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Cce Vs. Advance Automation and Process

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-08-1997

Reported in : (1998)(75)LC236Tri(Delhi)

Judge : S Peeran, K D Shiben

Appellant : Cce

Respondent : Advance Automation and Process

Judgement :

1. This is a Revenue appeal arising from Order-in-Original No. 50/86 dated 21.11.1986 passed by Collector of Central Excise (Appeals) discharging the show cause notice issued to the present respondent and another respondent, namely, M/s. Advance Dynamics. The Revenue has filed a common appeal against both these respondents. The second respondent, Advance Dynamics, is not present and the notice of hearing has come back undelivered with postal endorsement "Left".

2. We have heard both sides in the matter. Ld. DR submits that the Respondent No. 1 is a private limited company and Respondent No. 2 is a partnership firm. Among them two persons were common. Both the respondents had filed their respective classification list and had also taken the approval and are clearing the goods accordingly. Later, on investigations, it was found that the private limited company has advanced interest free loan to the partnership firm. They are also paying the bills towards telephone charges. However, both the factories were

established differently and were manufacturing different goods. It was the contention of the Revenue that the said two partners in the firm were also Director in the private limited company and controlling the affairs of both the units. Therefore, the clearances of both the companies are required to be clubbed.

3. The Ld. Collector on a detailed examination of the proceedings has come to the conclusion that the Department has not proved that one is the dummy unit of the other. He has also noticed that both the units are independent and functioning independently. He has concluded that the Revenue has not made investigations to find out whether in setting up the firm in 1976 anything was done to indicate that the firm was being created as a dummy of the private limited company or whether the exemption was there then. In the absence of facts, Ld. Collector held that the firm cannot be held to be a facade to enable the private limited company to defeat the tax laws.

4. Ld. DR points out from this order that the Collector has not taken into consideration the main allegation made in the show cause notice pertaining to the interest free deposits made by the private limited company in the name of the firm. He submits that this itself is a factor to conclude that there is a financial flow back and the firm is a facade of the private limited company.

5. Ld. Consultant points out that both the units are independent units with separate registration and carrying independent manufacturing activity of different goods. He points out that the partners although were directors in the private limited company but there were other 3 directors as a whole. They were paid independently. There was no financial flow back and he cites large number of judgments to show that the private limited company cannot be clubbed with the firm. He also produced a copy of the Board's Direction No. 6/92 issued under Section 35B of Central Excise Act, which clarifies that the clearances of the private limited company and the clearance of the firm cannot be clubbed. He also points out that a separate appeal should have been filed against M/s. Advance Dynamics, that is the firm who have not presented today. He points out that even in the Appeal Memo, the Revenue has not bifurcated the duty liability and therefore, the appeal is misconceived.

6. We have carefully considered the submissions made by both sides and perused the impugned order. The ground on which the Revenue has proceeded for clubbing both the independent company and a firm is commonality of directors and about the interest free deposits made by the company in the name of the firm. It is now well-settled that in such cases of clubbing what is required to be seen is about the financial flow back of one company to the other. The set up company should be controlled in all aspects by the first company. The second one should be a dummy in the nature of not being in existence but only on paper. In this regard, the Tribunal has delivered a number of judgments and has held that the clearances of the private limited company and of a firm cannot be clubbed in the absence of proof of financial flow back. It has also been held that commonality of directors, use of common premises or use of common telephones by itself is no ground to club the clearances. Ld. Consultant points out that the advances made by the company to the firm have been fully accounted for and these were in the nature of loans and the same had been returned.

There has been appropriation of these loans in the form of financial flow back. We find in the Collector's findings on these aspects to show that the Collector had been satisfied while dropping the charges. We have also perused the order and find that the submissions made by the Ld. Advocate are correct. It is a fact that both the units were separately functioning in different spheres and had filed different classification and have cleared the goods accordingly. In the absence of evidence produced by the Revenue to prove the charges, it cannot be said that both the units can be clubbed. We do not find any infirmity in the impugned order for upholding the charges in the show cause notice. We have also noticed that Revenue should have filed independent appeal against M/s. Advance Dynamics and they should have separately fixed the liability which has not been done.

7. We do not find any merits in the appeal and hence, we reject the appeal. While pronouncing this order we have taken into consideration a number of judgments cited before us in this regard, more particularly, a recent one as reported in 1997 (70) ECR 671 in the case of Naresh Shroff Prop. Uni. Offset Printers v. Commissioner of Central Excise, Madras and that of Geeta Valves & Engg. (P) Ltd. v. Commissioner of Central Excise, Vadodara, 1996 (66) ECR 37, which has

been particularly cited before us.

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