Solid and Correct Engineering Works Vs. C.C. and C.E.

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Overruled by : Commissioner of Central Excise, Ahmedabad Vs. Solid and Correct Engineering Works and Ors.

SooperKanoon Citation : sooperkanoon.com/28725

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-19-2002

Reported in : (2002)LC614Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Solid and Correct Engineering Works

Respondent : C.C. and C.E.

Judgement :

1. These seven appeals arise out of the common order passed by the Commissioner of Central Excise, Ahmedabad-I. These are therefore taken up for disposal together vide this common order.

2. M/s. Solid and Correct Engineering Works (hereinafter referred to as 'SEW') M/s. Solid Steel Plant Manufacturers (hereinafter referred to as SSPM) and M/s. Solmec Earthmovers Equipment (hereinafter referred to as 'Solmec') are partnership firms manufacturing asphalt drum mix plant and other civil construction equipment. M/s. Solex Electronic Equipment (herein after called as 'Solex') is a proprietary unit manufacturing electronic control panels. The partnership units are registered under the Central Excise law. Proprietary units availed of SSI exemption on filing due declaration. M/s. Solidmec Equipments (hereinafter called

as 'Solidmec') are engaged in marketing the products of the first named three units. Shri Hasmukh V. Dodia and Shri D.V. Dodia are the partners in the first units. Smt. Kusumben Dodia is the proprietor of Solidmec.

The manufacturing units cleared their goods on payment of duty to the marketing company. The marketing company Solidmec advertises the products, undertakes contracts to supply, erection and commissioning, etc. Each manufacturing units had a brand name.

3. All the units were visited by a team of Central Excise officers.

Statements of the partners were recorded. Statements of representatives of the buyers were also recorded. From the statements of the concerned persons it appeared that the M/s. Solidmec marketed entire plants. The various components of the plants were manufactured by the four other units. No single unit manufactured all the components of a plant. What they manufactured were in fact the parts of such plants. These various parts and components were transmitted to the customer's site. The marketing company undertook the installation, commissioning and general supervision. The plant bore the brand name of the marketing company.

The warranty was also given by M/s. Solidmec. The brand name Solidmec was well known in the market and was respected by the buyers. The buyers would go by the fact that the Solidmec were marketing the products and were not concerned with the identity of the manufacturers of the physical components.

4. Show cause notice was issued under which various allegations were made. It was alleged that the machinery falling under Heading 84.74 attracted lower rate than the parts thereof specified under the same heading, it was alleged that each of the manufacturing unit had manufactured and cleared only the parts and had discharged burden of duty @ 5% for machinery whereas in reality these were parts liable to attract 10% duty. Differential duty on this count was to be confirmed.

The second allegation was that the manufacturing units were using the trade mark/brand/logo of the marketing company Solidmec. As such the benefit of the

exemption Notification 1/93 was not available to them.

Differential duty on this count was also claimed. The third allegation was that M/s. Solidmec were manufacturing complete plant liable to duty at the client's site out of the components, and parts supplied by the other four units. It was alleged that this resulted in the creation of excisable and dutiable commodity on which duty was not paid. The five units filed replies to the show cause notice and were heard by the Commissioner. The Commissioner then passed the impugned order. He observed that the goods cleared by each of the three units were not capable of working as a complete machinery but that they were component parts of the plant. Having held that the duty was short paid on this ground, he held that the demand sustains. For certain periods he observed that even taking into account the higher levy, some units had not crossed the exemption limit. Only for the year 1996-97 he observed that Solmec had short paid duty to the extent of Rs. 1,97,875/-, and SEW had short paid to the extent of Rs. 2,16,373.47. He, however, did not confirm this demand on the observation that the eligibility to Notification 1/93 would be later examined. On examination of the various brand name and the arguments made by the assessees he observed that the brand name Solidmec establishes the connection between the plant and marketing company. Relying upon the Tribunal judgment reported in 2000 (121) E.L.T. 215 and 1996 (17) RLT 565 he held that the benefit of Notification 1/93 was not available to the four manufacturing units. As regards the third allegation he followed the law laid down by the Supreme Court in the case of Sirpur Paper Mills - 1998 (97) E.L.T. 3 and held that the plant assembled at site by M/s.

