

Superintending Engineer Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-22-1991

Reported in : (1992)(59)ELT610TriDel

Appellant : Superintending Engineer

Respondent : Collector of Central Excise

Judgement :

1. Both the appeals raise a common issue and are against the same order-in-original No. 13/90 dated 10-4-1990 and hence they are taken up together for disposal as per law.

The appellant herein is Supdt. Engineer Jayakwadi Project Circle who has challenged the order-in-original No. 13/90 dated 10-4-1990 passed by the Collector of Central Excise and Customs, Aurangabad confirming a demand made in Show Cause Notice dated 30-4-1987 issued MR 9(2) of Central Excise Rules read with proviso to Section 11A of Central Excises and Salt Act for Rs. 13,58,105.77 in respect of goods cleared during the period 1-4-1982 to 28-2-1986 by irrigation department of Jayakwadi Project, Aurangabad and Command Area Development Authority of Govt. of Maharashtra.

The appellant herein is Chief Administrator Command Area Development Authority, Aurangabad who has challenged the same Order-in-Original No.13/88 dated 29-5-1988 confirming the above noted demand.

2. The show cause notice dated 29-4-1987 was issued by the Collector of Central Excise dated 29-4-1987 to the Chief Engineer Irrigation Department Jayakwadi Project Aurangabad and to Chief Administrator Command Area Development Authority, Aurangabad. The reply to the show cause notice has been given by the Superintending Engineer on behalf of Chief Engineer. Chief Administrative Officer also has given separate reply to the show cause notice. The order-in-original No. 13/90 on page-1 in cause title shows the name of the Party as M/s. Chief Engineer Irrigation Deptt. Jayakwadi, Aurangabad and Others and on the last page the copy of the order is marked to Superintending Engineer and to the Chief Administrative Officer. The final demand is confirmed against Irrigation Deptt. of Jayakwadi Project Aurangabad and Command Area Development Authority, Aurangabad of Govt. of Maharashtra. The Supdt. Engineer and Chief Administrative Officer have separately filed the above appeals against the impugned order.

3. (a) The facts of the case leading to the adjudication proceedings as alleged in show cause notice dated 29-4-1987 are that intelligence was collected by the Supdt. of Central Excise (Preventive) Hq. Aurangabad that the Irrigation Department, Govt. of Maharashtra are engaged in the manufacture of cement products such as slabs, halfround channels, Tropicoidal sections, PCC channels for use in the canals of Jayakwadi Project, Irrigation Department of Govt. of Maharashtra. It was also alleged that these goods were manufactured at different places in factories which were commonly known as casting-yards without obtaining proper Central Excise Licence and without payment of Central Excise Duty. It was further alleged that these goods were manufactured with the aid of power using raw materials viz. sand, cement and metal in specified proportion. Mixing of sand, cement and metal was done in concrete mixer adding required quantity of water. The concrete is then placed in the moulds and then vibrated mechanically by the electrically operated by-channel casting machines called as "Mints machine of M/s.

Shirko". After stipulated vibrations and compaction, the channel is removed from the machine automatically. These channels are inserted in the curing tank for 21 days and after that they are removed from the tank and used at project sites. The department held these goods to be classifiable under T.I. 68 of First Schedule of

erstwhile Central Excise Tariff Act. An excise duty demand of Rs. 13,58,105.77 on slab and channels valued at Rs. 1,40,01,473.82 for the period from 1-4-1982 to 28-2-1986 was demanded under Rule 9(2) of Central Excise Rules, 1944 read with proviso to Section 11A of the Central Excises and Salt Act, 1944. The details of clearances etc. were annexed to the show cause notice.

3. (b) The main defence raised by the Chief Engineer (Specified Project) Irrigation Department Aurangabad in his reply dated 31-8-1987 filed on behalf of Supdt. Engineer is as follows: (i) The Chief Engineer through his subordinate officers is neither engaged anywhere in the connection of business of Central Excise Tariff Item 68 i.e. PCC channels and slabs etc. during the period 1-4-1982 to 28-2-1986 nor they are engaged in wholesale purchase or sale of the said goods as such the question of applying or obtaining licence for their manufacture does not arise.

