

CASE NO.:
Appeal (civil) 6988 of 2005

PETITIONER:
M/s MIL India Ltd

RESPONDENT:
Commissioner of Central Excise, NOIDA

DATE OF JUDGMENT: 01/03/2007

BENCH:
S.H. KAPADIA & B. SUDERSHAN REDDY

JUDGMENT:
J U D G M E N T

KAPADIA, J.

The short question which arises for determination in this civil appeal is whether the Customs Excise and Service Tax Appellate Tribunal (for short 'CESTAT') was right in entertaining the assessee's appeal on dutiability against the order passed by Commissioner (A) dated 9.4.2003 in the Quantum Dispute, particularly when in the earlier round of litigation the Commissioner (A) had concluded vide order dated 22.3.2000 that the bought out items were dutiable and which order had become final.

The appellants are engaged in the manufacture of plant and equipments for soaps, detergents and allied industries falling under Chapter Sub-Heading 8479.90 of the Central Excise Tariff Act, 1985. The manufactured equipments were cleared by the appellants on payment of duty. The dispute relates to dutiability of certain bought out items like motor-pumps, heat exchangers etc. The appellants had entered into a composite contract with M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd. for the supply of various items which formed part of the fatty acid plant. Under the contract, in addition to the supply of the equipments manufactured by the appellants, various duty paid bought out items were directly supplied by the appellants to the site of M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd. These items were never received in the factory premises of the appellants. The fatty acids plant and the film sulphonation plant were to be erected and commissioned not by the appellant but by M/s K.S. Krishnan Associates Pvt. Ltd. . On 23.5.1997 a show cause notice was issued by the department to the appellants demanding duty on the various bought out items supplied directly to the site of M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd. The demand was for the period April 1996 to March 1997. By a corrigendum dated 6.6.1997 the period was reduced to November 1996 to March 1997 (6 months). However, the duty amount was not correspondingly reduced. In reply the appellants contended that no duty was payable on various bought out items which were directly sent to the site. In the alternative they submitted that maximum duty payable, if any, would be Rs. 23,21,500 since the period was restricted to six months. By order dated 1.5.1999 the adjudicating authority confirmed the demand on the bought out items on the ground that the same was necessary for the manufacture of the fatty acid plant at the site of M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd. Aggrieved by the order dated 1.5.1999 the matter was carried in appeal to the Commissioner (A). By order dated 22.3.2000 the Commissioner (A) held that the value of the bought out items was includible in the assessable value of the equipments manufactured. However, the Commissioner (A) remanded the matter for quantification of the duty liability on the ground that the demand stood restricted for 6 months. In the quantum dispute the adjudicating authority confirmed once again the duty demand amounting to Rs.94,03,500 although the period stood reduced to 6

months. Aggrieved by the said order of the adjudicating authority the appellants once again moved the Commissioner (A). Vide order dated 9.4.2003 the Commissioner (A) confirmed the duty demanded on the ground that the appellant had failed to produce evidence to disprove the quantification made by the department. The Commissioner (A) did not consider the claim of MODVAT credit made by the appellants on the ground that the appellants had not followed the prescribed procedure for claiming MODVAT credit. Accordingly, he dismissed the appeal and also the contention of the appellants that the net duty liability would be only for Rs.20,42,993. Aggrieved, by the order passed by the Commissioner (A) dated 9.4.2003 the matter was carried in appeal by the appellants to the Tribunal. By judgment and order dated 3.10.2003 the Tribunal held that no duty was payable on the bought out items. The Tribunal further held that the appellants were entitled to raise the issue of dutiability of bought out items even though in the earlier round of litigation the appellants did not challenge the order of the Commissioner (A) dated 22.3.2000, on merits. The Tribunal concluded that the department was not entitled to add the value of the bought out items in the assessable value of the goods manufactured by the appellant. Accordingly, the Tribunal allowed the appeal. Aggrieved by the decision of the Tribunal the department preferred Central Excise Appeal No. 28 of 2004 in the High Court under Section 35G of the Central Excise Act, 1944. By the impugned judgment dated 5.11.2004 the High Court held that the order of the Commissioner (A) dated 22.3.2000 had become final on merits since that order was never challenged by the assessee, and therefore, in the quantification dispute (quantum dispute) the only question to be decided was regarding the quantum of duty liability. In the circumstances the High Court held that the Tribunal was not competent to entertain the appeal preferred by the assessee against the later order of the Commissioner (A) dated 9.4.2003 in the second round of litigation on the question as to whether the bought out items were dutiable. By the impugned judgment the High Court set aside the order of the Tribunal.

