Servo Electronics Vs. Collr. of Customs and Central

Servo Electronics Vs. Collr. of Customs and Central

SooperKanoon Citation : sooperkanoon.com/2088

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-14-1985

Reported in : (1985)LC1042Tri(Delhi)

Judge : S Jha, S Duggal, P A K.

Appellant : Servo Electronics

Respondent : Collr. of Customs and Central

Judgement :

1. M/s. Servo Electronics, New Delhi,--a partnership firm, having registered office at 83-84, DSIDC Sheds, Okhla Phase-II-have come up in appeal to the Tribunal, feeling aggrieved by an order passed by Collector of Central Excise, Delhi, on 3.10.1983. The proceedings, which culminated in the impugned order, were sequel to a visit to the factory- premises of the said firm by Central lixcise '(Anti Evasion)' officers of Delhi Collectorate Headquarters on 12.2.1982. The firm was found to have been engaged in the manufacture of automatic voltage stabilisers, high voltage testers, Servo Control Voltage Stabilisers, main filters, single phasing presenters, printed circuit board assemblies, transformers, etc. (hereinafter referred to as 'the goods'), falling under T.I. 68 of First Schedule to the Central Excises and Salt Act, 1944.

2. The officers allege to have observed that the factory was employing more than 10 workers and, as such, was registered under the Factories Act, 1948 and that, in the process of manufacture of goods, soldering and final testing was being done

with the aid of electric soldering iron rods, and that the total value of the goods manufactured and cleared by the appellants during the year 1981-82 (upto 11.2.1982) had exceeded Rs. 30 lacs. However, the firm had neither applied for nor obtained Central Excise licence required for the manufacture of goods, nor had they paid any central excise duty on the clearances effected by them; the explanation being that a declaration under Notification No.2/81 had been duly filed seeking exemption from licensing Control.

3. Statement of D.K. Gupta, one of the partners, recorded on 12.2.1982, revealed that they were engaged in the manufacture of aforesaid goods and that, during the manufacturing process, power was used and he also allegedly admitted to have employed 20 workers since the start of the factory in 1977 and, further, that during the year 1980-81, their total sales, as per invoices, including the job-work charges in respect of assembly of P.C. Boards for M/s. Bharat Electronics Ltd., Ghaziabad, had amounted to Rs. 23,50,000/- approximately and that during the year 1981-82 till the date of the surprise visit, their total sales including sales of spares as well as the job charges, came to Rs. 37,01,242.52.

4. In pursuance to statement of the partner and also as a result of what was observed during the visit, and discovered on subsequent investigation, the Department held the view that value of the clearances, during the financial year 1981-82, having already exceeded the exemption limit of Rs. 30 lacs, as stipulated in Notification No.105/80-CE dated 19.6.1980, the party was required to obtain central excise licence in terms of Notification No. 2/81-CE dated 7.1.1981 and were also required to pay excise duty, in respect of the clearances over and above the exemption limit, and to abide by other provisions of the Central Excise Rules on the subject. Since the appellants had failed to observe any of the formalities and, as already noted, had neither applied for nor obtained Central Excise licence nor paid central excise duty, they were considered to have contravened the provisions of Rules 174,9(1), 173F,173G(2) read with 52A, 173G(4) read with Rule 53 and 226 of the Central Excise Rules, 1944 (the Rules, for short). The seizure of the goods found on the premises was also effected on 12.2.82 itself, in the presence of partner : B.K. Gupta, and handed back to him on 'Sapurdarri' vide 'Sapurdgi Nama' prepared on the same date, i.e. 12.2.82. Central Excise officers

also took into possession and seized the relevant records maintained in the factory premises.

5. After completion of the investigation and necessary enquiries in pursuance to subsequent communications sent by the party--one on 24.2.82 and another on 19.3.1982, the Department came to the tentative conclusion of contravention of the rules, as aforesaid, and a notice to show cause was served on the party on 7.8.1982.