(ii) It was contended that the goods were used for the bona fide Govt work of providing and constructing canal lining. Casting of PCC slabs is one of the intermediate stage in the process. The PCC slabs were being cast at different work places wherever it is required for canal lining and does not require power for its casting and incidental to ordinary functions of the Govt. They contended that they were not manufacturing "Excisable goods" and hence paying of duty did not arise. As such question of delivering it from factory under the gate pass in proper form did not arise. Similarly, removal of goods on which duty has been determined also does not arise under Rule 173C(2). They contended that measurements of work done is taken for the finished item after laying and finishing in position and paid on M² (sq. metre) basis and no separate account of PCC slabs manufactured etc. were therefor kept. The PCC slabs were not cast for sale and they could not produce price list nor there was a question of obtaining trade discount on it. They contended that keeping account according to Rule 173Q of Central Excise Rules, 1944 did not arise for the purpose of casting PCC slabs.

(iii) They contended that PCC slabs amounting to Rs. 25,29,812.00 pertained to Chief Engineer (specified projects), irrigation department Aurangabad and were cast by different casting yards by the subordinate officers and the details were furnished in their reply. They contended that duty had been paid on the raw

materials like cement which comprised of 50% metal and hence levying of Excise duty on total cost of PCC slabs is not correct.

4. The Chief Administrator Command Area Development Authority, Aurangabad by his separate reply likewise took the same defence. They contended that PCC channels amounting to Rs. 1,14,71,662/- pertained to their office and it had been cast at different casting wards by their subordinate offices and details were furnished in their reply.

5. During the personal hearing, a detailed written submission was filed by the Superintending Engineer and in that one important plea raised was that their activity was exempted under Notification No. 57/75-C.E., dated 1-3-1975 for item falling under T.I. 68 manufactured by State Govt. They also contended that inputs used for manufacture were entitled for set off under Notification No. 201/79-C.E., dated 4-6-1979. They also contended that each site or yard, if were taken as.

a separate factory therein the clearances of each site would come within the exemption limit under Notification No. 77/83-C.E., dated 1-3-1983 as one sub-division or division may be considered as one unit for taxation purpose. The valuation and cost and duty liability done by the department was also challenged by the appellants.

6. The learned Collector by his Order No. 12/88 dated 24-5-1988 rejected all their pleas and confirmed the order raised in the show cause notice. The appellants appealed to CEGAT and on hearing their appeals it was remanded for de novo consideration. The appellants filed fresh written submission on 29-12-1989 reiterating their pleas and also seeking exemption under Notification No. 46/81. They also filed points of arguments made by their counsel. The learned Collector after giving a hearing has again confirmed the demand by the impugned order with the same previous findings.

7. (i) The learned Collector has held in the impugned order that in each site, goods were manufactured and it is a factory. He rejected the appellants' plea that it was not a factory under the Indian Factories Act, 1948 within the meaning of Section 2(m) of the said Act, as they had not filed any material to substantiate their claim.

He held that project works such as construction of canals or laying of irrigation pipelines etc. are the works of permanent nature spread over a long period and the irrigation department manufactures the cement products required for the said work on permanent basis. The value of the goods manufactured during the period was over rupees one crore and the manufacturing operations were carried on from 1982-86 for a period over four years and hence were not of temporary nature. The learned Collector, therefore, held that they were not entitled to the benefit of Notification No. 46/81.

(ii) He rejected the appellants' plea that contractors were manufacturers on the ground that the land was provided by the party for undertaking manufacturing operations. Even the raw materials, machinery, power etc. was also provided by the Party and the supervision over the manufacture was done by the party through their officials. He held that all these evidences goes to prove that the goods were manufactured at site. On the account of and on behalf of, as well as, for the party and the contractors simply carried out job work.

(iii) He held that even if the goods were used for bona fide State Govt. purposes, the duty is leviable on the said goods unless the same is specifically exempted by virtue of Notification issued by the Govt.

He held that there was no double taxation on the raw material and again on the finished goods and held that they were not entitled to the benefit of Notification No. 201/79 as input cannot fall under T.I. 23 the goods fall under T.I. 68.

