

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

Appeal No. : E/2345/2009-EX[DB], E/2548/2009-EX[DB]

Dated: 06/07/2012

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

AFCONS INFRASTRUCTURE LTD.
OPPOSITE MODEL TOWN-III
BLOCK H1, NEAR INDRAPRASTHA
GAS LTD. CNG SERVICE STATION
CHHATRASAL RING ROAD, DELHI-
110009

AFCONS INFRASTRUCTURE LTD.

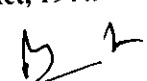
(Appellant)

VS

(Respondent)

C.C.E. DELHI I

I am directed to transmit herewith a certified copy of Final Order No. A/751-752/2012-EX[DB] dated 02/07/2012 passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


Assistant Registrar
EXCISE Appeal Branch

Copy To,

1. Respondent

C.C.E. DELHI I

C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Advocate(s) / Consultant(s):

P.K.SAHU

D-247, Second Floor, Defence colony, N
Delhi

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

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Assistant Registrar
EXCISE Appeal Branch

P.T.O.-2,

PM. MR. B.K.SINHA, DEPUTY GENERAL
MANAGER OF
M/S AFCONS INFRASTRUCTURE
LTD. OPPOSIT MODEL TOWN-III,
BLOCK H1, NEAR INDRAPRASTHA
GAS LTD. CNG SERVICE STATION
CHHATASAL RING ROAD, DELHI-
110009.

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

Date of Hearing: 03.05.2012

Date of Decision: 2/7/2012

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Appeals Nos.E/2548 & 2345 of 2009

(Arising out of common Order-in-Original No.13/2009 dated 11.5.2009 of the Commissioner of Central Excise, Delhi-I).

M/s. Afcons Infrastructure Ltd.
Shri B.K. Sinha, Dy. General Manager

...Appellant

Vs.

CCE, Delhi-I

...Respondent

Coram : Hon'ble Justice Shri Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Appearance: Shri P.K. Sahu, Advocate for the appellants.
Shri S.R. Meena, AR for the respondent.

FINAL Order No. A/751-252/2012-ET(BR)

Per Rakesh Kumar:

The appellant had contract with Delhi Metro Rail Corporation (DMRC) for construction of elevated viaduct of 5.222 kms. Length and four stations on Vishwavidyalaya Jahangirpuri section of MRTS Phase-II. For construction of elevated viaducts they were required to fabricate – “prefabricated structural segments at the casting yard allotted to them by DMRC on Ring Road, opposite Model Town-III, Block-H, New Delhi . The pre-fabricated segments were moved to the site of construction of elevated viaduct. For placing the pre-fabricated segment between piers, launching trusses are fabricated at site with the help of which, the pre-fabricated segments are placed between the piers. The launching trusses, though with site specific design, have only very limited mobility. The appellant were not paying any duty on pre-fabricated segments made out of cement and steel and launching trusses. The Department were of the view that by non payment of duty, the Appellant have contravened various provisions of Central Excise Act 1944 and the rules made thereunder, as while pre-fabricated segments are chargeable to duty under sub-heading 68109100, the launching

trusses are chargeable to duty under heading No.8425 of the Central Excise Tariff. For this reason, certain quantity of pre-fabricated segments and launching trusses found at the work site were placed under seizure. Subsequently, the Commissioner, Central Excise, Delhi-I vide Order-in-Original No.13/09 dated 11.05.2007—

