

AldowIn Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-28-2003

Reported in : (2002)LC420Tri(Delhi)

Judge : S Kang, a T V.K.

Appellant : Aldowin

Respondent : Commissioner of Central Excise

Judgement :

1. In these 4 appeals, arising out of a common Order-in-Original No.27/2001 passed by the Commissioner, Central Excise, the issue involved is whether the panels of Aluminium Glass Curtain Wall emerge on account of manufacturing activity, and if so, who are the manufacturer, whether M/s. Aldowin, Appellant No. 1 or M/s. Balaji Hotels & Enterprises Ltd. (BH& EL), Appellants No. 2.

2. Shri V. Lakshmikumaran, learned Advocate, submitted that M/s. BH & EL were engaged in the construction of a 5 Star Hotel at Chennai; that for installing facade of glass curtain, they imported glass Sheets of specific sizes exactly required as per design and the opening of the facade and purchased locally aluminium frames in dismantled condition after paying Central Excise duty; that the silicon sealant and other materials were also bought locally; that they entered into a labour contract with M/s. Aldowin and Blue Chip Consultants for providing labour for the purpose of assembling panels into frame, erecting glass sheet fixed on to the aluminium frame to the building so as to install the aluminium structural glazing

system; that the Commissioner, under the impugned Order, has held that aluminium glass panel have emerged before installation which are marketable and that as per terms and conditions of the contract, Aldowin are the manufacturer liable to pay Central Excise duty; that the Commissioner has classified aluminium glass panel under sub-heading 7610.90 of the Schedule to the Central Excise Tariff Act and besides confirming the demand of duty and imposing penalty on Aldowin, has imposed penalty on BH&EL and Shri N.S.Sankaran, General Manager, and Shri J. Roy Franando, Project Manager of M/s. BH&EL; that the Commissioner has also confiscated 156 aluminium glass panels with an option to redeem the same on payment of fine of Rs. 17.50 lakhs.

3. The learned Advocate, further, submitted that Aldowin merely supplies labour for the work which inter alia include fixing of the imported heat strengthened laminated glass to the aluminium frames; that after fixing the glass to the aluminium frame, silicon sealant is applied to fix the glass and close the gaps; that the work of filling silicon sealant was entrusted as a labour contract by BH&EL to another contractor M/s. Blue Chip against whom further proceedings had been dropped by the Commissioner; that then each piece called glazed panel is joined together with the help of bracket to form a curtain wall; that glass sheet is complete once the silicon sealant is applied and left to dry for a period ranging from 20 to 30 days; that the glass sheet remains, as glass sheet even after the fixing on aluminium frame and as such there is no emergence of new product nor is there any change in the use of the product; that accordingly the process does not amount to manufacture. Reliance has been placed on the decision in the case of J.G. Glass Industries Ltd. v. U.O.I., 1998 (97) E.L.T. 5 (S.C.), the learned Counsel also mentioned that even if the process undertaken by Aldowin amounts to manufacture, the Appellant No. 1 is not the manufacturer; that it is an undisputed fact that the aluminium glass panel is completed only after the action of silicon sealant which is a specialized job; that the silicon sealant is undisputedly applied by the labourers of Blue Chip and not by the labourers of Aldowin; that in such circumstances Blue Chip should have to be held as manufacturer since they are the persons who are applying silicon sealant and the demand of duty cannot be raised against the Appellant No. 1. The learned Advocate, further, contended that the classification of the product under Sub-heading 7610.90 is not correct; that

the aluminium frame purchased by BH&EL is classified under Subheading 7610.90 which refers to aluminium structure; that the glass sheet fitted on the aluminium frame remains glass sheet, and therefore, it is an article of glass meriting classification under Chapter 70 of the Tariff; that the essential character to the product is provided by the glass and not by the aluminium as decided by the Commissioner; that in all respects weight-wise, volume wise or value wise glass is dominant material; that further when the glass sheet is mounted on the frame of aluminium the frame loses its identity, and in fact, aluminium panel will not be visible and it cannot be called, as alluminium structural system; that the Commissioner has given the findings in the impugned Order that aluminium glass panel gets its form and functioning utility because of frame and mere glass cannot be fixed to the masonry of the building without the support of the aluminium frame; that the material which only provide support cannot give essential character to the product, and therefore, the classification under Sub-heading 7610.90 is not sustainable. He also contended that the demand of duty has been made for the period from August, 1999 to February, 2000 under the show cause notice dated 12-3-2001 and as such demand is time barred; that they were under the bona fide belief that no duty is payable on the impugned goods as there was no process amounting to manufacture is involved; that further the silicon sealant was also not applied by them; that moreover on an identical issue the Commissioner (Appeals) has held that the process does not amount to manufacture. He also mentioned that since the raw material and other infrastructure was supplied by BH&EL they were only working as hired labourer and hence they cannot be held to be a manufacturer as held by the Tribunal in the case of Maruti Udyog Ltd. v. CCE, New Delhi, 2001 (134) E.L.T. 188; that for the same reason no penalty is imposable on the Appellant No. 1. Finally, he submitted that if it is held that duty is leviable, the quantification of duty is incorrect; that it is settled law that labour charges paid includes the profit margin of the job worker and addition of 10% normal profit is incorrect and not sustainable; that moreover value of raw material included in the quantification includes the element of Modvat credit which has to be reduced as held by the Supreme Court in the case of CGE v. Dai Ichi Karkaria, 1999 (112) E.L.T. 353 (S.C.); that they would also be eligible for availing Modvat credit of duty paid on the raw material.

