

Subros Ltd. Vs. Commissioner of Central Excise

Subros Ltd. Vs. Commissioner of Central Excise

SooperKanoon Citation : sooperkanoon.com/30920

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-14-2003

Reported in : (2003)(162)ELT626TriDel

Judge : S Kang, a T V.K.

Appellant : Subros Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. In these two appeals filed by M/s. Subros Limited, arising out of a common Order-in-Original No. 9/2002 dated 28-6-2002 passed by the Commissioner, Central Excise, the issue involved is whether the different goods cleared from one or both the Plants of the Appellants constitute car air-conditioner kit not eligible for exemption from payment of Special Excise Duty under Notification No. 22/2000-C.E., dated 6-3-2000 or parts of car air-conditioner eligible to the exemption.

2.1 Shri V. Lakshmikumaran, learned Advocate, submitted that the Appellants have two Plants, viz., Plant I and Plant II in which they manufacture various parts and accessories of car air-conditioning system for supplies to various manufacturers of Motor Vehicles; that in Plant I, they manufacture cooling unit assembly and condensing unit assembly; that in Plant II they manufacture the gas compressor, parts of gas compressor and other fitting parts like valves, pipes, tubes, etc., necessary for the fitment of the car air-conditioner; that separate purchase orders are placed by the Motor car manufacturers on Plant I and Plant II

depending upon their requirements; that based on these orders, supply of the various parts is made separately under separate invoices at various points of time; that at no point of time, the complete car air-conditioner emerges at the hands of Plant I or Plant II; that the customers procure other parts required for assembly of the car airconditioner from various other manufacturers; that the complete airconditioner comes into existence during the course of manufacture of the car.

2.2 The learned Advocate mentioned that separate show cause notices dated 2-4-2001 were issued to Plants I and II contending that Serial No. 212A of Notification No. 6/2000 is not available to the parts in question since they are in the nature of sub-assemblies and when the clearances of both the plants are clubbed together, they have supplied only car air-conditioner and thus they would not be eligible for exemption; that the Commissioner, under the impugned Order, confirmed the separate duty demand on Plant I and Plant II besides imposing penalties also separately.

3.1 The learned Counsel submitted that the Commissioner has confirmed the demand of duty holding that the clearance of parts made from both the plants are to be clubbed for the purpose of determining the benefit of exemption from payment of Special Excise Duty (SED); that the clubbing of the clearances made by the two independently Central Excise registered units of the same manufacturers under the jurisdiction of different offices, to determine the eligibility of the exemption is ex-facie erroneous and contrary to well settled legal position; that it is settled law that the goods manufactured in a factory and cleared therefrom have to be assessed to duty in the condition in which they leave the factory; that any further operation or process done on the goods is totally irrelevant and extraneous for the purpose of classification; that it is also settled legal position that goods manufactured and cleared from each unit, may be of the same entity, are to be assessed to duty separately and not by clubbing the clearances of all the units; that the Central Excise law does not permit the assessment of the goods to duty based on such clubbing of clearances of various units located in different places and effected at different points of time. He relied upon the decision in the case of A.P. Heavy Machinery & Engg. Ltd. v. CCE, Hyderabad - 2001 (128) E.L.T. 155 (T) wherein it has been held that "these units of the same corporate

entity situated in three different municipal limits cannot be considered as the same manufacturer..... The goods are to be assessed in the condition in which they are presented for the purpose of assessment, the duty is to be assessed when the goods are being removed from the place of removal i.e. factory gate." Reliance has also been placed on the decision of the Larger Bench of the Tribunal in *Sony India v. Commissioner of Customs* - 2002 (143) E.L.T. 411 (T-LB). He, further, submitted that the findings of the Commissioner that they had floated the second unit only to smoothen the operations and claiming exemption is ex-facie erroneous and incorrect; that if this finding is taken to be correct, the clearances of all manufacturers from one or more factories have to be clubbed in order to determine the eligibility of any exemption as in the case of small-scale exemption notification; that there is no condition in the Notification that the clearances of two or more units of the same manufacturer are to be clubbed to determine whether they are entitled for the exemption.