(iv) He also held that the applicants were not entitled to the benefit of Notification No. 57/75 dated 1-3-1975 as the Govt. had not issued any declaration in terms of Article 289(3) of the Constitution of India and the Party had not produced any evidence to that effect.

(v) He held that the benefit of Notification No. 77/83 or 105/80 were also not available to the Party as the benefit is available to a manufacturer and in this case the manufacturer being the State Govt., the value of the clearances of all the factories manufacturing similar goods owned by State Govt. exceeded the eligibility limit for granting exemption under the said notification. He, therefore, held

that the irrigation department had to discharge the duty liability in respect of Ujjain Project (Solapur Division).

(vi) He held that the demands were not time-barred and as the Party had not communicated to the department regarding the carrying on of the process of manufacturing activity. Hence, they were liable to pay duty for the extended period. As also under the SRP scheme, the responsibility to disclose to the Excise department regarding manufacture of goods whether dutiable or exempted laid squarely on the manufacturer. He relied on the rulings of the Tribunal rendered in the case of VST Tillers Tractors Ltd., Bangalore v. CCE, Bangalore as reported in 1987 (31) E.L.T. 95 and that of M/s. Kiran Spinning Mills v. CCE, Bombay-II 8. We have heard Shri V. Sridharan, learned Advocate for appellants and Shri J.N. Nair, learned JDR for the revenue.

(i) Premises where manufacturing activity is carried on is not a factory as defined under the Indian Factories Act, 1948, and hence wholly exempted front duty under Notification No. 46/81 i.e. site where the goods are made is not a factory.

(ii) The appellants are not the manufacturers but the contractor is the manufacturer.

(iii) There is no suppression and hence the demand is hit by limitation.

(iv) Show Cause Notice should have been served on Secretary to the Irrigation Department and the service on the Supdt. is not maintainable.

10. On the first point, he elaborated that the Contractor carries out the work to make the slabs in open site and the slabs are cured in tank. The work spot keeps changing and hence temporary open land cannot be considered as factory. He contended that the production of goods was the independent activity of the contractor to make the concrete slabs.

Although there cannot be dispute of manufacture and durability of the goods under T.I. 68 of the erstwhile Tariff and also with regard to use of electricity and employment of more than 10 workers but the activity carried on in open site on temporary basis cannot be construed as 'factory' within the meaning of definition of

'factory' under Section 2(m) of the Factories Act, 1948. As such type of activity are carried on in hundreds of places by several contractors. There is no permanency of a place to be called a 'factory premises'. It is his contention that to construe as a 'factory premises' there has to be a permanency in the place of manufacturing activity and workers should not be 'birds of passage', as in this case, the premises was temporary and the workers were 'birds of passage'. He contended that the criteria is "Premises" and not manufacturing activity. Although it may be a factory for the purpose of Excises and Salt Act, 1944 but the Notification No. 46/81 contemplated the definition of Factory under 'The Factories Act, 1948' and under the said Act, 'Premises' is the criteria and not production or manufacture of goods as in the Excises and Salt Act, 1944. He contended that the show cause notice did admit that the 'premises' being temporary in nature and being spread out to various areas. As regards the Collector's finding that the site is not temporary, he assailed that this finding is incorrect and not maintainable, as the Contractors or the appellants were not taking out any licence under the Factories Act. He ultimately contended that temporary sites were not factories. *Vishakhapatnam and Others v. Collector of Central Excise, Guntur and Others* (ii) *Simon Carves India Ltd. v. State of Gujarat* reported in 1980 (41) FLR 75.

12. On the second point raised by him, his submission is that the appellants are not the manufacturers, but it is the Contractors, who are the manufacturers. He contended that the Contractors were neither dummy nor camouflage ones. The Contractors were bringing in their own labourers but they were also bringing their own design. It was sold on outright basis. The appellants had right of rejection of the goods and the goods had to qualify for ISI standards. Therefore, the appellants could not be treated as manufacturers but only the Contractors were the manufacturers and hence the demands confirmed on the appellants were not maintainable. He relied on the following rulings: *Kerala State Electricity Board v. CCE* reported in 1990 (47) E.L.T. 62 (Tri.) 13. He submitted that the Hon'ble Supreme Court had affirmed the Tribunal's ruling as reported in 1990 (47) E.L.T. A161. He contended that the learned Collector's rejection on the ground that the appellant was providing land, power and cement was not a tenable ground for rejecting their contention that Contractors were manufacturers, as the appellants were charging for all these facilities.

