IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.6.2008

CORAM:

THE HON'BLE MR. JUSTICE K.CHANDRU

W.P. NOS. 7169 AND 7170 OF 1998
AND
W.M.P. NOS. 10978 AND 10979 OF 1998 IN RESPECTIVE W.PS.

Calcium (India) Private Limited
125 SIPCOT Industrial Complex
Hosur .. Petitioner in both W.Ps.

vs.

1. Customs, Excise, Gold (Control)
Appellate Tribunal
South Zonal Bench
Shastri Bhavan, Annexe Building
26 Haddows Road
Chennai 600 006

2. The Commissioner of Central Excise
6/7 A.T.D. Street
Race Course Road
Coimbatore .. Respondents in both W.Ps.

W.P. No. 7169 of 1998 filed under Article 226 of the Constitution of India seeking for issuance of writ of Certiorarified Mandamus calling for the records of the case before the first respondent in Order Nos. 2938 to 2941 of 1997 dated 10.11.1997 passed by the first respondent herein and quash the same and further direct the first respondent to rehear the appeal Nos. E/340 to 342 of 1996 and miscellaneous application No. E.Mis. Appln. No. 1047 of 1997.

W.P. No. 7170 of 1998 filed under Article 226 of the Constitution of India seeking for issuance of writ of Certiorari calling for the records of the case before the first respondent in Order No. 2426 to 2430 of 1997 signed on 23.5.1997 but not dated in the preamble passed by the first respondent and quash the same.

For Petitioner : Mr. Aravind P. Dattar. SC
for Mr. C.Saravanan
For Respondents : Mr. P. Wilson, Asst. SGI

C O M M O N O R D E R

Heard the arguments of the learned counsel for the parties and have perused the records.

2. In W.P. No. 7169 of 1998, the challenge is to the order dated 10.11.1997 passed by the Customs, Excise, Gold (Control) Appellate Tribunal [for short,'CEGAT'], South Zonal Bench, Chennai. In W.P. No. 7170 of 1998, the challenge is to the order signed on 23.5.1997 and dispatched to the petitioners on 19.9.1997.

3. The petitioner Company is a Private Limited Company and was incorporated in the year 1977. It commenced manufacture of Calcium Gluconate from the year 1977. It had a tie-up with M/s Sandoz India Ltd.

4. During the year 1979, the individual Directors of the petitioner company promoted another company called the Global Calcium India (Pvt.) Ltd. for the manufacture of Calcium Gluconate and Calcium Lactobionate with a tie-up with M/s Glaxo India Ltd. During 1991, they also started Calcitech India Pvt. Ltd. Which started manufacture of similar range of products for export. Although the three companies were Private Limited companies and are independent entities, the second respondent Department issued a show cause notice dated 06.7.1993 seeking to club the clearance of all the three units for the period 1992-93. This was under the premise that the subsequent two companies were dummies of the petitioner. Even though detailed replies were sent by all the three companies, the second respondent confirmed his order dated 18.7.1984 by treating all the three units as one and called upon the petitioner to pay Excise Duty of Rs.9,18,823/-, a redemption fine of Rs.90,000/- and penalty of Rs.2.5 lakhs.

5. The petitioner and the other two companies preferred appeals (being Appeals 442, 443 and 446 of 1994) before the first respondent CEGAT. The appeals were heard from time to time. When the appeals were pending, the second respondent also preferred appeal in E/342 of 1996 against a subsequent order dated 01.11.1994. In those proceedings, certain inputs removed from one unit to the other were not brought under modvat credit. In that order, the units were not treated separately. In the grounds of appeal, it was stated by the Department that they had independent production facilities and the latter two units were not dummies of the petitioner.

6. Since the petitioners came to know about the subsequent stand of the Department only after receiving notice from the CEGAT, they filed a Miscellaneous Application No. 1047 of 1997 seeking to reopen the hearing of Appeals in Appeal Nos. 442, 443 and 446 of 1994. It was the stand of the petitioner that they are willing to

abide by the order dated 1.11.1994 which is appealed in Appeal No. 340 to 342 of 1996.

7. It is the stand of the learned Senior Counsel that he had made an oral mentioning before the CEGAT to pass final orders after taking into account the Miscellaneous Application filed by him and he was made to believe that the CEGAT will take into account the subsequent developments. However, to his shock, he received the final order rejecting his contention and holding that the latter two units were dummies of the petitioner company and, therefore, they are liable for excise duty by clubbing all the units as a single unit.