3.2 He, further, mentioned that in the context of Serial No. 212A of the Notification No. 6/2000-C.E. itself, the Board has, under Circular No. 666/57/2002-CX., dated 25-9-2002, clarified that unless all the parts mentioned in the Circular are supplied together, the exemption to parts of air-conditioner cannot be denied to the goods; that applying the said Circular, the Tribunal in *Keikin Panalfa Limited v. CCE* - 2003 (151) E.L.T. 367 (T), has held that when all the parts mentioned in the Circular are not supplied, the exemption cannot be denied; that in the present case, both Plant I and Plant II supply different parts of car air-conditioner and at no point of time, all the parts mentioned in the said Circular are supplied by a single plant and accordingly exemption from SED cannot be denied to the Appellants.

4. The learned Counsel also mentioned that Rule 2(a) of the Rules for the Interpretation of the Schedule is not invocable in the present matter; that car air-conditioner does never come into existence as an air-conditioner as different parts of the car air-conditioner get fitted in different parts of the car; for example the condenser assembly is mounted between the front bumper and car radiator whereas the compressor is mounted on the engine and control panel assembly on instrument panel; that as per Interpretative Rule 2(a), any reference in a Heading to goods shall be taken to include a reference to those goods, removed

unassembled or dis-assembled; that thus by virtue of Rule 2(a), a consignment of the air-conditioning machine in an unassembled condition would be covered by or fall within the description 'Air-conditioning machine' under Heading 84.15; that, however, Rule 2(a) does not create a deeming fiction to the effect that the goods in unassembled condition would be deemed to be complete or finished goods; that thus, even after application of Rule 2(a), a consignment consisting of all parts of air-conditioning machine would continue to be covered by description "parts" while simultaneously qualifying for being equally covered by description "air-conditioning machine in unassembled condition"; that two contradictory statements cannot be true at the same time; that, however, a truthful statement may be expressed in more than one way and consequently collection of parts is covered by description; that in the present matter the question is not whether heap of parts would be covered by the description used in Heading 84.15; that the question is whether heap of parts would be covered by the description 'parts of air-conditioning machine' employed in the Notification; that for deciding the applicability of an exemption notification all one has to see is that the items are covered by the description given in the Notification and it is wholly irrelevant that they can legally be covered by another description as well; that thus the benefit of Notification No. 22/2000 cannot be denied to the Appellants. He relied upon the decisions in *Tata Engg, & Locomotive Co. Ltd. v. CCE & C, Pune - 2001 (136) E.L.T.1316 (T)* and *Majestic Auto Ltd. v. CCE 5*. Finally the learned Advocate submitted that their bonafide is established from the fact that right from the day they started claiming exemption from payment of SED, they had sought clarification from the Department regarding the correct legal position; that they had also filed classification declaration giving therein the details of the goods manufactured by them along with the claim of exemption from payment of duty of SED; that thus mere filing the declaration dated 6-3-2000 indicating the factual position of clearance of parts of air-conditioner cannot amount to misdeclaration; that it is settled legal position that mere staking of claim for an exemption notification cannot amount to misstatement; that moreover penal provisions under Sections 11AB and 11AC of the Central Excise Act are not invocable as these provisions can be invoked only when the duty is determined under proviso to Section 11A(1) of the Act; that in the present matters, duty demand has not been raised under

proviso to Section 11A(1); that in fact, the show cause notice did not even allege that the duty demand had arisen on account of any suppression of facts or fraud, etc., on the part of the Appellants with intent to evade payment of duty. The learned Advocate submitted that if the charge of suppression, etc., is not upheld against the Appellants, they would not press for the refund of SED already paid by them.

6.1 Countering the arguments, Shri M. Chandrashekharan, learned Senior Advocate, submitted that the Appellants have themselves taken a professional advice from the learned Advocate for the Appellants who has advised that Special Excise Duty should be paid on all supplies which constitute a complete A.C. kit whether supplied together or separately from different plants under different purchase Orders and invoices; that the Commissioner has rightly referred to said legal advice produced by the Appellants themselves; that the documents were shown to the representative of the Appellants who appeared for personal hearing; that this fact has not been denied by him as only the company has given an affidavit which is not relevant; that a number of decisions have been relied upon by the learned Advocate for the Appellants without making any efforts to show that the facts in those decisions are similar to the facts in the present matters. He relied upon the decision in the Regional Manager v. Pawan Kumar Dubey - AIR 1976 Supreme Court 1766 wherein it has been held by the Supreme Court that "it is the rule deductible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are supplied in each case to similar facts".

