

Elecon Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-03-2000

Reported in : (2000)(70)ECC454

Judge : S Bhatnagar, Vice, S Peeran

Appellant : Elecon Ltd.

Respondent : Collector of Central Excise

Judgement :

1. The appellants are aggrieved with the Order-in-Original at 16.2.85 passed by Additional Collector of Central Excise, Meerut. By this order, the Id. Addl. Collector has confirmed duty amount of Rs. 51,891.84 on aluminium strips and Rs. 18,144 on paper covered aluminium strips. He has also confirmed out demand on 4732.420 kgs., of copper strips besides demanding interest at the rate of 17.5%. He has also imposed an penalty of Rs. 50,000 under Rule 173Q of the Central Excise Rules, 1944. The seized goods were directed to be released on payment of fine of Rs. 5,000. The facts of the case are that on 1.5.84, the Central Excise Officers visited the factory of M/s. Elecon, Partapur, Meerut and found the party engaged in the manufacture of aluminium strips (T.I.27) and paper covered aluminium strips (Conductors) (T.I.68) without having obtained a Central Excise licence. They had only one Central Excise licence for the manufacture of copper strips falling under Item 26A. Scrutiny of the records of the factory revealed that the value of paper covers copper strips cleared from the factory exceeded Rs. 40 lakhs during the preceding financial year, 1983-84. The assessee agrees to this fact in writing.

On physical verification of stocks, one cane of fully manufactured paper covered aluminium strips was found stored in the garage of the factory in the rear and another such cane was found stored in the manufacturing section. Four coils of bar aluminium wire rod and two coils of bare aluminium strips were found stored in the factory. On demand, the assessee failed to produce Central Excise licence for the manufacture of aluminium strips and paper covered aluminium strips (conductors). All 99 kgs. of double paper covered aluminium strips (conductors) in two coils, 171.500 kgs. of aluminium wire rod in four coils and 93.900 kgs. of aluminium strips in two coils were seized under the reasonable belief that the same were liable to confiscation.

Scrutiny of the papers contained in the file recovered from the factory indicated that M/s. Elecon received aluminium wire rods for fabrication in the name of M/s. Power Insulators at M/s. Elecon's, Partapur address. Firstly, they manufactured aluminium strips out of aluminium wire rods received and then subjected the same to the process of paper covering. They manufactured 4929.520 kgs. of copper strips and 6048 kgs. of aluminium strips and subjected the same to paper covering process between March '82 and April '84 at M/s. Elecon, Partapur and cleared the same from their factory in an irregular manner as per the chart enclosed with the show-cause notice.

Vide C. No. IV-CE (9) CF/163/84/3851 at 8.10.84, the Asstt. Collector (Prev.) issued a show-cause notice to M/s. Elecon wherein the contravention of Section 6 of the Central Excise & Salt Act, 1944 read with Rule 174 and of Rules 9(1), 52A, 53, 173G and 173F of the Central Excise Rules, 1944 was alleged and M/s. Elecon were asked to show-cause why a penalty should not be imposed on them under Rule 173Q of the Central Excise Rules, 1944, why 93.900 kgs. of aluminium strips, 99 kgs, of paper covered aluminium strips (conductors) and 171.500 kgs.

of aluminium wire rods should not be confiscated under Rule 173Q of the said rules and why duty amounting to Rs. 3796.16 involved on 4929.520 kgs. of copper strips and Rs. 51,891.84 involved on 6048 kgs. of aluminium strips and Rs. 18,144 involved on the paper covered aluminium strips weighing 6048 kgs (total duty Rs. 73,831.94) should not be demanded from them under Rule 9(2) of the Central

Excise Rules, 1944.

