

(2005) 03 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application No. 3308 of 1999

Elecon Engineering Co. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 17-03-2005

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 3
Sales of Goods Act, 1930 — Section 2(7)

Citation : (2005) 188 ELT 257 : (2005) 3 GLR 1957

Hon'ble Judges : H.N. Devani, J; D.A. Mehta, J

Bench : Division Bench

Advocate : S.I. Nanavati, for Nanavati and Nanavati, for the Appellant; Jitendra Malkan, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—The petition is filed to challenge seven show cause notices issued by respondent Nos.2 and 3, because according to the petitioner, the issues raised in the show cause notices are on the same grounds which have already been decided in favour of the petitioner in number of proceedings relatable to earlier periods.

2. The petitioner Company is engaged in the manufacture of Material Handling Equipments and parts thereof and is holding a license under the Central Excise Act, 1944 (the Act) and Central Excise Rules, 1944 (the Rules). The petitioner is discharging duty liability on the goods manufactured in its factory before / at the time of clearing the said manufactured goods. During course of its business activity, the petitioner Company undertakes manufacture and supply of plant and machinery on the basis of what is known in common parlance as Turn Key Projects. That for such activity, the petitioner utilises certain components which are manufactured and cleared from its factory after bearing the duty under the Act, certain other items / components purchased from open market which are duty paid, and lastly, it carries on erection, fabrication and commissioning of the

entire plant at the site as per terms of contract. It is the case of the petitioner that, in past, the respondent authorities had issued similar show cause notices in relation to (1) bought out items on which duty had been paid, and (2) on the process of erection, fabrication and commissioning of the project. That the petitioner having tendered its explanation by filing replies to the various show cause notices, the authorities had adjudicated upon the same and passed various orders in original as well as the order in appeal where under it was held by the authorities that the petitioner was not liable to pay any duty either on such bought out items or on the activity of erection, fabrication and commissioning of the project. In support of the aforesaid submission, at Annexure "A" (collectively) various such orders have been placed on record. A summary of the said orders reads as under :

Sr. Order in originals/ Order in appeal Nos. Quasi Judicial Dropping the No. Authority who demand on & dates

.....passed the order
----- 1. 2/
Demand/MP/81 Assistant Commi- bought out dated 7-5-1981 ssioner of items,
draw- Central Excise, ing, engineer-Anand ing, erecting, commissioning etc.

2. 3/Demand/MP/81 -do- -do- dated 7-5-1981 3. 4/Demand/MP/81 -do- -do-
dated 7-5-1981 4. 5/Demand/MP/81 -do- -do- dated 7-5-1981 5. 6/Demand/
MP/81 -do- -do- dated 7-5-1981 6. 7/Demand/MP/81 -do- -do- dated 7-5-1981
7. 17/Demand/MP/81 -do- -do- dated 1-7-1981 8. 18/Demand/MP/1981 -do- -
do- dated 23-7-1990 9. Demand/144/90 -do- -do- dated 19-9-1990 10.
402/95/173-AHD/CE The Collector Bought out dated 8- 8-1995(Appeals) Cen.
items (in appeal) Excise & Customs, Ahmedabad

3. It appears that another order in original bearing No.11/Commissioner/97 dated 31st December 1997 had been made by respondent No.2 confirming the duty liability on bought out items. The petitioner carried the matter in appeal before the Tribunal. The said appeal came to be decided by the Tribunal, New Delhi on 8th June 1999 vide its final order No.812/99-A. While deciding the said appeal, the Tribunal in the said order has not assigned any independent reasons, but has merely followed its own order passed in case of the petitioner for earlier periods which is reported in 1999 (82) ECR 677 and the same was rendered on 12th February 1999.

4. In light of the aforesaid factual scenario, the petitioner has approached this Court challenging the impugned seven show cause notices. Mr.S.I.Nanavati, the learned Senior Advocate appearing on behalf of the petitioner has submitted that there being no change either in the facts and circumstances of the case pertaining to the periods under consideration and the earlier periods for which the Tribunal has decided controversy, and in absence of any change in law, it was not open to respondent authorities to issue show cause notices on the same grounds raising the same issues. It was pointed out that the activity of

commissioning a Turn Key Project was held to be erection of an immovable property and was not liable to excise duty under the provisions of the Act. That the earlier order of the tribunal between the same parties had been carried in appeal by the revenue and the Apex Court had, in assessee's own case, dismissed the Civil Appeal filed by the revenue. It was submitted that if the Court did not entertain the petition merely because it was at a show cause notice stage, it would result in multiplicity of proceedings, harassment to the petitioner and fruitless litigation in light of the aforesaid settled legal position. Though various other contentions have been raised in the alternative on merits of the matter, it is not necessary to enter into discussion of the same and hence, the said contentions are not re-produced and dealt with.

