

Central India Polyester Limited Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-05-2004

Reported in : (2004)(94)ECC471

Judge : A Wadhwa, S T S.S.

Appellant : Central India Polyester Limited

Respondent : Commissioner of Central Excise

Judgement :

1. All the four appeals are being disposed of by a common Order as the issue involved in all the four appeals is common.
2. The issue involved in the present appeals is as to whether the appellants are entitled to the benefit of exemption Notification Nos. 6 /2000-CF dated 1.3.2000 and 3/2001-CF. dated 1.3.2001. The authorities below have denied them the benefit of the said Notifications and accordingly, have confirmed the demands of duties against the appellants and have imposed personal penalty upon them.
3. The facts involved in the present cases have a chequered history.

The appellants have presented the facts in a tabulated form. For better appreciation, the same are being enumerated below:- The appellants have two manufacturing units at two separate premises, one unit in Village: Dahali, Tal. Mouda, District ; Nagpur and another unit located at Rahadi Village, Tal: Mouda, District:Nagpur. In the unit at Village: Dahali , the appellants undertake the

manufacture of Polyester Chips and Partially Oriented Yarn(POY). This unit is registered with the Central Excise Authorities vide Registration No.01/Ch.39 & 54/RM/92 dated 26.6. 1992.

At Village: Rahadi , the appellants have a Texturising Division where they undertake the manufacture of Synthetic Filament Yarn, which is textured, twisted or drawn, which products fall for classification under Central Excise Tariff Headings - 5402.32, 5402.43 and 5505.10. This Texturising Division has been registered as a Manufacturing, Unit under Rules 174 and 192 of the Central Excise Rules, 1944 (the Rules in short) as a Manufacturing Unit vide Registration No.02/Ch.54/RM/TeXDn/2000 dated 21.3.2000.

Before 1996, the present Texturising Unit was a unit of a district and separate entity viz . M/s . Deccan Poly pack Ltd ., which was registered independently with Excise Authorities vide Registration No.9/Ch.54/RN/94 dated March, 1994 . The Registration was for the Manufacture, Storage and Clearances of "Synthetic Filament Yarn of Polyester (Tex) . " As per scheme of arrangement approved by the Hon'ble Andhra Pradesh High Court on 27.12.95, M/s.. Deccan Poly pack Ltd., was amalgamated with the Appellants in order to facilitate the functional convenience and other synergies of operations between both the units.

On the Appellants' application dated 12.3.96 for a single registration, the same was granted on 1.4.96. Accordingly, in the registration certificate issued on 1.4.96 Polyester Textured, Drawn, Twisted Yarns.

were added in the registration certificate of the Appellants.

On 27.10.1997, the Superintendent, Central Excise issued a letter to the Appellants asking them for getting themselves separately registered i.e. POY Division and Texturing Division and to separately follow the prescribed procedures. The Appellants were also directed to modify their practice of the captive clearances of POY from Dahali to Rabad .

A Show Cause Notice dated 17.12.1997 was issued by the Range Superintendent asking the Appellants to show cause as to why ground plan approval showing

Texturing Division premises as an integral part of the Appellares should not be withdrawn. The Show Cause Notice, inter alia, made the following factual averments: "The factory premise of the Texturing Dvn. (Earlier M/s. DPL), situated in Village Rahadi cannot be called the precincts of M/s. DCL Polyesers Ltd., situated in village Dahali. Moreover neither are these two premises separated merely by a road or railway line or a canal, nor are they adjoining each other. In fact they are situated miles apart from each other in two separate villages. They are not connected by land from within each others premises either. To reach one premise from the other a circuitous approach from the public road (State highway) stretching about 3 Kms. has to be taken leading from one village Dahali (M/s. DCL) to another village Rahadi (Text. Dvn.)" On receiving the above show cause notice dated 17.12.1997, the Appellants applied to the Range Superintendent, Excise, for a separate registration in respect of Texturing Unit at Village Rahadi. The Registration Certificate, inter alia, states that: "5. This Certificate shall remain valid till the holder carried on the activity for which a Certificate has been issued or surrenders the Certificate whichever is earlier: " Consequently, the Asst, Commissioner, Dvn. Bhandara passed an order-in-original dated 14.7.1998 holding that as the Appellants had applied for registration and accordingly, it had been issued by the Superintendent on 1.1.1998, there remains no ground for any further action.