2. The appellants have denied that they are engaged in the manufacture of aluminium strips and paper covered aluminium strips. They also denied that they had received aluminium wire rods for fabrication in the name of M/s. Power Insulators or that they manufactured aluminium strips out of such rods or that they undertook the paper covering of 6048 kgs. of such strips from March '82 to April '84. As regards the details of job bills issued as given in the charge enclosed with show-cause notice, they had given various explanations inasmuch as the few entries in several pages of the file seized by the Department. They denied the entries in those bills. Likewise, they have explained regarding other entries also. They also explained with regard to the challans issued by the other parties to them. The Ld. Collector has taken into consideration each and every plea made by them and had recorded a detailed finding. In the findings, he has discussed the reason as to why their explanation is not sustainable and how there are several contradictions and how pleas cannot be accepted. He has held that the presence of papers in the name of M/s. Power Insulators 189, Thapar Nagar, Meerut at the premises in Industrial Estate, Partapur, Meerut (which was the declared premises for assessee) further shows that the documents were falsified in the name of M/s. Power Insulators to conceal a part of transactions undertaken by the assessee with a view to evading Central Excise duty. He has also held that it is significant to note that a large number of papers in the said file are on a letter pad in the name of M/s. Power Insulators and there is no indication whatsoever on such documents that their office was located at B-12, Partapur Industrial Estate, Meerut which were the same premises which housed M/s. Elecon's factory, the assessee. He has also held that it is also noteworthy that in the letter pad of M/s. Elecon available at page 3 of the said file the office of M/s. Elecon has been shown at 189, Thapar Nagar, Street No. 5, Meerut. Therefore, in the circumstances when even M/s. Elecon's office is shown at Thapar Nagar, Meerut it is just not believable that M/s. Power Insulators which had no unit in Partapur Industrial Estate, Meerut could have their office at the factory of M/s. Elecon at Partapur Industrial Estate, Meerut. He has held that such state of affairs betrays mala fides on the part of the respondent party and proves that their intention was to hide certain transactions of the assessee under the name of M/s. Power Insulators, Thapar Nagar, Meerut in order

to avoid the ambit of Central Excise Duty. He has also observed that the Letter dt. 21.2.84 from M/s.

Sai Electricals, Meerut at page 15 of the said file purports to place an order for supply of aluminium strips and while originally the letter was addressed to M/s. Power Insulators, there is an interpolation in ink giving the address of Industrial Estate, Partapur. This also shows that the actual manufacturing work in respect of aluminium strips was done at Industrial Estate, Partapur where the factory of M/s. Elecon and not of M/s. Power Insulators was located. Likewise, the Ld.

Collector has discussed various aspects of the matter and has concluded that there is no satisfactory explanation as to why such letters including those wherewith raw materials were sent by customers were recovered from the factory of assessee and why should the customers address such other concerns by giving the address of the assessee at Partapur. He has also found that many of the documents in the said file as recovered from the assessee which are in the name of M/s. Power Insulators. He has held that it is noteworthy that no relatable account of M/s. Power Insulators have been shown to establish a nexus between the manufacturing activity of M/s. Power Insulators at Thapai Nagar, Meerut with the said documents recovered in the said file from the assessee. He has held that even when the Central Excise Officers contracted Smt. Nirmal Jain, Proprietor of M/s. Power Insulators, Thapar Nagar, Meerut on 2.5.84 and recorded her statement, she failed to show or even allude to any account or records of M/s. Power Insulators which could be relatable to the documents in the name of M/s. Power Insulators which were contained in the said file recovered from the assessee. Ld. Additional Collector has held that no evidence has come forth to indicate that the transactions described in the documents contained in the said file recovered from M/s. Elecon related to the manufacturing activity by M/s. Power Insulators. He has noted the statement dt. 21.5.84 of Shri B.K. Jain on behalf of M/s. Sai Electricals (one of the customers) mentions that a person comes and collects the material for manufacture and M/s. Sai Electricals did not know as to actually where such material was taken for fabrication and manufacture. Therefore, Ld. Additional Collector has held that this statement further mentions that the customer was not aware as to whether the manufacturing activity was

done at Partapur or at Thapar Nagar. He has held that despite their declared ignorance of the place of manufacture, M/s. Sai Electricals had been sending the materials for fabrication to the address of Industrial Estate, Partapur, Meerut which is evidenced from challans of M/s. Sai Electricals dt. 22.2.84 and 23.3.84 (available at pages 16 and 35 of the said file). Therefore, he has concluded that these challans bear an eloquent testimony to the effect that all materials for fabrication from customers were received at the factory of M/s. Elecon in Partapur Industrial Estate, Meerut. He has also recorded that M/s. Sai Electricals are located at Victoria Park in Meerut City and M/s. Power Insulators are also located in Thapar Nagar, Meerut City and both the said premises are within the main city at a small distance from each other. Therefore, he has held that it is not explained as to why M/s. Sai Electricals addressed their challans for supply of raw materials for fabrication to the Industrial Estate, Partapur which far away from Meerut City proper. Likewise, Ld.