14. As regards the third point, he contended that there was no deliberate intention to evade duty. He contended that department had not placed any positive evidence regarding suppression and relied on the ruling of the Supreme Court as rendered in the case of Padmini Products v. CCE as reported in 1989 (43) E.L.T. 195 (SC).

15. As regards the fourth point he contended that under the Excises and Salt Act, 1944, duty has to be charged against the Secretary to Govt.

and Supdt. Engineer is not the proper person to be proceeded against.

16. Shri J.N. Nair, learned JDR appearing for the department defended the impugned order and submitted that there was no infirmity in the order and the same was maintainable. He contended that the appellant had not denied the manufacturing activity or regarding the production of goods or its classification. The activity was carried on a site which was owned by appellant and the activity went on for a period of four years and hence it cannot be termed as temporary place. He contended that appellant had not placed any evidence of their not having reported under Factories Act or the workers being 'birds of passage'. The burden of proof for claiming the benefit of the notification laid on the appellant, which had not been discharged in this case. He referred to the heavy clearances which was spread over a period of long time pointed out to the permanency of the place of manufacture and it is a 'premises' within the definition of "Factories" Act, 1948.

17. He submitted that the Kerala State Electricity Board's case referred by learned Advocate was not applicable to the facts of the case. He referred to the Collector's finding in which he had held that clearances had to be clubbed and non-availability of Notification No.77/83 and Notification No. 105/80. He relied on the ruling of Indica Laboratories Pvt. Ltd. v. Union of India as reported in 1990 (50) E.L.T. 210 Gujarat.

He contended that the tender papers produced by the appellant were not correct papers and hence it could not be relied. He referred to the Schedule-A of the tender papers produced by the appellant and pointed out that several items were

supplied free to the Contractors. He contended that Contractors had manufactured on behalf of the appellants and hence the demand made against the appellant was maintainable. He contended that Supdt. Engineer represented the deptt. and that the demand raised was proper. He relied on the findings of the Collector on the limitation and contended that the demand raised on the extended period was maintainable.

18. We have heard both sides carefully and perused the records and examined the contentions raised by them. The question that arises for our consideration is as to whether the - (i) goods manufactured by appellants in Cement yards can be considered as having been manufactured within the meaning of 'Factory' under Section 2(m) of Factories Act; 19. Taking the first question, first it has to be seen as to whether the 'Casting Yards' can be construed as a factory within the ambit and definition of the said term in Section 2(m) of the Factories Act, 1948.

The definition of 'manufacturing process' in clause (k) and 'Factory' in clause (m) of Section 2 of the Factories Act, 1948 is reproduced below: (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or bookbinding; or (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or (i) whereon ten or more workers are working; or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or (ii) whereon twenty or more workers are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process, is being carried on without the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or (a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place) [Explanation. - For computing the number of workers for the purposes of this clause all the workers in different relays in a day shall be taken into account;] 20. The appellants are not disputing the fact that there is no manufacturing process. They admit that

the 'goods' are as a result of manufacturing process and the classification of the goods are also not disputed. But what is contended is that the place of manufacture being an open site and yard and the activity being temporary, it cannot be construed as a factory. According to appellant for construing a place to be a 'factory'. The employment of more than 10 workers and use of electricity as well as the production of goods by manufacturing activity is not disputed. The only question which remains to be examined is as to whether the place being an open site and activity said to be temporary, can it then be construed as a factory in terms of the definition of 'Factory' as occurring in clause (m) of Section 2 of Factories Act.

21. The question is best answered by examining some of the rulings on this point rendered by Hon'ble Supreme Court and other High Courts which are noted herein below.

