

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Writ Petition (Civil) No. 5454/2010**

Reserved on: 3rd August, 2011
% **Date of Decision : 30th September, 2011**

M/s Shiva Taxfabs Limited & Ors. Petitioners
Through Mr. S. Ganesh, Sr. Advocate
with Ms. Vibha Datta Makhija,
Mr. Prabhat Kumar and Mr.
Philemon Nongbri, Advocates.

VERSUS

Union of India & Ors. Respondents
Through Mr. P.K. Mittal, Ms. Preeti
Gupta, Advocates for
respondent No. 1.
Mr. Mukesh Anand, Advocate
for respondents 2 and 3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA, J.

The petitioners six in number have prayed for quashing of Circular No. 929/19/2010-CX dated 29th June, 2010, issued by respondent No. 3, Central Board of Excise and Customs, Ministry of Finance (Board, for short). It is alleged that the circular is patently illegal and contrary to the ratio approved and held by the Customs,

Excise and Service Tax Appellate Tribunal (CESTAT, for short), Northern Bench, New Delhi in the ***Commissioner of Central Excise, Kanpur vs. G.P.L. Polyfils Ltd.***, reported in 2005(183) E.L.T. 27 (Tri. – Del.).

2. The contentions of the petitioners are three fold. The decision in the case of ***GPL Polyfils Ltd.*** (supra) was accepted by the respondents and was not challenged. The said decision, therefore, is binding on the respondents in view of the principle of consistency and uniformity. Reliance is placed on ***Union of India Vs. Kaumudini***, (2001) 10 SCC 231; ***Berger Paints India Ltd. vs. CTI***, (2004) 12 SCC 42; ***Indian Oil Corporation vs. CCE, Baroda***, (2007) 13 SCC 803; ***Commissioner of Central Excise, Bangalore vs. Bal Pharma Ltd.***, (2011) 2 SCC 620; and ***Sunflag Iron & Steel C. Ltd. vs. Additional Collector of Central Excise, Nagpur***, 2003 (162) ELT 105 (Bom.). It is highlighted that the authorities have been asked to ignore the decision of the tribunal in ***GPL Polyfils Ltd.*** (supra). Secondly, the circular is contrary to the statute as Chapter note I of Chapter 54 to the Central Excise Tariff has been ignored. The Chapter Note is an integral and principal part of the statute as held by the Supreme Court in ***Subhash Photographic vs. Union of India***, 1993

Supp (3) SCC 323. Therefore, the circular which is contrary to the statutory provisions has no existence in law (ref. ***Commissioner of Central Excise, Bolpur vs. Ratan Melting & Wire Industries***, (2008) 13 SCC 1). Lastly, on the merits also it is submitted that the activity undertaken by the petitioners is not excisable and the impugned circular is contrary to law.

3. The respondents have contested the aforesaid contentions. On merits, it is submitted that the Chapter note I of Chapter 54, does not help and support the contentions of petitioners. Reliance is placed on the definition of the term 'manufacture' in the definition clause 2(f) of the Central Excise Act, 1944 (Act, for short) to controvert the first contention. To draw support, the respondents have referred to ***Plasmac Machine Mfg. Co. Pvt. Ltd. vs. Collector of Central Excise***, 1991(51) ELT 161 (SC); ***Elson Machines Pvt. Ltd. vs. CCE***, 1998(38) E.L.T. 571 (SC); ***Faridabad CT Scan Centre Vs. D.G. Health Services***, 1997(95) ELT 161 (SC); ***B.J. Akkara, Col. (Retd.) vs. Govt. of India***, 2007(207) ELT 3 (SC); ***Sharp Industries Ltd. vs. Commissioner of Central Excise***, (2005) 7 SCC 676; ***Rajasthan State Electricity Board & Ors. vs. Laxman Lal &***

Ors., 1991 Supp (2) SCC 531; *State of Maharashtra vs. Digambar*, (1995) 4 SCC 683; *Union of India vs. Delhi Cloth and General Mills Co. Ltd.*, AIR 1963 SC 791; *Sterling Foods vs. State of Karnataka*, AIR 1986 SC 1809; *Aditya Mills Ltd. vs. Union of India*, 1988 (37) ELT 471 (SC) and *Collector of Central Excise, Bombay vs. K.W H Helioplastics*, 1998 (97) ELT 385 (SC). It is submitted that the order of the Tribunal in *GPL Polyfils Ltd.* (supra), is per incuriam and cannot be treated as a precedent. On the question of the circular and the right of the Board to issue circulars, it is submitted that the same has been validly issued under Section 37B of the Act.