6. The party's stand in reply to this show cause notice, as conveyed by means of a reply dated 20.12.1982, was that of repudiation of the allegations made against them. Though conceding that the firm was engaged in the manufacture of T.I. 68 goods, as detailed in the notice, it was contended that they were doing so in different premises, independent from each other, which were to be treated as separate units. They pleaded that the Central Government had, by means of Notification No. 31/76 dated 28.2.1976, exempted from licensing control the units manufacturing goods falling under TI/68 which were fully exempted from payment of excise duty, and that, in view of this Notification, since they were producing goods falling under TI/68, which were exempt by virtue of different notifications issued under Rule 8(1) of the Central Excise Rules, 1944, they were not obliged to take central excise licence nor were the goods cleared from said units liable to pay excise duty. They fall back on Notification No. 85/79 dated 1.3.1979 and No. 46 81 dated 1.4.1981, as amended, in support of their plea as to exemption from payment of duty, as well as from excise control, by contending that they were operating from three separate sheds bearing No. 83, 84 and 39, and that out of these three, only Unit No. 83 could be designated 'a factory' whereas the other two, namely, No. 84 & No. 39, were not so inasmuch as the number of workers operating there was less than 10 and so these units were not factories within the meaning of the relevant notilications read in the light of the definition given under Section 2(m) of the Factories Act. So far as Unit No. 83 is concerned, the plea was that though the number of workers was more than 20 and, so, this unit could be considered 'a factory' but the goods cleared therefrom were not liable to pay central excise duty for the reasons, firstly, that the total value of clearances from this unit by itself fell below Rs. 30 lacs and, secondly, the manufacturing process

with the aid of power was negligible and, as such, even though the number of workers was 20 or more, since the manufacture could not be deemed to be with the aid of power, even this unit was not a 'factory'.

7. The Collector, after a detailed consideration of the facts, and various pleas set forth by the party-first by means of communications sent subsequent to the date of seizure and also through statement of another partner, K.C. Bothra, and thereafter, by means of reply to show cause notice-came to the conclusion that the party's contention, that operations from different sheds had to be taken as isolated from each other, was not acceptable. After taking note of the facts, as set forth by the party or as discernible from records, he came to the conclusion that Sheds No. 83-84 constituted one single unit, and the value of clearances, including those of the job charges, was admittedly in excess of Rs. 30 lacs from this unit and the party had thus contravened the provisions of the Rules by not filing their declarations and by not applying for central excise licence and submitting to Excise Control, and they were further liable to pay duty for the goods which have been cleared in excess of Rs. 30 lacs, by virtue of Notification No. 85/79 and subsequent Notification No. 105/80. He, however, determined the value of such clearances from this unit No. 83-84 to be Rs. 37,01,240.52 in terms of Section 4(1)(a) of the Central Excise Act and held that duty was payable on the excess clearances of Rs. 07,01,240.52 under Rule 9(2) of Central Excise Rules, 1944.

8. The Collector further observed that considering the fact that the party had never obtained any central excise licence nor paid any central excise duty, and whereas they had sought registration under the Factories Act and filed regular returns to the Chief Inspector of Factories and got themselves registered under the Employees Provident Fund Scheme; obtained Sales Tax code numbers and engaged regular Chartered Accountants; never thought of submitting to Excise Control.

He accordingly held it to be a case where there was no mitigating circumstance and, so a personal penalty of Rs. 75,000/- was imposed.

9. This order is assailed in the present appeal by contending that the Collector had committed basic error by starting with the presumption that the appellants were a 'factory' because in place of describing them as a 'firm', he has described them as