4. The learned Advocate also contended that no penalty is imposable on BH&EL and their General Manager, and Project Manager under Rule 209A of the Central Excise Rules, 1944 since the activity of fixing glass sheet on aluminium frame does not amount to manufacture; that further the Commissioner (Appeals) in Order-in-Appeal Nos. 23 & 24/2001 dated 13-2-2001 passed in the case of M/s. Aluplex (India) Ltd. had specifically held that no excisable product had emerged in the course of activity carried out by Aluplex at the site of Appellant No. 2; that this itself clearly shows that the Appellant Nos. 2 to 4 cannot have reason to believe that the activity carried out at their site resulted in emergence of dutiable items; that imposition of penalty under Rule 209A is clearly incorrect and unsustainable in law.

5. Countering the arguments Shri R.D. Negi, learned SDR, submitted that the process undertaken by the Appellant No. 1 amounts to manufacture as a new product known as aluminium glass panel comes into existence after assembly; that the two-fold test laid down by the Supreme Court in J.G.Glass case to determine the question of manufacture is satisfied in the present matter as the original items namely aluminium sections and glass lose their identity and ceases to exist in their original form.

The learned SDR, further, submitted that the Commissioner after referring to contract entered into between the Appellant No. 1 and Appellant No. 2, has given his findings that Appellant No. 1 are the manufacturer; that Clause (2) of the Contract specifies the price and terms of payment and for a labour supply contract, the remuneration clause would have been wages and not price; that Clause (9) of the Contract clearly provides that necessary hand tools, drilling machine, etc. for performance of the work would be arranged by the Appellant No.1 at no extra cost to BH&EL; that the contents of this clause clearly indicate that Aldowin were to make their own arrangement for the tools required; that this is supported by the statement of Shri M. Siva Kumar who admitted that Aldowin had been involved in fabrication of aluminium doors, windows, etc. from 1992 onwards having necessary expertise to do this work. Reliance has been placed on the decision in the case of CCE v. MM. Kham-batwala, 1996 (84) E.L.T. 161 (S.C.). The learned SDR also mentioned that role of BH&EL was only supervision which is evident

from the statement of Shri J. Roy Fernando who had stated that BH&EL had restricted their role only to supervision, coordination, and monitoring progress of various agencies as per their requirement. He also relied upon the decision of the Tribunal in the case of Kerala State Electricity Board v. CCE, 1990 (47) E.L.T. 62 which has been affirmed, by the Supreme Court as reported in 1990 (47) E.L.T. A161.

6. The learned SDR submitted that the classification of aluminium glass panel under Sub-heading 7610.90 is correct; that these items manufactured by Aluplex (India) Ltd. were classified under Sub-heading 7610.90; that other manufacturer were also classifying the aluminium glass panel under the said subheading; that it is settled legal proposition that classification is to be made as per the description of the product in the Tariff or otherwise on the basis of the common parlance; that as the people who deal with the impugned product are classifying the same under Sub-heading 7610.90 the classification made by the Commissioner in the impugned Order is correct. On the question of demand being time-barred the learned SDR submitted that earlier Contractor Aluplex were aware that excise duty is payable on the product in question; that the Appellant No. 1 had never disclosed to the department the activity of making aluminium glass panel; that they had never filed any classification list or price list and as such the fact of manufacture has been suppressed from the department; that accordingly extended period of limitation is invocable. He relied upon the judgment of the Supreme Court in the case of BPL India Ltd. v. CCE, Cochin, 2002 (143) E.L.T. 3 (S.C.) and Madras Petrochem Ltd. v. CCE, Madras, 1999 (108) E.L.T. 61 (S.C.) wherein the Supreme Court has upheld the invocation of extended time limit for demand the duty accepting the department's contention that under Self Removal Procedure the primary obligation is on the assessee to make proper declaration and entries in the production register RG-1, Gate-passes and RT-12 Returns. In reply the learned Advocate submitted that Aluplex were only supplying aluminium frame which no doubt were classifiable under Sub-heading 7610.90; that those aluminium frames were fitted with glass and as such the impugned product is not classifiable under the said sub-heading.

