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

Applied Electronics Ltd. Vs. Collector of Central Excise

Applied Electronics Ltd. Vs. Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/18718

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-21-2000

Reported in : (2001)(130)ELT500TriDel

Appellant : Applied Electronics Ltd.

Respondent : Collector of Central Excise

Judgement :

1. In these five appeals, arising out of a common Order No.32/92-Collr., dated 30-6-1992 passed by the Collector of Central Excise, Mumbai, the issue involved is whether the exemption under Notification No. 175/86-CE., dated 1-3-1986 is available to the excisable goods manufactured by M/s. Swicon Micro System Pvt. Ltd. 2. Briefly stated the facts are that M/s. Swicon Micro System Pvt. Ltd. manufacture electronic testing and measuring instruments, electrical machinery, mechanical appliances, etc. On 26-2-1989, Central Excise Officers intercepted a vehicle No. MTF 2936 carrying electronic testing and welding instruments and temperature controllers valued at Rs. 1,78,337.50. The goods were affixed with brand name 'APLAB' which was concealed with stickers of 'Swicon'. The Officers also found 5 meters and 6 power supply valued at Rs. 22,000/- unaccounted in their factory premises. All the goods were seized by the Officers. A show cause notice dated 24-8-1989 was issued to them alleging that goods manufactured by them were affixed/screen printed with brand name 'APLAB's of M/s. Applied Electronics Ltd.; that the brand name was concealed by affixing a sticker having name 'Swicon' over the printed brand name; that all the excisable goods

manufactured by them were sold exclusively to M/s. Applied Electronics who in turn sold them all over India. The Collector, under the impugned order, confirmed the demand of Central Excise duty amounting to Rs. 12,76,010.35 p. in respect of goods cleared during the period from October, 1987 to January, 1989; confirmed the duty of Rs. 28,091-31s in respect of goods cleared without payment of duty and seized on 28-2-1989, confiscated the seized goods with an option to redeem the same on payment of fine Rs. 2,00,000/-; imposed penalty as under : 2. Shri Rohan Shah, learned Advocate, submitted that the products manufactured by M/s. Swicon are supplied to M/s. Applied Electronics and they affix their brand name 'SWICON' by a sficker; that the products when cleared by M/s. Swicon bore only one legible mark i.e. of Swicon itself; that what is relevant for the purpose of the assessment is the goods in the state in which they are at the point of time of clearance which is the factory gate in the present matter and what is subsequently done is immaterial; that as per decision of the Madras High Court, in B.H.E.L. Ancillary Association v. C.C.E., 1990 (49) E.L.T. 33 (Mad.), what is important is that the small scale manufacturer should attempt to establish a connection in the course of trade between the mark and the products; that since in the present matters, the mark affixed on the product at the time of clearance is of 'Swicon', there is no use of the trade mark of another person and there is no attempt to establish the connection in the course of trade between the mark and the product. The learned Advocate, further, submitted that as their entire production is sold to M/s. Applied Electronics, affixing of brand name 'APLAB' will not make them ineligible for the exemption under Notification No. 175/86-C.E. as M/s.

Applied undertake some further processing on goods before selling them.

He relied upon the decision in the case of Model Soap Company v.C.C.E., Calcutta-1,1998(T) and Prakash Industries v.C.C.E., 2000 (119) E.L.T. 30 (LB) wherein it was held that if goods are marked with the brand name of the customers and such branded goods are only supplied to the customers and not traded in the market, the use of the brand name is not in the 'course of trade1 and it would not amount to using brand name so as to deny the benefit of Notification No.175/86. The learned Advocate mentioned that whatever duty has been paid by M/s. Swicon, its Modvat credit has been availed of by M/s. Applied Electronics; that

Collector has also given his findings, in the impugned order, that the argument that M/s. Applied Electronics were carrying further processing on the goods and were clearing these goods after paying duty at proper rate and value was not relevant to the demand made in the show cause notice.

