

CASE NO.:
Appeal (civil) 6394 of 2004

PETITIONER:
Commissioner of Central Excise, Delhi

RESPONDENT:
M/s Action Construction Equipment (P) Ltd.

DATE OF JUDGMENT: 19/07/2006

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.
WITH
CIVIL APPEAL NOS. 2380/2005, 2967-2969/2005,
2970/2005, 3481/2004, 3724/2005, 385/2004, 4909/2004,
6348-6350/2004, 6523/2004 and 7662/2004.

CIVIL APPEAL NO. 6394 OF 2004:

This civil appeal is filed under Section 35L(b) of Central Excise Act, 1944 against the order dated 16.6.2004 passed by the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT"), New Delhi in Appeal No. E/3857/03-NB(A) dismissing the appeal filed by the appellant herein.

The question involved in this civil appeal concerns computation of assessable value of mobile cranes under Section 4(4)(d) of the Central Excise Act, 1944 (for short "the 1944 Act") as it stood at the relevant time, prior to the year 2000.

The facts arising in this appeal are as follows:

The assessee (respondent) floated a non-functional dummy unit in the name of ACE Industries to evade excise duty on the mobile cranes being manufactured by it. The cranes were first assembled in the premises of the assessee and then dismantled into semi-knocked down condition for re-assembly. The same were cleared without payment of duty by wrongly availing the benefit of exemption available to small scale units in the name of ACE Industries. The assessee had manufactured three cranes valued at Rs. 26,63,400/- involving excise duty of Rs. 4,10,144/-. By a show cause notice dated 3.11.1999, the Additional Commissioner of Central Excise, Faridabad called upon the assessee to show cause why the mobile cranes should not be confiscated under Rule 173Q of the Central Excise Rules, 1944. He also demanded excise duty of Rs.4,10,144/- and penalty. The assessee replied to the show cause notice. The assessee denied that ACE Industries was a dummy unit as alleged by the department. Thereafter, a team of officers from the department visited the premises of ACE Industries. On verification of the records, the department found that ACE Industries was a division of the assessee and that division was dealing in spare parts of the mobile cranes. The department further found that no manufacturing activity took place at the premises of ACE Industries. On 11.6.1999 the proprietor of ACE Industries was examined. His statement under Section 14 of the 1944 Act was recorded in which he confessed that no manufacturing activity was being undertaken at the premises occupied by ACE Industries, and that the entire set up was a devise to evade duty and, at the same time, to avail of the benefit of exemption notification no. 8/99 dated 28.2.1999. He further confessed that the mobile cranes in question were actually manufactured by the assessee and not by ACE

Industries.

In the circumstances, the adjudicating authority came to the conclusion that the assessee had deliberately floated a non-functional unit to evade excise duty. Accordingly, the adjudicating authority ordered confiscation and appropriation of an amount of Rs. 3 lakhs from the bank guarantee given by the assessee towards redemption fine in lieu of confiscation.

Being aggrieved by the impugned order of the adjudicating authority, the assessee moved an appeal before the Commissioner (Appeals). By the impugned decision the appellate authority held that, ACE Industries was a non-functional unit created by the assessee to evade excise duty and claimed exemption as a small scale unit; that the said cranes were manufactured by the assessee but they were cleared in the name of ACE Industries and, therefore, there was a clear violation and evasion of duty under Rule 173Q of the Central Excise Rules. The appellate authority further recorded that the assessee had paid the duty pursuant to the order of the adjudicating authority. On account of the said evasion, the department assessed and imposed the duty of Rs. 4,10,144/-. The appellate authority, however, took the view that the normal price which is the basis of the assessable value is cum-duty price. On that basis the appellate authority reduced the assessable value from Rs.26,63,440/- fixed by the adjudicating authority to Rs.22,09,827/- and correspondingly the liability of the assessee stood reduced from Rs.4,10,144/- to Rs.3,53,573/-. Accordingly, the assessee seeks refund.

Aggrieved by the decisions of the appellate authority, the department went in appeal to the Tribunal i.e. CESTAT. We have perused the memo of appeal. The only ground taken in the memo of appeal is that the judgment of this court in the case of Commissioner of Central Excise, Delhi v. Maruti Udyog Limited, reported in 2002 (144) ELT 3 was pending reconsideration by this court vide Review Petition (C) No.75 of 2003 and, therefore, the appellate authority should not have followed the judgment of this court in Maruti Udyog Limited (supra). In this connection, the department placed reliance on the Circular issued by the Central Board of Excise and Customs bearing No. 749/65/2003-CX dated 26.9.2003

By the impugned decision rendered by the Tribunal on 16.6.2004, the appeal preferred by the department was, however, dismissed in view of the judgment of this Court in the case of Maruti Udyog Ltd. (supra).

Being aggrieved by the impugned decision, the department has come to this Court by way of statutory appeal under Section 35L(b) of the 1944 Act. At this stage, it is important to note that the Civil Appeal filed by the department before this Court is dated 27.8.2004. In the civil appeal, the department has once again submitted that in view of the Circular no. 749/65/2003-CX. dated 26.9.2003 of the Central Board of Excise & Customs, New Delhi the appellate authority had erred in fixing the assessable value on the basis of cum-duty price particularly when the matter was pending reconsideration in this Court vide Review Petition (C) No.75/2003. At this stage, we may point out that the above review petition has since been dismissed and the Circular dated 26.9.2003 has been withdrawn by the Central Board vide Circular dated 27.12.04, quoted hereinbelow.

