

2014 (3) ECS (139) (Tri - Mum)

In The Customs Excise & Service Tax Appellate Tribunal

West Zonal Bench, Mumbai

ASIAN TECHS LTD.

V/s

C C E, PUNE-II

Date of Hearing / Decision: 12.09.2005

Excise Appeal Nos. E/3047 & 3048/98-Bom

Appearance:

Shri Mithun Markos, Advocate

For the Appellant.

Shri Hitesh Shah, DR

For the Respondent

CORAM:

Ms. Jyoti Balasundaram, Vice-President

Smt. Archana Wadhwa, Member (J)

Shri Moheb Ali M., Member (T)

Order Nos A/533-534/2005

“PSC girders are distinguishingly common in the market as separate goods. The girders were cast in the casting yard and removed from there and launched on the sub- structure i.e. piers. This clearly shows that PSC girders are capable of being transported from one place to another and hence capable of being marketed.in the light of the admitted position that the girders are not manufactured at site, but in the casting yard and then removed from there for being launched on the piers, we hold that the Department has discharged the burden of proving PSC girders are marketable. even though the contract between M/s. Konkan Railway Corporation Limited and the appellants in the present appeals was construction of bridges, excise duty is leviable on PSC girders involved in the execution of the works contract for construction of bridges as PSC girders, which are cast at the casting yard and then transported to the site of the project, are marketable.” (Para 2)

“The word "building" has been defined in Concise Oxford Dictionary (1990 edition) as a permanent fixed structure forming

an enclosure and providing protection from the elements etc (e.g. the house, school, factory, stable). This does not cover bridges in its ambit. Buildings and bridges are different from each other. Hence the benefit of Notification No. 59/90 cannot be extended to PSC girders, as they are goods, which are not manufactured at site for construction of buildings.” (Para 3)

[Order per: Jyoti Balasundaram, Vice-President].- The issues referred to the Larger Bench for the decision are whether PSC girders manufactured at site by the appellants for the construction of bridge are marketable goods attracting Central Excise duty under tariff heading 6807 of Central Excise Tariff Act, 1985 and if so, whether they are exempt under Notification No. 59/90-C. E., dated 20th March 1990 when the notification speaks of building and not bridges in the light of the amendment carried out by the Notification No 51/95.

2. We have heard both sides. We find that the Commissioner has relied upon the decision of the Apex Court in the case of Andhra Pradesh State Electricity Board v. Collector of Central Excise, Hyderabad holding that prestressed cement concrete poles were "goods" and the decision in the case of Name Tuleman Manufacturing Pvt. Limited, Hyderabad v. Collector of Central Excise, Hyderabad AIR 1989 SC 79 and Bhor Industries Limited v. Collector of Central Excise to support his findings that PSC girders are distinguishingly common in the market as separate goods. The girders were cast in the casting yard and removed from there and launched on the sub-structure i.e. piers. This clearly shows that PSC girders are capable of being transported from one place to another and hence capable of being marketed. The appellants have not advanced any satisfactory arguments to dis-lodge [lie above findings and have only contended that since PSC girders are an integral part of the finished bridge structure, which is firmly embedded in earth, the girders do not have an independent identity for the purpose of trade and could not be treated as marketable goods. However in the light of the Case Laws cited supra and in the light of the admitted position that the girders are not manufactured at site, but in the casting yard and then removed from there for being launched on the piers, we hold that the Department has discharged the burden of proving PSC girders are marketable. The decision of the Tribunal in the case of M/s. B.E. Billimoria & Company Private Limited (Order No. C-II/890-891/WZB/2003 dated 25th April, 2003 holding that PSC girders are not marketable is based upon the finding that the contract between the appellants and M/s. Konkan Railway Corporation Limited for whom M/s B.E Billimoria & Company Private Limited were contractors for the construction of bridges and not for the construction of girders The Bench also relied upon the fact that the

nature of the contract entered into between M/s. Konkan Railway Corporation Limited and M/s. BE. Billimoria & Company Private Limited was works contract, which was indivisible, and the supply of material is only accessory to the performance of contract for work and labour. We note that the decision of Hon'ble Madras High Court in the case of M/s. Richardson and Cruddas Limited v. The State of Madras - 1965 (16) STC 826 has relied upon the decision of the Apex Court in the case of the State of Madras v. Gannon Dunkerley and Co. Ltd. - 1958 STC 353 (S.C.) holding that (sic.) no sales tax cannot be levied on the amount received under works contract by the Building Contractor even though he had supplied goods for the construction of the buildings. However, as rightly pointed out by the Id. SDR the Apex Court's decision in Gannon Dunkerley and Co Ltd. was delivered prior to 46th Amendment to the Constitution of India, by which Legislatures of States were empowered to levy Sales Tax on certain transaction described in sub-clauses (a) to (f) of Clause (29A) of Article 366. The Constitutional validity of the above amendment and the issue as to whether the State Legislature had power to levy tax on the transfer of property in goods involved in the execution of works contract referred to in sub-clause (b) of clause (29A) of Article 366 of the Constitution was considered by the Apex Court in the case of Builders Association of India and Ors v. Union of India and Ors - AIR 1989 SC 1371 wherein the Court held that, having regard to the passing of the property in goods, which are involved in works contract and legal fiction created by Clause 29A of Article 366, it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate i.e. the entire building that is actually constructed. The Apex Court held that the object of the new definition of the expression "tax on the sale or purchase of goods" introduced in clause 29A of Article 366 was to enlarge the scope of the expression so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of clause 29A wherever such transfer, delivery or supply becomes subject to levy of sales tax. The Court held the expression includes a tax on the transfer of property in goods in the execution of a works contract also. In the light of this decision and having regard to the fact that period in dispute in the present case is subsequent to the 46th Amendment to the constitution, we apply the ratio of the above said decision to hold that, even though the contract between M/s. Konkan Railway Corporation Limited and the appellants in the present appeals was construction of bridges, excise duty is leviable on PSC girders involved in the execution of the works contract for

construction of bridges as PSC girders, which are cast at the casting yard and then transported to the site of the project, are marketable. The reliance by the Bench in the case *M/s. B.E. Billimoha & Company Private Limited* upon the upholding of the decision of Madras High Court in the case of *Richardson and Cruddas Limited* by the Apex Court by dismissal of Revenue's appeal as reported in 21 STC 245 is misplaced for the reason that the *Richardson and Cruddas* decision cover the period prior to the 46th Amendment and the Supreme Court's dismissal of appeal filed by the State of Madras against the Madras High Court's decision was prior to the 46th Amendment to the Constitution in 1982. We, therefore, answer the first issue referred to us in the affirmative.

3. We now take up the second issue. The benefit of Notification No. 59/90 is *inter alia* available to "goods manufactured at the site of construction of buildings for use in such sites" It is not the case of the appellants that bridges are buildings. The word "building" has been defined in *Concise Oxford Dictionary* (1990 edition) as a permanent fixed structure forming an enclosure and providing protection from the elements etc (e.g. the house, school, factory, stable). This does not cover bridges in its ambit. Buildings and bridges are different from each other. Hence the benefit of Notification No. 59/90 cannot be extended to PSC girders, as they are goods, which are not manufactured at site for construction of buildings. We, therefore, answer the second issue referred to us in the negative.
4. Both sides confirmed that no other issues remain for decision. Therefore, in the light of our findings recorded herein above, we uphold the impugned orders confirming demands, imposing penalties and confiscating the goods, and reject the appeals.