

**Telco Vs. Collector of Central Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Feb-10-1987

**Reported in :** (1987)(11)LC609Tri(Delhi)

**Appellant :** Telco

**Respondent :** Collector of Central Excise

**Advocate for Pet/Ap. :** Shri. V. Lakshmi Kumaran

**Judgement :**

1. The revision application filed before the Government of India, on transfer to the Tribunal is being treated as an appeal.
2. The appellants manufacture inter alia Commercial Motor Vehicles covered by Central Excise Tariff Item. 34. Union Budget was presented to the Parliament on 19.6.1980. On 18.6.1980, the appellants submitted A.R.I. application in respect of 135 chassis for removal on the Budget Day. These chassis were in existence and were accounted for in the R.G.I. on 18.6.1980. Out of 135 chassis, 11 chassis were in the Bonded Store Room and 124 were under inspection and were in the finishing room. On the Budget Day, the appellants were anxious to clear 11 chassis out of the 135 chassis. The appellants were informed that unless the duty was paid on all 135 chassis, the removal of 11 chassis will not be allowed. The Union Budget introduced 5% of the Basic Excise Duty as Special excise duty. The appellants removed in June, 1980, nine out of the eleven chassis on payment of special excise duty "UNDER PROTEST". The appellants have paid Rs. 15,836.68.

The appellants requested the, Assistant Collector to authorise recredit of the amount in their P.L.A. the Assistant Collector informed the appellants that special excise duty was correctly paid in Terms of Rule 9A. An order was passed to this effect on 26.9.1980. An appeal was preferred to the Collector of Central Excise (Appeals) who decided the appeal against the appellants on 24.1.1981. Hence the revision.

3. Shri V. Lakshmi Kumaran, learned counsel for the appellants submitted that the issue is covered by the decision of the Tribunal. In 1985 (21) E.L.T. 757 (Vazir Sultan Tobacco Co. v. C.C.E., Hyderabad), the Five Member Bench of the Tribunal considered the question of Special Excise Duty and held that the :- "Special Excise Duty was not attracted to goods manufactured prior to the date of the imposition even though they were liable to Basic Excise Duty on the date of removal." The Tribunal relied on the decision reported in 1978 E.L.T. (333) (Kirloskar Brothers v. Union of India and Ors.), where the M.P. High Court held that :- "But excise duty will certainly not be leviable in respect of goods manufactured or produced during the exemption period." The S.L.P. filed before the Supreme Court against the decision was also dismissed on merits. The learned counsel also cited 1986 (25) E.L.T.849 (Union of India v. Modi Rubber Ltd., and Ors.), the Supreme Court has observed as follows :- "It is, therefore, clear that where a notification granting exemption is issued, only under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 without reference to any other statute making the Provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder applicable to the levy and collection of special, auxiliary or any other kind of excise duty levied under such statute, the exemption must be read as limited to the duty of excise payable under the Central Excises and Salt Act, 1944 and cannot cover such special, auxiliary or other kind of duty of excise." It was, therefore urged that as special excise duty was introduced for the first time after the Budget, the orders of the authorities below were not justified.

4. For the department, Shri A.K. Jain, SDR submitted that the special leave petition filed against the decision of the M.P. High Court in Kirloskar's case before the supreme Court was dismissed on merits by 3 Judges. The SDR referred to the decision of the Supreme Court in AIR 1967 (S.C.) 1512 (Shinde Brothers etc. v.

Deputy Commissioner, Raichur and Ors. etc.) where a Bench consisting of 5 Judges have held in paragraph 20 as follows :- "These cases establish that in order to be an excise duty(a) the levy must be upon 'goods'; and (b) the taxable event must be the manufacture or production of goods. Further the levy need not be imposed at the stage of production or manufacture but may be imposed later." He urged that the levy need not be imposed at the stage of production but may be imposed at a later point of time. The special excise duty was introduced on 19.6.1980 and this judgment should be preferred to the later judgment of the Supreme Court in Kirloskar's case. He also cited Ruling reported in 1978 ELT 427 (Amar Dyeing Chemicals Ltd.) In 1985 (20) E.L.T. 212 (S.C.) (D.R. Kohli and Ors. v. Atul Products Ltd.), the Supreme Court "...under a notification exemption could be claimed only where the dyes used in the manufacture of other types were liable to payment of excise duty when they were manufactured and such duty had been paid".

