ITEM NO.102 COURT NO.3 SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO.180 OF 2003

COMMISSIONER OF CENTRAL EXCISE, TAMIL NADU **Appellant (s)**

VERSUS

M/S. SOUTHERN STRUCTURALS LTD. **Respondent(s)**

[With Appln. for ex-parte stay and with office report]

Date: 06/08/2008 This Appeal was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ASHOK BHAN
HON'BLE MR. JUSTICE J.M. PANCHAL

For Appellant (s) **Mr. V. Shekhar, Sr. Adv.**
Mr. Gaurav Agrawal, Adv.
Mr. Rahul Kaushik, Adv. for
Mr. P. Parmeswaran, Adv.

For Respondent (s) **Mr. S.K. Bagaria, Sr. Adv.**
Mr. K.K. Mani, Adv.
Mr. C.K.R. Lenin Sekar, Adv.

UPON hearing counsel the Court made the following
O R D E R

The civil appeal is dismissed in terms of the signed non-reportable judgment.

(Subhash Chander) **(Kanwal Singh)**
Court Master **Assistant Registrar**

[Signed non-reportable judgment is placed on the file]

/NON-REPORTABLE/

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.180 OF 2003

Commissioner of Central Excise, Tamil Nadu .....Appellant

Versus

M/s. Southern Structurals Ltd. .....Respondent

J U D G M E N T

ASHOK BHAN, J.

1. Respondent company is an undertaking wholly owned by the Government of Tamil Nadu. It is engaged in the manufacture of railway wagons and conveyor systems falling under Heading 8605.50 and 8428.00 respectively of the Schedule to Central Excise Tariff Act, 1985. Upon verification of their accounts, it was noticed on 16th July 1998 that the respondent had entered into a contract, being Contract No.94/RS/PF&EC/954/3 dated 1.12.1994, with the Southern Railways for manufacture and supply of 106 wagons of BTPGLN wagons for an amount of Rs.16,10,90,974/- which was inclusive of cost of steel at Rs.6,65,833/- per wagon. The cost of each wagon worked out to Rs.15,29,724/- (6,55,833 + 8,63,891). The Railways supplied free raw material worth Rs.7 lac per wagon. The respondent paid central excise duty @ 15% *ad valorem* and cleared 21 wagons to their customer till 16th July 1998. It was also noticed that the respondent has adjusted the value mentioned

in the invoices against 50% of the advance amount received from its customer. Respondent had also collected a sum of Rs.2,400/- per wagon as by way of inspection charges. This amount allegedly was not included in the assessable value. The total amount of advance received was to the tune of Rs.10,29,80,192/-. The respondent also raised a bill being Bill No.20 dated 4.6.1998 for escalation price for 19 wagons and the amount on this account was Rs.18,81,036/- for which the amount of duty involved was Rs.2,82,155/- which amount, it was alleged, had not been debited by the respondent. According to the appellant, the respondent had suppressed the value in the invoice with a view to enjoy the benefit of duty involved on differential value. Proceedings were, therefore, initiated against the respondent by issuance of Show Cause Notice No.98 of 1998 dated 28th September 1998 on the following charges :

> **"(a) that they have undervalued the cost of wagons and conveyor parts cleared to Railways and Neyveli Lignite Corporation (NLC) to the extent of interest accrued on advances received from them and thus contravened Section 4 of the Act;**
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> **(b) that they have valued the cost of wagon to the extent of inspection charges collected and hence contravened Section 4 of the Act read with Rules 173Q, 9(1), 173F and 173G of the Rules; and**
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> **(c) that they have not paid duty on the escalation charges collected from the Railways thereby contravening Section 4 with Rules 173C, 9(1), 173F and 173GG."**

2. Thus, by the said show cause notice, the respondent was called upon to show cause as to why price of the wagons and other goods so suppressed and cleared to Railways and NLC should not be re-determined; duty amounting to Rs.61,44,084/- on the interest accrued

on the advances received from Railways be not charged; an amount of Rs.7,560/- being duty involved on the inspection charges collected from Railways be not demanded; and an amount of Rs.2,82,155/- being duty involved on the escalated price be not demanded and the said amount paid subsequently by the respondent be not adjusted/appropriated against the above duty liability and as to why penalty should not be imposed.

3. After the two replies submitted by the respondent, the Commissioner of Central Excise, vide order dated 29th December 2000, confirmed the demand Rs.61,44,084/- towards the interest on advances invoking proviso to Section 11A of the Central Excise Act, 1944 (for short, 'the Act'); the duty demand of Rs.7,560/- towards inspection charges under the proviso to Section 11A of the Act; duty demand of Rs.2,82,155/- involved on the escalation price of the wagons under Section 11A of the Act and ordered that the said amount paid subsequently be appropriated against this duty liability. The Commissioner also imposed the penalty of Rs.20 Lac under Rule 173Q and Rs.34,18,250/- under Section 11AC of the Act.

