

Pharma Art Pack Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-24-1998

Reported in : (2003)(159)ELT1163TriDel

Judge : S Bhatnagar, Vice-, J Balasundaram

Appellant : Pharma Art Pack

Respondent : Collector of Central Excise

Judgement :

1. These are appeals against the order of Additional Collector of Central Excise, Bombay dated 6-9-90.
2. Learned Counsel stated that both the appeals have been filed with reference to the same order-in-original passed by the Additional Collector of Central Excise, Bombay on 6th September, 1990.
3. He stated that both the appellants are manufacturer of printed cartons, labels, packages etc. The appellants M/s. Pharma Art Pack, C-21, Shalimar Industrial Estate, Matunga, Bombay-400 019 are a proprietary concern having SSI registration whereas M/s. T.R. Corporation situated at D-6, Shalimar Industrial Estate, Matunga, Bombay - 400 019 are a proprietary firm legally different and distinct from the former. However, the Department has clubbed both of them and denied them the benefit of exemption Notification Nos. 80/80, 83/83 and 85/85 on the ground that the combined production and clearances exceeded the prescribed

limits.

4. It was their contention that they were distinct units having separate premises, separate bank accounts, separate Income Tax and Sales Tax numbers and shop number and are, in no way, connected with each other. It is, of course, true that the partner Mrs. Tarla R. Amin of M/s. T.R. Corporation is the wife of Shri R.K. Amin, Proprietor of M/s. Pharma Art Pack.

5. Both the appellants had given separate declaration to excise authorities claiming benefit of the above exemption notifications from time to time. The partnership firm (M/s. T.R. Corporation) is in existence since 1977 i.e. 5 years before printed cartons became excisable. Hence, the presumption of the Additional Collector that the firm had come into existence to provide a cloak of two separate entities is baseless. One of these units had come into existence in 1964 and another has come into existence in 1977.

6. The Department has presumed that they were one unit merely because one Mr. Gonsalves had stated that he was working for both the units. It has, however, been well-established by now that the employment of a common Manager or some common employee was not sufficient to club the two units as held by the Tribunal in the case of Bhagwan Kanadias reported in 1987 (32) E.L.T. 204. The Department has also alleged use of machinery of one by another but the fact is that when the punching machine pertaining to M/s. Pharma Art Pack was shifted to Gala No. D-6 of M/s. T.R. Corporation thereafter, punching of bigger cartons of M/s.

Pharma Art Pack was being carried out by M/s. T.R. Corporation in accordance with the agreement dated 8-3-84 and no charges were paid and no rent collected as the punching machine was installed in the premises of M/s. T.R. Corporation and the electricity charges were fully met and maintenance of machine was also their responsibility i.e. M/s. T.R. Corporation were not charging for the job work and they were not charging for this much. It was also their contention that as per Tribunal's decision in the case of Jagjivandas & Co. reported in 1985 (19) E.L.T. 441 (T), one firm's machinery being used by another firm would not attract clubbing provisions, hence, they could not be clubbed.

7. It was also their submission that there were no financial transactions between the two firms and orders and purchases of two firms were made separately and income tax and sales tax were paid separately and M/s. Pharma Art Pack had no connection with M/s. T.R. Corporation.

8. Learned Additional Collector has relied upon Tribunal's order in the case of Collector of Central Excise v. Paper Packing Industries reported in 1988 (36) E.L.T. 340. However, that case was distinguishable as the Tribunal's order in that case is based on the specific circumstances of that case.

9. It is noteworthy that since the first firm was established in the year 1964 and the second in 1977, 5 years before the printed cartons became excisable, hence, it would not be in order to presume that they had done something to take advantage in respect of printed cartons. He would also like to submit that both the appellants had given declarations and the same had been verified by the excise authorities.

The Department's allegations are baseless and the show cause notice is time barred and imposition of penalty was also not justified.

10. In support of his contentions, learned Counsel stated that he would like to cite the following judgments :- (1) Renu Tandon v. Union of India reported in 1993 (66) E.L.T. 375 (Raj.). Jagjivandas & Co., Thane v. Collector of Central Excise, Bombay-II Collector of Central Excise, Ahmedabad v. Ambica Scale Mfg.