4. The first question which arises for consideration is what is the effect of the respondents not challenging the decision of the CESTAT in the case of *GPL Polyfils Ltd.* (supra). Counsel for the parties have relied upon several decisions of the Supreme Court as well as one decision of the Bombay High Court. We need not dwell deep into the said aspect as this issue is no longer *res integra* and was settled by the Supreme Court in *C.K. Gangadharan and Anr. Vs. CIT, Cochin*, (2008) 8 SCC 739. The first paragraph of the said decision refers to an earlier order dated 13th

March, 2008, by which reference was made to a larger Bench to decide the question to what extent, Revenue can be precluded from defending itself or contesting an issue when an assessee relies upon a contrary decision of a tribunal or High Court which has not been challenged; Whether it is open to the Revenue to challenge correctness of a ratio or a decision which has been accepted in case of one assessee, in cases of other assessees. The larger Bench of the Supreme Court while deciding the reference, has quoted paragraphs 20 and 22 from ***BSNL vs. Union of India***, (2006) 3 SCC 1, which read as under:-

“20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these

gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.

* * *

22. A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in *Rupa Ashok Hurra v. Ashok Hurra*. As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in *State of U.P. v. Union of India* related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can, if we so find, declare that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."

5. A paragraph of ***State of Maharashtra vs. Digambar***, (1995) 4 SCC 683, was also quoted. The said paragraph reads as under:-

"16. We are unable to appreciate the objection raised against the prosecution of this appeal by the appellant or other SLPs filed in similar matters. Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the

High Court rendered in writ petitions when they are considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefor. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper advice or negligence or improper conduct of officers concerned. It is further possible, that even where SLPs are filed by the State against judgments of the High Court, such SLPs may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some SLPs in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an SLP or SLPs in other similar matter(s) where it is considered on behalf of the State that non-filing of such SLP or SLPs and pursuing them is likely to seriously jeopardise the interest of the State or public interest.”

6. Thereafter, it has been observed by the Supreme Court as under:-

“6. In *Govt. of W.B. v. Tarun K. Roy* reference was made to the judgment in *Digambar case* and *State of Bihar v. Ramdeo Yadav*. It was noted as follows: (*Tarun K. Roy case*, SCC p. 358, paras 28-29)

“28. In the aforementioned situation, the Division Bench of the Calcutta High Court manifestly erred in refusing to consider the contentions of the appellants on their own merit, particularly, when the question as regards difference in the grant of scale of pay on the ground of different educational qualification stands concluded by a judgment of this Court in *Debdas Kumar*. If the judgment of *Debdas Kumar* is to be followed, a finding of fact was required to be arrived at that they are similarly

situated to *Debdas Kumar* which in turn would mean that they are also holders of diploma in Engineering. They admittedly being not, the contention of the appellants could not be rejected. Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See *State of Maharashtra v. Digambar*.)

29. In *State of Bihar v. Ramdeo Yadav* wherein this Court noticed *Debdas Kumar* by holding: (*Ramdeo Yadav case*, SCC p. 494, para 4)

‘4. Shri B.B. Singh, the learned counsel for the appellants, contended that though an appeal against the earlier order of the High Court has not been filed, since larger public interest is involved in the interpretation given by the High Court following its earlier judgment, the matter requires consideration by this Court. We find force in this contention. In the similar circumstances, this Court in *State of Maharashtra v. Digambar* and in *State of W.B. v. Debdas Kumar*, had held that though an appeal was not filed against an earlier order, when public interest is involved in interpretation of law, the court is entitled to go into the question.’
”

7. In *Ramdeo case* reference was made to *State of W.B. v. Debdas Kumar* wherein it was observed at para 5 as follows: (SCC pp. 494-95)

“5. It is then contended that Sections 3(2) and (3) make distinction between the employees covered by those provisions and the employees of the aided schools taken over under Section 3(2). Until the taking over by operation of Section 3(4) recommendation is complete, they do not become the employees of the

Government under Section 4 of the Act. The Government in exercise of the power under Section 8 constituted a committee and directed to enquire and recommend the feasibility to take over the schools. On the recommendation made by them, the Government have taken decision on 13-1-1981 by which date the respondents were not duly appointed as the employees of the taken over institution. Therefore, the High Court cannot issue a mandamus directing the Government to act in violation of law.”