Collector has discussed in great detail each and every plea taken by them and found the same to be not acceptable. It is therefore not required for us to extract the various findings given by the Addl.

Collector but it is sufficient to show a view of the findings recorded by Addl. Collector.

3. We have heard Shri Bipin, Ld. Advocate for the appellant and Shri K.K. Jha, Ld. SDR for the Revenue.

4. Ld. Advocate submitted that covering of aluminium strips and aluminium papers will not amount to manufacture both falling under the same tariff. He submitted that the item do not fall under T.I.68 but to fall under T.I.27 as aluminium strips. It is his contention that the process of covering aluminium strips paper does not bring into existence and new articles he relies on the ratio of the judgment rendered in the case of Shakti Insulated Wires (P) Ltd. and Anr. v. Union of India as . He also relied on the judgment of the Hon'ble Supreme Court as reported in 1994 (54) ECR 315 to support his plea that merely because the item falls under the same tariff, it does not mean that they are dutiable. It is his contention that the assessee was not manufacturing aluminium strips but they were receiving the same from customers

and that they were covering aluminium strips with paper. He submitted that the assessee had carried out the work of covering the strips with paper only for a day. They had informed the Collector and had also obtained a licence for such activity. He submitted that the department officials had not made any enquiry to verify the veracity of the statement of Shri Satish Jain in support of the said plea. He submitted that the assessee was having facility to manufacture copper strips that the issue was with regard to aluminium strips and as to whether the activity of covering the aluminium strips paper is to be considered as the activity of manufacturer to bring the goods under T.I.26A or T.I.68. He submitted that the papers were recovered from the factory of M/s. Power Insulators and that the department had not produced any evidence to club the clearances of M/s. Power Insulators and that of the assessee.

It is his contention that Hon'ble Supreme Court has held in the case of Electrical Aluminium Strips are classifiable under Item 27(b) and not under T.I.68 and however, the Bombay High Court in the case of Shakti Insulated has been that such goods fall under T.I.27(b). He submitted that the department had not placed any evidence to show that the assessee had manufactured aluminium strips in their factory. He referred to the letter said to have been given to the department. He submitted that this letter dt. 20.4.84 was not seized on this part but later they recorded the statement and during that time, Shri Satish Jain had given the letter to the department officials. He also submitted that challan and job charge bills overlapped and hence duty is not recoverable, as it refers to M/s. Power Insulators. He submits that the unit M/s. Power Insulators is owned by his wife of Shri Satish Jain who is a proprietor of the assessee's company. Further, it is his contention that both the units have to be treated as independent unit and there is no flow back for each other unit. He admitted that M/s. Power Insulators has not taken licence and had not manufactured maintained any registers. He also submitted that the department had not contravened the proviso of Section 11A to invoke duty for larger period.

5. Ld. DR submitted that the Ld. Additional Collector had given a detailed finding running into several batches and the Ld. Addl.

Collector had discussed each point which had been raised before him and had negative the same in view of lack of explanation and any convincing evidence placed by the assessee. He also referred to the evidence placed on record pertaining to one Shri Rajinder Singh, an employee for M/s. Power Insulators who was signing the papers on behalf of both the companies and how he was manipulating the activity. Ld. DR also submits that the wife of the appellant was not entrepreneur and she was totally independent and was working as house wife and therefore, Satish Jain was set up as the alleging unit at Pitarpur only and all the records of M/s. Power Insulator were seized from the assessee's unit. The Ld.