3. The learned Advocate also mentioned that the demand is hit by time limit as the demand confirmed is for the period from October, 1987 to January, 1989 and the show cause notice was issued in August, 1989; that larger period of limitation is not invokable as they had filed the classification lists which had been approved by the Department; that it has been held by the Tribunal in C.C.E. v. Muzzaffarnagar Steels -1989 (44) E.L.T. 552 that before approving the classification list, the Assistant Collector should fully satisfy himself about the particulars of goods being manufactured and the process of manufacture and the relevant facts. He also relied upon the decision in the case of Nestler Boiler Pvt. Ltd. v. CCE, 1990 (50) E.L.T. 613 (T) wherein also it was held that while approving the classification list, the department is expected to study the process of manufacture.

4. Regarding imposition of penalty under Rule 209A of the Central Excise Rules, the learned Advocate submitted that the penalty under the said Rule can be imposed only if the person who has acquired or dealt with the excisable goods, knows or has reason to believe that the goods are liable for confiscation. He relied upon the decision in the case of S.R. Jhunjhunwala v. CCE, Mumbai-II, 1999 (114) E.L.T. 890 (T), wherein it was held that unless specific allegations are set out in show cause notice and there is elaboration as to how ingredients of Rule 209A are satisfied, penalty under Rule 209A is not sustainable. Reliance was also placed on the following decisions :- (i) SMZ Schimmer & Scharwz Chemical Ltd. and Ors. v. CCE, Pune, 2000 (36) RLT 592Tirupati Granites P. Ltd. v. C.C. -1995 (78) E.L.T. 301 (Tribunal); (iv) Click Nixon Ltd. v. CCE, 1998 (97) E.L.T. 436 (Tribunal); (v) Standard Surfactants Ltd. v. CCE, 1998 (28) RLT 41 5. Learned Advocate submitted that neither there was any allegation contained against the appellants Nos. 3, 4, 5 in the show cause notice nor there is any finding against them indicating their role and conscious knowledge in the impugned order, and as such no penalty can be imposed on them under Rule 209A. He submitted that no penalty is imposable on M/s. Applied Electronics as they were not party to any

fraud or they had not taken any active part which could lead to evasion of duty; that they had to remove the sticker when the final products were cleared and sold in their brand name.

6. Countering the arguments Shri M.P. Singh, learned DR, submitted that after the amendment of Notification No. 175/86 by Notification No.223/87-C.E., dated 22-9-1987, Swicon did not disclose the use of brand name 'APLAB' on their products; that with a view to camouflage the brand name 'APLAB' they were putting a sticker bearing their name over 'APLAB'; that the department came to know about use of brand name of another person only when the goods were intercepted while in transit; that Applied Electronics were availing of higher notional credit under Rule STB of Central Excise Rules at the relevant time. Learned DR, further, submitted that while submitting the reply to the show cause notice M/s. Swicon had stated that they were selling the goods under their brand name as they were putting their sticker; that putting up a sticker does not make the goods as non-branded goods; that further M/s.

Applied Electronics were supplying the metal plates bearing their name which were affixed by Swicon on the excisable goods and as such there is no doubt that the brand name 'APLAB' was affixed by Swicon on the goods manufactured by them, and accordingly the mischief of para 7 of Notification No. 175/86 is attracted. Regarding the claim of the appellants that further process was done at the premises of Applied Electronics the learned D.R. submitted that it is not their case that the impugned goods at the time of clearance from the factory premises of Swicon were semi-finished goods; that in any case in normal course semi-finished goods are not affixed with brand name; that the classification list filed by Swicon was in respect of fully finished product and not the parts of the products; that as such the products manufactured and cleared by Swicon were not eligible for exemption under Notification No. 175/86. The learned DR further submitted that M/s. Applied Electronics played fraud by taking higher notional credit and removing the sticker and selling the goods on their own; that there was deliberate intention to evade payment of duty on their part. He also referred to the findings of the Collector to the effect that no manufacturing process was undertaken by M/s. Applied Electronics. He also mentioned that except a bold statement that M/s.

