
(2011) 12 BOM CK 0060

In the Bombay High Court

Case No : Central Excise Appeal (Lodg.) No. 102 of 2011

MS Alumayer India Pvt. Ltd.

APPELLANT

Vs

Commissioner of Central Excise-Mumbai-V

RESPONDENT

Date of Decision : 21-12-2011

Acts Referred:

Citation : (2011) 12 BOM CK 0060

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V. Sridharan, with Mr. Prakash Shah and Mr. Jas Sanghavi instructed by PDS Legal, for the Appellant; Jitendra B. Mishra, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—This Appeal is directed against an order of the Customs, Excise and Service Tax Appellate Tribunal dated 15 September 2011 by which an application for the waiver of a pre-deposit of duty in the amount of Rs.28,12,634/- together with interest and penalty was disposed of by directing that on the deposit of the entire duty, the requirement of depositing interest and penalty shall stand waived. The duty which has been required to be deposited is in the amount of Rs.28,12,634/-.

2. The Appeal is admitted on the following substantial question of law :

(f) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the Appellants did not make out a prima facie case for total waiver of pre-deposit ?

3. By consent and on the request of both the counsel for the parties this appeal is taken up for final hearing.

4. The Appellants are engaged in the work of fabrication and erection of structural glazing. The case of the Appellants is that they purchase on the payment of excise duty, aluminum angles / profiles. The Appellants also purchase against payment of duty, glass and other items such as fasteners and rivets.

Aluminum sections purchased by the Appellants are given on a job work basis for the purpose of cutting and/or anodizing. The Appellants cut the sections into various sizes as required for the execution of contracts which are then removed to sites where structural glazing has to be installed. The aluminum sections are subjected to cutting, drilling, punching and bending operations at site by contractors. Glass is purchased from glass manufacturers. The aluminum sections are assembled into a frame and after fixing the glass simultaneously the panels are permanently fixed on to the walls.

5. A notice to show cause was issued by the Additional Commissioner of Central Excise on 23 March 2009 in respect of the work executed by the Appellants for M/s. Eskay Resorts India Limited, who had awarded a work order on 20 April 2002 to the Appellants for the execution of a pyramid structure facade at a site at Borivali (West), Mumbai. The show cause notice stated that the Appellants had manufactured curtain wall / structural glazing without the payment of duty. It was alleged in the notice that the curtain wall / structural glazing is movable property and is liable to be classified under Heading 76.10 of the First Schedule to the Central Excise Tariff Act 1985. The extended period of limitation was applied under the proviso to Section 11A(1) on the ground that the Appellants had suppressed from the Central Excise Department the fact that they were manufacturing curtain wall / structural glazing.

6. The Additional Commissioner of Central Excise by an order dated 4 June 2009 confirmed a demand of duty in the amount of Rs. 28.12 lacs and imposed a penalty in the like amount. The Commissioner (Appeals) dismissed the appeal on 17 May 2010. Before the Tribunal the Appellants applied for a waiver of pre-deposit. The Tribunal has directed the Appellants to deposit the entire amount of duty, subject to which a waiver has been granted in respect of penalty and interest. The Tribunal has by its impugned decision dated 15 September 2011 noted that it has come to the notice of the Tribunal that in the case of the Appellants a judgment has been rendered on 8 March 2011 by the Bangalore Bench of the Tribunal in Excise Appeal 186 of 2008 holding the same goods as excisable. In view of that decision, the Tribunal held that there was no prima facie case for a waiver of duty. As regards the extended period of limitation, the Tribunal observed that the Appellants are not registered with the Revenue authorities and had not informed the department at any point of time regarding their activity. The same issue was raised before the Bangalore Bench and having been held against the Appellants the Tribunal came to the conclusion that no case was made out for the waiver of deposit of duty particularly since no financial hardship had been pleaded.

7. Learned Senior Counsel appearing on behalf of the Appellants submitted that -
(i) In the present case the dispute relates to the years 2003-04 and 2004-05. Prior to the decision of a larger Bench of the Tribunal in 2005 (190) ELT 301, the decision of the Tribunal which held the field was 1986 (9) ECC 35. The judgment in Mahindra and Mahindra was rendered on 18 November 2005. The reference to

a larger Bench of the Tribunal would in fact indicate that it was only thereafter that the law came to be settled. Hence, there could be no question of suppression on the part of the Appellants particularly in view of the fact that the judgment in Aruna Industries was approved in several judgments of the Division Bench of this Court including in Shapoorji Pallonji and Co. and K.B. Captain Vs. Union of India (UOI), The Collector of Central Excise and Customs, The Additional Collector of Central Excise and Customs and The Superintendent of Central Excise, ;