8. In *CCE v. Hira Cement* at para 24 the position was reiterated.

9. In *Govt. of A.P. v. V.J. Cornelius* it was observed that equity is not the relevant factor for the purpose of interpretation.

10. It will be relevant to note that in *Karamchari Union v. Union of India* and *Union of India v. Kaumudini Narayan Dalal* this Court observed that without a just cause Revenue cannot file the appeal in one case while deciding not to file appeal in another case. This position was also noted in *CIT v. Shivsagar Estate*.

11. The order of reference would go to show that same was necessary because of certain observations in *Berger Paints India Ltd. v. CIT*. The decision in *Union of India v. Kaumudini Narayan Dalal* was explained in *Hemalatha Gargya v. CIT*, at SCC para 14. It has been stated in the said case that the fact that different High Courts have taken different views and some of the High Courts are in favour of the Revenue constituted “just cause” for the Revenue to prefer an appeal. This Court took the view that having not assailed the correctness of the order in one case, it would normally not be permissible to do so in another case on the logic that the Revenue cannot pick and choose. There is also another aspect which is the certainty in law.

12. If the assessee takes the stand that the Revenue acted mala fide in not preferring appeal in one case and filing the

appeal in other case, it has to establish mala fides. As a matter of fact, as rightly contended by the learned counsel for the Revenue, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of decision is revenue neutral, there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure.

13. In answering the reference, we hold that merely because in some cases the Revenue has not preferred appeal that does not operate as a bar for the Revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts.”

7. The aforesaid decision brings out the legal principle that while continuity and consistency are conducive to the smooth evolution of Rule of law yet hesitancy to correct a wrong or set forth or correct a deviation for future can prevent/obstruct its growth. Rule of estoppel applies to one and the same assessment and not to assessment of different years/persons. The doctrine of “approbate and reprobate” is only a specie of estoppel. It applies to the conduct of the parties. It cannot operate against the provisions of a statute (see **CIT vs. V.Mr.P.Firm** [1965] 56 ITR 67 (SC)).

8. We are not required to decide, whether a contrary stand in the assessment/adjudication procedure can be taken by the Revenue/authorities when the High Court having jurisdiction over the authorities has decided the question. A decision of the High Court is a binding precedent. In view of the reference decided by the Supreme Court, it has to be held that the Revenue can prefer appeals or take a contrary stand to what has been held by the tribunal even if they have not preferred an appeal, when a “just cause” is established and can be shown. Mere fact that the Revenue has not preferred an appeal or challenged the same, does not bar the Revenue from preferring an appeal or taking a different stand in another case where there is a just cause or it is in public interest to do so or when a pronouncement of the higher Court is different and/or divergent views are expressed by the Tribunals or the High Courts (other than jurisdictional High court). The first contention raised by the petitioner is answered accordingly.

9. This brings us to the second question relating to the validity of the Circular. The aforesaid circular reads as under:-

“Circular No. 929/19/2010-CX

F.No. 55/1/2010-CS.1

Government of India

Ministry of Finance
Department of Revenue

New Delhi the, June 29th 2010

Order under section 37 B of Central Excise Act, 1944

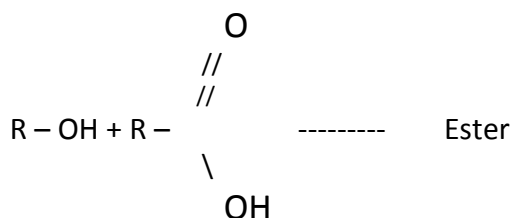
Subject:- Classification of Polyester Staple Fibre manufactured out of PET scrap and waste bottles.

In exercise of powers conferred under section 37B of the Central Excise Act, 1944 Central Board of Excise & Customs considers it necessary, for the purposes of uniformity with respect to classification of "Polyester Staple Fibre" manufactured out of PET scrap and waste bottles, to issue the following instructions.