5. In support of the order made by the Tribunal, Mr.Nanavati invited attention of the Court to the provision of Sections 2(d), 2(f) and Section 3 of the Act to submit that the definition of the term "excisable goods", the term "manufacture" and the "charge of duty" under the provisions of the Act would go to indicate that only movable property or goods or articles can be brought within the sweep of the provisions of the Act. That the following decisions rendered by the Apex Court are authorities for the said proposition :

(1) Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut,

(2) Auto Measurematic Ltd. v. Assistant Collector of Central Excise, Madras 1997 (96) ELT 14

(3) T.T.G. Industries Ltd., Madras Vs. Collector of Central Excise, Raipur,

He, therefore, submitted that the impugned notices be held to be bad in law and be quashed and set aside.

6. Mr.Jitendra Malkan appearing on behalf of the respondents submitted that the petition was required to be rejected at the threshold because the petitioner had approached the Court at the show cause notice stage. That in these circumstances, the petitioner must be relegated to the appropriate authority for arriving at a decision on merits after evidence is led and facts are found. That in the present case, even if on the basis of the impugned show cause notices, the matter was required to be decided, the issue was already concluded against the petitioners by the decision of the Apex Court in the case of Sirpur Paper Mills Ltd. Vs. Collector of Central Excise, Hyderabad, He read elaborately from the said decision as well as one of the impugned show cause notices to submit that the controversy before the Apex Court was identical and similar facts obtained in the present case. He, therefore, urged that, even on merits, the issues raised by the show cause notices stood decided against the petitioners by virtue of the aforesaid decision of the Apex Court. Entry No.84.28 of the Central Excise Tariff Act, 1985 (Tariff Act) was also pressed into service to submit that the activity carried on by the petitioner and the end-product would fall within the said Entry entitling the revenue to levy duty at the prescribed rate. Circular No.53/2/98-CX dated 2nd April 1998 issued by the Central Board was pressed into service to

contend that excisability of plant and machinery assembled at site had to be determined in accordance with criteria laid down in the said circular. That the said circular had been issued after the decision was rendered by the Supreme Court in case of Sirpur Paper Mills Ltd. (supra) and the contents of the circular were accordingly in consonance with the ratio enunciated by the Apex Court. He, therefore, urged that, in these circumstances, the petitions were required to be rejected.

6.1 Inviting attention to the affidavit dated 9th March 2005 sworn by one Shri Kantilal Ranchhodbhai Sengal, Assistant Commissioner, Central Excise, Anand, it was submitted that the reliance by the petitioner on decision of the Apex Court rendered in Civil Appeal No.165 of 2000 was not correct and misleading. That the said appeal was filed by Commissioner of Central Excise, Chandigarh against CESTAT order No. 121-137/99 dated 12th February 1999. That in the said matter, the Apex Court had remanded the matter to the Tribunal for being heard and decided afresh. That the Department had filed Miscellaneous Application No. E/Miscellaneous/429/03-NB (A) for a decision denovo, but the Tribunal had vide Miscellaneous Order No. 189/04-NB(A) dated 27th August 2004 / 22nd September 2004 rejected the said application based upon the submission made by the petitioner with liberty to revenue to approach the Tribunal again in case information tendered by the petitioner was found incorrect. That in fact, the Department had filed a fresh application for restoration on 8th October 2004 and the same was pending. According to him, therefore, in absence of any factual finding by the Tribunal, the entire basis on which the petitioner was claiming that the impugned show cause notices were bad, was not only incorrect but a misleading statement and the petitioner was required to be visited with costs while rejecting the petition.

7. Responding to the last contention made by Mr.Malkan that the petitioner had furnished incorrect and misleading information, Mr.Nanavati invited attention to the certified copy of Civil Appeal No.165 of 2000 issued by the Registry of the Apex Court on 15th March 2005 as well as a certified copy of the order made by the Apex Court in Civil Appeal No.165 of 2000. These documents, according to Mr.Nanavati, demonstrated in unequivocal terms that Civil Appeal No.165 of 2000 preferred by the Commissioner, Central Excise, Ahmedabad was filed against final order No.812/99-A dated 8th June 1999 made by CEGAT, New Delhi in Appeal No.E-811/98-A. He, therefore, submitted that various averments made in the affidavit in reply were not only contrary to facts, but were made without any verification and cannot be relied upon in absence of any documents in support of the same in face of the documents produced by the petitioners.

