IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. E/01,02/2011

(Arising out Order-in- Appeal No. PKS/334-335/BEL/2010 dated 29.09.2010 passed by the Commissioner of Customs & Central Excise (A), Belapur)

M/s. Nityanand Engineering Pvt. Ltd. — Appellant
M. Ganesh Shetty

Vs.

CCE Belapur — Respondent

Appearance:

Shri M.H. Patil, Advocate for the appellant
Shri S. Hasija, Supdt. (AR) for the respondent

CORAM:
Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of hearing : 09-10-2018
Date of decision : 09-10-2018

O R D E R No: **A/87583-87584/2018**

Per: Archana Wadhwa

After hearing both sides, we note that the duty of excise to the extent of `11.93 lakhs stands confirmed against M/s. Nityanand Engineering Pvt. Ltd. along with confirmation of interest and imposition of penalty of equivalent amount. In addition, penalty of `1 lakh stands imposed on M. Ganesh Shetty, director of the company.

2. The said duty stands confirmed on the ground that various activities like drilling, cutting, bending, welding etc. undertaken by the assessee for manufacture of various parts of towers has resulted in the emergence of excisable products and the activity has to be held as manufacturing activity so as to levy duty of excise on the said products. The demand stands confirmed by the invoking the extended period of limitation.

3. Ld. Advocate appearing for the appellant has drawn our attention to the development of the issue at various levels. Tribunal in the case of Mahindra & Mahindra 2005 (188) ELT 125 (T-Del) referred the said issue to the Larger Bench. Larger Bench of the Tribunal in the said case reported at 2005 (190) ELT 301 (T-LB) held the activity to be a manufacturing process and the resultant product to be dutiable goods. After answering the said disputed issue, the matter was sent back to the original bench for disposal of the appeal. While disposing the appeal, reported in 2006 (201) ELT 27, the demand falling within the limitation period was upheld and the benefit of extended period was granted to the assessee on the ground the issue was not free from doubt and there was confusion in the field.

4. In view of the above, ld. Advocate submits that inasmuch as in the present case also the demand stands raised by way of issuance of show-cause notice dated

07.10.1998 for the period 1994-95 to 1995-96, the entire demand is hit by bar of limitation. He also places reliance on various decisions of the Hon'ble Supreme Court.

5. There is no doubt about the fact that the matter was not free from doubt and inasmuch as the earlier decisions were in favour of the assessee, the matter was referred to Larger Bench. The Hon'ble Supreme Court in the case of *Continental Foundation Jt. Venture* reported in 2007 (216) ELT 177 (SC) has observed that where the correctness of the earlier decision of the Tribunal are doubted and the matter stands referred to the Larger Bench, there could be scope for entertaining doubt and extended period of limitation would not be available to the revenue. To the similar effect is another decision of the Hon'ble Supreme Court in the case of *Kiran Ispat Udyog* 2015 (321) ELT 182 (SC) wherein it was held that inasmuch as the issue was entangled in judicial battle and hazy picture was clarified only subsequently, the extended period cannot be held to be invocable. The said decision stands followed by the Tribunal in number of subsequent decisions. One such reference can be made to Tribunal decision in *Hindustan Fastener* final order no. A/85572/2018 dated 28.02.2018.

6. Inasmuch as in the present case admittedly, the extended period stands invoked by the revenue and admittedly, the issue was not free from doubt having been

referred to the Larger Bench, we hold the demand barred by limitation. Accordingly, impugned order confirming the demand and imposing penalty on both appellants are set aside and both the appeals are allowed with consequential relief.

(Dictated in Court)

(Sanjiv Srivastava)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

//SR