Additional Collector had discussed about the mutuality of interest and as to how both the units are required to be clubbed. He also pointed out to the Asstt. Collector pertaining to the letter which has been referred to be the Ld. Advocate. Ld. DR submitted that the activity of paper and aluminium strips amount to manufacture and the Ld. Additional Collector had given a detailed finding on this issue. He submitted that the issue pertaining to conversion of JI Steel Wire into PVC wire amounting to manufacture and both the items were duly known in the market. In this context, the Tribunal had decided the case in favour of the revenue as in the case of Collector of Central Excise v. D.K.Electrical Industries the case of CCE v. Vee Kay Electricals as . He submitted that the citation of Shakti Insulated cannot apply in the present case as the Bombay High Court have not dealt with the concept of manufacture and note of the editor in the report is misleading. He submitted that in the present case, there has been clandestine removal and hence larger period is invocable.

6. We have carefully considered the submissions made by both the sides and have perused the records in this case. The show cause notice in this case alleged that the appellants had contravened the provisions of Section 6 of Central Excise Tariff Act read with Rules 174(a)(1), 52A,53,173g(4) 173g(l),173F, Central Excise Rules, 1944 inasmuch as on 1.5.84, the Supdt. (Prev.) of Central Excise visited the factory and found that the assessee was engaged in the manufacture of aluminium strips (TA. 27) and paper cover (T.I.68) without having obtained a Central Excise Licence. They had only one Central Excise Licence for manufacture of copper strips under T.I.26A. The scrutiny of records revealed that

the value of paper covered copper strips cleared from the factory exceed Rs. 40 lakhs during the proceedings financial year of 1983-84 and that the assessee on this point admitted in writing. On physical verification of stocks, the aluminium strips and paper covered aluminium strips one cone of fully manufactured paper covered aluminium strips were found stored in the garage of the factory and another cone was found in the manufacturing Section. 4 coils of bare aluminium wire rod and 2 coils of bare aluminium strips were found in the factory. The assessee could not produce the licence as required for manufacture of both these items. Hence the appellants were called up to explain as to why duty and penalty should not be charged. The department also annexed to the show cause notice, the details of excisable goods manufactured had cleared without payment of duty. The assessee has submitted various explanations and these explanations have been gone into great detail by the Ld. Collector and each of the explanations has been rejected. The question before us is as to whether the item paper covered aluminium strips falls under T.I.68. On this point the Hon'ble Supreme Court in the case of CCE v. D.K. Electrical Indus. (supra) has held that insulated electric conductors of aluminium and copper falls under T.I.No. 26A and 27 and not under T.I.68 even after the insulated. In view of the judgment, we have to held that the classification of the insulated aluminium strips could not be classified under T.I.68 but is properly classifiable under T.I.27. Further question is as to whether the appellants can absolve duty liability as worked out by the department and the evidence which had been produced. The Ld. Addl.

Collector has held that documents clearly disclosed the manufacture and clearances of aluminium strips as well as paper cover aluminium strips.

The department has seized the aluminium strips which found in the godown. The explanation given by the assessee is that they had not manufactured aluminium strips. This aspect had been rejected on a very cogent evidence and the assessee has not been able to explain with any evidence to show that manufacture of aluminium strips was by another unit. The assessee admitted even before us that they had manufactured aluminium strips. It was found in the assessee's garage and another such cone found stored in the manufacturing section. The department had also seized four coils of bare aluminium wire rod and two coils of bare

aluminium strips found in the factory. The assessee had not been able to explain at the time of seizure and the Ld. Addl. Collector has rejected the subsequent explanation given by a detailed finding. We do not find any reason to interfere with the detailed reason given by the Addl. Collector and no satisfying explanation or arguments have been placed before us to set aside the reasoned finding of the Addl.

Collector. The Addl. Collector has found that no amount payee cheque was issued to M/s. Power Insulators and has also found that the transaction between Elecon and M/s. Power Insulators are one of the same and they cannot be treated as a different unit. We are inclined to accept this finding as uncontroverted and it cannot be rejected. The Ld. Addl. Collector has also discussed about the letter dated 18.4.84 which is said to have been sent to the Inspector on the basis of which the Ld. Advocate submitted that the department is aware about the activity. We are satisfied with the reason given by the Addl. Collector on this point and it is correct and does not require further findings.

He has clearly held that the activity could be only an activity of process of paper covering of aluminium strips and have commenced only on 18.4.84. We agree with this finding and even before us satisfactory explanation has not been given to this finding. The Ld. Addl. Collector has already rejected the assessee's plea that four coils of bare aluminium wire rod had been stored in garage and not in the factory.