22. The Allahabad High Court in the case of Employers' Association of Northern India v. Secretary for Labour as reported in (AIR 1952 at page 109) while interpreting the definition of 'Factory' occurring in clause (m) of Section 2 of Factories Act has held in para 2 of its judgment as follows: "We may first consider the later ground taken by the Employers' Association in Writ Application No. 208 of 1950. It was contended by the learned Counsel for the petitioner that because the sugar factories employ 500 or more workers during the crushing season only, it should be held that in the sugar factories 500 or more workers are not ordinarily employed. The contention is based on the interpretation of the word 'ordinarily'. It has been argued that since the working season, when there are 500 or more workers, forms only a minor part of the year, it cannot be said that 500 or more workers are ordinarily employed in the sugar factories. To interpret the word 'ordinarily', we can get assistance from the same word as used in the definition of the term 'factory' in this very Act, clause (m) of S.2, Factories Act, 1948, defines factory as follows: (i) whereon ten or more workers are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or It is undisputed that the manufacturing process in a sugar factory is carried on only during the crushing season which is also the period during which the factory

employs 500 or more workers. Under the first portion defining a 'factory', the premises would be a 'factory' only for the period during which the manufacturing process is actually being carried on with the aid of power; for the period during which the manufacturing process is not actually carried on, the premises can be a 'factory' only under the second portion of the definition which makes the premises a 'factory' if the manufacturing process is ordinarily carried on with the aid of power in these premises. It cannot be said that merely because no manufacturing process is carried on during the off season, sugar factories cease to be factories within the meaning of this Act. It is obvious that the word 'ordinarily' which was used in the definition was meant to be interpreted with reference to the nature of the factories to which it had to be applied. Factories, which, in the very nature of things, carry on the manufacturing process for only a limited period during a year and utilise the remaining period for ancillary work, such as the cleaning and repairing of the machinery, purchasing of stocks etc. must be deemed to be factories throughout the year even though they do not carry on the manufacturing process during the off season. The word 'ordinarily' in this definition cannot be interpreted in the sense in which it is used in common parlance. It must be interpreted with reference to the intention and purposes of the Act in which it has been used and with reference to the subject-matter to which the Act has to be applied. The principle that general words are to be construed with reference to the intention of the statute in which they occur and to the subject-matter to which they have to be applied is well recognised and has been fully discussed by Maxwell in his book on the Interpretation of Statutes. When the word 'ordinarily' has to be interpreted in the definition of 'factory' a similar interpretation must be put on the word 'ordinarily' used in S. 49 when that section is applied to sugar factories. We are, therefore, unable to accept the contention of the learned Counsel for the petitioners that S. 49 of Factories Act, 1948, cannot be applied at all to sugar factories or to other factories which have a limited working season. This question may be looked at from another angle. Even the factories which work throughout the year do not necessarily work for all the 24 hours every day. In fact, there is quite a large number of factories which work for only 8 or 9 hours out of 24 hours every day. This limitation on the working hours may be due to rules prescribed under various statutes or may be due to the exigencies and circumstances in

which the factories are working. Even if the factories carry on the manufacturing process for only 8 or 9 hours a day, there can be no doubt that it will have to be held that the manufacturing is ordinarily Carried on in them. This ground for holding that these rules do not apply to seasonal factories like sugar factories, therefore, fails." 23. The Madras High Court in re: Chinniah Manager, Sangu Soap Works as reported in AIR 1957 Mad. 755. while interpreting the Section 2(m)(ii) and Section 2(k) of the Factories Act held in para 4 as follows: "As is plain from the definition the whole premises are a factory even though the manufacturing process is being carried on only in a part of the premises. In Ramanatham v. Emperor - ILR 50 Mad. 834: (AIR 1927 Mad. 345) (A), the words "manufacturing process" do not necessarily refer to something produced but to the business carried on: Owner v. Cottingham Sanitary Steam Laundry Co. Ltd. 1910-74 JP 219 (B). Thus, a laundry carried on for the purpose of gain and in which mechanical power is used for driving machine used in aid of the work of washing clothes is within the definition of a factory.

The conversion of raw film into finished product comes within this definition of the section: In re: Sarma, AIR 1953 Mad. 269 (C).

Putting ginned cloth into bales and having it pressed in the compound of the factory is a work incidental to or connected with manufacturing process within the meaning of the Act: Local Government v. Nusarwanji, AIR 1953 Nag 283 (D). It will depend upon the circumstance of each case whether a particular business carried on comes within the definition of "manufacturing process", the different processes enumerated in the clauses being merely illustrative.

