

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. I

EXCISE APPEAL NO. 52469 OF 2022

(Arising out of the Order-in-Original No. 115/Commr/Delhi East/AP/2022 dated 13.09.2022 passed by Commissioner of Central Tax, GST Delhi East)

IPL Biologicals Limited

(Formerly Known as International Panaacea Limited)
4th Floor, M2K Corporate Park,
Sector-51, Gurugram,
Haryana-122003

...Appellant

versus

**Commissioner of Central Tax,
GST Delhi East**

C.R. Building, I.P. Estate,
New Delhi-110002

...Respondent

Appearance

Shri B.L. Narasimhan and Ms. Daliya Singh, Advocates for the Appellant
Shri Unmesh Kumar, Authorised Representative for the Department

CORAM: **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
 HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 09.09.2024
DATE OF DECISION: 11.11.2024

FINAL ORDER NO. 59434/2024

JUSTICE DILIP GUPTA:

IPL Biologicals Limited ¹ (formerly known as International Panaacea Limited), has filed this appeal to assail the order dated 13.09.2022 passed by the Commissioner of Central Tax, GST Delhi East ², by which the demand of central excise duty of Rs. 1,00,28,180/- has been confirmed and has been ordered to be

1. the appellant
2. the Commissioner

recovered with interest under section 11A of the Central Excise Act 1944³.

2. The appellant is engaged in the manufacture of bio-fungicides and bio-insecticides, namely Sanjeevni (Trichoderma Viride), Phasal Rakshak (Pseudomonas Fluorescens), Kalichakra (Metarhizium Anisopliae) and Daman (Beauverio Bassiana). All these four products will collectively be referred to as "products". The products were cleared by appellant till February 2009 on payment of excise duty at full tariff rate of 14.42% ad volerem by classifying them under Excise Tariff Item⁴ 3808 99 10.

3. However, pursuant to the decision of the Tribunal in **NMS Babu vs. Commissioner of Central Excise, Bangalore**⁵, the appellant started classifying the products under ETI 3002 90 30, as the products of the appellant were similar to the products dealt in **NMS Babu**, wherein the Tribunal decided the classification of an identical product under ETI 3002 90 30. The appellant, therefore, discontinued payment of excise duty w.e.f. March, 2009, and cleared the products at NIL rate by classifying them under ETI 3002 90 30, being cultures of micro-organisms. The appellant gave intimation of this fact to the department through a letter dated 27.02.2009.

4. The department, however, directed the appellant, by a letter dated 17.03.2009, to pay excise duty on clearance of bio-pesticides under ETH 3808.

5. The appellant, by letter dated 13.04.2009 filed a detailed write-up of the manufacturing process, technical literature, composition and

3. the Central Excise Act

4. ETI

5. 2006 (198) E.L.T. 528 (Tri.- Bang.)

end-use of each product along with approval copy dated 06.11.2008 from Indocert regarding the organic nature of the products to differentiate them from chemical pesticides. By another letter dated 13.05.2009, the appellant clarified that the products were correctly classified under ETI 3002 90 30.

6. The Excise Officers visited the appellant factory on 04.03.2010 and raised certain queries. The samples of all the products were submitted by the appellant by a letter dated 12.03.2010.

7. The appellant also filed an appeal against letter dated 17.03.2009 sent by the Assistant Commissioner before the Commissioner (Appeals). The said appeal was disposed of by order dated 27.08.2010 with an observation that the classification dispute of the products was under consideration and the department letter is not an appealable order. However, liberty was given to avail the appellate remedy after issuance of the order.

8. A show cause notice dated 23.04.2010 was issued to the appellant proposing classification of the products under ETI 3808 99 10 as pesticides and a demand of central excise duty amounting to Rs. 1,00,28,180/- on the products cleared during the period from April 2009 to January 2010 without payment of excise duty was proposed as the appellant had erroneously classified the products under ETI 3002 90 30 at Nil rate of duty. The demand was proposed with interest under section 11AB and imposition of penalty under section 11AC of the Central Excise Act.

9. The appellant filed a reply to the show cause notice and denied the allegations.

10. The Commissioner, by the order dated 29.04.2011, held that the

products were classifiable under ETI 3808 99 10 instead of ETI 3002 90 30 and confirmed the demand of differential excise duty with interest and penalty.