(ii) The Bangalore Bench of the Tribunal has rejected the contention of the Appellants on the application of the extended period of limitation under the proviso to Section 11A(1) placing reliance on a judgment of the Supreme Court in Commissioner of Central Excise v. Man Structural Limited 2001 (130) E.L.T. 401 (SC).. The judgment in Man Structural, it is urged, was a case where the Supreme Court remanded the proceedings back to the Tribunal on the ground that the Tribunal had failed to consider the facts of even a single one of the appeals before it and had only proceeded on the basis that structurals are not exigible to excise duty. The Supreme Court remanded the proceedings since the Tribunal failed to appreciate that there is a tariff entry which makes the structurals exigible to excise duty and that they are so exigible, provided there are new identifiable goods that are the result of a manufacturing processes and are marketable. The Bangalore Bench of the Tribunal, it has been held, has erroneously ruled that the assessee viz. the Appellants would not have required the exposition of the relevant law by the larger Bench in Mahindra and Mahindra to understand that the goods in question are liable to excise duty and on this ground held that the extended period of limitation was attracted. An application has been filed by the Appellants for rectification before the Bangalore Bench of the Tribunal;

(iii) Even the decision of the Tribunal in Mahindra and Mahindra provides that structures or parts thereof in tariff heading 73.08 in their movable state would be subject to excise duty under heading 73.08, notwithstanding that they are getting permanently fixed in structures. In the present case, it was submitted that the individual items which are used by the Appellants are duty paid excisable goods but what the department is seeking to subject to tax is the entire contract value in the erection of the glazed curtain wall, something which ex facie cannot be subjected to excise duty. On these grounds, it was urged that the entire basis of the decision of the Tribunal is erroneous and a clear case exists for the grant of a waiver of pre-deposit of duty.

8. On the other hand, counsel appearing for the Revenue submitted that -

(i) The Appellants had not obtained registration under the Excise Act and therefore the department was clearly not in knowledge of the nature of their operations. Consequently, the invocation of the extended period of limitation was in order;

(ii) The Tribunal has followed its decision in the case decided by the Bangalore Bench in case of the Appellants while declining to grant a waiver of pre-deposit of duty;

(iii) The law being settled by the Tribunal in Mahindra and Mahindra, no case for waiver of pre-deposit has been made out.

9. At this stage, the evaluation by the Court is confined to the question as to whether a prima facie case for the waiver of pre-deposit was made out. Tariff entry 76.10 reads as follows :

76.10 Aluminium structures (excluding pre-fabricated buildings of heading No.94.06) and parts of structures (for example, bridges, and bridge-sections, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminium plates, rods, profiles, tubes and the like, prepared for use in structures.

10. From the show cause notice dated 23 March 2009 it emerges that the demand for duty, based on applying the extended period of limitation under the proviso to Section 11A(1) was raised with respect to the total contract value received by the Appellants in the amount of Rs.2.03 Crores for the years 2003-04 and 2004-05 for carrying out project work at the site of Eskay Resorts India Limited. Paragraph 14A of the notice to show cause notes that certain parts and components are used in the process of manufacturing a curtain wall / glazing system which is erected at site. It is the curtain wall which is supplied and installed by the Appellants which is sought to be classified under tariff entry 7610 of the Central Excise Tariff Act 1985.

11. Now it is in this background that the Court must evaluate as to whether a prima facie case has been made out for the waiver of pre-deposit. The decision of a larger bench of the Tribunal in Mahindra and Mahindra (supra) contains an extract from an order passed by the Supreme Court in Man Structural (supra). The Supreme Court in Man Structural held that it was for the Tribunal to determine as a fact whether the structurals that the department sought to make exigible to excise duty in the appeals before it were new and identifiable goods as a result of manufacture and which were marketable. The Tribunal had simply proceeded on the basis that structurals are not exigible to excise duty, failing to notice that there is a tariff entry which makes structurals exigible. The Supreme Court accordingly set aside the decision of the Tribunal and directed a fresh disposal. Following the decision of the Supreme Court the Tribunal held in certain cases that there was no manufacture of goods involved in making structural components and relied upon its 1986 judgment in Aruna Industries (supra). When a batch of appeals came up before the Tribunal following the decision of the Supreme Court, a Division Bench of the Tribunal referred the issue to a larger bench. Finally it was on November 18, 2005 that the larger bench in Mahindra and Mahindra resolved the issue by holding that structures or parts thereof mentioned in heading 73.08 in their movable state will be subject to excise duty