Ld. Addl. Collector has rejected this difference as unsubstantiated and has held that the quantity of 171.500 kgs. of aluminium wire rods is too large a quantity to be needed for earthing in the factory. The Ld.

Additional Collector has also come to the finding that it is totally unsupported and false submission made by the assessee. We agreed with the findings of the Ld. Addl. Collector on this point and it cannot be believed that such huge quantities of bare aluminium rods could have been purchased for earthing purposes and no evidence has been produced.

It is clear that this material had been purchased for manufacture of aluminium strips and aluminium strips have been found in the appellant's premises. The

conclusion arrived at that the assessee had manufactured aluminium strips is uncontroverted and requires acceptance. Ld. Advocate submitted that there is over lapping of challans and job charges bills. However, he is unable to explain how there can be overlapping in the matter. Therefore, we do not find this explanation convincing. On the other hand, we find that the Addl.

Collector has individually taken up the entries in the files and discussed about it. The reasons given by Addl. Collector requires acceptance at our end. Ld. Advocate however, pointed out that the duty computation is required to be worked out again in view of the item paper covered aluminium strips (conductors) falling under T.I.27 and not under T.I.68. In view of the Hon'ble Supreme Court judgment held that this item falls under T.I.27 and we accept the Advocate's plea to recalculate the duty and also accept the plea which has been pleaded before us and consider the plea to set up of duty as urged by the Ld.

Advocate before us. The Ld. Advocate pleaded that the penalty of Rs. 50,000 in the present case is too excessive including the levy of interest and prayed for relief in the matter. We accept the Advocate's plea and we do not see the reason to impose Rs. 50,000 penalty in the present. In the end of justice, we order for waiver of interest.

However, we reduce the penalty to Rs. 10,000. With this modification and with the direction to recomputed the duty in view of the classification of the paper covered strips falling under T.I.27, otherwise, there is no merit in the appeal. Hence the same is disposed of in the above terms.

With due respects to Hon'ble Member (Judicial), my views and orders in the matter are as follows: 7. I observe that this case pertains to two different units -- one M/s.

Elecon and two M/s. Power Insulators. Whereas the appellant's unit i.e.

M/s. Elecon is stated to be a partnership unit of Shri S.C. Jain and Shri A. Jain, M/s. Power Insulators is a proprietiership concern of Mrs.

Nirmala Jain W/o. Shri Satish Chand Jain.

8. M/s. Elecon had a central excise licence for manufacture of copper products during the relevant period.
9. They had also informed the Department that they want to start the process of covering of copper and aluminium strips. This contention has been substantiated by the appellants by filing copies of the appellants' letter to the Inspector of Central Excise, Range II, Meerut dated 17.4.84 and 18.4.84 and to the Supdt. dated 30.4.84 and this fact has not been controverted.
10. In fact, the letters dated 18.4.84 and 30.4.84 also indicate the proof of receipt of these letters by the Inspector concerned who has signed above his official stamp. Therefore, the appellants' contention in this regard is acceptable. These communications are significant as they show that they were contemplating job work of paper covering of aluminium strips supplied by the parties concerned and they will not be manufacturing aluminium strips or wires but only covering aluminium strips/ wires with paper on job work basis. The very fact that they have addressed this communication and sought specific permission shows their bona fides in this respect. Their letter dated 30.4.84 addressed to the Supdt. not only incorporates a request for grant of permission but also states that they want to undertake trial operation.
11. I also observe that the appellants have filed a copy of approved ground plan and copy of approved classification list regarding copper products including paper covering thereof and a chart showing a large number of visits by the officers to the factory during 1983-84. The appellants' contention in this respect is, therefore, also acceptable.
12. As regards M/s. Insulators, I find that the officers had recorded a statement of the proprietress Smt. Nirmala Jain W/o. Shri Satish Chand Jain on 2.5.84 and this shows that she was the owner of the factory of M/s. Power Insulators at Thapar Nagar, the office of which is located in the factory of her husband Shri Satish Chand Jain at Partapur. This statement also shows that the Central Excise Officers had inspected the factory and its records and found--'three small vertical machines on which paper covering of thin strip of about 3 mm size could be done' and according to the statement, one big vertical strip the bill of purchase has been

shown to the officers had been sent for repairs to M/s. Mittersain Industries purchased from A.K. Jain and will be back after a week and stated that she was only doing paper covering of wires and strips of copper and aluminium on all these machines and had offered the inspection of the machines which had been sent for repair after its return.

