IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 88 OF 2014

Commissioner of Customs (CSI Airport)	}	**Appellant**
versus		
M/s. Star Entertainment Pvt. Ltd. and Anr.	}	**Respondents**

Mr. Pradeep S. Jetly for the Appellant.

Mr. Prakash Shah with Mr. Prasad Paranjape, Mr. Jas Sanghavi and Ms. Niyati Hakani i/b. M/s. PDS Legal for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATED :- FEBRUARY 20, 2015

P.C. :-

This Appeal by the Revenue challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai dated 22nd January, 2014.

2) The argument of Mr. Jetly, appearing in support of this Appeal, is that the question framed at para 4 of the paper book is a substantial question of law. That question reads as under:-

> "Whether the CESTAT, after holding by majority that royalties/licence fees paid on import of beta/digibeta tapes containing films are includable in the assessable value of the tapes, is right in law in holding that the extended period of limitation is not invokable and consequently setting aside the demand of duty, interest and penalty as time barred?"

3) The Revenue alleges that an intelligence was received by the Directorate of Revenue Intelligence, which indicated that the

Respondents were engaged in the import of recorded media containing foreign feature films, for which they had paid huge amounts to the overseas suppliers towards licensing rights to exploit the said films for a certain period or limited duration. It was also indicated that the said payment details had not been declared to the Customs Authorities at the time of Customs clearance of such feature films.

4) The issue of Customs valuation of the recorded media, on the basis of the value of its contents, in view of the existing legal provisions vis-a-vis the ever evolving technology for visual media, is explained briefly in the memo of the present Appeal and it has been urged that the statement of the Managing Director of the Assessee, which was recorded, reveals that the agreements with overseas entities have been scrutinised and upon such scrutiny, the material form, through which the said films and serials were to be delivered, was Beta or Digibeta tapes, which shows that payment of such licence fee was a condition for delivery/sale of the recorded media. The Managing Director stated as to how the agreements were finalised with the parties abroad and on the basis of these agreements, the licensor would supply the Master Tape of the film/programme. That Master Tape of the film would be in the form of either Beta or Digibeta Tapes, that the licence fees agreed used to be for a fixed period and the rights were to be

exploited within the licence period. Relying upon these statements and the materials collected during the course of investigation, the Revenue came to a conclusion that the Assessee has, during the period and as disclosed in their letter dated 29th October, 2007, willfully suppressed the relevant facts and with a view to evade payment of duty. The allegations in the show cause notice have therefore been relied upon and it is urged that the show cause notice relies upon the Circular and particularly CBEC Circular No. 86 of 2002 dated 12th December, 2002. The show cause notice was thus rightly adjudicated and the order-in-original calls upon the Assessees to pay the sums. The penalty is imposed on the company as also the Managing Director.

5) Mr. Jetly appearing for the Revenue would submit that against this order-in-original dated 18th March, 2010 an Appeal was preferred to the Tribunal and the Tribunal, by majority, has held that the royalties/licence fees paid for the import of Beta/Digibeta Tapes containing films are capable of being included in the assessable value of the said tapes. However, the demand in the present case is time barred. Consequently, Customs duty demand and penal consequences are not sustainable and accordingly set aside. The submission of Mr. Jetly is that the Member Technical and Member Judicial differed. The matter was referred to a third Member and the third Member has concurred with the view of the Member Judicial.

6) Mr. Jetly, with his usual fairness, submitted that though the finding on limitation and time bar is being questioned by the Revenue, there is a clear perversity therein. The Tribunal has failed to note that there was a Judgment of the Hon'ble Supreme Court in the field. The Tribunal merely referred to some views taken by it in earlier decisions. However, if the sequence has to be completed, the Tribunal should have also referred to the later Judgments. The reference to these Judgments was equally necessary. There is a perversity, therefore, in not referring to the Judgments of the Hon'ble Supreme Court in the case of *Associated Cement Companies Ltd. vs. Commissioner of Customs* reported in **2001 (128) ELT 21**, *State Bank of India vs. Collector of Customs* reported in **2000 (115) ELT 597** and *Indo Overseas Films vs. Commissioner of Customs, Chennai* reported in **2002 (139) ELT 729**, which are in favour of the Revenue. Thus, the Assessee has, despite clear legal position, not paid the duty in terms of the legal provisions. This is nothing but a willful suppression and with a view to evade payment of duty in law. Therefore, the extended period was rightly interfered with by the Revenue. The Tribunal's finding is thus perverse.