To sum up, to constitute a manufacture there must be a transformation. Mere labour bestowed on an article even if the labour is applied through machinery, will not make it a manufacture, unless it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it begins its existence. Whatever is made by human labour, either directly or through the instrumentality of machinery (Abbott Law Dictionary). "Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least

some new mode of employing practically his art and skill is required to satisfy the word "manufacture". Per Abbott C.J. in *R.V. Wheeler*, (1819) 2 B and Ald 345 (E). See also *Gibson v. Brand* - (1842) 4 M&G 179 (F)." (iii) The Kerala High Court in the case of *V.M. Patel v. Inspector of Factories* as reported in AIR 1958 Kerala (page 237) while interpreting the definition of 'Factory' and 'manufacturing process' in the Factories Act has observed in para 4 as follows: "... It appears that the Legislature has made a deliberate attempt to make the definition all-comprehensive so as to bring within it all conceivable activities in the course of commerce and industry.

The process of garbling of pepper carried on at the premises of the Gujarat Travancore Agency cannot come under parts 2 to 5 of the definition. But on the question whether that process would come within the first part of the definition, there is little scope for doubt ...

The process of washing and cleaning pepper in the course of garbling and the subsequent packing of the same with a view to its sale, transport, delivery or disposal, clearly amounts to "a manufacturing process" as defined in the first part of the definition of that expression." 24. Shri Sridharan, learned Advocate has argued that any activity in open space will not come within the ambit of the definition of the expression 'factory*. Similar, contention had been raised in the case of *Ardeshir H. Bhiwandiwalla v. State of Bombay* (now Maharashtra) before Hon'ble Supreme Court of India as reported in AIR 1962 (page 29). The Hon'ble Supreme Court after examining the definition of Factory and 'manufacturing process' in the Factories Act answered the question in Paras (5), (6) and (7) of the report as follows: "It is contended for the appellant that the expression 'premises' in the definition of the word 'factory' means 'buildings' and that 'mere open land' is not covered by the word 'premises' and as there are no buildings except temporary sheds on the Salt Works, the Salt Works cannot be said to be a 'factory'. We do not agree with this contention. The word 'premises' has now come to refer to either land or buildings or to both depending on the context. The meaning of the word 'premises' in various lexicons and dictionaries are given below: (b) *Cochran's Law Lexicon*, IV Edition: 'Premises' means 'houses or lands'.

(i) lands and tenements; an estate; land and buildings thereon; the subject-matter of the conveyance; (ii) a distinct and definite locality and may mean a room, especially building or other definite area; (d) Earl Jowitt, Dictionary of English Law: 'Premises' ... from this use of the word, 'premises' has gradually acquired the popular sense of land or buildings. Originally, it was only in this sense by laymen, and it was never so used in well-drawn instruments, but it is now frequently found in instruments and in Acts of Parliament as meaning land or houses, e.g. the Public Health Act, 1875, S. 4, where 'premises' includes messuages, buildings, lands, easements, tenements and hereditaments, of any tenure ...

'Premises' - as applied to land, Webster's New International Dictionary defines the word as follows: The property conveyed in a deed; hence, in general, a piece of land or real estate; sometimes, especially in fire insurance papers, a building or buildings on land; the premises insured." It is therefore clear that the word 'premises' is a generic term meaning open land or land with buildings or buildings alone.

The expression 'premises including precincts', it has been urged, clearly indicates that in the context of the definition of the word 'factory', premises meant only buildings as buildings alone can have precincts and there can be no precincts of any open land. This expression 'premises including precincts' does not necessarily mean that the premises must always have precincts. Even buildings need not have any precincts. The word 'including' is not a term restricting the meaning of the word 'premises' but is a term which enlarges the scope of the word 'premises'. We are therefore of opinion that even this contention is not sound and does not lead to the only conclusion that the word 'pre- mises' must be restricted to mean buildings and be not taken to cover open land as well.