When the matter came for admission it was urged on behalf of the department that the judgment of this Court in Maruti Udyog Ltd. (supra) was not applicable to the facts of the present case as the amount of tax was in fact not charged by the assessee from its purchasers as in the case of Maruti Udyog Ltd. (supra).

We are not prepared to examine this question. As stated above, vide order dated 22.9.2003, the appellate authority has held that the

price charged by the assessee should be treated as cum-duty price and accordingly reduced the assessable value from Rs.26,63,440/- fixed by the adjudicating authority to Rs. 22,09,827/- Against the order of the appellate authority the department filed an appeal only on the ground that the decision of this Court in Maruti Udyog Ltd. (supra) was pending re-consideration vide Review Petition (C) No. 75/2003. In this connection, the department placed reliance on the Board circular No. 749/65/2003-CX dated 26.9.2003, which is quoted hereinbelow:

"Circular No.749/65/2003-CX., dated 26-9-2003
F.No.387/67/99-JC

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

Subject: Valuation of goods for Central Excise
Purposes \026 Cum duty price.

Kind attention is invited to the judgment dated 26-02-2002 of the Hon'ble Supreme Court in the case of CCE, Madurai v. T.V.S. Srichakra Ltd. [2002 (142) E.L.T. A279 (S.C.)] and the judgment dated 27-02-2002 in the case of CCE, Delhi v. Maruti Udyog Ltd. [2002 (141) E.L.T. 3 (SC)]. Vide the said judgment, appeals filed by the Department were dismissed by the Hon'ble Supreme Court, upholding that the sale price realised by the assessee is to be regarded as inclusive of excise duty and therefore, in arriving at the excisable value of the goods, the element of duty which is payable is to be excluded.

In this regard, it is to be informed that against the above said judgments of the Hon'ble Supreme Court, Review Petitions have been filed by the Department and the Hon'ble Supreme Court has ordered for issue of notice. It is therefore, requested that the cases pending for adjudication and remanded on this issue may be kept pending in the Call Book till the decision of the Hon'ble Supreme Court on the Review Petition filed by the Department. Accordingly, if any, adverse decision of any appellate authority on this issue comes in the meanwhile, the same will need to be appealed against.

Though vide section 136 of the Finance Act, 2003, Section 4 of the Central Excise Act has been amended by insertion of an Explanation to Section 4(1) to the effect that the price-cum-duty shall be deemed to include the duty payable on the goods, Board has taken a view that the amended provision will apply only prospectively and the old cases will have to be pursued as per the provisions of law prevailing at the relevant time.

It is requested that the contents of this Circular may be brought to the notice of all the Commissioners under your charge for necessary action at their end."

It is important to note that the Review Petition preferred by the department against the judgment of this Court in Maruti Udyog Ltd.

(supra) stood dismissed on 9.12.2004 and accordingly, the Central Board of Excise & Customs withdrew its circular dated 26.9.2003 quoted hereinabove and issued a circular no. 803/36/2004-CX dated 27.12.2004. For the sake of convenience, we also quote hereinbelow the said circular dated 27.12.2004:

"Circular No.803/36/2004-CX., dated 27-12-2004

F.No.387/67/99-JC

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Valuation of goods for

Central Excise purpose \026 Cum \026 duty

price \026 Regarding

Kind attention is invited to Board's Circular

No. 749/65/2003-CX., dated 26-9-2003 [2003

(157) E.L.T. T27] issued from above file.

The Hon'ble Supreme Court vide its Order dated 9-12-2004 has dismissed the Review Petition

(C) No. 75 of 2003 in Civil Appeal No. 3783

of 2000 and other related matters filed by the

Department. Copy of the judgment is enclosed

[See: 2004 (179) E.L.T. A102].

In view of above the above Circular dated

26-9-2003 is hereby withdrawn.

It is requested that this may be brought to notice of all concerned for taking action accordingly."

In the above circumstances, we do not wish to go into the factual issue particularly, when no such plea was taken by the department in the appeal before the Tribunal and before this Court in the present Civil Appeal. We have gone through the grounds mentioned in the memo of appeal filed by the department before the Tribunal and we have also gone through the grounds mentioned in the civil appeal filed by the department before this Court. As stated above, the only ground taken in both the above appeals by the department was that the judgment of this Court in Maruti Udyog Ltd. (supra) was pending re-consideration vide Review Petition (C) No. 75/2003. The question as to non-applicability of the judgment of this Court in Maruti Udyog Ltd. (supra) to the present case is not reflected in the appeal memos before the Tribunal and in the civil appeal and, therefore, we refrain from examining the factual conspectus of the case.

In the circumstances, on the facts of this case, there is no merit in this civil appeal and the same is dismissed.

CIVIL APPEAL NOS. 2380/2005, 2967-2969/2005, 2970/2005, 3481/2004, 3724/2005, 385/2004, 4909/2004, 6348-6350/2004, 6523/2004 AND 7662/2004:

In view of the decision in Civil Appeal No. 6394/2004 above, these appeals stand dismissed.

There will be no order as to costs in all the appeals.