

Techma Engineering Enterprise Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-24-1986

Reported in : (1987)(10)LC511Tri(Delhi)

Appellant : Techma Engineering Enterprise

Respondent : Collector of Central Excise

Judgement :

1. By his order No. 36(52) 82-Collr-30/82 dated 5-4-1982, the Collector of Central Excise, Calcutta called upon M/s. Techma Engineering Enterprise to file declaration in terms of notification No. H1/78-CE to the proper ' central excise officer.

The facts leading to this order are quite simple and may be related here. Officers of central excise searched the sales office and godowns of the appellants, M/s. Techma Engineering Enterprise, and seized books of accounts and goods, namely, bolts and nuts falling under item 52 of the Central Excise Tariff, because the factory was not able to produce evidence of payment of duty on the goods. The central excise said that the company supplied raw materials to different manufacturers who manufactured bolts and nuts on their behalf on payment of job charges, during the period of April, 1977 to November 1981 and during which a quantity of 96,154.8 kgs. bolts and nuts valued Rs. 531,576.80 were manufactured. The department called upon the company by a notice dated 2-2-1982 to show cause why they should not pay duty amounting to Rs. 66,869.35, why the seized goods weighing 44,618.50 kgs. seized from them should not be

confiscated and why penalty should not be imposed on them under rule 1730.

2. The company argued that they could not be held to have manufactured the goods, bolts and nuts; they were manufactured by different independent manufacturers on payment of charges. The activity of the company in giving raw material to various manufacturing units and getting goods manufactured did not mean that they (company) had become a manufacturer of the bolts and nuts. The liability to pay central excise duty was always on the manufacturer of the goods and in this case the goods were manufactured by others out of the raw materials supplied by themselves. The duty liability will, therefore, rest on the person who actually carried out the manufacturing activity. M/s. Techma Engineering Enterprise received from the manufacturers fabricated goods, bolts and nuts, manufactured from the raw materials supplied by them. Accordingly, the liability to observe central excise formalities and to discharge duty liability devolves on the actual manufacturers who are also liable for any violation of the Act and the rules. The business undertaken by them does not make them a manufacturer. They are only dealers of the goods and not manufacturers and they are not subject to any central excise control and regulation.

3. The Collector, however, rejected the arguments of the company and said that they had supplied raw materials to different manufacturers and got goods manufactured out of the raw materials, on their behalf.

He relied on the Supreme Court judgment in Shree Agency case and held that the company were manufacturers of the said goods and liable to comply with the rules. He found, however, that the clearances of the said goods were within the exemption limit provided by notification No.71/78-CE and, therefore, central excise duty was not chargeable on the bolts and nuts falling under item 52. But he held them liable to file proper declaration under the provisions of notification No. 111/78-CE.4. The learned counsel for M/s. Techma Engineering said that the Collector was totally wrong, because his reliance on the Shree Agency case was misplaced. That case dealt with a matter where the outworkers were dummies. The show cause notice served on M/s. Techma Engineering did not make such an allegation. In his defence, he quoted 1984 (16) ELT 40, 1984 (16) ELT 415, 1985

(-21) ELT 187, 1985 (21) ELT 299, 1985(22) ELT 750 and Tribunal's order No. 49/86-B1. The counsel did submit that the Collector did not order the payment of duty, but he said that they should not be made to file declaration under notification 111/78-CE because they were not the manufacturers.

5. The learned counsel for the department quoted 1986 (25) ELT 609 to argue that people should appeal only against adverse judgments. This judgment is not adverse, because it places no liability on M/s. Techma Engineering; they were only asked to file a declaration; no further liability has been placed upon them.

6. There is no doubt that the Collector is wrong in his order. The Shree Agency case is not applicable, because the Supreme Court had before it a dispute on exemption of Cotton fabrics manufactured by or on behalf of the same person in one or more factories commonly known as powerlooms (without spinning plants) in which less than 5 powerlooms in all are installed.

