M/S. ESCORTS LTD. A

v.

COMMNR. OF CENTRAL EXCISE, FARIDABAD

(Civil Appeal No. 6561 OF 2004 etc.) B

APRIL 29, 2015

[A.K. SIKRI AND R. F. NARIMAN, JJ.]

Central Excise and Salt Act, 1944 – ss. 3 and 11-A – Whether excise duty payable on 'Transmission Assembly', an intermediate product which comes into existence during manufacture of tractors – Held: Transmission Assemblies being a distinct commercially known product, is liable to excise duty – The fact that such product has not been sold is irrelevant – However, in view of the facts of the cases showing that there was no suppression or intent to evade the duty, extended period of limitation is not available to Revenue – Constitution of India, 1950 – Art. 366(12) – Entry 84, List I, VII Schedule. C D E

Words and Phrases – "Materials", "Commodities", "Articles" and "Goods" – Meaning of.

Allowing the appeals, the Court F

HELD: 1.1 The Transmission Assemblies of tractors are commercially known products. The fact that not a single sale of such Assembly has been made by the appellants is irrelevant. Therefore, the Transmission Assembly of the tractor is clearly an intermediate product which is a distinct product commercially known to the market as such. [Para 15] [262-F-G] G

1.2 For excise duty to be chargeable under the H

A **constitutional entry read with Section 3 of the Central Excise and Salt Act, two pre-requisites are necessary. First, there must be "manufacture" which is understood to mean the bringing into existence of a new substance. And secondly, the word "goods" necessarily means that**
B **such manufacture must bring into existence a new substance known to the market as such which brings in the concept of marketability in addition to manufacture. [Para 10] [255-A-C]**

C **1.3 Although the definition under Article 366(12) of the Constitution of India is an inclusive one, it is clear that 'materials', 'commodities' and 'articles' spoken of in the definition take colour from one another. In order to be "goods" it is clear that they should be known to the**
D **market as materials, commodities and articles that are capable of being sold. [Para 9] [254-G-H]**

Union of India v. Delhi Cloth & General Mills Co. Ltd., **1963 Suppl. 1 SCR 586: 1963 Suppl. SCR 586 – relied on.**
E

A.P. State Electricity Board v. Collector of Central Excise, Hyderabad, **(1994) 2 SCC 428: 1994 (1) SCR 499;** *South Bihar Sugar Mills Limited v. Union of India*, **(1968) 3 SCR 21: 1968 SCR 21;** *Union Carbide India Limited v. The Union*
F *of India*, **(1986) 2 SCC 547: 1986 (2) SCR 162;** *Bhor Industries Ltd. V. Collector of Central Excise, Bombay*, **(1989) 1 SCC 602: 1989 (1) SCR 382;** *CCE v. Ambalal Sarabhai*, **(1989) 4 SCC 112: 1989 (3) SCR 784;** *Indian*
G *Cable Co. Ltd. V. Collector of Central Excise, Calcutta & Ors.*, **(1994) 6 SCC 610: 1994 (3) Suppl. SCR 678;** *Moti Laminates (P) Ltd. V. Collector Central Excise, Ahmadabad*, **(1995) 3 SCC 23: 1995 (2) SCR 81;** *Union of India & Ors. v. Sonic Electrochem (P) Ltd. & Anr.*, **2002 (145) E.L.T. 274**
H **– referred to.**

C.A. No. 6561 of 2004:

2.1 However, on facts of the present case extended period of limitation is not available to Revenue. There was no suppression on the part of the appellants nor was there any willful attempt to evade duty. The appellant has been manufacturing tractors from 1965 onwards. There has never been any change in the manufacturing process. In the year 1994-95, IC engines were stated by the department to contain Transmission Assemblies, which were dutiable. On receiving a reply from the appellant, the department did not levy any excise duty on such Transmission Assemblies. The show-cause notice itself stated that the issue of manufacture and captive consumption of Transmission Assemblies for tractors is the same as that for IC engines. These facts, coupled with the fact that not a single Transmission Assembly of tractors manufactured by the appellant had been sold, makes it clear that there was no suppression or any intent to evade excise duty in the present case. Thus, the show cause notice needs to be quashed on this ground alone. [Para 19] [268-G-H; 269-A-C]

Padmini Products v. Collector of Central Excise, Bangalore, 1989 (43) E.L.T. 195; *Continental Foundation Joint Venture Holding v. Collector of Central Excise, Chandigarh* – I, (2007) 10 SCC 337: 2007 (9) SCR 554 – relied on.

C.A. Nos. 9469-9470 of 2010:

2.2 The extended period of limitation is not available to the revenue because the respondent *bona fide* believed that Transmission Assemblies were not dutiable. [Para 22] [271-F-G]

A C.A. No. 457 of 2006

2.3 In this case also the extended period of limitation is not available to the revenue. In successive declarations made by the assessee in this case starting from 16.3.1995, the assessee had declared not merely the tractor but the chassis therefor. The assessee *bona fide* believed that the declaration of the chassis would suffice as according to them Transmission Assemblies were not taxable goods. There was no attempt to evade excise duty and in this case also the show cause notice being beyond the period of limitation of one year would have to be quashed on this ground. [Para 25] [273-B-F]

Case Law Reference

1963 Suppl. SCR 586	relied on	Para 10
1994 (1) SCR 499	referred to	Para 10
1968 SCR 21	referred to	Para 10
1986 (2) SCR 162	referred to	Para 10
1989 (1) SCR 382	referred to	Para 10
1989 (3) SCR 784	referred to	Para 10
1994 (3) Suppl. SCR 678	referred to	Para 11
1995 (2) SCR 81	referred to	Para 12
2002 (145) E.L.T. 274	referred to	Para 13
1989 (43) E.L.T. 195	relied on	Para 17
2007 (9) SCR 554	relied on	Para 18

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6561 of 2004 etc.

