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interscape Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-22-2003

Reported in : (2003)(90)ECC65

Judge : A T V.K., P Chacko

Appellant : interscape

Respondent : Commissioner of Central Excise

Judgement :
1. Shri Vinoo K. Naik (appellant in Appeal No. 2336/98) is the proprietor of the concern M/s. Interscape (appellants in Appeal No.2335/98). Hotel Rajputana Palace Sheraton, Jaipur (appellant in Appeal No. 216/98) is a unit of M/s. ITC Hotels Limited (erstwhile Hotels Division of M/s. ITC Limited). M/s. Interscape were awarded a contract, as per two agreements dated 23-6-92 and 25-8-92 entered into between them and M/s. ITC Ltd. (incorporated under the Companies Act, with registered office at Kolkata), to make different items of furniture for a 5-Star Deluxe Hotel at Jaipur, which later on came to be known as Hotel Rajputana Palace Sheraton (hereinafter referred to as Hotel RPS).

The work was executed by M/s. Interscape through sub-contractors in 1992-93, with the raw materials supplied by M/s. ITC and as per the specifications, drawings and designs supplied by them. On 12-12-95, officers of Central Excise visited Hotel RPS and called for details of the above contract, which were furnished by M/s. ITC. Copies of the two agreements also were supplied by M/s. ITC.

Statements of Shri Vinoo K.Naik of M/s. Interscape and Shri Abhijit Chakrawarti of M/s. ITC were recorded under Section 14 of the Central Excise Act. The Central Excise officers subsequently inspected various items of furniture manufactured at site by M/s. Interscape. They seized the furniture items which were believed to be liable to confiscation under the Central Excise Act. On the basis of scrutiny of the agreements, details of the works done thereunder, the statements recorded under Section 14, etc., the department found that M/s. Interscape had manufactured various furniture items chargeable to duty of excise under Headings 94.01 and 94.03 of the Central Excise Tariff Schedule and had cleared the same without payment of duty. The department also found that M/s. Interscape had suppressed material facts relating to such manufacture and clearance. Accordingly, the proviso to Section 11A(1) of the Central Excise Act was invoked and show-cause notice dated 13-9-96 was issued to M/s. Interscape, Shri Vinoo K. Naik, M/s. ITC Ltd., and Hotel Rajputana Palace Sheraton. An addendum to the SCN was issued subsequently to M/s. Interscape. The SCN alleged that, by suppressing material facts and contravening various provisions of the Central Excise Act, 1944 and the Central Excise Rules, 1944 with intent to evade payment of duty, M/s. Interscape had manufactured and removed furniture items of total value of over Rs. 1 crore without payment of Central Excise duty amounting to Rs. 35,49,367/-. Apart from demanding the duty, the SCN (read with the addendum) proposed to impose penalties on M/s. Interscape under Rules 9(2), 52A and 173Q and under Section 11AC. The notice also proposed to impose penalties on Shri Vinoo K, Naik and M/s. ITC under Rule 209A. Further, it called upon M/s.

Interscape and M/s. ITC to show cause, why the seized furniture items should not be confiscated under Rules 9(2) and 173Q. The show cause notice was contested by the noticees. The Commissioner of Central Excise who adjudicated on the dispute passed Order No. 26/97 confirming against M/s. Interscape a demand of duty of Rs. 20,79,309.62 under Section 11A read with Rule 9(2) and imposing on them a penalty of Rs. 20 lakhs under Rule 173Q. The Commissioner also imposed penalties of Rs. 1 lakh and Rs. 10 lakhs respectively on Shri Vinoo K. Naik and M/s.

Hotel Rajputana Palace Sheraton under Rule 209A. All the seized furniture items in respect of which duty demand was confirmed were confiscated under Rule 173Q with option to M/s. Hotel RPS to redeem the goods by paying Rs. 6.5 lakhs as redemption fine along with duty amount of Rs. 20,79,309.62 (in the event of this amount of duty not having been paid by the assessee by the time of redemption of the goods). The appeals mentioned earlier in this paragraph are against this order of the adjudicating authority.

2. M/s. Interscape had also manufactured various items of furniture for M/s. Umaid Bhawan Palace, Jodhpur tinder a labour contract awarded by the latter. Officers of Central Excise who visited the premises of M/s.

Umaid Bhawan Palace (for short, U.B. Palace) on 15-1-96 and made enquiries found that various furniture items such as service counters, TV/music units, wardrobes, round mirror frames, TV trolleys and a variety of tables and other items had been manufactured and supplied by M/s. Interscape and that Central Excise duty had not been paid on any of the items. The said furniture items were seized as they were believed to be liable to confiscation under Rule 173Q. Statements of Shri Vinoo. K. Naik (proprietor of M/s. Interscape) and Shri Hari Singh (Corporate Accountant of M/s. U.B. Palace) were recorded. Shri Vinoo K.Naik stated, inter alia, that the contracted work had been completed in October, 1994. Shri Hari Singh stated that the work had been started in 1989 and was completed in March, 1995. The Central Excise officers collected from them details of the work, payments made under the contract etc. They also recorded a statement of one Shri Chandrasekhar Kanetkar (Managing Director of M/s. Chandrasekhar Architects Pvt. Ltd., interior designers who had designed the furniture items manufactured by M/s. Interscape and supplied to M/s. U.B. Palace), who furnished the particulars of payments received from M/s. U.B. Palace towards interior designing charges. He also stated that the furniture works had been completed in October, 1994. On the basis of the results of investigation, the department issued show cause notice dated 1-3-96 to M/s. Interscape and M/s. U.B. Palace. The notice issued to M/s.

