

**Miles (India) Ltd. Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Feb-06-1998

**Reported in :** (1998)(60)ECC181

**Judge :** U Bhat, S T K.

**Appellant :** Miles (India) Ltd.

**Respondent :** Cce

**Judgement :**

1. The appeal challenges the order passed by Collector of Central Excise, Baroda in terms of which he had-- (ii) appropriated security of Rs. 25,000/- furnished by the appellant for obtaining provisional release of 10 Ames Blood Analysers (ABAs) seized from the appellant's factory, and 2. Learned Counsel for the appellant. Shri Willingdon Christian stated that appellant is the owner of the brand name of ABAs. They had supplied nearly half of the parts required for their manufacture to another company, M/s. Digital Innovations Pvt. Ltd. (DIPL, for short) who themselves procured the remaining required parts and manufactured the ABAs. The parts were sold by the appellant to DIPL who in turn sold the product to the appellant. The ABAs had a label showing the appellant's brand name and their marketing by the appellant. The ABAs were cleared by DIPL on payment of duty. Show cause notice was issued to the appellant initially by the Superintendent and later on by the Collector. After appellant's reply and grant of personal hearing, the impugned order was passed holding that the appellant was the manufacturer of ABAs and duty liability was on them. The duty demand was worked out by applying the price

at which appellant was selling the goods while duty had been paid by DIPL on the basis of the value at which they sold the goods to appellant. The Collector had arrived at the said finding on the ground that appellant owned the brand name and had provided the specifications for the ABAs and also supplied the essential and important components to DIPL who manufactured the ABAs according to the dictates of the appellant and sold the entire quantity of goods manufactured to appellant only, it being not open to them to sell the ABAs to any other buyer. The agreement entered into by appellant and DIPL was held to be not providing for a principal to principal relationship between the two. Learned Counsel submitted that DIPL are manufacturers in their own right and had manufactured the subject goods with their own machinery labour and management. Learned Counsel relied upon the Supreme Court judgment in Britannia Biscuit Co.

Ltd. v. Collector of Central Excise 1997 (89) ELT 22 and the Tribunal decision in Cheryl Laboratories v. Collector of Central Excise for his plea that factors like providing the materials required for manufacture and purchasing the entire quantity of goods manufactured do not make such supplier of raw material and purchaser of the product the manufacturer when the goods are manufactured by the other person having his own licence and employing his machinery and labour.

3. An alternative plea was raised by the learned Counsel for the appellant that the first show cause notice had been issued by the Superintendent who had no authority to do so. They had raised the plea of limitation before the Collector but he had held that the second notice was only a corrigendum and was in fact not necessary. This finding is wrong. The first show cause notice was time barred for the period beyond six months. The second show cause notice issued by the Collector covered a period which was beyond even five years. The extended period has been applied holding that appellant has not taken licence and filed R.T. 12 returns and Gate Passes or paid duty on the goods in question. They had bona fide believed that they were not the manufacturers and that DIPL were the manufacturers who discharged all excise formalities. The last point canvassed by the learned Counsel was that the demand amounted to double taxation as the ABAs had already been assessed at the hands of DIPL. What has been demanded by the Collector is duty from the appellant afresh and not any

differential duty. In this connection he cited Tribunal decision in Commissioner of Central Excise, Aurangabad v. Kinetic Engineering Ltd., 1997 (21) RLT 4. The arguments were resisted by Shri K. Srivastava. SDR. He submitted that the first notice had been issued under Rule 9(2) and as in that Rule the provisions of Section 11A have been referred to only for the purpose of adopting the time limit provided therein, Superintendent was competent to issue the notice. For this proposition he cited Tribunal decision in Piya Pharma Works v. Collector of Central Excise, Meerut 1985 (19) ELT 212. In the alternative, he submitted that the second notice was applicable for a period of five years prior to its issue.

There was clandestine removal in the sense that proper duty was not paid and that the proper person had not paid the duty. Proper duty had not been paid as the full cost of materials supplied by the appellant was not reflected in their purported sale to DIPL as the value of such material was Rs. 19 lakhs but only Rs. 11 lakhs was charged. The cost of dies developed by the appellant for certain items was not included.