a 'factory' throughout and that this has caused prejudice in his mind. The appellants contend that their entire case was that their premises No. 83, 84 and 39 were separate units, and whereas No. 83 could be treated as a 'factory', the other two were not so by virtue of the number of workers in each one of them; namely, 84 and 39 being less than 10. Though admitting that, initially, they had converted No. 83-84 as one unit by having a door in-between and got registered these two sheds as one unit under Factories Act, as a 'factory', but contended that on an objection having been raised by the DSIDC that no alteration was permissible, they had closed down the door linking the two sheds from within, with the result that they became two separate units, with access only through separate doors opening on the public road, and that they took steps to have this separation formalised by amending renewal application for registration under the Factories Act for the year 1981-82 by confining the address of the factory as of No. 83 DSIDC in place of the original 83-84. They also contended that they were employing separate labour for each unit and maintaining separate muster rolls which were duly being inspected by officials acting under the Factories Act and that, on their advice, they had got Units No. 84 & 39 registered under the Shops & Establishments Act for the year 1981-82, and that the Collector had gone wrong in ignoring this evidence, and basing his conclusions on the fact that the letter-heads showed their address still as 83-84, and that the invoices were also being issued in common because, according to them, when all the units were owned by one partnership firm, one common account system had to be maintained but they had a proper system of identifying the clearances from each unit separately by means of co-relating the challans to each unit. They thus plead that Shed No. 84 was a distinct and separate premises after January 1981, but since it was registered as a 'factory' alongwith Shed No. 83 upto December 1980, they did not take any steps to get it separately registered under the Delhi Shops & Establishments Act as they had to wait for 12 months thereafter, and that explains why they did not apply for such registration till February 1982; and that they did so as soon as they were specifically advised by the Factories Inspector. They also contend that as soon as premises No. 84 got excluded from the definition of a 'factory' under Factories Act 1948, the premises automatically became a commercial establishment and it was not incumbent upon them to get this Shed No. 84 registered as such.

They have, thus, summed up their plea in the appeal by stressing the fact that only Unit No. 83 could be treated as a 'factory' and since the clearance from that unit remained below Rs. 30 lacs, no duty was payable, as clearances from other units, namely, Sheds No. 84 and No.39 were exempted from payment of excise duty by virtue of Notification No. 46/81 dated 1.3.1981.

10. Shri P.S. Bedi, Consultant, appeared for the appellants at the hearing and reiterated all these contentions by laying emphasis on the fact that collective reading of the Notifications made it clear that even if a manufacturer had manufacturing activity in more than one unit but, fur the purpose of notification fixing the limit of exempted clearances as Rs. 30 lacs; namely, Notification No. 105/80-CE dated 19.6.1980, all that counts was 'clearances from a factory' further adding by means of Explanation III that in case clearances of goods, manufactured by a manufacturer, were exempt from duty under some other Notification issued under Sub-rule (1) of Rule 8 of the Central Excise Rules 1944, those clearances are not to be counted while computing the value of clearances. He urged that only premises No. 83 qualified for the definition of a 'factory' and it was on record that the value of clearances from this unit by itself was far below Rs. 30 lacs and consequently, no duty was payable. He reiterated the appellants' case that Units bearing Shed No. 84 & No. 39 could not be treated as a 'factory' inasmuch as the number of workers employed in each one of them was less than 10 and, so, clearances effected from these units were to be excluded. He subsequently tiled a compilation containing copies of the Notifications and also some judgments to the effect that there was a distinction to be maintained between 'premises' and 'precincts'. He gave the break up of number of clearances from Shed No.83 and No. 84, as under: adding that there was no independent production in Shed No. 39 and they were only manufacturing items which were feeding the production in Sheds No. 83 & 84.

11. Shri Kunhikrishnan, DR appearing for the respondent controverted these contentions by urging that the two sheds, namely, No. 83 & 84 were, in fact, one. He placed reliance in this regard on the ten points, tabulated by the Collector, in his adjudication order, in coming to the conclusion as he did, and defended the Collector's order by urging that the Collector had taken a very fair view of the

matter and had granted relief, wherever necessary, in the matter of assessable value of the goods and that no fault could be found in his finding that premises 83-84 constituted one single unit as a factory. He added, however, that so far as the quantum on account of goods cleared on job-work basis is concerned, the cost of the raw material supplied by the customers had also to be included in the assessable value and, in that view of the matter, the value of clearances would be even higher than taken by the adjudicating authority; for which proposition, he cited, as 1984(78) ELT 652 (Tribunal) Shree Hanuman Metal Industries v.C.C.E. Delhi 1985 ECR 77.

12. Shri Bedi, in a brief rejoinder, again contended that the Collector had gone wrong in treating premises No. 84 also a 'factory', and that the error committed was his taking into consideration the position as it prevailed in 1977, in spite of evidence to the effect that the two sheds became dis-joined from each other from January 1981 onwards.