8. As noted hereinbefore, in the past, various orders commencing from 7th May 1981 and ending on 8th August 1995 were made in case of the petitioner for various periods and the departmental authorities, after adjudicating the show cause notices and the reply tendered, have dropped the proceedings in relation to bought out items and activity of erection, fabrication and commissioning. In

the entire affidavit in reply, there is no denial to the averments made in paragraph No.3.2 of the petition which contains the aforesaid details. The petitioner has categorically stated that identical issues were raised in case of the petitioner for various preceding periods involving same activity carried out in the same manner and despite that, the reply affidavit is silent in this regard. In the circumstances, the petition is required to be allowed only on this limited count.

9. The position in law is well settled. In case of M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, the Apex Court has stated :

"That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened.

Strictly speaking, *res judicata* does not apply to Income Tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the orders, it would not be at all appropriate to allow the position to be changed in a subsequent year."

9.1 This principle has been applied and followed by this Court in the case of Taraben Ramanbhai Patel and Another, Harshadkumar Natvarlal Dalal and Others, Arvindbhai Chhotabhai Patel and Another Vs. Income Tax Office and Others, wherein this Court has laid down:

"The strict rule of doctrine of *res judicata* does not apply to proceedings under the Income Tax Act. At the same time, it is equally true that unless there is a change of circumstances, the authorities will not depart from previous decisions at their sweet will in the absence of material circumstances or reasons for such departure."

9.2 This ratio has been reiterated by this Court once again in Lalludas Children Trust Vs. Commissioner of Income Tax,

10. Therefore, applying the ratio of the aforesaid decisions, it is apparent that, in absence of any material change in either facts, circumstances or legal provisions, once an issue is decided between the parties, it is binding to the parties, and merely because a different period for which the assessment is to be framed is involved, neither the revenue nor the assessee can be permitted to change its stand and raise an issue which is otherwise concluded between the parties. Change of facts and circumstances does not mean change of the personality manning a particular range or division. In these circumstances, the petitioner having averred that, in relation to earlier periods, adjudication orders in original and order in appeal having been passed in case of petitioner itself involving the same issue and the said averment having gone unchallenged, it is not open to the respondent authorities to initiate proceedings by issuance of show cause

notice for subsequent periods having accepted the position between the parties.

11. Apart from the aforesaid fact situation, it appears that the same issue was raised once again by the revenue and the matter travelled upto the Tribunal in case of the petitioner itself. The Tribunal was called upon to decide whether the demand relating to erection of Coal Handling Plant in Appeal Nos. E/1885/91-B1 and E/2691/91-B1 was correct or not. The Tribunal decided the matter along with various appeals of other assessees on 12th February 1999 and the said decision is reported at 1999 (82) ECR 677. It is necessary to take note of the fact that revenue had placed reliance on as many as seventeen decisions before the Tribunal and one of them pertains to the case of Sirpur Paper Mills Ltd. (supra). The Tribunal, after taking into consideration the entire gamut and deciding the case law, dealt with the decision of Sirpur Paper Mills Ltd. (supra) in paragraph 12 of its order and the findings recorded by the Tribunal in relation to the petitioner herein read as under :

"..... However, we find that in the appeals relating to coal handling plant, etc. it has been specifically submitted that these plants cannot be brought and sold in the market. Coal handling plant was a large assembly of machinery, buildings and structures spread over a vast area comprising mainly of wagon trippers, conveyors, staker reclaimer, electric and manually operated hoists with trolleys, vibrators, built wares, switch gears, H.T. cables, transformers, etc. It has been explained along with photographs of the plant that it cannot be brought and sold in the market. We observe from the photographs produced during hearings that the plant consists of large civil structures, lengthy conveyor belts and civil structures to support such conveyor belts, called feeders, etc. spread over several hectares of land. It is not a case of machinery and plant being fixed to earth merely for vibration free functioning. They are immovable property."