The goods were sold by the appellant at much higher prices as compared to the prices at which DIPL had allegedly supplied to them. The agreement was only on paper and in many respects was not acted upon.

Thus, though the charging of interest was provided for in the case of delayed payment by the appellant to DIPL no interest was actually charged by DIPL. Accordingly, he supported the Collector's order.

5. We have considered the submissions. We have perused the record. The Collector has first considered the objection taken by the appellant about the lack of jurisdiction on the part of the Superintendent of Central Excise for issue of show cause notice for duty relating to a period earlier than six months prior to the date of the notice. He has rejected the plea holding that the notice was issued under Rule 9(2) and the reference to Section 11A therein was only for the purpose of specifying the period within which a demand can be made which is a far cry from the proposition that the power exercised under the said Rule was in fact one exercised under Section 11 A. On that reasoning he has held that the show cause notice in this case had been correctly issued by the Superintendent. He has

distinguished the judgment of the High Court of Gujarat in Gujarat State Fertilizer Corporation Ltd. v. Union of India 1988 (34) ELT 442 stating that it was concerned with Section 11A(1) and not with Rule 9(2). Further that was also not a case where the notice was issued by the Superintendent and later on reissued under Collector's signature. He has gone on to hold that as the first notice issued by the Superintendent was correct in law, there was no need to issue a subsequent notice under Collector's signature. Relying upon two Tribunal decisions, Collector of Central Excise, Hyderabad v. Uma Laminated Products Pvt. Ltd. Western Bengal Coal Field Ltd. v. CCE, Bombay he has held that the second notice was a corrigendum and the first notice was relevant for the purpose of computing time limit for raising the notice under Collector's signature and that as held in the Uma Laminated Products case the correction of minor mistakes would not vitiate the validity and legality of the show cause notice. He has, therefore concluded that the appellant's contentions were untenable. A perusal of the last paragraph of the show cause notice dated 9.5.88 issued by the Collector, however, indicates that it was issued "in place of the notice dated 23.4.87 in due compliance of Honourable Gujarat High Court orders dated 11.2.88 passed in S.C.A 6655/87 filed by G.S.F.C. Baroda and that the notice was being issued without prejudice to the decision of the Supreme Court in an appeal filed- if any by the department against it". This will make it clear that the first notice has been replaced by the subsequent one.

Thus, the first one had ceased to exist after the issue of the second one and has no effect. The matter has to be dealt with only with reference to the second notice. The notice, in any case, cannot affect any alleged short levy beyond even the extended period of five years prior to the date of its service.

6. The short payment of duty or rather the non-payment is held by the Collector to have arisen on account of the appellant not having paid the duty due thereon. The full duty leviable on the goods has been demanded from the appellant who has been treated as the manufacturer of the goods. The Collector has also held that duty had been wrongly collected from DIPL and that the same should be refunded to them in accordance with the provisions of law. The Collector had considered the plea advanced before him that factors like supply of raw material, ownership of the

brand name on the goods, furnishing specification of the goods, purchase of the entire output do not make such supplier of raw materials or brand name owner or purchaser the manufacturer of the goods. He has accepted such a position. He has, however, distinguished the present matter from the cases cited by the appellant in support of such a plea stating that such individual factors cannot be considered in isolation and the totality of facts, circumstances and evidence in the instant case have to be taken into account in the light of the provisions of Section 2(j) of the Central Excise Act. The features of the present case which have led him to conclude that the appellant is the manufacturer of the goods in question include the following:-- (i) Financial involvement of the appellant in the manufacture of the goods.

(ii) Supply of important components of major value by appellant to DIPL and that too at prices much lower than their cost. There was no real sale of components to DIPL.

(iii) The dealings between the appellant and DIPL were not on principal to principal basis.

(iv) Manufacturing activity actually commenced in the premises of the appellant as they developed the dies for five main components.

