**Bee Pee Coating Ltd. Vs. Collector of C. Ex.**

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**SooperKanoon Citation** : sooperkanoon.com/17007

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

**Decided On :** Oct-15-1999

**Reported in** : (2000)LC213Tri(Delhi)

**Appellant** : Bee Pee Coating Ltd.

**Respondent** : Collector of C. Ex.

**Judgement** :

1. The appellants are a subsidiary of M/s. Berger Paints (I) Ltd., Calcutta. Under an agreement with Berger Paints, the appellants manufacture paints and varnishes which are liable to duty under Chapter 32 of the Central Excise Tariff Act, 1985. Upon manufacture, the paint is handed over by the appellants to Berger Paints who carries out the marketing.

2. Prior to 1-4-1993, the appellant had adopted the wholesale prices at which M/s. Berger Paints sold the goods as the basis for working out the assessable value of the paints and duty was being paid at the assessable value so worked out. There were disputes about the deductions to be allowed while working out the assessable value from the sale price of Berger Paints. Commissioner of Central Excise (A) passed Order-in-Appeal Nos. 974-975 (513-514-Ahd) C.E./Collr.(A)/Ahd., dated 20-1-1993 which was subject matter of further appeal before this Tribunal and the Tribunal passed its Order Nos. 739-740/95-A, dated 8-11-1995 on the elements eligible for deduction while fixing the assessable value. This order has become final as no appeal was filed before the Hon. Supreme Court.

3. From 1-4-1993 the appellant claimed fixation of assessable value on the basis of sum total of value of raw materials, manufacturing expenses and profit of the job worker. This claim was made based on the judgment of the Supreme Court in the case of Ujagar Prints Ltd. -1989 (39) E.L.T. 493 (S.C.). This claim of the appellant was rejected by the jurisdictional Asstt. Collector in his Order-in-Original which order was confirmed by Commissioner (Appeals). That order is the cause for the present appeal. Both the orders noted that the valuation of the goods remained settled vide Orders-in-Appeal 974-975 (513-514/Ahd) C.E./Collr.(A)/Ahd., dated 20-1-1993 of Commissioner (Appeals) referred to earlier in this order. Orders also hold that in view of the terms of the agreement between Berger Paints and the appellant, the appellant can only be treated as an agent of M/s. Berger Paints and not as an independent manufacturer. Therefore, the valuation should continue to be on the basis of the sale price of M/s. Berger Paints. The orders also hold that the judgment of the Supreme Court in Ujagar Prints is not applicable in the appellant's case. The Commissioner (A) held that the appellant's case is covered by the decision of this Tribunal in the case of Pawan Biscuits Pvt. Ltd. v. C.C.E., Patna 1991 (53) E.L.T. 595 (Tribunal).

4. As the terms of the agreement between the appellant and Berger Paints are being considered the reason for holding that the appellant is only an agent of Burger Paints, the clauses of the agreement which have been specifically relied upon in the Order-in-original are reproduced below :- 1. In terms of the agreement the processor has undertaken to manufacture and/or process diverse paints, varnishes, enamels, synthetic resins, dry colours and allied products.

2. The processor process and manufacture the products for supply to M/s. BPIL in packages and quantities to be specified from time to time and in accordance with the requirements of M/s. BPIL, Calcutta.

3. M/s. BPIL, Calcutta, supply to the processors the raw material, containers and packing material necessary.

4. The processor in consultation with M/s. BPIL, Calcutta, arrange to fix the production programme of the products annually or for such a period as may be mutually agreed upon, so that the requirements of M/s. BPIL, Calcutta, shall be

supplied and deliveries made accordingly in terms of the order given by M/s. BPIL, Calcutta.

5. The products shall be of acceptable standard and shall conform strictly to the requirement of M/s. BPIL, Calcutta, in respect of quality, specification and quantity.

6. In the event of any product being found defective or not conforming to the requirement/standard of M/s. BPIL, Calcutta, as to quality, specification and quantity or otherwise and as to which M/s. BPIL, Calcutta, shall be the sole judge, the processor is to compensate M/s. BPIL, Calcutta, for such defective products by paying the stipulated price for the cost of the raw material, containers and packing material, including transportation charges.

7. M/s. BPIL, Calcutta, are entitled to inspect the products ready for delivery so as to ensure that they correspond to the contracted quality, specification and quantity, and if upon such inspection, the products are found defective, the processor, at its cost, shall tender fresh products for inspection and approval by M/s. BPIL and only after such approval the delivery be effect.

8. M/s. BPIL, Calcutta, during the continuance of this agreement, ensure that adequate processing work is given to the processor.

9. M/s. BPIL, Calcutta, reserves the right to terminate the agreement in the event of the processor failing to make available the necessary infrastructure with all the required facilities for processing the products to the entire satisfaction of M/s. BPIL, Calcutta.

10. M/s. BPIL, Calcutta, has hired out the plant and machinery to the processor.

5. In view of the aforesaid terms and conditions of the agreement covering the processing carried out by the appellant, the Excise authorities held that the manufacture by the appellant itself is on account of the agreement. All the materials required for the manufacture including packing materials are supplied by M/s. Berger Paints. The goods are manufactured strictly in accordance with the processing details, quality, specification and quantity indicated by Berger Paints. If the goods manufactured by the appellant are riot to the specification of M/s.

Berger Paints, they have the right to reject them and the appellants shall compensate Berger Paints for the cost of the raw materials, containers and packing materials including transportation charges. The supervision and control over the working of the appellant by M/s. Berger Paints is complete. The entire goods are to be returned to M/s. Berger paints and the appellant at no stage had title to the goods manufactured by them. In view of these it was held that the relationship between the two parties was not on principal to principal basis and that the appellant was only an agent whose case is more appropriately covered by the decision in Pawan Biscuits (supra).

