

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/622 -623/2005 - EX[DB]

Date 29/05/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S DIAMOND CEMENTS LTD.
NARSINGARH, DISTT. DAMOH, M.P.
M/S DIAMOND CEMENTS LTD.

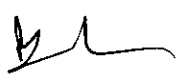
Appellant

Vs
Respondent

C.C.E BHOPAL

EX[DB] dated 23/5/2012

I am directed to transmit herewith a certified copy of **Final order No. 626-627/2012**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E BHOPAL

HOSHANGABAD ROAD, 48,
ADMINISTRATIVE AREA, AREA
HILLS, BHOPAL (M.P.) 462011

2. Adv. / Consult

MR.V.LAKSHMI KUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R

4. Bar association. CESTAT. New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

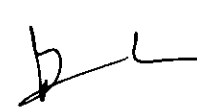
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI**

PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 622-623 of 2005

[Arising out of Order-In-Appeal No.394/CE/BPL/2004, dated 28.10.2004 issued by CCE, Bhopal]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member

Hon'ble Mr. Mathew John, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. Diamond Cements Ltd.

Vs.

Commissioner of Central Excise
Bhopal

Appellants

Respondent

Coram :

Hon'ble Ms. Archana Wadhwa, Judicial Member

Hon'ble Mr. Mathew John, Technical Member

Appearance:

Shri Amit Jain, Advocate for the Appellants

Shri S.R.Meena, AR for the Respondent

Date of Hearing : 28.02.2012

FINAL ORDER NO . 626 -627/2012-EX(BR)

Per Ms. Archana Wadhwa:

The appellants are engaged in the manufacture of cement and clinker. The demand in the present case relates to fabrication of structurals and other items of steel falling under Chapter 73 for the period 1988-89 to 1991-92. According to the Revenue, various items copper inserts, insert plats, copper support, grills,

cross bracings, bucket, trailer, gantry etc. were manufactured by the appellant in their factory and used in their units at Narsingarh and Amlai. By holding that the ~~droppers~~^{process} of drilling, cutting, welding etc. amounts to manufacture and by rejecting the appellants' stand that the goods were manufactured by the contractor and by denying them the benefit of various notifications as claimed by the appellant, authorities below have confirmed demand of duty of Rs.5,49,322/- along with imposition of penalty of identical amount.

2. We have heard Shri Amit Jain, Id counsel appearing for the appellants and Shri S.R.Meena, Id. AR appearing for the Revenue.

3. The law on the legal issue as to whether the cutting, drilling, welding etc. amounts to manufacture stands decided against the appellants by the Larger Bench in the case of Mahindra & Mahindra Ltd. reported in 2005(190)ELT301. However, it is the appellants' contention that the said goods were being fabricated by the contractors and in such a scenario, it is the contractor who has to be held as manufacturer. For the proposition that it is the job worker who actually manufactured the goods who has to be held as manufacturer, the appellants have relied upon the Hon'ble Supreme Court's decision in the case of MM Khambawatwala reported in 1996(84)ELT161(SC) as also on the decision of the Tribunal in the case of Indian Oil Corporation reported in 2010(253)ELT324(Tri.). In the alternative, the benefit of Notification No.61/90-CE and 281/86-CE, and 217/86-CE are claimed. The demand also stands assailed on the point of limitation.

4. We find that the goods in question were being fabricated by the contractors in the appellants' premises out of the raw material supplied by the appellants. The lower authorities have held that in as much as the fabrication was being done as per the specific requirement of the appellants out of the raw material supplied by them, the contractors were only a façade and dummy units and appellants have to be held as manufacturer.