Against the above referred order-in-original dated 14.7.1998, the Appellant filed an appeal before the Commissioner of Central Excise (Appeal), who vide Order-in-Appeal dated 18.11.1998 held that the Appellants require only a single registration for both the units.

Consequent to the above order in appeal, the Appellants vide their letter dated 27.11.1998 applied for single registration and the same was granted by the Range Superintendent on 24. 12.1998, A Central Excise audit was conducted by the Audit party between 17.2.2000 to 24.2.2000 headed by Joint Commissioner (Audit), Central Excise Headquarters, Nagpur.

In the course of audit, vide letter dated 24.2.2000, the Joint Commissioner instructed the Appellants to provide additional fencing and submit the ground plan

to the Range office for a separate registration of Texturising Unit at Village Rahadi (excluding residential premises).

Consequent to the Budgetary provisions introduced on 29.2.2000, a separate duty structure for PFY and Textured Yarns was introduced. On 10.3.2000 the Appellants made an application for separate registration and approval of ground plan for the premises at Village Rahadi in respect of Textured, Drawn and Twisted yarns.

An application was separately filed enclosing ground plan for the premises at Village Dahali excluding commodities manufactured in Tex.

Unit. The excise authorities undertook verification of the two premises and on being satisfied that these are 2 separate premises requiring separate registration, issued separate registration in respect of Tex. Unit on 21.3. 2000. Consequently upon the separate Registrations granted, all procedural formality were separately followed for each registered premises and goods cleared from each premises were separately assessed to Central Excise duty.

The Superintendent, Central Excise, Range- Mouda issued letter to the Appellants (Texturising Division) dated 17.2.2001 directed the Appellants (Texturising Division) to submit all the documents in support to their claim as an independent Texturiser.

The Deputy Commissioner of Central Excise issued Show Cause Notices No.C.No.V(54)5/2/CL/98/452 and V(54)5/2/CL/98/453 both dated 13.2.2001 calling upon the Appellants to show cause as to why: (a). the separate registration granted in respect of the manufacturing premises at Village Dahali and for the premises for the Texturising Division at Village Rahadi should not be cancelled and (b) the present approval of the revised ground plan should not be cancelled under Rule 174 of the Rules. It is the case of the Department that only a single registration should be granted in respect of the Units situated at Dahali and Rahadi.

The Deputy Commissioner of Central Excise also issued Show Cause Notices No.C.No.V(54)5/2/CL/98/450 and V(54)5/2/CL,'9S/912 dated 13.2.2001 and 15J.2001 respectively calling upon the Appellants to show cause why the benefit of duty exemption under Notification No. 6/2000 dated 1.3.2000 should not be denied and duty at the effective rate i.e.

16% BED, 16% SPL and 1 5% additional on BED plus SPL should not be charged.

The Show Cause Notice No.C.No.V(54)3-3t'2000/D/I063 dated 2.4.2001 calling upon the Appellants to; show, cause a,: to why the benefit of Notification No.6/2000-C.E. dated . .2000 should not be denied to the Polyester Textured Yarn manufactured by the Appellants. The Appellants were also asked to show cause as to why additional duty of Rs. 15,27,31,631/- should not be recovered for the period 22.3.2000 to 28.3.2001 under Section 11A of the Central Excise Act, 1944 (the Act).

The Appellants were also asked to .show cause against imposition of penalty under Rule 173Q of the Rules and payment.-i.v of interest under Section 11AA of the Act.

The Appellants filed their composite reply in response to the said three show cause notices.

The Respondent' passed following three Order-In-Original. By the impugned order !.he Respondent has, inter alia., held as under: "I revoke and cancel the Central Excise Registration Certificate No.2/CH 54/RM/Texturising Division/2000 dt. 21.3.2000 w.e.f. 21.3.2000. 1 order that with effect from 1.3. 2000 both the POY unit and the Texturising Unit should be 'treated as a single unit. I cancel the present approval of the ground plan of the noticee no. 1 and noticee no. 2 with effect from 21.3.2000. " "I disallow the benefit of Notification No.6/2MQ-C.E. , 'ated 1.3.2000 to the noticee and order charging of duty, at Tariff rate i.e. 16% BED 6 SED + 15% AED on P.ED and -SED. / order change in the- rate of duty in the classification declaration filed by the noticee ef/ 22.3.2000 and 1.4.2001 accordingly.