- (a) Confirmed the duty demand of Rs.2,72,74,40/- in respect of pre-fabricated segments and launching trusses under proviso to Section 11 A(1) of Central Excise Act, 1944, along with interest on it under Section 11 AB *ibid*;
 - (b) Imposed penalty of Rs.2,72,74,400/- on the Appellant under Section 11 AC *ibid*;
 - (c) Imposed penalty of Rs.50 Lakhs on Shri B.K. Sinha, Dy. General Manager of the Appellant Company under Rule 26 of Central Excise Rules, 2002; and
 - (d) Ordered confiscation of 810 prefabricated segments and 3 launching trusses totally valued at Rs.16,55,00,000/- with option to be redeemed on payment of redemption fine of rupee four crores.
- 1.1 The appeals filed by M/s. Afcons Infrastructure Ltd. and Shri B.K. Sinha against the above order of the Commissioner were allowed by the Tribunal vide Final Order No.269-286/11-EX dated 14.3.2011 along with appeals involving identical dispute filed by other appellants. The appeals

were allowed in view of Notification No.2/11-CE (NT) dated 17.2.2011 issued by the Government under Section 11C in respect of the goods specified in the notification and manufactured at site for use in the construction at site during the period as specified in the notification .

1.2 The Department filed ROM application No.E/ROM/14/11 in respect of the appeal filed by the Appellant company (E/2548/09) on the ground that the appeal also includes launching trusses which were not covered by the notification no.2/11-CE (NT) dated 17.2.11. This ROM was dismissed by the Tribunal vide order no.445/11-Excise dated 5.8.2011.

1.3 The department filed an appeal before Hon'ble Delhi High Court against Tribunal's order dated 5.8.2011. Hon'ble Delhi High Court vide order dated 14.11.2011 holding that launching trusses are not covered by notification no.2/11-CE (NT) dated 17.2.2011, remanded the matter to the Tribunal for deciding the issue of dutiability of the launching trusses, as this aspect has not been examined in the Tribunal's order dated 14.3.2011.

1.4 In pursuance of the above order of the Hon'ble Delhi High Court in respect of the appeal No.E/2548 & 2345/2009, the question of excisability of launching trusses and recovery of duty in respect of the same and also the question of their confiscation was heard.

2. Heard both the sides.

3. Shri P.K. Sahu, Advocate, the learned Counsel for the Appellants, pleaded that "launching truss" is a steel structure fabricated at site and is site specific, that it is a sort of massive beam made of steel which is fabricated and assembled at site, that its mobility is very limited, that it is placed on two adjoining pillars to take the necessary load to carry pre-fabricated segments while placing the segments on the opposing longitudinal faces of the pier segments by minimizing unbalanced movement, that its classification under heading 8425 is totally wrong, as it is not a machine, and if at all it can be said to have been manufactured, it would be classifiable under sub-heading 73084000, that on account of its very limited mobility, it can not be said to be "goods" and hence it is not excisable, that the burden of proving its marketability is on the department, but no evidence in this regard has been produced, that in this regard he relies upon the judgements of the Apex Court in case of **Triveni Engineering & Industries Ltd. Vs. CCE reported in 2000 (120) ELT 273 (SC)** wherein it was held that since Turbo alternator can not be moved without dismantling into components, its installation or erection at site does not result in emergence of any excisable goods and in case of **CCE Vs. Thyssenkrupp Industries India Pvt. Ltd. reported in 2006 (199) ELT A 128 (SC)** wherein it was held that rail mounted stackers assembled at site having very limited mobility are not marketable and hence not excisable, that these judgements are squarely applicable to the

facts of this case, that applying the criterion for “goods” in the Apex Court’s judgement in case of **Municipal Corporation of Greater Bombay Vs. Oil Corporation reported in 1991 Suppl (2) SCC-18**, launching trusses cannot be called goods, that there is absolutely no finding in the impugned order as to whether the Launching Trusses are marketable and hence “goods”, that even if the launching trusses are treated as goods attracting duty under SH 73084000, since the same are fabricated at site and on account of their very limited mobility, the same have to be treated as used in construction work at site, the same would be covered by notification no.3/05-CE and would be fully exempt from duty, and that in view of the above, the impugned order is not correct.