There is no dispute about the fact that fabrication was being done by the contractor. It stands recorded in the impugned order of the original adjudicating authority that on scrutiny of the bills raised by contractors, Shri Satyanarayan Visvakarma, Shri Shankerlal Chowdhary and Shri Puranlal Patel, it was revealed that apart from the steel structurals, other copper inserts, insert plats, copper support, grills, cross bracings, bucket, trailer, gantry etc. were found to have been manufactured by the contractors in the fabrication shop. Shri Satyanarayan in his statement dtd. 11.04.92 also admitted that the above activities have been carried by him. He also admitted that the bills are raised in respect of the work done according to its nature, i.e., ^{bills}~~goods~~ for erection, fabrication etc. are raised separately. The said fact also has been agreed by Shri Harpal Singh and Shri V.N.Malhotra in their statements dtd. 12.02.92. However, the lower authorities have held that the noticee has been indulging in manufacture of steel items through contractors. In as much as it is the appellants who have been supplying the raw material, the contractors were only ^{dummy}~~duty~~ and can be called as a mere façade. He has further observed

that if a hired labour is employed, in that case instead of hired labour, it is the employer who is the manufacturer.

5. We do not find favour with the above reasoning of the lower authority, ^Merely because the appellants were supplying the raw material and was exercising supervisory quality control over the goods, it cannot be held that the contractors were actually hired labourers especially when the contractors have admitted having fabricated the goods for and on behalf of the appellants. Similarly merely because the said fabrication was being done by the contractors as per the design and drawings of the appellants cannot be made a ground for holding that it is the appellants who had fabricated the goods. In fact, we find from the SCN that it stands admitted that the said goods were being fabricated through contractors. If that be so, the appellants cannot be held as a manufacturer.

6. In any case, we find that the appellants are entitled to the benefit of Notification No.281/86 dtd. 24.04.86 which provides exemption from duty to all the excisable goods manufactured in workshop within a factory and intended for use in the said factory or in any other factory of the same manufacturer, for repair & maintenance of machinery installed therein. The appellants have taken a categorical stand before the authorities below that the goods ~~were~~ in question were used by them for repair & maintenance of the factory. The said claim of the appellants stands denied by the Commissioner(Appeals) on the sole ground that no documentary evidence to show for which a particular

machinery, the items were used for repair & maintenance stands produced before him.

We note that it is not the Revenue's case that the said steels items were cleared by them as finally manufactured excisable goods. The statements of various contractors revealed that the said goods were meant for installation and erection in the factory premises itself. The appellants are engaged in the manufacture of cement and required periodical updating of their machines. There is nothing in the Revenue's case to show that the said goods were manufactured by them for clearance ^{from} ~~for~~ the factory. On the contrary, the evidence in the shape of statements of contractors revealed that the goods were meant for use in the factory itself. As such we are of the view that the benefit of Notification No.281/86 is available to the appellants.

7. In any case, Notification No.217/86, dtd. 02.04.86 which grants exemption to the goods manufactured in the factory and used in the factory, is also available to the appellants. The denial of the same on the ground that the said Notification excludes machines, machineries, plants, equipments, appliances does not hold ^{good} in as much as the items in questions are structurals and not machines or plant and equipments etc.

8. In any case, we find that during the relevant period, the decisions of the Tribunal were in favour of the assessee and it was only ^{with} ~~that~~ the Larger Bench decision in the case of Mahindra & Mahindra Ltd. reported in 2005(190)ELT301 that the activities of cutting, drilling and welding was held to be a manufacturing activity. It is well settled law that when during the relevant period,

the decisions of higher appellate forum were in favour of the assessee or there were conflicting decisions, no suppression can be attributed ^{to} the assessee so as to invoke the longer period of limitation. Reference in this regard can be made to following decisions:-

- i. Jaiprakash Industries Ltd. – 2002(146)ELT481(SC)
- ii. Mentha & Allied Products – 2004(167)ELT494(SC)
- iii. L&T Ltd. – 2007(211)ELT513(SC)

9. In view of our foregoing discussion, we find that confirmation of demand and imposition of penalty is not justified. Accordingly, impugned order is set aside and appeal is allowed with consequential relief to the appellants.

(Pronounced in the open Court on 23/5/12)

(~~Archana~~ Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

RK-I