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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-04-1996

Reported in : (1997)(92)ELT77TriDel

Appellant : Ashok Enterprises

Respondent : Collector of Central Excise

Judgement :

1. The appellants in these appeals are absent in spite of notice of hearing. We have heard Shri A.K. Agarwal, SDR appearing for the respondent and perused the papers.

2. These two appeals are filed by M/s. Ashoka Enterprises and M/s.

PUROFIL respectively challenging Order No. 049/CEX/88, dated 29-2-1988 passed by the Collector of Central Excise, Pune. By the impugned order the Collector of Central Excise directed that the clearance values of both the appellants' concerns shall be clubbed together for allowing the small scale exemption, if applicable. He also confirmed the demand of Rs. 1,81,989.74 issued on the concerns under Rule 9(2) of the Central Excise Rules, 1944 and imposed penalty of Rs. 25,000/-.

3. A firm under the name "Ashok Enterprises" was brought into existence prior to 1981 with Mishrimal S. Waghresa (M.S. Waghresa), Hirachand M.Solanki (H.M. Solanki), Ashok M. Solanki (A.M. Solanki) and Dilip M.Solanki (D.M. Solanki) as

partners for manufacture and sale of all types of filters under the brand name "PUROFIL" filters. They are father and three sons. On 1-1-1981 the father and the three sons and also two other sons, Babulal M. Solanki (B.M. Solanki) and Harakchand M. Solanki (H.M. Solanki) as partners formed a new partnership Enterprise under the old name "Ashok Enterprises" and for carrying on the same adventure. While so Notification 77/83 was issued granting exemption from duty for small scale industries of goods valuing up to Rs. 30 lakhs. In 1983-84 M/s. Ashok Enterprises cleared filters valued at Rs. 23,28,409.17 (including tax). Of these clearances the major part was sold to * M/s, Kirloskar Oil Engines Ltd. (KOEL). According to the department, the father and the sons anticipated their business to improve and the clearances to cross Rs. 30 lakhs level in 1984-85 and to enjoy the benefit of exemption Notification created a dummy partnership with M.S. Solanki described as M.S. Wagresa and his five daughters-in-law as partners. The partnership bears dated 31-5-1984.

This partnership deed dated 31-5-1984 describes the partnership as "PUROFIL" and the adventure as manufacture and sale of filters at 46, Parvati Industrial Estate, Pune to which premises, meanwhile M/s. Ashok Enterprises had shifted. The two concerns purported to enter into a lease agreement dated 22-5-1984 whereunder the first floor of the building at 46, Parvati Industrial Estate, Pune was leased by M/s.

Ashok Enterprises to M/s. PUROFIL on a monthly rent of Rs. 500/- and four machines namely, oven Racold, compressor welding, spot machine and roller machine belonging to and set up in the premises of M/s. Ashok Enterprises were allowed to be used by M/s. PUROFIL on payment of monthly rent of Rs. 300/-. The agreement was for 99 years and it recites Rs. 20,000/- as deposited by M/s. PUROFIL. It v -provided that electricity and water meters may be used by PUROFIL at present but in due course M/s. PUROFIL shall make separate arrangements. The department gathered more materials about the functioning of these two concerns and came to a tentative conclusion that M/s. PUROFIL was a dummy concern of M/s. Ashok Enterprises conceived to hide the fact of clearances crossing Rs. 30 lakhs and therefore, the clearances must be clubbed together. In 1984-85 the clearances clubbed together exceeded Rs. 30 lakhs. So also during the period from 1-4-1985 to 30-9-1985 during which period the total clearances were of the order of Rs. 4 lakhs. However, the two partnership concerns having shown their clearances separately, the clearance of each concern would be less than Rs. 30 lakhs and on this pretext no duty was paid. Accordingly, notice was issued to the two concerns and the partners to show cause why the clearances of the two concerns should not be clubbed together and duty demanded on clearances in excess of Rs. 30 lakhs. The two concerns and the partners resisted the notice contending that the two concerns are two separate and two independent legal entities and the clearances cannot be clubbed together. The impugned order overrules this contention and confirms the proposal to club the clearances and demand duty. This order is now challenged.

4. The appeal memoranda marshal the following circumstances against the clubbing: - (2) Though both the concerns are in the same building, they are in two different floors.

(3) M/s. PUROFIL pays rent for part of the premises and also for the four machines and made a deposit of Rs. 27,000/- with M/s. Ashok Enterprises.

(4) Raw materials are purchased separately and no common employees are used except the security staff.

(5) The two concerns have separate registrations for the purposes of income tax, sales tax and excise duty and have separate L-4 licences.