4. Shri S.R. Meena, the learned Senior Departmental Representative defended the impugned order reiterating the findings of the Commissioner and emphasized on the findings of the Larger Bench of the Tribunal in para 11 of its judgment in case of **Mahindra & Mahindra Ltd. Vs. CCE, Aurangabad reported in 2005 (190) ELT 201 (Tribunal-LB)** which is reproduced below:-

“Thus, when a truss is fabricated, a distinct article is brought into existence different from mere raw material namely angles or tubes used in making of the truss. Large Industries have thrived in manufacture of trusses and purlins of use in the erection of steel structures and there is a huge market world over for such products as is clear from the advertisements

issued by manufacturers of iron and steel structures such as stramit roofing, walling, rain water and structural products referred to during the hearing. Truss prices are listed on the websites for various spans of trusses with delivery information, by those dealing in building supplies.”

Shri Meena, therefore, pleaded that launching truss is a marketable product chargeable to central excise duty.

5. We have carefully considered the rival submissions and have perused the records. The point of dispute in this case is as to whether the launching trusses fabricated by the appellant are chargeable to duty. In this regard, the undisputed facts are that –

(a) the launching trusses are fabricated at site and have very limited mobility;

(b) they are used for placing the pre-fabricated segments ^{between} the piers for construction of elevated viaducts and for this purpose, the launching truss is placed over two adjoining pillars.

According to Department, the launching trusses are classifiable under heading 8425, are marketable and hence, attract central excise duty and since the same being covered under Chapter 84 are “capital goods” as defined under Rule 2 (a) of Cenvat Credit Rules, 2004 and since the same have not been used for manufacture of any excisable goods, the same are not eligible

for captive consumption exemption under notification no.67/95-CE dated 16.03.1995. According to appellant, the launching trusses with very limited mobility and location specific design, are not marketable and, hence, are not excisable and even if the same are treated as excisable goods, the same being structures of iron & steel would be classifiable under 7308 4000 and in that case, would be fully exempt from duty under notification no.3/05-CE, as same have been fabricated at site for use in construction work at such site.

6. Coming first to the question of classification, we find that the launching trusses are trusses, which are steel structures fabricated from structural steel, with sophisticated equipment, moving forward on bridge piers span by span and are used for placing pre-fabricated segments on the piers

6.1 Heading 8425 of the Central Excise Tariff covers –

“Pully tackles and hoists, other then skip hoists; winches and capstans, Jacks”.

The Commissioner in his order does not discuss as to how a launching truss, which is a giant steel structure, is covered by 8425. On the other hand, in term of judgment of larger bench of the Tribunal in the case of **Mahindra & Mahindra Ltd. Vs. CCE reported in 2005 (190) ELT 301 (Tribunal-LB)** trusses are classifiable under heading no.73.08. Since a launching truss is after all a “truss”, the same would be correctly classifiable under sub-

heading 73084000. As regards the marketability of "launching trusses", this aspect has been discussed in detail in para 9.5, 9.6, 10, 10.1, 11 and 11.1 of the larger bench judgement which are reproduced below:-

9.5 The system of nomenclature which is universally adopted covers the same articles of Heading 73.08 even in the context of the Customs Tariff, which means that they are internationally considered as commodities which can be traded and, therefore, are goods. The International Convention on Harmonized System and Coding System was adopted to provide a uniform nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 190 countries and economies, as a basis for their customs tariffs and for the collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the HS.

9.6 The HS contributes to the harmonization of Customs and trade procedures, and the non-documentary trade data interchange in connection with such procedures, thus reducing the costs related to international trade. It is also extensively used by governments, international organizations and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls,

compilation of national accounts, and economic research and analysis. The HS is thus a universal economic language and code for goods, and an indispensable tool for international trade. The Harmonized System is governed by 'The International Convention on the Harmonized Commodity Description and Coding System'. The official interpretation of the HS is given in the Explanatory Notes published by the WCO. The Explanatory Notes are also available on CD-ROM, as part of a commodities actually traded internationally.

