

GAHC010003032019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

C. EX. APPEAL NO.3 OF 2019

Commissioner, Central Excise & Service Tax, Milan
Nagar, Lane – F, CR Building, Dibrugarh – 786003.

.....Appellant

-Versus-

Hindustan Coca Cola Beverages Private Limited, A.T.
Road, RRL, Jorhat, Assam – 785001.

.....Respondent

- B E F O R E -

HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR

For the Appellant(s) : Mr. S.C. Keyal, Standing Counsel, CGST.

For the Respondent(s) : Mr. A. Chakravarty, Advocate.
Mr. K. Baishya, Advocate.

Date of Hearing : 19.09.2024.

Date of Judgment : 19.09.2024.

JUDGMENT & ORDER (ORAL)

(Vijay Bishnoi, CJ)

Heard Mr. S.C. Keyal, learned Standing Counsel, CGST, appearing for the appellant. Also heard Mr. A. Chakravarty, learned counsel appearing for the sole respondent.

2. This Court, vide order dated 03.03.2023, while admitting the present Central Excise Appeal, has framed the following questions of law:-

“1. Whether Hon’ble CESTAT has erred in determining the applicability of the Notification No.33/99-CE dated 08.07.1999 as amended.

2. Whether DIC certificate issued dated 10.05.1993 could form the basis for determination of installed capacity during pre expansion period as it was clearly stated in the notification no.33/99-CE dated 08.07.1999 that cut off date was to be treated on or after 24.12.1997.”

3. The brief facts of the case are that the Revenue had issued a show cause notice to the sole respondent on 05.09.2003 alleging that the respondent having the factory at A.T. Road, PO-RLL Jorhat, engaged in the manufacture of Aerated Water falling under Clause 22 of the Central Excise Tariff, 1985 and it had wrongly availed the benefit of the Notification No.33/99-CE dated 08.07.1999 and got the refund of central excise duty paid from PLA by it for the period from July, 1999 to November, 2002, amounting to ₹ 15,04,35,465.00 by projecting expansion 25% or more. It is mentioned in the said show cause notice that on review of the documents claiming expansion of over 25% of installed capacity after 24.12.1997, it was observed that the respondent Company had wrongly availed the benefit of exemption under the Notification dated 08.07.1999, which was otherwise not admissible to it. It was further mentioned in the show cause notice that during the course of investigation, serious anomalies regarding eligibility of the respondent Company by way of suppression of fact was noticed, as no expansion of critical machineries had been done and there was wrong assessment of installed capacity. Vide the said show cause notice, the Company was asked to show cause as to why ₹ 15,04,35,465.00, erroneously refunded to it, should not be adjusted/

demanded and recovery under the provisions of the Notification dated 08.07.1999 should not be made.

4. The respondent replied to the said show cause notice and the Commissioner of Central Excise, Dibrugarh, while relying on the decision of the Customs, Excise & Service Tax Appellate Tribunal, Kolkata (hereinafter to be referred as "CESTAT") dated 20.01.2005, dropped the charges framed under the show cause notice dated 05.09.2003, vide order dated 28.02.2006.

5. Being aggrieved with the order dated 28.02.2006, the Revenue preferred an appeal before the CESTAT, which came to be dismissed vide order dated 13.03.2018. Against the said order dated 13.03.2018 passed by the CESTAT, the present Central Excise Appeal is filed by the Revenue.

6. It is noticed that the CESTAT, in its impugned order has taken note of the fact that vide order dated 20.01.2005, the CESTAT had already affirmed the order passed by the Commissioner, Central Excise, Shillong in the case of the respondent Company for the period running from July, 1999 to May, 2002 and rejected the claim of the Revenue that the respondent Company has erroneously availed that refund under the Notification dated 08.07.1999, as amended. It is also to be noticed that against the order dated 20.01.2005 passed by the CESTAT in the case of the respondent Company, in relation to the period running from July, 1999 to May, 2002, no appeal or any other proceedings were initiated by the Revenue and the order dated 20.01.2005 passed by the CESTAT has attained finality.

