

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 369 of 2009

(Arising out of Order-in-Original No. 13/CEX/2008 dated 17.12.2008
passed by the Commissioner of Central Excise & Customs, Nashik)

Commissioner of Central Excise & Customs,Appellant
Kendriya Rajaswa Bhavan,
Gadkari Chowk
Nashik

Vs.

M/s Scheider Electrical India (P) Ltd.Respondent
58, MIDC Satpur,
Nashik

APPEARANCE:

Shri Bidhan Chandra, Addl.Comm (Authorised Representative) for
the appellant

Shri J.H. Motwani, Advocate with Ms. Nehal Parekh, Advocate
for the respondent

CORAM: Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/85749 / 2019

DATE OF HEARING : 17.12.2018

DATE OF DECISION : 16.04.2019

PER: C J MATHEW

Commissioner of Central Excise & Customs, Nashik, while
adjudicating the demand against M/s Schneider Electrical India (P)
Ltd in order in-original no. 35/CEX/2008 dated 17th December 2008,
held that the goods cleared were to be assessed to duty in accordance

with section 4A of Central Excise Act, 1944 for the period from April 2003 to March 2007 but limited the confirmation of liability to the normal period with a finding that the ingredients pertinent to invoking the extended period under section 11A of Central Excise Act, 1944 had not been established. Aggrieved by this order, Revenue is in appeal before us

2. It is informed by Learned Authorised Representative that an appeal of respondent, M/s Schneider Electrical India (P) Ltd, against the impugned order had been dismissed by a majority decision of the Tribunal in *Schneider Electrical India (P) Ltd v. Commissioner of Central Excise, Nashik [2014 (311) ELT 113 (Tri-Mumbai)]* and that the present appeal had not been tagged for disposal along with the appeal of the respondents herein and others similarly situated. It is his further contention that the said decision did examine the scope for invoking an extended period in relation to other assesseees before coming to the conclusion that the bar of limitation did not operate. Learned Authorized Representative further submits that the adjudicating authority had limited the scrutiny of ingredients justifying the extended period only to 'fraud', 'collusion', 'wilful misstatement' and 'suppression of facts' without going into the fifth element, viz., 'contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty' which was apparent from the circumstances readily available in the records. According to him, the issue of assessment under section 4 A of Central Excise Act 1944 had been settled by the decision of the Hon'ble High Court of Bombay in *Larsen & Toubro v. Union of India [2012 (275) ELT 153 (Bom)]* which, though arising from writ petition of another enterprise, should have been of interest to the present respondent all through the court battles as the issue involved was identical. He contends that the observations of the Third Member to whom the difference of opinion within the bench in disposing of the

appeals in *re Schneider Electrical India (P) Ltd* are equally applicable to the present respondent. He relies upon the decision of the Hon'ble High Court of Bombay in *Tigrania Metal & Steel Industries P Ltd v. Commissioner of Central Excise* [2015 (326) ELT 650 (Bom)], of the Hon'ble High Court of Madhya Pradesh in *Syncom Formulation (India) Ltd v. Commissioner of Central Excise & Customs, Indore* [2008 (221) ELT 206 (MP)] and of the Tribunal in *Syncom Formulation (I) Ltd v. Commissioner of Central Excise, Indore* [2005 (192) ELT 323 (Tri-Del)] and in *Commissioner of Central Excise, Kolkata-V v. Sure Safe Glass Works (P) Ltd* [2008 (232) ELT 836 (Tri-Kolkata)].

3. We have heard Learned Counsel for the respondent also at length.

4. There is no doubt that the contravention of any of the provisions of Central Excise Act, 1944 or the rules framed thereunder can also be cause for invoking the extended period of limitation provided for in section 11 A of Central Excise Act, 1944. Nonetheless, while that may be a necessary limb, it does not suffice in the absence of the second limb, viz., intent to evade duty. It is a well-settled in law that mere non-payment of duty cannot be equated with evasion and, even less so, with intent to evade. That has to be established by circumstances.

5. The decision of the Tribunal in the respondent's own appeal against the order impugned herein did go into the aspect of the bar of limitation but in the context of other appellants who sought relief on the lines granted to the respondent herein in the impugned order. As the bar of limitation is to be determined on facts and those facts were not examined in the impugned order in relation to the respondent, we are unable to adopt that finding to dispose of the present appeal. As pointed out by Learned Counsel, the consistent refusal to adopt the

prescribed assessment method despite clarification from the Directorate of Legal Metrology and the persistent resort to writ remedies to fend off the imminent decision by the appropriate statutory authorities may have been taken as indicators of intent to evade duty. It is the claim of the appellant that they were not concerned with the reference to judicial authorities as they had always entertained the belief that the assessment was to be in accordance with section 4 of Central Excise Act, 1944. It is also their contention that they had presumed that, unless the goods were earmarked for sale to normal household consumers directly, which their products were not amenable to, the assessment did not have to proceed on the basis of 'retail selling price.'

6. It is seen that the appellants had been marking the packages as intended for sale other than in retail despite which the goods were being sold to the final customers by the trade channels. It is indeed moot if a manufacturer is to be saddled with differential duty, despite intention to institutional or industrial customers, merely because an independent entity in the trade channel does sell the goods in retail. The substantive gap between an assessee, subject to duty on manufacture, and the person at whose premises the goods are employed is bridged by various independent links that were subject to other taxes on sale and purchase renders such visiting of arbitrary conferment of responsibility with harsh, and, at times, disproportionate, consequences. More so, as the statutory provisions do provide for alternative intent of non-retail supply without providing for acceptable manifestation of intent. In the circumstances, the presumption that there has been any intent to evade duty becomes tenuous.

7. The issue of the method of assessment to be adopted is yet to attain finality. That the Hon'ble Supreme Court has considered it necessary, in *State of Maharashtra v. Subhash Arjundas Kataria* [2012 (275) ELT 289 (SC)] to have the matter considered by a Larger

Bench would imply that the controversy is not free of any doubt. The tagging of the dispute arising from the decision of the Hon'ble High Court of Bombay in *re Larsen & Toubro*, which is the genesis of the dispute of Revenue with the respondent herein, with that reference for constitution of a Larger Bench, suffices to reinforce the existence of controversy from the beginning. In the circumstances, the practice by the appellant between 2003 and 2007 to discard applicability of section 4A of Central Excise Act, 1944 may not be easily amenable to labelling as intended to evade duty. In matters concerning the invoking of the extended period, which is also attended by a penalty of like amount under section 11AC of Central Excise Act, 1944, mere presumption will not suffice. The ingredients must be clearly established and benefit of doubt, if any, must go to the assessee.

8. For the above reasons, we find ourselves unable to accept the contention of Revenue that the adjudicator authority had failed to appreciate the circumstances appropriately while dropping the demand for the extended period. Accordingly, we dismiss the appeal of Revenue.

(Pronounced in Court on 16.04.2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)