From the Judgment and Order dated 27.05.2004 of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal Nos. E/24/2003-NB (B)

WITH

C. A. Nos. 457 of 2006 & 9469-9470 of 2010

Meenakshi Arora, V. Lakshmikumaran, M. P. Devanath, Vivek Sharma, L. Charanaya, Aditya Bhattacharya, R. Ramachandran, Hemant Bajaj, Ambarish Pandey, Anandh K., Rajesh Kumar, Rahul Narayan, Mohit Singh for the Appellant.

Jaideep Gupta, Shyam Divan, Nisha Bagchi, Rashmi Malhotra, Sujeeta Srivastava, Pooja Sharma, B. Krishna Prasad, E.R. Kumar, Krishna Srinivasan, Sanjana Ramachandran, Geethi Arya, Abhishek Vinod Deshmukh, Udayaditya Banerjee, Sameer Parkh (for M/s. Parekh & Co.) for the appearing parties.

The Judgment of the Court was delivered by

R.F. NARIMAN, J.

C.A. NO.6561 OF 2004

1. The present case raises an interesting question as to whether excise duty is payable on an intermediate product, namely, Transmission Assembly which comes into existence during the manufacture of tractors made by the appellant. The period involved is January 1996 to May 1998. The tractors that are manufactured have engines that are below 1800 CC and are covered by an exemption notification 162/1986. We are informed, however, that after 1.6.1998 this exemption has gone and even tractors of an engine capacity of less than 1800 CC now have to bear excise duty.

A 2. By a show cause notice dated 31.1.2001, the Department for the period aforesaid relied upon evidence in the form of statements made by various officers of the appellant and other documentary evidence to show that Transmission Assemblies of tractors was a commodity known to the market B as such and, therefore, came into the category of excisable goods. The respondent by their reply dated 1.10.2001 denied this stating that no separate product known as Transmission Assemblies came into existence which is known to the commercial community as such and, therefore, there was C neither manufacture nor marketability of the same. In the reply, however, various statements were made which, in fact, amount to admissions, that Transmission Assembly of a tractor is, in fact, known to the market as such. These admissions are set D out hereinbelow:

"16. It is submitted that transmission assemblies are in fact interchangeable. The Transmission Assembly can be used in both dutiable as well as exempt tractors, for E example in Model No.325 (exempt tractor) and Model No.335 (dutiable tractor). Therefore, it serves as a common input for both tractors. Therefore, in terms of provisions of Rule 57CC MODVAT credit is admissible on the common inputs which form part of transmission F assemblies in turn used in the manufacture of both types of Tractors.

47.1. The department has relied upon the case of M/s International Tractors Ltd., Hoshiarpur who are supplying G transmission assemblies.

(a) The Notice contends that M/s. Mahindra & Mahindra have not purchased any transmission assemblies for use in tractors from any other unit. Further, they have not H supplied or transferred any transmission assemblies to

any other person. However, they have been supplying the transmission assembly to their own units at Nagpur and Rudhrapur for manufacturing tractors. A

(b) It is submitted that this letter can at most lead to a conclusion that the transmission assembly made by M & M is marketable. B

50. The show cause notice has placed reliance on certain other web site to contend that the Hoovers on-line web site and Carraro web site shows that transmission assemblies are marketed and sold. It is submitted that while there might be mass production of transmission assemblies marketed by Hoovers Carraro, etc., the product specific transmission assemblies of the noticees never come to the market and have never been sold. Hence, there can be no question of demanding duty on the transmission assemblies made on the assembly line and used for assembling the tractors in the noticees factory. These are not marketable and hence, are not goods and there is no removal under Rule 9 and 49." C D E

3. The Commissioner by an order dated 4.10.2002 held as follows:- F

"41. I find that the issue has been well examined in the notice. Noticee's plea that the impugned transmission assemblies are not goods as transmission assemblies do not have independent existence is without merit. Noticee in fact itself clears such goods on payment of duty to ECEL, Transmission assemblies are well known in the commercial world and are very much dealt with as a commercial commodity. The end use as put forth in the notice amply proves it. To reiterate transmission G H

A assemblies are cleared by the noticee to ECEL; noticee company's sister concern (Farmtrac Division) imported transmission assemblies from Carraro Spa of Italy and also purchased transmission assemblies from Carraro India Limited, Pune; M/s TAFE, Chennai, International B Tractors Ltd., Hoshiarpur, Mahindra & Mahindra all deal in transmission assemblies and further information regarding transmission assembly availability as such is also available on internet.

