REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

☞ **CIVIL APPEAL NO. 1090 OF 2009**

The Commissioner of Central Excise Visakhapatnam …Appellant

Versus

M/s. Mehta & Co. …

Respondent

JUDGMENT

Dr. MUKUNDAKAM SHARMA, J.

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1. Delay condoned.

2. The present appeal filed by the appellant – Commissioner of Central Excise, Visakhapatnam arises out of an order dated 28.07.2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (hereinafter referred to as 'the Tribunal') in appeal No. E/132/2005.

3. Two primary issues fall for consideration in this appeal. The first issue is, as to whether or not the demand for payment of duty is barred by limitation, whereas the second issue is whether the items like chairs, beds, tables, desks, etc., affixed to the ground

could be said to be immoveable assets and not liable to excise duty. The aforesaid two issues have arisen in the light of the rival submissions made on the basic facts of this appeal which are hereinafter being set out.

4. M/s. Mehta & Company, Mumbai (the "assessee") are engaged in the business of interior decoration. The assessee provides composite services including

woodwork, furniture items etc. They entered into contracts with customers for doing these works as per their requirement and also carry out these works at their customer's premises.

5. On gathering specific intelligence that the assesses have undertaken the manufacture of articles of wood, furniture, etc. in the premises of Hotel Grand Bay, Vishakhapatnam and removed

the same without payment of duty of excise, the officers of Head Quarters Preventive unit inquired and investigated the matter.

6. It was found that the assessee along with M/s Chandrasekhar Architects Pvt. Ltd., Mumbai entered into an

agreement with M/s. Adyar Gate Hotel Ltd., Chennai (now M/s Welcome Group) on 30.08.1995 for carrying out the renovation of the existing structure in their hotel at Nowroji Road, Maharanipeta, Visakhapatnam. The scope of this agreement was further modified by another agreement dated 18.10.1995. As seen by the final bills dated 31.03.1997, raised by the assessee on Hotel

Grand Bay, it was observed that the assessee, inter alia, manufactured and cleared furniture, falling under chapter sub-heading Nos. 9401.00 & 9403.00, 4410.11, 8302.00 and 7610.90 respectively, of the Schedule to the Central Excise Tariff Act, 1985. As per the agreement the assessee quoted prices which included sales tax, excise duty, octroi etc.

7. It appears that the assessee

manufactured goods covered under different chapter headings at the customer's site and removed them without payment of proper duty of excise with an intention to evade payment of duty. The contract between the assessee and M/s Adyar Gate Hotel Ltd., clearly mentions that the assessee has quoted rates which include the excise duty and it had been made in the contract that the

contractor would not have any claim subsequently after execution of the work for excise duty, sales tax etc. from M/s. Adyar Gate Hotels Limited.

8. A show cause notice under the Central Excise Act, 1944 [for short "the Act"] dated 15.05.2000 was issued to the respondent - M/s. Mehta & Company to show cause as to why: -

1 (i) Duty of excise amounting to Rs. 62,94,910/- should not be demanded from them on the goods manufactured and cleared under Rule 9(2) of the Rules read with the proviso to section 11A (1) of the Act;

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1 (ii) The amount of Rs. 10,00,000/- already paid under protest towards the duty of excise should not be adjusted towards the payment of duty demanded in (i) above;

1 (iii) Penalty should not be imposed on them under Rule 9(2), Rule 52A and Rule 173Q of the Rules;

1 (iv) Penalty equal to the duty demanded in (i) above should not be imposed on them under Section 11AC of the Act;

1 (v) Interest @ 24% p.a. from the first day of the month succeeding the month in which the duty ought to have been paid, till the

date of payment of such duty should not be demanded from them under section 11 AB of the Act; and

1 (vi) The goods involved should not be confiscated under Rule 173Q (1) of the Rules.

9. M/s. Grand Bay Hotel, Beach Road, Visakhapatnam was also asked to show cause as to why penalty should not be imposed under Rule 209A of the Rules for purchase and possession of the excisable goods on which duty of excise had not been paid.

10. The respondent - M/s. Mehta & Co. and M/s. Grand Bay Hotel submitted their respective replies. The

Commissioner of Central Excise vide order dated 31.12.2002 confirmed the demand of Rs. 43,59,710/- out of the proposed demand of Rs. 62,94,910/- under Rule 9(2) along with penalty of equal amount i.e. Rs. 43,59,710/- and directed the redemption of the confiscated goods after the payment of a fine of Rs. 1,00,000/- plus the duty and penalty adjudged.

11. Aggrieved thereby, the respondent filed an appeal before the CESTAT, Bangalore, which allowed the appeal and remanded the matter to the concerned adjudicating authority to examine the matter afresh and to pass an appropriate order in accordance with law by providing an effective hearing to the parties. Thereupon, the Commissioner, Central Excise & Customs, Visakhapatnam vide order dated 22.10.2003 confirmed the demand of Rs. 14,94,656/- with penalty of Rs. 7,47,328/- with interest as per Section 11 AB of the Central Excise Act, 1944 (for short "the Act") and also imposed a penalty of Rs. 5,00,000/- under Rule 173Q. Aggrieved thereby the respondent filed an appeal before the Tribunal and vide order dt. 28.7.2008 the Tribunal allowed the appeal and set aside the order

of the Commissioner, Central Excise & Customs, Visakhapatnam under the impugned judgment and order as against which the present appeal was filed.

12. We heard the learned counsel appearing for the parties at length who had taken us through all the orders which gave rise to the aforesaid two issues which fall for our consideration in the present appeal.