8. In the light of the order passed and signed on 23.5.1997, they have confirmed the amount of duty as Rs. 6,53,087.65. In so far as the demand of duty in respect of electrolytic cells and their case was remitted to the adjudicating authority for fresh disposal. The penalty levied was also set aside pending final adjudication. In the light of the same, the order of the Commissioner in O.I.O. No. 111 of 1994 passed in the other appeal filed by the Department in E/342 of 1996 was set aside. It is against these two orders, the present writ petitions have been filed.

9. With reference to the objection about the conduct of the CEGAT in not entertaining the Miscellaneous Application and passing orders without reopening the case as contended by the learned Senior Counsel, Mr. P. Wilson, the learned ASGI took serious objection to take note of those submissions. He submitted that in so far as the proceedings of the Courts are concerned, they are final and this Court cannot go behind the order passed by the authorities.

10. Thereafter, the learned Senior Counsel referred to the order passed by the CEGAT, more particularly, paragraph No. 8 wherein the investigation by the Department was referred to as the basis for clubbing. The following eight points were noted from the investigation report as the basis for clubbing the units.

i) Mutual Financial assistance;
ii) Transfer of machinery from one unit to another
iii) Common effluent treatment plant;
iv) Common analytical lab
v) Diversion of orders for supply goods
vi) Common sales promotion and follow up
vii) Common Chairman for all the three units
viii) Common staff for all the three units

11. The learned Senior Counsel submitted that none of these criteria can either singly or collectively be a foolproof test for

deciding the clubbing question. In this context, he referred to the judgment of the Supreme Court in Arca Controls Pvt. Ltd. v. Commissioner of Central Excise [2003 (158) E.L.T. 272]. The following passage found in the said judgment may be referred to:-

> "The Tribunal found that seven companies namely JNM, SPIREX, CAMBRIDGE,JNMSS, KROHNE, FORBESONS and ARCA are carrying on activities together at the different units by supplying material to each other and the costing department of one Company attends to all the units; that the price structure of one Company is based on norms fixed by the costing department and several such features were noticed by the Tribunal including common funding and financial flow back to a substantial extent though on paper the units appear to be distinct, separate and independent; that these different companies have been established to avail of exemption under Central Excise Act and, therefore, clearances made by these units have been clubbed to hold that these Companies cannot avail of such benefit. A somewhat similar matter came up for consideration before this Court in M/s. Supreme Washers (P) Ltd. v. The Commissioner of Central Excise, Pune - Civil Appeal No. 6161 of 1999 and connected matters. In one of the Civil appeals it was brought to the notice of this Court that there are two circulars on dated 1.3.1956 and another Circular No. 6/82, dated 29.5.1992 issued by the Central Board of Excise and Customs, New Delhi to the effect that a limited company should be treated as a separate entity for the purpose of exemption limit and the effect thereof had not been considered in those cases as in the present cases also. This aspect of the matter, as to the applicability of the circulars, has not been examined inasmuch as the same had not been brought to the notice of the Tribunal. Therefore, we think it appropriate to set aside the order made by the Tribunal and remit the matter to the Tribunal for fresh consideration in accordance with law."

12. He also referred to the direction issued under Section 37-B of the Central Excise Act, 1944 so as to ensure uniformity of levy of duty of excise and the following passages found in the Notification may be extracted below:-

> (i) The question whether different partnerships having common partners are treatable as separate manufacturers or the same manufacturer, would be a question of fact in

each case to be determined on the basis of such factors among other, like composition of the partnership, existence of the factory, licence, nature of goods manufactured etc.

(ii) Different firms will be treated as different manufacturers for the purpose of exemption limit. But if a firm consisting of certain partners say A, B & C, has got more than one factory, all these factories should of course be combined. Limited companies whether public or private are separate entities distinct from the shareholders composing it. Hence each limited company is a manufacturer by itself and will be entitled to a separate exemption limit.

(iii) If there are two firms with only some of the partners in common, each firm is entitled to separate exemption limit and hence the question of distributing the exemption may not arise. If one firm or individual owns several factories, he or it gets exemption only in respect of one lot and the manufacturer being only one entity there will be no question of distributing the exemption.

