

**Bentex Industries Vs. Commissioner of Central Excise**

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

**Decided On :** May-31-2002

**Reported in :** (2002)LC378Tri(Delhi)

**Judge :** S T G.R., P Bajaj

**Appellant :** Bentex Industries

**Respondent :** Commissioner of Central Excise

**Judgement :**

1. Both the above captioned appeals have been preferred against the common order-in-original dated 28-9-1998 passed by the Commissioner of Central Excise vide which he had confirmed the duty and penalty amounts against them.

2. M/s. Bentex Industries Pvt. Ltd. (hereinafter referred to as 'BI')/ appellants No. 1, are manufacturer of electrical motor starter, control panel and parts thereof, while appellants No. 2, M/s. Bentex Electricals (hereinafter referred to as 'BE') are engaged in the manufacture of MCB, metal sheet enclosure, KWH energy meters, distribution board etc. The company, appellants no. 1, was formerly known as M/s. National Electric Industries. This company was set up in the year 1984 and is a private limited company in which Shri R.L.

Chopra, is M.D., while his wife Smt. Veena Chopra and daughter Smt.

Rashi Khanna, are the Directors. Whereas the appellant No. 2, BE, is a Proprietorship concern of Shri R.L. Chopra, who started the same in the year

1987. Both the appellants were availing benefit of small-scale exemption notification. However, w.e.f. 1-4-1995 the appellants No. 2 started paying full rate of duty as his clearances in the preceding financial year exceeded the prescribed limit of Rs. 2 crores. The brand name used by the company, appellants No. 1, is 'BENTEX RC, while by the appellants No. 2 is only 'RC- a Bentex product. The premises of both these appellants were visited by the officers of the Central Excise on 4-6-1997. The statements of the Directors of the company, appellant No.1 and Proprietor of appellants No. 2 were recorded. The statements of various employees were also recorded on different dates. On completion of investigation, show cause notice dated 4-6-1998 was issued to both these appellants proposing clubbing of their clearances for the period 1-5-1993 to 30-6-1997. The proposed duty was also demanded from them jointly. Penal action was also proposed against them under Section 11 AC of the Act, Rules 173Q and 9(2) of the Rules. Both companies, however, contested the correctness of that show cause notice and claimed themselves to be independent units. The appellants No. 2 also averred that after 1-4-1995, full duty was being paid on the clearances for having exceeded Rs. 2 crores' limit. The Commissioner, however, did not accept their version and passed the impugned order vide which he confirmed the duty of Rs 48,01,585/- against both of them with equal amount of penalty through the impugned order.

3. The learned Counsel has contended that there is no material evidence on the record to prove the financial flow back from one company to another and that clearances of both these companies could not be legally clubbed as duty has been demanded from both of them by treating them as independent units and that appellants No. 1 is a Private Limited company, while appellants No. 2 is only a proprietorship concern. Therefore, the impugned order of the Commissioner is invalid and deserves to be set aside.

4. On the other hand, the learned DR, has simply reiterated the correctness of the impugned order of the Commissioner.

5. The bare perusal of the impugned order shows that the learned Commissioner has clubbed the clearances of both the companies named above, broadly on the

grounds; that both were working in the same building, had a shared staff and machinery, the Managing Director of one company was proprietor of another, the brand names being used by both the companies were also similar with little variation, the advance income-tax of the Director of the Company, appellants No. 1, was paid by the Director of the other company, they had common telephone facilities, even the raw material was also purchased by them under same documents, payment in respect of one unit was being received by another, inward register was common, there was transfer of labour from one unit to another, as well as on some other grounds detailed in the order itself. But, in our view, all these facts, circumstances and grounds were inconclusive and insufficient in the eyes of law for clubbing the clearance of both the companies. The duty has been demanded in the show cause notice from both the companies and same had been even confirmed by the Commissioner through the impugned order against both of them. This fact itself is enough to prove that the Department itself had accepted both the companies, as independent units, otherwise the duty was to be demanded/confirmed only from one unit which was the main and not from the another which was dummy. In this context, the observations of the Apex Court in the case of *Gajanan Fabrics and Distributors v. CCE*, 1997 (92) E.L.T. 451 (S.C.), can be read with advantage.