10. There can be no dispute over the proposition that immovable property, be it immovable steel structure embedded in earth or a constructed building, cannot be subjected to excise duty which applies to excisable goods, i.e. to movables. In the making of an immovable structure or building are used a variety of movable. Raising iron and steel structures like sheds involves fabrication work and many of the articles used in raising the structure come into existence through fabrication as per the pre-determined design to be fitted into the structure that is to be raised. For example, roof frame may be fabricated for the roof structure of a shed. Such fabrication of frames may be done at the construction site or at some factory premises. The iron and steel frames fabricated at the factory premises away from the site of construction would be brought to the site for their use in erecting the structure. The frames pre-fabricated and brought at the site and frames fabricated the site of erection both are goods manufactured. There will be variety of parts of structures of iron and steel, that can be fabricated either at the site or at some factory premises away from the site.

The iron and steel raw material, such as angles, plates, tubes, etc., are used in making parts of structures and they acquired a distinctly different shape to suit the structural designs. For example, if iron or steel angles and plates are cut to make a steel table or chair which can be dismantled, it cannot be said that there are no goods manufactured because the iron and steel angles or plates remain such angles and plates though of different sizes, and merely holes are punched and screws fitted. Unlike in liquid mixtures, the raw material of iron and steel or wood will retain their identity, but it is precisely their being cut, and designed, punched and fitted to make an article commercially known that involves manufacture of an article distinct from the angles, sheets, tubes etc. used in it. Mere drilling holes or mere cutting jobs in isolation may not by themselves involve manufacture of an article, but, converting raw material like angles, tubes, plates etc. to bring about a distinct commodity will surely amount to manufacture as it is not "mere" drilling holes or cutting, but the activity is aimed at bringing about a distinct commodity. Thus, making of porta cabin from iron and steel angles with, roof frame-work i.e. trusses, doors, windows, ladders in it made by drilling holes and cutting the raw material, will be a movable structure having identity as a distinct marketable commodity. When the porta cabin is dismantled it nonetheless remains the manufactured products i.e. porta cabin dismantled or disassembled. The material such as angles, rods, shades, sections plates, tubes, etc. of such designed structure in their pre-assembled or disassembled form are prepared for use in the said structure,

namely porta cabin. One cannot, with any conviction or authority, say that these dismantled parts of the structures are raw material used in its original form and that mere cutting or drilling holes has made no difference. The items in the parenthesis of Heading 7308 described as excisable goods include roofs, roofing frame-work, doors, windows and their frames, thresholds for doors, shutters, pillars, column, balustrades pillars, sheets of iron and steel, each one of these items has a complete distinct identity. The contractor undertaking the works contract for erecting a structure may not himself manufacture all such items used for structure. He may order the doors and windows to be made by a particular manufacturer and roof frame-work by the other, depending on the specialization and expertise of the manufacturer of different items. The contractor may supply designs and raw material for various parts of structures and get the work done on job work basis. To save time and expenses he may get the fabrication done at the site of construction instead of getting it done at some distance in a factory. When the required parts are fabricated they will be fixed as per the designed structure and will continue to be moveable object until made immovable by permanently fixing them in the designed immovable structure. To say that no parts of the structures came into existence as distinct commodities because ultimately they got permanently fixed into an immovable structure will run counter to the legislative intent to impose excise duty on such excisable goods at a stage when they have a separate identity as marketable goods anterior to their being permanently fixed in the immovable structure.

10.1 It has been said in *Aruna Industries* (supra) by the Hon'ble Member (Technical) in the oft coated passage that, "there are no such goods as trusses, columns, purlins.....A truss is only a frame. The steel members of a truss may be items of merchandise, but a truss never.....A truss does not form a recognizable article of commerce in the same way an angle or channel does because a truss is only a function which a steel member article performs when placed in a position obtained by the engineer". With respect, the erudite language projects the meaning of 'truss' as a verb and ignores it as a noun. While, as a verb the word "truss" would mean to tie-up or bind tightly, and, therefore, doing of such thing may not be a recognizable commercial article when used as a noun the word 'truss' denotes a rigid frame-work designed to support a structure. When one speaks of 'truss' in the context of Tariff Heading 73.08 as an excisable article, it necessarily means the frame-work called 'truss' in civil engineering, fabricated for use in a structure to support its roof. In architecture and structural engineering, a 'truss' is a structure consisting of straight slender member connected at joints. In order for a 'truss' to be rigid, it must be composed entirely of triangles. Such trusses are statically determinate, because the stress in each and every member can be completely determined once we know the external loads and the geometry of the truss. It is widely known that there are leading manufacturers of steel building products, including roofings, walling, gutters and fascias, frames, and trusses, purlins, flooring and structural frame-work having distribution centres and assuring on time delivery. Structural