Works 11. Learned DR reiterated the Department's view as contained in the order-in-original and emphasised that the Collector has, in his finding portion of the order, given detailed reasons which go to show that for all practical purposes, the units had been functioning as one unit as highlighted in paragraphs 10 & 12 of the show cause notice. He would like to emphasise that the firms were interdependent and each using the facilities of the other for manufacturing the end product and the two firms had interest in the business of each other and for all practical purposes, they worked as one unit and therefore, the value of their clearances was required to be clubbed for the purpose of determining eligibility for exemption. And, in this respect, he would like to cite the decision of the Tribunal in the case of Step Cosmetics v. CCE reported in 1996 (87) E.L.T. 724 and CEGAT Order Nos. 227-

231/96-C, dated 20-3-96 [1997 (92) E.L.T. 502 (T)] in the case of M/s. H.T.Bhavnani Chemicals (P) Ltd. and Ors.

12. In the circumstances of the case, since these facts had not been disclosed, the extended period of time was also available and the Collector was justified in demanding the duty and imposing penalty.

13. We have considered the above submissions. We observe that the Department has been able to discharge its initial burden and the onus has, therefore, shifted on to the appellants in the facts and circumstances of this case inasmuch as there is some force in the learned DR's arguments that the inter-relationship between the units has been brought about in the show cause notice and during the adjudication proceedings. The appellants have, merely drawn attention to the fact that the 'two units' had come into existence at separate points of time and were registered separately for income tax and sales tax purposes but that was, by itself, not sufficient. The Tribunal has repeatedly held that it is the totality of facts and circumstances which is required to be taken into consideration in such situations and if the Department is able to lift the veil and show that in reality, the so-called units were virtually one, the consequences thereof would automatically follow and in this respect, it is important to take note of the organisation, method of functioning and control, in particular.

The aspect of financial relationship or commercial relationship is undoubtedly important and therefore, the factor of financial flowback, and it is open to the assessee/defendants to show that the relationship was at arm's length on principal-to-principal basis but, once the Department is able to show that many of the activities or utilisation of machinery or staff or facilities were in common, the onus shifts on to the other side to show that in spite of it all, they were still functioning, in fact, as in law as distinct units. In the present case, the Department has been able to show its case from the facts and circumstances narrated in the Collector's order and therefore, what is to be seen is that whether commonality of interest stands discovered and the test of pre-ponderance of probability weighs the scales in favour of one or the other view. In the present case, it is observed that the control and management, premises of manufacture, storage and removal of

the excisable goods are common. The method of functioning itself shows that the processes undertaken in the so-called two units are a continuity operated by consent in a common way and the so-called two units have interest in the business of each other and the method and manner of functioning, supervision and control is such that manufacturing process begins at one end, ends up at the other and even such incidental or ancillary operations as pasting, packing and clearances are done virtually in common although effected in different names. The appellants are correct in saying that one firm came into existence much earlier than the other and even before the notification in question came into existence but, in the above facts and circumstances, the case law cited by the learned Counsel does not advance their cause and the production of both the so-called distinct units was required to be clubbed and once it is so done, the value of clearances, in total will be required to be seen, in order to ascertain whether they were still within the limits prescribed in the notification for exemption or were required to pay the duty. Hence, in such case, separate income tax and sales tax number or bank accounts and even central excise declarations, if any, are by themselves not sufficient when organisation method of functioning and control disclose them to be in effect, one single whole and the two so-called units were merely acting as parts of the whole. Therefore, it is the entire production of "both taken together" which will be required to be considered for the purpose of assessment.

14. We, therefore, hold that the order of the Collector is correct and confirm the demand. However, we notice that the Collector has erred in imposing a penalty of Rs. 15,000/- on each of the two firms.

15. Once the Department had come to the conclusion that there was, in reality, only one organisation in existence and the legal cover did not matter, it will be inappropriate to say that the above penalty was imposable on each of the two firms. Further, looking to the totality of facts and circumstances, we consider that it would be sufficient if the penalty was held as payable by the organisation on its behalf by M/s.

T.R. Corporation i.e., in all, a penalty of Rs. 15,000/- (and not Rs. 30,000/-) was required to be paid.