C 42. Noticee's submission that no identifiable transmission assembly emerges in their production of Tractors is also incorrect. They are manufacturing transmission assemblies for their tractors as well as for ECEL. Of course transmission assemblies meant for different D models of machines/vehicles will be of slightly different specifications from each other but as a whole transmission assemblies are one identifiable commercial product as already discussed. I also note E that the concerned persons of the noticee company themselves have admitted that transmission assemblies do emerge as identifiable goods. Statements of Sh. K.K. Kachroo, Manager Excise, Shri Vinod Ahuja, Plant Head, Sh. Ramesh Kumar Khurana, Chief Manager Production F all admit this fact. Even otherwise manufacturing of the tractors in the noticee's factory cannot be accepted as such a continuous process in which raw materials are fed in the machine at one end and final product emerges at another. Only in such a case, can it be believed that G there is no independent identifiable intermediate stage of goods. The procedure as adopted by the noticee is basically assembly of various parts & components and of course all these parts and accessories which are H manufactured by the noticee in their factory as identifiable

goods are excisable themselves. Therefore, the emergence of I.C. Engines is excisable and so also the ÿþemergence of the transmission assembly is also excisable. In fact in the case of Pratap Rajashtan Copper Foils Vs. CCE -1999(109) ELT 288 (T) it was held that duty is payable on intermediate products even if some minor processes were not carried to make the product marketable.

43. I also find that the noticee in their reply has laid great emphasis on their argument that their tractors are manufactured as a result of integrated manufacturing process on the assembly line and therefore there is no removal of intermediate goods, if any, in terms of Rule 9 or Rule 49. I have to reiterate that noticee's plea is inadmissible. In terms of Rule 9 and 49, intermediate goods emerging during such integrated assembly line production would be deemed to have been cleared for production and therefore liable to Central Excise duty. Besides facts of the case are entirely different as has been stated by the noticee company's concerned persons in their statements. Assembly of a vehicle or machine on line or otherwise still remains assembly i.e. various parts and components are either manufactured first by the assessee himself or procured from outside and then assembled to produce the resulting machine. All excisable goods emerging during such assembly or production are themselves excisable as intermediate goods meant for captive consumption unless or until specifically exempt. Transmission assembly is one such excisable intermediate product and therefore its duty liability ÿþis obvious. Therefore, I hold that these are independent, identifiable, commercial goods capable of being bought and sold in the market and, therefore, are

A excisable goods leviable to Central Excise duty under Section 3 of the Central Excise Act, 1944. That impugned transmission assemblies have been used captively in production of Tractors cleared at Nil rate of duty is not denied by the noticee. The captive consumption
B exemption Notification No. 67/95-C E dated 16.3.95, as amended, debars such intermediate products used in production of exempt final products, from the duty exemption under the notification. As the final product i.e.
C Tractors were exempt, the impugned transmission assemblies did attract Central Excise duty. I hold that all the observations in the show cause notice regarding excisability of the impugned goods are correct. I also note that as far as the classification of the product is
D concerned, the same has not been challenged by the noticee."

4. By the impugned judgment dated 27.5.2004, CESTAT dismissed the appeal holding:

E "6. We have considered the submissions of both the sides. The Central Excise duty is leviable on goods manufactured in India. "Manufacture" as per the judgment of the Supreme Court in the case of Union of India vs.
F Delhi Cloth and General Mills, 1977 (1) ELT (J 199) "implies a change .... and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

G The Supreme Court, after referring to various judgments on the concept of the manufacture, has laid down a two fold test for deciding whether the process is that of "manufacture" in Union of India vs. J. G. Glass, 1998 (97) ELT 5(S.C.) as follows, "First, whether by the said
H process a different commercial commodity comes into

existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said purpose." We find that this two fold tests laid down by the Supreme Court is satisfied in respect of the transmission assembly coming into existence during the course of manufacture of tractors by the Appellants. After assembly of various parts and components a new and different article known as transmission assembly emerges having a distinctive name, character and use and but for the manipulation undertaken by the Appellants, the parts and components would not have served the purpose which a transmission assembly performs. The impugned product is also marketable as the learned Senior Departmental Representative has mentioned the fact of its being imported by the Appellants themselves (Farmtrac Division); the clearance of the transmission assembly by the Appellants to their subsidiary company M/s. Escorts Construction Equipment Ltd. and the removal of transmission assembly by M/s. Tractors and Farm Equipment Ltd. The mere fact that the impugned product is meant only for the tractors manufactured by them will not mean that the impugned product is not capable of being brought to the market for being bought and sold. The Supreme Court in the case of A.P. State Electricity Board vs. CCE, Hyderabad, 1994 (70) ELT 3 (S.C.) has held that the marketability is essentially a question of fact to be decided in the facts of each case. The fact that the goods are not, in fact, marketed is of no relevance. So long the goods are marketable, they are goods for the purpose of Section 3 of the Central Excise Act. It is not necessary that the goods should be generally available in the market. We, therefore, uphold the finding in the impugned order

A that the transmission assembly is an excisable goods exigible to Central Excise duty."