2. It has been brought to the notice of the Board that divergent practices are being adopted in respect of classification of the "Polyester Staple Fibre" manufactured out of PET scrap and waste bottles. Whereas in some jurisdictions the said product has been classified under the Chapter 39 as article of plastic, in other jurisdictions the same has been classified under Chapter Heading 55032000.

3. The matter has been examined. Polyester is "Long-chain polymers chemically composed of at least 85 per cent by weight of an ester and a dihydric alcohol and a terephthalic acid." **Federal Trade Commission defines Polyester Fibre:** A manufactured fibre in which the fibre forming substance is any long-chain synthetic polymer composed of at least 85% by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalic units, $p(-R-O-CO-C_6H_4-O-)_x$.

4. Normally PSF is manufactured by using main inputs like PTA & MEG. The name "polyester" refers to the linkage of several monomers (esters) within the fiber. Esters are formed when alcohol reacts with a carboxylic acid. The monomer ester then is polymerized under suitable conditions to obtain polyester.



5. The most common polyester for polyester staple fibre purposes is poly (ethylene terephthalate), or simply PET. This is also the polymer used for many soft drink bottles and it is becoming increasingly common to recycle them after use by re-melting the PET and extruding it as fibre. To manufacture Polyester staple fibre, used PET bottles are taken as inputs. They are crushed and converted into PET flakes. These PET flakes are then charged to extruders where they are melted and molten polymer is passed through spinnerets to obtain TOW. The tow is drawn and then cut into different lengths to obtain PSF.

6. As per Chapter Note 1 to Chapter 54,

1. Throughout this Schedule, the term “man-made fibres” means staple fibres and filaments of organic polymers produced by manufacturing processes, either:

(a) by polymerisation of organic monomers to produce polymers such as polyamides, polyesters polyolefins or polyurethanes, or by chemical modification of polymers produced by this process [for example, poly (vinyl alcohol) prepared by the hydrolysis of poly (vinyl acetate)] ; or

(b) by dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.

The terms “synthetics” and “artificial”, used in relation to fibres, mean: synthetic: fibres as defined at (a); artificial: fibres as defined at (b). Strip and the like of heading 5404 or 5405 are not considered to be man-made fibres.

The term “man-made”, “synthetic” and “artificial” shall have the same meanings when used in relation to “textile materials”.

7. Thus manmade fibre can be obtained either starting from monomers or from polymers itself. The process of manufacture is not determinative of the classification of the manufactured product. What is essential for determining the classification is the nature of the end product and the market understanding of the said end product. In the present case there appears to be no dispute with regard to the nature and commercial understanding of the product viz. Polyester Staple Fibre.

8. As per technical literature uses of Polyester Fibre are as follows

- **Apparel:** Every form of clothing
- **Home Furnishings:** Carpets, curtains, draperies, sheets and pillow cases, wall coverings, and upholstery
- **Other Uses:** hoses, power belting, ropes and nets, thread, tire cord, auto upholstery, sails, floppy disk liners, and fiberfill for various products including pillows and furniture

9. From the above facts it is quite evident that the product under consideration is nothing but a textile material and hence will be classified as textile material under Section XI and not as article of plastic in Chapter 39.

10. Tribunal decision in case of GPL Polyfils Ltd [2005 (183) ELT 27 (T)] would be relevant to the particular facts as in the said case and hence cannot have binding precedents in other matters.

11. To ensure uniformity in the manner of classification of the Polyester Staple Fibre obtained from PET scrap and waste bottles it is clarified that this product is correctly classifiable under heading 55032000.

12. Based on the above clarification pending cases may be disposed of.
13. Receipt of this order may please be acknowledged.
14. Hindi version will follow.

(Madan Mohan)
Under Secretary to the Government of India”

10. A reading of the said circular shows that the respondents have referred to the technical process involved when “PET scrap and waste bottles are converted”. According to the stand taken by the Revenue this is covered by Chapter note I to Chapter 54 read with Section 2(f) of the Act. The circular also refers to the divergent stands as to the classification adopted in different jurisdictions of the Central Excise. It has been stated that the circular has been issued for the purposes of uniformity of classification.