13. The learned counsel appearing for the appellant submitted before us that so far as the issue with regard to the limitation is concerned, the same was not urged before the Commissioner when he was hearing the matter after the order of remand by the Tribunal and in that view of the matter, the Tribunal could not have decided the said issue against the appellant. It was further submitted that in any case proviso to

Section 11A of the Act is attracted to the facts and circumstances of the present case, and therefore, the show cause notice was issued by the appellant within the period of limitation as prescribed under the proviso to Section 11A of the Act and that the Tribunal was wrong in holding that the demand was beyond the period of limitation. It was further submitted that the Tribunal erred in holding that all the items

manufactured by the assessee are exempted from demand of excise duty.

14. Per contra, the learned counsel appearing for the respondent, however, refuted the aforesaid submissions and submitted that the appellant never had any intention to evade excise duty and there is no finding to that effect and therefore no such duty is

leviable particularly when it is barred by limitation. It was also submitted that the pre-conditions for attracting the provisions of proviso is not satisfied in the present case, and therefore, it cannot be submitted that the demand is not barred by limitation.

15. We have considered the aforesaid submissions of the learned counsel appearing for the parties in the light of the records placed before us. So far as the issue with regard to limitation is concerned, since that goes to the root of the demand made, it is appropriate to deal with the same before we go into the second issue.

16. Section 11A of the Act empowers the Authority to demand excise duty in terms of the conditions laid down in the said provision as and when the pre-conditions mentioned therein are

satisfied.

17. There is no dispute with regard to the fact that issuance of a notice for invoking the provisions of Section 11A of the Act is a condition precedent for a demand to be made under Section 11A of the Act. However, in the present case, a show cause notice was issued to the respondent herein making it a specific case that the

respondent manufactured excisable goods as mentioned in the notice and covered under different chapter headings at the site of the customer and removed the same without payment of duty of excise with an intention to evade payment of duty when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. clearly mentioned that the contractors quoted rate shall

also include the excise duty. It was also mentioned that such conscious action on the part of the contractor has clearly established the intention to evade payment of duty of excise and consequently proviso to Section 11A of the Act could be invoked in the present case.

18. In the reply submitted by the respondent, it was stated that a proforma was enclosed to the show cause notice and also the summons. The hotel furnished the details of work done by the respondent and that the Central Excise Department was informed that the work order was to carry out job on the turn key basis and not for any furniture as such.

19. As stated hereinbefore, after the order of remand was passed

by the Tribunal, the Commissioner considered the issue with regard to the liability of payment of excise duty at length and held that the respondent is liable to pay central excise duty for the items as specifically mentioned in the said order passed.

20. A perusal of the said order would also indicate that no issue with regard to the demand raised by the appellant as time barred was either raised or discussed by the Commissioner.

21. Being aggrieved by the aforesaid order passed by the Commissioner, an appeal was filed before the Tribunal. The Tribunal, however, held that the items fabricated by the respondent herein are permanently fixed to the walls and ground of the room and the same could not be removed from one place to

another without causing much damage to them and without cannibalizations and consequently the said items cannot be considered as furniture in the light of the decision of this Court in the case of **Craft Interiors Pvt. Ltd. vs. CCE, Bangalore** reported in **(2006 (203) ELT 529 (SC)]**. It was, however, held that the case of the appellant is weak not only on merits, but also in any case the entire demand is also hit by time bar as there is no justification for invocation of the longer period. Thus, findings which are recorded appear to be abrupt and without recording any reasons.

22. Consequently, we propose to look into the first issue in the light of the background facts as stated hereinbefore. The specific case of the appellant is that the respondent having manufactured

the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from the aforesaid action it is explicit that there was an intention on the part of the respondent to evade payment of duty particularly when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. clearly mentioned that the contractors quoted rate would also include excise duty.

23. Although, the respondent has pleaded that it was done out of ignorance, but in our considered opinion there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (i) of the Act would get attracted to the facts and circumstances of the present case.

24. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the

department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27.2.1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15.5.2000, the

demand made was clearly within the period of limitation as prescribed, which is five years.

25. So far as the second issue is concerned, we fail to appreciate as to how the Tribunal could come to a finding, as recorded in the impugned judgment and order in view of the proposition of law already settled by this Court in the decision of **Craft Interiors (supra)**.

26. The decision in **Craft Interiors (supra)** has clearly laid down that ordinarily furniture refers to moveable items such as desk, tables, chairs required for use or ornamentation in a house or office. So, therefore, the furniture could not have been held to be immoveable property.

27. A perusal of the records would also indicate that the

Commissioner in his order has listed out various items which were held as furniture and while doing so, he has scrutinized the records to determine the immovability or movability of the items. A bare perusal of the said order would also indicate that he has given deductions for the items held as immovable. He has prepared Annexures 1,2, 3 and 4 and the items mentioned in

Annexures 1 and 2 have been held as 'furniture' after proper examination of the records whereas he has held items in Annexures 3 and 4 as immovable and has allowed deduction.

28. So far as the items such as chairs, tables etc. listed in Annexure 5 is concerned, the same admitted to be furniture by the assessee himself. The Commissioner having considered the

aforesaid issue carefully and after proper scrutiny, the Tribunal was not justified in rejecting the said findings by mere conclusion and without trying to meet the findings recorded by the Commissioner.

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Accordingly, we allow this appeal and set aside the order passed by the Tribunal and restore the order passed by the Commissioner. However, there shall be no order as to costs.

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J
(DR. MUKUNDAKAM SHARMA)

.....,J
(ANIL R. DAVE)

NEW DELHI;
FEBRUARY 10, 2011.

SUPREME COURT OF INDIA

JUDGMENT