ITEM NO.22 COURT NO.9 SECTION XVII-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No.754/2020

M/S. GMR POWER AND URBAN INFRA LIMITED Appellant(s)

VERSUS

COMMR. OF CUSTOMS (EXP.), MUMBAI Respondent(s)

(IA No. 16326/2020 - EX-PARTE STAY
IA No. 17383/2020 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date : 01-10-2024 These matters were called on for hearing today.

CORAM :
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE NONGMEIKAPAM KOTISWAR SINGH

For Appellant(s) Mr. Preshit Vilas Surshe, AOR
Mr. Niranjan Reddy, Sr. Adv.
Mr. Nand Kumar, Adv.
Mr. Sahil Raveen, Adv.
Mr. Preshit Surshe, Adv.

For Respondent(s) Mr. Mukesh Kumar Maroria, AOR
Mr. N. Venkatraman, A.S.G.
Mr. Arijit Prasad, Sr. Adv.
Mr. Rupesh Kumar, Adv.
Mr. Rajat Nair, Adv.
Mr. Balendu Shekhar, Adv.
Ms. Chinmayee Chandra, Adv.
Mr. Siddhant Kohli, Adv.
Mr. Udai Khanna, Adv.
Mr. Shashank Bajpai, Adv.
Mr. G.S. Makker, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Appeal admitted.

(KRITIKA TIWARI)
SENIOR PERSONAL ASSISTANT

(DIVYA BABBAR)
COURT MASTER (NSH)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 86101 of 2013

(Arising out of Order-in-Appeal No. 944/MCH/ADC/VIIB/2012 dated 27.11.2012 passed by Commissioner of Customs (Appeals), Mumbai-I)

M/s. GMR Infrastructure Ltd. **Appellant**
Skip House,
25/1, Museum Road,
Bengaluru 560 025.

Vs.

Commr. of Customs (Exp.), Mumbai **Respondent**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Appearance:

Shri Nand Kishore, Advocate, for the Appellant
Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86983/2019**

Date of Hearing: 22.07.2019
Date of Decision: 01.11.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order n appeal No 944/MCH/ADC/VIIB/ 2012 dated 27.11.2012 of the Commissioner Customs (Appeal)Mumbai Zone –I. By the impugned order Commissioner has upheld the assessment order of the Bill of Entry No 9566214 dated 06.07.2010.

2.1 Appellants have filed Bill Of Entry No 956214 dated 06.07.2010 for the clearance of goods described by them as *"Electronic Sensor Paver Vogel Model 1800-2 with AB 600-2-TV for laying bituminous pavement upto 9 meters along with multiplex big SKJ and its accessories"*, and

declared value was Euro 3,60,000/- (Rs 2,11,25,160/-). They claimed classification under CTH 84306100 and benefit of exemption under notification No 621/2002-Cus dated 01.03.2002 as amended (Sr No 230, Item Sr No of List 18 & condition 40)

2.2 Assessing/ Adjudicating Authority denied the benefit of exemption claimed for the reason as follows:

- Appellant name being the subcontractor, did not figure in the main contract between GHVPL and NHAI.
- Goods imported by the appellant is Electronic Paver (with Sensor device) for laying bituminous pavement upto 9 mtr whereas the exemption was in respect of Electronic Paver Finisher (with sensor device) for laying Bituminous pavement 7 mtr size and above.

2.3 Aggrieved by the assessment order appellants filed the appeal before the Commissioner (Appeal). By the impugned order referred in para 1, supra Commissioner (Appeal) has dismissed the appeal.

2.4 Aggrieved by the impugned order appellant have preferred this appeal.

3.1 We have heard Shri Nand Kishore, Advocate for the Appellants and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the revenue.

3.1 Arguing for the Appellant learned Counsel, submitted that-

- Joint Secretary (Tax Research Unit), has vide his D O F No 334/15/2014-TRU dated 10th July, 2014 clarified the issue in respect of admissibility of the exemption to sub contractors as follows:

  "A doubt has been raised as to whether road construction machinery imported under Notification No 12/2012-Customs dated 17.03.2012 (Sr No 368) can be sold within 5 years of importation on payment of custom duty on depreciated value and whether

individual constituent of the consortium whose names appear in the contract may import goods under the notification. It is reiterated that the road construction machinery imported duty free can be sold within 5 years of importation subject to payment of customs duty on depreciated value subject to the conditions specified therein and that individual constituent of consortium whose names appear in the contract can import goods under the said notification."