Hence this appeal by the assessee.

In our view the High Court had erred in holding that the Tribunal could not have examined the question of dutiability, once on merits, the order of the Commissioner (A) dated 22.3.2000 became final. Firstly, one must understand that excisability is a matter of principle. The Tribunal is the highest authority in hierarchy to decide on facts whether the bought out items were dutiable or not. The Tribunal was not bound by the decision of the Commissioner (A) on the question of dutiability or excisability. By order dated 22.3.2000 the Commissioner (A) had remanded the matter to the adjudicating authority the question of quantification. Therefore, it was open to the appellant to appear before the adjudicating authority and submit contentions on quantification of duty liability. In the present matter in the second round the appellant appeared before the adjudicating authority and pointed out in the alternative that the duty demanded from the appellants at the rate of Rs.94,03,500 was erroneous as the appellants were entitled to the benefit of MODVAT credit. From this it cannot be said that the question of excisability or dutiability had become final. The conclusion of the Commissioner (A) in his order dated 22.3.2000 was not binding on the Tribunal. Further one needs to understand the concept of assessment. An order of assessment under the taxing law does not become final before the adjudicating authority in every matter. It is subject to before the Commissioner (A). The Commissioner (A) can even add or subtract certain items from the order of assessment made by the adjudicating authority and that order of the Commissioner(A) could also be treated as an order of assessment. In complicated cases where costing is involved the adjudicating authority can also refer the matter to an expert. The Act also makes provision for special audit. However, when the principle of law is evolved an appeal lies to the appellate Tribunal under the said Act. In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore,

the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35B indicates that the decision of order passed by the Commissioner (A) shall be treated as an order of an adjudicating authority. In the circumstances the High Court had erred in holding that the assessee was not entitled to agitate the question of dutiability in appeal before the Tribunal.

We do not wish to remand the matter. This matter has undertaken a chequered history. In the present case vide order dated 9.4.2003 the Commissioner (A) held that the assessee had failed to produce evidence regarding its entitlement for the MODVAT credit. However the fact remains that even if the bought out items were dutiable, the department was still required to give the benefit of MODVAT credit. At this stage we may note that the appellants had a composite contract with M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Limited under which the appellants not only agreed to supply the equipments to M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd., they also agreed to provide data/information in the format of drawings, diagrams, charts, tables etc. It is in these circumstances that the department sought to impose duty on the ground that the appellants under the composite contract were to facilitate M/s Godrej Soaps Ltd. and M/s Galaxy Surfactants Ltd. to set up their plant at given site. According to the department the bought out items were therefore necessary for the manufacture of the plant at site which was erected and assembled by the above two companies through their contractor. Whether the value of the bought out items should be added for computing the assessable value would depends on the facts of each case. Even erection of a plant by assembling certain items at site could constitute 'manufacture' under the excise law. In the present case, however, we are satisfied that the quantification done by the department needs to be modified. As stated above vide show cause notice dated 23.5.1997 the department demanded duty of Rs.94,03,500 for the period April 1996 to March 1997. However, even after the corrigendum dated 6.6.1997, whereby the period stood reduced to 6 months (11/96 to 3/97), the demand continued to be to the tune of Rs 94,03,500. This was not possible. Moreover, even if bought out items were dutiable the assessee was entitled to the benefit of MODVAT credit. Unfortunately, in the present case time was consumed on issues which had no relevance to taxability of the goods. In the circumstances we reduce the demand from Rs.94,03,500 to Rs.23,56,000 which shall be paid within eight weeks failing which Department would be entitled to levy interest at 9% p.a.

Accordingly, appeal is partly allowed, the impugned judgment of the High Court in Central Excise Appeal no. 28 of 2004 dated 05.11.2004 is set aside with no order as to costs.