

M.D. Kedia Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-01-2003

Reported in : (2003)(159)ELT909TriDel

Judge : S Kang, a T V.K.

Appellant : M.D. Kedia

Respondent : Commissioner of Central Excise

Judgement :

1. In these twelve appeals, filed against Order-in-Original No. 25/90, dated 6-6-1990 passed by the Commissioner, Central Excise, Order-in-Appeal Nos. 431 to 434, dated 22-4-91 and Order-in-Appeal Nos.

1166-1167/91, dated 29-11-91, the common issues involved are whether the value of clearances of excisable goods cleared by M/s. Dujodwala Industries, M/s. Dujodwala Udyog Ltd. and M/s. Rosin & Terpene Industries are to be clubbed for the purpose of extending the benefit of Small Scale Exemption, whether the goods are chargeable to Central Excise duty, whether the assessable value of the goods has to be determined on the basis of Depot Sale prices, whether the demand is time-barred and whether demand of duty can be confirmed against the units held to be dummy units.

2.1 Shri A.K. Jain, learned Advocate, submitted that M/s. Dujodwala Industries (DI in short) is a partnership firm manufacturing rosin products, terpene chemicals,

camphor and sodium acetate; that they came into existence in 1969 and have been duly licensed by the Central Excise department and are also duly registered as a SSI units with Director of Industries, Haryana; that M/s. Rosin & Terpene Industries (RTI in short) came into existence in 1979 as a partnership firm; that they are also registered as a SSI unit and have filed declaration with the Excise Department on 7-3-1980; that M/s. Dujodwala Udyog Pvt. Ltd. (DUL in short) was set up in 1983 and L4 Licence was obtained by them in February, 1983.

2.2 He, further, mentioned that after conducting search of all the three factories on 12-4-88, a show cause notice was issued on 14-12-88 on the main grounds that all the units were solely controlled by Shri S.V. Dujodwala; the ownership of all three units was vested among Shyam, his father V.M. Dujodwala and his wife L.S. Dujodwala; three units had been shown existing separately to avail of the benefit of SSI exemption Notification and the goods had been under-valued; that the Commissioner, under Order-in-Original Number 25/1990 denied the benefit of SSI exemption to all the three units, confirmed the demand of excise duty for the period from September 1983 to 11-4-1988 and imposed penalty on M/s. Dujodwala Industries besides imposing penalty on S/Shri S.V. Dujodwala, O.P. Garg and M.D. Kedia holding that M/s. Dujodwala Industries are manufacturing unit and others i.e. M/s. Rosin & Terpene Industries and M/s. Dujodwala Udyog Ltd. are dummy units of M/s.

Dujodwala Industries.

2.3 He also mentioned that under Order-in-Appeal Nos. 431 to 434, dated 22-4-1991 and Order-in-Appeal Nos. 116-67/1991, dated 29-11-91 demand of duties have been confirmed against M/s. RTI and M/s. DUL for the period from April, 1988 to March, 1991.

2.4 The learned Advocate also mentioned that a Miscellaneous Application No. 490/2000-C has been filed by the Appellants for admitting certain documents which were not before the Adjudicating Authority; that the earlier Misc. Application No. 861/96-C has become infructuous in view of the Misc. Application No. 490/2000-C; that another Misc. Application No. 531/99-C has been filed for additional ground relating to excisability of the impugned products.

3. The learned Advocate submitted that the Appellants were purchasing duty paid Turpentine and rosin which, under the old Central Excise Tariff were classifiable under Tariff Item 68 and under sub-headings 3801.19 and 3801.90 of the Schedule to the Central Excise Tariff respectively; that their final products Rosin Derivatives and Turpentine Derivatives fall under Tariff Item 15A(1) of the Old Central Excise Tariff and sub-headings 3801.19 and 3801.90 respectively of the present Tariff. He concedes that there cannot be a case of non-excisability of their final products under the Old Tariff but contended that as the raw materials and final products both fall under the same Headings of the New Central Excise Tariff, no further excise duty is chargeable on these products; that they are undertaking only some chemical processes and as the raw materials and the finished goods both fall within the same sub-heading without any distinct tariff description, the goods are not exigible to excise duty; that the Tribunal has already given a finding in their favour in their own matters vide Final Order Nos. 1076-1077/98-C, dated 30-10-1998. He also relied upon the following decisions: Bharat Forge & Press Industries (P) Ltd. v. Commissioner of Central Excise (2) Telangana Steel Industries v. State of Andhm Pradesh - 1994 (73) E.L.T. 513 (S.C.). Union of India v. J.G. Glass Industries - 1998 (97) E.L.T. 5 (S.C.). Light Metal Works v. Commissioner of Central Excise, Bombay - Final Order No. 612/86 BI, dated 26-9-86. Affirmed by the Supreme Court in 1998 (95) E.L.T. A66 (S.C.) read with 2001 (47) RLT 78 (T). Commissioner of Central Excise v. Popular Cotton Covering Works, 1994 (73) E.L.T. 264.

(6) Master Strips Ltd. v. Deputy Commissioner of Commercial Taxes - 1995 (99) STC 216 (Kar.). Swadeshi Mills Co. Ltd. v. Union of India - 1982 E.L.T. 237 (Bom.). Commissioner of Central Excise v. Shri Balaji Cable Industries - 1987 (29) E.L.T. 77(T). Ramakant Wire Industries v. Commissioner of Central Excise - 1993 (63) E.L.T. 148(T).