5. The department, on the other hand, has marshalled the following circumstances: - (1) The partnership concern M/s. Ashok Enterprises as well as the new Enterprise by the name PUROFIL have the same adventure, namely, manufacture and sale of filters falling under erstwhile Tariff Item (2) Notification 77/83 granted exemption on clearance up to Rs. 30 lakhs per year. This Notification was in force till 16-3-1985.

During 1983-84 (before setting up of M/s. PUROFIL) the clearances of M/s. Ashok Enterprises was around Rs. 24 lakhs of which a major part consisted of clearances to M/s. KOEL.

(3) In the first two months of 1984-85, namely, April and May the clearances of M/s. Ashok Enterprises were Rs. 3,38,735.18 and Rs. 3,65,835.98 and at this rate the partners would have expected the clearances during the year 1984-85 to cross Rs. 30 lakhs limit.

(4) On 31-5-1984, the partnership deed was entered into in relation to M/s. PUROFIL. While the partners of M/s. Ashok Enterprises are the father and the five sons and the partners of M/s. PUROFIL are father and five daughters in law.

(5) Even before the partnership deed came into existence, the two concerns purported to enter into lease agreement on 20-5-1984 to create documentary evidence to the effect that M/s. PUROFIL had taken a part of the premises and four machines belonging to M/s.

Ashok Enterprises on rent for a period of 99 years.

(6) With the formation of M/s. PUROFIL, the supplies to KOEL were made exclusively by M/s. PUROFIL and M/s. PUROFIL had no other customers with the result that the clearances of M/s. PUROFIL ranged from Rs. 1.345 lakhs to Rs. 2.86 lakhs P.M. and the clearances of M/s. Ashok Enterprises ranged from Rs. 0.9 lakhs to Rs.2.87 lakhs per month.

(7) Though the lease agreement covered only four machines, as a matter of fact two more machines belonging to M/s. Ashok Enterprises were used by M/s. PUROFIL. The four machines covered by the lease agreement continued to be in the premises of M/s. Ashok Enterprises though being used by M/s. PUROFIL.

(8) In a manner of speaking the premises were common. There is no dispute that vehicle, security staff and water meters were being used in common by both the concerns. Electricity and water charges were being paid exclusively by M/s. Ashok Enterprises.

(9) The father was attending to the purchases and sales relating to both the concerns. One of the sons Harakchand M. Solanki was giving technical guidance to both the concerns and provided technical know how and control for both the concerns. The five lady partners of M/s. PUROFIL were sleeping partners. One of

the sons B.B. Solanki had signed bills and invoices standing in the name of M/s. PUROFIL even though legally he had nothing to do with that concern. He did not produce any letter of authority as promised.

(11) During the personal hearing before the Collector, M.S. Waghresa (Solanki) promised to provide data regarding source of funds for the lady partners but failed to do so.

6. The circumstantial evidence to show that M/s. PUROFIL was only a dummy concern created with a view to protect the interest of M/s. Ashok Enterprises is overwhelming. M/s. Ashok Enterprises is a show of the father and the sons. When their clearances was expected to cross the exemption limit, a device was made to share the clearances with a view to continue to retain the benefit of exemption. The control of activities of both the concerns, is mainly by father who of course is partner of both the concerns and one of the sons Harakchand M. Solanki was incharge of the technical aspects of both the concerns though he was not a partner of the second concern. Though the concerns were different for the purposes of taxation and duties, they were being managed by these two persons and sometimes also by one of the other male partners as can be seen from the involvement of B.M. Solanki in the functioning of M/s. PUROFIL. As a matter of fact, the total clearances exceeded the limit in 1984-85 and this trend continued further. The major customer of M/s. Ashok Enterprises was KOEL and by an arrangement this customer was made the customer of M/s. PUROFIL.

Parties had taken so much trouble to create appearance of separateness and were naturally successful in creating records relating to registration and lease but that cannot prevail over the overwhelming circumstantial evidence showing that the two concerns were part of one show belonging to the father and the sons. The memoranda of appeals refer to a large number of decisions of the Tribunal in respect of other cases. We do not wish to refer each of them separately since we find that the decision in each case rested essentially on the facts and circumstances of the case. They cannot be said to lay down in general principle of law which would be favourable to the respondent.

7. In the light what we have indicated above, we are in agreement with the view taken by the Collector of Central Excise that the clearances of the two concerns are required to be clubbed for the purposes of the exemption notification. The demand is only consequential to the clubbing.

8. In the nature of the finding and upheld by us we take it that the penalty has been imposed on M/s. Ashok Enterprises. We find no reason to interfere with this part of the order.