4. Aggrieved against the said order-in-original passed by the Commissioner, the respondent preferred an appeal before the

Customs, Excise & Gold (Control) Appellate Tribunal (for short, 'the Tribunal'), Chennai. The matter came up before a two-member Bench of the Tribunal.

5. Member (Technical) held that so far as the interest on the advances received from the Railways is concerned, it is an admitted position that the respondent has adjusted the value mentioned in the invoice against 50% of the advance amount received from the Railways and that the amount of advance was deposited into the bank. Therefore, it can be logically concluded that the respondent has used the said amount for repayment of loan and

thus saved huge amount by way of interest which would have been required to be paid to the bank on the loan amount. Hence, he concluded that the interest on advance was includible in the assessable value. He also held that the longer period of limitation could also be invoked in this regard.

6. So far as the second charge that the respondent has collected inspection charges from the Railways, he held that the issue is covered by a decision of the Tribunal in the case of Hindustan Gas & Industries Ltd. v. Commissioner of Central Excise & Customs, Baroda reported in 2001(133) ELT 481 wherein it was held that the cost of inspection would form part of the value. In this case, the contract itself provided that the cost of testing at Government expenses will be to the contractor's account. Therefore, the amount received would be includible in the

assessable value and longer period of limitation was invocable. On this point also, he confirmed the order of the Commissioner.

7. So far as the invocation of longer period of limitation is concerned, relying upon a decision of the Tribunal in the case of Nizam Sugar Factory v. Collector 1999(114) ELT 429 it was held that in case there is suppression etc. show cause notice may be issued within five years from the relevant date. Therefore, he held that longer period of limitation in respect of demand of duty was rightly invoked.

8. So far as the charge of non-payment of differential duty on the escalation bill for Rs.18,81,036/- raised by the respondent is concerned, the Member (T) agreed with the Commissioner that as per the commercial practice, a pre-audit commercial invoice dated 4.6.1998 for escalated price was raised by the respondent for verification by Railways after

which Rule 52A invoice was raised on 24.7.1998 when excise duty was paid through PLA and that duty on the price escalation was paid even before the receipt of the money from the Railways and, therefore, there was no ground to attribute fraudulent intent on this score. The duty on the escalated price was, however, liable to be paid and the amount of Rs.2,82,155/- paid by the respondent was appropriated against this liability thus upholding the finding of the Commissioner in this regard also.

9. In respect of the penalty of Rs.20 Lac imposed by the Commissioner under Rule 173Q the Member(T), on the facts and

circumstances of the case, particularly because the respondent is a State Government Undertaking and the buyer is Indian Railways, reduced the amount of penalty to Rs.1,20,000/-. Insofar as the penalty under Section 11AC is concerned it was held that the limit of penalty imposable under Section 11AC equal to the duty under Section 11AC is the maximum limit and it is not mandatory in each case that maximum penalty should be imposed. Hence, he reduced the penalty from Rs.34,18,250/- to Rs.11,50,000/-.

10. In short, the Member (T) confirmed the order of the Commissioner except the modification to the extent of reduction in the quantum of penalties.

11. Member (Judicial), however, disagreed with the Member (Technical) on the point as to whether interest on advances should be included in the assessable value. He held that in order to include the interest element, burden is on the Department to prove that advances received had a direct nexus with the price inasmuch as the price had been depressed. Applying the decision of this Court in the case of M/s. VST Industries v. Collector of Central Excise, Hyderabad 1998(97) ELT 395, he held that the deposit or advance ought to depress the price of the goods in order to include notional interest on such advance in the assessable

value and in this case the Department had failed to show that the advance received had a nexus with the price fixed or the depreciation thereof. Thus, on this point he set aside the order of the Commissioner.

12. On the point of inspection charges he held that these charges are to be paid by the manufacturer and that the charges paid to any third party in addition to the normal inspection would be includible in the assessable value. He agreed with the Member (Technical) on this point.

13. On the point of invocation of longer period of limitation, he held that the Department had full knowledge of the price and the advances received by the respondent. Moreover, the Assistant Commissioner in similar proceedings had noted in the Order-in-original no.71/96 dated 15.10.1996 about the advances received by the respondent and also held that the advances had no nexus with the contract and had dropped the proceedings. Therefore, it could not be said that there was any suppression of facts. The ratio of Nizam Sugar is not applicable to the facts of the present case. Consequently, longer period of limitation could not be invoked.