Solidmec amounted to manufacture. He deliberated upon the plea of limitation but observed that the extended period was invocable. Denying the benefit of Notification 1/93 he confirmed duties as below: Penalties of Rs. 11 lakhs on Shri S.V. Dodia and of Rs. 12 lakhs on D.V. Dodia under the provisions of Rule 209A of the Rules were also imposed. He directed payment of interest on all outstanding amounts of duty confirmed. He also confiscated land, building, etc., of the four units but permitted their redemption on specified fines. The present appeals are filed against this order.

6. Shri Nankani, Advocate arguing for all the appellants stated that it was not contested that the four manufacturing units did not make machinery falling under Heading 84.54; and that they manufactured only parts thereof. He had therefore no arguments to advance on the resultant confirmation of duty. As regards the allegations as to the use of the brand name, his argument was that each of the manufacturing unit had their own brand name. Each piece of machinery had prominent aluminium label indicating individual brand names, name and address of the firm, model number, year of manufacturing, etc. He stated that the name of the marketing company was displayed by way of plastic stickers.

These stickers were on the inside of the machinery and did not have a prominent place. It was claimed that all that was displayed was that the goods were marketed by M/s. Solidmec. Where the goods bore the label of the manufacturer as well as the marketing entity, it could not be held that the goods were falling out of the purview of Notification 1/93. He referred to the relevant case law in this regard. As regards the allegation that M/s. Solidmec manufactured plants at customer's site out of the components/parts furnished by the four manufacturing units, his first plea was that they were not the manufacturers. They merely deputed their technicians for supervision of erection and commissioning of the machinery. The actual work was carried out by the buyers by engaging labourers, etc. The second contention was that even if it is to be assumed that Solidmec was the manufacturer the design of the plant would show that each part of the structure was embedded firmly into the earth. Embedded parts were connected together with pipes, belts etc. Thus when the entire structure came into existence it was fixed to the earth and could not be called as "goods". In making the submission he relied upon the Supreme Court judgment in the case of Triveni Engineering Works Ltd. v. CCE - 2000 (120) E.L.T. 273 (S.C.).

He argued that the entire demand was barred by limitation. He claimed that in 1996 a very detailed enquiry was undertaken in the working of the all the five units. All the relevant documents had been scrutinised by the jurisdictional officers. The fact that the entire production of the manufacturing units were sold to Solidmec was in the knowledge of the department. This is evidenced by jurisdictional Superintendent's letter dated 14-8-1996 and the assessees reply dated 30-9-1996,

copies of which were on record. He stated that the current enquiry was launched on in 1999 and was not an extension of the earlier enquiry. On this ground he claimed that the demand was hit by limitation.

7. Shri Nankani also made arguments on related aspects. It was his case that the so called activity of manufacture of plants was undertaken in a number of locations, most of which were beyond the jurisdiction of the adjudicating Commissioner. He stated that on this ground bulk of the demand would not sustain.

8. It was also his claim that duty was quantified wrongly. He claimed that in the case of Srichakra Tyres - 1999 (108) E.L.T. 361, it had been laid down that the invoice value could not be adopted by quantification without giving due deduction therefrom. He claimed that excise duty element was also deductible even if the excise duty had not been paid. He stated that ratio of Srichakra Tyres has been upheld by the Supreme Court. The Commissioner had erred in not re-quantifying the demand. It was claimed that in the event it is held that M/s. Solidmec were the manufacturers then the benefit of Modvat credit of the duty paid on the component parts was available.

10. We have carefully gone through the submissions and have seen the citations made.

11. The issues in this case are interlinked and a finding on one aspect will have a direct bearing on other aspects. Thus when the Commissioner found that duty was recoverable on the ground that what the four units had produced was not machinery but parts, he did not confirm that portion of the demand holding that portion would be included in the duty recoverable on the benefit of Notification 1/93 being denied to them.