Applied Electronics were undertaking the process on the goods received from Swicon, no details about the nature of the process and for what purposes those processes were undertaken have been given by the Appellants. He emphasised that even now the learned Advocate appearing on behalf of the appellants has not mentioned any of the processes supposed to have been undertaken by M/s. Applied Electronics on the goods received from Swicon. He also submitted that the decision in the case of Model Soap Co. and Prakash Industries, supra, are not applicable to the facts of the present matter as in those cases the goods were captively consumed by the brand name owner and as such the goods were not coming in the course of trade; that in the present matters the goods were sold by M/s. Applied Electronics and they were coming to the main-stream of the trade where the goods are known by their brand name. He also contended that merely because the department has allowed the Modvat credit of the duty paid to Applied Electronics the Appellate Tribunal cannot be required to authenticate that the manufacture was undertaken by M/s. Applied Electronics. He also mentioned that extended period of limitation as provided under proviso to Section 11A of the Central Excise Act is invokable as Swicon did not disclose the fact of using the brand name of another person in their classification list; that when an Assessee claims exemption under a particular Notification and that notification is amended, they should have filed a classification list disclosing the use of brand name. He relied upon the decision in the case of Sonoma Aromatics Pvt. Ltd. v.C.C.E., Bangalore, 1995 (78) E.L.T. 285, wherein it was held that the extended period of limitation is invokable, if the Assessee had suppressed the fact of using the foreign company's logo. He also mentioned that the appeal filed by M/s. Sonoma Aromatics against this decision has been dismissed by the Supreme Court as reported in 1997 (93) E.L.T. A70.

7. Regarding imposition of penalty under Rule 209A of Central Excise Rules the learned DR mentioned that the goods which were intercepted in the vehicle were cleared without payment of duty; that Shri S.K. Nair as General Manager of Swicon is in charge of all the activities done by the Assessee and it cannot be said that he was not aware of the clearance of the goods without payment of duty and of using brand name of 'APLAB' belonging to M/s. Applied Electronics; that Shri L.S.Sannabhadta is Director of M/s. Swicon and Shri S.P. Joshi is Director in both

M/s. Swicon and Applied Electronics and there is no averment that these persons were not looking after day to day business of both the Assessees; that further Shri S.K. Nair, in his statement recorded under Section 14 of the Central Excise Act, had clearly admitted that the goods were manufactured as per the specification and standards of M/s. Applied Electronics on which they affixed the brand name 'APLAB' and sticker bearing their name Swicon were affixed on the brand name 'APLAB' so as to camouflage the brand name of Applied Electronics. He, therefore, concluded that all the ingredients specified in Rule 209A are satisfied and penalty is imposable on the appellants.

8. Shri Rohan Shah, learned Advocate in reply, referred to the statement of Shri J. Castelleno who was working as General Manager of Applied Electronics; that Castelleno has stated in his statement that equipment sold to Applied Electronics by Swicon were in semi-finished condition and were subjected to quality control testing, tuning, caliberation and final functioning by putting additional stores item wherever required and contended that it is apparent from this statement that M/s. Applied Electronics were undertaking processes on the goods received from Swicon. He also emphasised that after collecting Central Excise duty from Applied Electronics the department cannot say that they were not manufacturing excisable goods.

9. We have considered the submissions of both the sides. The facts which are not in dispute are that the goods manufactured by Swicon were affixed with the brand name 'APLAB' which belongs to Applied Electronics Ltd. and that Swicon were putting a sticker bearing their own name Swicon over the brand name 'APLAB' affixed on their products.