Sub-clause (bb) of clause (1) of S. 7 of the Act requires the occupier of a factory to mention in the written notice to be sent to the Chief Inspector before his occupying or using any premises as a factory, the name and address of the owner of the premises or building including the precincts thereof referred to in S. 93. This sufficiently indicates that the word 'premises' is not restricted in scope to buildings alone.

Of course, the building referred to in this clause is the building which is referred to in S. 93 of the Act. Subsection (1) of S. 93 reads: "Where in any premises separate buildings are leased to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services, such as approach roads, drainage, water supply, lighting and sanitation." "This again makes it clear that 'premises' refer to an entire area which may have within it several separate buildings." 25. Shri V. Sridharan, learned Advocate has relied on two rulings in his support. One is Aruna Industries (supra) and the other is of the Gujarat High Court as rendered on Engineer Construction Corporation Ltd. v. S. Patel Factory, Inspector (Crime Rev. 267/78).

26. In Aruna Industries case the Tribunal held that the making of structural shapes like trusses, beams, girders etc. from raw materials such as plates, channels, angles by cutting, drilling rivetting etc.

and assembling structural shapes for construction of a building or shed was a fabrication activity and not a manufacturing process. The Tribunal relying on the Engineering Construction Corporation case of Gujarat High Court held that fabricating activity on a site allotted by concerned party was not deemed to be working within a factory.

Therefore, this case on facts is clearly distinguishable. The Gujarat High Court in Engineering Construction Corporation case, examined the question as to what is the work which the company usually and predominantly carried on and as to whether the work of preparing the articles etc. with the aid of power is done incidentally to the carrying out of the main object of the work construction. It was held that the work of preparing articles etc. formed only a small part of the whole integrated process of the operation of the construction wherein many such incidental activities would contribute their mite so that the main object of construction can be achieved. Applying this test, the Court further held that the said work of manufacturing articles in the circumstances aforesaid, does not and cannot amount to establishing and running a factory so as to attract the provisions of the Act. The Hon'ble Gujarat High Court was examining the applicability of the

Factories Act to the workers involved in that activity. The laudable object of the Factories Act was to regulate health, safety working hours and to provide ameliorative and social objectives for the betterment of working conditions of the workers in the factory. In this context, the Court had observed on examining the facts of the case, that the nature of work was temporary and the workers were 'birds of passage' and hence the object of Factories Act was not to bring in its ambit such activity. The situation in this case is different. We are not examining the applicability of the provisions of the Factories Act to the irrigation works but are concerned with the definition of the term 'factory' in so far as of manufacture of goods are concerned. The notification in question No. 46/81-C.E. is to grant exemption to goods other than the goods manufactured otherwise in a factory. The meaning of the expression 'factory' was assigned to it as in clause (m) of Section (2) of the Factories Act. The definition of the factory in clause (m) as read above means any premises including the precincts thereof, where ten or more workers are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on. In this case, the employment of workers, use of power and manufacturing activity is not disputed. It is their case that the 'cement yard' being an open site will not come within the words 'premises'. This word 'premises' has been held as noted in Case Law discussed above to include even 'open yard'. The above noted rulings have gone into similar question raised regarding the seasonal nature of the work and also being temporary in nature and has negated such contentions. The rulings noted by us, apply in full force.

Applying the ratio of the rulings, the contentions raised regarding the activity of manufacturing process of manufacturing 'cement goods' does not come within the term 'factory' has to be ruled out.

27. The second question raised is can the demands be confirmed on the appellants? The appellants have contended that they are not the manufacturer but it is the Contractor, being a job worker is the manufacturer and hence duty cannot be confirmed on them. In this connection reliance is placed on the rulings given by Tribunal in the ratio of the Kerala State Electricity Board's case (supra). The Tribunal had examined the terms of contract and has held that the agreement is in

the nature of principal to principal basis between the Board and the Contractors. This is a question of finding of fact. This has to be ascertained in each case and seen as to whether such a situation exists. In this case the learned Collector has examined in detail the facts involved in the case and has negated the contention that the facts revealed that there was no agreement on principal to principal basis. The contractors have carried out the work on labour charges and that the work has been carried on behalf of the appellants.