11. Right of the Central Boards to issue circulars and the effect thereof under Section 119 of the Income Tax Act, 1961 or Section 37B of the Act, Section 151 A of the Customs Act, 1962 etc. has been examined and explained by the Supreme Court in several cases. In ***State of Kerala v. Kurian Abraham (P) Ltd.***, (2008) 3 SCC 582, it has been held as under:-

“23. Tax administration is a complex subject. It consists of several aspects. The Government needs to strike a balance in the imposition of tax between collection of revenue on one hand and business-friendly approach on the other hand. Today, Governments have realised that in matters of tax collection, difficulties faced by the business have got to be taken into account. Exemption, undoubtedly, is a matter of policy. Interpretation of an entry is undoubtedly a quasi-judicial function under the tax laws. Imposition of taxes consists of liability, quantification of liability and collection of taxes. Policy decisions have to be taken by the Government. However, the Government has to work through its senior officers in the matter of difficulties which the business may face, particularly in matters of tax administration. That is where the role of the Board of Revenue comes into play. The said Board takes administrative decisions, which includes the authority to grant administrative reliefs. This is the underlying reason for empowering the Board to issue orders, instructions and directions to the officers under it.

24. X X X X

25. One more aspect needs to be mentioned. Provisions of Section 3(1-A) are similar to the provisions of Section 119(1) of the Income Tax Act, 1961 (the 1961 Act) inasmuch as both the sections have used the expression “for the proper administration of this Act”. According to *Law of Income Tax* by Kanga and Palkhivala, the Board is entrusted with the power to give effect to the provisions of the Act and to provide “fair and just administration” in the matter of imposition and collection of tax. This is where it becomes the incumbent duty of the Board to grant administrative relief in appropriate cases. In such exercise, incidentally the Board has to consider the effect of the items enumerated in the entry. Therefore, it is not open to the State Government to contend that the Board in this case had entered into an area which is earmarked for the legislature/executive. In our view, the said circular grants administrative relief to the business. It was entitled to do so. Therefore, it cannot be said that the Board had acted beyond its authority in issuing the said circular. One more reason needs to be stated. Whenever such binding circulars are issued by the Board granting administrative relief(s) business arranges its affairs relying on such circulars. Therefore, as long as the circular

remains in force, it is not open to the subordinate officers to contend that the circular is erroneous and not binding on them.

26. In *Union of India v. Azadi Bachao Andolan* a circular was issued by CBDT under Section 119 of the Income Tax Act, 1961. It was challenged inter alia on the ground that it was ultra vires the provisions of Section 119(1). The argument was rejected by this Court in the following words: (SCC p. 32, para 47)

“47. It was contended successfully before the High Court that the circular is ultra vires the provisions of Section 119. Sub-section (1) of Section 119 is deliberately worded in a general manner so that CBDT is enabled to issue appropriate orders, instructions or directions to the subordinate authorities ‘as it may deem fit for the proper administration of this Act’. As long as the circular emanates from CBDT and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to the source of power under Section 119 irrespective of its nomenclature. Apart from sub-section (1), sub-section (2) of Section 119 also enables CBDT

‘for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue appropriate orders, general or special, in respect of any class of income or class of cases, setting forth directions or instructions (not being prejudicial to the assessee) as to the guidelines, principles or procedures to be followed by other Income Tax Authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties’.

In our view, the High Court was not justified in reading the circular as not complying with the provisions of Section 119. The circular falls well within the parameters of the powers exercisable by CBDT under Section 119 of the Act.

27. Lastly, the binding effect of the said Circular No. 16/98 needs to be kept in mind. As stated above, the said circular was issued by the Board by exercising statutory powers vested in it under Section 3(1-A). As stated above, Section 3(1-A) provides for an enabling power of the Board which

was recognised as an authority under the 1963 Act. The said power was to be exercised in special cases. As stated above, granting of administrative reliefs by the Board came within its authority. As stated above, the said circular was issued for just and fair administration of the 1963 Act. As stated above, Section 3(1-A) is similar to Section 119(1) of the 1961 Act. The circulars of this nature are issued by the Board consisting of highest senior officers in the Revenue Department. These circulars are to be respected by the officers working under the supervision of the Board. These circulars are binding on all the authorities administering the Tax Department. The power of the Board to issue such circular is traceable to Section 3(1-A)(c) of the Act. The said circular is statutory in nature. Therefore, it is binding on the Department though not on the courts and the assesseees....”