11. The aforesaid order dated 29.04.2011 passed by the Commissioner was assailed by the appellant before the Tribunal. The Tribunal, by an order dated 12.03.2012, remanded the matter to the Commissioner for a fresh adjudication. The relevant portion of the order passed by the Tribunal is reproduced below:

"7. We have gone through the impugned order of the Commissioner and have appreciated the submissions made by both the sides. **It seems that there is no dispute about the fact that the appellant's products are formulation of micro organisms as is itself mentioned in the show cause notice as also in the impugned order. Though the appellant have placed strong reliance on the precedent decisions of the Tribunal, the Adjudicating Authority has chosen to ignore the same and have decided the issue independently, without taking note of the earlier judgments. The fair process of adjudication requires the adjudicating authority to deal with each and every plea raised by an assessee and specifically the decisions, which apparently covers this issue.** In its fairness even if the adjudicating authority was of the view that the relied upon decision deal with a different products or appellant's product is not covered by the said decisions, he was within his rights to distinguish the same, instead of a convenient pass over or skip.

8. **In view of the foregoing discussion, we deem it fit to set aside the impugned order, remand the matter to the Commissioner for *de novo* decision, in the light of the two precedent decisions of the Tribunal referred supra. We make it clear that the remand is being made only on the above ground and we have otherwise not expressed any opinion on the merits of the case.**

The appellant are at liberty to raise all the issues, as they may deem it fit before the Commissioner, in remand proceedings.”

(emphasis supplied)

12. Pursuant to the directions issued by the Tribunal, the appellant sent letters to the Commissioner to adjudicate the show cause notice but the Commissioner did not adjudicate the show cause notice and transferred the matter to the call book for the reason that the two decisions of the Tribunal in **NMS Babu** and **T. Stanes & Co. vs. Commissioner of Central Excise, Coimbatore**⁶, on which reliance was placed by the appellant, had been assailed by the department before the Supreme Court and the Civil Appeals were pending. The said letter sent by the Deputy Commissioner (Adj) to the appellant is reproduced below:

“Please refer to your letter dt. 23.08.2014 in respect of above order.

In this regard, it is informed that the Hon’ble CESTAT has remanded back the instant case for de-novo adjudication in the light of following two decisions:-

- (i) M/s. T Stance & Co. vs. CCE, Coimbatore – 2009 (235) E.L.T. – 183 (Tri.-Chennai)
- (ii) M/s. NMS Babu vs. CCE, Bangalore – 2006 (198) E.L.T. – 528 (Tri.- Bangalore)

As in both the above cases, the department has gone in appeal in the Hon’ble Supreme Court and both the appeals are still pending in the Apex Court, the de-novo adjudication proceedings in the instant case has been kept in abeyance till finalization of the issue in the Apex Court. This case will be taken up for adjudication only after the Hon’ble Supreme Court gives its final verdict in both the appeals.”

(emphasis supplied)

6. 2009 (235) E.L.T. 183 (Tri.-Chennai)

13. The appellant sent another letter dated 02.08.2022 to the Commissioner pointing out that the department had not challenged the order of the Tribunal in **NMS Babu** on the issue of classification of goods before the Supreme Court and so the order of the Tribunal in **NMS Babu** on the issue of classification issue had attained finality. The appellant also pointed out that the department had withdrawn the appeal in **T. Stanes** before Supreme Court on account of monetary limit and hence the order of the Tribunal in **T. Stanes** had also attained finality. Thus, as the decisions of the Tribunal in **NMS Babu** and **T. Stanes** had attained finality so far as the classification of the products is concerned, the matter should be decided by the Commissioner.

14. The Commissioner, after considering the submissions of the appellant, by order dated 13.09.2022 confirmed the demand of excise duty of Rs. 1,00,28,180/- under section 11A with interest under section 11AB of the Central Excise Act for the period from April 2009 to January 2010, but the penalty proposed under section 11AC of the Central Excise Act was dropped. The relevant portion of the order is reproduced below:

“31. **The Hon’ble CESTAT has further directed for deciding the case in light of the decision in the case of NMS Babu v. C.C.E., Bangalore** reported in 2006 (198) E.L.T. 528 (Tribunal.-Bang) **& T. Stanes and Co. v. C.C.E., Coimbatore** reported in 2009 (235) E.L.T. 183 (Tribunal. – Chennai).

32.1 **As far as decision in the case of NMS Babu v. C.C.E., Bangalore reported in 2006 (198) E.L.T.528 (Tribunal.-Bang) is concerned,** I find that the department while not accepting the same, preferred appeal with Hon’ble Apex Court.

32.2.1 The Apex Court decided the case on 19.09.2015 by way of remand. The operative part of the order as reported in 2015 (324) E.L.T. 3(S.C.) is as under:-

8. It is clear, therefore, that the sole basis on which the CESTAT has decided the issue of clubbing is bad in law. Equally, on the issue of suppression of material facts leading to the extended period of limitation being applicable to the first of the six Show Cause Notices, the CESTAT is equally cursory, relying upon one letter dated 20.07.1998 sent by the subsidiary company in which nothing is stated from which it can be said that there is suppression or otherwise of facts except the fact that M/s. Margo Bio Controls (P) Ltd. happens to be a 100 per cent subsidiary of the holding company viz., M/s P. J. Margo (P) Ltd.