14. Since there was difference of opinion between the two members, the following question was referred to the third Member for determining the same :

> **"Whether the appeal is required to be rejected in terms of the findings recorded by learned Member(T) Shri Jeet Ram Kait by ordering that the penalty imposed under Rule 173Q is required to be reduced to Rs.1,20,000/- and penalty imposed under Section 11AC is required to be reduced to Rs.11,50,000/-.**
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> **OR**
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> **The appeal is required to be allowed both on merits and on time bar in the light of judgments noted by Member (Judicial) Shri S.L. Peeran in his order."**

15. The third Member being Member (Technical) agreed with the Member (Judicial) and after referring to the similar issue decided by the Assistant Commissioner vide order no.71/96 mentioned above, held that it could not be validly said that the facts were suppressed. He, therefore, held that the demand was time barred.

16. On the inspection charges he held that the same are includible in the assessable value. Hence, he agreed with both the members on this point. He, therefore, allowed the appeal on merits and held that the demand was time barred and set aside the order of the Commissioner.

17. Accordingly, by a majority of 2:1, the appeal of the assessee was allowed.

18. Aggrieved, the Department has come up in appeal before us.

19. It is clear from the above that on the point of inclusion of inspection charges in the assessable value, all the three members have given a common finding that the said charges are to be includible in the assessable value. It is stated that the assessee has not filed any appeal on this point. Thus, the order of the Tribunal has attained finality in this regard.

20. So far as the payment of differential duty on escalation bill is concerned, the assessee in reply to the show cause notice has admitted its liability to pay the said duty and the same has already been paid and pursuant to the finding of the Commissioner, the same has been appropriated against this liability. Tribunal has also recorded the same. There is no dispute on this point also.

21. So far as the interest on advances received from the Railways is concerned, by a

majority of 2:1, it has been held that the advances received and the price were in full knowledge of the Department which is clear from the order in original no.71/96 dated 15.10.1996 wherein the Assistant Collector has noted about the advances received and has also held that the advances received had no nexus with the contract and dropped similar proceedings.

22. By the majority view, the Tribunal has also held that since the facts regarding receipt of advances were already in the knowledge of the Revenue it could not be said that there was suppression of facts regarding advances received warranting invocation of extended period of limitation. The finding regarding limitation has not been specifically challenged by the Revenue in this appeal. Even otherwise, we agree with the Tribunal that since the fact regarding advances received was already in the knowledge of the Department and the earlier similar proceedings initiated by the Department were dropped by the Assistant Commissioner, the Revenue was not justified in invoking the extended period of limitation. We confirm the finding of the Tribunal on the point of limitation and hold that the Revenue was not justified in invoking the extended period of limitation. Insofar as the under-valuation on account of advances received but

not included in the assessable value is concerned, suffice would it be to say that the point is concluded against the Revenue and

in favour of the assessee by a judgment of this Court in the case of Commissioner of Central Excise, Mumbai III v. ISPL Industries Ltd. (2003) 5 SCC 113 in which it has been held as under :

"It is clear that the mere fact of making an interest-free advance by a buyer to the manufacturer, by itself will not be a sufficient ground to reload the assessable value with notional interest. It would be necessary for the Revenue to show that such advance has influenced in the lowering of the price and that it is not depicting the normal price of the goods. There may be different reasons for taking advances, as indicated above in the earlier part of this judgment. Learned counsel for the appellant submits that all that the Revenue has to show is that interest-free advance has been made by the buyer to the manufacturer which would lead to a presumption that it is to the advantage of the manufacturer having influenced the fixation of price as well. We, however, fail to appreciate the submission made on behalf of the Revenue for drawing a presumption that fixation of price is influenced by such an advance. In this connection, we may refer to the Board's circular of 1998 quoted earlier, clause (*iii*) of which clearly provides that if there is no difference in the selling price for both categories of the wholesale buyers and there is also 'no proof' that on account of advance deposits taken from some buyers, the price charged from all buyers has been reduced, then the element of notional interest on advance deposits, cannot be added. Obviously, where there are two prices, one for those who have made the advance and the other who have not, it would require no further proof of the lower price having been influenced by the interest-free advance made by the buyer. But otherwise it would require proof and the proof for the purposes of holding that interest-free advance has influenced the price would obviously be provided by the Revenue. There is no scope for any such presumption as canvassed on behalf of the appellant. We find the same position to be continued in the later amendment in the Rules of 2003 referred to above. As in Illustration 2, it talks of evidence to show that interest-free advance has resulted in lowering of the prices. The departmental circulars and the amendments in the Rules at the relevant time and subsequently too, do not envisage of any presumption to be drawn by the mere fact of interest-free advance by the buyer to the manufacturer. It

requires proof and evidence to show that fixation of price has been influenced on the lower side by such a transaction of interest-free advance."

22. Majority opinion of the Tribunal is also in line with and in consonance with the findings recorded by this Court.

23. Following the said judgment, a number of appeals have been disposed of by this Court.

24. We find no merit in the appeal and the same is dismissed.

Sd/-
.....J.
[ASHOK BHAN]

Sd/-
.....J.
[J.M. PANCHAL]

New Delhi.
August 06, 2008.