".....The test laid down in the Sirpur Paper judgement was whether the machine can be sold in the market. The coal handling plant cannot be brought and sold in the market and, therefore, is not covered by this decision of the Supreme Court. "

"....The coal handling plant and other plants involved in these appeals have lots more civil, electrical and other structures making it even more embedded to earth and incapable of marketing. ..."

11.1 Thus, the Tribunal has not only distinguished the case of Sirpur Paper Mills (supra), but found on facts that the activity of erection, fabrication and commissioning of coal handling plant is (1) an immovable property, (2) not goods, and not liable to excise duty, and (3) incapable of marketing i.e. cannot be brought and sold in the market.

12. The decision in case of Sirpur Paper Mills (supra), which is the fulcrum on which the entire case of the revenue has been built proceeds on the findings of fact recorded by the Tribunal in the said case. This is abundantly clear from the observations made by the Apex Court in paragraph Nos.3, 4 and 5 of the said

decision. In paragraph No.3, it is recorded that, "The Tribunal further held that the paper making machine was saleable and observed "if somebody wants to purchase, the whole machinery could be dismantled and sold to him in parts." In paragraph No.4, the Supreme Court states, "In view of this finding of fact, it is not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property The Tribunal has pointed out that it was for the operational efficiency of the machine that it was attached to earth.". In paragraph No.5, it is further recorded that, "The test is whether the paper making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the company." Lastly, in paragraph No.8, it is observed, "Marketability being a question of fact, we are of the view there is no scope for interference with the order passed by the Tribunal. It cannot be said that the Tribunal has overlooked any material fact or its decision is perverse."

13. Applying the aforesaid test to the decision of the Tribunal rendered in the case of petitioner Company itself, it is clear that the finding recorded by the Tribunal are otherwise. On facts, the Tribunal has found, as already recorded hereinbefore, that coal handling plant cannot be marketed; it is immovable property and considering the large assembly of machinery, buildings and structures spread over vast area comprising mainly of wagon trippers etc. and after going through the photographs produced before it, the Tribunal has found that the plant consists of large civil structures, lengthy conveyor belts and civil structures to support such conveyor belts, spread over several hectares of land; it is not a case of machinery and plant being fixed to earth merely for vibration free functioning. Therefore, as held by the Apex Court, these are findings of fact after appreciation of evidence before the Tribunal and in absence of any evidence, in fact, that is not even the case of revenue, it is not possible to state that the Tribunal has overlooked any material fact or rendered a decision by considering any irrelevant material and ignoring any relevant material. In these circumstances, the case of the petitioner is fully concluded by the decision of the Tribunal in case of petitioner itself and the decision in case of Sirpur Paper Mills (supra) cannot carry the case of revenue any further. Nothing has been brought on record to suggest that the aforesaid decision of the Tribunal rendered on 12th February 1999 was challenged. Even if it was challenged, there is nothing on record to show that a superior forum has either modified or reversed the said order. Therefore, in identical fact situation, it was not open to the revenue to raise the same issue over and over again.

14. In case of T.T.G. Industries Ltd. v. Collector of Central Excise, Raipur, the Apex Court has elaborated the test of "marketability" as well as indicated other tests for determination whether a particular activity resulting in manufacture / production of articles or property was exigible to duty. Referring to earlier decision in case of Mittal Engineering Works (P) Ltd. Vs. Collector of Central

Excise, Meerut, , the Apex Court stated that, "marketability was a decisive test for dutiability. It meant that the goods were saleable or suitable for sale, that is to say, they should be capable of being sold to consumers in the market, as it is, without anything more." Therefore, in case of a plant which is assembled, erected and attached to the earth by a foundation at the site and is not capable of being sold as it is, without anything more, cannot be termed to be "goods" within the meaning of the Act and, therefore, not exigible to excise duty. Another test that has been formulated is whether the plant and machinery was goods or immovable property could be determined by ascertaining whether it could not be shifted without first dismantling it and then, re-erecting it at another site, taking into consideration the volume of the machines concerned and their weight. A further test is whether the equipments are such which are usually shifted from one place to another, or is it practicable to shift them frequently. On application of the aforesaid tests also, in light of the findings recorded by the Tribunal, it is not possible to state that coal handling plant is an item or an equipment which is either marketable or can be sold as it is or can be shifted without first dismantling or can be shifted frequently. Therefore, the stand of the revenue that the process of erection, fabrication and commissioning and usage of duty paid bought out items was liable to excise duty because it brought into existence "goods", cannot be accepted.