(10) Bahri Steel Wires v. Additional Commercial Tax Officer - 1992 (84) STC 41.

4. The learned Advocate also submitted that on the question of valuation, the Revenue has no case because when there are substantial sales at the factory gate to numerous independent buyers, the depot sale prices become irrelevant;

that about 55% to 65% excisable products have been sold by DI and RTI from factory gate to independent buyers on direct basis; that the branches are selling their products in retail, semi-wholesale and wholesale directly to consumers and traders; that the price lists in Part I filed by them had been approved by the Department; that the Revenue had not disputed the sale of the goods at factory gate nor it has disputed the price at which the goods were sold at the factory gate; that the higher prices for the goods sold from the branches were charged on account of freight and octroi, loading and unloading charges, godown rents, sales office expenses, local delivery expenses; that in the case of Geep Industrial Syndicate Ltd. v. Commissioner of Central Excise, Allahabad - 2000 (120) E.L.T. 405 (T) = 2000 (40) RLT 638 it has been held by the Tribunal that as 3% of the products are sold to dealers at the factory gate which has not been shown to be rigged, assessment to duty must be based on that price. He mentioned that in terms of the decisions in the cases of Indian Oxygen Ltd. v. Commissioner of Central Excise - 1998 (36) E.L.T. 723 (S.C.), there is no undervaluation of the goods and no demand of duty can be demanded on this count. Reliance has also been placed on the following decisions :Golden View Electrical Industries Pvt. Ltd. v. Commissioner of Central Excise, Chandigarh 5. On the aspect of clubbing the clearances of all the three units, the learned Advocate submitted that DI and RTI are partnership firms and DUL is a private limited company; that in the beginning DI and RTI were being managed by two families of R.M. Dujodwala and V.M. Dujodwala; that DUL came into being in 1982 after the separation of the two families had taken place; that after separation all the units came under the control of the family of V.M. Dujodwala; that Shri S.V.Dujodwala has been the partner in DI and director in DUL from the very beginning; that he came to participate in the working of RTI after V.M.Dujodwala suffered a paralytic attack in 1985; that he was eligible to participate in the activities of RTI as VMD -HUF was partner in that firm and he was a coparcener in the said HUF; that the other circumstances namely commonness of compound, water tank, canteen, administrative block, single entry and exit have pre-existed in all the three units; that all the three units enjoy independent status not only in the eyes of Income-tax, Sales Tax, Factory Act, Provident Fund Act, ESI Act, Industries Directorate, but in the eye of Central Excise Department itself as these units are registered separately and separate

classification lists were filed and approved; that RT 12s were being assessed separately; that further even after registering the case against them, the Department had raised separate demands on RTI as well as DUL accepting them as separate and independents. The learned Advocate also mentioned that the three units have separate sheds for manufacturing activities with due segregation, separate electric meters, separate generator, separate production machineries/spares/fittings purchased by respective units, separate raw materials stock yards and separate accounting thereof, separate bank accounts, separate capital/funding/ bank loans/bank financing; no profit sharing among each other; independent execution of orders. He emphasized that all partners/Directors in the three units are not common; that out of 20 products of DI only 2 products are common between DI and DUL; that there was never divergence of any raw materials among the three units; that services of managers of DI were utilized by DUL and RTI on payment basis; that facilities of table space and telephone were obtained by RTI and DUL on payment basis. The learned Advocate also mentioned that S.V. Dujodwala never stayed at the factory at Faridabad except 3-4 visits a year; that it is totally wrong that Shri S.V. Dujodwala used to fix the sales prices of all the products and despatch instructions were given by him; that in fact he never controlled the clearances or the delivery of the product of any of the units as he was sitting at Bombay and the factories were located at Faridabad; that it may be appreciated that S.V. Dujodwala continued to be an active and experienced member of the family which owned three units; that it is not far fetched that one could always on behalf of others, who are close relatives like wife, father, etc., have authority implicitly or explicitly to issue directions concerning production/clearance; that this would be well borne out of the counter signature of Mrs. Leela S. Dujodwala on the letters written by S.V.Dujodwala. He also contended that hiring of the premises to RTI and DUL by DI was not meant for taking any benefit of SSI exemption as would be evident from the fact that through DUL had started in 1982, it did not take any benefit of exemption notification nearly half of its entitlement; that DI paid full duty all through and that too producing the goods at its full capacity; that as enough vacant space was lying with DI, it was given on hire to RTI and DUL under proper Rent Agreement which was seized by the Department on 12-4-88; that funds for starting the units were not given out by

DI and each unit had its own funds to start the unit for purchasing the machinery and plant including raw materials; that the money transferred among the three units was not interest free; that at the time of search all the units were found working and the stocks of raw materials as well as of finished goods were found matching the statutory records; that the share holding in DUL by persons of Dujodwala family worked out to be 44.97% as against the share holding of 52.03% by other persons; that in any event all the buyers were eligible to take Modvat credit; that during the entire working of the three units, at no point of time the goods manufactured by each unit were found short or more and the Central Excise Officers had made endorsement on the respective RGIs in token of their having checked the stocks.

