central Excise, Indore v. Cethar Vessels Ltd.*, (2007) 212 ELT 454 (SC), relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6790-6791 of

A 2005.

From the Final Order No. 1312, 1313/2005 dated 8.8.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore in Appeal Nos. E/1038, 1309/2004.

B V. Lakshmi Kumaran, Alok Yadav and M.P. Devanath for the Appellants.

Vikas Singh ASG, Ajay Sharma and B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

C **DR. ARIJIT PASAYAT, J.** 1. These appeals have been directed against the judgment of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (in short 'CESTAT'). Challenge before the CESTAT was to the order in original 7/04 dated 14.7.2004 passed by a Commissioner of Central Excise, Bangalore No.3. By the said order the
D Commissioner confirmed demands on bringing into existence "electric power fencing system by use of solar power". The same was classified in sub-heading 8543.90 as "other electrical machinery and apparatus having individual functions". The Commissioner had invoked larger period in terms of Section 11A of the Central Excise Act, 1944 (in short the 'Act'). He confirmed the duty demand and also imposed like sum as penalty under Section 11AC of the Act.
E Penalty of rupees five lakhs was also levied on the Managing Director. According to the Revenue for the purpose of manufacture and clearance of the said item, namely, solar power electric power fencing system, the appellant brings various items which are also duty paid such as insulator, insulation test tool kit, battery charger and also procure various items from outside
F stores. They get GI wire, springs, battery, solar panel and Voltage Stabilizer etc. as bought out items and procured items such as Kiwitha Post, posts and pipes etc. on job work basis and imported certain items as such six channel controller and key pad etc. These are all erected as a fence at various sites. The Commissioner after examining Section 2(b) of the Act held that process
G of erection of the fence at the site will bring into existence this item as a new product distinct from all the products used. According to the assessee, the item is fixed on the walls and separately also on poles and they are not classifiable as electrical machines and apparatus having individual function under heading 8543.90. The Tribunal repealed the contention of the assessee and held as follows:

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"On a careful consideration and examining the impugned order,

and the record, we are satisfied that the item which has come into existence is an electrical appliances having individual functions. All the items are put together to bring into existence this item, Electric Power Fencing system and the same is also powered by using solar power. The catalogue as well as the statement of the MD is relied by Revenue to say that the item can be relocated and item can be saved and it does not get destroyed and dismantled merely because the evidence has to be reused if at all for use in other places does not mean that the item has got destroyed while refixing the same. The item has not become immovable property on erection piece by piece. The poles are fixed and the wires are fenced with all the other parts. The fence gives electric shock to animals when they want to cross the same it acts not only as an electrical barrier but also as a psychological barrier as no human or domestic animal having felt the shock once will attempt to go anywhere near the fence again. The power fence systems of various components which are brought out and some are manufactured and some are imported. They are all assembled to bring into existence solar power fence as a system. There is no civil work for erection and the item does not become part and parcel of immoveable property as contended. Therefore, the item satisfies the tariff description. We are of the considered opinion that it is goods and liable for duty in the Chapter heading already noted supra. However, the prayer of the appellant for modvat credit and cum duty benefit is required to be extended in terms of the ratio of the judgment cited (supra). The submission that the demands are partly time barred as the department was aware of all the details collected by them for 1998 and the show cause notice issued in 2003 makes the demands time barred is a well considered plea and require to be accepted in the light of the following judgments cited by them.

- (1) *Cosmic Dye Chemical v. CCE Bombay*, (1995) 75 ELT 721 (SC)
- (2) *CCE v. Chemphar Drugs & Linements*, (1989) 40 ELT 276 (SC)
- (3) *Padmini Products v. CCE*, (1989) 43 195 (SC)
- (4) *Pushpam Pharmaceuticals Company v. CCE Bombay*, (1995) 78 ELT 401 (SC)

The penalty of Rs.5 lakhs on the Managing Director is excess. Hence it is reduced to Rs.50,000/-. The matter is remanded to Commissioner

A for re-working out after granting benefit of modvat and treating clearance as cum duty as pleaded by the appellants in the light of large bench judgment rendered in the case of *Shre Chakra Tyres*. Appeals are allowed by remand only for recomputation of duty. Order accordingly.”

B 2. However, the penalty was reduced to Rs.50,000/- in the case of the Managing Director.

C 3. In support of the appeal learned counsel for the appellant submitted that the excisability on plant and machinery assembled at site has been considered by this Court and placed strong reliance on decision of this Court in *Commissioner of Central Excise, Indore v. Viridi Brothers*, (2007) 207 ELT 321 (SC)].

D 4. Learned counsel for the Revenue, on the other hand, submitted that though in some cases this Court remanded the matter to the CESTAT to decide on the factual aspects, in this case categorical findings have been recorded on the aspects for which remand has been made and, therefore, the assessee's appeal is without merit.

E 5. Apart from *Viridi Brothers* case (supra) this Court in *Commissioner of Central Excise, Indore, v. Cethar Vessels Ltd.* (2007) 212 ELT 454 (SC) also dealt with the similar question.