(iv) Whether or not in the expression' by or on behalf of a manufacturer' the expression 'from one or more factories' is added, the effect would be the same if the manufacturer is also the same. The expression 'one or more factories' only further clarifies that whether the factory is one or more, it is the clearances by or on behalf of the same manufacturer which is to be taken into consideration for purposes of interpreting the exemption notification'.

13. Further, he also relied upon the judgment of the Supreme Court in Rollatainers Limited v. Commissioner of Central Excise, Delhi - III [2005 (11) SCC 203] and more particularly, relied upon the following passage found in paragraphs 7 and 8:-

Para 7: "There are no two opinions that both the factories are near to each other and they are owned by the same owner and the common balance sheet is maintained. But, by this can it be said that both the factories are one and the same? The definition

of "factory" as defined in Section 2(e) of the Central Excise Act, 1944, reads as under:

"2. (e) 'factory' means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;"

Para 8: Simply because both the factories are in the same premises, that does not lead to the inference that both the factories are one and the same. In the present case, from the facts it is apparent that there is no commonality of purpose, both the factories have a separate entrance, there is a passage in between and they are not complementary to each other nor are they subsidiary to each other. The end product is also different, one manufactures duplex board and the other manufactures paper. They are separately registered with the Central Excise Department. The staff is separate, their management is separate. It is also not the case of the Revenue that the end product of one factory is raw material for the other factory. From the above facts it is apparent that there is no commonality between the two factories, both are separate establishments run by separate managers though at the apex level they are maintained by the appellant Company. There are separate staff, separate finished goods. Simply because both the factories may have common boundaries, that will not make them one factory. Accordingly, we are of the opinion that the view taken by the Tribunal does not appear to be well founded and likewise, the view taken by the Commissioner, Central Excise. Accordingly, we allow both these appeals, set aside the order of the Tribunal passed on 7-6-2002 as well as the order passed by the Commissioner, Central Excise, New Delhi III on 28-9-2001 in both the appeals.

In the light of the above, he prayed for setting aside the order of the CEGAT.

14. Per contra, Mr. P. Wilson, the learned ASGI submitted that the writ petition is not maintainable under Article 226 of the Constitution against the order of the CEGAT and the petitioner should have approached the Tribunal for making a reference to this

Court. Apart from the preliminary objection, he took this Court through the order passed by the CEGAT and contended that the clubbing was done based upon a factual finding and such a finding of fact cannot be interfered lightly and, therefore, the writ petitions should be dismissed. He also placed reliance upon the averments made in the counter affidavit filed in both the writ petitions.

15. With reference to the preliminary objection, it must be stated that even in case of Tribunals constituted under Articles 323 A and 323 B of the Constitution, the Supreme Court in L.Chandrakumar v. Union of India [1994 (5) SCC 539] has held that the power under Article 226 of the Constitution cannot be taken away and parties are allowed to move the High Court inspite of a bar created under the Tribunals Act. It is admitted that the CEGAT is not a Tribunal constituted under the above provisions of the Constitution and, therefore, the preliminary objection must fail.

16. With reference to the second objection made by the learned ASGI, it must be stated that even a finding of fact must take into account relevant factors. Any omission to take into account the relevant factors to arrive at a factual finding will be an error apparent on the face of the record and it was also held to be mixed question of law and facts. In such circumstances, this Court can set aside those findings even in a writ petition under Article 226 of the Constitution.

17. In the present case, the CEGAT had not taken into account the two decisions referred to above as well as the directions issued under Section 47-B of the Central Excise Act. Since the CEGAT had largely went by the Investigation Report and relied upon irrelevant considerations, the order of the CEGAT confirming the order of the second respondent must be set aside.

18. It is also stated by the learned Senior Counsel that each unit has crossed from the exemption under Excise duty and all the three units are levied excise duty and the present case covers only the impugned order.

19. In the light of the above, W.P. No. 7170 of 1998 will stand allowed. In view of the decision in that writ petition, there is no necessity to pass any separate order in W.P. No. 7169 of 1998 and that writ petition will stand allowed. However, there will be no order as to costs. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

/true copy/

Sub Assistant Registrar

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To

1. Customs, Excise, Gold (Control)
   Appellate Tribunal
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   26 Haddows Road
   Chennai

2. The Commissioner of Central Excise
   6/7 A.T.D. Street
   Race Course Road
   Coimbatore

+ 1 cc to Mr.C.Saravanan Advocate SR No.33318

Delivery Common Order in
W.P. Nos. 7169 and 7170 of 1998

JSV(CO)
JJM(14.07.08)