7) On the other hand, Mr. Prakash Shah appearing for the Respondents/Assessee would submit that the ingredients of the relevant statutory provisions have not been satisfied. The Tribunal has clearly

referred to those ingredients. He has invited our attention to sub-section (4) of section 28 to submit that if there is any willful mis-statement or suppression of facts by the importer or exporter or the agent or supplier, then, alone the extended period of 5 years could have been invoked and by provisions then applicable. In the present case, the Tribunal has found that there was a doubt about the legal position. The finding of fact, therefore, is that the Assessees cannot be termed as guilty of any willful mis-statement or suppression of facts. In the circumstances, the extended period could not have been invoked. Therefore, the Tribunal's view cannot be termed as perverse. In that regard, our attention is invited to pages 268 to 270 of the paper book. On page 270, Mr. Shah would submit that there is a Judgment of the Hon'ble Supreme Court rendered in the case of *Commissioner of Customs Excise, New Delhi vs. Living Media India Ltd.* dated 17th August, 2011, reported in **2011 (271) ELT 3 (SC)**. Till then, the legal position was not settled. The royalty was not therefore capable of being included till then.

8) In such circumstances, this Appeal does not raise any substantial question of law, according to Mr. Shah and it deserves to be dismissed.

9) We have, with the assistance of the learned Counsel appearing for both sides, perused the Appeal paper book and the relevant paragraphs in the orders of the dissenting Members and the opinion of the third Member. The said controversy, as has been summarised in the order of the Tribunal, is that the Assessee imported recorded media such as Beta, Digibeta falling under Tariff Heading No.8523 of Customs Tariff during April, 2004 to October, 2007. These recorded media contained feature films/programmes and they were imported through a courier agency. The duty liability was discharged by the Assessees only on the cost of media as declared by the courier agency based on the invoices submitted by the foreign supplier. The Department conducted an investigation into the matter and found that the Assessee has purchased and imported media which contained feature films/serials and paid, to the overseas suppliers, licence fee for exploiting the intrinsic content of the said media. In the circumstances, while paying customs duty and at the stage of valuation of the goods, they declared the cost of only the material/media and suppressed the amount of licence fee paid/payable to the overseas suppliers. It was further noticed that the recorded media was imported against either fixed amount of licence fee or against minimum guarantee amount. All these amounts were paid before the importation of the goods. It was further seen that the imported Beta/Digibeta tapes were sub-licenced by

the Assessees to various companies. Rule 9(1)(c) of the Customs Valuation Rules, 1988 and Rule 10(1)(c) of Customs Valuation Rules, 2007 are referred to by the Tribunal's Technical Member in para 2.2 of his order and it is then held that the show cause notice was issued for inclusion of royalties/licence fee to the overseas suppliers in respect of the goods imported and re-determination of the assessable values of consequential demand of differential duty liable to be paid under section 28(1) of the Customs Act, 1962 read with proviso thereto along with interest on such duty under section 28AB. That is how the case was adjudicated and the order in-in-original proceeded.

10) The Technical Member arrived at a conclusion that the royalties and licence fees paid by the Assessee for import of Beta/Digibeta tapes containing films ought to be included in the assessable value of the said tapes. Consequently, the demand of differential duty along with applicable interest were upheld.

11) There was a difference of opinion on the point as to whether the extended period of 5 years can be applied in confirming the demand. The difference of opinion was noted in the orders of the Member Technical and Member Judicial on this point. While the Member Technical held that the Assessee is guilty of suppression, the Member Judicial thought otherwise.

12) When the matter was referred to third Member for his opinion, he heard both sides and we are concerned only with his finding on the point of time bar and limitation. Paras 22 and 23 of his decision read as under:-

> "22. On the issue of time bar, the contention of the appellant is that the demand is confirmed by invoking extended period of limitation on the ground of suppression of facts with intent to evade payment of duty. In this regard I find that prior to the decision of the Hon'ble Supreme Court in the case of *Living Media India Ltd.,* there were decisions of the Tribunal in the case of *Sony Music Entertainment Pvt. Ltd. vs. CC, Mumbai* reported in 2005 (189) ELT 227, *CC, Mumbai vs. Sony BMG Music Entertainment (I) Pvt. Ltd.* reported in 2007 (218) ELT 699 and in the case of *Living Media Ltd. vs. CC* reported in 2002 (148) ELT 441.
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> 23. In the case of *Sony BMG Music Entertainment (I) Pvt. Ltd.* (supra), the Tribunal, after taking into consideration the Hon'ble Supreme Court decision in the case of *Associated Cement Companies Ltd.* reported in 2001 (128) ELT 21 (SC), held against the Revenue. The Hon'ble Supreme Court in the case of *Living Media India Ltd.* (supra), reversed the view taken by the Tribunal in the year 2011. In these circumstances, as during the period when the goods in question were imported into India, there were certain decisions which are against the Revenue, therefor I find merit in the contention of the appellant that the allegation of suppression with intent to evade payment of duty is not sustainable. On the issue of time bar I agree with the view taken by the learned Member (Judicial) hence the order confirming the demand, confiscation of the goods and imposition of penalties is not sustainable hence set aside. The Appeals are allowed after setting aside the impugned order on the ground of limitation."