6.2 The learned Senior Counsel, further, submitted that it has been mentioned by the Commissioner in the impugned Order that the cooling assembly unit and condenser assembly of car air-conditioner manufactured in Plant I are transferred to Plant II and then the same are supplied by the Appellants to their customers; that in their classification declaration effective from 15-10-99, the Appellants have declared "air-conditioner kit for model 'B' consisting of gas compressor with magnetic clutch, cooling unit, condenser assembly and parts and accessories";

that thus kit consists of all the elements which makes a complete car air-conditioner; that initially the Appellants were manufacturing all the sub-assemblies of car air-conditioner at Plant I and in order to meet the heavy demands, they started Plant II; that the sub-assemblies manufactured at Plant I are transferred to Plant II to be used as inputs of the automotive air-conditioner system which is completed at Plant II and finally cleared as end-products i.e. automotive car air-conditioner to their customers. He also mentioned that M/s. Subros Limited is one legal entity and separate units have been established so as to smoothen the work; that this is strengthened from the fact that their customers were corresponding not with Plant I and Plant II but with M/s. Subros Limited only and they were not talking about parts of air-conditioners but about car air-conditioners. He relied upon the decision in Sharp Business Machines Pvt. Ltd. v. Collector of Customs - 1990 (49) E.L.T.640 (S.C.). In the said matter the Department has held that the goods covered by three bills of entry to be one consignment which amounted to the import of ten copiers. The Supreme Court held that the "Tribunal was not right in setting aside the finding of the adjudicating authority and in taking the view that one has to look into the respective licence and not to the fact that if all the consignments covered by all the bills of entry assembled together, there will be a full and complete machine." The learned Sr. Counsel, therefore contended that in the present matter the Commissioner has rightly combined the clearances of both Plant I and Plant II; that in Shiv Shakti Enterprises v. Collector of Customs - 1991 (52) E.L.T. 439 (T) also, the Tribunal held that "the goods imported by the appellants in the two bills of entry are to be clubbed together." The learned Senior Counsel also mentioned that it is well settled legal position that corporate veil can be pierced to see as to who is controlling all the affairs. He relied upon the judgment in the case of State of U.P. v. Renusagar Power Co. - 1988 (4) S.C.C. 59 wherein the Supreme Court has held that "the veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of Salomon case still visits frequently the hounds of Company Law but the veil has been pierced in many cases... It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and

not treating it as the own source of energy." 7. The learned Senior Advocate mentioned that Board's Circular No.479/45/99-CX., dated 17-8-1999 clearly mentions that "fitting of an air-conditioner kit, which had already suffered duty as an air-conditioner, does not amount to manufacture of air-conditioner"; that only in respect of parts acquired from different sources by garages and fitted at different places in a car, the Circular clarified that the activity does not amount to manufacture as a separate and distinct commodity does not come into existence. He, further, mentioned that sub-heading 8414.30 of the Central Excise Tariff speaks of gas compressors of a kind used in refrigerating and air-conditioning appliances and machinery; that as such the Appellants cannot claim that air-conditioning machinery does not come into existence; that in CCE v.Subros Limited - 1989 (43) E.L.T. 543 (T), it has been held by the Tribunal that once a motor driven fan or blower is fitted to the air-conditioning kit, the same will be classified under Heading 8415.00 as air-conditioning machine. He also contended that a car air-conditioner comprises of various parts and assemblies which are sold as kit; that when the Appellants are making assemblies of a car air-conditioner, the same cannot be classified as parts only; that when the car air-conditioner is being cleared in an unassembled form, Rule 2(a) of the Interpretative Rules becomes applicable; that the goods put to assessment are those goods which make the air-conditioning machine and as such the clearances of both the units are to be combined; that Heading 84.15 applies to air-conditioning machine as well as parts thereof; that the goods have to be classified read with Rule 2(a) of the Interpretative Rules, as these goods have the essential character of a car air-conditioner; that accordingly the benefit of Notification will not be available to the Appellants. The learned Senior Advocate emphasised that when an assessee clears all parts which constitute a machine, exemption Notification has to be read with Tariff Heading read with Rule 2(a). He relied upon the decision in Universal Commercial Corporation v. CC, Delhi - 1994 (69) E.L.T. 150 (T). In this case, since the imported goods contain motor driven fan or blower for circulating the air and also contain a refrigerator unit consisting of a compressor, condenser and cooling oil, the Tribunal has held that "the imported goods satisfy the description of air-conditioning machines described under CTH 84.15". The Tribunal has further held that "it cannot be said that the imported goods are