5. Shri Lakshmikumaran, learned advocate for the appellant argued that the tractors manufactured by the B appellant (having engines of a capacity of less than 1800 CC) had no such thing as a Transmission Assembly. The so-called Transmission Assembly was only an aggregate of various items which connected the engine of the tractor with its wheels. Further, the so-called Transmission Assembly was specifically C designed for the appellant's tractor and was not saleable in the market. Also, not a single instance of sale in the market had ever taken place. In fact, the so-called Transmission Assembly was not something which came into existence at all but was part of a continuous process on the assembly line in D the appellant's factory of manufacture at the end of which a complete tractor came into existence. He further submitted that post 1.6.1998 in any case, the appellant had been paying 8% under Rule 57 CC on the value of the said Transmission E Assembly as required. It is only for the period upto August 1996 that would be in dispute. Even for this period, he contends that ultimately the figures would show that it was revenue neutral in that MODVAT credit reversed for this period would amount to 1.71 crores, the duty demand being approximately 2.43 F crores out of a total of 9.66 crores for this period of 8 months. He also argued that the duty demand was absurd in that the Transmission Assembly of TAFE which is said to be the same as that of the petitioner's was only 13,000 rupees per piece as opposed to the highly inflated figure of Rs.53,790/-. If the G figure of Rs.13,000/- is to be taken, it is clear that the reversal of MODVAT credit would amount to much more than the duty demand itself. He further argued that in any case since there was no fraud or willful suppression of facts, invoking the extended period of limitation was not in order and that in any H

case the show cause notice being beyond one year of the stated period would have to be quashed on this ground alone. A

6. Shri Jaideep Gupta, learned senior counsel for the revenue contended that the Transmission Assembly was very much excisable goods known to the market as such from the statements of the appellants themselves. Further, the revenue had discharged its burden by oral and documentary evidence which showed beyond doubt that Transmission Assembly of tractors were excisable goods in that a new commodity came into existence known to the market as such. It is completely irrelevant that no sale actually took place of any such Transmission Assembly. It is enough to show that the said goods were capable of being sold which, undoubtedly, they were. He very fairly stated that on valuation, if necessary, the matter could be remanded. He also stated that the extended period of limitation was available in the present case as the appellants on their own showing knew that the intermediate product of Transmission Assemblies was marketable as such and had suppressed this fact while claiming exemption of excise duty on the finished product, namely, the tractor. B C D E

We have heard learned counsel for the parties. It is important in matters like this to begin at the beginning. Entry 84 List I of the 7th Schedule of the Constitution of India reads as follows: F

"SEVENTH SCHEDULE

[Article 246]

List I — Union List G

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

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A (b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

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7. It is clear on a reading of this Entry that a duty of excise is only leviable on "goods" manufactured or produced in India. "Goods" has been defined under Article 366 (12) as follows:

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"366. **Definitions.**—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

D

(12) "goods" includes all materials, commodities and articles;"

8. Each of these three expressions has been defined

E in the Shorter Oxford English Dictionary as follows:-

"Materials" – the matter of which a thing is or may be made; the constituent parts of something.

F "Commodities" – a thing of use or value; a thing that is an object of trade; a thing one deals in or makes use of.

"Articles" - a particular item of business.

9. Although the definition of "goods" is an inclusive one,

G it is clear that materials, commodities and articles spoken of in the definition take colour from one another. In order to be "goods" it is clear that they should be known to the market as materials, commodities and articles that are capable of being sold.

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10. In the basic judgment which has been referred to in every excise case for conceptual clarity, namely, **Union of India v. Delhi Cloth. & General Mills Co. Ltd.**, 1963 Suppl. 1 SCR 586, this Court held that for excise duty to be chargeable under the constitutional entry read with Section 3 of the Central Excise and Salt Act, two pre-requisites are necessary. First, there must be "manufacture" which is understood to mean the bringing into existence of a new substance. And secondly, the word "goods" necessarily means that such manufacture must bring into existence a new substance known to the market as such which brings in the concept of marketability in addition to manufacture. A large number of judgments have explained what is meant by marketability in this context. In **A.P. State Electricity Board v. Collector of Central Excise, Hyderabad**, (1994) 2 SCC 428, this Court referred to a large number of previous judgments. Firstly, it referred to Union v. Delhi Cloth and General Mills. It then referred to **South Bihar Sugar Mills Limited V. Union of India,** (1968) 3 SCR 21, in which kiln gas which was a mixture of gases generated during a process of burning limestone with coke in a lime kiln was held not to be a marketable commodity. Since it was a mixture of gases and not only carbon dioxide, it was clear that it was not known to the market as such. Carbon dioxide was only a component of kiln gas, the content of which ranged from 27 to 36.5%. The Court also referred to the decision in **Union Carbide India Limited v. the Union of India,** (1986) 2 SCC 547, in which aluminum cans in crude form used as a torch bodies were held to be not capable of sale to a consumer in their crude and unfinished form. To be made saleable, such cans would have to undergo various processes such as, trimming, threading and re-drawing. The Court also referred to **Bhor Industries Ltd. v. Collector of Central Excise, Bombay,** (1989) 1 SCC 602. In that case, it was held that crude PVC films manufactured as an intermediate product and

A used in captive consumption of other goods was not marketable, not being known to the market as such. The Court also referred to **CCE v. Ambalal Sarabhai,** (1989) 4 SCC 112 in which an intermediate product, namely, starch hydrolysate was not marketable in that it was highly unstable
B and fragmented quickly losing its character in a couple of days. After referring to all these judgments, the Court held:

> "10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found
> C to be not marketable. Whether it is refined oil (non-deodorised) concerned in *Delhi Cloth and General Mills* [1963 Supp 1 SCR 586 : AIR 1963 SC 791] or kiln gas in *South Bihar Sugar Mills* [(1968) 3 SCR 21 : AIR 1968 SC 922] or aluminium cans with rough uneven
> D surface in *Union Carbide* [(1986) 2 SCC 547 : 1986 SCC (Tax) 443 : (1986) 2 SCR 162] or PVC films in *Bhor Industries*[(1989) 1 SCC 602 : 1989 SCC (Tax) 98 : (1989) 1 SCR 382] or hydrolysate in *Ambalal*
> E *Sarabhai* [(1989) 4 SCC 112 : 1989 SCC (Tax) 584 : (1989) 3 SCR 784] the finding in each case on the basis of the material before the Court was that the articles in question were not *marketable* and were not known to the market as such. The 'marketability' is thus essentially a
> F question of fact to be decided on the facts of each case. There can be no generalisation. <u>The fact that the goods are not in fact marketed is of no relevance.</u> So long as the goods are marketable, they are goods for the purposes of Section 3. <u>It is also not necessary that the</u>
> G <u>goods in question should be generally available in the market.</u> Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the
> H appeals before us, the fact that in Kerala these poles

are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The appellant's own case before the excise authorities and the CEGAT was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself — though not pressed before us — is adequate to demolish the case of the appellant. In our opinion, therefore, the conclusion arrived at by the Tribunal is unobjectionable."

11. In **Indian Cable Co. Ltd. v. Collector of Central Excise, Calcutta & Ors.**, (1994) 6 SCC 610, this Court held:-

"10. We are of the view that the provisions of the Act mandate that a finding that the goods are marketable is a prerequisite or sine qua non for the levy of duty. Section 3 of the Act is the charging section:

"3. *Duties, specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.*— There shall be levied and collected in such manner as may be prescribed duties of excise on *all excisable goods* other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 ...."

Section 2(*d*) defines "excisable goods". We have quoted the definition in para 5 supra. The word 'goods' is not defined in the Act.

A 11. After adverting to the aforesaid definition of "excisable goods" and the meaning of the word 'goods', a Constitution Bench of the Supreme Court in *Union of India* v.*Delhi Cloth and General Mills* [AIR 1963 SC 791 : 1963 Supp (1) SCR 586] stated in paragraph 17 thus:

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"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.*" (emphasis supplied)

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12. In a series of decisions, this Court has held that 'marketability' is an essential ingredient, to hold that an article is dutiable or exigible to duty of excise. The important decisions of this Court which have laid down

D the law on this aspect are the following: (1) *Union of India* v. *Delhi Cloth and General Mills Co. Ltd.* [AIR 1963 SC 791 : 1963 Supp (1) SCR 586] (2) *South Bihar Sugar Mills Ltd.* v. *Union of India* [AIR 1968 SC 922 : (1968) 3 SCR 21] (3) *Bhor Industries Ltd.* v. *CCE* [(1989) 1 SCC

E 602 : 1989 SCC (Tax) 98] (4) *Hindustan Polymers* v. *CCE* [(1989) 4 SCC 323 : 1990 SCC (Tax) 118 : (1989) 43 ELT 165] (5) *CCE* v. *Ambalal Sarabhai Enterprises (P) Ltd.* [(1989) 4 SCC 112 : 1989 SCC (Tax)

F 584 : (1989) 43 ELT 214 : JT (1989) 3 SC 341] (6) *Union Carbide India Ltd.* v. *Union of India* [(1986) 2 SCC 547 : 1986 SCC (Tax) 443 : (1986) 24 ELT 169 : JT 1986 SC 453] (7) *A.P. State Electricity Board* v. *CCE* [(1994) 2 SCC 428 : JT (1994) 1 SC 545] .

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13. In the latest decision in *A.P. State Electricity Board* v. *CCE, Hyderabad* [(1994) 2 SCC 428 : JT (1994) 1 SC 545] , one of us (B.P. Jeevan Reddy, J.) speaking for the Bench succinctly stated the law thus at pages 549

H and 550:

"Marketability is an essential ingredient in order to be dutiable under the Schedule to the Act .... The 'marketability' is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. *The fact that the goods are not in fact marketed is of no relevance*. So long as the goods were marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers.... The marketability of articles *does not depend upon the number of purchasers* nor is the market confined to the territorial limits of this country."

(emphasis supplied)

'Marketability' is a decisive test for dutiability. It only means 'saleable', or "suitable for sale". It need not be in fact 'marketed'. The article should be capable of being sold or being sold, to consumers in the market, as it is — without anything more. The Appellate Tribunal has not adverted to the above vital aspects nor has it entered a finding that the PVC compound (granules)is a "marketable product" as understood in law. The Appellate Tribunal was swayed by the fact that the conversion of PVC resin into PVC compound by the process employed by the appellants amounts to 'manufacture' within the meaning of Section 2(*f*) of the Act and that by itself will justify the levy of duty. In our view, this is a palpable error committed by the Tribunal. In the absence of a finding, that the goods are 'marketable' i.e. saleable or suitable for sale, we hold that the order of the Appellate Tribunal

A is infirm. It should be set aside and we hereby do so. We order a remit of the matter to the Appellate Tribunal to consider the appeal afresh and dispose of the same in accordance with law. There shall be no order as to costs in this appeal."