12. In ***Padinjarekkara Agencies Ltd. v. State of Kerala***, (2008) 3 SCC

59, the Supreme Court has relied upon the above mentioned case and

held as under :

“13. It is no doubt true that the AO is bound by the directions issued by the Commissioner even with regard to the terms used in the exemption notification(s). However, as held in our earlier judgment in *Kurian Abraham (P) Ltd.*, circulars/orders issued by the Commissioner are not binding on the assessee. Therefore, dehors the directives given by the Commissioner, it is open to the assessee to claim the benefit of exemption/concession on the basis of various exemption notification(s) issued by the Government from time to time. We express no opinion on the interpretation of those notification(s). Suffice it to state that the assessee was not bound by the orders/directions issued by the Commissioner to the AO, therefore, on the scope and effect of each of the above exemption notifications, the matter needs to be remitted to the AO for fresh decision in accordance with law. In other words, if the assessee satisfies the terms and conditions mentioned in the exemption notification, the assessee would be entitled to the benefit thereunder notwithstanding the circular issued by the

Board/Commissioner. This is on the principle mentioned hereinabove that such circular does not bind the assessee if the assessee demonstrates that it fulfils the conditions mentioned in the exemption notification.”

13. Paragraph 10 of the circular cannot be sustained. Paragraph 10 of the circular states that the decision of the Tribunal in ***GPL Polyfils Ltd.*** (supra) would be relevant to the facts of that particular case and is not a binding precedent in other matters. It stipulates that even if the facts and the process are identical, other assesseees cannot rely upon the decision in ***GPL Polyfils Ltd.*** (supra) before the Revenue authorities. In the written submissions and during the course of the argument, the Revenue took a forthright and categorical stand that the said decision is incorrect and per incuriam. Intention of the Revenue in paragraph 10 of the circular is apparent, Revenue authorities should not follow the decision of the CESTAT in ***GPL Polyfils Ltd.*** (supra). Paragraph 10 of the said circular is accordingly struck down.

14. The petitioners and the Revenue have taken divergent stand on interpretation of Chapter note 1 to Chapter 54 and whether petitioners are ‘manufacturing’ a taxable commodity, polyester stable fibre. As noticed above, the respondents have also relied upon definition clause

2(f). The circular in question refers to the process by which the purported 'manufacture' takes place. The stand of the petitioners is to the contrary and they heavily rely upon the decision in **GPL Polyfils Ltd.** (supra). In the said decision, it has been held by the CESTAT as under:-

"4. Chapter 54 of the Tariff, relates to man-made Filaments and its Chapter note I defines man-made fibres, as under:-

"Throughout the First Schedule, the term man-made fibre" means staple fibres and filaments of organic polymers produced by manufacturing processes, either:

(a) By polymerization of organic monomers, such as polyamides, polyesters, polyurethanes or polyvinyl derivatives; or

(b) By chemical transformation of natural organic polymers (for example, cellulose, casein, proteins or algae), such as viscose rayon, cellulose acetate, cupro or alginates."

It remains undisputed that none of these processes, had been undertaken by the assessee in respect of their fibre so as to bring the same within the ambit of this Chapter 54 or even Chapter 55 which are part of the First Schedule. The learned Commissioner (Appeals) has, in our view, rightly dropped the duty demand against the assessee on this ground.

5. The Chapter Note 1, reproduced above, sets out the definition of man-made fibres for the purpose of bringing the same within the ambit of the First Schedule of the CETA. It gives an exhaustive and self-contained/ self-defined, definition and for bringing the "man-made fibres" within the scope of the First Schedule of the CETA, the

processes detailed in this Chapter note, must be undertaken by an assessee.”

15. The actual process involved and the chemical reaction involved etc. are technical and factual aspects and we do not see any reason why we should go into the said disputed and debatable questions in the writ petition. These aspects have to be gone into and examined by the authorities under the Act, and if required by the CESTAT.