13. We have given our careful consideration to the arguments advanced on behalf of the appellants. We find that the whole controversy revolves around the fact as to whether clearances from Shed No. 84 can also be treated as from a 'factory'. There is no dispute that the appellant firm, which is a partnership of four partners, owns all the three sheds jointly. It is also in evidence that the premises 83-84 were treated as one unit at the inception of business of the firm, which fact is evidenced by Anncxure-D1, when, while applying for registration under Factories Act in 1978, the postal address and situation of the factory was disclosed as 83-84, DSIDC Complex Phase-II, Okhla, New Delhi. Same was shown to be the address to which communication relating to the factory was to be sent. Case of the appellants now is that these sheds, namely, No. 83 & 84, were separate units and allotted separately by DSIDC, and no structural alteration was permitted, with the result that the inter-linking door, that they had made m the common wall of the two sheds, had to be closed down somewhere towards the end of December 1980 and, with that change in situation, they took steps, which were long before the date of surprise visit, to have the registration under the Factories Act suitably modified. Reliance is placed in this regard on forms : Annexures D2 & D3 where the postal address and situation of the factory is shown as 83, DSIDC Complex only.

14. In view of the fact that learned Consultant for the appellants laid great stress on this action, taken by the appellants for the purpose of registration under Factories Act, we have examined these three annexures with great care and find that no effective change is deducible on the basis of these forms alone. It is to be noted that Serial No. 2 of the form has two relevant columns: (b) Full address to which communication relating to the factory should be sent.

Whereas, in the beginning, both the columns gave the factory unit as 83-84, the only change that subsequent forms introduced was that postal address of the factory was shown at only 83. No change was intimated so far as communications relating to the factory were to be sent, and it remained as of before, namely, 83-84 DSIDC Complex. It is pertinent to note that this particular entry covers the full address to which communications relating to 'factory' were to be sent and, while filling up this column, 84 remained duly combined with 83. We, therefore, do not think that merely by this half way change in the matter of filling up of the proforma for registration under Factories Act, the appellants can succeed in urging that this signifies complete change in position.

15. It is noteworthy that, originally, both the sheds, namely Nos. 83 & 84, were admittedly treated as one integrated factory, the only plea being that on an objection from the DSIDC, the position had to be changed. but we do not have any documentary evidence on record in support of this plea. The certificate, on which the appellants place reliance, as having been issued by the DSIDC (Annexure-C), is a certificate issued after the start of the controversy as it bears the date 2.9.1983, which was even after the Show Cause Notice had been issued, and is in too general terms, mentioning only the structural pattern of the individual sheds but, even then, so far as the appellants are concerned vis-a-vis the controversy with the Excise Department, the most crucial factor, namely, that the door in the common wall had to be closed down on the objection by the DSIDC, is not borne out from this certificate and there is no indication even of any such direction having been given by DSIDC. The onus lies heavily on the appellants to disprove the continuance of 83-84 as a single unit. The evidence is rather to the contrary inasmuch as apart from the fact, as already noted, that the appellants did start 83-84 as a factory and got the two sheds registered as one unit under the Factories

Act as a 'factory', they continued, even after they intimated some change, to treat 83-84 as a single unit for the purpose of address of the factory where communications were to be directed. The letter head, vide letter at Annexure-P, reveals that the firm has the address as 83-84 DSIDC Complex, which fact also dislodges the plea of the two sheds having been separated or disjointed.

16. We find that the total number of workers, as per muster rolls, in 83 & 84 together has been during all material times, 40 or even above.

That articles shown to be manufactured in the two sheds are also of practically identical nature except for little variations and there is no vouch-saving (sic) the fact that the workers, shown to be working in one shed, could not be working in the adjacent shed. The fact, that clearances have been treated to be as common, is established from the sale invoices being all in the name of the firm itself. The explanation that the challans bore indication of the unit as shown by Anncxure-Q1 to Q3, to our mind, does not detract from the Tact that the premises shown as Unit-B (Shed No. 84) could not be working in amalgamation with Shed No. 83, us one factory, as they had started initially, when the management and ownership continues to be the same, the manufacturing activity remains the same, and so the nature of goods. The onus in this setting of facts lay very heavily on the appellants to prove that Shed No. 84 was totally separate from Shed No. 83 because it is a very peculiar case where there is one management, and one manufacturer operating in two adjacent premises, which have been originally, on their own admission, used as one factory. There is no documentary or other credible evidence of any outside agency having compelled them to bring about the change, which they are now setting up in defence.