incomplete air-conditioning machines although from the point of view of common parlance they may be incomplete air-conditioners but for the purpose of assessment to customs duty we are necessarily to go by the definition or description of goods as given in CTA. That definition having been fully satisfied as stated above, there is no doubt that the goods are air-conditioning machines falling under TH 84.15." Reliance has also been placed on the decision in *Nafar Chanda Jute Mills Ltd. v. Assistant Collector of Central Excise* - 1993 (66) E.L.T. 574 (Cal.) wherein the Calcutta High Court has held that Rules of Interpretation are applicable to exemption notification as well.

8. The learned Senior Counsel finally submitted that the provisions of Section 11AC of the Act are invokable for imposition of penalty as they had wilfully mis stated the facts to evade payment of duty; that both the plants apart from clearing a complete air-conditioning system from both the units, were also manufacturing a complete air-conditioner system in the individual unit as per declaration dated 1-3-2000 under Rule 173B of the Central Excise Rules, 1944; that they changed the heading of the complete air-conditioner system to parts and accessories of automotive air-conditioner system after issue of Notification No.22/2000-C.E., dated 6-3-2000; that when on 4-8-2000 they started paying duty under protest, they once again changed the nomenclature from parts and accessories of automotive air-conditioner system to automotive air-conditioner system; that thus the, Appellants resorted to change of nomenclature between the period 6-3-2000 to 3-8-2000 just to mislead the Department that they were manufacturing parts of car air-conditioner; that they were very well aware that if a car air-conditioner was being cleared from one or both the units, they have to pay SED on that as they had sought legal opinion which was on the lines of the stand taken by the Department; that even then they did not pay the SED in time; that this shows their clear cut intention to evade payment of duty.

9. In reply, the learned Advocate for the Appellants submitted that Plant No. II was set up in 1995 and as such it cannot be alleged that Plant II was created to avail the concession of any notification or to camouflage any clearances made by the Appellants; that the question of lifting the veil does not arise as admittedly both plants belong to same limited company; that the demand in show cause notice has

not been made on the basis that the goods have moved from Plant I to Plant II. He pointed out that the finding of the Commissioner in the impugned Order that they had admitted that a complete car air-conditioner system was being manufactured in Plant II is erroneous as they had never admitted such a fact; that even their letter dated 4-8-2000 addressed to the Range Superintendent does not state so; that it is clearly mentioned therein that they "are the manufacturers of parts and accessories of automotive air-conditioning system". He finally referred to the Commissioner's finding (internal page 30 of the impugned Order) to the effect that the Appellants had cleared air-conditioner system to M/s. Maruti Udyog Limited and contended that these clearances made to Maruti are not the subject-matter of demand of duty in the impugned order.

