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INDIRECT TAX REVIEW
SEPTEMBER 2015

EXCISE

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ARTICLES:

GST exemptions list to have under 100 items

In an effort to minimize the number of exemptions under the goods and services tax (GST), the centre and the states have agreed to restrict this list to less than 100. In a GST regime, the centre and the states will have one common list of exempted goods and services. At present, while the states put together have around 99 exempted items under value – added tax (VAT), the centre has around 250 exempted items under central VAT or excise duty.

It has been decided to adopt the states' exempted list under the GST regime as and when it is rolled out, said a senior finance ministry official who did not want to be identified. Typically, those goods that are consumed by the lower strata of society and those that are consideredto be of national importance are exempted from taxes. Food items such as rice, wheat, salt, fresh vegetables and fruits, milk and milk products are some of the items that are typically exempted from VAT by states.

"The aim is to keep the exemptions at a minimum. The lesser the exemptions, the better it will be," the official said. "The centre and the states have agreed to only exempt those items under GST that are exempted by states at present." Since both the states and the centre are taxing goods, the exemption list varied. To be sure, these exemptions will be over and above those that have already been excluded from GST in the Constitution Amendment Bill itself.

The 122nd Constitution Amendment Bill proposes to exclude alcohol from GST. Though petroleum products have been brought under GST's ambit in the Constitution Amendment Bill, GST will not be levied till the GST council — the representative body of the centre and the states decides on it.

The restricting exemption seems to be a good move. Under GST, exemptions should be at a minimum. At present, exemptions vary across the centre and the states, and among states as well. So, the fact that the centre and the states have arrived at a consensus to keep the exemptions to less than 100 should be welcome.

This problem does not arise for services since only the centre has been levying service tax so far based on a so called negative list of services.

Under a negative list based taxation of services, only those services that are part of the negative list are not taxed. All other services that are not in this list are taxed. Keeping the exemption list to a minimum has also been one of the key demands of industry proposed GST structure intends to widen the tax base and eliminate exemption. Therefore, the list of exempted items should be meticulously prepare based on the principles behind exemptions and practice in other jurisdictions.

Avoiding common errors in filing of service tax return

Self-assessment under service tax has been started in the year 2001. In any self-assessment taxation system, the onus is on the assesse to make true disclosure of all statutory information required to be disclosed. Non/wrong disclosure of any material information could result in allegation of suppression or deliberate wrong disclosure which may result in invocation of larger period of 5 years along with imposition of penalty which now has become mandatory. Apart, this could result into higher chances of assesse being selected from scrutiny, audit or investigation by department. The cost of error is under service tax law is very huge as it may culminate into demand of service tax +

interest upto 30% +penalty upto 100%. This necessitate that return is filed by assesse making true disclosure of all relevant information so that no allegation of suppression etc. can be made. In the course of filing of ST-3 return, certain errors may be committed which could result in the return being incorrect and possibly may be liable for rejection.

Certain such aspects where generally errors are committed suggesting the manner in which these could be mitigated/avoided.

a) Adjustment of tax rate change: The rate of tax has increased from 12.36% to 14% w.e.f. 1.6.2015. It is expected that new return utility would be issued by department. In case new utility is not issued, existing excel utility may also be used as it provides option for change in rate of tax by adding additional raw in which rate of tax could be put 14% without any mention regarding education cess and SHE cess. Though utility will automatically calculate cess also, it needs to be converted to zero. While validating return at the end, a pop up will appear mentioning that there is difference in the cess calculated by utility and entered into by the assesse. But this needs to be ignored and file the return.

b) Non-filing of return for few categories: As per the provisions of Service Tax, assesses are required to file the Service Tax return for all the categories of Service Tax. But some assesses who are providing multiple services would not file the ST-3 return for few of the Services due to reason that there were no transactions for the return period.

c) Return filing in wrong category: Some times, the assesses would file the return in by selecting wrong category of services. Example, return for works contract filed under construction of complex service category. This could result into denial of some benefit which may be available in the form of abatement/exemption.

d) Non-disclosure of exemption / abatements in the ST-3 Return: In the ST-3 return, the assesse's require to disclose total value of service which also includes exemption / abated value of Services. Later, the exempted / abated value of Services is required to be disclosed and the same would be considered before computing the Service Tax. Some assesse's would show only the net amount of Taxable Services in the ST-3 return which results in non- disclosure of exemption / abated portion in the ST-3 return. Showing the exempted value of Services in the ST-3 returns would help the assesse to prove that they have not suppressed the facts to the department.

e) Noncompliance of Rule 6 for reversal of credit: It could be possible that assesse may be providing taxable as well as exempted services but may have not reversed the credit pertaining to exempted services. Especially in case of trading of goods. Though may be inadvertent yet it could invite allegation of suppression if not disclosed in the return. There is separate section for detailed disclosure of all cenvat related compliances which need to be properly disclosed.

f) Non-disclosure of credit note adjustment: Credit notes issued by service providers may be adjusted from revenue and only net figure shown. It may be possible that the reason for which credit notes have been issued are not permissible for deduction. All credit notes issued must be separately shown in the column of Rule 6 (3) adjustment and tax credit to be availed.

g) Revising the revised/belated return: Return once revised may not again be revised. Similarly, belated return may not be revised.

h) Difference in closing balance of CENVAT Credit of previous ST-3 return to ST-3 return for the current period.

i) Non-disclosure of challan numbers in the ST-3 return. Due to this, there is a risk of return being rejected and the department may write a letter to the assesse for clarification.

j) Non-disclosure of details of Export of Services resulting in denying of refund under Rule 5 of Cenvat Credit rules, 2004 at the first stage.

k) Credit distributed by input service distributor not disclosed by ISD or recipient unit

l) Non-disclosure of amount claimed as pure reimbursement in the capacity of pure agent.

CASE UPDATE
CENTRAL EXCISE

Differential Duty on account of Price Escalation is a valid demand

2015-TIOL-2034-HC-MAD-CX ALSTOM T AND D INDIA LTD

Differential duty paid on account of price escalation - Demand of interest - Appeal by assesse against the order of Tribunal upholding demand of interest following the ratio of Supreme Court decision in the case of SKF India Ltd - Contention that the issue is decided in favour of the assesse in case of M/s BHEL by Karnataka High Court - Held: The Supreme Court in SKF India Ltd. case, held that payment of differential duty by the assesse at the time of issuance of supplementary invoice to the customer demanding the balance of the revised prices clearly falls under the provisions of Section 11A(2B) of the Act. By interpreting Explanation (2) to subsection 2B of Section 11A of the Act, the Supreme Court in SKF India Ltd. case, has clearly held that such payment of differential duty at the time of issuance of supplementary invoices would not be exempt from interest chargeable under Section11AB of the Act. No reason totake a different view merely on theground that the Special Leave toAppeal filed by the Revenue againstthe decision of the Division Bench ofthe Karnataka High Court in BharatHeavy Electricals Ltd. case, wasdismissed by the Supreme Court byorder dated 3.12.2010.Substantial questions of law raised intheseappeals are answered against the assesse and the appeals are dismissed.

Issue Involving disallowance of CENVAT appealable before HC

[2015] 60 taxmann.com 412 (SC)Commissioner of Central Excise v. Raj Petroleum Products

Maintainability of - Supreme Court - Revenue filed appeal before Supreme Court against Tribunal order on issues of :

(a) Demand on clandestine removal;
(b) Disallowance of Modvat/Cenvat credit; and
(c) interest and penalties –

HELD : Appeal against order of Tribunal involving said issues can be filed before High Court and same cannot be filed before Supreme Court - Since present appeal was filed bona fide by department and waspending for last 10 years, department was granted liberty to file appeal before High Court within one month from present date

Intermediate product were marketable, if could not be proved by department, no duty leviable

[2015] 60 taxmann.com 321 (SC) Cimmco Birla Ltd. v. Commissioner of Central Excise, Jaipur

Assesse was manufacturing railway wagons on job-work basis for Indian railways - Since railway wagons were exempt, department demanded duty on intermediate products viz. wagon parts - Assesse argued that goods in question were not marketable -

HELD : Before assesse can be asked to pay duty, department has to show that goods are marketable – Since department did not lead any evidence to demonstrate that products are marketable, hence, assesse's appeal was allowed reversing judgment of Tribunal

Goods supplied to weaker/poor section free of cost no duty leviable

[2015] 60 taxmann.com 340 (SC) Commissioner of Central Excise, Jaipur-I v. JVS Foods (P.) Ltd.

Food' free of cost to Government of Rajasthan under World Food Programme project for supply to weaker sections of society – Assesse claimed exemption from excise duty under Paras 9.10 and 9.26 of EXIM Policy - Department denied said exemption citing absence of relevant certificates - Tribunal allowed exemption considering certificates produced –

HELD : Tribunal discussed certificates produced by assesse and arrived at a finding of fact that assesse had distributed goods free of cost to weaker sections of society Hence, exemption could not be denied

CENVAT credit on inputs inherently lost in manufacturing process allowed – HC

M/s. Rupa & Co. Limited Vs. The Commissioner of Central Excise (High Court of Madras); Civil Miscellaneous Appeal No.2350 of 2006 & M.P.No.1 of 2006

Brief of the Case

In the case of M/s. Rupa & Co. Limited Vs. The Commissioner of Central Excise, it was held that what is contained in finished product is only a quantity of all the inputs of the same weight as that of the finished product would presuppose that all manufacturing processes would never have an inherent loss in the process of manufacture. The expression 'inputs of such finished product' contained in finished products' cannot be looked at theoretically with its semantics. It has to be understood in the context of what a manufacturing process is. If there is no dispute about the fact that every manufacturing process would automatically result in some kind of a loss such as evaporation, creation of by-products, etc., the total quantity of inputs that went into the making of the finished product represents the inputs of such products in entirety.

The appellant is a manufacturer of cotton knitted garments and cotton knitted fabrics, falling under Sub-Heading Nos.6101.00 and 6002.92 respectively under the First Schedule to the Tariff Act, 1985. On the ground that the appellant had wrongly availed CENVAT credit on the stock declared on 1.4.2003 and utilized the same for payment of duty towards clearance of knitted garments manufactured by them, a show cause notice dated 8.7.2004 was issued. The

appellant gave a reply on 29.7.2004. Thereafter, a personal hearing was conducted and the Commissioner of Central Excise passed an Order in Original dated 3.11.2004, disallowing a claim for CENVAT credit and ordering the recovery of credit amount of Rs.7,06,433/-, apart from directing the appellant to pay interest under Section 11AB of the Central Excise Act, 1944 and a penalty under Rule 13 of the CENVAT Credit Rules, 2002.

The appellant filed a statutory appeal before the Commissioner (Appeals). But, the Commissioner disposed of the appeals by an order dated 13.1.2005, holding the appellant guilty of claiming CENVAT credit, to which, they were not entitled. However, the amount of penalty was reduced from Rs.7,06,433/- to Rs.70,643/-. The appellant then filed an appeal before CESTAT. The appeal was disposed of by the Tribunal by an order dated 6.2.2006 sustaining the orders in principle, but setting aside the quantum of duty and penalty and remitting the matter back to the Original Authority for re-quantifying the duty and penalty.

On the question, in relation to which, the Tribunal remanded the matter back to the Original Authority, the appellant has no difficulties. But, on the point that was sustained by the Tribunal in principle, the appellant has come up with the above appeal. Held by Hon'ble High Court of Madras The Hon'ble High Court referred to the Rule 9A of the CENVAT Credit Rules which reads as follows : "Rule 9A. Transitional provisions for textile and textile articles – (1) A manufacturer, producer, first stage dealer or second stage dealer of goods falling under Chapter 50 to 63 of the First Schedule to the Tariff Act, shall be entitled to avail credit equal to the duty paid on inputs of such finished product, lying in stock or in process or contained in finished products lying in stock as on 31st day of March 2003 upon making a written declaration of the description, quantity and value of the stock of inputs (whether lying in stock or in process or contained in finished products lying in stock) and subject to availability of the document evidencing actual payment of duty thereon."

The Hon'ble Court stated that what the appellant did was to make a claim for CENVAT credit in respect of the total quantity and value of goods that had gone into the making of fabric. Under Rule 9A, the appellant is admittedly entitled to credit, equivalent to the duty paid on inputs of finished product, lying in stock or in process or contained in finished products lying in stock as on 31.3.2003.