B

12. In **Moti Laminates (P) Ltd. v. Collector Central Excise, Ahmadabad**, (1995) 3 SCC page 23, this Court held that an intermediate product, namely, resols, not being marketable would not be exigible to duty. After referring to several earlier judgments, this Court held:

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"11. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An article does not become goods in common parlance unless by production or manufacture something new and different is brought out which can be bought and sold. In *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.* [AIR 1963 SC 791] , a Constitution Bench of this Court while construing the word 'goods' held as under:

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"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."

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Therefore, any goods to attract excise duty must satisfy the test of marketability. The Tariff Schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being bought and sold."

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13. A large part of the arguments ranged around the

decision in **Union of India (UOI) & Ors. v. Sonic Electrochem (P) Ltd. & Anr.**, 2002 (145) E.L.T. 274. In this judgment the question that arose for decision was whether the plastic body of electro mosquito repellent was excisable goods. This Court held:

"7.....The germane question is whether it has marketability. The plastic body is being manufactured to suit the requirements of the EMR of the respondents and is not available in the market for being bought and sold. It is not a standardised item or goods known and generally dealt with in the market. It is being manufactured by the respondents for its captive consumption. It is not a product known in the market with any commercial name.

9. It may be noticed that in the cases referred to in the passage, quoted above, the reasons for holding the articles 'not marketable' are different, however they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase plastic body of EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known

A product. For these reasons, the plastic body, which is a part of the EMR of the respondents, is not 'goods' so as to be liable to duty as parts of EMR under para 5(d) of the said exemption notification."

B 14. From this judgment, Shri Lakshmikumaran wished to emphasise that, as in the said judgment, Transmission Assemblies were not available in the market for being bought and sold, they were not excisable goods not being marketable. As has correctly been pointed out by Mr. Gupta, learned senior C counsel appearing on behalf of the Revenue, what was held in this judgment is that the product should not be known in the market with any commercial name. The moment a product is commercially known in the sense of fulfilling the practical test of being known to persons in the market who buy and sell, the D test is satisfied. The fact that the product is generally not bought or sold or has no demand in the market is irrelevant. It was held in the said judgment that the plastic body is not known as a commercially distinct product in the market and, therefore, if E a manufacturer is asked to replace such body, it would not be replaceable not being a commercially known product.

15. The facts in the present case show that Transmission Assemblies of tractors are commercially known products as F has been pointed out above. The fact that not a single sale of such Assembly has been made by the appellants is irrelevant. This being the case, we are of the view that the Transmission Assembly of the tractor on the facts before us is clearly an intermediate product which is a distinct product commercially G known to the market as such. On this ground therefore, the appellants are not liable to succeed.

16. However, the appellants are on firm ground when they say that the extended period of limitation could not have H been invoked in the present case. In their reply to the show

cause notice, the appellants stated: A

"20.2 It is submitted that the noticees have been manufacturing tractors right from 1965 onwards till date. The manufacturing process undertaken by the noticees has been made known to the Department innumerable B number of times. Consequent1y the proposal to invoke the extended period of limitation in the present case is incorrect and the same is liable to be set aside.

20.3 The Noticee points out that just like the department C raised the issue with regard to the IC engines in the year 1994-95, similarly the department is raising the issue in regard to the transmission assembly by the present Show Cause Notice. Therefore the dept. cannot allege any suppression or fraud on the part of Noticee. D

20.4 However, that is not to say that there has been any contumacious conduct or an intent to evade duty on the part of the noticees. In regard to the transmission assemblies which arise on the assembly line, if they are E used in the dutiable tractors, they would be exempt under Captive Consumption Exemption Notification No.67/95-CE dated 16.3.95.

20.5 In regard to transmission assembly going into the F exempted tractor, the department has now raised the issue that they are dutiable and there is no exemption notification for such transmission assemblies. Further, that the Noticee had not claimed NIL rate of duty for transmission assemblies used within the factory for G manufacture of tractors.

20.6 The Noticee submits that they never entertained a belief that the transmission assembly would be dutiable and consequently, when such transmission assemblies H

A arose on the assembly line, whether they go into the exempted tractor or dutiable tractor, Transmission ÿþAssembly as an item was not mentioned separately in the classification list. This shows their bona fides and does not lead to an inference that there was non-mention
B of the transmission assemblies in the classification list with ulterior motive.

20.7 The Noticees submit that declarations of the term "Transmission" appearing under Heading No.87.08
C showing that the rate of duty applicable is 15% and the department knowing fully well that tractors have been manufactured, should have raised the issue regarding the transmission assembly at the earliest and not by invoking the extended period as done in the present Show
D Cause Notice. The number of Transmission cleared on payment of duty to ECEL over the entire period from Jan.1996 to May, 1998 is very meagre as compared to the total number of tractors (both dutiable and exempted)
E cleared during the period. It is clear that only one Transmission Assembly is used in one tractor. Consequently, the Department knew that duty was not being paid on captively consumed Transmission Assemblies. Hence, extended period is not invocable.
F Thus, the department was fully aware that the tractors have been manufactured and a transmission assembly is made at the intermediate stage. Nothing prevented the department from raising demands within the permissible shorter period of limitation under Section
G 11A.