"(i) I disallow the noticee the benefit of the notification No.6/2000 dt. 1.3.2000 to the noticee and demand duty @ 16% BED + 16% SF.D + 15% AED TTA on BED+SED w.e.f 21.3.2000.

(ii) I confirm demand for duty of Rs. 15,27, 31,631/- (Rs. Fifteen Crore Twenty Seven Lakh Thirty One Thousand and Six Hundred and Thirty One Only) on the noticee; (Hi) I impose a penalty of Rs. 15, 27,31.631/- (Rs. Fifteen Crore Twenty Seven Lakh Thirty One Thousand and Six Hundred and Thirty One Only) on the noticee under Rule 173Q of the erstwhile Central Excise Rules, 1944 on the noticee, (iv) I demand interest under section 11AA of the Central Excise Act, 1944 from the noticee".

The Appellants thereafter preferred three appeals challenging the said three orders beaz Appeal (i) No.V2(54)72/NAG of 2001, (ii) No.V2(54)73/NAG of 2001 and (iii) No.V2(54)74/NAG of 2001 before the Commissioner of Central Excise (Appeals) Mumbai. The Appellants also filed applications for stay under the provisions of Section 35F of the said Act before the Commissioner (Appeals).

The stay applications filled in the said 3 appeals pending before the Commissioner (Appeals) were disposed of by a common Order F.Nos. No.V2(54)72/rl AG of 2001, No.V2(54)73/NAG of 2001 & No.V2(54)74/NAG of 2001/1386 dated 15.1.2002. The Hon'ble Commissioner (Appeals) came to a prima facie finding that cancellation of separate central excise registrations to units situated at Dahali and Rahacii; disallowing the benefit of Notification No.6/2000-0; dated 1.3.2000 appears to be legal, proper and correct.

The learned Commissioner had he'd that the confirmation of demand of Rs. 15,27,31,631/- was made without taking into account the abatement of duty from the. cum duty price actually received as. per the decision of the Hon'ble Supreme Court in the case of Govt./of India vs. MRF as also in the case of Shrae Chakra Tyres Ltd. and further denying the benefit- of Modvat Credit to the tune of Rs.1 1,07,62,0507- needed to be reconsidered V.) that extent; Accordingly, the learned Commissioner was of the prima facie view that details in this regard that the differential amount payable according to the Appellants would at the highest be Rs. 8,83,8717-However, by the said order, the learned Commissioner ordered a

predeposit of Rs.7,50,00,000/- along with interest.

Aggrieved by the said order, the Appellants filed a Writ Petition No.522 of 2003. before the Hon'ble; Bombay High Court, Nagpur Bench, challenging the said order, inter alia, on the ground that the Appellants; had made out a prima facie case for waiver of predeposit and also that the Appellants were in financial hardship. By a judgment and order dated 11.2.2002, the said Writ Petition No.522 of 2002 was disposed of by the Hon'ble Bombay High Court. The operative part of the said order reads as follows: "In the result, the impugned order dated 15.1.2001 /; quashed and set aside. The Writ Petition is allowed t,'itii directU-iis to the petitioners to deposit K; 1 crore within four ,week from the; :late of this order*. In is made clear that if the said amount is not deposited, the Commissioner (Appeals) will be at liberty to dismiss the Appeal .pending before him for non-compliance of the,order of this court" Pursuant to the direction of the Hon'ble High Court, Appellants deposited rupees one crore with the Excise Department.

The said appeals bearing Nos.V2(54)72/NAG/2001, V2(54)73/NA 0/2001 and No.V2.(54)74/NAG/2001 were finally The Central Excise Department filed its written submissions before the learned Commissioner.

The Appellants submitted a reply to the said written submission dated 26.2.2002.

The Central excise Department filed parawise comments to the Appellants' reply.

Pursuant to the liberty granted by the Hon'ble Commissioner (Appeals), the Appellants filed further written submissions.

4. Shri J.J. Bhatt, Senior Advocate for the appellants, submits that the authorities below have denied the benefit of Notification Nos.

6/2000-CF dated 1.3.2000 'and 3/2001-CF dated 1.3.2001, on the sole ground that there existed at the earlier stage, an Order of the Commissioner (Appeals), holding that both the Units situated at Village:Dahali and Village:Rahadi, were one and the same, and required only one licence for the manufacture of their goods. He submits that though the above contention was raised by the appellants themselves before the Commissioner (Appeals), but there was no res judicata and the lower

authority should have examined the issue afresh after taking into consideration the facts. He submits that the appellants were at liberty to contend that the two units were separate units and the earlier Order of the Commissioner(Appeal) holding the same to be one, would not act as an estoppel against their fresh contention. For the above proposition, he has referred to the various decisions which we shall be discussing in the subsequent paragraphs.