5.2 The learned Counsel, further, submitted that it is settled law that a Company is always independent of its share holders and is separately entitled to exemption. He relied upon the decision in *Wood Craft Orissa Pvt. Ltd. v. Assistant Collector, Central Excise* - 1979 (4) E.L.T. (J 139). He also contended that it is also settled law that when one person is a partner in two firms, those firms cannot be clubbed because partners and firm are different persons; that it has been held in *Jaswant Sugar Mills Ltd. v. Union of India* -1981 (8) E.L.T. 177 (Del.) that partnership is a legal entity in itself; that the Central Board of Excise & Customs has held in *Re: Shyam Kumari* - 1982 (10) E.L.T. 329 (Central Board of Excise & Customs) that merely because the two partnership concerns had common partners, it cannot be said that the two concerns had no separate existence and legal entity quite different from the partners; that the Tribunal has also taken a similar view in *G.D. Industrial Engineers v. Commissioner of Central Excise* - 1983 (14) E.L.T. 1994 (T); that the Kerala High Court has held in *Rice & Oil Mills v. Dy. Superintendent of Central Excise* - 1981 (8) E.L.T. 59 (Ker.) that a partnership firm is independent of its partners and a firm is the same as a corporation and exemption cannot be computed per capita; that it has been held by the Calcutta High Court in *Ruby Rubber Industries v. Commissioner of Central Excise.* - 1999 (115) E.L.T. 621 (Cal.) that different legal status alone is relevant for Central Excise purposes and it is doubtful whether concept of piercing of veil can be extended; that the Board has also clarified vide Circular 21/31/56-CX., dated 10-8-56; that different firms will be treated as different manufacturers for the purpose of exemption limit, limited

companies are separate entities different from share holders composing it and hence limited company is a manufacturer by itself and will be entitled to a separate exemption limit; that it has also been clarified therein that there are two firms with only some of the partners in common, each firm is entitled to separate exemption limit; that it has been held by the Supreme Court in Commissioner of Central Excise v. Dhiren Chemical Industries - 2002 (139) E.L.T. 3 (S.C.); that the interpretation placed by the Board will be binding on the Revenue.

5.3 The learned Advocate, further, mentioned that common management of all the units is not sufficient to treat the units as dummies. He relied upon the decision in the case of Alfa Toys Ltd. v. Commissioner of Central Excise - 1994 (71) E.L.T. 689 wherein it has been held that the mere fact of management control and a few directors being common and also the fact that interest free loans are being given to the other units by the firm unit, these factors, by itself, is no ground for holding them as dummy units when they are having independent transactions without any profit sharing, management control or money flow back to the main unit and each unit is having independent bank transactions, loans, sale, purchase and tax registration. He also referred to the decision in Jagjivan Dass & Co. - 1985 (19) E.L.T. 441 (T) wherein despite the fact of three factories being located in the same compound having common telephone/storage place/trade mark/office premises, having some common machinery/telegraphic address and mutual flow of finance without interest, the Tribunal did not club the three units keeping in view their separate Income-Tax/Sales Tax Registrations, SSI Registrations and separate electric meters. Reliance has also been placed on the decision in the case of Renu Tondon v. Union of India - 1993 (66) E.L.T. 375 (Raj.) wherein the Rajasthan High Court has held that value of clearance of the two units cannot be clubbed together and the two units cannot be treated as one unit merely because there are some common employees unless there is a clear and specific evidence that there is mutuality of business interest between the two units and that both have interest in the business of each other or they have common funding and financial flow back. "In the present case, the most important aspect having common funding and financial flow back is missing and therefore, to withdraw the assessment or club the clearances is wholly unjustified and illegal and without jurisdiction. Reliance has also been placed on the decision in Process Plant (India) Ltd. v.

Commissioner of Central Excise, Bombay - 2000 (124) E.L.T. 391 (T) = 1999 (32) RLT 651 (CEGAT), D.M. Gears Pvt. Ltd. v. Commissioner of Central Excise, Delhi-1 - 2002 (141) E.L.T. 514 (T) -2002 (48) RLT 768 (CEGAT) and Commissioner of Central Excise & Customs, Pune v. A.Z. Electronics - 2001 (134) E.L.T. 689 (T) = 2002 (48) RLT 867 (CEGAT).

6. Finally, the learned Advocate contended that the extended period of limitation cannot be invoked; that there is no allegation in the show cause notice that any wrong information or an incomplete information had been given by the Appellants; that the Department had granted separate licences after being told the detailed constitution of each of the three units; that all the three units had been visited by a large number of officers for either checking the factories or for drawal of samples or for stock challenge or for studying process of manufacturer; that RTI was subjected to detailed enquiry firstly in the beginning itself and secondly in October, 1987 and was accepted to be rightfully entitled to exemption after both the enquiries; that the Assistant Collector had approved the classification lists after due enquiries; that the factum of common location/partner/director from the same families, common laboratory/common canteen, common main gate, etc., were in the knowledge of the Central Excise officers on account of their visits before accepting the declarations, granting licences and approving ground plans, etc.; he referred to various correspondence in this regard and specifically letter dated 2-4-1980 in which RT I had clearly mentioned that their industry is situated in premises of DI and the plot had been taken on rent; that copy of the Rent Deed and Partnership Deed were also submitted to the Department under letter dated 26-2-1981; that the Department as such cannot allege suppression of any fact. He relied upon the decision in the case of Apex Electrical Pvt. Ltd. v. Union of India - 1992 (61) E.L.T. 413 (Guj.) wherein Gujarat High Court has held that there is no suppression where the assessee is neither required to disclose the information nor is he questioned about it. Reliance has also been placed on the following decisions; Tata Iron and Steel Co. Ltd. v. Union of India - 1988 (35) E.L.T. 605 (S.C.) Prabhu Steel Industries Ltd. v. Commissioner of Central Excise, Nagpur ESPI Industries & Chemicals Pvt. Ltd. v. CCE - 1996 (82) E.L.T. 444 (S.C.) Nikhildeep Cables Pvt. Ltd. v. Commissioner of Central Excise, Coimbatore He also relied upon the Board's Circular No. 312/28/97-CX., dated 22-4-1997