- Taking note of the said clarification issued, Tribunal has in their own case vide order No A/85813/2018 dated 03.05.2019 held that they were eligible to the benefit of exemption notification.
- Since the issue is squarely covered by the said decision of the tribunal appeal needs to be allowed.

3.3 Arguing for the revenue learned authorized representative submitted that-

- The finding of the assessing authority and the appellate authority to the effect that the name of appellant do not figure in the main contract, is not in dispute.
- The issue in respect of the same exemption notification and the condition, has been settled by the Apex Court in case of Gammon India Ltd [2011 (269) ELT 289 (SC)];
- The clarification referred to by the advocate, has been issued by JS (TRU) in respect of subsequent notification and not in respect of the same notification.
- The decision of the tribunal in appellants own case relying on the clarification issued subsequently cannot be said to be good law, for the reason that Apex Court has in case of Ratan Melting & Wires Industries [2008 (231) ELT 22 (SC)] has clearly held to the contrary.

- In view of the decisions of the Hon'ble Apex Court in case of Gammon India Ltd, the appeal filed needs to be dismissed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments-

4.2 The issue in the present case is squarely covered by the decision of the Hon'ble Apex Court in case of Gammon India Ltd referred to by the authorized representative. In that decision Hon'ble Apex Court has clearly laid down the law as follows:

*"**12.** The short question for determination is whether import of the specified machine by Gammon can be considered to be an import "by a person who has been awarded a contract for construction of the roads in India", so as to fulfill Condition No. 38, laid down in Exemption Notification No. 17/2001-Cus., dated 1st March, 2001 ?*

***13.** In order to appreciate the contentions advanced on behalf of the parties on the question in issue, it would be expedient and useful to once again notice the salient features of agreement dated 18th September, 2000 entered between Gammon and Atlanta.*

***14.** Agreement dated 18th September, 2000 provided that : financial responsibilities of each of the parties to be shared equally in the form of guarantees, securities, etc. of the joint venture would be 50% of the project value; the Management of the joint venture would be subject to the overall control of the Management Board, consisting of a Chairman, to be nominated by Gammon, a Joint Chairman to be nominated by Atlanta and one Director each to be appointed by both of them; joint venture bank account would be operated under joint signatures of the authorized representatives of Gammon and Atlanta and neither party would be entitled to borrow for or on behalf of the joint venture or to acknowledge any liability without express prior consent in writing of the other party except to the*

extent of its share of work; Gammon being most experienced party would be the lead partner of the joint venture for the performance of the contract; the partner-incharge would be authorized to incur liabilities and to receive instructions for and on behalf of the partners of the joint venture, whether jointly or severally, and entire execution of the contract including receiving payment would be carried out exclusively through the partner-incharge but any financial commitment required by the lead partner, on behalf of the joint venture, would always be previously discussed and agreed upon by the parties. As stated above, though under agreement dated 18th September, 2000, Gammon was notified as the lead partner but agreement dated 20th December, 2000 executed between NHAI as the "employer" and Gammon-Atlanta JV as "contractor" was signed by the representatives of both the companies viz. Gammon and Atlanta, meaning thereby that so far as NHAI was concerned, for them the contractor was Gammon-Atlanta JV and not Gammon or Atlanta individually.

15. *According to the adjudicating authority, it was clear from both of the said agreements that the contract of construction of roads in India was awarded to the joint venture and, therefore, Gammon was not entitled to avail of the benefit of the Exemption Notification as an independent entity. On the contrary, the Commissioner (Appeals) allowed the benefit of the Exemption Notification to the appellant on the ground that the Exemption Notification should be given a liberal interpretation and that the revenue should not try to take advantage of ignorance of law and procedure on the part of Gammon. It is the Tribunal which has dealt with the issue in detail by taking into consideration certain factual aspects pertaining to the import of machine like placement of the supply orders by Gammon and not by the joint venture and its payment by Gammon from its own account and not from the joint venture account provided for in the joint venture*

agreement. Rejecting the plea of the appellant that in light of the decision of this Court in New Horizons (supra) wherein it has been held that a joint venture is a legal entity in the nature of a partnership, the import of the machinery by Gammon is to be considered as having been done on behalf of the joint venture, the Tribunal has allowed revenue's appeal.