12. We will first take up the issue whether M/s. Solidmec was the manufacturer of machinery and whether the demand confirmed against them could sustain. It is the allegation that they had sold the entire plant to the buyers. They had procured individual parts; they had undertaken the work of construction, erection and maintenance of the plants at the site of the clients thereby making them the

manufacturer in terms of Section 2(f) of the Central Excise Act, 1944. The assessees on the other hand claimed that the individual buyers had actually erected the plant and that they had merely offered advice and supervision.

13. The statement of buyers of the plant are on record. In his statement, Shri Dayashankar Dubey, one of the buyer, claimed the scope of the purchase of the plant included erection and commissioning charges, trials and guarantee. He stated that the commissioning was under the supervision of an engineer deputed by Solidmec. The scope of the contract was accepted by Shri D.V. Dodia in his statement. He also accepted that Solidmec were undertaking erection and commissioning, although in some cases the buyers had done this. The statement of another buyer namely R.K. Katira is also on the same lines. The sum total of the aforesaid evidence is that M/s. Solidmec supplied all the essential components to make a hot mix plant at the buyer's site. Some of the components were manufactured by the manufacturing units and the other components were purchased from the market. These were erected and commissioned by Solidmec and the cost of erection, commissioning, etc., were charged from the buyers. In these circumstances they deserve to be termed as manufacturers.

14. The second issue is whether the plant could be termed as "goods".

The learned Commissioner accepts that this plant is affixed to the ground but holds that it could be readily dis-assembled and was therefore "goods" in terms of the Supreme Court judgment in the case of Sirpur Paper Mills. In this judgment the Supreme Court held that a plant embedded in concrete to ensure its wobble free operation did not make it immovable proper, but that it was marketable goods. This judgment was taken into account by the Supreme Court in a later judgment in the case of Triveni Engineering Works Ltd. (supra). In this case the issue was whether fixing of a steam turbine and alternator amounted to manufacture of a new commodity and whether the resultant products was excisable or not. The Hon'ble Supreme Court held that in the form of plant a new commodity did come into existence. In this case the Court was examining the coverage of Tariff Entry No. 85.02 of the CETA, whether the generator and the prime mover were put together on a common base they were to be classified under that heading. The

Hon'ble Supreme Court observed that the manner in which the alternator was installed could not be treated as a common base and therefore resultant assembly would be movable property.

15. We have seen the schematic drawings of the plant and have seen the write up. The dimensions of the plant are substantial. The main components are the 4 bin feeder, the conveyor and the dryer unit. The length of these 3 elements is about 105 feet. The width is about 100 feet. Additional area; is requested to house the asphalt tank, the LDO tanks and the central panel board housing. The individual element such as feeder bins, conveyor, rotary mixing drum, asphalt tank, fuel tanks, etc., have to be separately embedded into the earth. This is done on a civil foundation of 1.5 deep. This is because the weight of the material as well as the vibrations caused by the movement thereof is very substantial. The dryer at one time holds 40MT of raw material. The electrical cabling is underground and so are the pipes carrying LDO. It cannot be said that it could be dis-assembled and re-assembled elsewhere without any civil work being undertaken.

16. In this situation we accept the claim of the appellants that what was assembled at the site using the various components was firmly affixed to the ground and therefore could not be called as "goods".

Consequently the confirmation of duty thereupon would not sustain.

17. Since we have held thus, we do not find it necessary to go into the related issues, namely : (i) whether the Commissioner had jurisdiction in adjudging upon the duty liability arising out of such manufacture in areas which were situated beyond his territorial jurisdiction; (ii) whether the duty should have been computed working backward from the price to arrive at the assessable value; and (iii) whether the Commissioner was required to grant the benefit of Modvat credit when confirming the duty on the plant.

18. We now come to the issue whether the benefit of Notification 1/93 could be denied to the four manufacturing units on the ground that the products cleared by them bore the brand name of another person. The proceedings bring out that the buyers of the plant placed their orders on M/s. Solidmec. M/s. Solidmec purchased

the component parts from the four manufacturing units and also certain other goods from the market.