16. However, one difficulty remains as pointed out by the counsel for the petitioners. It is stated that the hands of the authorities are bound and tied because of the impugned circular. It is submitted that the entire adjudication process would be a formality. It is further submitted that even if paragraph 10 of the circular is struck down, the damage and harm has been caused. There is merit in the contention of the petitioners in this regard. The situation, we think, can be redeemed by giving two directions. Firstly, the Revenue authorities will examine the contentions raised by the petitioners without being influenced or treating the circular as binding. The Revenue/adjudicatory authorities will independently apply their mind and take into consideration the decision of the Tribunal in **GPL Polyfils Ltd.** (supra). They will also

examine whether the said decision is applicable or state if they feel that there are good grounds and reasons (i.e. just cause) why the said decision should not be applied and questioned in appeal etc. The circular will be read as a guideline and not a binding mandate. Secondly, the petitioners can be protected by ensuring that in case the authorities hold that the decision in **GPL Polyfils Ltd.** (supra) is not to be applied even if facts are similar, then the demands should not be recovered by adopting coercive measures till stay applications are decided by the CESTAT. This direction is necessary, as a piquant situation has been created by the Revenue. Equities have to be balanced. The earlier decision of the CESTAT in **GPL Polyfils Ltd.** (supra) should be given due regard if the petitioners are able to show that the same applies, unless the same is set aside. (See judgment dated 6th July, 2011 in Civil Appeal No. 5166/2003 titled **M/s Gammon India Ltd. versus Commissioner of Customs, Mumbai**). Of course the stay of demand will be subject to the order of the CESTAT. The petitioners if denied stay by the CESTAT and aggrieved will be entitled to challenge the order of the CESTAT in accordance with law.

17. The aforesaid directions have been issued in view of the peculiar facts of the present case. They find echo and resonance in the decision of the Supreme Court in ***Varsha Plastics Private Limited v. Union of India***, (2009) 3 SCC 365 :

“30. The proviso to Section 151-A makes it abundantly clear that the Customs Officer who has to make a particular assessment is not bound by such orders or instructions or directions of the Board. An assessing authority under the Act being a quasi-judicial authority has to act independently in exercise of his quasi-judicial powers and functions. Section 151-A does not in any manner control or affect the independent exercise of quasi-judicial functions by the assessing authority.

XXXX

32. The question now is whether the impugned Standing Order in any manner interferes with the independent quasi-judicial function to be discharged in the assessment of duty by the assessing officer. Whatever be the language employed in the Standing Order which may suggest that the said instructions are in the nature of a mandate or command, the High Court has read down the impugned Standing Order purely as instructions or guidelines and not as a mandate or command for being obeyed in each individual case of assessment before them.

33. The High Court further held that the Standing Order is to be taken only as assistance in exercise of the quasi-judicial power of determining value for the purpose of levying of customs duty. We agree with the view of the High Court. As a matter of fact, it is the case of the Department as well that the impugned Standing Order is not binding; it is just in the nature of guidelines to streamline the functioning of Customs Officers at various field formations.

34. According to the Department, the impugned Standing Order was issued for the smooth functioning of assessment and examination work and to bring about uniformity in the work and it prescribes only the pattern of assessment and in no way

interferes with the discretion of the assessment authority. In view of the categorical stand of the Department that the impugned Standing Order is just in the nature of guidelines and it does not in any way interfere with the discretion of officers, the impugned Standing Order has to be read and understood accordingly.

XXXX

38. Para 7 of the impugned Standing Order which provides as to how the classification of mixed waste material like floor sweeping should be made also has to be read only as guidelines to the assessing authority. The assessing authority in his quasi-judicial function has to take an independent view in this regard as well."

(emphasis supplied)

18. Section 37 B of the Act has a similar proviso. In this context we may refer to proviso to Section 37 B of the Act which reads as under:

"37-B. Instructions to Central Excise Officers.—

X X X X

Provided that no such orders, instructions or directions shall be issued—

- (a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or
- (b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions."

19. Accordingly, the aforesaid writ petition is disposed of recording as under:

- (a) The first question is decided in terms of paragraph 8 above.
 - (b) Paragraph 10 of the impugned circular is struck down;
 - (c) The Assessing Officer and the authorities under the Act shall independently apply their mind and consider the judgment of tribunal in **GPL Polyfills Ltd.** (supra) and keep in mind the observations and ratio of Supreme Court in **C.K. Gangadharan & Anr.** (supra). The Assessing Officer/authorities will not be bound by the impugned circular. The circular can be referred for guidance but not as a binding mandate.
 - (d) In case of an adverse decision, the demand will not be enforced by adopting coercive method till the stay application is decided by CESTAT.
19. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

September 30th, 2011
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