13. She had also stated that on these machines, strips cannot be manufactured.

14. She had also explained the reasons for not taking central excise licence mentioning that she was working only with a couple of workers on job work basis.

15. She had also shown the records on being asked to do so and had further stated that they issued challans and bills from which account is prepared and mostly, the payment is received by A/c payee cheques.

16. She has used the word 'fabrication' for this paper covering operation and also indicated the charges of Rs. 7 to Rs. 9 per kg. for job work when the paper is also supplied by the party.

17. She also indicated the capacity of the factory as 200 kg. for 24 hours on an average. she also indicated that the power connection was in the old name of Mahaveer Handlooms and she has 5 H.P. connection which was sufficient for these machines. She had also indicated her annual turn-over of job work of Rs. 25,000 and mentioned that during the last six months, the factory had consumed 1090 units during the period 23.9.83 to 25.3.84.

18. I consider that this statement is very important. It shows that Mrs. Nirmal Jain had given clearly very specific details about the machines, the operation and the way the factory functioned and she conducted her business. The Department has not been able to show that these facts stated by her were factually incorrect. Therefore, the existence of Thapar Nagar factory of Mrs. Nirmal Jain in which the machines capable of only paper covering copper or aluminium strips were installed and were in use has to be accepted. In other words, it cannot be treated as a dummy unit in view of Tribunal's order in the case of Alpha Toyo Ltd. v. CCE, New Delhi .

19. There is no law to my mind which bars a wife from having a separate factory from that of her husband or from being proprietor in her own right. There is also no bar in husband and wife helping each other in a normal way. We have to take a pragmatic way in these matters and cannot close eyes to realities. A husband can certainly allow the wife to open a factory or unit.

20. The statement of Shri Rajendra Singh, an employee of M/s. Elecon as well as M/s. Power Insulators is also important to the extent of showing that he was working for both the units on part-time basis and maintained accounts in the form of diaries and correspondence as well.

Since he was so employed and the office of Thapar Nagar factory was also in the Partapur state, there is nothing surprising if the records relating to both were found at one place or written by the same man (common employee).

21. There is no law which bars a person to work for more than one units or for units to have a common employee. In fact, this is a common practice in the very small-scale sector.

22. The letter dated 21.5.84 of Sai Electricals addressed to the Supdt., Central Excise if anything supports the appellants' contention that Mrs. Nirmal Jain's statement that aluminium wire rods or strips used to be received in M/s. Power Insulators for paper covering and even this activity was loosely called as 'fabrication' in trade parlance.

23. The statement of Shri Satish Chand Jain, partner of M/s. Elecon dated 1.5.84 is also very important and shows the correctness of counsel's plea that they were manufacturing copper strips and covering them with paper and then clearing such paper covered copper strips.

They had licence for copper products and had filed the classification list which had been approved as noted above and on this factual part, there is no doubt. The main problem is with reference to the question whether the aluminium strips found in the factory were manufactured in the factory and whether the aluminium rods were used for such manufacture or the factory was engaged only in the activity of

paper covering of aluminium strips on job work basis.

24. If it could be shown that they were engaged only in the later and activity, then they would stand covered by the Tribunal's orders in the case of Deen Dayal Non-Ferrous Industries Pvt. Ltd. v. CCE, Bombay and Supreme Court 1994 (54) ECR 315 (SC) as mere paper covering of copper/aluminium wires or strips received for the purpose by itself does not amount to a process of manufacture, the goods remain classifiable under T.I.26A/27.

Hence, in view of the intimation to the Department as per the letters quoted above, they could not be charged with any offence in this regard but, if they were also engaged in the manufacture of aluminium strips, it would be a different matter.