wherein it has been observed by the Board that quite a lot of unnecessary litigation and avoidable work is created by indiscriminate issue of show cause notices invoking the proviso to Section 11A of the Central Excise Act even when there is no fraud or misdeclaration, etc., for example where there has been an established practice well within the knowledge of the Department; that the Board has directed therein that where a view is taken that the long established practice was wrong, the show cause notice cannot normally be issued beyond six months.

7. In respect of demand of Central Excise duty confirmed against M/s.

DUL and M/s. RTI only, the learned Advocate submitted that after holding these two units as dummies of DI, no duty can be demanded from them. Reliance has been placed on the following decisions :East India Cotton Manufacturing Co. Ltd. v. Commissioner of Central Excise - 2000 (36) RLT 274 wherein it has been held that non issue of show cause notice to all the units whose clearances are to be clubbed together is vitiation of principles of natural justice.Ramsay Pharma (P) Ltd. v. CCE, Allahabad - 2001 (127) E.L.T. 789 when a demand is raised by clubbing the value of clearances of the two units, and show cause notice has been issued only to one unit and not to other, the notice is bad in law.Commissioner of Central Excise, Rajkot v. Sompura Ceramics - 2001 (130) E.L.T. 195 (iv) Bijoli Grill Aerated Water Co. v. CCE, Calcutta-I - 1999 (31) RLT 441 wherein it has been held that "We also find sufficient force in the arguments of the learned Advocate that after holding the second Appellant as a dummy unit of the first, the duty and penalty has been confirmed and imposed upon the same, which makes the order self-contradictory." 8. Countering the arguments, Shri A.K. Jain, learned Senior Departmental Representative, submitted that the Central Excise duty is levied and collected on goods manufactured or produced in India; that if the manufacture has taken place, liability to pay duty is attracted irrespective of the fact as to whether the product remains classified in the same Heading of the Tariff; that the learned Advocate has also admitted that manufacturing process is involved; that it has been observed by the Larger Bench of the Tribunal in the case of Guardian Plasticote Ltd. v. Commissioner of Central Excise, Calcutta - 1989 (24) E.L.T. 542 (T) that the Supreme Court had held in Empire Industries case 1985 (20) E.L.T. 179 (S.C.) that even though there was no jump from one tariff entry to another, or

even from one sub-heading to another in the same entry, yet duty liability would arise so long as (i) the process engaged in amounted to manufacture and (ii) the resultant product was a commercially a distinct marketable commodity; that similar views have been expressed by the Tribunal in the case of *Srinivasa Metal Industries v. Commissioner of Central Excise, Guntur* - 1987 (30) E.L.T. 578 wherein it has been held that "If the process of manufacture led to the emergence of a new and distinct commercial product, marketable as such, the conclusion is inevitable that their new product would invite imposition of duty, though there may not be any move away from the tariff item or from one sub-heading to another." The learned Senior Departmental Representative also referred to the decision of the Supreme Court in the case of *TVL. K.A.K. Anwar and Co.*

v. *State of Tamil Nadu*, AIR 1998 S.C. 518. He also mentioned that it has been held by the Supreme Court in *Union of India v. Ahmedabad Manufacturing and Calico Printing Co. Ltd.* - 1985 (21) E.L.T. 633 (S.C.) that the classification of the manufactured product for the purpose of excise duty should depend upon its nature and character at its final stage of production and contended that as new products emerge as a result of processes undertaken by the Appellants, excise duty is leviable. Alternatively, he mentioned that as the plea of excisability was not raised by the Appellants before the Adjudicating Authority, they cannot take a new plea at the Appeal stage.

9. The learned Senior Departmental Representative, further, submitted that the factual position came to the notice of the Department only after the searches conducted by the officers of the Directorate of Anti-Evasion; that the vital information was withheld by the Appellant from the Department which was unearthed only as a result of searches and investigation carried out against them; that RTI and DUL were floated with an intent to evade tax only; that these two units were started in the same premises; that DUL, cannot be considered as independent entity and different from DI because in addition to the common control and supervision of S.V. Dujodwala, there was common production, use of machinery, electricity, despatch and sale of the goods; that separate income-tax, sales tax and SSI registration numbers were taken for RTI and DUL to avoid Central Excise duty by wrongly availing of the exemption. He also mentioned that