9. **We are, therefore, of the opinion that this case should be remanded to the CESTAT to decide afresh as to whether any case for clubbing of excisable goods manufactured by the holding company and the subsidiary company is or is not made out on facts. Equally, the issue as to whether or not there has been suppression of material facts by both the aforesaid companies is also sent back for a re-determination on facts.**

10. As this is an old matter, we request the CESTAT to take up the matter and decide it within a period of six months from the date of receipt of a copy of this order.

32.2.2 On perusal of the above it is clear in no uncertain terms that the case has not attained finality as it has been remanded to the Hon'ble CESTAT for decision.

33.1 The Noticee has contended that the department has not contested the issue of classification and accordingly the issue stands settled in their favour. The assertion flows from Para 2 of the remand decision of the Apex Court which read as:-

2. A large number of issues were decided by the impugned judgment dated 25-10-2005 [2006 (198) E.L.T. 528 (Tribunal)], but Shri A.K. Panda, learned Senior Counsel appearing on behalf of the Revenue, has confined himself to two of these issues. According to him, the CESTAT has not dealt with whether a subsidiary company, viz., Respondent No. 3 in the present appeal, is only a dummy, consequent to which the excisable goods manufactured by it needs to be clubbed with its holding company, viz., Respondent No. 1. If this is done, it is an admitted position that the terms of Notification No. 7/97, dated 1-3-1997, which exempts Small Scale Units if the aggregate value of clearances of all excisable goods do not exceed three crores in the preceding financial year, will not apply as the aggregate value of excisable goods produced from both companies together would exceed three crores.

33.2 I find that the Hon'ble CESTAT in their remand order had directed to decide the case in light of two precedent decisions which included T. Stanes and Co. v. C.C.E., Coimbatore reported in 2009 (235) E.L.T. 183 (Tribunal- Chennai).

34.1 As far as decision rendered in the case T. Stanes and Co. v. C.C.E., Coimbatore is concerned, I find that the department has not accepted the same and had preferred appeal with Hon'ble Apex Court.

34.2 However, later the department sought withdrawal on monetary grounds. The Apex Court

while permitting withdrawal passed following order:-

ORDER

In terms of the change brought in the litigating policy of the Government deciding to withdraw all the matters pending for adjudication before this court in which tax effect / revenue involved is less than Rupees Two Crore, learned counsel for the appellant (s)/ petitioner (s) seek permission for withdrawal of the instant appeals and the special leave petition (s).

Permission, as sought for, is granted.

Accordingly, the instant appeals and the special leave petition(s) are dismissed as withdrawn. **However, the questions of law are left open.**

34.3 A perusal of above, unequivocally bear out that the issue is wide open. The department as well as the Noticee are at liberty to adduce more evidences in their support.

34.4. Accordingly, the claim of the Noticee that issue has been settled in their favour is rejected.

(emphasis supplied)

15. After rejecting the claim of the appellant that the issue of classification of the products stood settled in view of the aforesaid two decisions of the Tribunal, the Commissioner proceeded to decide the issue of classification on merit. The relevant observations are:

38.1 In the present case, the products are admittedly manufactured using cultures of microorganisms as a basis along with other products. These Impugned products are put up in retail packings and sold in a ready to use condition. Therefore, they are not mere cultures of microorganism but are preparations in retail packings. Chapter CETH 3808 clearly states that the products coming under CETH 3808 should be put up in forms or packing for

retail sale or as preparation or articles. In the circumstances discussed above the product in question are rightly classifiable under CETH 3808 since, they use cultures of microorganism as a base, they are cleared as preparations and put up for retail sale and the end use as claimed by the party is that for controlling insects, pests and fungus.

38.2 I further find that in the case of M/s. T. Stanes & Co. the Original Authority in his order dated 25-10-2004 has examined the evidences and recorded his finding in which he states: "From the above, it is seen that the manufacturing process of the impugned goods consist of crushing, blending and mixing it with chemicals, curing and dispatching. Chemicals like Dihydrogen Artho Phosphate, Potasium, Potassium Dihydrogen Phosphate and muriate of Potash etc. are used at the time of broth preparation". Further, the meaning of the word "preparation" is discussed in Re Bayer Australia Ltd. Vs. Collector of Customs (NSW) (1985) 7 ALN N84 as follows: "That a product cannot be a preparation of an intermediate nature not presented in the form ready to be marketed". The learned Primary Judge accepted this definition and held that "a preparation is a presentation of a substance which is ready to be used for a particular application or purpose. In our respectful opinion this is the correct interpretation of the word preparation in heading 3808". **The findings of the Original Authority and the above case law clearly establish that the impugned products sold by M/s. T.Stanes & Co are disinfecting insecticidal etc. preparations based on cultures of microorganisms and as such merit classification under CETH 3808.**

39. For the above reasons, the decision in the case of NMS Babu Vs, CCE, Bangalore does not expound the correct position of law and hence the reliance placed thereon is not justified or proper."