6. In the present appeal, it has been reiterated that the appellant's case is covered by the decision of the Supreme Court in the case of Ujagar Prints (supra) and the assessable value should be worked out based on cost of raw materials and job charges as claimed by the appellant. It has also been submitted that the decision in Ujagar Prints was followed by the CEGAT in Kandivali Metal Works v. C.C.E., Bombay - 1997 (18) RLT 297 as also by Madras High Court in the case of Asia Tobacco Co. Ltd. v. Asstt. Collector of Central Excise 1991 (53) E.L.T. 297. It has also been submitted that the case of the appellant is distinguishable from the decision of the Tribunal in Pawan Biscuits case. Appellant was a job worker and that does not create any relationship of principal and agent between the job worker and the supplier of raw material. There was also no control or supervision over the appellant by Berger Paints.

7. As alternative to the claim for assessment based on the cost of raw materials and job charges, the appellants have submitted that the decision impugned in the present order is in any case not correct as the Tribunal has already held in its Order Nos. 739-740/95-A, dated 8-11-1995 that further deductions than were allowed in Commissioner (Appeals) Order Nos. 974-975 (513-514/Ahd) C.E./Collr.(A)/Ahd, dated 20-1-1993 were permissible.

8. As against the aforesaid submissions on behalf of the appellants, it has been contended on behalf of the Revenue that in the facts of the present case, the relationship between Berger Paints and the appellant cannot be treated as on the basis of principal to principal. The manufacturing/processing has been undertaken

by the appellant only in consideration of the job work offered by Berger Paints; but for this, the appellant is not an independent processor or manufacturer of paints. Therefore, the appellant's case is clearly distinguishable from the case of textile processors covered by the Supreme Court decision in the case of Ujagar Prints (supra). The Departmental Representative has submitted that the appellant's case is more appropriately covered by the decision of the Supreme Court in the case of Calcutta Chromotype Ltd. v. C.C.E., Calcutta 1998 (99) E.L.T. 202 wherein the Supreme Court reaffirmed that if the buyer is a related person and price is not the sole consideration, Section 4(1) will not be attracted. The Supreme Court had also ruled that there is no bar on the authorities to lift the veil of a company and look into the real state of affairs and, that a company is a separate entity, by itself, does not mean that it cannot be held to be related. Further, Pawan Biscuits case was on all fours with the appellants case.

9. We have perused the records and have considered the submissions made by both sides. As mentioned earlier in this order, the Revenue authorities have held the appellant to be an agent of Berger Paints on account of the terms of the agreement of manufacturing/processing.

These terms indicate a very close relationship between the appellant and Berger Paints. The appellants are undertaking the manufacture/processing of paints and varnishes only because of the agreement between the two parties. The manufacturing has been started after the appellants hired out the plant and machinery of Berger Paints. The processing/manufacture for Berger Paints is the sole activity of the appellant. The agreement provides that adequate processing work will be given to the appellant by Berger Paints. All the items required for the processing are supplied by Berger Paints.

The processing is under the supervision of Berger Paints and on completion of processing/manufacture the entire goods must be supplied to Berger Paints. The appellant can be penalised by Berger Paints by making them to pay the cost of the raw materials etc., in case the processed material is not found to be of satisfactory quality. At no stage the appellant had any title to the goods. Thus, the appellant had no machinery, no capital to purchase raw materials and other requirements and had no knowledge and activity which they could independently put to use for processing/manufacturing of paints.

10. Sans (sic) the equipment of Berger Paints, their work orders, their supervision and other support, the appellant hardly existed. In fact the appellant is only an extended arm of Berger Paints. In these facts and circumstances, we are of the opinion that the orders of the lower authorities were correct in holding that the appellant was not an independent processor/manufacturer but was only an agent of M/s. Berger Paints.

11. The impugned order has relied heavily on this Tribunal's decision in Pawan Biscuits (supra). We find that the situation of Pawan Biscuits Co. and the appellant is very close. The appellants agreed to undertake manufacture/process paints and varnishes for Berger Paints. The entire materials were supplied by Berger Paints and Berger Paints exercised full control, direction and supervision over the activities of the appellant. The machinery was on hire from Berger Paints. It was for them to assign enough work to the appellant and it was for them to supply the entire raw materials. It was for them again to supply standards of production and to ensure that the standards were kept. The entire marketing was also done by Berger Paints. Thus, the appellant did not have any of the attributes like capital, machinery and capacity to carry out the activity of manufacture. The position was the same in the case of Pawan Biscuits also. The situation of these assessees is clearly distinguishable from the facts in the Ujagar Prints case. In that case, the job worker was an independent manufacturer with his own machinery, labour and expertise and was not under the control of the supplier of the raw materials. His was an enterprise on its own, separate from the raw material supplier. Therefore, we are not able to accept the appellant's contention that their case is covered by the Ujagar Prints decision and is distinguishable from that of Pawan Biscuits. We also observe that this Tribunal had taken note of Apex Court's decision in Ujagar Prints case while passing its order in the Pawan Biscuits case. In these facts and circumstances, we reject the appellant's claim for fixing assessable value as the sum total of cost of raw materials and job charges.

12. The appellant's alternate plea is that deductions as held permissible under the order of this Tribunal in the appellant's own case for a different period should be made available to them while fixing the assessable value. There could be no two opinions about this as that decision settles the valuation issue between the Revenue and the appellant. Therefore, this plea is accepted and it is ordered that the appellant shall be allowed the deductions as held to be permissible in this Tribunal's Order Nos. 739-740/95-A, dated 8-11-1995 and assessable value for the goods determined afresh in conformity with that order.