7. The show cause notice, in relation to the period running from July, 1999 to May, 2002, was issued on 03.10.2002, whereas the show cause notice

relevant for the present appeal was issued on 05.09.2003, which was in relation to the period July, 1999 to November, 2002. Admittedly, the subsequent show cause notice dated 05.09.2003 includes the period July, 1999 to May, 2002, for which the CESTAT has already passed an order in favour of the respondent, which has attained finality and, therefore, it is not open for the Revenue to again -agitate the said issue by way of issuing a fresh show cause notice. The action on the part of the Revenue of not challenging the decision of the CESTAT in relation to the period July, 1999 to May, 2002, which is included in the subsequent show cause notice dated 05.09.2003, disentitles it from challenging the same.

8. The Hon'ble Supreme Court has disallowed the Revenue to take different stand in the same situation in ***Birla Corporation Limited -Vs- Commissioner of Central Excise***, reported in ***2005 (186) ELT 266 (SC)***. The Hon'ble Supreme Court has observed as under:-

“5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was thereafter, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. (supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary.

9. In ***Jayaswals Neco Limited -Vs- Commissioner of Central Excise, Nagpur***, reported in ***2006 (195) ELT 142 (SC)***, again the Hon'ble Supreme Court has reiterated that the Revenue cannot be permitted to take a stand different than the principles laid down in the earlier case and has observed as under:-

“6. This Court in *Birla Corpn. Ltd. v. CCE4* relying upon an earlier decision of this Court, held that the Department having accepted the principles laid down in the earlier case cannot be permitted to take a contra C stand in the subsequent cases. In para 5 of the said judgment it was observed, thus:

‘In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue d was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary.’

7. Since the point involved in the present case is identical to the point decided in *Hindustan Gas and Industries case*’ and the Department having accepted the principle laid therein to the effect that the inserts did not require any precision machining or that any such machining was done by the appellant, cannot be permitted to take a stand different than the principles laid down in the earlier case.

8. The aforesaid decision of the Tribunal in *Hindustan Gas and Industries* easel, amongst other decisions, was relied upon by the assessee before the Tribunal as noticed by the Tribunal in para 10 and dealt with in para 12 of the impugned final order, the Tribunal held that this case has no applicability to the present case. The Tribunal has, in fact, not deliberated on the said decision of a coordinate Bench of the same Tribunal and, without 9 examining the ratio therein, simply held the same to be inapplicable to the present case.

9. Assuming even if it were to disagree with the test laid down in *Hindustan Gas and Industries* easel in order to maintain the judicial propriety in decision-making, the Tribunal ought to have referred the matter to a larger Bench, which it did not do. If a Bench of coordinate jurisdiction does not agree with a Bench of the same strength, then it should refer the matter to a larger Bench and refrain from taking upon itself not to follow such decision and take a contra view. This inevitably leads to uncertainty and creates confusion. This practice must be deprecated at all costs.

10. A Bench of coordinate jurisdiction must not disregard the decision of the same strength on its own on an identical question. The rationale of this rule is the need for consistency, certainty and predictability in the

administration of justice. Classification of particular goods adopted in earlier decisions must not be lightly disregarded in subsequent decisions, lest such judicial inconsistency shake public confidence in the administration of justice. It is undoubtedly vital in the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an erroneous decision in the earlier case. In such circumstances, it is reasonable and indeed efficacious to refer the case to a larger Bench.”

10. Taking into consideration the fact that the issue regarding availment of benefit by the respondent of the Notification dated 08.07.1999 has already been settled in favour of it by CESTAT, vide order dated 20.01.2005, in relation to the period running from July, 1999 to May, 2002 and the same has attained finality because the Revenue has accepted the said decision and has not challenged it further in appeal or other proceedings, we do not find any case for interference. Hence, the present Central Excise Appeal is dismissed.

JUDGE

CHIEF JUSTICE

Comparing Assistant