(emphasis supplied)

16. This appeal has been filed to assail the aforesaid order dated 13.09.2022 passed by the Commissioner.

17. Shri B.L. Narasimhan assisted by Ms. Daliya Singh, learned counsel for the appellant made the following submissions:

- (i) The finding recorded in the impugned order that the products are not merely cultures of micro-organisms, but preparations with a base of such culture is clearly beyond the scope of the show cause notice as it alleged that the products are actually Biological Insecticide;
- (ii) The Commissioner was bound by the directions issued by the Tribunal in the order dated 12.03.2012 to examine the matter in the light of the judicial precedents but the impugned order has taken a view contrary to the aforesaid decisions. The Commissioner committed judicial impropriety in not following the binding precedents of the Tribunal in **NMS Babu** and **T. Stanes**, which decisions had attained finality; and
- (iii) In any view of the matter, the appellant had correctly classified the products under ETI 3002 90 30 as 'cultures of micro organisms'. The demand of duty is, therefore, liable to be set aside. Interest cannot also be demanded.

18. Shri Unmesh Kumar, learned authorised representative appearing for the department, however, supported the impugned order and submitted that:

- (i) The products are not merely 'cultures of micro-organisms' but 'preparations with the base of culture of micro-organisms and, therefore, merit classification under ETI 3808 99 10;

- (ii) The classification of a product under Chapter 38 is not dependent on the product containing any chemical merely because the Chapter is titled "Miscellaneous chemical products"; and
- (iii) The findings contained in the impugned order are not beyond the scope of the show cause notice.

19. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

20. The issue that arises for consideration in this appeal is as to whether the products deserve classification under ETI 3002 90 30 as contended by the appellant or under ETI 3808 99 10 as contended by the department.

21. When the matter had earlier come up for decision before the Tribunal against the earlier order dated 29.04.2011 passed by the Commissioner, the Tribunal noticed that though the appellant had placed reliance upon the decisions of the Tribunal in **NMS Babu** and **T. Stanes**, but the impugned order had ignored these two decisions and had decided the matter independently. The impugned order was, therefore, set aside and the matter was remanded to the Commissioner for a de-novo decision in the light of the two decisions of the Tribunal. The Tribunal, however, made it clear that it was not expressing any opinion on the merits of the case.

22. The Commissioner, instead of deciding the matter, placed the matter in the call book by letter dated 15.09.2014 for the reason that the appeals filed by the department before the Supreme Court against the orders of the Tribunal in **NMS Babu** and **T. Stanes** were pending.

The Commissioner also stated that the matter will be taken up for adjudication only after the Supreme Court decided the matter.

23. It needs to be noted that the Supreme Court decided the appeal filed by the department against the decision of the Tribunal in **NMS Babu** on 16.09.2015 (**Commissioner of Central Excise, Bangalore vs. P. J. Margo Pvt. Ltd.**⁷) and the relevant portion of the judgment of the Supreme Court is reproduced below:

"2. A large number of issues were decided by the impugned judgment dated 25-10-2005 [2006 (198) E.L.T. 528 (Tribunal)], but **Shri A.K. Panda, learned Senior Counsel appearing on behalf of the Revenue, has confined himself to two of these issues. According to him, the CESTAT has not dealt with whether a subsidiary company, viz., Respondent No. 3 in the present appeal, is only a dummy, consequent to which the excisable goods manufactured by it needs to be clubbed with its holding company, viz., Respondent No. 1.** If this is done, it is an admitted position that the terms of Notification No. 7/97, dated 1-3-1997, which exempts Small Scale Units if the aggregate value of clearances of all excisable goods do not exceed three crores in the preceding financial year, will not apply as the aggregate value of excisable goods produced from both companies together would exceed three crores.