products include a huge range of purlins in C and Z profiles for use as roof purlins or wall girts all cut to length. A snap-in purlin bridging system for quick installation was also widely known.

11. Thus, when a truss is fabricated a distinct article is brought into existence different from mere raw material, namely angles or tubes used in making of the truss. Large industries have thrived in the manufacture of trusses and purlins of use in the erection of steel structures and there is a huge market world over for such products as is clear from the advertisement issues by the manufacturers of iron and steel structures such as stramit roofing, walling, rain water and structural products referred to during the hearing. Truss prices are listed on the websites for various spans of trusses with delivery information, by those dealing in building supplies.

11.1 It is, therefore, difficult to view that trusses which are rigid frame-work to support roofs, bridges, cranes, etc., have no existence as a recognizable item of commerce "because a truss is only a function" as opined by the Hon'ble Member (T) in paragraph 26 of the judgment in *Aruna Industries* (supra). The mix-up of the expression "truss" as a transitive verb and the use of the word truss as a noun denoting rigid frame-work in the engineering world is more than obvious and the error has unfortunately percolated in several subsequent decisions that have followed *Aruna Industries* (supra). For the foregoing reasons, we cannot and, therefore, do not subscribe to that view and hold that *trusses*, *purlins*, and similar parts of structures are

commercial articles having distinct character and identity than the raw material used for fabricating them, in the field of structural engineering. As noted above, purlins are articles distinct from raw angles, and C and Z types of purlins are well known in the field of structural engineering manufactured as marketable commodities.”

6.2 In view of the above, we hold that launching trusses are excisable goods chargeable to duty under SH 73084000 of the Central Excise Tariff.

7. As regards the eligibility for exemption under Notification no.3/05-CE dated 24.2.2005, this notification prescribe ‘nil’ rate of duty for the goods of heading 7308, which are fabricated at site of work for use in construction work at such site. In this case, the plea of the appellant is that the design of launching trusses fabricated is site specific and a launching trusses fabricated for a particular site cannot be used at any other site and after a couple of uses at a particular site, the same is dismantled and sold as scrap. If this contention of the appellant is correct, the use of the launching trusses would have to be treated as at the site of fabrication for construction work and since as discussed above, the goods are classifiable under heading 7308, the benefit of this exemption would have to be extended. But the Commissioner in the impugned order, has not discussed the eligibility of the launching trusses for notification no.3/05-CE, probably for the reason that in the impugned order, he

held the launching trusses as classifiable under 8425 to which notification no.3/05-CE is not applicable. But since the goods have been held to be classifiable under 73084000, the eligibility for notification no.3/05-CE would have to be considered for which it has to be ascertained –

- (1) whether the launching trusses are fabricated at site'; *and*
- (2) if so, whether their design is site specific and the same have to be necessarily used in connection with construction of elevated viaduct at that site only and are used at that site only.

For determining the eligibility for exemption notification no.3/05-CE after ascertaining the above factual position, the matter has to be remanded to the Commissioner for de novo adjudication. The question of duty demand from the Appellant Company and penalty on the Appellant Company and its DGM, Shri B.K. Sinha would arise only if the appellant company are not liable for notification no.3/05-CE.