These goods are transported to the customer's site and were erected thereupon under the supervision of M/s. Solidmec who also give a guarantee for its performance.

19. On record a number of invoices issued by the trading unit M/s.

Solidmec to a number of buyers were placed. Invoice No. 6/96-97, dated 25-4-1996 shows that the plants and/or the components thereof were shown as bearing "Solidmec" brand. It is not denied that at the point of sale there was no activity of manufacture on the part of M/s.

Solidmec. The manufacturing appellants had not denied that the brand name Solidmec is affixed to the plant or the component thereof. It is their case that when the individual goods are despatched from their factory those goods bore their own brand name in each case. It is claimed that the name Solidmec is also displayed only for the sake of identification of the customers. It was also claimed that the brand name of the individual units was much larger in size (47" x 10") than the name of the marketing company which was of the size 20" x 7 1/2".

We find that although the learned Commissioner has remarked on the size of the label of Solidmec, 20" x 7 1/2", he has not cited the dimensions of the labels used by the manufacturing units. It was further demonstrated that the brand name of the manufacturing units was on aluminium plates prominently affixed with the individual pieces of machinery whereas the brand name of the marketing company is printed on paper which was stuck on the inside of the machinery at the point of their clearance. It is further claimed that this paper label bearing the name of Solidmec Equipment Limited also had the legend "marketed by" thereupon. On this ground it is claimed that this label displaying M/s. Solidmec as the marketing people could not be taken to be the declaration of a brand name establishing the relationship between the goods and the buyers thereof.

20. During the hearing substantial case law was cited and discussed.

The learned Commissioner has relied upon the Tribunal judgment in the case of Rughmani Packwell Traders v. CCE - 1996 (17) RLT 565 as also on the Tribunal judgment in the case of CCE v. Tarai Foods Limited - 2000 (121) E.L.T. 215. We have examined these judgments. In the case of Tarai Foods the duty was attracted where foodstuff was put in unit container "bearing a brand name". Thus it was sufficient for any brand name to bore on the package to attract duty. The dispute was not about the ownership of the brand name. This judgment is therefore clearly not relevant. The judgment in the case of Rughmani Packwell Traders does not give any ratio inasmuch as it is an order made on a stay application. In the absence of the final order nothing turns on this judgment.

21. The appellants relied upon the Tribunal judgment reported in 2000 (124) E.L.T. 741 (Emkay Investments Pvt. Ltd. v. CCE, Calcutta). In this case the goods bore the brand name of the manufacturer as well as of another person manufacturing the same goods. Benefit of Notification 175/86-CE was denied to the assessees on the observation that the goods bore the brand name of another person who was not entitled to the benefit of the notification. The Tribunal on examination of both the labels observed that although both brand names did exist on the product the assessee's own brand name was more prominently displayed and the symbol of the another person was in a less prominent position. On this observation the Tribunal allowed the benefit of the notification. In our opinion the ratio of the judgment applies squarely to the facts of this case.

22. In another order in the case of Vijohn Beauty Tech v. CCE, New Delhi - 2002 (143) E.L.T. 148 where both brand names were displayed the Tribunal granted the benefit on the ground and observation that the manufacturer's name was more prominently displayed than the marketing organisation.Poisons Drugs & Chemical Industries v. CCE, Calcutta - 1998 (98) E.L.T. 665 the Tribunal had observed that the brand name of the manufacturer were more prominent than the logos and the names of the marketing firm. On this ground benefit of Notification 175/86 was extended. In the case of Rajdoot Paints Ltd. and Ors. v. CCE, New Delhi - 2001 (134) E.L.T. 281 (Tribunal) = 2001 (42) RLT 997 the goods bore, in addition to the brand name of the manufacturer, another label which showed that the goods were made in technical collaboration with a corporate person abroad. In that case also

the Tribunal overruled the denial of the notification.