3. **Mr. Panda has further argued that the CESTAT has not dealt with the ground of suppression of material facts by both the holding company and the subsidiary company and has merely referred to a single letter of the subsidiary company which does not lead to the position that suppression is not made out on facts.**

4. On the other hand, Shri S.K. Bagaria, learned Senior Counsel appearing on behalf of the Respondent Nos. 1 and 3, argued before us that the nine factors stated by the learned Commissioner of Central Excise in his order dated 12-10-2004, all of which showed that

7. **2015 (324) E.L.T. 3 (S.C.)**

Respondent No. 3 was, in fact, a dummy of Respondent No. 1, were only trotted out from the Show Cause Notice itself without any discussion of the detailed reply sent by Respondent Nos. 3 and 5 answering all these grounds to the Show Cause Notice.

5. We are of the view that the issue as to whether the excisable goods manufactured by the holding company and the subsidiary company have to be clubbed together has not been satisfactorily answered either by the learned Commissioner or by the CESTAT in the impugned judgment.

6. In the impugned judgment, the CESTAT, without adverting to either the facts stated in the Show Cause Notice or the reply thereto, directly arrived at a conclusion that the manufacture of the excisable goods by both the holding company and the subsidiary company cannot be clubbed only on the basis of a circular dated 29-5-1992. A cursory reading of the circular would show that it refers to a completely different Notification and not to Notification No. 7/97, dated 1-3-1997.

7. In fact, this Court, in 'Commissioner of Central Excise, New Delhi v. Modi Alkalies & Chemicals Ltd. & Ors. [2004 (7) SCC 569 = 2004 (171) E.L.T. 155 (S.C.)] has held that this very circular would have no relevance to notifications other than the Notification mentioned therein. This judgment was followed in 'Parle Bisleri Private Limited v. Commissioner of Customs and Central Excise, Ahmedabad' [2010 (14) SCC 378 = 2011 (263) E.L.T. 15 (S.C.)].

8. It is clear, therefore, that the sole basis on which the CESTAT has decided the issue of clubbing is bad in law. Equally, on the issue of suppression of material facts leading to the extended period of limitation being applicable to the first of the six Show Cause Notices, the CESTAT is equally cursory, relying upon one letter dated 20-7-1998 sent by the subsidiary company in which nothing is stated from which it can be said that there is suppression or otherwise of

facts except the fact that M/s. Margo Bio Controls (P) Ltd. happens to be a 100 per cent subsidiary of the holding company viz., M/s. P.J. Margo (P) Ltd.

9. We are, therefore, of the opinion that this case should be remanded to the CESTAT to decide afresh as to whether any case for clubbing of excisable goods manufactured by the holding company and the subsidiary company is or is not made out on facts. Equally, the issue as to whether or not there has been suppression of material facts by both the aforesaid companies is also sent back for a re-determination on facts.

10. As this is an old matter, we request the CESTAT to take up the matter and decide it within a period of six months from the date of receipt of a copy of this order.

11. The appeal is disposed of in the above terms."

(emphasis supplied)

24. The Supreme Court also decided **T. Stanes** on 24.11.2020 and the order is reproduced below:

"In terms of the change brought in the litigation policy of the Government deciding to withdraw all the matters pending for adjudication before this court in which tax effect/revenue involved than Repees Two Crore, **learned counsel for the appellant(s)/petitioner(s) seek permission for withdrawal of the instant appeals and the special leave petition(s).**

Permission, as sought for, is granted.

Accordingly, the instant appeals and the special leave petition(s) are dismissed as withdrawn. However, the questions of law are left open."

(emphasis supplied)

25. The Commissioner had to decide the matter after remand in the light of the two decisions of the Tribunal in **NMS Babu** decided on

25.10.2005 and **T. Stanes** decided on 23.10.2008, in view of the directions issued by the Tribunal.

26. It has, therefore, to be seen as to how the Commissioner has dealt with these two decisions.

27. In the context of the decision of the Tribunal in **NMS Babu**, the Commissioner observed that the department had not accepted the said decision and had filed an appeal before the Supreme Court. The Commissioner also observed that the decision of the Tribunal had not attained finality since the Supreme Court had decided the matter on 19.09.2015 by remanding the matter to the Tribunal. The contention of the appellant that the appeal filed by the department before the Supreme Court was not on the issue of classification of the products has been noted by the Commissioner in paragraph 33.1 of the order but has not been specifically dealt with by the Commissioner.

28. A perusal of the judgment of the Supreme Court in **NMS Babu** clearly indicates that the issue of classification of the products had not been raised by the department in the appeal filed by the department before the Supreme Court. What was contended by the department before the Supreme Court was in connection with only two issues. This is evident from a perusal of paragraph 2 of the judgment of the Supreme Court wherein it has been noticed that though large number of issues were decided by the Tribunal, but only two issues were raised by the learned counsel appearing for the department. The first contention of the department before Supreme Court was that the Tribunal had not dealt with the issue as to whether the respondent subsidiary company was only a dummy company, consequent to which the excisable goods manufactured by it would have to be clubbed with

the holding company. The second issue that was raised by the department before the Supreme Court was regarding suppression of material facts by both the holding company and the subsidiary company. The Supreme Court noticed that neither the Commissioner nor the Tribunal had satisfactorily answered the first issue raised by the department. It is for this reason that the Supreme Court remanded the matter to the Tribunal to decide afresh as to whether any case for clubbing of excisable goods manufactured by the holding company and the subsidiary company had been made out or not. The Supreme Court also remitted the matter regarding suppression of material facts by the holding company and the subsidiary company to the Tribunal for re-determination on facts.