(v) Non-charging of interest on the appellant by DIPL for delay in payment of price in spite of agreement providing for it.

(vi) Supply of specifications and technical help to DIPL by appellant.

(viii) DIPL debarred from selling the goods to any buyer other than the appellant.

(ix) Production programme of DIPL carried out according to the dictates of appellant.

7. The Collector has relied upon the following decisions for his conclusion: (iii) *Pilky Footwear Co. Pvt. Ltd. v. Union of India* 1980 ELT 338 (Tribunal).

In the first case, the High Court of Allahabad held that a person though not owning a factory or not himself doing the manufacturing process can be considered to be

a manufacturer if those who own a factory are dummy or camouflage for him or he gets the goods manufactured by them under his direction or control.

In the second case, the High Court of Gujarat observed that it is possible for a person who himself does not employ labour but gets goods manufactured through an independent contractor to say that he is not the manufacturer for he had not brought into existence an article or product in question either himself or through his servants. To cover such a class of persons the Legislature provided the inclusive part of the definition in Section 2(f) of the Act which would include a person who does not himself employ labour but employs himself in the production or manufacture of goods through an independent contractor.

In the third case, it was held by the High Court of Bombay that the agreement between the petitioner company and Bata Shoe Company was not at arm's length as it provided that Bata should provide not merely advice, assistance, technical know-how and supervision to Pilky but would also provide necessary working capital by way of interest-free advances required for operation of the plant and other working expenses and for procurement of moulds and equipment required for manufacture of footwear. Pilky was debarred from enlarging the capacity or installing fresh machinery without the consent of Bata. The entire stock was to be sold with the brand name of Bata. It was held that the two were not different units but Pilky was the agent of Bata.

8. Per contra, appellant's counsel has, inter alia, relied upon the Supreme Court decisions in *Britannia Biscuits Co. Ltd. v. Collector of Central Excise*(SC) and *Collector of Central Excise, Baroda v. MM. Khambhatwala*. and *UOI v. Cibatul Ltd.* . In the first case the goods. Metal containers were manufactured by four job workers with Tin sheets supplied by Britannia Biscuits Co. Ltd. The company was held to be not treatable as the manufacturer of metal containers particularly when all the job workers' units had their own licences and employed their own workers. In the second case, goods like Agarbattis, dhup etc. were produced by household ladies in their own premises out of raw material supplied by the respondent who paid wages on the basis of production. There was no supervision by him over the manufacture of the goods. The goods were sold from the premises of such

household ladies but sale proceeds were sent to the respondent. The household ladies were held to be manufacturers and not hired labourers.

9. In the last mentioned case goods were manufactured by the respondent according to an agreement with the buyer/customer in accordance with a manufacturing programme drawn up jointly and in accordance with the restrictions and specifications constituting the buyer's standard. The goods were to be supplied at prices agreed upon between the respondent and the buyer from time to time. The buyer was entitled to test the goods to be supplied only after approval. The buyer's trade mark was affixed on the goods produced under the agreement. The respondent had agreed to refrain from selling directly or indirectly goods having such trade mark. The Supreme Court held that as the provision of the agreement indicated, the manufacturing programme was drawn up jointly by the buyer and the respondent and not merely by the buyer and the buyer was obliged to buy the manufactured products from the respondent only if it conformed to the buyer's standard and had the right to reject the goods if they were not in accordance with that standard. The respondent owning the plant and machinery, the raw material and labour, it was held that the goods were manufactured by the respondent on its own account and that cannot be said to be manufacturing goods on behalf of the buyer. Accordingly, the wholesale price of the goods manufactured by the respondent was held to be the wholesale price at which the respondent sold the goods to the buyer and not the wholesale price at which the buyer sold the goods to others. This case was cited before the Collector who however, distinguished it from the present case on the ground that the terms of the agreement for the manufacture and sale of the goods were different in the two cases. Thus, the Collector has stated that while in the Cibatul case the buyer and brand name owner was not obliged to buy the manufactured goods regardless of their quality and there was provision for reprocessing of the defective goods to bring them upto the requisite quality or if that was not possible to sell the goods to the buyer at a lower price if it was suitable for an alternative purpose or sold to others as substandard goods or to destroy the goods. As against such provisions in the Cibatul case the Collector has stated that the agreement in the present case only required that defective material will be repaired or replaced. The agreement did not provide that if the quality of the product was not approved by the appellant,