Paragraph 7 of Notification No. 175/86 as amended provides that "the exemption contained in this notification shall not apply to the specific goods where a manufacturer affixes the specific goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification". As the products manufactured by Swicon were affixed with the brand name 'APLAB' belonging to Applied Electronics the mischief of this para will be attracted and the benefit of the Notification No. 175/86 will not be available

to Swicon. It is evident from the statement of Shri S.K. Nair and Shri S. Haldhar, Accounts Clerk of Swicon, that the brand name 'APLAB' was affixed on the products manufactured by them. Tin plates bearing the name of Applied Electronics were also affixed on the products manufactured by them. The fact of affixing the brand name of another person cannot be wiped out by putting of sticker bearing their own name. In fact this was deliberate act on the part of Swicon to conceal the brand name of another person which was affixed on the goods. The learned Advocate for the appellants has emphasised that as the entire goods were sold by Swicon to Applied Electronics there was no connection in the course of trade between the goods and the brand name and reliance has been placed on the decision in the case of Model Soap Co. and Prakash Industries. We agree with the submissions of the learned DR that the ratio of both these decisions is not applicable as in Model Soap Co.'s case the goods were bearing the logo and name of the customers which were hotel, Indian Airlines, who were using the soaps for their own establishment and were not selling further.

Similarly, in Prakash Industries case the Appellants therein were manufacturing HDPE sacks bearing the brand name of buyer who was using those sacks for packing cement manufactured by them. In the light of these facts the Tribunal has held in both the cases that the goods were not sold in the course of trade whereas in this case Applied Electronics are selling the goods received from Swicon in the market and the goods enter in the market stream and it cannot be said that the use of brand name does not indicate connection between the goods and the brand name. We do not find any substance in the submissions of the learned Advocate that the goods were further processed by Applied Electronics. Even query from the Bench he could not tell the process undertaken by Applied Electronics on the goods received from Swicon. No doubts, in his statement, Shri J. Castelleno had stated that the goods were in semi-finished condition, but no material has been brought on record to contradict the findings given by the Commissioner in the impugned order to the effect that "no manufacturing process was being conducted by Applied Electronics in their factory on goods received by them from Swicon. Accordingly, we hold that the goods manufactured and cleared by Swicon which were affixed with brand name 'APLAB' are not eligible for exemption under Notification No. 175/86-C.E. We also find that the proviso to Section 11A of the

Central Excise Act is invokable as the Appellants had not disclosed the fact of affixing the brand name of another person on their products. It is not their case that in the classification list filed by them they had made a mention of the fact that the goods were affixed with the brand name of another person. The ratio of the decision in the case of Muzzafarnagar Steel and Nestler Boiler, relied upon by the learned Advocate, are not applicable to the facts of the present matters as the facts are different. The observations in Muzzafarnagar Steel case were made by the Tribunal as the Respondents therein had given the particulars of goods in the classification list filed by them. Similarly in Nestler Boiler case also the Appellants therein had filed the classification list mentioning all the products manufactured by them and in view of these facts the Tribunal held that the Department is expected to study the process of manufacture and also dutiability of any product that comes into existence which will be leviable to excise duty. Penalty is imposable, both on Swicon Micro System Pvt. Ltd. and Applied Electronics P. Ltd. as the goods were cleared without payment of appropriate duty and by camouflaging the brand name 'APLAB' by putting a sticker on it which was removed by Applied Electronics. However taking into consideration the amount of duty involved the penalty imposed warrants reduction. However, in respect of other 3 Appellants we agree with the learned Advocate that the Revenue has not indicated the specific role played by them and their conscious knowledge that the goods were liable for confiscation. As per the provision of Rule 209A the person should have knowledge and the reasonable belief that the goods are liable for confiscation. In absence of specific allegation in the show cause notice and clear findings in the impugned order penalties imposed on the 3 Appellants Nos. 3 to 5 are set aside.

11. Accordingly, we uphold the demand of duty confirmed by the Collector in the impugned order. We also uphold the confiscation and redemption of confiscated goods on payment of fine as ordered by the Collector. We reduce the amount of penalty to Rs. 5 lakhs in the case of Swicon Micro System Pvt. Ltd. and Rs. 2.5 lakhs in the case of Applied Electronics Ltd. Penalties on the other three Appellants are set aside. All the appeals are disposed of in the above terms.

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