10. We have considered the submissions of both sides. Even though the Appellants have contended that both Plant I and Plant II supply different parts of car air-conditioners and at no point of time, all the parts of the car air-conditioners are supplied by any single plant and that the clubbing of the clearances made by two units is erroneous and contrary to well settled legal position, the learned Advocate has emphasised that as there was no suppression or wilful misstatement on their part, imposition of penalty on the Appellants under Section 11AC of the Central Excise Act is not warranted and if their this contention is accepted they would not challenge the demand of duty confirmed against them. We, therefore, first take up this aspect as to whether there was any suppression of facts or misstatement on the part of the Appellants. It has been alleged in the show cause notice dated 30-3-2001 that the Appellants, despite the knowledge that the goods cleared by them are in the nature of air-conditioning machines, misstated the facts and availed the exemption from SED on parts, thereby knowingly evaded the payment of SED during the period 6-3-2000 to 3-8-2000. The Commissioner has given his findings that both plants were manufacturing a complete air-conditioner system in the individual units relying the declarations filed by them on 1-3-2000, 6-3-2000 and 4-8-2000 and they paid the duty only when they came to know that a show cause notice was being contemplated. It is not the case of the Revenue that the Appellants did not file the declarations as required under Rule 173B of the Central Excise Rules and cleared their goods without informing the Department. Any change in declaration effected by them has been

made known to the Department and has not been kept suppressed from it. It is open to a manufacturer to effect the clearance of goods in such a manner which is beneficial to him within the legal framework.

The changes effected by them in their declaration was brought to the notice of the Department and it was open to it to verify the same. It cannot therefore be made the basis of suppression or misstatement. We also observe that the matter regarding payment of Special Excise Duty was being discussed between the Department and the Appellants. In their letter dated 14-6-2000, in response to letters from the Range Superintendent, they had claimed that assemblies or sub-assemblies are not air-conditioning system as defined under Heading 84.15 of the Central Excise Tariff. We also note that the Central Board of Excise & Customs, has itself under Circular No. 666/57/2002-CX., dated 25-9-2002, clarified that "if an assembly or kit (even in CKD or SKD form) does not have all the above components it will not be considered to have the essential characteristics of an air-conditioning machine and will be classified as "parts"." The Tribunal, relying upon the said Circular, in the case of Keihin Panalfa Limited v. CCE, Noida - 2003 (151) E.L.T. 367 (T) has held that air-conditioner sub-assembly are eligible for the benefit of exemption under Notification No. 6/2000-CE, We also note that the Appellants, in their letter dated 4-8-2000 has again referred to their earlier declarations in which the benefit of exemption of SED on parts and accessories was claimed by them. They had also mentioned in the said letter that they had been given to understand by the Department to debit the Special Excise Duty. Then they had chosen to pay SED with effect from 4-8-2000 under protest and filed a revised declaration under protest. No mileage from the said declaration can be derived by the Revenue in support of charge of misstatement as the same has been filed "under protest". They had also requested the Department to examine their declaration filed earlier and to settle the dispute regarding the classification of their products.

In view of these facts, we agree with the learned Advocate for the Appellants that mere filing the declaration on 6-3-2000 and claiming benefit of exemption Notification cannot amount to wilful misstatement warranting imposition of penalty under Section 11AC of the Central Excise Act. It has been also the consistent view

of the Tribunal that when classification list/declaration has been filed by the manufacturer, extended period of limitation cannot be invoked meaning thereby that none of the ingredients mentioned in the proviso to Section 11AC(1) of the Central Excise Act can be alleged against the manufacturer. It has been held by the Supreme Court in *Padmini Products v. CCE* - 1989 (43) E.L.T. 195 (S.C.) that "mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was a scope for doubt as to whether a licence was required to be taken out or where there was a scope for doubt as to whether goods were dutiable or not, would not attract Section 11A of the Act." In the present matters, there is doubt about the nature of the goods whether parts or air-conditioner system and Rules of Interpretation and Section Note are being resorted to ascertain as to benefit of Notification is available or not. Thus penalty under Section 11AC and interest under Section 11AB of the Central Excise Act cannot be imposed on the ground that the Appellants filed a declaration claiming the benefit of the Notification. For the same reasons, no penalty under Rule 173Q(1) of the Central Excise Rules is imposable as declaration has been filed claiming the benefit of exemption Notification and the issue revolves round the interpretation of Tariff. We, therefore, set aside the penalty imposed on the Appellants and demand of interest under Section 11AB of the Central Excise Act.

11. As the penalty and interest have been set aside, we are not going into other issues regarding availability of Notification No.6/2000-C.E. and whether the clearances from two units can be clubbed for the purpose of determining the availability of exemption under a Notification and also the question as to whether the impugned goods are air-conditioning machine or only parts thereof.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com