As can be seen from paragraph 9 of the judgment, the appellants argued that the cotton fabrics were really manufactured by the 16 weavers, whose details were given by the appellants, the cases of 14 of whom were covered by clause (10) of the notification dated March 1, 1956 and the appellants merely purchased the same from the weavers. The findings of the Assistant Collector reproduced by the Hon'ble Supreme Court throw much light on the case. He said at one point. : I am unable to believe that any genuine trader will enter into such a transaction on moral hazard unless he has got definite interest on the goods produced at the factories. It is very interesting to note that even up to the date of personal hearing M/s. Shree Agency was not in a position to know what amount was recoverable from the powerloom factories to whom they say they have supplied yarn on credit and advanced money every week during the period, (paragraph 9) In paragraph 14, the court again reproduced from the Assistant Collector's order, the following: From the above facts, I am convinced that the plea of a commission agent is not at all genuine. I have no doubt that actually M/s.

Shree Agency continued to engage themselves in production of the cotton fabrics on their own account, but in order to evade the excise levy, the bills were prepared in the individual names of the factories, and the payments were shown to have

been made against the hundies issued by the Mills to M/s. Shree Agency. In all the cases 1 have also noticed that even the hundies have been written by the people of M/s. Shree Agency.

Note the words "engage themselves in production of the cotton fabrics".

The Assistant Collector saw in the transaction an attempt to evade excise levy by Shree Agency who sought to obtain the exemption by presenting the other powerloom mills as independent of themselves when, in fact, the cotton fabrics were made on their Shree Agency's behalf.

The notification dealt with cotton fabrics manufactured by or on behalf of the same person in one or more factories. When Shree Agency suppressed the fact that the cotton fabrics were woven on their behalf by the other 15 or 16 powerlooms, they sought to obtain an exemption on the cotton fabrics by a device that was clearly fraudulent.

7. On 5-1-1957 another notification was issued by the government; it read : Cotton fabrics produced in factories commonly known as powerlooms (without spinning plant) provided that the number of powerlooms producing cotton fabrics in such factories does not exceed four.

This notification, it will be noted, put a limit on the number of powerlooms producing cotton fabrics. The employment by Shree Agency of the 15 or 16 other weavers, disentitled them to the exemption on the same criterion as in the notification dated 1-3-1956.

8. The court observed at para 15 that it was impossible to read the statement of Mr. Abdulkhan of Hanuman Weaving Mills "to make out a case that he was an independent manufacturer who used to buy yarn from the appellant and sell cloth to them and to transact through the appellant as commission agent purchases yarn from others and sale of cloth to others".- The court dismissed the claim of independence of the weavers and, therefore, held them to have woven cotton fabrics as proxies of M/s. Shree Agency. It tacitly agreed with the Assistant Collector who said "in my opinion, the employment of looms is the, vital factor for

consideration in such case." The question, therefore, was whether they employed the looms from the 16 factories for the manufacture of cloth for themselves or not after December, 1956. He observed that "Under these circumstances, I am unable to agree with your contention that you ceased to employ looms from the individual factories after December, 1956." The Assistant Collector came to this conclusion after agreeing that one out of the 16 factories manufacturing cloth on behalf of the appellant was a licenced one and, therefore, the demand was revised to Rs. 43,020.00 from Rs. 52,290/-. A licenced unit obviously could not have been a false front or a cover. All through we see that the lower authorities like the Assistant Collector and the Collector were concerned with proving that the cloth weaving factories or units were not independent but were employed by Shree Agency to make cloth for themselves. This is an activity" that disentitled the cotton fabric to the exemption since on the facts established by the Assistant Collector and accepted by the Supreme Court, the cotton cloth, was made on behalf of Shree Agency by people and units which were not independent but which were employed and controlled to do so by Shree Agency. The Collector referred to the "so-called proprietor- weavers" and noted that they did not even maintain proper accounts of consumption of raw materials and production of cloth. Even payments for so-called sale of yarn supplied to the manufacturing units were fraudulently adjusted against the price of the finished product, and all of the profit was absorbed by Shree Agency.

