

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 260 OF 2016**

Commissioner of Central Excise, }
Mumbai - I } Appellant
 versus
M/s. Taj Sats Air Catering Ltd. } Respondent

**WITH
CENTRAL EXCISE APPEAL NO. 265 OF 2016**

Commissioner of Central Excise, }
Mumbai - I } Appellant
 versus
M/s. Sky Gourmet Catering }
Services Pvt. Ltd. } Respondent

**WITH
CENTRAL EXCISE APPEAL NO. 286 OF 2016**

Commissioner of Central Excise, }
Mumbai - I } Appellant
 versus
Mr. Ganesh Chaturvedi } Respondent

**WITH
CENTRAL EXCISE APPEAL NO. 266 OF 2016**

Commissioner of Central Excise, }
Mumbai - I } Appellant
 versus
Mr. Manish Chiranewal } Respondent

Mr. M. Dwivedi with Ms. Shalaka Gujar
for the appellants in all appeals.

Mr. V. Sridharan-senior counsel with
Mr. Prakash Shah for the respondents in
CEXA/260/2016 and CEXA/266/2016.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.
DATED :- MARCH 12, 2018**

P.C. :-

1. By the order under appeal, the Revenue says that substantial questions of law arise for determination and consideration of this court.

2. We have heard Mr. Dwivedi learned counsel appearing for the Revenue in support of this appeal and Mr. V. Sridharan learned senior counsel appearing for the assesseees-respondents. The order under appeal is delivered by the tribunal in a group of matters. Those arose from the orders-in-original.

3. The respondents before us are into catering business. The catering services, according to the Revenue, amount to manufacture of edible preparation and supply of food preparation/materials to various airlines, served on board of aircrafts. It is the case of the Revenue that the assessee (in CEXA/286/2016) was not registered with the Central Excise Department at the relevant time for manufacture of goods. Thus, the meals prepared by them are excisable goods falling under Chapter 21 of the Central Excise Tariff Act, 1985. Hence, the assessee is liable to pay central excise duty. In the year 2009, based upon the information, inquiries were conducted and since the assessee was found not paying tax, it was observed that for the period 1st April, 2004 to 31st March, 2006 the assessee failed

to pay the central excise duty. A notice styled as show cause notice dated 21st April, 2010 was, therefore, issued calling upon the assessee as to why the food preparation cleared to various international and domestic airlines should not be classified under Chapter Sub-Heading 2106.90.99 of the Central Excise Tariff for the financial years 2005-06 and 2006-07 attracting central excise duty at the appropriate rates applicable during the material period and as to why the central excise duty of Rs.3,62,23,608/- should not be demanded and recovered together with interest and appropriate penalty.

4. The show cause notice was adjudicated and the adjudicating authority held that the food preparations were classifiable under the above Chapter Sub-Heading. Then, there were two notifications referred and it was stated that the food preparations not cleared in sealed containers attracted nil duty. Subsequently, another notification was issued, but as far as the duty demand for the period under question is concerned, it was held that the assessee suppressed the facts and hence, the duty for extended period is payable and the assessee is liable for penalty as well.

5. This order dated 2nd December, 2011 was then appealed to the tribunal. The tribunal was of the opinion that the adjudicating authority has not given any definite finding, much less conclusive

that the activity of the assessee amounts to manufacture. The tariff entry apart, given the individual facts and circumstances, according to the tribunal, it was incumbent upon the Commissioner to have rendered a definite conclusion on this point. However, according to the Revenue's counsel Mr.Dwivedi, curiously, the tribunal went into other issues and opined that the extended period was not invokable. In other words, according to Mr. Dwivedi, the tribunal's findings and conclusions are peculiar. The tribunal or the Commissioner does not hold whether the activity amounts to manufacture, but the Revenue pleads that it is so. Apart therefrom, unless it was a manufacture and declared as such, the question of any duty demand or exemption therefrom does not arise. If the above two issues are satisfied, then, third would arise whether for the period in question, the Revenue was justified in issuing a show cause notice and which show cause notice is dated 21st April, 2010. Thus, the issue of extended period of limitation beyond the normal one can be invoked or not could not have been gone into unless the tribunal gave a conclusion on the first two. There was then no question of, according to Mr. Dwivedi, dropping the penalty. If the matter is remanded back to the Commissioner, it should have gone in its entirety.