29. The judgment of the Supreme Court is, therefore, confined to these two issues and merely because the matter was remitted to the Tribunal for a fresh decision does not mean that the order of the Tribunal on the other issues, including that on classification which had not been assailed by the department before the Supreme Court, had not attained finality. This is what was observed by the Supreme Court in **S. Shanmugavel Nadar vs. State of Tamil Nadu and Another**⁸. The Commissioner, on remand, was, therefore, bound by the decision of the Tribunal in **NMS Babu** regarding classification of the products.

30. It now needs to be noticed as to how the Commissioner has dealt with the order of the Tribunal in **T. Stanes**. The Commissioner noticed that the department had not accepted the decision of the Tribunal and had filed an appeal before the Supreme Court. The Commissioner further observed that though the appeal filed by the

8. (2002) Supp 8 SCC 361

department before the Supreme Court was dismissed on account of the monetary limits imposed by the Government for filing of appeals, but from the order of the Supreme Court it was clear that the questions of law had been left open. The Commissioner, therefore, felt that both the department as well as the appellant were at liberty to adduce evidence to support their contentions. It is for this reason that the contention of the appellant that the issue had been settled in favour of the appellant in **T. Stanes** was rejected by the Commissioner.

31. The view taken by the Commissioner that all the issues could be addressed by the Commissioner because the Supreme Court had left the question of law open is not correct. When the Supreme Court observed that the question of law had been kept open, it is obvious that the question of law would be considered by the Supreme Court in future. This certainly did not give liberty to the adjudicating officer to determine the issue afresh.

32. Thereafter, the Commissioner proceeded to examine the classification issue of the products on merits and held that the products in question were correctly classifiable under ETH 3808. To arrive at this conclusion, the Commissioner even went to the extent of placing reliance upon the order passed by the adjudicating authority in **T. Stanes**, which order had been challenged by the appellant and had been set aside by the Tribunal. The Commissioner then held that "the findings of the Original Authority and the above case law clearly establish that the impugned products sold by M/s. T. Stanes & Co are disinfecting insecticidal etc. preparations based on cultures of microorganisms and as such merit classification under CETH 3808".

Not only this, the Commissioner proceeded to also comment on the decision of the Tribunal in **NMS Babu** and observed that the said decision of the Tribunal does not expound the correct position of law and hence reliance placed on it by the appellant is not justified or proper. The relevant portion of the order passed by the Commissioner is again reproduced below:

“39. For the above reasons, the decision in the case of NMS Babu Vs, CCE, Bangalore does not expound the correct position of law and hence the reliance placed thereon is not justified or proper.”

33. The Commissioner should have realised that there were atleast two binding decisions of the Tribunal which governed the classification issue that was to be examined by him, but the Commissioner not only exceeded his jurisdiction in taking a view contrary to the two binding decisions, but even went to the extent of observing that the decision of the Tribunal in **NMS Babu** does not expound the correct position of law and hence reliance placed on this decision was not justified or proper. The Commissioner had no option but to follow the two decisions of the Tribunal and the observation made by the Commissioner that the decision of the Tribunal in **NMS Babu** does not “expound the correct position of law” is clearly against all settled principles of judicial discipline and may even be contemptuous in nature.

34. This observation made by the Commissioner compels us to remind the adjudicating authorities of the observations made by the Supreme Court and the High Courts on the issue relating to judicial discipline.

35. It would be pertinent to refer to the decision of Supreme Court

in **The Bhopal Sugar Industries Ltd. vs. the Income-Tax Officer, Bhopal**⁹. The Supreme Court pointed out that it would result in chaos in the administration of justice if a subordinate Tribunal refuses to carry out directions given to it by a superior Tribunal as this would be destructive of one of the basic principles of administration of justice. The observations of the Supreme Court are as follows:

“By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal.