the procurement of raw materials was made from the same place by the same person for these three units; that there was common stock of raw materials and finished products of all the three units; that Shri Shyam in his statement dated 5-7-88 stated that he looked after the arrangement of major raw materials for DI and DUL and sometimes for RTI also; that Shri M.D.Kedia, also in his statement dated 12-4-88, deposed that the raw material i.e. Rosin. Turpentine and Isobornyl Acetate, etc., were purchased mostly by Bombay Office; that this is also apparent from the letter dated 5-11-86 addressed to Central Bank of India, Bombay in which it is mentioned that the Manager of Faridabad Branch of Central Bank of India was insisting upon to transfer the account also to it as they found it difficult to segregate the stock of raw material as well as of finished product of DI and DUL as DI were also manufacturing camphor and sodium acetate using the same raw materials imported as well as indigenous; that it was also mentioned in the letter that they had deposited with the Bank the title deeds of office premises at Bombay apart from the first charge on various factories, land and building, plant and machineries located at Faridabad and Himachal Pradesh. The learned Senior Departmental Representative contended that it is thus evident that common land, machine, etc., had been mortgaged for loan facilities from the bank; that prices were controlled by S.V.Dujodwala; that Shri Kedia deposed, in his statement dated 12-4-88 that prices of the manufactured items were communicated by Bombay office; that under letter dated 21-7-87 from Shyam to Calcutta office price of goods ex-factory and ex-godown were intimated; that selling strategy was also decided by Shyam which is evident from Inter Office Memo dated 6-4-87 in which Shyam instructed Calcutta to sell resin on account of RTI to give benefit of 10% excise duty to customers; that Shri M.D.Kedia has clearly stated, in his statement dated 4-5-88 that S.V.Dujodwala used to decide about when, how much, and to whom and from which factory i.e. RTI, DUL and DI how much sale was to be done and accordingly instructions were to be sent to Faridabad factory; that Kedia confirmed that factory gate price of all the three factories was fixed by S.V. Dujodwala and O.P. Garg.

10. The learned Senior Departmental Representative also mentioned that there was common offices, common staff and common facilities for all the units and head branches, offices spread all over India as deposed by Shri O.P. Garg, Shri

B.L. Kamath, Shri Arun Jain and Shri P.K.Jhunhunwala in their respective statements all dated 12-4-88; that Shri Bishwanath Bokania. honorary caretaker and Chartered Accountant at Bangalore had stated in his statement dated 13-4-88 that all the industries belonging to Dujodwala group of companies were having their branch office and only one godown for all the firms at Bangalore; that Shri S.K. Gupta had deposed in his statement that at the time of his appointment in DI, Shri O.P. Garg instructed him that he would have to look after the work of all the companies of Dujodwala group and he was never paid any time by RTI or DUL; that Shri P.K. Jhunhunwala also deposed, in his statement dated 12-4-88, that though he joined RTI, he was asked to look after the work of other group companies, that other officers were also working for the group as a whole; Shri P.P. Jain of M/s. P.P. Jain & Associates, Chartered Accountant, also stated in his statement dated 12-4-88 that a single appointment order was given by S.V. Dujodwala, managing partner/managing director of the group; that similarly Shri Ghanshyam Das Agrawal, Assistant Accountant was appointed for Dujodwala group of Industries at Madras. The learned Senior Departmental Representative further submitted that money was transferred from one firm to another firm without charging any interest, that this is apparent from the statement of Shri S.V.Dujodwala in which he had deposed that to meet the emergency expenses, one firm used to take from another for payments and no interest was generally charged; that at the time of closing of the year, the outstanding amount of sister concerns were transferred to Bombay office Account; that Shri B.L. Kamath has also deposed that the finance was arranged through S.V. Dujodwala for DI, RTI and DUL; that Shri Kedia also deposed that finance was arranged by S.V. Dujodwala and V.M.Dujodwala. He also referred to letter dated 19-9-87 addressed to Dy.

General Manager, Central Bank of India in which Shyam mentioned that the units were owned by a single family of four i.e. Parents, sons and son's wife and that it would be convenient to operate from one account after getting all the funds accumulated in different account to one account and then telegraphically transfer to procurement places i.e.

Head Office at Bombay and factories at Faridabad; that it is apparent from the said letter that all their business activities were interlinked being the business of one family and working capital was utilized commonly and profits made by individual industry were ploughed back into the business funds as a whole. The learned Senior Departmental Representative contended that these facts have not been controverted by the Appellants as Commissioner has given a specific finding in the impugned order that "nothing has been brought on records before me to disprove the allegations levelled in the show cause notice." The learned Senior Departmental Representative relied upon the decision in the case of U.K. Machine Tools Pvt. Ltd. v. Commissioner of Central Excise - 1999 (114) E.L.T 1009 (T) wherein it has been held that common procurement of raw materials, centralized payments to employees, common storage facilities, common operation of bank accounts and other financial arrangements establish that the units were not independent and the value of clearances of the three units is to be clubbed for purpose of small-scale exemption; that this decision has been affirmed by the Supreme Court as the Civil Appeal filed against the decision has been dismissed as reported in 2000 (119) E.L.T. A84.