16. *Since the stand of the appellant is that the issue arising in the present appeal stands concluded in their favour by the decision of this Court in New Horizons (supra) and a subsequent decision of this Court as also of the Tribunal, in which the said decision has been relied upon, it would be necessary to discern the ratio of the decision in New Horizons (supra).*

17. *In New Horizons (supra), a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of telephone directories of Delhi and Bombay. The tender submitted by New Horizons Ltd.; (for short "NHL") was not accepted by the tender evaluation committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Telecommunications. The said writ petition was dismissed rejecting the plea of the NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court. Explaining the concept of joint venture in detail, it was held that a joint venture is a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking*

some commercial enterprise wherein all contributed assets and shared risks. It was observed that a joint venture could take the form of a Corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore based company which had jointly undertaken the commercial venture by contributing assets and sharing risks. Applying the principle of "lifting the corporate veil", it was held that the joint venture companies' technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed thus :

"24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific

undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342)

……..."

18. *In short. New Horizons (supra) recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in New Horizons (supra), wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s. Gammon-Atlanta JV, the joint venture could be treated as a 'legal entity', with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition No. 38 of the Exemption Notification, stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI?*

19. *In support of his submission that the joint venture is a "person" as contemplated in the Exemption notification, learned counsel for Gammon had relied on the definition of the word "person" as given in para 3.37 of the Export and Import Policy for the year 1997- 2002. It reads thus :*

"3.37 - "Person" includes an individual, firm, society, company, corporation or any other legal person".

20. *The argument was that since a joint venture has been declared to be a legal entity in New Horizons (supra), it squarely falls within the ambit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any further. Neither was it the case of the appellant either before the Adjudicating Authority or before the Appellate Authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint*

venture. On the contrary, the Tribunal has recorded in its order that when questioned, learned counsel for the appellant clarified that correspondence with the supplier of goods and placement of order had been done by Gammon and not by the joint venture or on their behalf. He also admitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

21. *Thus, the inevitable conclusion is that import of "Concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s. Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India and therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No. 38 of the Exemption Notification No. 17/2001-Cus., dated 1st March, 2001.*

22. *As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In Novopan India Ltd. (supra), dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows :*

"16. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals — and in Union of India v. Wood Papers referred to therein — represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee — assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision.

In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

4.3 We also find that the principle of strict construction of notification and also that in case of ambiguity, ambiguity has to be construed in favour of the revenue has been reiterated and stated by the five member Bench of the Apex Court in the case of Dilip Kumar & Co [2018 (361) ELT 577 (SC)]-

***"52.** To sum up, we answer the reference holding as under -*

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

4.4 In view of the decisions as above we are of the view that issue is squarely covered against the appellants. However appellants do not dispute the same but have relied upon subsequent clarification issued by the Joint Secretary (TRU) clarifying that benefit of similar exemption notification would be admissible to the constituents of the consortium. It is their case that on the basis of the said clarification tribunal has vide order dated 03.05.2019 extended the benefit of exemption notification to them stating as follows:

"The first order of the Tribunal in re Gammon India Ltd that was ultimately decided by the Hon'ble Supreme Court, and the subsequent decision of the Tribunal re Gammon India Ltd, referred to by the Learned Authorised Representative, predate the clarification issued by the Central Government on 10th July 2014. The clarification is unambiguously clear: award of eligible works is preceded by shortlisting of the eligible bidders to be furthered on award by formalising the relationship of two or more of bid-partners as a joint venture. The procedure following the award in the impugned project required establishment of 'a special purpose vehicle' and it is that 'special purpose vehicle' which takes the bid process to its logical conclusion by entering into an agreement with the awarding agency. Restricting the eligibility to the subsequently created artificial person, emerging from the contractual compulsion to fulfil a structuring requirement, would incapacitate the execution of the work and the original intent of the extent of the notification was thus amplified, and articulated, in the referred clarification. The adjudicating authority who authored impugned order did not have the benefit of this clarification. The earlier decisions were rendered in the absence of such declaration of intent and the intent, having been declared subsequently despite contrary judicial decision, would have to be acknowledged in the implementation; disregard of

that intent, as declared, would be tantamount to foray into policy formulation."

4.5 We cannot agree with the submissions made. Hon'ble Supreme Court (five member bench) has clearly in the case of Ratan Wire & Melting, referred by the Authorized Representative clearly laid down the law in respect of applicability of circulars/ clarification as follows:

"5. *Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.*

6. *Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive.*

Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

7. *As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis-a-vis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."*

4.6 In view of the decision of Apex Court referred above we are not in position to agree with decision of the coordinate bench on the issue, which is per-incuriam, and could not be binding precedent.

5.1 In view of the discussions as above the appeal is dismissed.

(Order pronounced in the open court on 01.11.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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