7. We have considered the submissions of both the sides. The process of making aluminium glass panel as mentioned by the learned Advocate for the Appellant goes to show that a new product known as aluminium glass panel emerges. It has been held by the Supreme Court in the case of *U.O.I. v. Delhi Cloth and General Mills Ltd.*, 1977 (1) E.L.T.) 199 that "manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, and a new and different article must emerge having a distinctive name, character or use." The Supreme Court has laid down two-fold test for deciding whether the process is that of manufacture in the case of *U.O.I. v. J.G. Glass Industries Ltd.* (supra). The test are first, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity comes to exist; secondly, whether the commodity which was in existence will serve no purpose but for the said process. Applying this two-fold test we agree with the findings of the learned Commissioner, in the impugned Order that a different commercial commodity comes into existence by the processes undertaken and the raw materials which were used would not have serve the same purpose but for the processes undertaken. We are also in agreement with the findings in the impugned Order that the Appellant No. 1, Aldowin are the manufacturer of aluminium glass panel. The various Clauses of the contract as referred to in the impugned order clearly indicate that Aldowin are manufacturer and not only supplier of labour. The Scope of work as given in Clause 1 of the contract clearly mentions that Aldowin would supply labour for shifting of glasses from crates to the inspection area for unloading of aluminium unitized panel in CKD units to the godown, for removing aluminium panel units from godown to work area, coordination with the sealant application labour agency, stacking aluminium unitized panel and shifting to desired location, etc. It is also mentioned in Clause 1 that BH&EL would provide the supervision, direction and guidance. This clause also contains the condition that any breakage of glass beyond 2% shall be on account of Aldowin. The necessary tools and tackles were also to be provided by Aldowin. It is settled law that the supplier of raw material is not the manufacturer. It has been held by the Supreme Court in the case of *CCE, Baroda v. M.M. Khambatvala*, 1996 (84) E.L.T.161 (S.C.) that the household

ladies who have made Agarbattis, Dhoop, etc. are manufacturer and not the Respondents. It has also been held by the Supreme Court in *Empire Industries Ltd. v. U.O.I.*, 1985 (20) E.L.T.179 (S.C.) that sale or the ownership of the impugned product is absolutely irrelevant for the purpose of taxable event under the Central Excise Act. Merely, because the sealant was applied by Blue Chip Consultants it cannot be claimed by Aldowin that they are not the manufacturer of Aluminium Glass Panel as the same has come into existence as a result of processes undertaken by them. However, we find substance in the submissions of the learned Advocate that the demand of the duty is hit by time limit specified in Section 11A(1) of the Central Excise Act. The entire demand has been confirmed for the period August, 1999 to February, 2000 whereas the show cause notice was issued on 12-3-2001 which is beyond the period of one year specified in Section 11A(1) of the Act. It has been claimed by the Appellants that they were under the bona fide belief that the processes undertaken by them does not amount to manufacture. In support of their contention they have relied upon the Order-in-Appeal Nos. 23 & 24/2001, dated 13-2-2001 passed by the Commissioner (Appeals) in the case of Aluplex (India) Ltd. who were given the contract by BH&EL for manufacture, supply and erection/fixation of aluminium curtain wall structural glazing system. The Commissioner (Appeals) has held that fixing, sealing, and assembling glass on the aluminium panel and to erect glass wall does not amount to manufacture. It is thus apparent that there was confusion even in the Department whether the activity involved amounts to manufacture or not. It has been held by the Supreme Court in the case of *Padmini Products v. CCE*, 1989 (43) E.L.T. 195 (S.C.) that "mere failure or negligence on the part of the manufacturer either not to take out the licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation." It has also been held in the said judgment that the ingredient mentioned in proviso to Section 11A(1) postulate the positive act and suppression of facts is not failure to disclose the legal consequences of certain provisions.

Further, the appellants also had the bona fide belief that they were only supplying the labour and were not manufacturing at all the goods in question. This view is also supported by the decision of the Appellate Tribunal in the case of *Maruti Udyog Ltd.* (supra) wherein it has been held that where the work is to be carried

out under the total control and supervision of the Appellants the fabricators are to be held hired labour and not independent manufacturers. We, accordingly, hold that the entire demand of duty is hit by time limit. As the entire demand of duty is time barred no penalty is imposable on any of the appellants. The goods which have been seized are liable to confiscation under the provisions contained in the Central Excise Rules. However, taking into consideration all the facts and circumstances of the matter we feel that the interest of justice will be met if the Appellant No. 1 is directed to pay a fine of Rs. 2 lakhs only for redemption of the confiscated goods. We order accordingly.

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