

Kalanidhi and anr. Vs. Cce

Kalanidhi and anr. Vs. Cce

SooperKanoon Citation : sooperkanoon.com/15047

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-20-1999

Reported in : (1999)(82)LC417Tri(Mum.)bai

Judge : S Bhatnagar, V A Unni, L Ram, T Members

Appellant : Kalanidhi and anr.

Respondent : Cce

Judgement :

1. These are two appeals filed by M/s. Colour Prints and M/s Kalanidhi, Bombay against the common order-in-original passed by the Additional Collector, Central Excise, Bombay dt. 16.1.1989. By the impugned order excise duty of Rs. 2,47,890.37 was confirmed against the appellants.

Monetary penalty of Rs. 35,000/- on each of the appellants as well as redemption fine of Rs. 1,000/- was also imposed by the same order.

2. The charge against the appellants relate to clubbing of manufacture of printed cartons by both the firms and evasion of excise duty by suppressing the facts of production and clearance.

3. Both the appellants M/s. Colour Prints and M/s. Kalanidhi are engaged in the manufacture of printed cartons falling under TI 17(3) of the erstwhile Central Excise Tariff. On the basis of intelligence, Show Cause Notices were issued to both the appellants on 22.5.1986 alleging contravention of various provisions of

the Central Excise Rules and for having suppressed facts about production and clearance of excisable goods without accounting for the goods, in RG 1 Register and for not filing classification and price lists and for removal of excisable goods without payment of appropriate duty. They were also called upon to show cause why all the goods seized should not be confiscated.

4. In reply to the Show Cause Notice and in the subsequent adjudication proceeding before the Additional Collector both the appellants denied the allegation and submitted that both the firms were separate and independent entities engaged in the manufacture of printed cartons and were recognised as such by the Central Government and State Government agencies such as Income Tax and Sales Tax authorities, the Directorate of Industries, Financial institutions, etc. They stated that the installation of machinery belonging to one firm in the premises of the other firm was done as a matter of mutual convenience; that electricity and rent charges was not recovered by one firm from the other because of mutual trust and understanding.

5. Rejecting the contentions the Additional Collector held that both the units, namely, M/s. Colour Prints, M/s. Kalanidhi are, in fact, one unit and, therefore, their production should have been clubbed together for the purpose of levy of duty of Central Excise. The Additional Collector observed that it is an admitted fact that the machines belonging to M/s. Colour Prints were installed and used in the premises of M/s. Kalanidhi for the manufacture of common products, that neither rent for the machine installed and used nor electricity charges were recovered by each other in respect of the machine; that M/s. Colour Prints had no facility for punching and cutting and these activities were carried out in the premises of M/s. Kalanidhi in the presence of Gala No. 4A of the Industrial Estate; that M/s. Colour Prints got printed cartons manufactured on the machine belonging to M/s.

Kalanidhi; that pasting and packing of printed cartons of both the firms were carried out in Gala No. 3A of the same industrial estate rented by M/s. Colour Prints and that both the M/s. Colour Prints and M/s. Kalanidhi had engaged the same contractor for pasting and packing and the charges were paid for both by M/s. Colour Prints. On the basis of the above facts the Additional Collector held

that it was clear that both the units were functioning as one unit for the manufacture and clearance of printed cartons "and the veneer of separateness was meant only for purpose of availing exemption". He relied on the Tribunal decision in CCE v. Paper Packing Industries wherein it was held that a firm set up by the partners of another firm engaged in the same business cannot be considered as a separate firm and the clearances of the second firm was clubbable with the first for determination of eligibility for exemption.

6. We have heard Shri A.S. Sundararajan, Advocate who appeared for the appellants and Shri J.M. Sharma, JDR who appeared for the Department.