SDR urged that both in Amar Dyeing Chemicals and in Atul Products, the judgement of Shinde Brothers had not been cited.

5. It was urged that the judgement of the Supreme Court rejecting the special leave petition in respect of Kirloskar Bros.' case was not a judgement under Article 131 of the Constitution and no law had been laid down. In 1985 (156) I.T.R. 493 (Commissioner of Income-Tax v.Indraman Amrati Lal), the Gujarat High Court has stated as follows :- "The only effect of not granting special leave is that the legal position enunciated by the Judgment of the court sought to be appealed against is one where the Supreme Court for valid reasons declines to interfere. In any case it would be unsafe to say that the effect of not granting the special leave, even where the court has in its order refusing to grant the leave stated that special leave petition was dismissed on merits, since there is no practice to state the reasons while refusing the leave that it would be tantamount to confirming the judgment sought to be appealed against on the matter of the principle involved and/or the conclusion therein. This contention has not commended itself to us because otherwise it would amount to saying that the decision is binding impliedly without having the benefit of the detailed consideration being stated by the Supreme Court."(Late) (Nawab Sir Mir Osman Ali Khan v.Commissioner of Wealth Tax,

Hyderabad), the Supreme Court has held as follows :- "It is, however, well settled that dismissal of a special leave petition in limine does not clothe the decision under appeal in the special leave petition with the authority of the decision of this court." 6. The Revenue urged that whenever there was a mere dismissal of the special leave petition, it was not a judgment on merits. It was submitted that in view of decision of M/s. Shinde Brothers the Larger Bench's view should be reconsidered. The Ruling reported in AIR 1985 Allahabad 34 (Parag Lal Behari v. Deputy Director of Consolidation, Gorakhpur and Others) was also cited. In that decision, the Allahabad High Court has observed as follows :- "Secondly, even if some inconsistency may be there this Court is, on the facts of the instant case, bound to follow the decision of the Supreme Court in case of State of West Bengal V. Hemand Kumar (AIR 1966 S.C. 1061) (supra) the same having been rendered by a Bench of four Hon'ble Judges in reference to the decision in the case of Mathura Prasad (supra) the same having been rendered by a Bench of three Hon'ble Judges." On the present facts, the goods continued to be excisable prior to and after the imposition of the special excise duty. It was argued that the contentions of the appellants should not be approved. Even though the Shinde Brothers' case dealt with a case of Health Cess, the ratio of that decision would apply to the present facts. If the goods are excisable despite the exemption, the imposition of special excise duty will not change the colour or scope of the excise duty. The Finance Act Section 37(4) merely provided the machinery for charging the special excise duty and that will not be the ground to hold that the special excise duty should not be levied on goods manufactured prior to the date of the imposition. The point of removal should be the consideration for the purpose of attracting the levy.

7. Shri Lakshmi Kumaran, in his reply stated that the decision of Shinde Brothers has been considered by the Larger Bench in the Vazir Sultan and certainty of law was essential in such matters. He cited AIR 1980 S.C. 1762 (Ambika Prasad Mishra v. State of U.P. and others).

There is no contradiction between the judgment of Shinde Brothers and the decision of the Supreme Court in the Kirloskar Brother's case.

Section 37 of the Finance Act envisaged the levy of special excise duty for the first time. The Supreme Court had not dismissed the special leave application in Kirloskar's case in "limine" but dismissed the special leave petition on merits which would make all the difference.

(ii) Whether the ratio of M.P. High Court in Kirloskar Brothers' case reported in 1978 E.L.T. 033) (Kirloskar Brothers Ltd., v. Union of India and two others) are applicable to the facts of the present case.