6. Mr. Sridharan learned senior counsel appearing for the respondents would submit that for a brief period, the activity was not conclusively held to be either a manufacture or otherwise. Now, given the tariff entry, after a specified date, the Revenue itself declared that such an activity, in which the assessee is involved, cannot be brought within the tax net. Therefore, for such a short duration and for an academic issue raised, we should neither admit these appeals nor pass an order of remand. Alternatively and without prejudice, Mr. Sridharan would submit that there was no question of invoking the extended period and that finding of fact should not be interfered with. In any event, once there was a doubt created, then, there was no question of imposition of penalty. Hence, he would submit that the appeals be dismissed.

7. After hearing both sides, we are of the firm opinion that the order under appeal raises substantial questions of law. The appeals are, therefore, admitted on the following substantial questions of law:-

“(i) Whether the respondent has failed to declare the details of food preparations manufactured by the assessee company and thereby contravened Rule 26 of the Central Excise Rules, 2002?

(ii) Whether under the facts and circumstances, the CESTAT was correct/right in holding that the extended period was not invokable for the financial year 2005-06 and 2006-07, as the assessee has suppressed the facts that

the activity conducted by them amounts to manufacture and goods/meals are classifiable under Chapter Sub-Heading No. 2106.90.99 of the Central Excise Tariff Act, 1985?

(iii) Whether the tribunal is right in holding that the Revenue has to prove that the activity carried out by the assessee amounts to manufacture, under the facts and circumstances, as just because particular goods are classifiable under a particular heading, it will not automatically mean that the activities carried out by assessee amounts to manufacture?"

8. The tribunal, in this case, has charted a very peculiar course. There was a debate as to whether the activity of preparing food and which is stated to be the business of the assessee, amounted to manufacture. The tribunal does not hold that it is manufacture. The tribunal faults the Commissioner while passing the order-in-original for not rendering any finding much less a conclusive opinion on this point. The tribunal, at one point, was persuaded to direct a remand of the matter to the Commissioner to pass a fresh order. If the tribunal was clear in its view that the matter should go back to the adjudicating authority, then, it should have sent it for being decided afresh on all points. The difficulty arose when the tribunal does not hold that the activity is manufacture or otherwise and yet deems it fit to decide whether the extended period of limitation could have been invoked. It renders a finding that the same should not have been invoked, but this is on an assumption that the activity amounts to manufacture, attracts duty, but for some period and

at some stage both parties were in doubt and therefore, the duty was neither levied nor demanded and paid.

9. We do not think that this is a happy manner of deciding cases and by a last fact finding authority. A party should not be left guessing nor a higher court speculating as to whether the tribunal decided the matter by holding that the activity amounts to manufacture and yet not sustained the demand in terms of the adjudication order on the ground of limitation. Precisely, that has happened in this case. If there was no question of any show cause notice being issued, then, whether the show cause notice was issued for demanding duty not within the normal period but the extended period and whether the ingredients of the legal provisions enabling this exercise are fulfilled or satisfied or otherwise was the issue which would arise depending on the activity being held to be a manufacture. In the present case, that is not conclusively decided. In the fitness of things, therefore, the tribunal should have decided the matter in its entirety or remanded the matter back for de-novo adjudication, if it was not satisfied with the order-in-original.

10. We are of the opinion, therefore that the tribunal erred in law in not completely deciding the matter, but remanding it to the Commissioner by rendering a partial conclusion. In these

circumstances, we have no alternative but to quash and set aside the order under appeal. It is accordingly quashed and set aside in. The matter now stands remanded to the adjudicating authority for adjudication of the show cause notice afresh on merits and in accordance with law. We clarify that we have not expressed any opinion either on the point that the activity of the assessee amounts to manufacture and equally whether the extended period could have been invoked so as to demand the duty and interest.

11. However, we are of the opinion that given this confusion and which is directly attributable firstly to the Revenue and then to the adjudicating authority, this was not a fit case for imposition of penalty. Unless the duty was leviable and there was absolute proof of the nature demanded by law, there was no justification for imposition of penalty. That part of the order-in-original, which imposes penalty, therefore, is rightly set aside and the issue of penalty need not be reopened in the peculiar facts and circumstances of this case. It is only on the above two points, namely, whether the activity amounts to manufacture and whether the extended period of limitation could have been invoked to demand the duty and interest that the matter would go back to the Commissioner. The adjudicating authority shall now

pass a fresh order totally uninfluenced by the earlier order or by any opinion rendered in the order of the tribunal. All contentions of both sides are kept open.

12. This order will dispose of Central Excise Appeal Nos. 260 of 2016 and 265 of 2016.

13. For the above reasons, Central Excise Appeal Nos. 266 of 2016 and 286 of 2016 are dismissed as no substantial question of law arises from the order under appeal impugned in these appeals.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)