The agreement copy has not been placed for scrutiny only 'Tender documents for Earth work, Lining and structures of Distributory No. 74 @ KM 130.601 of Parthan Right Bank Canal Part-II Executive Engineer, Jayakwadi Project-II Division No. 3, Wadi Godri, Govt. of Maharashtra Irrigation Department' is placed before us. There is initial of the Executive Engineer only. The Contractor's signature has not been affixed on each place in the column meant for signature of 'Contractor'. This tender document reveals about the entire work project of the irrigation project involving earth work, excavation, lining etc. On a careful examination of this material, it cannot be said that the manufacturing activity in Cement Yards for production of goods has been done on principal to principal basis. The terms of agreement and ratio of M/s. Kerala State Electricity Board's (case) is not directly applicable to the facts of this case. The contractors have carried on the work on behalf of the Irrigation Department and the irrigation department is therefore, a principal manufacturer who got their goods manufactured on their own account.

28. The appellants had further contended that each 'Cement Yard' has to be construed as factory and that the clearances of each 'Cement Yard' cannot be clubbed together, as each Chief Engineer of that division in which the 'Cement Yard' is located has to be held as the separate factory and separate manufacturer. This plea has been rejected by the learned Collector. It has been held that the benefit of Notification No. 77/83 or 105/80 cannot be given the wordings of the notifications it is clear that the benefit is available to a manufacturer. The learned Collector held that the manufacturer being a State Govt., the value of clearances of all the factories manufacturing similar goods owned by State Government exceeded the eligibility limit for granting exemption under the said notification. This view of the learned Collector is supported by ruling of this Bench rendered in the

case of Andhra Pradesh State Electricity Board, Hyderabad v. CCE, Hyderabad as reported in 1984 (16) E.L.T. 579.

29. The learned Counsel has not shown any ruling against this finding of the learned Collector. There is no infirmity in this portion of the finding. The Chief Engineer of each division is acting on behalf of the Irrigation department and the duty has been confirmed on the Irrigation department. The Chief Engineer has represented the department. The 'Cement Yard' is controlled and held by the Irrigation department for the Govt. of Maharashtra. Therefore, the appellants cannot plead that each yard has a separate manufacturer who is independent in all aspects. The learned Collector has rightly rejected this plea of the appellants.

30. The duty confirmed is for five years invoking larger period. The learned Collector has relied on the rulings of the Tribunal rendered in the case of VST Tillers and Tractors (supra) and that of Kiran Spinning Mills (supra). Shri Sridharan relied on the ruling of the Supreme Court as rendered in Padmini Products (supra), the Hon'ble Supreme Court did not accept the plea that failure to take out the licence and thereafter to take the goods out of the factory gate itself sufficient to infer that the appellants came within the mischief of Section 11A of the Act.

The Hon'ble Supreme Court held that "As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11A of the Act. In the facts and circumstances of this case, there were materials as indicated to suggest that there was scope for confusion and the appellants believing that the goods within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of Section 11A of the Act". Now it has to be examined as to whether the appellant being a State Govt. who are vested with the legislative powers and also its implementation can plead and take the benefit of the rulings of

the Hon'ble Supreme Court. In the first instance the factors for the bona fides belief of non-excisability with evidence has to be placed. Such bona fide belief of non-excisability of goods has not been placed before us. The State Govt. could have always sought clarification from the Excise Department as regards the 'Cement Yard' coming within the ambit of expression 'factory' which has not been done in this case. Therefore, it cannot be said that the appellants had entertained any bona fide belief of non-excisability of the goods and that there was scope for such a belief or opinion. It cannot also be said that the appellant State Govt. did not know about the goods were not excisable or required to be licensed, and would not attract the penal provisions of Section 11A of the Act. The appellants are not disputing the production of 'goods' but their plea is that 'Cementing Yard' is not a factory. Therefore, the ruling of Padmini Products (supra) is on a totally different footing on the different facts and circumstances and those facts and circumstances does not exist in this case to grant the benefit of the said rulings.

31. The learned Collector has examined the Notification No. 57/75 dated 1-3-1975 and also Notification No. 201/79-C.E., dated 4-6-1979 and rejected the plea of the appellants for its benefit. There is no infirmity in these findings also. The appellants are not entitled to any other benefit and the appeals are, therefore, dismissed.

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