Rule 9A deals with three items. They are (i) finished products lying in stock (ii) the products lying in process and (iii) those contained in finished products. The appellant has not made a claim in respect of the entire quantity and value of the inputs that had gone into the making of the finished products. Incidentally, it should be pointed out that the appellant uses yarn, on which, excise duty is paid. This yarn is made into fabric and the fabric is made into garment. Their claim for credit was confined only to the duty paid on the yarn that had gone into the making of fabric. The claim of the appellant is that unless X quantity of yarn is used, 0.95 x quantity of fabric could not be produced. In other words, their claim is that about 5% of the quantity and value of yarn is lost while making it into a fabric and that therefore, they are entitled to take credit for the entire quantity and value of input that had actually produced the fabric that was lying in store.

To put it in simple terms, what the appellant claimed was that if X kg of fabric was lying in stock on the relevant date, the inputs that had gone into the making of the said quantity was X plus something. The only question that falls for consideration is as to whether that something is actually entitled to CENVAT credit or not? The Hon'ble Court further stated that what is contained in finished product is only a quantity of all the inputs of the same weight as that of the finished product would presuppose that all manufacturing processes would never have an inherent loss in the process of manufacture. The expression 'inputs of such finished product' contained in finished products'

cannot be looked at theoretically with its semantics. It has to be understood in the context of what a manufacturing process is. If there is no dispute about the fact that every manufacturing process would automatically result in some kind of a loss such as evaporation, creation of by-products, etc., the total quantity of inputs that went into the making of the finished product represents the inputs of such products in entirety.

The Hon'ble Court further stated that if the purport of Rule 9A is not understood in this manner, every manufacturer will have to pay excise duty on the quantity and value of inputs, which go to the making of a finished product, whose weight will never be equivalent to the sum total of the weight of all the inputs. Therefore, this is not the way to understand Rule 9A. The Hon'ble stated that right from the stage of issue of show cause notice upto the stage of the order of the Tribunal, the claim of the appellant that they incur a manufacturing loss to the extent of 5% of the total quantity of the finished product, has not been disputed by the Department. In cases where there is a dispute about the existence of a loss and in cases where there is a dispute with regard to the quantum of loss, the questions may have to be left open. But, in cases where the quantum of manufacturing loss claimed at 5% by the appellant is never disputed by the Department from the stage of issue of the show cause notice upto the stage of the order of the Tribunal, the interpretation given to Rule 9A cannot be accepted.

Head Office not registered as Input Service Distributor – CENVAT Credit cannot be denied

M/S National Engineering Industries Ltd Vs. Vs Commissioner Of Central Excise (CESTAT Jaipur), Appeal No. E/1371/2011EX(DB), Final Order No. 52267/2015EX(DB),

Customs, Excise and Service Tax Appellate Tribunal Jaipur has ruled in the case of National Engineering Industries Ltd. Vs. Commissioner of Central Excise that CENVAT credit cannot be denied for non-registration of head office as Input Service Distributor (ISD), since omission to obtain registration as an ISD can at best be considered as procedural irregularity which cannot stand in the way of allowing substantial benefit of CENVAT credit, so long as there is no dispute regarding availment of services by the appellant company, issue of invoices by the service provider and the services are eligible input services as per CENVAT credit rules.

The Tribunal followed the decisions in the case of Demosha Chemicals Pvt. Ltd., Vs. CCE Daman – 2014 (34) STR 758 (Tri) and Doshion Ltd. Vs. CCE Ahemdabad – 2013 (288) ELT 291 and held that appellant cannot be denied CENVAT credit availed by them in the absence of registration as input service distributor by the Head office. Facts of the case are discussed hereunder briefly: The appellant is a manufacturer of Ball Bearing and having three units at Jaipur, Manesar and Newai. They are having their central Head Office at Jaipur. The appellant availed CENVAT Credit on certain services like Selling Commission, Royalty, Consultancy & Professional, Banking Charges, Audit Fee, AMC Charges, etc. on which service tax was paid and invoices were raised in the name of the Head Office. The Jaipur unit of the appellant has taken Cenvat Credit on all these services. The case of the Revenue is that as their head office is not registered as input service distributor, therefore, Jaipur unit is not entitled to take Cenvat Credit on these services. It is also in the case of Revenue that services in question have not been only utilized by Jaipur unit. Therefore, 100 % credit is not entitled for Jaipur unit.

Department had issued show-cause notices for the period February 2006 to March 2009 proposing denial of CENVAT credit to the Jaipur unit. As usual, the show cause notices were adjudicated against the appellant and Cenvat Credit was denied. Penalty was also levied on the appellant.

Aggrieved by the orders, the appellant approached the Tribunal. The Tribunal granted relief to the appellant by holding that CENVAT credit cannot be denied for procedural irregularities when substantial conditions are fulfilled. The above case shows how our tax administrators deny benefits available to the assesses for procedural irregularities, even though the services are utilised by the assesse and therefore eligible for CENVAT credit. This type of attitude creates an impression in the minds of the assesses that injustice is being handed out by the department to them and highlights the indifferent attitude of the tax department towards assesses. Trade and Industry expects department to pro-actively support them in availing benefits due to them and at the same time take strenuous action against tax evaders. CBEC should actively and regularly review such decisions of the Tribunal which are based purely on procedural matters and issue instructions to the field formations to ensure that due benefits are allowed to the assesses, without wasting their time, energy and money in filing and pursuing appeals before the higher forums. That will help in promoting "Ease of Doing Business" in India.

Trade discount quantified subsequent to clearance is an admissible deduction from transaction value – HC -

M/s Shyam Steel Industries & Anr. Vs. Deputy Commissioner of Central Excise and Service Tax, Durgapur Div-I & Ors.; (Calcutta High Court); WP 299 of 2015

Brief of the Case

In the case of M/s Shyam Steel Industries & Anr. Vs. Deputy Commissioner of Central Excise and Service Tax & Ors, it was held by Calcutta High Court that discount of any type made known prior to the clearance of the goods but quantified subsequently and passed on to the customers is an admissible deduction from the transaction value and as such the assessment for such transactions may be made on a provisional basis.

In this writ petition, the petitioner prays for a direction in the nature of mandamus directing the respondents to allow clearance of excisable goods manufactured/to be manufactured by the petitioners under provisional assessment in terms of Rule 7 of the Central Excise Rules, 2002. The petitioner company is engaged in the business of manufacture and sale of; inter alia, MS Billets and TMT Bars. The TMT Bars cleared from the company's factory are either supplied directly to the customers or to a network of dealers engaged in re-sale thereof. In accordance with the conventional practice prevailing in the industry, the petitioner company, in order to boost the sale of finished goods through the dealers offers various promotional schemes in the form of turnover/quantity discount, cash discount etc. While these discounts are made known to the dealers even before the clearance of the finished goods from the factory by way of claims notified and published from time to time, quantification thereof is possible only at the end of the notified period. The dealers fulfilling the qualification conditions become eligible to get duty discount at the end of the notified period, processed by way of credit notes.

Central excise duty is leviable on the goods manufactured and cleared by the petitioner company in terms of the provisions of Section 3 of the Central Excise Act, 1944 read with the Central Excise Tariff Act, 1985. The manner of valuation of the excisable goods manufactured by the petitioner for the purpose of charging excise duty thereon is provided for in Section 4 of the 1944 Act.

By a letter dated August 6, 2013, the petitioner company applied for permission to clear the subject goods upon provisional assessment as per Rule 7 of the said Rules for the period August 1, 2013 to November 30, 2013. By a letter dated October 29, 2013 the said application of the company has been

rejected. Being aggrieved, the company preferred an appeal before the Commissioner of Central Excise, Calcutta, who by a letter dated May 21, 2014 allowed the appeal holding that there are sufficient reasons for extending the facility of provisional assessment of duty under Rule 7 of the said 2002 Rules. The respondent has preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Calcutta (in short the 'said Tribunal') against the Commissioner's order dated May 21, 2014 which is pending. There is, however, no stay of operation of the said order dated May 21, 2014.

The petitioner company by its letter dated July 31, 2014 applied to the respondent for permission to clear the manufactured goods on the basis of provisional assessment for the period of August 1, 2014 to November 30, 2014. A similar application was made by the petitioner company by its letter dated December 2, 2014 for the period of December 1, 2014 to March 31, 2015. These applications of the petitioner company have not been responded to by the respondent. As a result, the petitioner company is being forced to clear the goods manufactured by it on final assessment basis without taking into account the trade discounts made available by it to its customers, thereby ending up paying excess central excise duty than what is actually payable under the 1944 Act.

Contentions of the Assesse

The petitioners submitted that in terms of Section 4 (1)(a) of the 1944 Act value of excisable goods for the purpose of charging excise duty thereon is the transaction value as defined in Section 4(3)(d) of the Act. 'Transaction value' is defined to mean the price actually paid or payable for the goods when sold and additional consideration which the buyer is liable to pay to or on behalf of the assesse in connection with the sale. The price 'actually paid or payable' for the goods manufactured and sold by the company is the net price arrived at upon deduction of the discounts offered by the company to its buyers. It is the discounted price which is the transaction value of the subject goods on which central excise duty is required to be paid by the company.

The petitioners further submitted that at the time of clearance of the goods, in view of the nature of the trade discounts, it is not possible to arrive at the price actually paid or payable for the goods being sold by the company. Since the quantity/turn over discounts are based on achievement of the target and are allowed on varying rates depending upon the slab which a particular dealer attains in terms of the relevant scheme, it is not possible to quantify the discount at the time of clearance of a particular consignment from the factory. Hence, the petitioner company being unable to determine the correct 'transaction value' of the concerned excisable goods at the time and place of removal thereof, is compelled to take recourse to clearance of the goods under provisional assessment in terms of Rule 7 of the Central Excise Rules, 2002 (in short 'the said Rules').

The petitioners submitted that trade discounts known and understood at the time of removal of goods, whether in the form of year ending discount or target discount or quantity discount are allowable deductions in determining the actual price paid or payable on the manufactured goods for determining the transaction value thereof as per Section 4(1) (a) of the 1944 Act read with Section 4(3) (d) thereof. By reason of their nature, such discounts cannot be shown in the invoice under which the subject excisable goods are manufactured from the factory since the quantum of discounts is known only at the end of the achievement of the target by the respective customers and because of their varying rates depending upon the slab which a particular dealer achieves in terms of the scheme under which such discounts are provided. It is, therefore, impossible for the company to determine the correct transaction value of excisable goods on which central excise duty is payable at the time of removal of the said goods from the factory. The actual price paid or payable for such goods would be a net price after deduction of the trade

discounts. The requirement of Rule 7(1) of the 2002 Rules for the subject goods to be allowed to be cleared on provisional assessment basis is duly satisfied. The company being agreeable to comply with the requirements of Rule 7(2) of the said Rules, there can be no justification on the part of the respondent to deny clearance of the subject goods by the petitioner company on provisional basis in terms of Rule 7 of the said Rules.

The assesse relied on a circular dated 30th June, 2000 issued by the Central Board of Excise and Customs, Ministry of Finance, Department of Revenue wherein at paragraph 9 it is stated as follows:-

"9. As regards discounts, the definition of transaction value does not make any direct reference. In fact, it is not needed by virtue of the fact that the duty is chargeable on the net price paid or payable. Thus if in any transaction a discount is allowed on declared price of any goods and actually passed on to the buyer of goods as per common practice, the question of including the amount of discount in the transaction value does not arise. Discount of any type or description given on any normal price payable for any transaction will, therefore, not form part of the transaction value for the goods, e.g. quantity discount for goods purchased or cash discount for the prompt payment etc. will therefore not form part of the transaction value. What is important is that it must be established that the discount for a given transaction has actually been passed on to the buyer of the goods. The differential discounts extended as per commercial considerations on different transactions to unrelated buyers if extended cannot be objected to and different actual prices paid or payable for various transactions are to be accepted for working out assessable value. Where assesse claims that the discount of any description for a transaction is not readily known but would be known only subsequently – as for example, year end discount – the assessment for such transactions may be made on a provisional basis. However, the assesse has to disclose the intention of allowing such discount to the department and make a request for provisional assessment."