9. Since both the issues involve consideration of identical facts, we are taking them up together. The scrutiny of the facts show that out of the 11 chassis cleared after the Budget, two vehicles were intended for export about which we are not concerned. The special excise duty in respect of the 9 vehicles comes to Rs. 15,936.68. It must be mentioned that Special Excise Duty was introduced for the first time under Section 37 of the Finance Act, 1978. Section 37(1) of the Finance Act reads as follows :- "In the case of goods chargeable with a duty of excise under the Central Excises and Salt Act as amended from time to time, read with any notification for the time being in force issued by the Central Government in relation to the duty so chargeable, there shall be levied and collected a special duty of excise equal to five per cent of the amount so chargeable on such goods." It is clear from the reading of the above Section that the Special Excise Duty equal to five per cent of the basic duty was levied under the Finance Act. This levy was in addition to the basic excise duty.

The main case of the appellants is that special excise duty will not apply on goods manufactured prior to the date of (sic) imposition even though the basic duty was leviable on the date of manufacture.

Admittedly, these 9 chassis were manufactured prior to 19.6.1980. In the case of Vazir Sultan Tobacco Co., an identical question came up for decision. In that case the goods were not liable to special excise duty prior to 1.3.1978. They were manufactured prior to that date but removed between 1.3.1978 to 12.3.1978. The Tribunal considered the situations that might arise in the case of imposition of duty on goods both exciseable and non-excisable at the time of manufacture. In a detailed judgment, the Tribunal in paragraph 29 has concluded that :- "Special

excise duty in a case where it was not leviable at the time of manufacture but was imposed between the time of manufacture and the time of removal, it could not be levied and collected at the time of removal".

It must be pointed out that this decision of the Tribunal has taken into account the decision of the Supreme Court in Kirloskar Brothers and Amar Dye-Chem. This decision would apply to the facts of this case in the absence of any other decision subsequent to this, either by the larger Bench of the Tribunal or a decision to the contrary by any other High Court. We respectfully follow the ratio of this decision.

10. Shri A.K. Jain mainly argued that the issue that came up before the M.P. High Court in 1978 E.L.T. (333) (cited supra) in respect of stock manufactured during the period no excise duty was payable. The M.P. High Court has observed that the liability to excise would arise no sooner the manufacture or the production is completed and it is immaterial as to what machinery may be devised by the Central Government under the rule making powers for recovery of tax. It is stated that:- "The point of recovery or any restriction on removal will not be the determining factor for grant of exemption in respect of the goods manufactured during the duty free period." The SLP was filed before the Supreme Court and it was dismissed on merits. Shri A.K. Jain submitted that the earlier decision of the Supreme Court in the case of Shinde Brothers (cited supra) held by a Bench of 5 Judges that the levy need not be imposed at the stage of production or manufacture but imposed later. He emphasised that the earlier decision in Shinde Brothers should apply to the present case.

We are of the view that there is no conflict between the decision of the Supreme Court in Shinde Brothers or in the Kirloskar's case. In Shinde Brothers, the question was the recovery of Health cess. Under the Notification, Health cess @ 9 n.p. per rupee was payable on the shop rent and a tree tax of toddy and other duties of excise leviable on certain articles in accordance with the Mysore Health Cess Act. When this Notification was challenged, the Hon'ble Supreme Court had to consider the nature of the impost. In the course of their discussion, they have adverted in paragraph 20 to the scope of duties of excise. It is laid down that in order to be an excise duty, the duty must be (i) upon goods; and (ii) the taxable

event must be on the production or manufacture of goods, even though the levy need not be imposed at the stage of production or manufacture but imposed later. The Hon'ble Supreme Court has held that whether the particular levy was imposed in respect of manufacture or production, the question should be decided on the facts of each case but having regard to certain principles. The first was that the essential characteristics of excise duty is uniformity of incidence. Secondly, the duty must be closely related to production or manufacture of goods. In amplifying the second essential characteristic, the Hon'ble Supreme Court has observed as follows :- "Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. If a duty has been levied on an exciseable article but this duty is collected from a retailer it would not necessarily cease to be an excise duty." The above observation indicates that the Supreme Court had referred in particular to the levy and collection of excise duty from a retailer.