The Ld. Advocate contended that M/s. Kalanidhi and M/s. Colour Prints were separate and independent partnership firms. M/s. Kalanidhi were registered under the Income Tax Act, Bombay Sales Tax Act, Central Sales Tax Act and the Shops and the Establishment Act and had separate bank account. M/s. Colour Prints were likewise holder of Central Excise Licence for the manufacture of printed cartons. They had a separate factory at Gala No. 5A of Shalimar Industrial Estate, Bombay and were assessed for Income Tax Act and had separate registration under the Bombay Sales Tax Act and the Central Sales Tax Act. He submitted that the facts relied on by the Adjudicating Officer for concluding that the two units had been functioning as one unit was not conclusive and had been arrived at without considering the various submissions made by the appellants and the judicial pronouncement on the subject. He relied on the following Judgments: Shree Packing Corporation v. CCE 1987 (32) ELT 94 (T): 1988 (16) ECR 227 (T).

(2) Bhagwan Das Kanodia and Ors. v. CCE 1987 (32) ELT 204 (T): 1992 (38) ECR 279 (T).

(3) Jagjivandas and Co. v. CCE 1985 (19) ELT 441 (T): 1985 ECR 17 (T). G.D. Industrial Engineering v. CCE 1983 ELT 1994: 1984 ECR 1837 (T). Triveni Sheet Glass Works Ltd. v. CCE 1992 (62) ELT 330: 1992 (43) ECR 595 (T).

7. He submitted that the Department has not established the allegations contained in the Show Cause Notice and, therefore, the findings of the Additional Collector are liable to be set aside.

8. Shri J.M. Sharma, JDR defending the impugned order referred to the declaration filed by M/s. Colour Prints (page 146 of appeal filed on E/765/89-C filed by M/s. Colour Prints) on 8.5.1986 under Notfn. No.111/78 as amended in which against item 3 of the Schedule relating to the name and address of other factory in whom the manufacturer was claiming exemption as proprietary interest, the entry given was 'nil'.

The said declaration had claimed full exemption under Notfn. No. 80/80 as amended. The said declaration had, however, not given any details about the name and address of partners and the name and address of the factory. The same was signed by Shri G.P. Salian as partner. He referred to the declaration filed by M/s. Kalanidhi (page 75 of Appeal No. E/764/89-C filed by M/s Kalanidhi) in which the name of Ms. Rajni U. Malli had been shown as partner. He also drew attention to the fact that Shri Gopal R. Salian and Ms. R.U. Malli were the partners of the firm, M/s. Colour Prints, that both the firms were manufacturing the same excisable goods; that they operated from the same or neighbouring Galas of the same industrial estate; that they share the same machinery, electricity and other facilities and there was no reimbursement of electric charges made by one firm for payment made on behalf of the other. In these circumstances, JDR contended that the Adjudicating Officer had rightly concluded that the separate registration for purposes of sales tax and income tax and separate registration of the partnership firms was only to camouflage the actual fact that both the entities were, in fact, one and the same. He referred to the recent decision of the Tribunal STEP Cosmetic v. CCE in support of his contention.

8A. We have considered the submissions. The question whether two firms who are sharing common facilities are independent of each other would depend on the facts of each case. Prima facie two different partnership firms have to be treated separately notwithstanding that some or all the partners are common [G.D. Industrial Engineering v. CCE . Where clearances of one unit are sought to be clubbed with that of another, it is essential to prove that the manufacturing operations as well as other business transactions relating to the production and manufacture are in fact managed by the person in charge of one unit while the persons in charge of the other unit are only lending their name. The most

important consideration for arriving at a decision whether one unit is carrying on manufacturing activity for and on behalf of the another is to see whether there is any financial flow back from one to the other expect (sic) in the case of normal commercial transactions. If such financial flow back or adjustment is established, that would be strong proof of the fact that the two firms are in fact, though purporting to be different [Kinjal Electrical Ltd. v. CCE 1991 (43) ELT 327 (T)]. In the absence of conclusive evidence of flow back, it has been held that no clubbing of clearances of separate units can be sustained [Vivomad Laboratories v.CCE]. In the instant case nothing has been brought on record to show any financial flow back among the two firms. Our attention was drawn to the recent decision of the Tribunal No. 227 to 231/96-C in Bhavani Chemical v. CCE. The Tribunal had held that in the facts and circumstances of the case, where the firms consisting of the same two persons, (Husband & Wife) were managed by the same persons and financed by the same persons and produced the same product, both units were held to be one and the same for purposes clubbing of value of clearances on the ground that it is not so much the flow back in business only which is to be considered but also the identity of interest among the firms and the intention of the partners. In the said case it was observed that the second firm was established when the first firm had achieved value of clearances close to the limit allowed under the small scale industries exemption Notfn. No. 175/86. In the said case the show cause notice had clearly alleged such an intention.