The petitioner further referred to a decision of the Hon'ble Supreme Court in the case of Union of India-vs.-Arviva Industries (I) Ltd. reported in 2007 (209) ELT 5 wherein the Hon'ble Supreme Court after referring to several of its earlier decisions, reiterated that circulars issued under Section 119 of the Income Tax Act, 1961 and Section 37B of the Central Excise Act, 1944 are binding on the revenue. In that case, the Hon'ble Supreme Court referred to its earlier decision in the case of Commissioner of Customs, Calcutta-vs.-Indian Oil Corporation Ltd. reported in (2004) 3 SCC 488. The petitioners then relied on a judgment of this Court in the case of Commissioner of Central Excise, Calcutta-vs.-Black Diamond Beverage Ltd. reported in 2014 (307) ELT 679 wherein this court also observed that a circular issued by the Board binds the revenue and they cannot take a stand that the circular is contrary to the provisions of the statute.

The assesse also referred to a decision of the Madras High Court in the case of Manickam Enterprises-vs.-Commissioner of Customs, Trichy reported in 2002 (140) ELT 16 and Pankaj Guljarilal Gupta-vs.-Collector of Customs, Calcutta reported in 1995 (75) ELT 47.

Contentions of the Revenue

The Revenue contended that submitted that the requirements of Rule 7 of the 2002 Rules are not satisfied in the instant case and, as such, the petitioners cannot claim clearance of the goods on the basis of provisional assessment. The writ petitioners have approached this court one year after the department filed appeal against the order of the Commissioner and, such delay disentitles the writ petitioners to any relief. If the writ application is allowed, the department's appeal against the Commissioner's order permitting clearance of goods on the basis of provisional assessment would be rendered infructuous. The respondents relied on a decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs, Mumbai-vs.-ITC Ltd. reported in 2006 (203) ELT 532 wherein at paragraph 21 of the judgment it was observed that a provisional assessment is made in terms of Rule 9B of the Central Excise

Rules, 1944, inter alia, at the instance of the assesse. Such recourse is resorted to only when the conditions laid down therein are satisfied, viz, where the assesse is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods. The Revenue further referred to a decision of Madras High Court in the case of Shree Ganesh Steel Rolling Mills Ltd.-vs.-Asstt. Commissioner of Customs, Chennai reported in 2006 (206) ELT 76.

Held by Hon'ble High Court of Calcutta

The Hon'ble High Court stated that the Commissioner of Central Excise in his order dated 21st May, 2014 rightly held that the value of the goods cannot be determined at the time of removal of such goods from the factory. This is for the reason that the normal transaction value is not available for such removals at that time as the assesse at that time cannot determine the quantity of discount being extended to the buyers. This can be done only at a later stage, precisely at the end of discount scheme period offered to the dealers which is usually after four months. As per paragraph 9 of the Central Board of Excise and Customs circular dated 30th June, 2000 referred to above, discount of any type made known prior to the clearance of the goods but quantified subsequently and passed on to the customers is an admissible deduction from the transaction value and as such the assessment for such transactions may be made on a provisional basis. The said circular is binding on the department and in this connection the decision of the various courts including the Hon'ble Supreme Court discussed above may be referred to.

The Hon'ble Court further stated that no legitimate ground exists for the department to disallow the petitioner company to pay excise duty on provisional basis on the concerned goods as per Rule 7 of the Central Excise Rules, 2002 since the actual transaction value cannot be determined at the time of removal of the goods from the factory. Denying such permission to the petitioner company would result in forcing the petitioner company to pay more excise duty than it is actually liable to pay. In fact, for the period August 1, 2013 to November 30, 2013, the petitioner company was compelled to obtain clearance of the goods upon paying excise duty on the basis of full value of the goods without taking into account the trade discounts extended by the petitioner to the dealers. This is grossly unfair and is causing undue injustice and prejudice to the petitioners. Since the petitioners are agreeable to execute requisite bond as per Rule 7(2) of the Central Excise Rules, 2002, the interest of the department would be fully protected even if the petitioner is allowed to pay duty on a provisional basis.

The power conferred on a public authority or a statute or Rules framed thereunder is coupled with a duty on the authority to exercise such power in fit and appropriate cases. Refusal to exercise such power in a situation which warrants exercise of the power, would amount to an act of unreasonableness and arbitrariness on the part of the authority and such act/omission is not legally sustainable. If the Court finds that an authority has arbitrarily or unreasonably refused to exercise the power which is causing undue prejudice to a party, the courts must interfere and direct the authority to exercise such power.

Furthermore, about one year as elapsed from the date of the order of the Commissioner of Central Excise and there is no order of stay of the Commissioner's order in the appeal which the department claims to have filed before the Tribunal. Hence, it is obligatory on the part of the department to comply with the Commissioner's order and allow the writ petitioners to obtain clearance of the concerned goods upon payment of duty on provisional basis as contemplated by Rule 7 of the Central Excise Rules, 2002. In this connection, the decision of this court in the case ofPankaj Guljarilal Gupta-vs.-Collector of Customs, Calcutta (Supra) may be referred.

The Hon'ble Court further stated that the ground on which the Deputy Commissioner of Central Excise turned down the petitioner's request for provisional assessment is not acceptable in law.
In view of the aforesaid this writ petition succeeds.

SERVICE TAX

Service tax cannot be levied on indivisible works contracts prior to 1st June, 2007: SC

Commissioner, Central Excise & Customs, Kerala Vs. M/s Larsen & Toubro Ltd. (Supreme Court), Civil Appeal No. 6770 of 2004

Brief of the Case

In the case of Commissioner, Central Excise & Customs, Kerala Vs. M/s Larsen & Toubro Ltd., it was held by Supreme Court that service tax cannot be levied on indivisible works contracts prior to introduction, on 1st June, 2007.

The present appeal is concerned with whether service tax can be levied on indivisible works contracts prior to the introduction, on 1st June, 2007, of the Finance Act, 2007 which expressly makes such works contracts liable to service tax.

It all began with State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., 1959 SCR 379. A Constitution Bench of this Court held that in a building contract which was one and entirely indivisible, there was no sale of goods and it was not within the competence of the State Provincial Legislature to impose a tax on the supply of materials used in such a contract, treating it as a sale. The above statement was founded on the premise that a works contract is a composite contract which is inseparable and indivisible, and which consists of several elements which include not only a transfer of property in goods but labour and service elements as well. Entry 48 of List II to the 7th Schedule to the Government of India Act, 1935 was what was under consideration before this Court in Gannon Dunkerley's case. It was observed that the expression "sale of goods" in that entry has become "nomen juris" and that therefore it has the same meaning as the said expression had in the Sale of Goods Act, 1930. In other words, the essential ingredients of a sale of goods, namely, that there has to be an agreement to sell movables for a price, and property must pass therein pursuant to such agreement, are both preconditions to the taxation power of the States under the said entry. This Court, after considering a large number of judgments, ultimately came to the following conclusion:-

"To sum up, the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible — and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

Held by Hon'ble Supreme Court of India

The Hon'ble Supreme Court stated that Service tax was introduced by the Finance Act, 1994 and various services were set out in Section 65 thereof as being amenable to tax.

All the present cases are cases which arise before the 2007 amendment was made, which introduced the concept of "works contract" as being a separate

subject matter of taxation. Various amendments were made in the sections of the Finance Act by which "works contracts" which were indivisible and composite were split so that only the labour and service element of such contracts would be taxed under the heading "Service Tax".

The Hon'ble Court further stated that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows:–

"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

Similarly, in Kone Elevator India (P) Ltd. v. State of T.N., (2014) 7 SCC 1, this Court held:-

"Coming to the stand and stance of the State of Haryana, as put forth by Mr Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious.

The Hon'ble further stated that a close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by

deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105) (zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament.

The Delhi High Court judgment unfortunately misread the judgment of this Court in Mahim Patram's case to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no rules are framed for assessment of such tax, which is wholly incorrect.

The Hon'ble Court further stated that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services. In view of the above, the appeals of the assesses are allowed and all the appeals of the revenue are dismissed.

Appeal for determination of any question in relation to rate of duty or to value of goods for assessment would lie before Apex Court – HC

M/s. Greatship (India) Ltd. Vs. Commissioner of Service Tax (High Court, Bombay); Central Excise Appeal No. (L) No. 20 of 2015;

Brief facts of the Case

The appellant is engaged in providing services in relation to offshore exploration and production of oil and natural gas. The appellant has entered into a contract with M/s. Oil and Natural Gas Corporation Limited (hereinafter referred to as 'ONGC'). The appellant provided offshore drilling services to ONGC in terms of the contract entered with the ONGC at various locations. Vide notification dated 7/7/2009 services provided on installations, structure and vessels were made taxable. It is not in dispute that by a subsequent notification dated 27/2/2010 the provisions of notification dated 7/7/2009 were also extended to the area specified in column 2 of table stated in the said notification in the continental shelf of India and exclusive economic zone of India for the purpose mentioned in the column No.3 of the table. It is not in dispute that the service tax for the services provided by the appellant for drilling on the installations of ONGC has already been paid. It is also not in dispute that in the continental shelf and exclusive economic zone of India which is beyond 12 nautical miles and within 200 nautical miles in the open sea, service tax has been paid in respect of services provided on the installation of the ONGC. The only dispute that falls for consideration in the present Appeal is

as to whether within the continental shelf of India and exclusive economic zone of India, services provided by the appellant for drilling so as to explore whether there are oil reserves in the open sea, are liable to the service tax between 7/7/2009 to 27/2/2010 or not.

The preliminary objection has been raised by the Revenue, that in view of Section 35 G and 35 L of the Central Excise and Salt Act, 1944 (hereinafter referred to as "the said Act), the appeal would lie before the Hon'ble Supreme Court of India and not before this Court.

Contentions of the Appellant

The Appellant contended that the issue in the present Appeal does not involve any question with regard to either classification or taxability or excisability of the service or the rate at which service tax is to be paid. He submits that only when the aforesaid issues are involved, the appeal would lie before the Hon'ble Apex Court and in all other cases the appeal would lie before this Court. The Appellant contended that the judgment of the Hon'ble Apex Court in the case of Navin Chemical Manufacturing and Trading Company Ltd. v/s. Collector of Customs reported in 1993(68) E.L.T. 3(S.C.) would make the position clear.

Contentions of the Revenue

The Revenue contended that as per the correct interpretation of section 35 G and 35 L of the said Act, it will have to be construed that the present appeal involves question regarding taxability and therefore would fall within the term "a question having a relation to the rate of duty". It was further contended that the department rightly construing the aforesaid provisions has proposed to file an appeal before the Hon'ble Supreme Court with regard to that part of the impugned order, by which the Revenue is aggrieved, regarding setting aside the order of penalty and also on merits. It was further contended that the proper remedy available to the appellant is to approach Apex Court by way of an appeal under Section 35 L of the said Act and the present appeal deserves to be dismissed on the ground of tenability.

The revenue relied on the following judgements in this regard:-

(i) Union of India v/s. Auto Ignation Ltd., reported in 2002 (142) E.L.T. 292(Bom.)

(ii) Commissioner of Custom & Central Excise, Goa v/s. Primella Sanitary Products (P) Ltd., reported in 2002(145) E.L.T. 515(Bom.)

(iii) Sterlite Optical Technologies Ltd. V/s. Commissioner of Central Excise, Aurangabad, reported in 2007(213) E.L.T.658.

(iv) Commissioner of Central Excise, Nagpur v/s. Universal Ferro & Allied Chemicals Ltd., reported in 2009 (234) E.L.T. 220 (Bom.).

(v) The Commissioner of Central Excise & Service Tax, Pune v/s. M/s. Credit Suisse Services (I) Pvt. Ltd., bearing Central Excise Appeal No. 5 of 2014 & other connected matters decided on 23/2/2015.

Held by Hon'ble High Court, Bombay

The Hon'ble High Court referred to Subsection 1 of Section 35 G and Section 35 L of the said Act, which read thus:

"35G. Appeal to High Court (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

35L. Appeal to Supreme Court.

(1) An appeal shall lie to the Supreme Court from

(a) any judgment of the High Court delivered

(i) in an appeal made under section 35G; or

(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003;
(iii) on a reference made under section 35H,
in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or
(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

(2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment."

Upon a conjoint reading of aforesaid provisions, it would thus be seen that an appeal shall lie to this Court against every order passed in appeal by the Appellate Tribunal, if the Court is satisfied that the case involves a substantial question of law. The only exception that is carved out is that an appeal shall not lie before this Court against an order relating amongst other things to the determination of any question having relations to the rate of duty of excise or to the value of goods for purpose of assessment.