21. The department CII11WI plead ignorance that they were not aware that in a tractor a transmission assembly arises at the intermediate stage. Thus, the noticee
H entertained a bona fide belief that since the transmission

assembly formed a part of the integrated assembly line for manufacturing tractors, there was no removal or exigibility of Transmission Assembly. Nothing prevented the department from raising a similar issue as to dutiability of Transmission Assemblies as they raised in regard to I.C. Engines arising at the intermediate stage, which was done in 1995.

22. That in fact, the Show Cause Notice itself terms the issue of manufacture and captive consumption of transmission assemblies for tractors is the same as that for I.C. Engines. However, knowing fully well that Transmission Assembly comes into existence at the intermediate stage, the department never raised the issue. This implies that in the present proceedings, assuming without admitting duty is payable on the transmission assembly, the same was not being paid due to a bona fide error. The same belief was entertained on the part of the Noticees as well as the Department during the relevant period that transmission assemblies going into the exempted tractor do not attract duty."

17. Added to this, the appellants have also clearly stated that not a single Transmission Assembly has in fact been sold by them in the market. On these facts, we are of the opinion that the appellants would fall within the test laid down in two judgments of this Court. In **Padmini Products v. Collector of Central Excise, Bangalore**, 1989 (43) E.L.T. 195, this Court held:

"8. Shri V. Lakshmi Kumaran, learned counsel for the appellant drew our attention to the observations of this Court in *CCE* v. *Chemphar Drugs and Liniments, Hyderabad* [(1989) 2 SCC 127 : 1989 SCC (Tax) 245] where at p. 131 of the report, this Court observed that in

A order to sustain an order of the Tribunal beyond a period of six months and up to a period of five years in view of the proviso to sub-section (1) of Section 11-A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or
B erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was
C observed by this Court that something positive other than mere inaction or failure on the part of the manufacturer or producer of conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established before it is saddled with any
D liability beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a
E particular case.

.....As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was
F scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there
G was scope for confusion and the appellant believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that behalf, when there was no
H

contrary evidence that the producer or the manufacturer knew these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act. If the facts are otherwise, then the position would be different."

18. Similarly in **Continental Foundation Joint Venture Holding v. Collector of Central Excise, Chandigarh-I**, (2007) 10 SCC 337, this Court held:

"14. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful", preceding the words "misstatement or suppression of facts" which means with intent to evade duty.The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement of fact must be wilful.

13. Factual position goes to show that the Revenue relied on the Circulars dated 23-5-1997 and 19-12-1997. The Circular dated 6-1-1998 is the one on which the appellant places reliance. Undisputedly, view expressed by CEGAT in *Continental Foundation Joint Venture case* [*Continental Foundation Joint Venture* v. *CCE*, (2002) 150 ELT 216 (Tri-Del)] was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not

A considered these aspects correctly. Contrary to the factual position, CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly
B goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11-A of the Act.

12. The expression "suppression" has been used in the
C proviso to Section 11-A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop (*sic* evade) the payment of duty.
D Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it
E suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with
F the knowledge that the statement was not correct."

19. Judged by this test, it is clear that on facts in the present case there was no suppression on the part of the appellants nor was there any willful attempt to evade duty. As
G stated by the appellant, the appellant has been manufacturing tractors from 1965 onwards. There has never been any change in the manufacturing process. In the year 1994-95, IC engines were stated by the department to contain Transmission Assemblies, which were dutiable. On receiving a reply from
H the appellant, the department did not levy any excise duty on

such Transmission Assemblies. The show-cause notice itself stated that the issue of manufacture and captive consumption of Transmission Assemblies for tractors is the same as that for IC engines. These facts, coupled with the fact that not a single Transmission Assembly of tractors manufactured by the appellant had been sold makes it clear that there was no suppression or any intent to evade excise duty in the present case. We feel that the show cause notice needs to be quashed on this ground alone. Accordingly, the appeal is allowed, and the judgment dated 27.5.2004 passed by CESTAT is set aside.

Civil Appeal Nos.9469-9470 of 2010

20. This case has similar facts. We are concerned with the period 1.4.1997 to 31.5.1998. The show cause notice in this case was issued on 1.5.2002, in which the extended period of limitation was invoked as follows:-

> "M/s. TAFE have filed the declaration under Rule 173B of Central Excise Rules, 1944, during the year 2000-2001, for the manufacture of product viz., Transmission Assembly falling under Chapter Sub-heading No.8708.00, and cleared the said product on payment of duty under Invoice No.1120969 dated 21.6.2000. Never before in the past M/s. TAFE have declared this product along with other factory finished products for which duty was paid by them. Hence, necessary verification was conducted in order to know whether any such sub-assemblies were manufactured and cleared by the assessee for use in the exempted tractors.
>
> 4. M/s. TAFE have manufactured the sub-assemblies as listed in the Annexure-I and Annexure-II for the tractors Model No. TAFE 25 and TAFE 30 inside the factory for captive use in the production of tractors. The details of process of manufacture of such sub-assemblies are

A explained in Annexure-III. As per Clause (ii) to Notification No.67/95 dated 16-3-1995 all inputs specified in column 1 of the Table in the said Notification which also includes inputs falling under Chapter Heading 87 of Central Excise Tariff Act, 1985, manufactured in a B factory and used within the factory of production in or in relation to the manufacture of the final products are exempt from the whole of the excise duty due thereon, provided the final product is chargeable to duty. As per this notification, M/s TAFE have paid duty on all the C goods falling under Chapter Sub-Heading 87.08, used in the manufacture of Tractors of engine capacity less than 1800cc which are exempted, except the sub-assemblies manufactured and used in the exempted D tractors. Therefore, it appears that M/s TAFE are liable to pay duty on all the sub-assemblies manufactured (as per Annexure-I and II), and used in the Tractors which are exempt for the period from April, 1997 to May, 1998.