5. Sri R.K. Pardeshi, learned J.D.R. for the Revenue, contended that it was the appellants' own case before the Commissioner(Appeals) that the two units were, in fact, one and the same, and required one licence only. The said contention of the appellants was accepted by the Commissioner(Appeals). The Order of the appellate authority was neither challenged by the appellants as it was in their favour, nor by the Revenue. As such, the same had attained finality. It was not open to the appellants now to claim otherwise in the subsequent proceedings. He further submits that the case law relied upon by the learned Sr.

Advocate is in respect of the Income-Tax Laws, where the assessments are made on yearly basis, and the ratio of the same is not applicable to the facts and circumstances of the instant cases. Reference was also made to various other decisions.

6. We have considered the submissions made by both sides. The dispute in the present appeals relates to the availability of Notification Nos.

6/2000-CE and 3/2001-CE. The said Notifications grant exemption to Textured Yarn falling under Heading 54.02 of Polyester manufactured by an independent Texturiser who does not have the facilities in his factory (including plant & equipment) for processing Partially Oriented Yarn (POY in short) of Polyester falling under sub-heading 5402.42. The above benefit of concessional rate has been denied to the appellants on the ground that the two units in question are one as held by the Commissioner (Appeals), vide his Order-in-Appeal dated 18.11.98 laying down that inasmuch, as the two units were one, only a single registration was required for both the units. As such, it was the Revenue's contention that inasmuch as there was no physically material change in the location of the two units, the Commissioner (Appeals') Order which was decided in favour of the

appellants upholding their plea, holds good till date, and the appellants' contention that the two units be treated as separate units, was not acceptable. On the other hand, the appellants have strongly contended that there is no estoppel in taxation matters and the appellants were at liberty to take a different stand.

7. As per the facts enumerated above prior to 1996, the appellants, M/s. Central India Polyester Limited were registered separately for the manufacture of synthetic filament yarn of polyester. As per High Court's Order, M/s. Deccan Polypacks Ltd. were amalgamated with the appellant company and thereafter, the dispute arises as regards the registration of the units with the Central Excise Authorities. Whereas the Revenue was of the view that the two units - POY Division and Texturising Division - are required to be registered separately and to follow the Central Excise. Procedures separately, the appellants were of the view that both the units were one and the same, and required only one registration. The litigation in respect of the above dispute travelled upto the Commissioner (Appeals) who vide his Order-in-Appeal dated 18.11.98, accepted the appellants' contention and held that only one single registration for both the units was sufficient. While holding that, the Commissioner(Appeals) observed that it is the appellants' case that the land of the erstwhile M/s. Deccan Polyback Ltd., and M/s. DCL Polyesters Ltd., is in continuity, and therefore, grant of common licence with effect from 1.4.96 was in order. The appellants also referred to the clarification issued by C.B.E.C. vide their Circular No. 10/2/69-CX-6 dated 12.5.71, according to which different sections or departments of the same factory, if located in adjoining premises or in premises merely separated by a road or railway line or canal, both the places are known as forming part of the factory. While disposing of the appeal filed by the appellants, the Commissioner(Appeals) in his Order referred supra, held as under:- "6. Having considered the facts on record and the submission of the appellants, it is found that the SCN as also the impugned Order passed by the adjudicating authority have no legs to stand upon. In view of the definition of 'factory' given under Section 2(e) of the Central Excise Act and clarification given by the Board vide its Circular under No.10/2/69-CX-6 dtd. 12.05.71, the stand taken by the adjudicating authority that the erstwhile Deccan Polypack Ltd., which upon amalgamation became a division of M/s. DCL Polyesters Ltd. and which has been held as such i.e. a division of DCL Polyesters by the Supdt. and the adjudicating officer as

would be clear from the SCN and the order-in-original, and DCL Polyesters Ltd., are situated miles away from each other and being not connected by land and located in different villages separated by a distance of 3 Kms. is clearly not sustainable because this cannot be the criterion for consideration of grant of registration. It has rightly been pointed out by the appellants that there are any number of factories which are spread over vast areas running into kilometers spread over more than one village and that there are no restrictions in Central Excise Rules on the area which should be covered by a factory even if they are separated by railway line, road or canal or by all of them.