25. However, as we have seen above, M/s. Power Insulators cannot be considered as a dummy unit and in spite of a common employee, could not be treated merely as a part of M/s. Elecon, Partapur and the Department has not been able to adduce any evidence that manufacture of copper/aluminium wires/strips was being done at Thapar Nagar and Mrs.

Nirmala Jain's statement that machines were capable of only paper covering of such wires and strips and she was doing this work on job work basis has not been proved to be wrong. The Department has not been able to establish that there was any financial flow-back. Although it is very difficult to so prove in cases of such intimate relationships, but there is not even circumstantial evidence or one which can pass the test of preponderance of probability to allow clubbing of two units and the case cannot be based merely on an assumption or presumption simply because the two persons happen to be related closely and in any eventuality, the appellants would be entitled to the benefit of doubt in this regard.

26. In the case of appellants M/s. Elecon themselves, the activity of covering of aluminium strips with paper after intimating the Department clears them to that extent.

27. Further, the appellants have contended that the challans have been wrongly treated as 'job bills' and claimed that there were errors in the computation

including duplications in the annexure to the show cause notice. Regarding four coils of bare aluminium rods found in the premises, it was their contention that they were stored in garage and not in the factory but that does not make any difference as both the premises apparently belong to the appellants and in any case, the ownership of these four coils has not been denied. That the quantity was required for earthing is not believable in the absence of anything to show that so much quantity is required for such purpose. Regarding paper covered aluminium strips, in view of the letters to the Inspector dated 17.4.84 and 18.4.84, there is no reason to doubt that paper covering was done as intimated.

28. Further, as regards the four coils of strips, they have stated that the same were received from M/s. Electra India Ltd. on 30.4.84 under the cover of delivery voucher dated 1.5.84. But, learned Additional Collector is correct in pointing out that aluminium strips and paper covered aluminium strips had been apparently received by them from Electra India Ltd. on 30.4.84.

29. Learned Additional Collector has, however, erred in relying on the statement of Shri Rajendra Singh to the extent of believing his statement that the work of aluminium strips and of paper covering of aluminium strips was commenced on 1.5.84 because that is the date of seizure and of recording of statement and the officers had already found the above quantity in stock.

30. Further, a question arises whether the machines used for manufacturing bare copper strips could or could not be used for manufacturing aluminium strips. An answer to the question would have clinched the issue; but, we find that there is no definite assertion on the part of the appellants (as in the case of Mrs. Nirmal Jain's statement regarding M/s. Power Insulators) that they could not be so used and this coupled with the fact that aluminium rods could be used for manufacture of aluminium strips on the same or similar machines on which copper strips are manufactured and the discovery of a large quantity of aluminium rods/wire rods along with the bare aluminium strips would tilt the preponderance of probability in the favour of the Department to some extent but in respect of two coils of paper covered aluminium strips, balance would again tilt in favour of the appellants in view of their letter dated 17.4.84 and 18.4.84 to the .Inspector and subsequent

letter to the Supdt. cited above.

(i) That the production of M/s. Power Insulators cannot be clubbed with that of M/s. Elecon.

(ii) That the process of paper covering aluminium/copper wires/strips simplicitor would not amount to manufacture and therefore, quantity which was subjected to only this process has to be excluded and treated as non-excisable.

(iii) That the quantity of aluminium wire rods found in the garage can only be treated as raw material for manufacture of aluminium strips.

(iv) That only the quantity of bare aluminium strips seized could be considered as excisable and dutiable.

32. I also observe that the Additional Collector has not cited any section, rule or any other authority to show that interest could be charged on the duty due. Learned DR has also not been able to show any such provision.

33. In the absence of any section or rule providing for levy of such interest during the relevant period, no interest could be charged on the amount of duty found due. (Therefore, there was no question of Tribunal waiving any interest).

34. The penalty is also required to be proportionate to the offence and one of the criterion for judging the seriousness of the offence is the quantity of duty involved. Therefore, once in view of the above findings, the duty amount payable was required to be re-ascertained and recalculated the quantum of penalty imposable cannot be determined in advance.

35. In view of the above discussion, the impugned order is set aside and remanded for de novo consideration in the light of observations and findings and the Law.