24. The appellants are also relying on the Larger Bench decision of the Tribunal in the case of Prakash Industries v. CCE, Bhubaneshwar 2000 (119) E.L.T. 30. In this case the HDPE sacks bore the name of the buyer. The Tribunal observed that where the sacks were sold to a person it did not amount to trading. Therefore it did not establish any relationship between the maker of the sacks and the buyer of the ultimate products packed in the sacks. It is difficult to apply the ratio of this judgment to the facts of this case.

25. One peculiarity in this case comes to the fore with the last citation. The Commissioner has accepted that the goods being manufactured by the lour units were not machinery falling under 8474.10 but parts and components thereof falling under 8474.90. For the sake of convenience the tariff entry is reproduced below : "84.74 Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores, or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; Machines for forming foundry mounts of sand 8474.10 - All goods other than parts 8474.90 - Parts" 26. Note 2 to Section XVI, states parts of machinery which are goods enumerated in any heading of Chapter 84 are to be classified in their respective headings. The description of the machinery manufactured by the four assessees is on record. Most of these are separately nomenclatured in the tariff. Thus an asphalt boiler would prima facie merit classification under Heading 84.03; an asphalt storage tank of an LDO storage tank would fall under Heading 73.09. A paver finisher would fall under Heading 84.30. The hoist would merit classification under Heading 84.26 and the control panel boards would fall either under 85.35 or 85.35 (sic). The allegation was that the complete machinery falling under 84.74 was being sold by M/s. Solidmec. The benefit of the last named judgment could be available if it could be argued that the goods sold by the manufacturing units to the marketing unit were not such as to establish the linkage between them and the buyer of the ultimate. But this has not been the argument of either side.

27. On the basis of the judgment we find that the existence of the brand name of the marketing company in the circumstances described above would not deprive the manufacturing companies of the benefit of the Notification 1/93. The consequential demands would not survive.

28. During the hearing before the Commissioner as also before us the charge that the assessees manufactured not full machinery but the component parts has been admitted. The Commissioner in his order has very fairly given the benefit of the value based notifications and had held that there was a short levy established against the units of the following amounts: M/s. Solmec Earth movers Equipments Rs. 1,97,875/-M/s. Solid & Correct Engineering Works Rs. 2,16,347/- He had observed that this quantum was merged in the quantum of duty; confirmed on account of denial of the Notification No. 1/97. Now that the benefit has been granted the confirmation as made above would survive.

29. Throughout the proceedings the plea of limitation was made by the assessees on the ground that the fact of manufacture and marketing was known to the department from 1996 onwards. Since we have found that the plants erected by M/s. Solidmec did not amount to "goods" and since we have found that the denial of the benefit of the exemption notification to the manufacturing units was not warranted, we need not examine this plea. Plea of limitation has not been advanced on the aspect of manufacture of parts cleared as machinery. In fact Shri Nankani very fairly conceded this levy of duty. The demand to this extent confirmed in an indirect manner by the Commissioner will have to be upheld.30. Penalties have been imposed both under Rule 173Q and also under Section 11AC of the Act on each of the units. The amount of penalty are commensurate with the demands confirmed, hi view of our orders above the demand would survive to a very small extent against two of the five appellant units. The surviving demands are also for the extended period. Therefore although these two units and two partners responsible for their operations deserve to be penalised the amounts of penalty should be of token pro- portions. In view of bulk of the demand failing to sustain we find that the orders of confiscation of land, building, etc., also would not survive.

(i) The demand of Rs. 1,97,875/- against M/s. Solmec Earthmovers Equipments and Rs. 2,16,347/- against M/s. Solid & Correct Engineering Works is upheld. The penalties imposed upon them under Rules 173Q and 226 and under Section 11AC are maintained but reduced to Rs. 2 lakhs on each. Since the firms are penalised to this extent there is no need for levy of penalties on the partners. Therefore, the penalties imposed upon S/Shri H.V. Dodia and D.V. Dodia are remitted.

(ii) Orders of payment of interest will survive for this amount only in the case of these two units only.

(iii) The orders of confiscation of plant, land, building, etc. of the five units are set aside.