Subsection 2 of Section 35 L of the Act provides that the term "determination of any question having a relation to the rate of duty" shall also include "the determination of taxability or excisability of goods for purposes of assessment". It would thus be clear that if any question having a relation to the rate of duty is involved in an appeal or when it is relating to value of goods for the purposes of assessment, then such an appeal would not lie before this Court. Similarly, if a question with regard to the determination of taxability or excisability of the goods for the purposes of assessment arises, then also appeal would not lie before this Court.

The Hon'ble Court stated that the issue is no more integra. In the catena of Judgments beginning from the Judgment of the Apex Court in the case of Navin Chemicals Mfg. & Trading Co. Ltd. (cited supra), the position has been clarified. The Apex Court while considering the pari materia provisions of Customs Act has held that where an appeal involves determination of any question that has relation to custom duty for the purpose of assessment, or where the appeal involves determination of any question that has relation to the value of goods for the purpose of assessment, then such case have to be treated separately and given special treatment.

The Apex Court has carved out following categories of cases, to which the legislature has given special treatment
(i) determination of a question relating to a rate of duty;
(ii) determination of a question relating to the valuation of goods for the purpose of assessment;
(iii) determination of a question relating to the classification of goods under the Tariff and whether or not they are covered by an exemption notification;
(iv) whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for.
The aforesaid interpretation placed by the Apex Court is interpreting the words "determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment". In view of amendment to Section 35 L, following category of cases would also be required to be added to the said categories.
"determination of disputes relating to taxability or excisability of goods for the purpose of assessment."

The Hon'ble High Court also dealt with the various Judgments of this Court which are referred to by the Revenue.
The case of Union of India v/s. Auto Ignation Ltd. (cited supra), distinguished on the basis of facts.

The case of Primella Sanitary Products (P) Ltd. (cited supra) was related t the question as to whether the assesse was eligible to claim benefit of the exemption. notification dated 1st March, 1986 as amended by notification dated 28th February, 1993. The question before the Division Bench was as to whether the assesse was entitled to benefit of exemption notification or not directly fell for consideration before the Division Bench and as such it was directly related to the rate at which duty was payable. In that view of the matter, the Division Bench held that reference to this Court under Section 35 H was not tenable.

In the case of Sterlite Optical Technologies Ltd. (cited supra), the question that arose for consideration, was as to what should be the rate of duty for the goods cleared to the Domestic Tariff Area. The Division Bench thus held that the direct and proximate issues in the appeal were related to the rate applicable to the goods and the value thereof. It held that the issue involving the status of the subject Unit was one of the incidental issues and not the main issue.

In the case of Universal Ferro & Allied Chemicals Ltd. (cited supra), question that arose for consideration was as to whether the assesse was liable to pay duty as per notification No. 8 of 1997 or whether the duty was payable in accordance with the provisions of proviso to Section 3(1) of the Act of 1944. Apart from that there was also a dispute regarding the value on which duty was payable.

In the case of the Commissioner of Central Excise & Service Tax, Pune v/s.M/s. Credit Suisse Services (I) Pvt.Ltd. (cited supra), the question that arose for consideration was as to whether the services wholly in SEZ area are taxable or not in view of the notification dated 3rd March, 2009 and amended on 29th May, 2009.In that view of the matter, the Division Bench held that the appeal would lie before the Apex Court and not before this Court.

The Hon'ble Court stated that in the present case, the only question that falls for adjudication is as to whether prior to notification dated 27/2/2010, for the services rendered by the appellant between the period of 7/72009 and 27/2/2010 in the Continental Shelf of India and the Exclusive Economic Zone of India, service tax was payable on services rendered by the appellant for drilling for the purpose of exploration of oil reserves or not.

It could be seen that vide said notification, provisions of Chapter V of Finance Act, 1994 were also extended to the areas specified in column No. 2 of the table in the said notification in the continental shelf and the Exclusive Economic Zone of India for the purposes mentioned in table 3. The table refers to any service provided for all activities pertaining to construction of installations, structures and vessels for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof. The table also refers to any service provided or to be provided by or to such installations, structures and vessels and for supply of any goods connected with the said activity.

The Hon'ble Court is of the view that the present appeal does not involve an issue regarding the rate of duty in as much as even the assesse does not dispute the rate of duty i.e. payable for the services rendered. The present case also does not involve an issue regarding valuation of goods or services for the purpose of assessment. It also does not involve the issue regarding classification of goods under the tariff. It also does not involve the question as to whether or not services rendered by the appellant are taxable or not. It also does not involve the question as to whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters,

which the said Act provides for. The issue regarding the services being rendered by the appellant being taxable and the rate at which service tax is to be paid are not disputed by the appellant. The issue regarding taxability and excessibility of the goods is also not involved in the present appeal.

The Hon'ble High court stated that when prima facie it was found that the present case is not covered by the term "determination of any question having relation to the rate of duty or to the value of goods for the purpose of assessment", the court cannot nonsuit the appellant only because the Revenue has proposed to file.

In view of the above, the preliminary objection is rejected and the Appeal is admitted on substantial questions of law posted for hearing on a future date.

Mere Remanding back the case by Tribunal without going into Merits not sufficient

M/s.Thirumurugan Enterprises Vs The Customs, Excise & Service Tax Appellate Tribunal, Chennai (Madras High Court)- C.M.A. NOS. 764 TO 788 OF 2015 AND M.P. NOS. 1 OF 2015;

Brief of the Case

In the case of M/s.Thirumurugan Enterprises Vs The Customs, Excise & Service Tax Appellate Tribunal, Chennai, the Hon'ble Madras High Court held that remanding back the case by Tribunal, without going into merits and asking the adjudicating authority to re-adjudicate the matter will not suffice. The issues raised by the appellant and answered by the Commissioner (Appeals) in their favour has to be considered by the Tribunal on its own merits and there being no finding on the issues in the manner in which the plea has been taken by the present appellants, who were successful before the Commissioner (Appeals).

The appellants are contractors, who carried out various activities for the Neyveli Lignite Corporation (for short 'NLC'), a Government of India Undertaking. The respondent found that the activities, undertaken by the appellants, come within the purview of service tax and, therefore, they are liable to pay service tax.

Accordingly, the appellants were visited with show cause notices. It further appears that subsequent to the show cause notices, in the adjudication proceedings, many of the parties did not appear and the matters were adjudicated and assessment orders were passed demanding service tax. It is also not in dispute that some amount has been paid pending the dispute and subsequently substantial amounts have also been paid.

These appellants, consequent to the assessment order, pursued the matter by filing appeals before the Commissioner (Appeals) and the Commissioner (Appeals) considered the prima facie case pleaded by the appellants. The Commissioner (Appeals) accepted the plea of the appellants both on vagueness of show cause notice and also on the plea of limitation and set aside the order of adjudication.

Aggrieved by the order of the Commissioner (Appeals), the Department pursued the matter in appeal before the Tribunal on the findings of the Commissioner (Appeals) with regard to the vagueness of the show cause notices as well as with regard to the plea of limitation. The Hon'ble tribunal remitted back the matter to the assessing officer to provide the statement, provided by NLC, to the appellants to enable them to defend the demand of tax and, thereafter, the adjudicating authority was directed to pass orders after giving opportunity of hearing to the assesse. Further, all the issues were also directed to be kept open for decision by the adjudicating authority. Aggrieved

by the said order of the Tribunal, the appellants are before this Court by filing the present appeals.

Contentions of the Appellant

The appellant contended that there was no proper classification of works rendered by the appellant in the show cause notices and, therefore, the show cause notices suffered from illegality, which cannot be cured and, accordingly, the remand by the Tribunal is virtually an attempt to confirm the adjudication order. Further, it was submitted that the demands are barred by limitation, which the Tribunal failed to address and that the remand order failed to record the details as to reasons for remand. The burden has been shifted on the appellants for segregating the works that would attract service tax, when there is no proper classification made with regard to the works, by NLC, on which aspect of the matter the show cause notices are also silent. Further, each appellant has provided a different service, which has not been appreciated in proper perspective by the Tribunal and a common order has been passed, which is per se illegal and unsustainable. Therefore, it was prayed that the order of the Tribunal is liable to be set aside.

Contentions of the Respondent

The respondent contented that the appellants were rendering the works mentioned in the show cause notices to NLC and therefore, they are liable to pay tax. The appellants are registered for the services, as mentioned in the show cause notices, and have been rendering the services to NLC and receiving payment thereof and, therefore, they are liable to pay service tax and the tax has been rightly demanded by the Department. It was further submitted that the remand by the Tribunal is an open remand with no fetters on both the sides and the appellants cannot have any grievance with the said order as they are only directed to show the taxable services rendered by them for the purpose of payment of tax. In such circumstances, it was submitted that no interference is called for with the order of the Tribunal.

Held by Hon'ble Madras High Court

The Hon'ble Madras high Court noted that it is the stand of the appellant that many of the services undertaken by them do not fall under taxable category, which has been pointed out by the Tribunal in its order.

However, a careful perusal of the orders of the adjudicating authority, the Commissioner (Appeals) as also the Tribunal would reveal that the Commissioner (Appeals) has decided the issues on two aspects, viz., one on the vagueness of the show cause notices stating that it is bereft of details and being without clarity and the other on the plea of limitation. The Tribunal, however, in its order, while extracting the portion of the order of the Commissioner (Appeals) was of the view that the Revenue had discharged its burden by producing the statements given by NLC and that the assesse did not dispute it at any point of time and that the entire demand was raised on the basis of the statements provided by NLC. However, this finding of the Tribunal runs counter to the plea raised by the appellant before the Commissioner (Appeals) as the show cause notices were challenged on the very foundation that they are vague and without particulars as to classification of works that attracts service tax.

Further, The Hon'ble Court stated that the Tribunal, while glossing over the various decisions of the Tribunal and the Supreme Court, has come to an erroneous conclusion that the only grievance of the assesse is that the Revenue did not give break-up of the amounts with reference to each service rendered by them. This finding of the Tribunal appears to be a fallacy on fact. The various contentions raised by the present appellants before the Commissioner (Appeals) shows that that issue as raised is not pure and simple break-up of amounts, which should have been shown in the show cause notice, but the show cause notices itself being vague and bereft of details as to the nature of taxable services rendered by the appellant to NLC. The Hon'ble High Court

further stated no finding has been rendered by the Tribunal on the aspect of limitation.

In view of the above, the Hon'ble High Court stated that without going into these issues, mere remanding the matter back and asking the adjudicating authority to re-adjudicate the matter after giving break-up of the details to the appellants will not suffice. The issues raised by the appellant and answered by the Commissioner (Appeals) in their favour has to be considered by the Tribunal on its own merits and there being no finding on the issues in the manner in which the plea has been taken by the present appellants, who were successful before the Commissioner (Appeals).

Thus, the Hon'ble High Court sets aside the order of the Tribunal and remands the matter back to the Tribunal to answer the issues in relation to the findings of the Commissioner (Appeals) which was under challenge before the Tribunal in the appeals

CUSTOMS

Basmati Rice satisfying both length & component parameters can only be exported- HC -

Commissioner of Customs vs. Orion Enterprises (Delhi High Court), Customs Appeal No.- CUSAA 4/2013,

Brief of the case:

The Delhi High Court in the case of Commissioner of Customs vs. Orion Enterprises held that as per Basmati Rice Rules if the rice doesn't qualify as Basmati rice then the same cannot be exported as the export of non-Basmati rice is illegal and liable to confiscation. To qualify as Basmati rice the consignment must satisfy length as well as component parameters.

The assesse filed shipping bills for export of 'PUSA 1121 Basmati Sella Rice'. After the order of high court, the samples were sent for testing to RegionalAgmark Laboratory, Okhla, New Delhi (RAL).

The RAL in its report reported that the sample does not conform to standards prescribed in Basmati Rice (Export) Grading and Marketing Rules, 1979.The sample conforms to the requirements of length and length/breadth ration as per the Notification dated 5th November, 2008 of the Director General of Foreign Trade.

On seeking clarification , RAL confirmed that samples were not conforming to the Basmati rules as they contained 'other rice' in a proportion that exceeded 20% which was the maximum permitted under the said Rules. Secondly, the rice did not possess the natural fragrance in both raw and cooked stages. Hence, these sample could be considered as samples of Basmati Rice.