13) Having perused these paragraphs and finding that the majority view is that on merits there being no dispute but difference was with regard to invocation of the extended period that there is no perversity in the views which have been taken. It is well settled that finding on the point of limitation can raise mixed question of fact and

law. In the present case, the facts being undisputed, the Tribunal found that prior to the decision of the Hon'ble Supreme Court, which came on 17th August, 2011, there were certain decisions of the Tribunal. It may be that the Tribunal has not referred to all the decisions, but nonetheless in the order passed by the third Member, there is a reference to the Judgment of the Hon'ble Supreme Court in the case of *Associated Cement Companies Ltd.* (supra). These were the views against the Revenue. The legal position, therefore, was not clear, but somewhat in doubt. It is in these circumstances that the Tribunal concurrently held that the demand in the present case is time barred. The demand was, therefore, set aside.

14) We do not see how a decision of this nature can be faulted. In the case of *Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh-I* reported in **2007 (216) ELT 177**, the Hon'ble Supreme Court had an occasion to consider this aspect in somewhat similar wording and phraseology. There, M/s. Nathpa Jhakri Power Corporation (NJPC) was a joint venture between the Government of India and the Government of Himachal Pradesh set up for the purpose of construction of a power-project. The civil work relating to project was alloted to 3 companies, one of which was the Continental Foundation Jt. Venture. The agreement was executed and to provide

inter alia mix concrete for execution of various items of work under the contract. A show cause notice was issued by the Commissioner of Central Excise to the joint venture companies alleging that the construction companies employed by Nathpa Jhakri Power Corporation were manufacturing Ready Mix Concrete (RMC) on which no central excise duty is being paid. Since the said RMC falls under Chapter Heading No. 3824.20 of the Schedule to the Central Excise Tariff Act, 1985 and is subject to Central Excise duty under Central Excise Act, 1944, duty is payable. The allegations in the show cause notice and the reply of the Assessee have been then referred extensively by the Hon'ble Supreme Court. Then, in para 5, the Hon'ble Supreme Court noted the plea relating to non applicability of the extended period of limitation. Then, the Hon'ble Supreme Court in para 9 held that it is not necessary to go in other issues, because the Appeals are bound to succeed on the point of the challenge to the extended period of limitation.

15) In paras 10 and 11, this is what the Hon'ble Supreme Court has held:-

> "10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and , therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes

> the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.
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> 11. Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in *Continental Foundation Joint Venture case* (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act."

16) In the light of the above principles and which we can safely apply to the present case, we do not term the Tribunal's view as perverse. The Tribunal may not have referred to all the decisions, the Assessee also has been faulted in this case for not abiding by the provisions of law in the teeth of some clear judicial pronouncements, however, the question was, when the consignment or goods were imported, was the Assessee guilty of not complying with the provisions of law and willfully. That there were certain orders and the decisions of the Tribunal against the Revenue being an undisputed fact, the Tribunal concluded that the extended period could not have been invoked. If the Assessee cannot be faulted for taking advantage of the unclear or doubtful legal position, then, the demand rightly fails. The Tribunal

has, by majority, held that during the period when the goods were imported in India, there were certain decisions against the Revenue. The allegation of suppression with intent to evade payment of duty, therefore, is not established and proved. In the circumstances, the third Member agreed with the Member Judicial that the order confirming the demand, confiscation of the goods and imposition of penalty is not sustainable and must be set aside. While we can appreciate the anxiety of the Revenue, when the Assessee succeeded on technical ground, but, the doubtful legal position and which is required to be cleared by the higher Courts is something for which we cannot hold either the Assessee or the Revenue responsible. In the circumstances, we do not think that the Appeal raises any substantial question of law. It is accordingly dismissed.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**