This decision cannot be held to be contrary to the judgment of Kirloskar's case. In Shinde Brothers it was held that there was no connection of any part of the levy with any manufacture or production of the goods. The decision in Shinde Brother will not advance the case of the department to sustain special excise duty.

11. The question whether the dismissal of the special leave petition on merits in contradiction to a dismissal of special leave petition in (limine) has also to be considered. The decision in 1986 (162) 'ITR 888, the Supreme Court has held that the dismissal of the Special leave petition in "limine" did not clothe the decision with the authority of the Supreme Court. But it must be mentioned that the dismissal therein was in "limine" and not on merits. In 1985 (156) ITR 493 (Commissioner of Income-Tax, Gujarat-III v. Central India Builders), the Gujarat High Court has considered the case of dismissal of a special leave petition by the Supreme Court. In that case the special leave petition was preferred by the Commissioner against the Division Bench decision of the Gujarat High Court. The Supreme Court dismissed the special leave petition on merits. But on a reference the case of the Division Bench came up for hearing before the Full Bench of the same High Court. The Full Bench ultimately, overruled the Division Bench judgment. In the state of affairs, the Division Bench of the Gujarat High Court had

to consider the situation. It is observed therein that the parties should proceed on the basis of the Full Bench decision. It is stated that the only effect of not granting special leave petition was that the legal position enunciated by the judgment of the court sought to be an appealed against was one which the Supreme Court for valid reasons declined to interfere. On the same basis it must be said that the legal position enunciated by the judgment of the M.P. High Court sought to be appealed against was one which the Supreme Court for valid reasons declined to interfere. In 1984 (17) E.L.T. 217 (Sirpur Paper Mills v. Union of India and Ors.) the Andhra Pradesh High Court considered the question of dismissal of special leave petition on merits. In paragraph 24, the court has observed as follows :- "The contention of the learned Standing Counsel for the Central Government that the decision in Kirloskar's case should not be a guideline in adjudicating the case on hand for the reason that the case was concerned with the goods wholly exempted, has no substance inasmuch as on principle it makes no difference whether the matter pertains to partial or total exemption. Likewise, the contention in regard to the dismissal of the S.C.L.P. on merits by the Supreme Court passed on September 1, 1977 against the aforesaid judgment of the Madhya Pradesh High Court in Kirloskar's case, it should not be taken to be really a decision on merits, also merits no consideration, as it is fairly settled by now that when the court records its order as dismissal on merits, it must be taken to have been a decision on merits." Hence it is clear that the A.P. High Court has considered the effect of the dismissal of the S.L.P. by the Supreme Court. Having regard to the decision of the A.P. High Court and in view of the decision of the Tribunal in Vazir Sultan's case, it is reasonable to conclude that the special excise duty having been levied under the Finance Act cannot apply to goods manufactured prior to the date of the imposition.

12. It is argued that the levy does not mean collection. But excise duty is indisputably a levy upon manufacture. The imposition of special excise duty is a percentage of the duty of excise. Since the special excise duty was levied under the Finance Act and not under the provision of any Central Excises and Salt Act, one can safely conclude that the goods were not liable to Special excise duty at the time of manufacture and, therefore, they could not be charged to duty at the time of removal. We do not find any conflict in the decision of Shinde Brothers.

Section 37(4) of the Finance Act merely provided the machinery for collection without incorporating the details of the main provision. The decision in *Kiran Spinning Mills 1986 (24) E.L.T. 299* will not be applicable to the present facts because it dealt with the case of additional duty of customs chargeable on the date the goods entered into the territorial waters. The Tribunal has followed the decision of the Bombay High Court in *Apar Private Limited*. Those were cases in respect of additional duty of customs which is totally different and distinct from special excise duty.

13. Hence on a careful consideration of the authorities as also the facts of the case, we are of the view that the appellants should succeed and the impugned order cannot be sustained. The appeal is, therefore, allowed with consequential relief.

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