Reliance has also been placed on the decision in the case of Heemanshu Traders v. CCE, Surat - 2000 (122) E.L.T. 555 (T) wherein the Tribunal has upheld the clubbing of value of clearance of different unit on the basis of cumulative effect of the evidences brought on record; that in the said matter all the operations of different units namely marketing, managerial, sale and purchase were performed under the direction and control of the Appellants. The learned Senior Departmental Representative also mentioned that it is settled law that the veil of the corporation can be lifted and its face examined in substance. He relied upon the judgment of the Apex Court in Calcutta Chromotype Ltd. v. Commissioner of Central Excise, Calcutta - 1998 (99) E.L.T. 202 (S.C.) wherein the Supreme Court has held that the Corporate veil may be lifted, the corporate personality may be ignored and the individual members recognized for who they are in certain exceptional circumstances. The Supreme Court has further held as under : "It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from

probing anything further to find who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other." 11. The learned Senior Departmental Representative also relied upon the decision in Unique Resin Industries v. Commissioner of Central Excise -1993 (68) E.L.T. 230 (T) wherein the Tribunal has held that the separateness of the four units is only a facade as apart from common infrastructural facilities, the units are adjacent to each other, located in the same compound and financed and run by the same family and are being managed by same persons under the directions of the head of the family. Reliance has also been placed on the following decisions :Supreme Engineering Works v. CCE, Pune - 1996 (82) E.L.T. 102 (T) Double Bee Enterprises v. CCE, New Delhi - 1995 (78) E.L.T. 261 (T) 12. Regarding Valuation, the learned Senior Departmental Representative submitted that the Appellants have not made any factory gate sales to any independent buyers; that they had been making direct sales from the factory gate only to their sister concerns, their commission agents or transferring stock to their branch offices and to the independent buyers on contract basis; that no evidence has been produced by the Appellants for having sales at factory gate; that the goods were transferred at lower prices in the names of fictitious firms created in the names of partners/directors by withdrawing the money from their personal accounts; that this has been disclosed by Shri P.K.Jhunjunwala in his statement; that accordingly the assessable value for charging excise duty would be the price charged by their sister concerns from the independent buyers. Regarding confirming demand of excise duty against individual units, learned Senior Departmental Representative mentioned that there are two types of dummy units - Dummy units which are not in existence and dummy units which exist; that where the dummy unit exists and their value of clearances is to be clubbed as all the units are one and the same, demand of duty can be made from them as they have been availing the exemption wrongly.

Finally, the learned Senior Departmental Representative mentioned that the extended period of limitation for demanding duty is invokable as the vital information was suppressed from the Department; that two units were floated with an intent to evade payment of duty by availing the benefit of small-scale exemption

Notification; that all the facts would not have been known by the officers who visited the factory for specified purposes; that the Appellants had withheld the information of having other units; they had also not disclosed the financial flowback among them; that it has been held by the Tribunal in *Bathija Enterprises v. CCE, Bombay-II* - 2000 (115) E.L.T. 720 (T) = 2000 (36) RLT 181 (CEGAT) that "when the main unit had been fragmented into two different units to avail exemption the extended period of limitation can be invoked." He also mentioned that they had also misdeclared the assessable value of the goods. Reliance has also been placed on the decision in the case of *Madras Petro Chem Ltd. v. Commissioner of Central Excise* - 1999 (108) E.L.T. 611 (S.C.) wherein the Supreme Court has upheld the invocation of proviso to Section 11A of the Central Excise Act as under the self-removal procedure, the primary obligation of an assessee is to make proper declarations and entries in RGI, gate passes and RT 12 returns. He also mentioned that the penalty on all the Appellants is imposable; that S.V. Dujodwala, O.P. Garg and M.D. Kedia have been dealing with the excisable goods as they were concerned with their transport, removal, preparation of documents, sales and purchases and filing of documents with the Department and they knew that the goods are liable to confiscation and as such penalty on them is also imposable under Rule 209A of the Central Excise Rules.

13. In reply, the learned Advocate submitted that the decision in the case of *TVL. K.A.K. Anwar & Co.*, supra, is not applicable as the same dealt with the levy of sales tax under the Tamil Nadu General Sales Tax Act, 1987 whereas the duty under consideration in the present matter is Central Excise duty leviable under the Central Excise Act; that RTI and DUL were not created to evade payment of duty as DI was paying excise duty all the time; that DUL paid the duty up to 1985; that further it was Shyam who was organizing all the activities and not DI and, therefore, the confirmation of demand of duty against DI is not correct; that the decision of Tribunal in *Unique Resin Industries* - 1993 (68) E.L.T. 230 was passed before the decision of the Rajasthan High Court in *Renu Tandon's* case; that the decision in *Heemanshu Traders*, supra, is not applicable to the facts of the present matter as in the said matter two units were not paying any duty at all; that the judgment in *Calcutta Chromotype* case was in relation to related person and as such is not relevant; that in fact all the decisions relied upon by the learned Senior

Departmental Representative are not applicable as facts are different. He also referred to the list of buyers (at page 461) whom the goods were sold directly from the factory and contended that they were not related persons. He also mentioned that there was no financial flow back as the partners and directors were arranging finances for their requirements and all the units were having there independent bank facilities; that transfer of profit or loss to Head Office was compulsory for preparing a consolidated balance sheet of all the transactions for submitting to Income Tax Department.

14.1 We have considered the submissions of both the sides. As per Section 3 of the Central Excise Act, the duty of excise is levied and collected on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act. For the purpose of levy of duty what is important is that the goods should be manufactured and they should be capable of being marketed. The mere fact that the goods after being manufactured falls in the same Tariff Heading will not make the goods non-excisable.