A show cause notice was issued to assesse stating that the samples were not conforming to the Basmati Rice "as they were having other rice more than 20% (maximum permitted under the rules) and do not possess the natural fragrance in both Raw and Cooked stages.

Since the export of Non-Basmati Rice is prohibited u/s 113(d) of Customs Act, 1962 , the goods tendered for export are liable to confiscation. The SCN was adjudicated by Additional Commissioner of Customs who ordered confiscation of the seized goods and also imposed a penalty of Rs.3,00,000.

In appeal before CESTAT , the case was decided in favour of assesse as CESTAT observed that the counsel for the Revenue had been unable to point out any notification of the DGFT which prescribes that the AGMARK standards had to

be applied to decide whether the goods were Basmati Rice or otherwise. Aggrieved by the said order , Revenue is in appeal before Hon'ble High Court.

Contention of Assesse:

The samples clearly conformed to the requirements of length and the length/breadth ratio in terms of the DGFT notification dated 5th November, 2008. There was no such requirement regarding percentage of other rice component.

Further,assesse contended that Bureau of Indian Standards in response to a query under Right to Information (RTI) replied that there was no Indian Standard or method to differentiate non-Basmati Rice from Basmati Rice.

Even Further , the assesse also made a reference of reply received from Ministry of Agriculture in response to a query that Basmati Rice rules were made to ascertain the 'quality of Basmati Rice.' Thus , the 'other rice' component exceeding 20% as reported in test report of RAL could include even other varieties of Basmati rice which may not be able to be determined in terms of the Basmati Rules.

Contention of Revenue:

DGFT Notification dated 5th November, 2008 prohibits the export of non-Basmati rice, this meant that the consignmenthad to also conform to the requirement of the Basmati Rice Rules. Schedule 2 to the Basmati Rice Rules specifies the maximum presence of other rice including red grain as 20%.

Therefore, only satisfaction to length parameters is not enough rather the consignment should also satisfy the component parameter laid down in Schedule 2 of Basmati Rice Rules which had not been so satisfied in the present case as indicated by RAL test reports. Hence, the goods tendered for export were Non-Basmati Rice which are prohibited goods and liable for confiscation.

Held by Hon'ble High Court:

The point of dispute in the present case is that whether rice tendered for export are Basmati or Non-Basmati which is essential to check the legality of proposed export. The department had relied on tests report submitted by RAL whichstated that non-basmati rice, was more than the permissible maximum limit of 20%.

The contention of the respondent that the other rice component is also a type of Basmati Rice cannot be sustained without any evidence submitted by assesse that the other rice was also Basmati rice.

Therefore, the test reports are more than enough to determine whether the rice tendered to be export are Basmati or other rice and the same cannot be questioned without any contra finding to the testing done by RAL.

Interest payable if drawback not paid within one month from the date of filing a claim – HC

M/s.Karur K.C.P.Packagings Limited vs. The Commissioner of Customs (High Court of Madras); W.P.(MD).No.15003 of 2015

Brief of the Case

In the case of M/s.Karur K.C.P.Packagings Limited vs. The Commissioner of Customs, it was held by Madras High Court that that where any drawback payable to the claimant is not paid within a period of one month from the date of filing a claim for payment of such drawback interest at the rate fixed under Section 27-A from the date after the expiry of the said period of one month is payable. Brief Facts This Writ Petition has been filed by Mr.T.Madhaiyan, General Manager (Works) representing M/s.Karur K.C.P.Packkagings Limited, seeking a Mandamus, directing the Assistant Commissioner of Customs (Draw

Back), Tuticorin, to pay and settle the interest at the rate of 18% payable on the sanctioned and paid Duty Drawback Claim amount entitled to by the petitioner, for the period 18.02.2010 to 24.09.2010, as per Section 75A of the Customs Act, 1962.

Held by Hon'ble High Court of Madras The Hon'ble High Court stated that the issue also has been decided by the Director General of Foreign Trade, Udyog Bhawan, classifying that Flexible Intermediate Bulk Containers are covered under ITC(HS) Code 63 and not under ITC(HS) Code 39. The Ministry of Finance (Department of Revenue) Central Board of Excise & Customs, New Delhi, in Circular No.42/2011-Cus., dated 22.09.2011, F.No.609/82/2011-DBK, also has settled the dispute regarding the classification of FIBC by bringing it under Chapter 63, therefore, this Court has no hesitation to allow the prayer made by the petitioner. In view of the above, a Mandamus is issued directing the Assistant Commissioner to settle and release the pending balance duty drawback claim amount entitled to the petitioner for the period 18.02.2010 to 24.09.2010 in the light of the Notification No.103/2008-Customs, dated 29.08.2008 issued by the Government of India, Ministry of Finance and as per the decision of DGFT Committee Meeting No.17/AM-14, dated 25.07.2013, within a period of two weeks from the date of receipt of a copy of this order.

Needless to mention that in the event of success by the respondents before the CESTAT in the pending appeal, it is always open to the respondents department to take recourse under rule 16 of the Customs Central Excise Duties Service Tax Drawback Rules, 1995 In the light of the above direction, the Assistant Commissioner of Customs (Draw Back), Tuticorin, has sanctioned Drawback claim amount entitled to by the petitioner on execution of personal bond for a value of 1.9 Crores in respect of 192 shipping bills. However, the petitioner was requested to intimate the outcome of the classification, which was pending before the learned CESTAT, Chennai, for taking further necessary action.

Now, the learned CESTAT also in its order, dated 03.08.2015, in Appeal Nos.E/76/2011 and E/146/2012 categorically has held that Flexible Intermediate Bulk Containers (FIBC) is rightly classifiable under 6305 3200 and not under 39232990. Accordingly, the learned CESTAT has further found that there was no infirmity in the order passed by the Commissioner (Appeals) and finally dismissed the appeals preferred by the Revenue.

Now, in view of the final decision rendered and concluded, the petitioner is entitled to get the interest on Drawback, as per Section 75-A of the Customs Act, 1962. The Hon'ble Court further referred to the extract Section 75-A of the Customs Act, which reads as under:- 75A. Interest on drawback (1) Where any drawback payable to a claimant under section 74 or section 75 is not paid within a [period of [one month] from the date of filing a claim for payment of such drawback, there shall be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under section 27A from the date after the expiry of the said period of [one month]] till the date of payment of such drawback. [(2)Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AB and the amount of interest shall be calculated for the period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback.]

The Hon'ble Court further stated that a mere perusal of the above Section goes to show that where any drawback payable to the claimant is not paid within a period of one month from the date of filing a claim for payment of such drawback interest at the rate fixed under Section 27-A from the date after the expiry of the said period of one month is payable to the petitioner. Therefore, when it is made clear that the petitioner is entitled to claim interest, as per Section 75-A and further notification with regard to quantum of interest and

also as per Notification Customs No.18/2011-Customs (N.T), 1st March 2011, 18% interest per annum having already fixed by the Central Government is hereby fixed.

In the result, the Writ Petition is allowed and the Asst. Commissioner is hereby directed to pay the interest at the rate of 18% on the sanctioned and paid duty drawback claim amount entitled by the petitioner for the period from 18.02.2010 to 24.09.2010, within a period of four weeks from the date of receipt of a copy of this order.

Mentioning Correct provisions of law in SCN mandatory for invoking any charge against assesse – HC

The Commissioner of Central Excise Vs. M/s. Super Spinning Mills Ltd. (High Court of Madras); Civil Miscellaneous Appeal No.350 of 2009 & M.P.No.1 of 2009

Brief of the Case

In the case of The Commissioner of Central Excise Vs. M/s. Super Spinning Mills Ltd., it was held that non-mentioning of Section 72 of the Customs Act, 1962 along with Section 28 of the Customs Act, 1962 would render the Show-Cause Notice outside the purview of Section 72. Wrong mention of provision of law in the show cause notice is sufficient to invalidate the exercise of that power, when the power exercised is available under a different provision.

The respondent/assesse is a 100% Export Oriented Undertaking and holders of Central Excise Registration and Customs Licence for undertaking manufacturing activity under bond. The assesse is engaged in the manufacture of cotton yarn falling under Chapter Heading 52.05 of the Schedule to both Central Excise Tariff Act, 1985 and Customs Tariff Act, 1975 and procure raw materials viz., cotton indigenously and also through imports. They were exporting cotton yarn as well as clearing under DTA sales in the domestic market.

The assesse had imported cotton from various countries without payment of Customs Duty claiming exemption under Notification No.53/97 (Cus) dated 3.6.97 as amended for use in the manufacture of cotton yarn. One of the conditions stipulated in the said Notification was that the imports, clearance, export, transfer and usage of goods and goods manufactured there from and the net foreign exchange earnings as a percentage of export shall be subject to the conditions of Export and import policy for 1st April 1997 to 31st March 2002 notified by the Government of India under the Ministry of Commerce Notification No.1/97 dated 31.3.1997. The norms were fixed for waste and scraps, fixed for an export product by an Export Oriented Unit as per Sl.No.100 of Appendix 41 of Hand Book of Procedures, EXIM Policy 1997-02 vide Public Notice No.34(RE-01)/97-02 effective from 1.12.1999 in the following manner:

S.No.	Goods Manufactured	Imported goods used	Percentage of scrap or waste on imported goods
1	Combed cotton yarn below 40's	Cotton	25%

In terms of Notification No.53/97 dated 3.6.97 as amended that in case of imported cotton, permissible wastage is 25% when used in the manufacture of combed cotton yarn below 40's count. If the waste exceeds 25%, no benefit of duty free import under the said notification would be available in the cotton imported and used in such excess waste. The assesse has been regularly corresponding with the jurisdictional authorities on the quantum of waste collected and some of the correspondences referable to the instant case were dated 02.02.2000, 16.10.2000, 06.10.2000, 10.11.2000 and 11.10.2001. These correspondences relate to excess generation of waste in respect of the imported cotton. However, on scrutiny, the Department was of the view that

the cotton waste generated in the Course of manufacture of combed cotton yarn out of the imported cotton, exceeded the prescribed norms on several occasions, which the importer did not declare to the Department; consequently, statements were recorded from the person concerned and a show cause notice was issued on 16.12.2003

In response to the said notice, the assesse filed a reply denying the allegations made in the Show Cause Notice. After due process of law, the Adjudicating Authority adjudicated the matter and passed an order holding that there was no suppression by the assesse. After considering the entire issue, the Adjudicating Authority came to the conclusion that the waste generated was well within the knowledge of the jurisdictional Central Excise Officers and there is no question of suppression of facts regarding the cotton waste generated.

Accordingly, the Adjudicating Authority passed the order in favour of the assesse. As against the order of the Adjudicating Authority, the Department filed an appeal before the Commissioner (Appeals) contending that that the time limit specified under Section 28(1) of the Customs Act was not applicable to the case and that the applicable provisions were those of Section 72(1) of the Customs Act, which did not specify any time limit. The Commissioner (Appeals) rejected the contention of the Department and held that Section 72 of the Customs Act was not applicable to the facts of the case and it was not open to the Department to change their stand after having invoked Section 28 of the Customs Act for demanding duty. The Commissioner (Appeals) further held that the Department had no basis to sustain the duty in terms of Section 72 as they proceeded entirely on the basis of proviso to Section 28 of the Customs Act. Accordingly, the Commissioner (Appeals) upheld the order of the Adjudicating Authority.

Aggrieved by the order of the Commissioner (Appeals), the Department once again pursued the matter before the Tribunal. The Tribunal, concurred with the view of the Commissioner (Appeals), dismissed the appeal holding as follows:

"After giving careful consideration to the submissions, I have found valid point in the submissions made by the counsel. The SCN invoked Section 28 read with Section 72 of demanding duty of Customs from the respondents on a certain quantity of the imported raw material. It invoked the extended period of limitation under the proviso to Section 28(1) of the Act on the ground that the notice had deliberately suppressed the generation of excess cotton waste before the department. The entire drift of the SCN was in the direction of a demand of duty under the proviso to Section 28. The notice also contains peripheral mention of section 72. In the present appeal, the department says that Section 72(1) (d) was invoked in the SCN. This is not factually correct. No fact was pleaded, nor any allegation raised, against the notice by the department purporting to demand duty under Section 72. According to Section 72(1) (d), the proper officer of Customs may demand duty on any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or exportation (or) are not duly accounted for to the satisfaction of the proper officer. For such a demand of duty, the ingredients of clause (d) of sub-section (1) of section 72 should be alleged and proved. This has not been done in the present case. As already observed, the tenor of the SCN is for demand of duty under the proviso to Section 28(1) of the Customs Act. Therefore, the claim of the appellant that Section 28 was erroneously mentioned in the SCN and that it was Section 72 which was intended to be pressed into service cannot be accepted. The findings of the ld. Commissioner (Appeals) are eminently sustainable. The appeal gets dismissed." Aggrieved by the order of the Tribunal, the Department is before this Court in this appeal.