It must be remembered that the order of the Tribunal dated April 22, 1954, was not under challenge before the Judicial Commissioner. That order had become final and binding on the parties, and the respondent could not question it in any way. As a matter of fact the Commissioner of Income-tax had made an application for a reference, which application was subsequently withdrawn. The Judicial Commissioner was not sitting in appeal over the Tribunal and we do not think that in the circumstances of this case it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in disregarding that order. **As we have said earlier, such view is destructive of one of the basic principles of the**

9. AIR 1961 SC 182

administration of justice. In fairness to him it must be stated that learned counsel for the respondent did not attempt to support the judgment of the Judicial Commissioner on the ground that no manifest injustice resulted from the refusal of the respondent to carry out the directions of a superior tribunal. He conceded that even if the order of the Tribunal was wrong, a subordinate and inferior tribunal could not disregard it; he readily recognised the sanctity and importance of the basic principle that a subordinate tribunal must carry out the directions of a superior tribunal."

(emphasis supplied)

36. This principle was also laid down by Supreme Court in **Dharma Chand Jain vs. The State of Bihar**¹⁰ and the observations are:

"The State Government being a subordinate authority in the matter of grant of a mining lease, was obliged under the law to carry out the orders of the Central Government as indicated above. But the State Government declined to do so on the ground that it had laid down a policy that the mining leases in respect of the area should be given only to those who were prepared to set up a cement factory. It was clearly not open to the State Government to decline to carry out the orders of the Central government on this ground, particularly because the Central Government was a tribunal superior to the State Government....."

37. In **Smt. Kaushalya Devi Bogra and others vs. The Land Acquisition Officer and another**¹¹, the Supreme Court also observed that the direction of the Appellate Court is binding on the courts subordinate thereto and that judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and followed. In this connection, the Supreme Court referred to the observations made by the House of Lords and the

10. AIR 1976 SC 1433

11. AIR 1984 SC 892

relevant portion of the judgment of the Supreme Court is reproduced below:

"The direction of the appellate court is certainly binding on the courts subordinate thereto. That apart, in view of the provisions of Article 41 of the Constitution, all courts in India are bound to follow the decisions of this Court. **Judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and followed.** It is appropriate to usefully recall certain observations of the House of Lords in *Broom v. Cassell & Co.*(1) Therein **Lord Hailsham**, L. C. observed:

"The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exist in this country, **it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tier.**"

Lord Reid added:

"It seems to me obvious that the Court of Appeal failed to understand Lord Delvin's speech but whether they did or not, I would have accepted them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House."

Lord Diplock observed at p. 874 of the Reports:

"It is inevitable in a hierarchical system of courts that there are decisions of the Supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal, I sometimes thought the House of Lords was wrong in over

ruling me. Even since that time there have been occasions, of which the instant appeal is one, when alone or in company. I have dissented from a decision of the majority of this House. **But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted."**

(emphasis supplied)

38. In this connection it will also be appropriate to refer to the decision of the Supreme Court in **Union of India vs. Kamlakshi Finance Corporation Ltd**¹². The order passed by the Assistant Collector not only ignored the order of the Collector (Appeals) remanding the matter, but also distinguished the decision of the Tribunal by observing that the decision of the Tribunal had not been agreed to by the Department as an appeal had been filed in the Supreme Court. The assessee filed a writ petition in the Bombay High Court to challenge the said order of the Assistant Collector. The High Court not only quashed the order passed by the Assistant Collector but also directed the Department to allocate the matter to a competent officer for passing a proper order. It is against this decision of the Bombay High Court that the Union of India preferred an appeal before the Supreme Court. The Supreme Court remarked that as the Assistant Commissioner had not followed the decision of the Tribunal merely because an appeal had been filed by the Department before the Supreme Court, the High Court had rightly criticized the conduct of the Assistant Collector since it resulted in harassment to the assessee caused by the failure to give effect to the

12. 1991 (55) E.L.T. 433 (S.C.)

order passed by the Tribunal. The Supreme Court also observed that the order of the Tribunal is binding upon the Assistant Collectors who functions under the jurisdiction of the Tribunal and that the principles of judicial discipline require that the orders of higher appellate authorities are unreservedly followed by the subordinate authorities. The relevant portion of the order of the Supreme Court is reproduced below:

"6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. **The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy.** It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; **The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.** The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is

the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesseees-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. **The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."**

(emphasis supplied)

39. The aforesaid decisions of the Supreme Court have been referred to by the Supreme Court in **Commissioner of Income Tax vs. Ralson Industries Ltd.**¹³ and it has been observed that when an order is passed by a higher authority, the lower authority is bound, keeping in view the principles of judicial discipline.