7. Similarly, the other ground that as these two divisions maintained different excisable items under different chapter headings they should have separate registration is also not, sustainable. As has correctly been pointed out by the appellants a registration certificate can be issued for manufacturing any number of items by a manufacturer and this is a common practice and should have been known to the Supdt. and the Asstt. Commissioner.

8. A perusal of the SCN and the impugned order lead to certain interesting findings. Apart from the fact that the grounds on which the SCN has been issued are in themselves not sustainable, what is still more intriguing in the fact that this issue was raised almost a year and a half after the grant of a single registration for both the divisions after the verification of the ground plan and other aspects related to the issue of such registration.

9. There is nothing on record to indicate any change in! the premises or any other development which necessitated the Range Supdt. to ask the appellant for separate registration for the two Divisions of their factory. It cannot be the contention of Supdt.

issuing, the SCN that the fact that two divisions were spread over a number of vast area running into Kms. was not known to the department. As a matter of fact, this aspect, apart from not being material at all for grant of registration, must have been examined at the time of inclusion of the item manufactured by erstwhile Deccan Polypack Ltd., in the registration already held by M/s. DCL Polyesters Ltd. Similarly, the insistence that there should be two separate registrations for the two

divisions as they manufacture different items under the Central Excise Tariff speaks of ignorance on the part of officials. As has correctly been pointed out by the appellants, there are any number of factories manufacturing different items under a single registration. If at all it is held that the two divisions should have separate registration for the above reasons, it is the Range Officer who earlier allowed the appellants to work under a common registration should have been responsible and reprimanded for having violated the provisions of Rules, if any, and not the appellants because the appellants did not issue the registration themselves without the knowledge of the Central Excise Officials who, moreover, operate from the premises of the appellants 10. The adjudicating authority erred in holding that as the appellant applied for separate registration which was accordingly granted by the Supdt. I/C Range, there remained no further action for him to take. The record shows that the application for separate registration in respect of PFY was not a voluntary one but was a result of pressure exerted by the Range Supdt., Mouda, as evident from his letter dtd. 27.10.97 directing the appellant to apply for separate registration and refused to authenticate and certify their statutory records till such time as they obtained a separate registration for their texturised division.

11. In view of the discussions above, it is held that the impugned order is not only not sustainable but is the result of non-application of mind. The appellants need not have separate registration for their two divisions. Their contention that they need have only a single registration for both the divisions is legally valid. The single registration issued earlier is held to be valid." 8. Admittedly, the above Order of the Commissioner(Appeals) was not challenged by the appellants before any higher appellate forum for the obvious reasons that their contention of the two units being one factory, was accepted by the Commissioner (Appeals). The Revenue also accented the above Order and did not challenge the same. The same attained finality.

9. However, subsequently, proceedings were initiated against the appellants for separate registration of texturising unit. When the new Budgetary Provisions were introduced on 29.2.2000 providing for separate duty-structure for POY Texturised Yarn, the appellants filed a new ground plan and adopted altogether a different

stand to the effect that the two units were two separate premises requiring separate registration. The separate registrations were, however, granted.

Subsequently, proceedings for cancellation of such separate registration and consequent denial of the exemption notification were initiated by way of issuance of the show cause notice as detailed in the facts reproduced in the tabulated form.

10. The success or failure of the present appeals depends upon the fact as to whether the two units situated at Villages:Dahali and Rahadi - are required to be considered as two separate units or the same is one and the same. The appellants have not disputed the fact that the earlier Order-in-Appeal passed by the Commissioner(Appeals) holding the two units to be as one, was at their behest, and the appellants continued to enjoy the status of one unit on the basis of the above order, till the Notifications in question were issued in the Budget of 2000 dated 29.2.2000. From that date, the appellants took a U-turn and started claiming the two units to be separate units with an eye on the Notifications in question. The appellants' contention duly represented by the learned Advocate is that there is no estoppel in, the eyes of law and the appellants were at liberty to take a diametrically opposite stand in the subsequent proceedings, and the authorities below instead of relying upon the earlier Order of the Commissioner(Appeals) should have decided the issue afresh. However, we do not find any merits in the above contention of the learned Sr. Counsel. It was the appellants' own case before the Commissioner(Appeals) that the two units are one and the same and a single registration would suffice. The Order of the Commissioner(Appeals) was not appealed against and has attained finality. The same was binding upon the Revenue as also upon the appellants. The said Order having reached a stage of finality, cannot be circumvented by the appellants in the subsequent set of proceedings involving the same dispute without any change in the facts and circumstances of the cases. The Hon'ble Supreme ' Court in the case of Gulabchand Chhotalal Parikh v. State of Gujarat reported in AIR-1965-SC-1153, as noted by the Tribunal in the case of N.V.K.Mohamed Sultan Rowther & Sons v. Collector of Central Excise as reported in 1991 (55) ELT-401(Tribunal), has held that the provisions, of Section 11 of C.P.C. relating to the bar of res judicata were not exhaustive with respect to an earlier decision operating as res judicata