6. It is also evident from the record that appellants No. 2 was not even availing the benefit of SSI after 1-4-1995 for having crossed the limit of Rs. 2 crores and for this reason also, there could not be clubbing of the clearances of this company with that of company, appellants No. 1. Moreover, the appellants No. 1 is a Private Limited company, whereas appellants No. 2 is only a Proprietorship concern.

Both have got distinct legal identities. The mere fact that in the company, appellants No. 1, the major shares were held by Shri R.L.

Chopra and his family members, while company, appellants No. 2, was the sole concern of Shri R.L. Chopra could not be taken to be enough to infer legally that one of these two companies, was a dummy one. Even the Commissioner in the impugned Order has not recorded any specific findings regarding the dummy character of any of these two companies.

He has confirmed duty demand against both of them by treating them as independent units.

7. There is no tangible evidence on the record to prove the financial flow back from one company to another. Mere sharing of company telephone, office, labour, on certain occasions receipt of raw material, etc., as detailed in the impugned order were not sufficient in the eyes of law to club the clearance of both the units. In the case of *Indian Metal Industries v. CCE, Bhubaneswar, 1999 (108) E.L.T. 593 (Tribunal)*, it has been observed that financial flow back between the two units is essential for clubbing their clearances. Similarly, in the case of *CCE, Rajkot v. Amar Plast Industries, 2000 (115) E.L.T. 482 (Tribunal)*, it has been ruled that use of common premises, telephone, common electric generator and cutting/mixing machines are not enough for clubbing the clearances of both the units.

8. Regarding use of the brand name by the two units, it has been observed by the Tribunal in the case of *Arvind Nanda v. CCE, Meerut, 2001 (136) E.L.T. 416 (Tribunal)*, that the same cannot result in clubbing of the clearances of both the units. Similarly, in the case of *Karnataka Gears (P) Ltd., Concord Steel Works Ltd. v. CCE, Bangalore, 1999 (110) E.L.T. 529 (Tribunal) = 1998 (29) RLT 543 (T)*, it has been held by the Tribunal that just because two limited companies were interested in the business of each other, their clearances could not be clubbed, holding one to be dummy of another. *Applied Research & Engg. (P) Ltd, v. CCE, Pune, 1997 (89) E.L.T. 494 (Tribunal)*, it has been observed that clubbing of a limited company with a partnership firm, although having some common factors, is not permissible. The use of same premises/shed, common management, common office, some common labour, common goods, had been also held to be insufficient for clubbing the clearances of two units, by the Rajasthan High Court in the case of *Renu Tandon v. U.O.I., 1993 (66) E.L.T. 375 (Raj)*.

10. From the record, we find that both the companies stand duly registered with the State and Central Excise Authorities as well as Sales Tax a Department independently. They have got their separate registration numbers for the purposes of labour, industrial law, provident fund, income-tax, etc. It is also evident from the record that earlier also the Central Excise Department issued show cause notice

to both these companies for denying the benefit of SSI on the ground that they were using the brand name of another person who was not entitled to the benefit of said exemption, The Commissioner even had already in that show cause notice confirmed the duty demand against both of them. This also goes long way to prove that the Excise Department had accepted both these companies as independent/separate identities and units. This circumstance, in fact, debars the Department from now taking somersault and to plead that only one company is the main unit while the other is a dummy one.

11. Apart from this, the duty demand is also time-barred. The period for which the duty had been demanded, is from 1-5-93 to 30-6-97, whereas the show cause notice was served on 4-6-1998. No suppression of facts can be said to have been made by both the companies as they both got themselves independently registered with the Excise Department by disclosing their constitution and the place of working. It is not the case of the Department that the registration was given to both the companies without visiting their place of working and without verifying their constitution. The Department was obviously aware about the true functioning of both these companies. Therefore, extended period of limitation could not be invoked.

12. The imposition of penalty under Section 11AC and demand of interest under Section 11AB of the Act prior to 28-9-1996 when both these sections came into force could not be legally made. The impugned order of the Commissioner in this regard is patently against the law.

13. In view of what has been referred and discussed above and taking into account the facts and circumstances of the case, the impugned order of the Commissioner cannot be legally sustained and the same is set aside. Both the appeals of the appellants are allowed with consequential relief, permissible under the law.

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