9. On these conclusions, the Supreme Court held that there could be no doubt that the appellant was a manufacturer within the contemplation of the Act, and the exemption under item (10) of the notification dated March 1, 1956 or under item (7) of the notification dated January 5, 1957 was not available to the appellant.

10. Notification No. 71/78-CE did not have this test, but of clearance "on or after the 1st day of April in any financial year by or on behalf of a manufacturer, from one or more factories", a different standard altogether. The bolts and nuts cleared by the other factories which the Collector himself acknowledges in para 6 to be different manufacturers could not be said to have been cleared on behalf of M/s. Techma Engineering. It is true that they were manufactured on Techma's behalf but they were not cleared on their behalf since clearance cannot be done on

behalf of another. When the bolts and nuts after manufacture are cleared, they were not cleared on behalf of M/s. Techma Engineering but were simply cleared. Therefore, the value of bolts and nuts manufactured by the other independent manufacturers cannot be added into the account of M/s. Techma Engineering. The Collector does not reject the appellants' submission that the manufacturing factories were independent people.

11. It is submitted by M/s. Techma that an independent contractor or manufacturer cannot be called a hired labourer. We are in agreement with this. We understand a hired labourer as one who hires himself out to work for and under the control of another for wages. Thus, a person who manufactures cans and who has machinery in his house can, without himself manipulating or working the machinery, hire labourers to make manufacture cans by turning, manipulating, working the sheets in the machinery, to produce and turn out cans. Such a man is a man who hires labour to manufacture cans and so engages himself in their manufacture.

He is directly and visibly involved in the process of manufacture, in the act of forming and manipulating and fabricating cans from sheets either manually or with the aid of machinery. That person may manufacture the cans for himself or for another, but he engages in their production on his own account. But because he undertakes to make cans for another customer for a consideration, he cannot be said to have hired himself out to other persons for the manufacture of cans or that the customer engages in the manufacture of cans. The difficulty in the interpretation given by the Collector is that there will be two manufacturers in such a case, the so-called person who engages himself and the person who actually manufactures the goods, the hired labourer.

12. Rule 9 prohibits the removal of excisable goods from "any place where they are produced, cured or manufactured or any premises appurtenant thereto etc. etc. until excise duty leviable thereon has been paid". If we say that M/s. Techma were the manufacturers of the bolts and the nuts, what is the place from which they cannot be removed until the duty is paid Is it the place of the manufacturer of the bolts and nuts or is it the premises of M/s. Techma Engineering; and who shall

pay the duty, it duty is payable The straight answer that is free of complications is to say that it is the place of the independent manufacturers who actually fabricated and turned out the bolts and nuts because that is where the prohibition can have effect since it is in those premises that the bolts and nuts are to be found.

There is no point in prohibiting the removal from M/s. Techma Engineering's premises because the bolts and nuts are not there and, not to put too fine a point on it, the nuts and bolts have already been removed; indeed, they never even reached those premises.

13. The Shree Agency case let us note carefully, saw falsification aimed at taking an exemption. The manufacturing was in the context of that notification only. It cannot be said to have been a manufacturing of the kind that we see in this case. There is no charge by the Collector that the independent manufacturers were mere surrogates of M/s. Techma Engineering or that they were set up by them. Had they been so and had there been evidence proving it, we would have without hesitation said that the bolts and nuts were manufactured by M/s.

Techma Engineering and cleared by them. Those dummies' premises would be M/s. Techma's premises, and the prohibition to removal of the goods would be prohibition relevant to removal from M/s. Techma's premises because they in reality are the owners of those manufacturing units.

But it is not so. The Collector himself treats the manufacturing units as independent from M/s. Techma Engineering; at any rate, he does not say that they were tools of M/s. Techma. In accordance with these findings we hold that M/s. Techma Engineering Enterprises is not required to fulfil the requirements of notification No. 111/7S-CE.

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