17. The argument, that the two sheds are totally separate structures and one has to come on the public road through a door and then enter the other via the public road and, consequently, no goods could be cleared from one shed without gate passes and, thus, clearances had to be treated as separate and independent ones, does not carry conviction for the short reason that the appellants never submitted to any excise control. They had not applied for any central excise licence and, as noted by the Collector, did not observe any formality laid down by

Central Excise Rules and, consequently, the question of their having effected clearances under gate-passes does not arise nor has it been shown that they had been operating under the system of gate-passes.

18. The argument that the two sheds have separate power connections as installed by the DSIDC is of no consequence because this was so even when admittedly sheds No. 83 and 84 were united to constitute one factory.

19. The authority cited by Shri Bedi to the effect that in the same premises different units may work as factories or non-factories, placing reliance on AIR-1953-Madras-269 (V 40 C.N. 161) re: K.V.V.Sarma Manager Gemini Studios, Madias, is in the context of different situation, namely when different type of activity is carried out in different departments and then, obviously, depending upon the nature of the activity, a part of the premises could be treated as a 'factory', other parts to be out of the contemplation of concept of a 'factory'.

20. The situation in the present case is entirely distinguishable, because here we have the case of one partnership, as already high lighted, managing the entire activity, carrying on the same or identical manufacturing activity, making the same type of goods, with one unified accounting system with the result that the category of workers is bound to be similar and with the geographical position as it is, the two premises being adjacent, and workers being under the same employer, it is not possible to conceive a situation which the appellants would have us believe to the effect that workers in one particular Shed shall be kept confined throughout the year to less than 8 whereas in the other they are as many as 36. There is no evidence that the things were to be in such a water-tight compartment that workers show in the muster roll to be employed in respect to one shed, could not have been used by the same management in the contiguous shed.

For the same reason, the other authority on the point, namely, that of Kerala High Court, quoted as AIR 1968 Kerala 143 V 55 C 37 : re: Malabar Tile Works, Feroke, Kerala, does not help establish the plea of the appellants. All that is said in that authority is that a factory may cease to be so depending upon the number of workers employed therein, and in case it falls short of 10 in the case of power operated units, and 20 in those operated without the aid of power, then it could

cease to be a 'factory'. There could be no denying this proposition, but, here, the question is altogether different because the total number of workers employed in the two sheds, as already remarked, is at any given time '10 or above. In the context of geographical situation, common management, original pattern and other factors pointed out in the foregoing discussion, the plea that for Shed No. 84, the number of workers should be treated to have been always below 10, after the alleged separation in Jan.81, is not sustainable as it is not substantiated by any reliable evidence. The appellants seem to have been intent upon remaining out of the dragnet of Excise Laws because even the declaration, which they filed in terms of Notification No.2/81 dated 17.1.81 (copy whereof they themselves have supplied as Exhibit-J filed on 10.4.81), does not contain complete information inasmuch as against Serial No. 3 they have, after giving the address of the factory as Shed No. 83 against Serial No. 2, nowhere disclosed about the manufacturing activity being conducted in Sheds No. 84 and 39 also. The information against column No. 5 is, also, factually incorrect because whereas now it is not disputed that in Shed No. 83, manufacture is with the aid of power but. while replying to this column, they categorically stated that the manufacture was without the aid of power. No disclosure of the thin distinction, which they attempted in the grounds of the appeal, but which was not even pressed during arguments, namely, that the use of soldering iron rod for purpose of soldering and final testing was negligible and could not be considered as use of power.