8. In view of the above, while holding that launching trusses are excisable goods chargeable to duty under sub-heading 73084000, the impugned order with regard to (a) duty demand on launching trusses; (b) confiscation of launching trusses and (c) imposition of penalty on the Appellant Company

and its DGM, Shri B.K. Sinha for non-payment of duty on launching trusses is set aside and the matter is remanded to Commissioner for de novo adjudication after hearing the appellants on the question of eligibility of the launching trusses for exemption under notification No.3/05-CE dated 24.2.2005, keeping in view our observations in this order.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.

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

Dated: 29/08/2012

MISC Order No : 930/2012
ROM Application No. : E/ROM/3098/2012
Appeal No. : E/2548/2009-EX[DB]

1. Appellant :

AFCONS INFRASTRUCTURE LTD.
OPPOSITE MODEL TOWN-III
BLOCK H1, NEAR INDRAPRASTHA
GAS LTD. CNG SERVICE STATION
CHHATRASAL RING ROAD, DELHI-
110009

2. Respondent :

C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

3. Advocate(s) / Consultant(s) :

P.K.SAHU
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Delhi

4. C.D.R

5. Bar Association, CESTAT, New Delhi

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

7. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony,
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Kunj, New Delhi - 110070

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**Assistant Registrar
EXCISE Appeal Branch**

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

Date of Hearing/ Decision: 23.08.2012

M/s.Afcons Infrastructure Ltd.

...Appellants

Vs.

CCE, Delhi-I

...Respondent

Present Shri P.K. Sahu, Advocate for the appellant.
Present Shri M.S. Negi, DR for the respondent.

Coram: Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Excise ROM Application No.3098 of 2012 in
Excise Appeal No. 2548 of 2009

Misc. Order No. 930/2012-Ex(BR)

Per Justice Ajit Bharihoke:

The petitioner/appellant vide instant application under Section 35 C(2) of the Central Excise Act, 1944 is seeking rectification of mistake in Final Order No.A/751-752/2012-Ex (BR) dated 02.07.2012, whereby the impugned order was set aside and the matter was remanded back to the adjudicating authority for fresh adjudication after hearing the petitioner/ appellant on the question of eligibility of launching trusses for exemption under notification No.3/05-CE dated 24.02.2005.

2. Shri P.K. Sahu, Advocate appearing for the appellant has contended that the order of the Tribunal requires rectification as it suffers from error apparent on the face of record. Expanding on the argument Id. Counsel pleaded that the department has raised the demand under show cause notice dated 28.04.2008 on the premise that launching tresses fabricated by the appellant are subject to excise duty under chapter heading 8425 of the first schedule to the Central

Excise Tariff Act. The Tribunal vide the order in question has dispensed aforesaid view of the Department and held that launching tresses are classifiable under heading 7308. It is contended that once the classification mentioned in the show cause notice was rejected, the Tribunal ought to have accepted the appeal and dropped the demand instead of remanding the matter for fresh adjudication. Secondly, it is contended that order of the Tribunal suffers from defect because the Tribunal has failed to appreciate that launching tresses fabricated by the appellant /petitioner are not marketable as such not excisable. Thirdly, it is contended that order of remand is not justified because the evidence/facts relevant for deciding about the applicability of exemption notification are available on record and the Tribunal itself could have looked into those facts and decided the matter.

3. Before advertizing to the above submission by the Id. Counsel for the appellant, it would be useful to have a look on the law relating to the scope and power of the Tribunal to rectify /modify its own order. Section 35C(2) of the Central Excise Act, 1944 deals with the power of the Tribunal to rectify mistake in its own order and it reads thus:-

"SECTION 35C.

(2) The Appellate Tribunal may, at any time within [six months] from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the [Commissioner of Central Excise] or the other party to the appeal :

***Provided** that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard".*

4. The issue regarding the scope of Tribunal's power to recall its order under Section 35C(2) of the Central Excise Act, 1944 came up before the Supreme

Court in the matter of CCE, Calcutta vs. A.S.C.U. Ltd. Reported in 2003 (151)

ELT 481 (SC) wherein the Supreme Court held thus:-

"13. As stated above, the scope of correction which can be made by the Tribunal under Section 35C(2) is limited. Undoubtedly if a decision is based solely on material which is irrelevant or which could not have been used then possibly it could be said that there is a mistake apparent from the record. However, if a decision is based on more than one material, then merely because in the process of arriving at the final decision, reliance was placed on some material which could not have been used it can never be said that in the final decision there is a mistake apparent from the record. This is because the final opinion could also have been based on the other material which was relevant and which could be used".