between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, would operate as res judicata in a subsequent regular suit. It was not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceedings and the subsequent suit have the same subject matter. The nature of the former proceedings was immaterial. The Supreme Court further observed as under:- "We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Articles 226 or 32 of the Constitution from operating as res judicata in subsequent suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality, of the decisions after full contest. We, therefore, hold that, on the general principle of res judicata, the decision of the High Court on a writ petition under Article 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter." The Tribunal further observed that it was well-settled that the principles of res judicata and constructive res judicata are applicable in quasi-judicial proceedings.

11. In the present matters, the dispute primarily is as regards the two units being separate or one, which dispute stands decided by the competent authority under the law and his Order had attained finality.

The appellants are precluded from now taking a diametrically opposite stand in the subsequent proceedings, especially when it was the appellants themselves who in the initial proceedings contended that both the units were one and the same, and required one licence.

12. Shri J.J. Bhatt, learned Sr. Counsel for the appellants, has drawn our attention to the Honourable Supreme Court's decision in the case of Commissioner of Income Tax, West Bengal v. Brijlal Lohia and Mahabir Prasad Khemka, Executors of Late Kanailal Lohia reported in 1972-4-Supreme Court Cases-432, laying down that the earlier decision of the Appellate Tribunal as regards gifts made to brother

and nephew not being genuine, can be subsequently reversed, while dealing with assessments of the subsequent years, and on a consideration of considerable additional evidence. However, we find that the ratio of the above decision is not applicable inasmuch as firstly it was the appellants' own stand before the Commissioner(Appeals) which was accepted by him, and secondly, there was no change in the facts of the case and the location of the two units remained the same. In the above-referred case, the Honourable Supreme Court has observed that in the second set of proceedings, there was considerable additional evidence which was taken into consideration by the Tribunal for arriving at a decision that the gifts were genuine. There is no extra material in the present case so as to upset the earlier Order of the Commissioner(Appeals) and to come to a different conclusion.

13. Our attention has also been drawn to the Madras High Court's decision in the case of Commissioner of Income Tax, Madras v. Central Studios(P) Ltd. reported in 1973(88)ITR-298. It was held in the said decision that each assessment year is a unit by itself and the decision rendered with reference to any particular year will not constitute res judicata or estoppel in relation to the assessment for the subsequent years so as to bind either the assessee or the revenue. We note that the above decision was given in the context of the Income Tax Laws, wherein the assessment is required to be conducted on yearly basis and reference to the evidences available for that particular year. It was in that context, the Hon'ble High Court has held that the assessment year is a unit by itself. The above ratio will not apply to the Central Excise Laws where there is no system of assessment on yearly basis, and an earlier decision given on facts and in law having not been set aside by any higher appellate forum, would be binding on both the sides i.e.

the assessee as well as the Revenue.

14. Similarly, in the case of Commissioner of Income Tax, Gujarat v. Motilal Hirabhai Spg. and Wvg. Co. Ltd. reported in 1978-Vol.81-ITR-173, the Court observed that the doctrine of res judicata is not applicable to income tax proceedings. Inasmuch as the Court observed that it was open to the Appellate Tribunal on the material before it to arrive at a finding which was not consistent

with the decision arrived at by the taxing authorities in the earlier proceedings for assessments under Income Tax Act. As already observed that assessments of income tax are on yearly basis and each assessment year is a unit by itself, requiring a fresh decision on the basis of evidences available for that particular assessment year, which is not the case in the Central Excise matters. In any case, it has been clearly held in the said decision that principle of res judicata will not apply to any Income Tax matters. (emphasis provided). As such, we are of the view that the ratio of the said decision is not applicable to the present cases also. For the same reason, the Gujarat High Court's decision in the case of Anant Mills Ltd. v. Commissioner of Income Tax reported in VOL-206:ITR-582, will not apply. The Hon'ble High Court in the said decision has held that the doctrine of estoppel does not apply to the case of successive assessments. It applies only to the same assessment. In other words, the assessee will be bound by his earlier representation of fact and will not be allowed to go back on it at a subsequent stage of the same assessment. However, the representation made by him or the stand taken by him in an earlier assessment would not necessarily bind him in a subsequent assessment.