15. The reliance on behalf of respondents on the Circular issued by C.B.E.C. is misplaced. Firstly, the said Circular has been issued on the basis of ratio laid down in case of Sirpur Paper Mills Ltd. (supra). It has already been noticed hereinbefore as to how the said decision is not applicable on facts of the case. Secondly, the broad criteria laid down in the Circular are also not applicable. The Tribunal has, in the case of the petitioner itself, found as a matter of fact that the activity carried on by the petitioner does not result in manufacture or production of goods, and thus, there are no excisable goods. There is no marketability of the products. The Circular, therefore, even on the assumption that it could be pressed into service, cannot be invoked against the petitioner for the purpose of assessment, but to the contrary, has to be applied in favour of the petitioner. Lastly, the Circular is dated 2nd April 1998 and the findings recorded by the Tribunal are on 12th February 1999. In the circumstances, the Circular also does not carry the case any further.

16. Under the provisions of the Act, the taxable event occurs when "excisable goods" are produced or manufactured. The definition of the term "excisable goods" as given in Section 2(d) of the Act states "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Tariff Act. The term "manufacture" has been defined u/s 2(f) of the Act. The question that would then arise is what does the term "excisable goods" mean. The term only states that they are the items mentioned in the Schedule of the Tariff Act. Under Article 366(12) of the Constitution, the term "goods" includes all materials, commodities and articles. Therefore, on a plain reading of the aforesaid definition, it would go to show that only movables which can be traded or

marketed are items which would fall within the definition of term "goods". u/s 2(7) of the Sale of Goods Act, 1930, definition of "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Hence, the definition under the Constitution and the Sale of Goods Act makes it abundantly clear that the term "goods" would take within its sweep all nature of movable items, but would not include any immovable property. As a corollary, when one refers to "excisable goods", it is necessary to bear in mind that only movable articles or properties can be roped in for the purposes of liability to excise duty under the Act, i.e. those which can be easily and frequently bought and sold.

17. In case of Union of India v. Delhi Cloth and General Mills Co. Ltd. 1977 E.L.T. (199), the Apex Court was called upon to decide the scope of Section 3 of the Act and in this context, the meaning of the term "manufacture" and "goods" in light of definitions u/s 2(f) and 2(d) of the Act. It was observed as under :

"15. It is helpful to consider also in this connection the ordinary meaning of the word "goods". For, by the very words of the Central Excise and Salt Act 1944, excise duty is leviable on "goods". The Act itself does not define "goods" but define "excisable goods as meaning" "goods specified in the First Schedule as being subject to a duty of excise and includes salt." On the meaning of the word "goods" an interesting passage is quoted in the Words and Phrases, Permanent Edition, Vol.18 from a judgment of a New York Court thus :-

"The first exposition I have found of the word "goods" is in Bailey's Large Dictionary of 1732, which defines it simply "merchandise"; and by Johnson, who followed as the next lexicographer it is defined to be movable in a house; personal or immovable estates; wares; freight; merchandise."

16. Webster defines the word "goods" thus :-

"Goods, noun, plural; (1) Movables; household furniture; (2) Personal or movable estate, as horses, cattle, utensils, etc., (3) Wares; merchandise; commodities bought and sold by merchants and traders."

17. These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold."

17.1 The position in law, therefore, appears to be well settled that, to become "goods", an article must be something which can ordinarily come to the market to be bought and sold.

17.2 Applying the aforesaid tests, in light of the facts found by the Tribunal, it is not possible to state that the petitioner was manufacturing goods when it erected or fabricated or commissioned the Coal Handling Plant.

18. Lastly, coming to the various submissions made on behalf of the respondents

on the basis of averments made in the affidavit in reply, suffice it to state that it is a confusion of its own making. The deponent of the affidavit, to say the least, could have placed on record, if he had chosen to do so, the documents on the basis of which such averments have been made. In absence of any supporting documents, the averments to the effect that the petitioner has made incorrect and misleading statement, remain bald and irresponsible statement. On behalf of the petitioner, the certified copies of the civil appeal and the order thereon made by the Apex Court and issued by the Registry of the Apex Court have been tendered. In light of these authenticated documents, the averments made in the affidavit in reply, in absence of any supporting documents, cannot be countenanced and are not required to be dealt with.