DIPL was at liberty to sell the goods to any other party or to destroy them and that not a single instance had been shown of substandard ABAs having been allowed to be sold to any other party or dealt with in any manner suited to DIPL. In these circumstances, the Collector has held that the Supreme Court decision in the Cibatul case was not applicable to the present case.

10. We are of the view that the Collector erred in distinguishing the Cibatul case based on the provisions in that case for alternative disposal of the goods found defective or substandard. The agreement in the present case did provide for DIPL to repair or replace defective material free of charge. The agreement also refers to approval of samples by the appellant. The difference in the agreements pointed out by the Collector are not material and do not render the ratio of that, decision inapplicable to the present case.

11. Taking into account the rival contentions and the decisions cited in support of the respective stands we find that the appellant in the present case cannot be considered to be the manufacturer of the subject goods. The alleged charging of a lower price by the appellant to DIPL for the material provided by them to the latter for manufacture of ABAs cannot be taken as amounting to providing financial assistance to DIPL which was the case in the Pilky Footwear case decided by the High Court of Bombay which has been referred to earlier. The supply of some of the parts required for such manufacture and the requirement that the entire production of ABAs should be sold to them (appellants) by DIPL does not make the agreement unacceptable. If the price of the material supplied by appellant to DIPL was less than the correct price and if such lower price accordingly led to a depression of the price of the goods manufactured and sold to the appellant by DIPL, it may point to misdeclaration of value for purposes of assessment but it does not alter the position of DIPL as the manufacturer and instead make the appellant the manufacturer. DIPL cannot be treated to be the hired labour of the appellant. While some parts even if they are the important ones constituting the major cost of the product ABAs, as held in the impugned order, had been provided by the appellant, the other parts were procured by DIPL for the manufacture of ABAs which were as many as 220 in number as stated in the appeal memorandum. During the hearing learned Counsel stated that fifty per cent of the

parts were provided by the appellant and the remaining fifty per cent were added by DIPL. This discrepancy need not, however, detain us as even if all the required materials are provided by the customer to the manufacturer and the product is supplied to the customer, the customer does not, on that account become the manufacturer. The Collector has also accepted such a position and also other factors like affixing the brand name of the owner and supply of specifications not making such a person the manufacturer. He has, however, held that such factors cannot be considered in isolation and the totality of the facts and circumstances have to be taken into account and examined in the light of Section 2(f) of the Act. His consideration of such circumstances has been examined by us. We have found that these factors do not point to the appellant being the manufacturer. It has been held by the High Court of Allahabad in *Hind Lamps Ltd. v. Union of India* 1978 ELT J 78 that the fact that the department was treating Hind Lamps Ltd. as the manufacturer and making them liable for excise duty precluded it from taking the plea that they were a dummy company or a benamdar for the customer companies. It was further held that manufacturer manufacturing goods with customer's brand name cannot be said to be manufacturing the goods on behalf of the customer. In the light of this decision as also the other decisions cited, namely 1997 (89) ELT 22 (SC) and appellant cannot be treated as the manufacturer of the goods in question. It is noteworthy that though duty has been computed on a higher value than that declared by DIPL, no charge of short payment of duty has been levelled against them. On the contrary, it has even been indicated in the order that duty was wrongly collected from them which should be refunded to them in accordance with the provisions of law. This part of the order will be infructuous as any action for refund was time barred at the time of passing of the Collector's order. Duty has been paid by DIPL and accepted by the department and rightly too. No disturbance of the department's action on the lines adopted by the Collector is called for. Action regarding possible short payment of duty at the hands of DIPL has, however, remained unexplored. In the circumstances, we hold that the impugned order is unsustainable. We set it aside and allow the appeal.