The assessment is complete in itself and neither the assessee nor the Revenue should be directly bound by the stand taken by them in the earlier assessment. As already observed, there is no system of yearly assessment in the Central Excise Law as is the system in the Income Tax Law. The fact that whether in the present cases, the two units were one or two separate units, is not required to be considered afresh with the start of every financial year. It is a question of fact and law, which already stands decided by the Commissioner (Appeals). As per the stand taken by the assessee, at the relevant time, the said conclusion arrived at by the Commissioner(Appeals) cannot be upsetted subsequently, in our views, inasmuch as it is not a question required to be decided in each financial year as is the case in the Income Tax Laws. It is for this reason, we are of the view that the various decisions relied upon by the learned Advocate are not applicable inasmuch as the same have been rendered in the context of Income Tax Laws.

14. We note that in the case of H.A. Shah and Co. v. Commissioner of Income Tax and Excess Profits Tax, Bombay City reported in ITR-XXX-618, the Hon'ble

Bombay High Court has observed as under:- "Now, can it be said that because the principle of res judicata does not apply, an Income-tax Authority is entitled, to go back upon a finding given in an earlier decision without any limitation whatsoever? We are considering this question on the basis that the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal stand on the same footing. We will later on deal with the contention of Mr. Palkhivala that the Tribunal stands on a different footing. In this very case a decision was arrived at that Hiralal was not partner in his own right but he was merely a trustee for Vasantlal. That decision was very important both from the point of view of Hiralal and from the point of view of Vasantlal. Can it be said that in the subsequent year when that very question arises it is open to the Income-tax Authorities at their sweet will to come to a conclusion which is contrary to the one arrived at in the earlier assessment. While taking the view that the principle of estoppel or res judicata does not strictly apply to the Income-tax Authorities, we wish to make it clear that we do not suggest that it is open to a Tribunal to come to a different conclusion to the one arrived at by that very Tribunal earlier without any limitation whatsoever, and we shall presently indicate what in our opinion are the limitations upon the right of an Income-tax Authority not to be bound by the earlier decision or the right to revise the earlier decision. If the first decision was not an arbitrary decision or a perverse decision, if the first decision was arrived at after due inquiry and if no fresh facts were placed before the Tribunal giving the second decision, would it still be open to the second Tribunal to come to a contrary conclusion? Two or three different positions may arise. The first Tribunal may come to a particular decision on construction of a particular document. Take this very case. The partnership deed referred to played an important part in the decision arrived at by both the Tribunals. If the first Tribunal took a particular view as to the construction of that document, would it be open to the second Tribunal, without more, to come to a different conclusion on the construction of that document? In our opinion it would not be open to the second Tribunal to disturb the decision given by the first Tribunal because we must bear in mind that the construction of the partnership deed is not a matter of computation or a matter of reckoning which may alter from year to year or from assessment to assessment. The partnership deed is the very basis of the decision as to whether Hiralal is a partner in his own right or is a trustee for Vasantlal, then

it is a decision with regard to the construction of the partnership deed and is a decision which is bound to affect not only that particular assessment but subsequent assessments, and therefore it seems to us that the mere fact that the second Tribunal may look upon the decision of the first Tribunal as erroneous in law would not justify it in coming to a contrary conclusion or reversing the finding of the first Tribunal. Nor are we satisfied that in order to enable the second Tribunal to depart from the finding of the first Tribunal it is essential that there must be some fresh facts which must be placed before the second Tribunal which were not placed before the first Tribunal. If the first Tribunal failed to take into consideration material fact, facts which had a considerable bearing upon the ultimate decision, and if the second Tribunal was satisfied that the decision was arrived at because of the failure to take into consideration those material facts and that if these material facts had been taken into consideration the decision would have, been different, then the second Tribunal would be in the same position to revise the earlier decision as if fresh facts had been placed before it. On principle there is not much difference between fresh facts being placed before the second and the second Tribunal taking into consideration certain material facts which the first Tribunal failed to take into consideration. It may be said that even though the first Tribunal may take into consideration of the fact, still its decision may be so erroneous as to justify the subsequent Tribunal in not adhering to that decision.