40. Recently, a Division Bench of the Madras High Court in **Royal Sundaram General Insurance Company Limited vs. Commissioner of Central Excise and Service Tax**¹⁴ consisting of

13. (2007) 2 SCC 326

14. Writ Petition No's. 31725 and 31726 of 2023 decided on 24.05.2024

the Acting Chief Justice R. Mahadevan (now Hon'ble Judge of the Supreme Court) and Justice Mohammed Shaffiq also examined this issue. What was assailed before the Madras High Court was a reference order in which Member (Judicial) and Member (Technical) differed in their views. The Madras High Court noticed that the issue that had come up for consideration before the Division Bench of the Tribunal had been dealt with and decided by co-ordinate benches of the Tribunal and so there was no reason to make a reference to a third Member. In this connection, the Madras High Court also made reference to various decisions and the observations made by the Madras High Court are reproduced below:

"14. Referring to the decisions of the Honourable Supreme Court in **Union of India vs. Kamlakshi Finance Corporation Limited reported in 1992 Suppl (1) Supreme Court Cases 443** and in **East India Commercial Co. Ltd vs. Collector of Customs, Calcutta reported in 1983 (13) E.L.T. 1342 (SC)**, the learned Senior counsel for the petitioner submitted that judicial discipline demands that the decision reached by the coordinate benches has to be scrupulously followed by the other Tribunal. However, in this case, the Tribunal has taken a contrary decision and refused to place reliance on the decisions of the Coordinate Benches. Thus, according to the learned Senior Counsel, without taking note of the ratio laid down by the Coordinate Benches, on the very same issue, the Member (Technical) has passed the prejudicial portion of the order, which cannot be allowed to be sustained.

15. **We find much force in the submissions so made by the learned Senior counsel for the petitioner. The prejudicial portion of the order has been passed by the Tribunal in derogation of the various orders passed by the coordinate benches of the Tribunal on the very same issue.** xxxxxxxxxx. Therefore, we hold that the very reference

made by the Tribunal to determine as to whether the conclusion reached by the Member (Judicial) is right or the one made by the Member (Judicial) itself is unnecessary. The issue before the Tribunal has already been examined and adjudicated by the coordinate benches and it binds the Tribunal in all respects. While so, the Tribunal cannot go beyond the settled issue and to re-adjudicate the same by referring the dispute to a third member. **Judicial discipline requires that the orders of the coordinate bench or the jurisdictional High Court have to be followed without in any manner attempting to factually re-examine or re-adjudicating the same issue.**

16. **At this juncture, it would be appropriate to refer to the decision of Hon'ble Supreme Court in the case of Official Liquidator v. Dayanand and others, reported in (2009) 1 SCC (L&S) 943, in which, the aspect of judicial discipline has been discussed in detail.**

XXXXXXXXXXXXX

78. There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system."

(emphasis supplied)

41. The Madras High Court also placed reliance on the decision of the Supreme Court in **Official Liquidator vs. Dayanand and others¹⁵**, in which the aspect of judicial discipline has been discussed in detail. Paragraph 90 of the decision of the Supreme Court in

15. **(2009) 1 SCC (L&S) 943**

Official Liquidator, on which reliance has been placed by the Division Bench of the Madras High Court, is reproduced below:

"90. **We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so.** Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. **It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed."**

(emphasis supplied)

42. In the instant case, as noticed above, though there were two binding decisions of the Tribunal on the issue that had arisen for consideration before the Commissioner and inspite of a specific direction issued by the Tribunal to decide the matter in the light of the aforesaid two decisions, the Commissioner made an attempt not to follow the two binding decisions and take an independent decision. The belief of the Commissioner that he could decide the matter on merits as the Supreme Court while dismissing the Civil Appeal filed by the department against the decision of the Tribunal in **T. Stanes** had left the questions of law open is tainted with mala fides. When the

Supreme Court left the question of law open, it was the Supreme Court alone that was to decide the matter and the Commissioner was bound by the two decisions of the Tribunal. The Commissioner also did not attempt to examine the contention raised by the appellant that the appeal filed by the department before the Supreme Court against the decision of the Tribunal in **NMS Babu** was not against that part of the order of the Tribunal that decided the issue of classification and it was only on other two issues. To maintain judicial discipline, the Commissioner was bound to follow the decisions of the Tribunal in **NMS Babu** and **T. Stanes**. However, the Commissioner not only declined to follow the two binding decisions, but even went to the extent of stating that the decision of the Tribunal in **NMS Babu** "does not expound the correct position of law and hence reliance placed thereon is not justified or proper". The Commissioner even placed reliance upon the decision of the adjudicating authority in **T. Stanes**, which decision had been set aside by the Tribunal in the appeal filed by T. Stanes.

43. In view of the aforesaid discussion, the order dated 13.09.2022 passed by the Commissioner deserves to be set aside and is set aside. The appeal is, accordingly, allowed with consequential relief (s), if any.

(Order pronounced on **11.11.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)