5. In the matter of Assistant Commissioner of Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd. Reported in 2008 (230) ELT 385 (SC) Hon'ble Supreme Court had an occasion to interpret the meaning of the error apparent on record and the Supreme Court observed thus:-

"37. In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record".

6. In the light of aforesaid enunciation of law we now proceed to analyse whether or not there is any error apparent on the face of record which may justify rectification of the final order dated 02.07.2012.

7. As regards the first plea taken by the appellant we may note that object of serving show cause notice on the assessee basically is to put the assessee on notice about the case against him. In the instant case perusal of show cause notice would show that basic thrust of show cause notice is to raise excise

demand on the premise that launching trusses which manufactured, marketable and excisable items as such the appellant/petitioner is required to pay the excise duty as per the demand raised in the notice. The classification under heading 8425 proposed by the department was only for the purpose of quantifying the excise duty. It is seen from the reply to the show cause notice that in the reply the appellant disputed the proposed classification under heading 8425 and claimed that launching trusses are classifiable under heading 7308 which plea of the appellant/petitioner has been accepted in the final order. From this it is apparent that the appellant/petitioner all through was contesting the show cause notice on the plea that launching tresses are classifiable under heading 7308 besides the other pleas. Thus, it cannot be said that the appellant has been prejudiced in his defence. A such we do not find any error apparent on the record by remanding the matter for fresh adjudication instead of dropping the demand. It may be noted that Id. Counsel for the appellant/petitioner in support of his plea has relied upon the judgment of Supreme Court in the matter of Warner Hindustan Limited vs. Collector of Central Excise, Hyderabad reported in 1999 (113) ELT 24 (SC). In our considered view aforesaid judgment is of no avail to the appellant/petitioner. Aforesaid matter was a case involving pure classification issue wherein the appellant/petitioner was claiming his product to be classifiable under heading 3003.30 and the department vide show cause notice was proposing to classify under tariff heading 3003.19. and the Tribunal rejecting both the classification proceeded to classify the subject goods of that case under sub-heading 17.04 which clearly indicate that the appellant/petitioner was taken by surprise and new case was set up at the second appellate stage before the Tribunal. In the instant case the classification proposed by the appellant/petitioner has been accepted, therefore, it cannot be said that he has been taken by surprise or has been prejudiced in his defence.

8. As regards the plea that the Tribunal has failed to appreciate that launching tresses which are subject goods are not marketable and as such not excisable. We may note that this issue has been adequately dealt with by the Tribunal in para 6.1 of the order, as such, it cannot be said that there is any error apparent on record on this count.

9. As regard the third plea we may note that the matter has been remanded back because of plea of the appellant that design of launching trusses fabricated is site specific and launching trusses fabricated at a particular site cannot be used at any other site and after couple of users the same is to be dismantled and sold as a scrap. This plea of the appellant/petitioner relates to the factual aspect which requires evidence as well as appreciation of facts to decide about the applicability of exemption Notification No. 3/2005-CE dated 24.02.2005 has not been discussed by the Commissioner in the impugned order. Therefore, remand order cannot be said to be the result of error apparent on record.

10. In view of the discussion above, we do not find any error apparent on the face of the record which may call for indulgence of the Tribunal under Section 35C(2) of the Central Excise Act, 1944. This application is nothing but abuse of process of law and it appears to have been moved with malafide intention to delay the proceedings. Accordingly, the application is dismissed with cost of Rs.1 Lakh to be deposited with the concerned Commissioner within a month.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant