Precision Tool Room Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-19-1997

Reported in : (1997)(96)ELT57TriDel

Appellant : Precision Tool Room

Respondent : Collector of Central Excise

Judgement :

1. This appeal is directed against order-in-original dated 16-4-1987 passed by the Collector of Central Excise, Ahmedabad, confirming demand of duty of Rs. 3,26,771.85 on electric motors manufactured and cleared by the appellant without payment of duty during the period from 1981-82 to 1981-86 as demanded in the show cause notice and imposing penalty of Rs. 50,000.00 on the appellant under Rule 173Q(1) of the Central Excise Rules, 1944. Certain electric motors seized earlier were ordered to be released.

2. Appellant is a partnership firm engaged in the manufacture of electric motors since 1974 in premises L 84, in the Industrial Estate allotted by GIDC. Appellant had availed benefit of exemption Notification Nos. 71/78, 80/80 and 83/83, which exempted small scale industries from payment of duty for goods manufactured and cleared up to the value of Rs. 5 lakhs, Rs. 7.5 lakhs and Rs. 7.5 lakhs respectively. Appellant was filing declarations indicating the annual production to be of the value of Rs. 4 lakhs in each of the years and since this value was less than 80% of Rs. 7.5 lakhs (that is, Rs. 6 lakhs), appellant was exempted from licensing control. Appellant-firm, M/s. Precision Tool Room (for short, PTR) is

constituted of two partners, namely, B.R. Padaria and Kalubhai M. Khokhar. In November, 1979, another firm by name M/s. Precision Electrical (for short, PEC) was brought about, with partners Kalubhai M. Khokhar and Mrs. K.B.Padaria, wife of Shri B.R. Padaria, as partners. Declarations were being submitted in the name of PEN also under the later two of the aforesaid Notifications and PEN also purported to avail the benefit of the Notifications and was clearing goods without payment of duty. In January, 1995, a third partnership firm by name M/s. Patel Engineering Company (for short, PEN) was brought about with partners B.R. Padaria and Mrs. C.K. Khokhar, wife of Kalubhai M. Khokhar and declaration was submitted in the name of this firm and the benefit of exemption was availed. Building L 84 belonging to PTR has two floors. According to the assessee, initially PEC was functioning in the first floor of the building after taking the same on rent from PTR and subsequently shifted to another building L 541 also taking it on rent from PTR.3. The values of clearances of excisable goods in the name of each concern were as follows :-Period PTR PEC PEN1981-82 5,81,089.17 5,95,814.95 -1982-83 5,99,121.27 5,80,582.58 -1983-84 5,89,682.74 5,84,302.26 -1984-85 5,96,049.00 5,57,232.15 -1985-86 2,71,504.34 2,56,261.57 5,51,774.16(up to November) While the value of clearances in the name of each concern in each year was below Rs. 7.5 lakhs, total value of clearances of PTR and PEC in each of the first four years exceeded Rs. 7.5 lakhs and if the two concerns are to be treated as "a manufacturer" within the meaning of the Notifications, the value of clearances in excess of the exemption limit of Rs. 7.5 lakhs would be dutiable. In the first eight months of 1985-86, the value of clearances of PTR and PEC came down drastically and for the first time there were clearances in the name of PEN to the extent of around Rs. 5.5 lakhs. In the first eight months, the total clearances in the name of three concerns were of the value of Rs. 10,79,540.07.

4. Thus it can be seen that the clearance in the name of each concern for each year was less than Rs. 6 lakhs. According to the Notifications, if the clearances exceed 80% of Rs. 7.5 lakhs, that is, Rs. 6 lakhs, exemption from licensing ceased.

5. When the excise officers concerned visited the premises of PTR, it was found that 16 workers were working in the premises of PTR and of them 13 belonged to

PTR and 3 belonged to PEC. It was found that all the motors manufactured in the name of the three concerns were of the same type and Kalubhai M. Khokhar, a partner of PTR and PEC and whose wife is a partner of PEN was managing the affairs of the two concerns and that PEC was functioning prior to 3-10-1983 in the premises of PTR and only thereafter PEC shifted to L 541 also belonging to PTR. The electric motors cleared in the name of the three concerns bore the unregistered brand name "NAGMANI". While B.R. Padaria and Kalubhai M.Khokhar are partners of PTR, the latter is partner of PEC and his wife is a partner of PEN and the former is a partner of PEN and his wife is a partner of PEC.6. Statements of three workers referred to above and others were recorded, which, according to the show cause notice, showed that motors partially manufactured in the premises of PEC were being sent to PTR for winding and painting and fixing number plates and that the three workers ostensibly employees of PEC were actually working in PTR. M.K.Makhwana, one of the owners of shed L 90, stated that the shed was rented out in the name of PEN from January, 1995 to September, 1995.

S.M. Parmar, a transporter stated that he used to deliver bodies for making electric motors from shed L 84 to shed L 541 and that no papers relating to the goods had been given to him. It was also found that raw materials and machinery belonging to PEN were in the premises of PTR after the closure of PTR. B.R. Padaria in his statement also referred to certain debit and credit entries in their account in the name of PEN and PEC evidencing short term loans without interest.

7. A show cause notice dated 2-6-1986 was accordingly issued to all the three concerns and the partners reciting the above facts and alleging that the two male partners had brought about three different concerns using the names of their wives also with a view to remain within 80% of the exemption limit under the various notifications and with a view to evade central excise duty, that this amounted to fragmenting of principal unit, that is, PTR and diverting the production from the principal unit to two dummy units, that the existence of common workers, common partners, common financial and administrative arrangements were significant, that the motors cleared in the name of PEC were partly manufactured in PTR and, therefore, the clearances in the name of the two concerns in the first four years

and of the three concerns in the last year should be clubbed together and on such clubbing, the total clearances would far exceed the limit of Rs. 7.5 lakhs and duty was required to be paid on the excess. The. notice further alleged deliberate plan of action of the two male partners with a view to evade central excise duty. On these grounds, it was proposed to demand duty payable and to impose penalty. There were contraventions of provisions of the Central Excise Act, 1944 and the Rules and the contraventions were committed by reason of fraud, wilful suppression and mis-statement of facts with intent to evade duty.

8. Even though notice was sent to all the three concerns and all the partners, reply was submitted only by PTR. The reply denied the material averments, factual averments and the inferences drawn in the show cause notice and denied the alleged fragmenting or intention to evade duty. The three concerns are separate legal and factual entities with separate registration for the purpose of State Sales tax, Central Sales tax, Income tax and SSI exemption, with different sets of workers and premises and different financial sources and they were separately filing different declarations under the Notifications. Initially, first floor of L 84 shed was leased to PEC and rent was being collected.

Subsequently, PTR purchased another shed L 541 and rented it out to PEC and rent was being collected. The workers referred to were not common workers. Absence of Panchnama regarding the alleged three workers of PEC indicates that they were really not present for work in the premises. Statements of workers were written by the excise officers themselves and were deliberately recorded to create confusion. The workers were all temporary daily wagers. Many a time it happened that workers of one employer having two factories move from one factory to another for petty work and this did not show that the two factories are one and the same. The brand name is not registered in the name of any of the concerns and can be used anyone. All the financial transactions were made under account payee drafts or cheques. There was no justification to club the clearances of two or three concerns for the purpose of the Notifications. The materials belonging to PEN, when they were asked to vacate the premises, were temporarily kept in the premises of PTR at their request. The charge of suppression and misdeclaration is not correct. The larger period of limitation under the proviso to Section 11A(1) of the Act cannot be invoked and the notice is barred by time.

9. The Collector rejected the aforesaid contentions and acted on the material factual statements in the show cause notice and held that PEC and PEN had been set up by the two partners of PTR with a view to keep the value of clearances below Rs. 6 lakhs with a view not only to evade payment of duty but also to evade licensing requirement and the contraventions of law had been established. This led to confirmation of demand of duty and imposition of penalty.

10. Learned Counsel for appellant touched upon various aspects having a bearing on the decision on the question of clubbing of clearances of more than one unit and submitted that the facts and evidence available in the case do not warrant the conclusion that the units PTR, PEC and also PEN belong to "a manufacturer" as required in the SSI exemption notifications. He adverted to the various items of evidence relied on by the Collector as also the new documents produced before us and contended that the evidence, far from supporting the impugned conclusion, shows that the three units, though belonging to two persons and their wives in different combinations, are really separate and distinct legal entities with separate sources of finance, management and activities. He also contended that aspects relating to buildings, housing PEC and interse financial arrangements, storing the raw materials and machinery belonging to PEN being stored in the premises of PTR after the closure of PEN, presence of the workers of PEN in the premises of PTR 6n the occasion of visit of Excise Officers can be attributed to the close relationship among two sets of partners (Husband and Wife) and commonality of partners. He pointed out the units have separate registration for purpose of Sales tax, Income tax, SSI exemption and the like and have been separately filing declarations under the exemption Notifications. PEC was initially functioning in the first floor of L 84 shed and later in L 541 shed, both belonging to PTR under specific lease agreements and on payment of rent as evidenced by documents of payments and accounts. Even when PEN was functioning in the first floor of L 84 shed, during the period when there was a single Electricity meter, the charges were being shared by the two units and subsequently separate meter was installed in the name of PEC and charges were being paid by PEC. He contended that it is legally open to partners of a Firm to establish another Firm in combination with

relations or third parties. According to him, the respective partners of the three firms have been separately managing the units and there has been no common management or common financial control or arrangement and no financial flow from PEC and PEN to PTR. In these circumstances, according to him, there was no justification for clubbing the clearances of the two units in the first four years and of three units in the last year of the period covered by the impugned order. He also contended that there was no suppression of facts by the parties and no justification to invoke the larger period of limitation, namely, 5 years prescribed under the proviso to Section 11A(1) of the Central Excise Act, 1944 and hence the claim is wholly barred by limitation and there was no justification to impose penalty. It is pointed out that if clubbing cannot be resorted to, exemption under the exemption Notifications and no duty was payable.

11. Shri J.M. Sharma, JDR rebutted the above contentions and supported the inferences drawn and conclusions arrived at by the adjudicating authority. He also referred to the various circumstances relied on by the adjudicating authority. He contended that though limit of exemption was clearances of the value of Rs. 7.5 lakhs, the Notifications required the manufacturer to give declaration regarding estimated value of clearances for each year and to apply for Central Excise licence when value of clearances in each year reaches 80% of the limit of Rs. 7.5 lakhs, that is, Rs. 6 lakhs and there was a deliberate design by which when value of clearances of PTR reaches just under Rs. 6 lakhs, remaining clearances were made in the name of PEC set up in 1995 and when value of clearances of PEC also reached just under Rs. 6 lakhs in 1985-86, remaining clearances for the year were made in the name of PEN established in January, 1985. He pointed out even though PEN came into existence on 1-1-1985, no clearances were made in the name of PEN during the year 1984-85 as in that year there was no need to distribute or camouflage the clearances in the name of PTR and PEC as value of clearances of each were expected to be below Rs. 6 lakhs. The same thing happened in regard to PEC also. Though PEC came into existence on 1-11-1979, there were no clearances in the name of PEC during the year 1979-80; the value of clearances of PTR in 1979-80 was not expected to reach Rs. 6 lakhs, but the value of clearances increased in 1980-81 and subsequent years. Care was taken to ensure that value of clearances in the name of each units did not reach Rs. 6

lakhs in any year. The true facts were suppressed from the Department all along. Manipulation and evasion of duty are writ large in the case.

12. The circumstances under which clearances made in the name of more than one unit could be clubbed have been considered by the Tribunal in several decisions. One of the recent decisions is in the case J.N.Marshall (P) Ltd. v. Collector of Central Excise, Pune - 1997 (29) ETR 551 (Tribunal) in which the Tribunal referred to several decisions earlier and explained the legal principle as follows :- "...regard must be had to all the circumstances established in a given case but emphasis must be on common control of production and sales or on management control and special financial relationship existing between the units or profit sharing or financial flow back.

If the combination of circumstances create a pattern indicative of the clearances from the plurality of units being made by "a manufacturer", clubbing is warranted." The basis of the above decision is the requirement of the Notifications that if there are clearances from more than one factory by or on behalf of "a manufacturer".

13. According to the appellant commonality of partners in a plurality of firms has no relevance. If this is the only circumstance available in the case, that may not be sufficient to hold that the clearances of goods by or in the name of the firms are clearances by a manufacturer.

Nature of the commonality and other circumstances available in the case have to be taken into consideration. The goods produced in the name of the three units are same, namely, electrical motors and the same brand name (not registered) NAGMANI is affixed on all the goods. In other words, the three units proposed to manufacture and clear motors having the same brand name. The first firm established by B.R. Padaria . and Kalubhai M. Khokhar was PTR and that was in 1974. SSI Notification No.71/78, dated 1-3-1978 prescribed limit of exemption as Rs. 5 lakhs and exemption from licensing control was available as long as value of clearances during a year did not reach 80% of Rs. 5 lakhs, i.e. Rs. 4 lakhs. PTR filed declarations in 1978-79 and 1979-80 to the effect that the value of clearances for the respective years would not reach Rs. 4 lakhs. Notification No. 80/80 increased the limit of exemption of Rs. 7.5 lakhs consequent on which the limit for the purpose of exemption from licensing control would be Rs. 6 lakhs. PEC was set up on 1-11-1979 with Kalubhai M. Khokhar and the wife of B.R. Padaria as partners. The factual position in 1980-81 is not on record. But in 1980-81 and succeeding year PTR had filed declarations to the effect that value of clearances would not exceed Rs. 6 lakhs. We take it that similar declarations had been filed in the name of PEC also during the period 1981-86. Value of clearances in the name of each of the two firms during each of the years during the period 1981-85 was slightly below Rs. 6 lakhs. In other words, the total value of clearances of these two firms during the period 1981-1985 was slightly below Rs. 12 lakhs and according to the department, this was distributed between the two firms in such a manner the value of clearances of each firm was kept Rs. 6 lakhs. PEN was set up on 1-1-1985. Yet there were no clearances for PEN in 1984-85. The values of clearances in the names of PTR, PEC and PEN during the first seven months of the financial year 1985-86 were Rs. 2,71,504.34 Rs. 2,56,261.57 and Rs. 5,51,774.16 respectively, the total being Rs. 10,79,540.07. Thus, according to the department, B.R. Padaria and Kalubhai M. Khokhar would have reasonably anticipated the total value of clearances in the name of the three firms during the entire year 1985-86 to be around Rs. 17 lakhs and in view of such anticipation, the clearances in the name of PTR and PEC were deliberately depressed and a part of the clearances were arranged to be made in the name of PEN so that it can be ensured that at the end of the year, the value of clearances in the name of each firm during the year would be less than Rs. 16 lakhs. This, in our opinion, is a very strong tell-tale circumstance indicative of manipulation in establishing different firms by the two male partners with the deliberate design of artificially distributing the clearances in the names of these firms with a view to maintain the same under Rs. 6 lakhs with a view to avoid licensing control and to evade payment of Excise duty. The statement made by learned Counsel for the appellant that the three firms had separate and respective managements of the respective parties does not appear to be correct. The show cause notice specifically averred that the three units were under the common direction and control, administratively and financially, of the two male partners. The denial of this averment as seen in paragraph 15 of the PTR's reply is as follows :- "This also does not mean that there was any common direction and control, administratively or financially, because all the transactions have taken place through bank and in accordance with the normal trade practice." The denial is not effective and is based on the plea that financial transactions among the units were through bank and as per trade practice. That the direction, control and management of all the affairs of the units were in the hands of B.R. Padaria and Kalubhai M. Khokhar is also in accordance with probability, particularly since the reply of PTR did not indicate that the two lady partners had anything to do with direction, control, management or financial dealings and no reply was submitted in the name of PEC or PEN or the two lady partners. There was also no specific case that the two/lady partners had any financial sources of their own from which they could have contributed to the share capital or working capital. All these circumstances are a clear pointer to the inference that the PEC and PEN were actually set up by the two male partners of PTR, but incorporating the names of their respective wives also with a view to distribute their clearances in an attempt to evade licensing control and payment of excise duty.

14. B.S. Dobaria, an employee of PEC as per records, was in the premises of PTR during the visit of Excise Officers on 4-12-1985. He gave statement that since the last two years, he has been working in the first floor of L 84 shed as "rewinder", that he did not know the name of the factory and only winding work was being done on the first floor during the last two years. V.S. Patel, an employee of PTR stated that he, B.S. Dobaria and G.S. Gupta shown in attendance cards as employees of PTR, PEC and PEN respectively are working in the factory and only winding activity is undertaken in the first floor. B.M. Patel, another employee of PTR stated that PTR purchases castings for motors from M/s. Kirti Products, that they are machined, stampings are fitted and then taken to the first floor of PTR building for winding and thereafter taken to the ground floor and painted and serially numbered.

There was no attempt to explain these statements till July, 1986 when PTR submitted reply to the show cause notice. The reply stated that the first floor of shed L 84 was rented by PTR to PEC with effect from 1-11-1979 and subsequently separate electric meter was installed in the name, PTR and that the statements were recorded in a confusing manner.

It was also stated that PTR did not share permanent workers and employed temporary workers only on daily wages. The reply denied the incriminating parts of the statements. B.S. Dobaria, B.M. Patel and V.S. Patel were cross-examined on behalf of PTR in the adjudication proceedings. During cross-examination these employees tried to go back on their versions in the earlier statements. The adjudicating authority brushed aside the belated statements in cross-examination as the result of afterthought. Learned Counsel for the appellant challenges this approach of the adjudicating authority. We do not find any error in regard to the different versions at the stage of cross-examination as unreliable. Going by the initial versions of three witnesses, at least one employee of PEC was actually working in the factory of PTR and part of the work of motors cleared in the name of PEC was also attended to by employees of PTR and PEC in the factory of PTR. This position is seen supported by the statement recorded on 4-11-1985 of S.M. Parmar who was operating a hand car. He stated that he had brought several pieces of bodies of motors from the premises of PEC (L 541) to L 84 shed and he used to regularly transport electric motors from L 84 shed to L 541 shed and such transport was done without papers. The reference to absence of accompanying papers evidently was to documents such as gate pass, etc. In the reply to the show cause notice submitted eight months later, it was stated PEC was sending to M/s. Kirti Products burnt out motors for heating which was necessary to separate the burnt wire from the motors and after such heating operation, they were being sent to the door of PTR and thereafter they were being taken to premises of PEC. This version which is in conflict with the earliest version of the transporter cannot be believed. This statement supports statements of some of the employees suggesting that a part of the work on motors subsequently cleared in the name of PEC was being attended to in PTR factory. The explanation that the employees are all temporary and migrate from one factory to another cannot be accepted in view of the contrary version of the workers in their earlier statements.

15. It was also admitted in the reply to the show cause notice that PEC had provided loan of Rs. 1,18,574.98 to PTR and this amount had not been repaid and no interest had been paid. The explanation that non-payment of interest and non-repayment of principal amount was in order to adjust the same towards the price of L 54 shed ultimately to PEN does not inspire any confidence. The allegation in

the notice that PEN had given interest free loan to PTR and the amount remained unpaid was not denied in the reply. We have already indicated that there is no material to show that the two lady partners had contributed or could have contributed any share money to PEC and PEN. Necessarily the finances of all the three units must have been provided and arranged by the two male partners who also made some adjustments therein by way of loans not intended to be repaid.

16. The circumstances referred to above clearly establish that the three units were established, financed, managed and controlled by B.R.Padaria and Kalubhai M. Khokhar. We have already indicated that this was done to distribute the clearances in an attempt to evade licensing control and payment of excise duty. All other circumstances referred to above such as commonality of some workers, part of the work of PEC being done in PTR premises, the fact of materials in the name of PEN being taken to PTR premises after the closure of PEN support the inferences referred to above.

17. It is true that two lease agreements, one for first floor of L 84 shed and the other for L 541 shed were brought about and accounts refer to payment of rent. It is also true that registrations for the purpose of Sales taxes, Income tax, SSI exemption, etc. were separate and declarations were submitted separately. These circumstances pale into insignificance in comparison with the overwhelming nature of the circumstances discussed earlier. Even otherwise, as observed in paragraph 13 of the decision in J.N. Marshall (Pvt.) Ltd. v. Collector of Central Excise, Pune - 1997 (29) ETR 551 if the intention is to evade duty by securing SSI exemption, the manufacturer can be expected to ensure that on paper the units appear to be distinct, separate and independent. This is a mere facade to hide the reality of single entity. In this view, we agree with the finding of the adjudicating authority that the clearances in the names of all the three units are required to be clubbed together as clearances of a single manufacturer in which case the total clearances will not be eligible for exemption being the limit of Rs. 7.5 lakhs.

18. The contention regarding the show cause notice being barred by time as issued more than six months subsequent to the period of demand is not sustainable, since the manufacturer was clearly guilty of suppression of material

facts, giving false and separate declarations, deliberate failure to take out licence and of deliberate evasion of licensing control and of payment of duty and as such the larger period of five years under the proviso to Section 11A(1) of the Act could be and was rightly invoked. For the same reason, the adjudicating authority was justified in imposing penalty. In the circumstances; the quantum of penalty appears to be reasonable.

19. For the reasons indicated above, we find no ground to interfere and accordingly dismiss the appeal.