Contentions of the Assesse

The assesse contended that there is no allegation or material to support the invocation of Section 72 of the Customs Act. The claim of the Department to demand duty was not in terms of Section 72 of Customs Act. The assesse contended that a passing reference to Section 72 will not cure the defect because the assesse or the importer was not put on notice in respect of the charge or demand for duty in terms of Section 72 of the Customs Act.

Contentions of the Revenue

The Department contended that the question of law raised by stating that the mere wrong mentioning of provision of law would not render the entire exercise futile. In this regard, revenue relied on the decision in the case of Collector of Central Excise, Calcutta V. Pradyumna Steel Ltd. reported in 1996 (82) ELT 441 (SC).

Held by Hon'ble High Court of Madras

The Hon'ble High Court stated that It is not the case of the Department that the provision has been wrongly quoted. Factually, there is no allegation or material to support the invocation of Section 72 of the Customs Act. The claim of the Department to demand duty was not in terms of Section 72 of Customs Act. The entire exercise of the Department was on the question of invoking the extended period of limitation. A passing reference to Section 72 will not cure the defect because the assesse or the importer was not put on notice in respect of the charge or demand for duty in terms of Section 72 of the Customs Act.

The stand of the Department before the Supreme Court was that the mere mention of an incorrect provision of law in the show cause notice was not sufficient to invalidate the same. In the instant case, it is not the case of the Department that the provision has been wrongly quoted. In the present case, the relevant provision, namely, Section 72 of the Customs Act was not invoked and there was no charge or show cause notice in support of such a demand. Hence, the assesse or the importer cannot be asked to answer the charge, which is not specifically raised.

Assuming that Section 72(1) (d) of the Customs Act would apply, there is no material to support such a plea in the show cause notice. As the exact nature of the contravention for invoking Section 72 is absent, on facts, the Original Authority, the Appellate Authority as well as the Tribunal have correctly came to the conclusion that the allegation of the Department against the first respondent/importer is only in respect of wilful suppression, which has been found against the Department and in favour of the assesse There is also a finding that there is no case for demand of duty in terms of Section 72 of the Customs Act. As the Original Authority held that when the jurisdictional Officers have knowledge with regard to the issue of waste generated, which was confirmed by the Appellate Authority, there is no question of suppression of fact by the assesse.

SAD exemption not applicable when goods sell from a place where no sales tax is chargeable – SC

Commissioner Of Customs vs. M/s. Seiko Brushware India (Supreme Court of India); Civil Appeal No. 216 of 2007; Date of Decision: – 04/09/2015

Brief of the Case

In the case of Commissioner of Customs vs. M/s. Seiko Brushware India , it was held by Supreme Court that benefit of exemption Notification No. 34/98-Cus. Dated 13.06.1998 for NIL SAD is not granted in respect of such goods which the importer sells post importation from a place located in an area where no tax is chargeable on sale of goods.

The facts of the present case are that pig hair bristles that were imported were sold in the years 1998-1999 and 1999-2000. Revenue issued a show cause notice dated 26.03.2003 stating that since these pig hair bristles were, in fact, sold without any sales tax been paid thereon, the benefit of Exemption

Notification dated 13.06.1998 would not be available to the importer in the present case.

By a reply dated 17.10.2003, the importer essentially contended that pig hair bristles may be exempted from sales tax but that did not mean that they were not chargeable to sales tax.

In a detailed order dated 31.03.2004, the learned Commissioner, after setting out the Notification dated 13.06.1998, and after hearing the importer, ultimately came to the conclusion that an Exemption Notification exempting pig hair bristles from tax would amount to a case where no tax is chargeable on the sale of goods and therefore, the benefit of the said notification would not be available to the importer in the present case.
In an appeal against the said order by the importer/assesse, the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') vide its judgment dated 22.02.2005 has held in favour of the assesse as follows:

"We have heard both the sides and in our view, the contention raised by the learned counsel deserves to be accepted. We find that the exemption Notification issued by the Sales-tax Department of Delhi and UP state opponent from where goods in question after import without payment of SAD under Notification No. 34/98 detailed above, were sold only exempted the payment of tax on the sale and purchase of the goods at that time and but for these exemption notifications, the goods were otherwise chargeable to Tax. It was only the payment of tax which was deferred/exempted under those notifications for the period mentioned therein. The exemption notification did not render the goods non-chargeable to tax, but only allowed concession in the tax by way of exemption for some period. Therefore, the appellants cannot be said to have sold the goods from the places where no tax was chargeable on the sale/purchase of the goods and thereby violated the condition contained in the above said exemption Notification No. 34/98-Cus."

Contentions of the Revenue

The Revenue contended that the CESTAT has not taken note of Section 7 of The Delhi Sales Tax Act, 1975 (hereinafter referred to as 'Act') by which pig hair bristles were said to be in the nature of tax free goods. In the present case, the CESTAT was not correct in referring to an Exemption Notification. What was, in fact, notified was the addition of Entry No. 67 to the Third Schedule of the Act vide Notification dated 15.10.1996 which was wrongly referred to as an Exemption Notification.

Held by Hon'ble Supreme Court of India

The issue in this appeal relates to the denial of the benefit of Exemption Notification No. 34/98-Cus. Dated 13.06.1998 which reads as follows:-
"In exercise of the powers conferred by sub-section (1) of Section 3A of Customs Tariff Act, 1975 (51 of 1975), the Central Government having regard to the maximum sales tax, local tax or any other charges for the time being leviable on the like goods on their sale or purchase in India, hereby specifies the rates of special additional duty as indicated in column (3) in table below in respect of goods, when imported into India, specified in corresponding entry in column(2) of the said table and falling within First Schedule to the said Customs Tariff Act:" Against the relevant entry 'Nil' rate has been specified for All goods falling under the said First Schedule which are imported for sale as such, other than by way of high sea sale and the importer at the time of importation or at the time of clearances of warehoused goods for home consumption under the provisions of Section 68 of the Customs Act, 1962 (no. 52 of 1962), as the case may, makes a specified declaration to that effect in the Bill of Entry in the manner specified below.

Provided that rate specified therein shall not apply if the importer sells the said imported goods from a place located in an area where no tax is chargeable on sale or purchase of goods."

A reading of this Notification would show that exemption is not granted in respect of such goods which the importer sells post importation from a place located in an area where no tax is chargeable on sale of goods.

The Hon'ble further referred to Section 7 of the Delhi Sales Tax Act, 1975 which reads as under: –

"7. Tax-free goods.-

(1) No tax shall be payable under this Act on the sale of goods specified in the Third Schedule subject to the conditions and exceptions, if any, set out therein.

(2) The lieutenant Governor may by notification in the Official Gazette, add to, or omit from, or otherwise amend, the Third Schedule either retrospectively or prospectively, and thereupon the Third Schedule shall be deemed to be amended accordingly:

Provided that no such amendment shall be made retrospectively if it would have the effect of prejudicially affecting the interests of any dealer."

The imported goods, viz., pig hair bristles, find mention in Entry 67 of the Third Schedule which reads as follows: –

"Pig hair bristles and paint brushes made of pig hair bristles."

It will be noticed that the charging Section itself, viz., Section 3 of the Act, speaks of a dealer whose turnover during the year immediately preceding the commencement of this Act exceeds the taxable quantum as also every registered dealer liable to pay tax under this Act on all sales effected by him on or after such commencement. It will, thus, be seen that even the charging Section uses the expression "liable to pay tax". Correspondingly, Section 7, whose marginal note indicates that the subject matter of the said section is tax free goods, also uses the same expression as is used in Section 3, viz., "no tax shall be payable under this Act".

On a reading of Sections 3 and 7 of the Act, it becomes clear, therefore, that so far as the imported item, viz., pig bristles is concerned, no sales tax, in fact, is charged on the same. This being the case, it is obvious that the proviso to the Notification dated 13.06.1998 gets attracted and since no tax is chargeable on the sale of such goods, the said Exemption notification will therefore, not apply. In view of the above the appeal is dismissed.

Assesse contributing to delay in legal proceedings not eligible for remedy – HC

Srikant Bagla Vs. Commissioner of Customs & Ors. (High Court of Calcutta); WP NO. 818 OF 2014; -

Brief of the Case

In the case of Srikant Bagla Vs. Commissioner of Customs & Ors., it was held that an assesse cannot be benefitted when it is proved that the assesse had a substantial contribution to make towards the delay in the legal proceedings.

The writ petitioner imported a large quantity of a substance alleged to be furnace oil. This is also known as fuel oil He did so between January and March, 2013 in six containers, from Singapore, Malaysia and Australia. The first and the second arrived on 1st January, 2013. The containers were unloaded and removed to a container freight station the very next day, 2nd January, 2013. Other containers followed.

The goods were detained by the customs for a long period of time on the suspicion that they were hazardous. Under our law hazardous goods cannot be imported into the country. Ultimately, the goods were found to be hazardous. However, permission was given by the Indian authorities to the petitioner to re-export the goods.

Now, unpaid rent or demurrage charges operate as a lien on the goods. The container freight station owners will not allow the goods to be removed unless their charges for storage are met. The charges are quite substantial. The writ petitioner says that these charges are more than the value of the goods.

Out of the six containers two arrived in the port of Kolkata on 1st January 2013 and the others by March, 2013. Four containers were shipped from Singapore one from Malaysia and one from Australia. Of the six containers, five were shipped by M/s. Arrow Chem. Pvt. Ltd, Singapore and one by Houra Resources Pvt. Ltd., Australia.

The customs took up the first container on 29th January, 2013 for sampling and assessment of customs duty. Similarly, the second container arrived at the port on 1st January, 2013. It was removed to the container freight station on the same day. On 1st February, 2013 sampling and assessment to duty were made. In the same way, the third container arrived on 6th January, 2013. It was removed to the container freight station on 8th January, 2013. Sampling and assessment to duty were made on 1st February, 2013. Again, the fourth container arrived on 2nd February, 2013and removed to the container freight station on 3rd February, 2013. Sampling and assessment to duty were made on 8th March, 2013. In the same manner, the fifth container arrived on 10th February, 2013 and was removed to the container freight station on 11th February, 2013. Sampling and assessment to duty were made on 9th March, 2013 and 25th March, 2013.

Lastly, the six containers arrived on 15th March, 2013. It was removed to the container freight station on 16th March, 2013. Sampling and assessment to duty were made on 19th March, 2013. The petitioner filed six bills of entry on 22nd January, 2013, 29th January, 2013, 29th January, 2013, 5th March, 2013, 5th March, 2013 and 13th March, 2013 for home clearance of the goods.

The alleged furnace oil was not released to the petitioner, although he wanted provisional release thereof. The respondents subjected the goods to tests on receipt of information that some unscrupulous importers were importing hazardous waste oil, importation of which was absolutely prohibited.

According to the affidavit-in-opposition affirmed on behalf of the customs on 29th October, 2014 the samples which were drawn from the goods were sent to the Customs House laboratory for testing. The test report dated 31st January, 2013 with reference to a part of the goods stated that the sample did not satisfy the requirement of furnace oil/fuel oil as per IS1593-1982. The Customs House laboratory recommended that the sample be sent to the Central Pollution Control Board, Kolkata, for testing.

Tests were carried out with regard to the rest of the goods and the report was the same. The main reason for coming to this opinion by the customs laboratory was that in the sample the mineral hydrocarbon oil was less than 70% by weight. Hence, it did not appear that the imported goods were furnace oil/mineral oil. Successive consignments of the goods were tested by the Customs till April, 2013, with the same report.

It would further appear from this affidavit, by their letter dated 3rd May, 2013 five sealed samples were sent by the Customs authorities in Kolkata together with their test report, to the Central Pollution Control Board to report to them whether the goods were hazardous. The customs recorded in another letter of 7th May, 2013 that the Central Pollution Control Board, Kolkata had refused to accept the samples on the ground that no chemical tests were conducted in their office. This letter was addressed by the Customs to the scientist 'D' in-charge of the Central Pollution Control Board with a request whether his office would test the goods.