We find from the Show Cause Notice dated 22.5.1986 that a similar charge of wrongful availment of exemption under Notfr. No. 85/85 by mis-declaration of facts in regard to value of clearances during the proceeding year had been made. We find the material facts of the present case are very similar to the facts of the said case. Following the ratio of the Tribunal decision in Bhaganwani (sic) Chemical we hold that the Collector has rightly held against the appellants. In these circumstances we see no reason to interfere with the findings in the impugned order.

10. With due respects to Hon'ble Member (J), my views and orders in the matter are as follows.

11. It is observed that the appellants M/s Kalanidhi have mentioned, inter alia, that they were a partnership firm registered in the Indian Partnership Act since 14.10.1972 and engaged in the manufacture of printed cartons, labels etc. Shri Gopal Ram Salian and Smt. K. Rajani Ugappa Malli are the partners of the said firm from its inception.

12. Apart from their registration with various state and local authorities mentioned by them, they were also holders of central excise licence No. 6/R- III/H/17/82 dated 5.4.1982 for the manufacture of the above goods. They have also mentioned, inter alia, that immediately after the Budget of 1982, they had addressed a letter dated 5.3.1982 to the Supdt. of Central Excise declaring the stock and requesting for guidance regarding the procedure in the matter of excise levy and furnished all the information and officers had also verified the same by visiting the factory. Thereafter, a licence No. 111-4/14/85 was granted to the appellants. However, vide letter dated 1.4.1985 addressed to the Supdt., Range-II, the appellants surrendered the licence for cancellation as their turnover for the year ending 1984-85 was less than the prescribed limit. Thereafter, the appellants had furnished all the necessary information and officers were also verifying the same.

13. They also argued that they were a distinct legal entity, independent of the other appellants M/s. Colour Prints and argued that the installation of one of their machines in the other firm or the use of machinery of one by another or utilisation of the service of the same contractor, who used to serve others also, for pasting and packing was not sufficient to prove that they were one unit.

14. Virtually the same line of argument has been taken by the second appellant M/s. Colour Prints who have mentioned, inter alia, that they were a partnership firm registered under the Indian Partnership Act since 21.9.1966 and Shri Gopal Ram Salian and Shri K. Ugappa Malli were partners of the firm since its inception. Apart from being registered by other authorities as a separate unit, they had also applied for central excise licence on 27.4.1983 and furnished all the . information necessary and were thereafter, granted licence No. 1/R-III- 4/17/85.

However, by letter dated 1.4.1985 addressed to the Supdt., they had surrendered the licence as their turnover was less than the prescribed limit but had furnished all

the information necessary and the officers were also verifying the same by visiting the factory.

15. Both the appellants have also emphasised that they have been existing as separate units and manufacturing the said goods since much before the year these items became excisable and dutiable and even then, each one of them was eligible for exemption under notification 80/80, 83/83, 143/83 and 85/85 as in force from time to time.

16. I observe that the department has not contradicted the above affirmations and assertions and shown them to be wrong in any manner.

In other words, in view of their registration in 1966 and 1972 much prior to the inclusion of the items under the central excise network and their writing to the Supdt. to advise and guide them, once the items came in the central excise net and taking out of central excise licence, which was granted after due verification, shows that they could reasonably develop a bona fide belief that they were independent units and were being treated by the department as such. Further, they were giving all the required information to the department as such in the absence of any objection of the department, they were entitled to believe that it was sufficient for central excise purpose.

17. In these circumstances, I hold that we have to proceed on the basis of presumption of bona fides and the test of preponderance of probability and when we do so, it cannot be said that they had deliberately or intentionally suppressed or mis-stated any fact with intention to evade duty or to take undue advantage.