notwithstanding the fact that they are permanently fixed in the structures. The Supreme Court has held in several decisions that where a bonafide doubt as to the non-exciseability of the goods existed due to a conflict of decisions between different High Courts, the extended period of limitation u/s 11A cannot be applied and the mere failure or negligence in not taking a licence or not paying duty would not be sufficient to invoke the extended period. (Padmini Products Vs. Collector of Central Excise, Bangalore, followed in Jaiprakash Industries Ltd. Vs. Commissioner of Central Excise, Chandigarh, .) In Larsen and Tubro Ltd. Vs. The Commissioner of Central Excise, Pune-II, , the Supreme Court applied the same principle where a decision of an earlier bench of the Tribunal was questioned before a larger bench and the law was settled by a larger bench of the Tribunal. The principle underlying these decisions is that when the position in law has been settled only as a result of the decision of the larger bench, it cannot be postulated that there was necessarily a suppression on the part of the assessee merely on the basis that the assessee had not applied for a licence and has not paid the duty. This principle must, in our view, apply to the facts of this case in determining whether a waiver of pre-deposit was warranted. Prior to the decision in Mahindra and Mahindra, the decision in Aruna Industries which held the field since 1986 was in favour of the assessee. A similar view was taken by Division Benches of this Court inter alia in Simplex Concretes Piles (India) Ltd. Vs. Union of India (UOI), and Shapoorji Pallonji (supra). In Shapoorji and Pallonji the Division Bench in fact referred to an earlier decision in Sunflag Iron and Steel Co. Ltd. Vs. Additional Collr. of C. Ex., as having approved the view taken by the Tribunal in Aruna Industries. Consequently in this state of the law prior to 18 November 2005 when the Tribunal delivered its larger bench decision in Mahindra and Mahindra, no case prima facie has been made out for applying the extended period of limitation.

12. The Tribunal has declined to grant a waiver of pre-deposit on the view which was taken by its Bangalore Bench. The Bangalore Bench of the Tribunal held that the extended period of limitation was attracted and in holding so relied upon the observations of the Supreme Court in Man Structural (supra). The Bangalore Bench has held that as the assessee has been following judicial pronouncements to decide if the goods were liable to excise duty, the judgment in Man Structural could not have escaped its notice. Hence, it was held that the assessee could not have required the exposition of law by a larger bench in Mahindra and Mahindra to understand that the goods were liable to excise duty. Since an application for rectification is pending before the Tribunal in its Bangalore Bench, we are not expressing a final view on the correctness of this line of reasoning. However, we may only observe at this stage that what the Tribunal clearly missed in its Bangalore decision was the fact that the decision of the Supreme Court in Man Structural found fault with the order of the Tribunal on the ground that the Tribunal had merely proceeded on the basis that structurals are not exigible to excise duty without considering in each case as a matter of fact whether new and identifiable goods which were marketable had come into existence. As a matter

of fact, the Supreme Court in Man Structural's remanded all the appeals to the Tribunal for that reason. We would leave this part of the judgment by observing that the view taken by the Bangalore Bench of the Tribunal is with respect inexplicable when it holds that the assessee did not require an exposition of law by the larger bench in Mahindra and Mahindra to know as to whether the goods were exigible to excise duty. The Tribunal having constituted a larger bench, evidently the purpose and object was to settle the law. Larger Benches are usually constituted when there is a conflict of opinion or when a matter of importance requires a decision by such a bench. The attention of the Court has also been drawn by counsel appearing on behalf of the assessee to the decision of the Supreme Court in Commissioner, Central Excise, Nagpur Vs. Wainganga Sahkari S. Karkhana Ltd., In Wainganga the Supreme Court dismissed an appeal by the Revenue against a decision of the Tribunal which had applied the earlier decision in Aruna Industries. In Wainganga the Supreme Court noted that it had been found as a fact that the assessee had undertaken fabrication work at site and hence the application of the decision in Aruna Industries could not be faulted.

13. All these facets of the case have with respect been ignored by the Tribunal. A prima facie case was made out by the Appellants for the grant of a complete waiver of pre-deposit of duty. We accordingly set aside the impugned order of the Tribunal insofar as it declines to grant a waiver of pre-deposit of duty and direct that the Appellants shall be heard without requiring the Appellants to deposit the duty of Rs.28,12,634/-. In the view which we have taken, it is not necessary for this Court to answer the question of law which would otherwise arise at the hearing of the appeals before the Tribunal and we clarify that all the observations contained in this order are confined to the disposal of the application for the waiver of pre-deposit. The Appeal shall stand disposed of in these terms.

There shall be no order as to costs.