F 6. According to learned counsel for the appellant, the view taken by the CEGAT is untenable. The adjudicating authority was not justified in holding that fabrication of the plants in question out of duty paid bought out items amounts to manufacture of a new marketable commodity and therefore dutiable.

G 7. The issue relating to excisability of plants and machinery assembled at site has been determined by this Court in several cases, e.g. *Quality Steel Tubes Pvt. Ltd. v. CCE*, (1995) 75 E.L.T. 17 (SC); *Mittal Engineering Works Pvt. Ltd. v CCE, Meerut*, (1996) 88 E.L.T. 622 (SC); *Sirpur Paper Mills Ltd. v. CCE, Hyderabad*, (1998) 97 E.L.T. 3 (SC); *Silica Metallurgical Ltd. v. CCE, Cochin*, (1999) 106 E.L.T. 439 (Tribunal); *Duncan Industries Ltd. v. CCE, Mumbai*, (2000) 88 ECR 19 (SC); *Triveni Engineering & Industries Ltd. v. CCE*, (2000) 120 E.L.T. 273 (SC) and *CCE, Jaipur v. Man Structurals Ltd.*, (2001) 130 E.L.T. 401 (S.C.).

H 8. As a matter of fact taking into account these decisions Circular

No.58/1/2002-CX dated 15th January, 2002 has been issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi. The Circular indicates that it was intended to clarify the question of excisability of plant and machinery assembled at site. The relevant portion of the Circular reads as follows: A

“Government of India B

Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Sub: *Excisability of plant and machinery assembled at site-Regarding C*

In exercise of the power conferred under Section 37B of the Central Excise Act, 1944, the Central Board of Excise and Custom considers it necessary, for the purpose of uniformity in connection with classification of goods erected and installed at site, to issue the following instructions. D

2. Attention is invited to Section 37B Order No.53/2/98-CX, dated 2.4.98 (F.No.154/4/98-CD.4) (1998 (100 E.L.T.T9) regarding the excisability of plant and machinery assembled at site.

3. A number of Apex Court judgments have been delivered on this issue in the recent past. Some of the important ones are mentioned below: E

(i) *Quality Steel Tubes Pvt. Ltd. v. CCE*, (1995) 75 E.L.T. 17 (S.C.);

(ii) *Mittal Engineering Works Pvt. Ltd. v CCE, Meerut*, (1996) 88 E.L.T. 622 (S.C.); F

(iii) *Sirpur Paper Mills Ltd. v. CCE, Hyderabad*, (1998) 97 E.L.T. 3 (S.C.);

(iv) *Silica Metallurgical Ltd. v. CCE, Cochin* (1999) (106) E.L.T. 439 (Tribunal) as confirmed by the Supreme Court *vide* their order dated 22.2.99 (1999 (108) E.L.I. A58 (S.C.); G

(v) *Duncan Industries Ltd. v. CCE, Mumbai*, (2000) 88 ECR 19 (S.C.);

(vi) *Triveni Engineering & Industries Ltd. v. CCE*, (2000) 120 E.L.T. 273 (S.C.) H

A (vii) *CCE, Jaipur v. Man Structural Ltd.*, (2001) 130 E.L.T. 401 (S.C.)

4. The plethora of such judgments appears to have created some confusion with the assessing officers. The matter has been examined by the Board in consultation with the Solicitor General of India and the matter is clarified as under:-

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a. For goods manufactured at site to be dutiable they should have a new identity, character and use, distinct from the inputs/components that have gone into its production. Further, such resultant goods should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if they are not actually sold). The goods should not be immovable.

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b. Where processing of inputs results in a new products with a distinct commercial name, identity and use (prior to such product being assimilated in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their change of identity and prior to their assimilation in the structure or other immovable property.

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c. Where change of identity takes place in the course of construction or erection of a structure which is an immovable property, then there would be no manufacture of "goods" involved and no levy of excise duty.

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d. Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net work of machines. The system comes into being upon assembly of its component. In such a situation there is no manufacture of 'goods' as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)

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- e. If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods. A

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5. Keeping the above factors in mind the position is clarified further in respect of specific instances which have been brought to the notice of the Board.

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(iii) Refrigeration/air conditioning plants. These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff. D

6. Based on the above clarifications pending cases may be disposed of. Past instructions, Circulars and Orders of the Board on this issue may be considered as suitably modified. E

7. Suitable Trade Notice may be issued for the information and guidance of the trade.

8. Receipt of this order may please be acknowledged. F

9. Hindi version will follow."

9. As the basic factual aspects were not considered by the CEGAT we deem it proper to remit the matter to it for a fresh consideration in the light of the judgment in *Virdi Brothers'* case (supra) and *Cethar Vessels'* case (supra) and Circular referred to above. G

10. The appeals are accordingly disposed of without any order as to costs.

S.K.S.

Appeals disposed of. H