In a case like this, which indeed must be an extreme case, it could be said that the decision of the first Tribunal was a perverse decision, and if the decision of the first Tribunal was either arbitrary or perverse it would justify the second Tribunal in departing from the decision arrived at by the first Tribunal.

Therefore, in our opinion an earlier decision on the same question cannot be re-opened if that decision is not arbitrary or perverse, if it had been arrived at after due enquiry, if no fresh facts are placed before the Tribunal giving later decision and if the Tribunal giving the earlier decision has taken into consideration all material evidence. We should also like to sound a note of warning, especially with regard to a Tribunal like the Appellate Tribunal, that it should be extremely slow to depart from a finding given by an earlier Tribunal. Even though the principle of *res judicata* may not apply, even though there may be no estoppel by record, it is very

desirable that there should be finality and certainty in all litigations including litigations arising out of the Income-tax Act.

It is not a very satisfactory thing that an assessee should feel a grievance that one Tribunal came to one conclusion and another Tribunal came to a different conclusion and that the two conclusions are entirely inconsistent with one another. Therefore, the second Tribunal must be satisfied that the circumstances such as to justify it in departing from the ordinary principles which apply to all Tribunals to try and give as far as possible to finality and a conclusiveness to the decision arrived at....." As observed by the Honourable Bombay High Court in the above case, the Tribunal should be slow to depart from an earlier finding of the authorities and the judicial discipline requires the earlier Orders which have attained finality to be followed too, unless it can be said that the same are arbitrary or perverse or there are some additional circumstances which were not considered by the earlier decision giving authority. This is not the case in the present matter. It is not the appellants' case that the location of the two units have been changed, or the earlier Order of the Commissioner (Appeals) was not on appreciation and full consideration, of the facts. In fact, it was the appellants themselves who pleaded in favour of the two units being one and changed their stand subsequently only with the introduction of the Notification in 2000. As such, we are of the view that the principle of *res judicata* will apply and the appellants now cannot take a different view than the one taken by themselves before the Commissioner (Appeals).

15. In view of the foregoing discussions, we are of the opinion that the benefit of the Notifications in question have been rightly to the appellants by treating the two units as one. At this stage, we also take note of the Tribunal's decision in the case of *Rollatainers Ltd. v. Commissioner of C.Ex., Delhi-III* 2002(51)RLT-531(CEGAT-Del.), wherein it was held that since two divisions manufacturing paper and paper-board are located in the same premises, they have to be treated as are one factory and hence not entitled to the benefit of exemption Notification No.6/2000-CE.16. At this stage, we take note of the appellants' contention that the benefit of MODVAT Credit has not been extended to, them while calculating the demand of duty against them. Similarly, the duty has been calculated without treating the total

consideration as cum-duty and without allowing the deduction of the duty now being demanded from them. It is their contention that the duty would considerably come down if both the above contentions are accepted. We find that the law on the above two issue, is no more *res Integra*, and it is well-settled that in case of subsequent demands of duties, benefit of MODVAT Credit is to be extended to the assessee and the total realisation is required to be considered as cum-duty price. For the above proposition, reference has been made to the latest decision of the Supreme Court in the case of *VIP Industries v. Commissioner of Customs* reported in 2000(115)ELT-8(SC) and the Larger Bench decision of the Tribunal in the case of *Shri Chakra Tyres* reported in RLT(LB-CEGAT)-1262. Accordingly, for the above limited purpose, we set aside the impugned Order and remand the matter to the original adjudicating authority to examine the appellants claim of MODVAT Credit and to re-calculate the duty by treating the value as cum-duty. Needless to say that the appellants would be given an opportunity to appear before the authorities and to present the relevant documents on the basis of which they claimed the MODVAT Credit before the adjudicating authority.

17. As regards the penalty, we observe that the appellants had claimed the benefit of the Notifications with the due knowledge and consent of the Central Excise Authorities, and nothing had been suppressed by them. It "seems to be a bona fide dispute on the interpretation of the Notifications, which does not call for any penal action against the appellants. Accordingly, we set aside the imposition of personal penalty upon the appellants. All the appeals are disposed of in the above manner.

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