19. During the course of hearing, on behalf of respondent authorities, a xerox copy of order stated to have been made by the Apex Court in Civil Appeal No.D17666/1999 (For Preliminary Hearing) has been placed on record. The order dated 7th January 2000 reads as under:

"Delay condoned. The appeal is admitted. Tag along with Civil Appeal Nos.3725-26/1999. No stay."

19.1 This order does not give any indication as to what was the appeal about, which order was challenged by the appellant and in absence of the same, the aforesaid order cannot carry the case of revenue any further.

20. On behalf of the respondents, a copy of Tribunal's order dated 27th August 2004 rendered in E/Misc.429/2003-A in Appeal No.E/811/98-NB(A) is also placed on record. The Tribunal has rejected the application by saying that, in light of the evidence produced on behalf of the assessee, it did not find any merit in the application. The Tribunal has reserved liberty to approach the Tribunal, in case information tendered by the assessee was found incorrect. Thereupon, it appears, the respondents have moved an application for restoration on 8th October 2004, a copy whereof has been placed on record, and it is stated that the same is pending. In the said application, the revenue has once again reiterated that Civil Appeal No.165 of 2000 was not an appeal filed against final order No.812/99-A dated 8-6-1999 made by the CESTAT. However, for preferring this application also, reliance has been placed on order dated 7th January 2000 rendered in Civil Appeal No. D17666/99, which has already been re-produced hereinbefore.

20.1 In these circumstances, no evidence has been led on behalf of revenue to show that Civil Appeal No.165 of 2000 which came to be dismissed by the Apex Court on 19th April 2001 along with various other appeals, was not against final order No.812/99-A dated 8th June 1999 made by the Tribunal. In fact, the certified copy of the appeal produced by the petitioner belies such irresponsible averments. Therefore, in light of these facts, these contentions, being without any factual foundation, are rejected. It unfortunate that an officer of the rank of Assistant Commissioner makes statements on oath without any supporting

documents.

21. Before parting, it is necessary to express the anxiety of the Court in matters involving revenue. This petition was admitted as far back as on 13th September 1999, but the affidavit in reply has been sworn on 9th March 2005. When the matter came up for hearing on 23rd February 2005, a statement by Mr. Shaikh was made and the Court has recorded the same in the following words :

"Mr. Shaikh, the learned advocate appears and states that he has instructions to appear on behalf of respondents. He prays for time to obtain papers and instructions. He is directed to file his appearance. The matter to come up on 3rd March 2005."

21.1 Thereafter, the matter was posted on 10th March 2005 and from 10th March 2005 to 16th March 2005. When the matter was called out on 16th March 2005, it appears that there was confusion amongst the counsel as to whether Mr. Shaikh was to represent the matter or whether Mr. Malkan was to represent the respondents. Ultimately, Mr. Malkan has addressed the Court, but it needs to be noted that he was neither ready with the facts nor the law and during course of hearing, the Court had to wait till he obtained instructions in the matter from the officers present in the Court. In this context, one can do no better than reiterate what the Apex Court has observed in relation to such a situation in case of K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, , as under:

"The Union of India should take care to entrust these sensitive cases of far reaching effect, in particular on question of law, to Counsel who have experience and ability in that branch of law to defend their cases. Lest it is public justice that suffers and economy of the country is put to jeopardy. Unfortunately, the Counsel did not make any effort to analyze the provisions of the act nor did he make investigation into question of law from the decisions rendered by this Court. At this juncture, it is further relevant to point out that when the Union of India has its panel of Counsel, they should see to it that work is assigned to the Counsel who can competently argue the case in that behalf lest, for lack of assistance, investigation and marshalling the questions of fact and law, public justice tends to suffer. We would greatly appreciate the Counsel appearing for the appellant who placed for consideration all aspects of the case on law and facts. It is, therefore, for the Secretaries of the Department of Law & Justice and Finance to look into the matter and set their house in order; equally, the Attorney General of India should also see that the affairs in the Central Agency in the Supreme Court are organised accordingly. We have pointed out all this only to express our deep anxiety as the burden on the Court is multiplied to undertake unto itself the task of investigating into all aspects to consider the case so as to reach satisfactory conclusion."

22. In the result, the petition is allowed. The seven show cause notices at Annexure "C" (collectively) are hereby quashed and set aside in light of the fact

that, for the reasons stated hereinbefore, no excise duty is exigible on bought out items, erection and fabrication charges and commissioning charges on the Turn Key Project. Rule made absolute. Costs payable by the respondents are quantified at Rs.10,000=00.