E 5. M/s. TAFE have not brought to the notice of the manufacture of sub-assemblies to the Department with the intention to evade payment of excise duty. They have willfully suppressed the fact of the manufacture of the sub-assemblies from the knowledge of the Department F and cleared the same without payment of duty for use in the manufacture of Tractors, which are exempted. It can be seen from the process of manufacture that the making of the independent, sub-assemblies are inevitable in the Tractor build. But, M/s TAFE chose to declare only the G parts constituting these sub-assemblies as factory finished items and not sub-assembly. Whether these factory finished items and bought out, items, when assembled will form a sub-assembly has not been declared by them. M/s. TAFE have chosen not to declare H the sub-assemblies willfully in order to evade payment

of duty."

21. In the reply to the show cause notice, the respondents stated that they had never sold transmission assemblies in the market and that their price list does not carry a list price for this item. The only removal ever made was during the warranty period of one tractor and this one removal does not justify the fact that transmission assemblies have a market. It was further stated that had the respondents known that transmission assemblies were excisable, they would have claimed exemption as the finished product was exempt. Further, Transmission Assembly is only recognized as an Assembly line intermediate product and not as a product in itself which is separately identifiable as in the case of other Assemblies such as axel shaft, engine, gear parts, instrument panels, etc. The difference in this case is that *vide* an order dated 30.4.2004 the authorities found in favour of the respondents on merits holding that there was neither manufacture nor marketability of the Transmission Assemblies in question. This was confirmed in appeal by CESTAT by the impugned judgment dated 12.11.2009.

22. In view of what is stated in Civil Appeal No.6561 of 2004, the part of the order in original and the CESTAT order on merits have to be set aside. However, for the self-same reasons as are contained in Civil Appeal No.6561 of 2004, we hold that the extended period of limitation is not available as we are satisfied that the reply extracted above of the respondent shows that the respondent bona fide believed that Transmission Assemblies were not dutiable. In the circumstances, the appeals of the revenue shall stand dismissed on this ground.

C.A. No.457 of 2006

23. The facts in this appeal are as follows. The period

A involved is April, 1996 to May, 1998 and the show cause notice is dated 1.5.2001. As the impugned judgment in this case by CESTAT merely follows the Escorts case i.e. Civil Appeal No.6561 of 2004, we hold that the finding of the authorities on merits is correct. However, in this case also the extended B period of limitation is not available to the revenue.

24. In the order dated 26.12.2001, the Commissioner stated:-

C "In the present inquiry which was undertaken by the proper officer, it was found that the transmission assembly or chassis assembly which is classifiable under Sub-heading 87.08 of the 1st Schedule to the Central Excise Act was not declared by the noticee in the classification D list. Therefore, their plea that they have declared the chassis thereof does not cover transmission assembly or chassis assembly. They themselves in their reply have admitted that the chassis is the main frame that supports the body and the engine has to be so framed as to receive, E hold and fasten an engine and other components of the tractors (Para 14 of the reply). Thus, transmission assembly is not the chassis and since the noticee have failed to declare the transmission assembly/ chassis F assembly, the suppression of fact is clear.

The intention to evade duty is clear from the statement of Shri P.C. Kale dated 12.04.2001 as the noticee was knowing that duty is required to be paid on G the goods which go into the assembly of the tractor of engine capacity less than 1800 CC. As such tractors were exempt from duty during the relevant period. Knowing this fact very well and not declaring the transmission assembly or chassis assembly in the H classification declaration and clearing such transmission

assembly/ chassis assembly without payment of duty without recording their production in the statutory records and without filing the RT-12 returns for the production and clearance of such transmission assembly/ chassis assembly clearly established that this was done with an intention to evade payment of duty." A B

25. We find that in successive declarations made by the assessee in this case starting from 16.3.1995 the assessee had declared not merely the tractor but the chassis therefor. The assessee bonafide believed that the declaration of the chassis would suffice as according to them Transmission Assemblies were not taxable goods. The intention to evade duty is according to the Commissioner made out from a statement made by Shri P.C. Kale dated 12.4.2001. It is pointed out by learned counsel appearing on behalf of the appellant that in the memorandum of appeal filed against the order in original, Shri P.C. Kale was never in the employment of the appellant during the relevant period as he joined the appellant only in July, 2000. Apart from this, it is also pointed out that the appellant is a public sector company governed by a Board of Directors consisting of IAS Officers. Be that as it may, we are satisfied that there was no attempt to evade excise duty and in this case also the show cause notice being beyond the period of limitation of one year would have to be quashed on this ground. On this ground alone, therefore, the impugned judgment dated 3.10.2005 is set aside. The appeal is allowed accordingly. C D E F

Kalpana K. Tripathy Appeals allowed. G