Then again on 9th May, 2013 the customs wrote to the Indian Oil Corporation that the Customs department had opined that the goods did not satisfy the requirements of furnace oil/ fuel oil and whether the two samples could be sent to the Indian Oil laboratory. On 23rd May, 2013 the customs reminded Indian Oil that they had not received their reply. On 24th May, 2013 the refineries division of Indian Oil Corporation, Kolkata e-mailed to them that the

samples might be taken to Indian Oil's, Haldia refinery laboratory on 27th or 28th May, 2013 for testing. On 27th May, 2013 the Assistant Commissioner of Customs (Appraisal) Gr-1 informed the writ petitioner that the customs had opined that the goods were not furnace oil/fuel oil and that they were to be sent to the Central Pollution Control Board and Indian Oil Corporation (IOCL) for testing. On 7th June, 2013 another lot of goods was sent by the customs to Haldia for testing.

The affidavit is not at all clear as to the report that was made by Indian Oil Corporation, Haldia regarding the goods. I find only a note of regret by them that they did not have the facility to perform the tests in the way the customs wanted them to do. Correspondence between the Customs and IOCL continued till at least mid-July, 2013.

Contrary to what the writ petitioner has stated in the petition that the customs did not permit them to store the goods in a bonded warehouse, under Section 49 of the Customs Act, 1962, the letter dated 27th May, 2013 by the customs to them, clearly suggests that the customs were offering them the option to store the goods under Section 49 in a bonded warehouse.

It is also averred in the affidavit that the petitioner was given the option of getting the goods tested at the National Test House but since he did not deposit the fees the samples were forwarded to the Central Revenue Control Laboratory, New Delhi.

The letter of the customs dated 6th November, 2013 records that the duplicate samples were being sent to the Central Revenue Control Laboratory, New Delhi for their opinion as to whether the goods were hazardous or not. On 11th December, 2013 this agency reported that the sample did not meet the requirement for furnace oil/fuel oil and fell under the category of "hazardous waste oil".

Permission was granted to the writ petitioner by this Court on 18th December, 2013 in a writ application filed by him (WP 836 of 2013) to re-export the goods. The court did not make any observation as to the liability to pay the rent or demurrage charges of the container freight station owners.

In obedience to the said order dated 18th December, 2013 passed by Mr. Justice Tandon the Commissioner of Customs (Port) made an adjudication on 17th February, 2014 allowing re-export of the goods by the payment of fine of Rs. 10 lakh in terms of customs circular 100/03 dated 28th November, 2003 read with rule 17 of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008.

Meanwhile, the writ petitioner preferred an appeal from the said Judgment and order of Justice Tandon inter alia contending that he had a right to claim damages for wrongful detention of his goods by the customs, which had not been decided or kept open by the learned Judge. The appeal was disposed of on 9th July, 2014 inter alia by granting liberty to the writ petitioner to claim the consequences of the alleged delay by the customs.

The claim of the writ petitioner is confined to a very small area, in this writ application. The alleged fuel or furnace oil which had been imported by him had been lying from almost the time of their unloading in Kolkata Port in the container freight stations operated by the eighth and ninth respondents. These freight stations allow a lay time or free time for removal of the goods. Beyond this period rent or demurrage is discharged. The quantity of alleged furnace oil/fuel oil imported by the writ petitioner is still lying in the container freight stations. Considerable rent or demurrage charges are due and payable on account of their storage.

Held by Hon'ble High Court of Calcutta

The Hon'ble High Court stated that every importer, every trader and every manufacturer owes this duty to the nation of not bringing from outside, to this country, goods which are hazardous or in other words, substances which are injurious to human life. This report is uncontradicted. Although, it is contended on behalf of the writ petitioner that the exporter's document certified that the goods were not hazardous, he has been unable to bring any report from any test house or agency in India to certify that the goods are non-hazardous.

It also appears from the records that these kind of hazardous goods are rarely brought into this country. The routine testing centres like the ones available with the customs or Indian Oil Corporation, Haldia do not even have the facilities to test such goods. The testing department of the customs expressed doubt whether the goods were non- hazardous, after having declared that they did not fit into the description of furnace oil or fuel oil. The Central Pollution Control Board refused to receive the sample on the ground that it did not have the testing facility. Ultimately, the Central Revenue Control Laboratory tested the goods and arrived at the finding that they were hazardous.

Throughout the annexures of the affidavit-in-opposition the constant efforts had been made by the customs to get the goods properly tested but they were faced with the obstacle that there were no adequate testing centres for them. The correspondence that the customs had with Indian Oil Corporation, Central Pollution Control Board etc. brings to light two or three very important facts.

First, the petitioner did not respond to the letter of the customs to store the goods under Section 49 of the customs Act, 1962. Secondly, he did not even deposit the charges of the National Test House which could have tested the goods in Kolkata. Having not received the fees for testing such goods in this laboratory, they had to be sent to New Delhi to be tested by the Central Revenue Control Laboratory. Thirdly, the petitioner did not offer the services of another testing centre to test the goods so as to rule out that the goods were hazardous.

When the writ petitioner found that the imported goods were not being cleared for home consumption by the Indian authorities, he should have immediately taken steps to re-export the same under Rule 17(2) of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008. He took no decision to this effect before the hearing of the first writ before Mr. Justice Tandon.

The Hon'ble High Court stated that the petitioner had a substantial contribution to make towards the delay. The delay that was made by the Indian authorities was due to lack of testing centres in our country to test this kind of an unusual import of hazardous materials. Law must be taking its own course for the petitioner.

In Padam Kumar Agarwala vs The Additional Collector of Customs, Calcutta &Ors reported in AIR 1972 SC 542 cited by the Ld. Advocate General the customs had detained a consignment of lentil on the ground that these goods were sought to be exported by a Nepalese exporter through the Calcutta port in breach of the Indo Nepal treaty. The customs thought that the lentil were of Indian origin and originally imported into Nepal from India. The India Nepal treaty prohibited export of those goods. The Supreme Court negated both the premises of the customs holding that neither was it established that the goods were of Indian Origin nor was there any bar in the India Nepal treaty to the export of goods imported into Nepal from India. It opined that the customs were fully responsible for the sizeable demurrage charges incurred. Nevertheless it refused to pass an order upon the customs to pay the demurrage.

First of all there is no direction by the Supreme Court, to the customs to pay the demurrage charges. The Court left it to the "good offices" of customs to pay the demurrage.

Secondly, there was a concrete finding that the customs were at fault. Recent decisions of the Supreme Court have told that a writ court is entitled even to decide disputed questions of fact if those facts can be easily decided on affidavits.

Here the findings can only be prima facie. In this mesh of facts the court cannot and should not come to any final finding regarding fault or the nature of the goods. So, on appraisal of the facts, prima facie the writ petitioner is not entitled to any remedy.
In view of the above the appeal is dismissed.

Anti-dumping duty could not be added for computing customs duty, SCD & SAD: SC

M/s. Jaswal neco ltd. V/s. Commissioner of customs, visakhapatnam; (supreme court of india); civil appeal no.7189 of 2005;

Brief of the Case

In the case of M/S. Jaswal Neco Ltd. Vs. Commissioner Of Customs , it was held by Supreme Court that anti-dumping duty could not be added for computing customs duty, Special Customs Duty and Special Additional Duty by referring to the judgment in the case of Commissioner of Customs (Preventive) v. Goyal Traders, (2014) 302 ELT 529 and J.K. Synthetics Ltd. v. Commercial Taxes Officer, (1994) 4 SCC 276. Brief facts The appellant is engaged in the manufacture of pig iron. The appellant imported Low Ash Metallurgical (LAM) Coke under seven Bills of Entry, against four advance licenses without payment of basic customs duty (BCD) levied under Section 12 of the Customs Act, 1962, special customs duty (SCD) levied under Section 68 of the Finance Act, 1996, special additional duty (SAD) levied under Section 3A of Customs Tariff Act, 1975 and Anti-dumping duty (ADD) levied under Section 9A of the Customs Tariff Act, 1975 during the period June 1998 to August 1998, which were exempt from duty vide (i) Notifications No. 30/97 Cus dated 1.4.1997, (ii) Sr. No.4 of Notification No.12/97 Cus dated 1.3.97, (iii) Sr. No.3 of the Notification No.34/98-Cus dated 13.6.1998, and (IV) Notification No.41/97-Cus dated 30.4.97 respectively. At the time of import, the appellant furnished a bond containing an undertaking to pay duty on imported goods cleared under Notification No.30/97 and 41/97 in the event of failure to fulfil its export obligation. It is an admitted position that the appellant failed to fulfil its export obligation in the terms of the exemption notifications. The entire LAM so imported has instead been used by the appellant in its factory for the manufacture of pig iron. Pending final adjudication of the show cause notice by the Commissioner, the appellant duly paid the entire duty payable towards BCD, SAD and SCD after considering partial exports already made. The appellant did not make any payment towards ADD. The Commissioner of Customs confirmed the duty demand.

The appellant appealed to CESTAT. Vide the impugned judgment dated 18.8.2005, CESTAT partly allowed the appeal by remanding the matter to the original authority to calculate duty, interest, and penalty in accordance with the findings contained in its judgment. The basic difference between CESTAT's judgment and that of the Commissioner is that interest was reduced from 24% to 15%, but the Anti-dumping duty was increased by applying the higher rates specified by the final Notification No.69 of 2000. Contentions of the Assesse The assesse contended that Anti-dumping duty was not payable at all stating that the appellant was exempt under Notification No.69 of 2000. The assesse further contended that no interest is chargeable on any of the four duties inasmuch as the bond that was furnished under Notification No.30 of 1997 did not stipulate that in the event of default, interest would become payable.

Further, it is clear that the assessment in the present case is only provisional and that being the case, even if the provisions of the Customs Act are made applicable insofar as Anti-dumping duty is concerned, under the Customs Act itself there was no provision for collection of interest for the period in dispute as Section 18 was amended to include such a provision only prospectively with effect from 2006. Anti-dumping duty could not be added for purposes of computing customs duty, special customs duty and special additional duty. Also no penalty is imposable inasmuch as nothing contumacious was done by the appellant and the export obligation could not be fulfilled only because of bonafide commercial impossibility.

Contentions of the Revenue

The Revenue contended that the exemption contained in the Anti-dumping duty Notification 69 of 2000 was only prospective and, hence Anti-dumping duty had to be paid for the relevant period. The Revenue further submitted that interest in any case was payable as Notification No.30 of 1997 independently levied a charge of interest. Held by Hon'ble Supreme Court of India The Hon'ble Supreme Court stated that it is clear that under Rule 20(2)(a) of the Customs Tariff (Identification, Assessment And Collection of Antidumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995, where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or threat of injury and the further finding that the effect of imports in the absence of provisional duty would have led to injury, the Anti-dumping duty may be levied from the date of imposition of provisional duty. In the present case, therefore, it will be noticed that the final Notification dated 27.10.1998 is said to come into force from the date of the first Notification dated 6.5.1998 imposing provisional duty in the present case.

It is clear that as the final Notification dated 27.10.1998 has been superseded by the Notification dated 19.5.2000, the appellant would have had to pay Anti-dumping duty at the rate of US$ 24.95 per metric tonne as indisputably it falls within Item No.7 of the said Notification. The Hon'ble court referred to the judgment in the case of Commissioner of Customs (Preventive) v. Goyal Traders, (2014) 302 ELT 529, the Gujarat High Court has held as under:- "17.

In the present case, we find that prior to introduction of sub-section (3) of Section 18 of the Act in the present form, there was no liability to pay interest on difference between finally assessed duty and provisionally assessed duty upon payment of which the assesse may have cleared the goods. It was only with effect from 13.7.2006 that such charging provision was introduced in the statute. Upon introduction therefore such provision created interest liability for the first time w.e.f. 13.7.2006.

In absence of any indication in the statute itself either specifically or by necessary implication giving retrospective effect to such a statutory provision, we are of the opinion that the same cannot be applied to cases of provisional assessment which took place prior to the said date.