21. It is also significant that the visit of Central Excise officers took place on 12.2.1982 in the presence of one of the partners--B.K.Gupta--whose statement was immediately recorded and nowhere he seems to have mentioned all this which is now set out as an explanation to the charges leveled by means of show cause notice as he did not state that they had separated Sheds No. 83 & 84, as independent or isolated and that this was pursuant 1o an objection by the DSIDC. On the other hand, he, by means of a written statement, gave the total value of their clearances during the period 1981-82 to be Rs. 37,01,242.52, and admitted to have employed 20 workers since the start of the factory in 1977. There is no retraction of the statement or a hint that it was under any duress. Any subsequent explanation, made by means of communications dated 24.2.1982 or 19.3.1982 or by means of statement of another partner conveyed on 15.3.1982, can,

undoubtedly, be the result of after thought and an attempt to get out of the situation, but the more significant statement in this regard has to be the first statement of B.K. Gupta which he gave as a partner and, at no stage, he had intimated that that statement given by him was under any pressure or mistake of fact.

22. In face of the aforesaid situation, the communication now being set up in defence, namely, as having been issued by a Factory-Inspector intimating that since Shed No. 84 had workers less than 10, it ceased to be a 'factory', does not inspire confidence because, although it is purported to have been in respect of a visit on 6.2.1982, the date of issue is 1.3.1982, (Annexure-F) which is obviously, after the date of the surprise visit which was on 12.2.1982, and the Collector had rightly disbelieved the evidence created by means thereof, particularly when the partner, who was present on the spot, nowhere indicated in his written statement that these two sheds were totally separated and that one of them was employing less the an 10 workers.

23. Apart from the fact that, even if it were so, in view of the peculiar situation that the two sheds arc adjacent, it seems to be wholly unacceptable that in manufacturing same or similar type of goods, the management will keep two sheds isolated in such a manner that workers of one will remain confined to that particular shed. It is also to be noted that this is a question of availing of exemption notifications depending upon the number of workers and also upon the value of clearances, and the burden of satisfying the requirements of the two notifications separately was squarely on the appellants, but the attempt made at proving after the surprise visit by the Excise officers and after the notice to show cause was served, remains singularly unconvincing. We, therefore, have no hesitation in rejecting the appellants' contention that Shed No. 84 was not to be treated as a 'factory' and that, by virtue of Explanation-III to Notification No.105/80-CE dated 19.6.1980, the value of clearances from this unit was not to be computed as value of clearances from the factory of the appellants. We, on the other hand, come to the finding, that Shed No.83-84 is one operational unit and power having been proved 1o be used and number of workers together being at all material times far beyond 10 or even 20 the value of clearances taken together from the Complex

83-84 is to be' computed for the purpose of this notification. There is no disputing that the value taken together is in excess of Rs. 30 lacs and so the goods of the value in excess of Rs. 30 lacs have to be paid excise duty.

24. We, however, do not think that the question as to what is to be the value of goods cleared on job work basis, can be re-opened at this stage because the Collector has accepted the value as given by them and, in the appellants' appeal, no contention which lakes away the benefit, already allowed to them by adjudication order, can be entertained. As a result, we dismiss the appeal on merits and hold that Shed No. 83-84 has to be treated as one factory for the purpose of clearances and the goods of the value in excess of Rs. 30 lacs, as determined by the Collector for the period 1981-82, would be excisable and duty would be payable by the appellants.

25. So far as the question of penalty is concerned, although we find Collector's observation justified that whereas (he appellants approached every possible authority operating under different statutes, they took no steps to submit to Excise Control and, but for the chance visit, this would have continued, but taking into consideration the fact that excise duly was payable only for the year 1981-82 even according to Collector's finding] because, for the previous years, the value of clearances remained below the exempted limit and taking into consideration that the evasion of duty covers only one year, we think that the penalty of Rs. 75,000/- is excessive.' The duly payable for the period in question, pursuant to the Collector's order, is mentioned to be Rs. 56,099.32. Taking into view the entirely of circumstances, we think that about 20 to 25 per cent of the duty involved could be adequate penalty and we, thus, order that the penalty amount shall stand reduced from 75,000/-to Rs. 15,000/-. We dismiss the appeal partly in the above terms.