It is not the case of the Appellants that the process undertaken by them on the raw materials do not amount to manufacture. Once the process of manufacture takes place, Central Excise duty is leviable under Section 3 of the Act irrespective of the fact that the goods after being manufactured fall in the same Heading. In fact, the learned, Advocate himself mentioned that under the old Central Excise Tariff the raw materials and finished products were falling under two different Tariff Items and there cannot be a case of non-excisability under the old Tariff. The learned Senior Departmental Representative has relied upon the decision of the Supreme Court in Empire Industries case wherein the Apex Court has held that the duty liability would arise if the process involved amounts to manufacture and a new commercially distinct marketable commodity emerges, though there may be no jump from one Tariff entry to another. The Supreme Court in the case of Laminated Packings (P) Ltd. v. Commissioner of Central Excise - 1990 (49) E.L.T. 326 (S.C.) has held as under : "The further contention urged on behalf of the Appellant that the goods belong to the same entry is also not relevant because even if the goods belong to the same entry, the goods are different identifiable goods, known as such in the market. If that is so, the manufacture occurs and if

manufacture takes place, it is dutiable." 14.2 In the present matters the Appellants are bringing duty paid turpentine and rosin and are manufacturing derivatives of Rosin and Turpentine which are different products and applying the ratio of the Supreme Court's judgment, the duty is payable by them even if there is no change in the Tariff Heading. Recently the Supreme Court has again held in Commissioner of Central Excise, Meerut v. Kapri International (P) Ltd. - 2002 (142) E.L.T. 10 (S.C.) that "the mere fact that the material from which the new goods are manufactured, has suffered a duty under a particular tariff item that does not exclude the finished product from being exigible to fresh duty if the Tariff Act provides for it. In the instant case, though the cotton fabric had suffered duty under Tariff Item 19(1), the Tariff Act has made bed sheets, pillow covers, etc., also dutiable under the very same tariff item, therefore, the Respondent is liable to pay duty on bed sheets, pillow covers, napkins, etc., manufactured by it". The decision in the case of J.G.Glass Industries, supra, is not applicable as in the said matter glass remains glass even after printing and no new product emerges. The decision in the Appellants own case [Final Order Nos. 1076-77/98-C, dated 30-10-98] does not advance their case as the Tribunal observed that "the authorities below have not addressed the question whether the impugned goods can be said to still retain the same characteristics of the raw materials even after manufacture" and the appeals were decided by the Tribunal on the ground of limitation only. We, therefore, hold that the impugned products are exigible to excise duty.

15. The Collector under, Order-in-Original No. 25/90, dated 6-6-1990 has denied the benefit of SSI exemption to all the three units DI, DUL, and RTI and has confirmed the demand of Excise duty against M/s. DI holding it as manufacturing unit and holding DUL and RTI as dummy of DI. We have considered the submissions of both the learned Advocate and learned Senior Departmental Representative who have also relied on many decisions in support of their respective contentions. The clubbing of value of clearances of the various units will depend on the facts and circumstances of each case. The Tribunal has observed in the case of U.K. Machine Tools Pvt. Ltd. supra, that "no cut and dry formulae could be established to arrive at the decision whether a group of units could or could not be considered as a single manufacturer/manufacturing entity for the purpose of small-scale exemption. From the various decisions of the Tribunal, it is

seen that while with reference to isolated facts, the units may appear to be distinct and separate, but when the facts and circumstances are seen in totality, a new picture may emerge where the seemingly distinct and separate units merge into one common manufacturing unity." 16. There is no substance in the submissions of the learned Advocate that the value of clearance of a limited company cannot be clubbed. The Supreme Court has gone into the aspect of lifting the veil of corporate entity in the case of Calcutta Chromotype Ltd., supra. The fact that the said judgment relate to the concept of "Related Person" is irrelevant to the law laid down to the effect that "to lift the veil the actual shareholding of both the companies and the person in control of the management of both the companies needed to be ascertained to consider the identity of interest of both the companies in the business of each other." It is thus well settled that the veil of the Corporation can be lifted and its face examined in substance. The Collector has given a specific finding in the impugned Order No. 25/90 that S.V. Dujodwala was controlling the production and other business activities of all the units. In fact we observe that the Appellants have themselves mentioned that S.V. Dujodwala is eligible to participate in the activities of R.T.I. being a coparcener of the VMD-HUF which is a partner in RTI. Further he is controlling DI as partner and DUL as a director. Thus it is apparent that these three units were controlled by one person Shri S.V. Dujodwala. The material brought on record by the Revenue clearly show common use of plant and machinery, common production, mixing of final products, common despatches and sales, utilization of employees commonly. The learned Senior Departmental Representative has referred to the letter dated 5-11-86 in which it is mentioned that Central Bank of India, Faridabad was insisting upon to transfer the account to it as it was found difficult to segregate the stock of raw materials as well as of finished products of DI and DUL. The financial involvement of these three units is also evident from the evidence material brought on record. Common land and machines, etc., were mortgaged for loan facilities from the bank. The learned Senior Departmental Representative has also drawn our attention to the statement of Shri S.V. Dujodwala in which he had stated that to meet the emergency expenses, one firm used to take money from another for payments and no interest was generally charged. It has not also been rebutted by the Appellants that at the close of the year, the outstanding amount of sister