In view of the difference of opinion between Hon'ble Member (judicial) and the Vice President, the matter is submitted to Hon'ble President for reference to a third Member on the following point: Whether the order is only required to be modified and matter remanded for recalculation of duty in the light of observations and

findings of Hon'ble Member (Judicial) or the appeal is required to be accepted on merits and required to be remanded for re-calculation of duty in the light of observations and findings of the Vice President.

1. In view of the difference of opinion between the Hon'ble Member (Judicial) and the then Hon'ble Vice-President, the matter was referred to me to express my view as a third Member on the following point: Whether the order is only required to be modified and matter remanded for recalculation of duty in the light of observations and findings of the Hon'ble Member (Judicial) or the appeal is required to be remanded for re-calculation of duty in the light of the observations and findings of the Vice-President.

3. As can be seen from the difference of opinion, difference in between two Member is very narrow and very limited. Both Members have expressed that the matter is required to be remanded for re-calculation of duty.

4. Both sides submit that there is no dispute with reference to the classification of paper covered aluminium strips. The item in question falls under T.I. 27 of the Central Excise Tariff Act in view of the ruling given by the Supreme Court in the case of Vee Kay Electricals as reported in 1995 (77) ELT 420. Since the Adjudicating Authority has classified the item under T.I.68, in view of the ruling of the Apex Court the duty is required to be recalculated on classifying the item under T.I.27.

5. Both sides submit that dispute in between both Members is only on the point of clubbing of the clearances of two units. It was submitted by the learned Counsel for the appellants that M/s. Elecon and M/s.

Power Insulators are different legal entities. M/s. Elecon is a partnership concern consisting of Shri S.C. Jain and A. Jain, whereas other concern viz., M/s. Power Insulators is a proprietary concern run by Smt. Nirmala Jain wife of S.C. Jain. It was submitted on behalf of the appellant that there was no mutual interest in between two concerns and entire activities are carried out independently and there was no justification for clubbing clearances of Power Insulators to M/s.

Elecon on the ground that proprietor was wife of a partner in M/s.

Elecon. He submits that this position has been properly analysed by the Hon'ble Vice-President in Paras 12 to 21 of his order.

6. On the other hand, learned DR drew my attention to the observations made by the Member (Judicial) and particularly in Para 5 and 6 of his order. He said that as observed Smt. Nirmala Jain wife of Shri S.C.Jain is not an entrepreneur and she was totally dependent and was working as a house-wife. He submits that office itself was situated in the premises of the factory of M/s. Elecon and no independent decision was taken by the wife with reference to the manufacturing activity of Power Insulators and everything was done at the behest of Shri S.C.Jain who was a partner in M/s. Elecon. He said that entire evidence has been properly evaluated by the Additional Collector in the impugned order and the observations with reference to that evidence made by the Member (Judicial) strengthens this view.

7. I have carefully considered the matter. The only point of difference in between two Hon'ble Members in a way is whether clubbing of clearances of both units is justified or not. Merely on the ground that wife carries on another unit, the clearance of that unit should not be clubbed with the other unit in which husband is a partner as it was rightly argued by the counsel on behalf of the appellants. But the question is to be decided in clubbing the unit not on the point that Smt. Nirmala Jain was wife of one of the partners of the partnership concern but whether she carried out manufacturing activity independently with that of another unit in which her husband was a partner. As can be seen from the records and observations made by Member (Judicial), it is clear that manufacture and clearances of aluminium strips as well as paper covered aluminium strips have taken place under the supervision and management of Shri S.C. Jain.

Furthermore, it was clearly brought out by the authorities below that no cogent evidence was brought on record to substantiate that manufacture of aluminium strips was carried out by other unit i.e.

,M/s. Power Insulators run by Smt. Nirmala Jain, wife of Shri S.C.Jain.

8. In the facts and circumstances and in view of the clear findings by the lower authorities, the view expressed by Member (Judicial) is concurred with. Accordingly the file is returned to the original Bench to pass an appropriate order.

View The clearances of M/s. Elecon and M/s. Power Insulators are required to be clubbed, duty demand is to be recalculated in view of the classification of paper covered aluminium strips under T.I.27 of the Schedule to the erstwhile Central Excise Tariff. The penalty is reduced to Rs. 10,000.

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