18. At the same time, in view of the various common features and the method of their organisation and functioning, they were actually required to be treated as a single entity for central excise purposes, their separate registration with various state, local and other authorities notwithstanding and therefore, the reasons recorded by the learned Additional Collector and mentioned in the paragraphs above, were required to be taken into account.

19. Learned Counsel as well as learned DR have cited various orders in favour of their respective point of views including orders .

20. Further, in view of the above analysis, the demand beyond the normal period of six months was required to be treated as time barred but the portion of the demand which falls within the normal period of limitation was required to be considered as in time. The appellants have, however, not rested their case merely on time bar. They have also argued that in any case, the value taken for the purpose of assessment was excessive and not correct. In this connection, I find that the show cause notice refers to the department's point of view on valuation but, no finding has been recorded by the learned Collector regarding the method or manner of assessment or the basis of valuation and he has simply confirmed the demand as it is. This was not correct. Since the appellants have made a pointed reference to the issue of valuation, the dispute on this aspect was also required to be settled. Prima facie, there appears to be some substance in the appellants' contention that one and the same figure could not be taken for the entire period as the value has varied from time to time. But, in the absence of any finding by the Collector, at this stage, it will only be appropriate to direct the Collector to consider this aspect as well.

21. In view of the above discussion, I set aside the impugned order and remand the matter back to the learned Commissioner/Additional Commissioner concerned to re-assess the goods and re-calculate the duty liability after taking into account, inter alia, the appellants' submission regarding valuation and such further submissions as may be required to be made in this connection and then pass appropriate orders in accordance with law.

24. In view of difference of opinion between Hon'ble Member (Judicial) and the Vice-President, the matter is submitted to Hon'ble President for referring it to a Third Member on the following point:- Whether the appeals are required to be rejected as held by Hon'ble Member (Judicial) or the matters are required to be remanded as proposed by the Vice-President in view of his observations and findings. Member (J) Dt. 15.5.1998 Vice-President 25. The difference of opinion referred to me in this appeal filed by M/s. Kalanidhi and Colour Prints is-- Whether

the appeals are required to be rejected as held by the Hon'ble Member (J) The matters are required to be remanded as proposed by the Hon'ble Vice-President in view of his observations and findings.

26. I have heard Shri Sumeet Das, JDR and have gone through the facts on record. It was alleged that M/s. Kalanidhi and Colour Prints had suppressed the production of duplex board printed cartons classifiable under Item No. 17(3) of the erstwhile Central Excise Tariff and that those units were in effect one unit and therefore, the value of the clearances in respect of both the units were liable to be clubbed together for the purpose of determining their eligibility to the small scale exemption. I find that both the Member (J) and the Vice-President had come to a view that both the units were to be treated as a single entity. Following the Tribunal's decision in the case of Bhawani Chemicals v. CCE, Final Order No. 227-231/96-C, the Id. Member (J) had held that the appellate authority with regard to the issue of clubbing had rightly held against the appellants. Similarly in para 18 of his order, the Id. Vice-President had observed that in view of the various common features and the method of organisation and functioning, they were actually required to be treated as a single entity for central excise purposes,, Thus, both the Member (J) and the Vice-President have held that with regard to the clubbing of clearances, against the appellants.

27. The Id. Member (J) had not discussed the issue of limitation in the order. The plea of the appellants was that there was no justification for demanding the central excise duty for the period beyond the normal period of limitation. It is seen that the adjudicating authority, the Addl. Collector of Central Excise, Bombay had not gone into the issue of limitation, while in the show cause notice, it was alleged that the appellants had suppressed the facts about the production and clearances of excisable goods involved, with an intent to evade payment of central excise duty and in reply to the show cause notice, the appellants had challenged the allegation of suppression. There is no finding in this regard by the adjudicating authority. In para 14 of reply dated 2.8.1986 filed on behalf of M/s. Kalanidhi, it had been submitted as under: 14. Our clients say that the attempt of the Department to club the value of the clearances of the said two firms for determining the eligibility of exemption during the period 1982-83, 1983-84, 1984-85 and 1985-86 is baseless,

illegal, contrary to law and numerous judicial pronouncements on the subject. Our clients deny that the separate legal entities were only on paper and were not real, as alleged. Our clients specifically and emphatically deny that our clients i.e. the said firm and the partners deliberately did not disclose the full facts to the Central Excise Department as alleged.