concerns were transferred to Bombay Office Account. In fact it has been mentioned by the learned Advocate that the transfer of profit or loss to head office was compulsory for preparing a consolidated balance sheet of all the transactions for submitting to Income Tax Department. The learned Senior Departmental Representative has also referred to letter dated 19-9-87 addressed to the Central Bank of India mentioning therein that it would be convenient to operate from one account. In U.K. Machine Tools, from the facts of common procurement of raw material, centralized payments to employers, common storage facilities, common operations of bank accounts and other financial arrangement, the Tribunal has concluded that the value of clearances of the three units are required to be clubbed. This decision has been affirmed by the Supreme Court as reported in 2000 (119) E.L.T. A84 (S.C). Similarly in the case of L.R. Industries v. Commissioner of Central Excise, Pune - 1999 (114) E.L.T. 550, the Tribunal has, after placing reliance on facts like the three companies having common management under one person, having common procurement of raw material, having common planning, having common stock of raw materials, having common marketing arrangements and free flow of finance between three units concluded that these factors cumulatively indicates interdependence of the three units with each other and the value of clearance is to be clubbed for the purpose of Notification No.175/86-CE., dated 1-3-1986. In Heemanshu Traders, supra, also the Tribunal went by the cumulative effect of the entire evidence to club the value of clearances of various units including a limited company.

The case law cited by the Appellants may be relevant for weighing the individual factors but not for considering the question of clubbing in totality. For example, decision in the case of Renu Tandon is not applicable to the facts of the present matter as therein the Rajasthan Court found that there was no mutuality of interest or common funding and financial flow back. In the present matter, the Revenue has succeeded in establishing the common funding and financial flow back.

The decision in the case of D.M. Gears Pvt. Ltd. - 2002 (48) RLT 768 is also not applicable as the Tribunal did not find any cogent evidence in support of the finding of the Commissioner in that case that both the units were under the overall control of one Rajev Gambhir and that the units belonged to the Gambhir family.

The fact of all the units registered separately under different Acts is of no relevance for the purpose of clubbing the clearance if the different units are held to be one. It has been held by the Tribunal in *Double Bee Enterprises v. Commissioner of Central Excise, New Delhi* - 1995 (78) E.L.T. 261 (T), relying on the decision in *Lotus Chemical Industries and Aurbindo Chemical Industries v. Commissioner of Central Excise, Indore*, Final Order Nos. 458-459/91-C, dated 21-5-1991, that "the mere fact that units are separately registered as SSI unit or that they were separately assessed for income-tax or sales tax purpose will not make any difference for clubbing of clearances of two firms." Thus taking into account the cumulative effect of all the facts and circumstances, we find no reason to interfere with the findings of the Collector that the value of clearances of all the three units, DI, RTI and DUL is to be clubbed for determining the availability of the benefit of small-scale exemption.

17. We also agree with the submissions of the learned Senior Departmental Representative that the extended period of limitation for demanding duty is invokable as the Appellants had devised the modus operandi of having three units to avail the benefit of SSI exemption with an intent to evade payment of duty. The visit by the officers or approval of classification list etc. will not disclose to the Department that all the units are controlled by one person and there is common funding, common management, etc.

18. We, however, find substance in the submission of the learned Advocate that when RTI and DUL have been held to be dummy units of M/s.

DI, no duty can be separately demanded from them. This was the view expressed by the Tribunal in the case of *Bijoli Grill Aerated Water Co.*, supra. We also observe that M/s. DI who has been held to be the manufacturing unit was not issued any show cause notice while demanding the duty from M/s. RTI and M/s. DUL in Appeal Nos. E/1983-1984/91-C, E/1987-1988/91-C and E/187-188/92-C. The benefit of SSI Notification has been disallowed on the basis of Collector's Order-in-Original No. 25/90 without making M/s. DI as a party to the proceedings. We, therefore, set aside the demand of duty, subject-matter of the aforesaid six appeals, following the decision in the case of *Ramsay Pharma (P) Ltd. v.*

Commissioner of Central Excise 19. We also find substances in the submission of the learned Advocate that there was substantial sales at the factory gate. He has drawn our attention to the list of direct sales from factory gate to buyers from 1-4-1987 to 31-3-1988, at page 461 of the Paper Book (E/3134/90-C). The Revenue has not brought any material on record to controvert the submissions that these were not independent buyers. Thus following the decisions in the case of Indian Oxygen Ltd. v. Commissioner of Central Excise - 1988 (36) E.L.T 723 (S.C), the assessable value has to be determined on the basis of factory gate price for the period from 1-4-87 to 31-3-88. As the information about factory gate sale for the remaining period has not been brought on record, we remand the aspect of valuation to be redetermined by the Commissioner for the remaining relevant financial years.

20. We find that penalty under Rule 173Q of the Central Excise Rules is imposable on M/s. DI. The Penalty, however, is reduced to Rupees eight lakhs as the aspect of valuation has been partly allowed and partly remanded. The penalty is also imposable on Shri S.V. Dujodwala as he was controlling the entire affairs of all the units and as such was dealing with the excisable goods. However, we reduce the penalty from Rs. 1.5 lakh to Rs. one lakh. Penalties imposed on Shri O.P. Garg and Shri M.D. Kedia are set aside as they were employees of DI only. All the appeals are disposed of in the above terms.

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