Any such application would in our view amount to retrospective operation of the law." In addition, it is clear that this Court has held that the levying of interest can only be by a substantive provision (See: J.K. Synthetics Ltd. v. Commercial Taxes Officer, (1994) 4 SCC 276 at paragraph 16), thereby making it clear that such levy can only be prospective. Given the aforesaid, it is clear that no interest is chargeable on any of the customs duties that are payable on the facts of the present case. It will be noticed that the very words "as an addition to, and in the same manner as" used in Section 3(2) and 3A(2)

of the Customs Tariff Act have been used in Section 23 of the Finance Act of 1963 when what was sought to be levied was only a surcharge.

By way of contrast, Section 24(3) when it levies a different duty – a regulatory duty of customs – uses the expression "in addition". It is clear, therefore, that what is referred to in Section 3(2) and 3A (2) is only a surcharge or an additional duty of customs. The words "in the same manner" also point to the same conclusion. It is clear on a reading of the Customs Tariff (Identification, Assessment And Collection of Antidumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995, that Anti-dumping duty apart from being a separate levy from a levy of customs duty is also levied in a completely different manner from that of customs duty. Though it is stated that the object of the amendment is to clarify and set at rest doubts, it is not necessary to decide whether this amendment is clarificatory and, therefore, retrospective in view of what has already been held as above. In view of the above, the appeal is allowed.

Availability of alternate remedy do not preclude High Court from exercising jurisdiction– SC

Enterprises ltd. V/s. Assistant collector of customs and ors.; (supreme court of india); civil appeal no. 4417 of 2003;

Brief of the Case

In the case of D.R. Enterprises Ltd. Vs. Assistant Collector Of Customs And Ors, it was held by Supreme Court that the powers of the High Court under Article 226 of the Constitution, while issuing appropriate writs, are very wide. Even if there is an alternate remedy available that may not preclude the High Court from exercising the jurisdiction in a particular case. In the face of alternate statutory remedies, when the High Court declines to exercise the jurisdiction under Article 226 of the Constitution, it is a self imposed restriction only.

The appellant herein had imported one printing machine of 'Harris Graphic V-15H Model' which arrived at Mumbai airport on 24.10.1987. Custom house agent of the appellant filed Bill of Entry for Home Consumption under OGL on 13.11.1987 and claimed concessional rate of duty under Notification No. 114/80-CUS. On 26.11.1987, the Appraiser of Customs House, Bombay issued a query memo with regard to the printing capacity of the imported machine which had been shown in the import invoice as 36,000 copies per hour, but was shown as 25,000 in the leaflet furnished along with the Bill of Entry. The appellant answered the issue on 21.01.1988. Having not been satisfied with the reply furnished by the appellant, the customs authorities directed it to warehouse the goods under Section 49 of the Customs Act, 1962 (hereinafter referred to as the 'Act'), after depositing the admitted customs duty. Accordingly, the imported machine was warehoused. Thereafter, some queries regarding the output of the machine were raised and the appellant tried to meet them.

It also filed communications received from the manufacturer explaining that the machine was custom-made for Indian purposes, i.e., for the appellant enhancing its capacity to 36,000 copies per hour as against normal capacity of 25,000 copies, which is the normal product manufactured by the said manufacturer. On that basis, the appellant wrote to the customs authorities for arranging physical examination of the consignment to satisfy themselves that the machine in question was capable of giving output of 36,000 copies per hour. However, no action was taken by the customs authorities thereafter.

Taking note of the inaction of the customs authorities to get the imported consignment physically inspected and proceeding with the clearance of the

same, on 24.04.1988, the appellant filed a writ petition before the Bombay High Court (being Civil Writ No. 2229/1988) praying for a declaration that the imported machine was covered by OGL and was entitled to the concessional rate of customs duty under Notification No. 114/80-CUS and for directing the respondents to permit clearance of the same.

Interim relief of release of the machinery was also prayed for. The appellant herein is aggrieved by the impugned judgment of the High Court whereby the High Court has refused to allow the appellant import of Web Printing Machine on concessional rate of custom duty. The appellant had endeavoured to avail the concessional rate of custom duty on the import of the aforesaid machine under Open General Allowance (for short, 'OGL') with the aid of Notification No. 114/80-CUS, dated 19.06.1980. The High Court has held that the said Notification is not applicable in the instant case as the appellant has not been able to satisfy one particular eligibility condition contained therein.

To put it pithily, one of the conditions needs to be satisfied to avail the concessional rate of duty @ 35% ad valorem under the aforesaid Notification is that the machine is having output of 30,000 or more copies per hour. Whereas the appellant contends that the machine in question churned out 36,000 copies per hour, the High Court has found it otherwise. As per the High Court the output of the machine was 25,000 copies per hour, which was reflected in the leaflet of the manufacturer of the machine, which leaflet was filed along with Bill of Entry. Contentions of the Assesse The Assesse contended that the High Court was not competent to go into this issue when the Act provides for complete adjudication machinery to adjudicate this issue.

The assesse referred to the provisions of Section 28 of the Act, as per which the authorities are supposed to issue show cause notice to the importer and after giving opportunity to the importer to meet the allegations contained in show cause notice, the Adjudicating Officer is to pass an Order-in- Original deciding the case stated in the show cause notice. The assesse further contended that against the order of the Adjudicating Authority there is a provision for appeal before the

Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). Against the order of the CESTAT, appeal is provided to the Supreme Court. The Authority and Tribunal are the fact finding authorities, which are supposed to take evidence/material on record and arrive at a finding on that basis. In this backdrop, it was submitted that not only this procedure was sidelined thereby causing great prejudice to the appellant, even otherwise, the High Court, while exercising its extraordinary writ jurisdiction under Article 226 of the Constitution, was not competent to decide the disputed questions of facts.

Contentions of the Revenue

The Revenue contended that that it did not behave well on the part of the appellant to now question the jurisdiction and competence of the High Court to go into the issue when the High Court was requested and persuaded by the appellant itself to decide the issue, as is reflected in the impugned judgment itself. The appellant was estopped from raising such an issue when the appellant itself invited the judgment on merits. This fact would also negate the contention of the appellant predicated on limitation. The appellant had itself raised this issue in the High Court in its petition which was pending adjudication.

That was a reason that the Revenue authorities did not initiate any action as per the adjudicatory mechanism provided in the Act.

Therefore, the appellant was not entitled to rake up the issue of limitation as well.

Held by Hon'ble Supreme Court of India

The Hon'ble Supreme Court held that it is necessary in the first instance to take note of the scope of the writ petition that was filed by the appellant in the High Court which is dismissed by the judgment impugned. A copy of the said judgment is placed on record and a perusal thereof would show that the appellant contested and disputed the position taken by the Department that the imported machine did not fulfil the aforesaid requirement of exemption Notification No. 114/80-SC. The appellant enclosed copies of various documents procured from the manufacturer and others in support of its submission on the basis of which it was claimed that the appellant was able to establish that the speed of the imported printing machine was 36,000 copies per hour. On that basis, contention raised in the writ petition was that action of the Department in not allowing the appellant to clear the machine was illegal.

The appellant also alleged failure and refusal on the part of the customs authorities in not permitting the appellant to effect clearance for an inordinately long period of time after the machine was landed. No doubt, when the High Court passed the interim order in favour of the appellant, the High Court could dispose of the writ petition with the observation that the aforesaid issue involved on merit can be gone into by the appropriate authority by putting the machinery of adjudication in motion via Section 28 route. For some reason, that was not done and it was more so as the appellant had itself prayed for declaration to this effect in the writ petition, which means it called upon the High Court to decide this issue. In the aforesaid scenario, when the writ petition was pending, wherein this issue was raised, probably for this reason the Department also stayed its hands off.

No doubt, there was no stay of adjudication proceedings and the competent authority could go ahead with the adjudication proceedings. However, if there was a show cause notice in the year 2002, whether it would have been time barred or not is not even required to be gone into. Such a guess game is not needed because of one simple reason. When the writ petition came up for final hearing in the year 2002, it is the appellant who is responsible for inviting the decision on merits. Even at that stage, the appellant could have simply withdrawn the writ petition as with the passing of interim order it had got the printing machine cleared from the customs authorities and was using the same.

However, it did not choose to do so. Had it done so, and thereafter received show cause notice under Section 28 of the Act, it could have defended that notice raising the plea of limitation as well. Only then question would have arisen as to whether the period during which the writ petition remained pending had to be excluded or not, for the purpose of computing limitation period. The

Hon'ble Court further stated that High Court was not oblivious of Section 28 of the Act and that determination of such an issue is to be more appropriately in the hands of Adjudicating Authority. It also appears that High Court might have disposed of the writ petition with liberty to the Adjudicating Authority to initiate proceedings under Section 28 of the Act. Curiously, such an action was not taken at the instance of the appellant who contended otherwise.

The Hon'ble Court further stated that after inviting the High Court to decide the matter on merits and finding that the decision has gone against the appellant, contrary argument is nothing but a desperate attempt to chicken out of the situation which is appellant's own creation. This kind of somersault, taking completely

reverse stand before us, cannot be countenanced. The position would have been different if it was a case of inherent lack of jurisdiction. That is not so. The powers of the High Court under Article 226 of the Constitution, while issuing appropriate writs, are very wide. Even if there is an alternate remedy that may not preclude the High Court from exercising the jurisdiction in a particular case. In the face of alternate statutory remedies, when the High Court declines to exercise the jurisdiction under Article 226 of the Constitution, it is a self imposed restriction only. In the instant case, what is pertinent is that it is the appellant which not only made a prayer in the writ petition for deciding the issue in question, even at the time of hearing (as noted above), it is the appellant which pressed for the decision with the submission that existence of alternate remedy should not deter the Court to render the decision on merits. In such a situation, the objection, if any, to the maintainability of the writ petition could have been taken by the respondent and it does not behove the appellant to raise this objection in the present appeal after pleading in the High Court that the matter be decided on merits. Order of the High Court clearly records that the appellant had requested the High Court to decide the issue on the basis of material on record.

The issue as to whether the import of Web Printing Machine was covered by Notification No. 114/80-CUS dated 19.06.1980 was pending in the High Court in respect of which petition was filed by the appellant itself way back in the year 1988 raising this issue. The appellant even got the interim order in its favour. When the writ petition came up for final hearing, the appellant impressed the Court to decide the said issue. In such a situation, question of limitation does not arise inasmuch as it is not a case where proceedings under Section 28 of the Act were taken out giving any show cause notice under the said section. The question of limitation would have arisen only in case the respondent had issued show cause notice under Section 28 of the Act. Further, it is not that the High Court was oblivious of the provisions of Section 28. That is categorically recorded in the impugned judgment. As pointed out above, the case of the appellant is that the High Court has given undue weightage to the two leaflets as against the other material, including the certificate of the manufacturer clearly stating that the machine in question which was supplied to the appellant was an upgraded version capable of producing 36,000 prints per hour.

However, from the reading of the impugned judgment, it becomes clear that each and every document which was filed and relied upon by the appellant has been discussed. The High Court observed that insofar as the documents of the appellant are concerned, they can conveniently be divided into parts. One part of the document consists of two leaflets furnishing technical data and description of the printing machine in question along with Bill of Entry and certificate showing date 08.02.1987 issued by the manufacturer of the machine M/s. Harris Graphics Corporation, USA.

The other part of the document is nothing but a correspondence made by the appellant, its Clearing and Holding Agent and one M/s. S.L. Kulkarni & Co., which deals in printing machinery, projecting themselves to be the Indian agent of M/s. Harris Graphics Corporation, USA. The said second part of the documents can well be described as self serving evidence. Likewise, documents produced by the respondent were also divided in two parts. One part represents the document in the nature of Inspection Report based on examination of the entire consignment which was completed on 28.09.1988, while complying with the part of the directions issued by the High Court by order dated 02.09.1988, and the other part of documents is basically the reproduction of documents supplied by the appellant itself. Thereafter, the High Court formulated the question as to whether the appellant had

discharged its burden to prove that the subject printing machine imported by it under OGL was having an output of more than 35,000 copies per hour so as to entitle it to claim exemption under Notification No. 114/80-CUS, as amended from time to time. On that touchstone, the High Court has examined, appreciated and analyzed all the documents produced by both the parties. The Hon'ble Court stated that the view taken by the High Court on merits is correct, having regard to the fact that burden of proof was on the appellant to establish that the machine imported by it generates more than 35,000 composite impressions or copies per hour. The appellant has failed to do so. In view of the above, the appeal is dismissed.

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