Our clients say and submit that immediately after the Budget of 1982 our clients had filed necessary declaration periodically from 1982 onwards and addressed a letter to the Superintendent of Central Excise informing him that they were manufacturing printed cartons and that they were entitled to exemption under Notification No. 80/80 as amended from time to time. They had also sought guidance from the Superintendent as to the procedure to be followed. The officers were visiting our clients' factory periodically for inspection and whatever information sought by the officers were promptly supplied by our clients. The materials on the basis of which the show cause notice has not been issued were available with the Department and therefore there is no question of our client suppressing the relevant facts, as alleged. Our clients had not, at any time, made any wilful mis-declaration.

28. In appeal before the Tribunal also, the question of limitation had been agitated in Ground No. (r) which is extracted below:- (r) The Ld. Addl. Collector erred in confirming, the demand of Central Excise duty beyond six months by invoking the provisions of Rule 9(2) of Central Excise Rules, read with Section 11A of the Central Excises Act, 1944, in as much as there is nothing on record nor is there any finding by him in the impugned order that there was clandestine manufacture or removal or that the appellants were carrying out operations in a manner with a view to evade the detection of the same by the Excise Officers or any wilful mis-statement or suppression of facts of production and or clearance. It is humbly submitted that the appellants were functioning under Central Excise Control. They were having a licence for the manufacture of printed cartons. Their ground plan was approved after due verification. They were filing periodical returns and furnishing all necessary informations to the Department. The officers were also inspecting their units periodically. They have got the licence cancelled by an application, dated 1.4.1985, as their turnover for 1984-85 was less than Rs. 6

lakhs. The facts and circumstances do not support any mis-declaration or suppression of fact for availing of exemption or any intention to evade duty. All the materials on the basis of which the show cause notice was issued were available with the Department.

29. I find that the Id. Member (J) had not discussed this aspect relating to the limitation and that the Id. Vice-President had proposed that the demand beyond the normal period of six months was required to be treated as time barred but the portion of the demand, which falls within the normal period of limitation was required to be considered as in time. With regard to the value taken for the purposes of assessment, the Id. Vice-President has observed that while the appellants had asked that the value taken for the purposes of assessment was excessive and not correct, no finding has been recorded in this regard by the adjudicating authority. In reply to the show cause notice in para 13 of the reply dated 2.8.1986 filed on behalf of M/s. Kalanidhi, it had been pleaded by the appellants that the value of clearances calculated at the rate of Rs. 545/- per thousand was not correct in law. The Id. Vice-President has rightly observed that there is no finding with regard to the question of valuation in the adjudication order. In Ground No. (s) of the Appeal, the appellants have pleaded that the value of clearances made by the appellants fixed by the Department at the rate of Rs. 545/- per one thousand was arbitrary and that the Department had taken the value of all the cartons cleared by the appellants during 1982-83, 1983-84, 1984-85 and 1985-86 at the rate of Rs. 545/- per one thousand cartons irrespective of the size of cartons and had thereby inflated the value of clearances of cartons during the said period. I find that this issue has not been discussed in the order proposed by the Id. Member (J). The Id. Vice-President had observed that in the absence of any finding by the adjudicating authority, it would be appropriate to remand the matter back to the jurisdictional adjudicating authority.

30. After hearing the Id. Departmental Representative and taking note of the submissions made by the appellants, I agree with the view taken by the Id. Vice-President that these matters are required to be remanded as proposed by the Id. Vice-President.

32. In view of majority opinion, the impugned orders are set aside and matter remanded back to the jurisdictional Commissioner/Additional Commissioner concerned to re-assess the goods and re-calculate the duty liability after taking into account inter alia, the appellants' submission regarding valuation and such further submissions as may be required to be made in this connection and then pass appropriate orders in accordance with law.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com