Interscape raised a demand of Central Excise duty of Rs. 20,10,156/- on them in respect of the various furniture items manufactured by them in the premises of M/s. U.B. Palace and proposed to confiscate the furniture items (valued at Rs. 82,78,677/-) under Rule 173Q and to impose penalty under Rules 9(2), 52A, 173Q, 210 and 226. The notice issued to M/s. U.B. Palace proposed to impose penalty on them under Rule 209A. An addendum to the show cause notice was later issued to M/s. Interscape for charging interest on duty under Section 11AB as also for imposing penalty under Section 11AC. Both M/s. Interscape and M/s. U.B. Palace contested the show cause notices. After hearing the noticees, the Commissioner by order No. 20/97, dated 18-12-97 confirmed against M/s. Interscape demand of duty of Rs. 11,20,117/- under Section 11A and imposed on them a penalty of Rs. 2.5 lakhs under various provisions of the Central Excise Rules, 1944. He also confiscated, under Rule 173Q, those items of furniture which were held to be dutiable. However, option was given to M/s. U.B. Palace to redeem the goods on payment of a fine of Rs. 1 lakh as also on payment of the aforesaid amount of duty (if not already paid by M/s. Interscape).

Appeal No. E/2337/98-D, filed by M/s. Interscape, is against this order of the Commissioner.

3. Heard Counsel for the appellants and SDR for the Revenue. It was submitted by ld. Counsel for M/s. Interscape and Shri Vinoo K. Naik that M/s. Interscape had not manufactured any of the furniture items.

They had assigned the works to several independent contractors on a principal-to-principal basis. M/s. Interscape had no control over the sub-contractors or their workers. Most of the raw materials required for the job work were supplied by M/s. ITC and the actual job work was carried out by the sub-contractors. The role of M/s. Interscape was only that of a trader and they could not be considered as manufacturer.

All the items mentioned in the annexure to the SCN were in a state of having become part and parcel of the Hotel's immovable property and were not marketable and excisable. Without prejudice to this contention, ld. Counsel contended that the furniture items in question could be considered as handicrafts

by virtue of their special visual appeal and substantial ornamentation. As handicrafts were exempt from duty under Notification No. 76/86-C.E., dated 10-2-86, the said items were not chargeable to duty of excise. In this connection, reliance was placed on the Hon'ble Supreme Court's decision in CCE v. Louis Shoppe -[1996 (83) E.L.T. 13 (S.C.)]. It was further submitted that M/s.

Interscape were under a bona fide belief at the relevant time that the furniture items could not attract levy of Central Excise duty owing to the Exemption Notification No. 76/86-C.E. as also the Tribunal's decision in the case of Louis Shoppe. Therefore, the department's allegation that they had suppressed material facts with intent to evade payment of duty was baseless and invocation of the extended period of limitation against them was not justifiable. It was also argued by the Counsel that the provisions of Section 11AB were not applicable to the case. It was further argued that where a penalty was imposed on M/s.

Interscape under Rule 173Q no penalty could be imposed on the proprietor under Rule 209A. It was requested that all these arguments be considered mutatis mutandis in the connected appeal (E/2337/98) also. Ld. Counsel for M/s. Hotel RPS adopted the arguments relating to demand of duty on the furniture items acquired by the hotel. Their additional argument was that M/s. Hotel RPS were neither liable to pay any duty of excise on the furniture items nor to be penalised. There was no proposal in the SCN to impose any penalty on Hotel RPS, nor to recover any duty from them. It was also pointed out by the ld. Counsel that, in a similar case, the Commissioner (Appeals), Allahabad had exonerated their sister unit viz. Welcom Group Mughal Sheraton (Agra) from penal liability under Rule 209A as per Or-der-in-Appeal No.236-C.E./KNP-I/97, dated 1540-97.

4. Ld. SDR reiterated the findings of the adjudicating authority. He particularly submitted that the decision of the Supreme Court in the case of Louis Shoppe was the final authority on the question whether any furniture item was, or was not, a handicraft within the meaning of this term occurring in Notification No. 76/86-C.E. Two tests were laid down by the Apex Court for the purpose. The appellants failed to establish that the furniture items answered the said tests so as to attract the benefit of exemption under the notification.

5. We have examined the records and the submissions. In Appeal Nos.

2335, 2336 and 216, the main issue is whether M/s. Interscape was liable to pay duty of excise amounting to Rs. 20,79,309.62/- on the furniture items other than those mentioned in Annexure-I to the Commissioner's order. The items mentioned in the said Annexure have been held to be classifiable under Heading 44.10 of the CET Schedule and to be exempt from payment of Central Excise duty. All the remaining items of furniture covered by the show cause notice have been classified under Heading 94.03 and chargeable to duty of excise.

Heading 94.01 is the entry for seats (other than those of Heading No.94.02) whether or not convertible into beds, and parts thereof. Heading 94.02 stands for medical, surgical, dental or veterinary furniture; barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements; parts of the foregoing articles.

Heading 94.03 covers other furniture and parts thereof. None of the parties before us has had a case that the furniture items covered by the show cause notice were classifiable under Heading 94.01 or Heading 94.02. None has argued that any of the goods covered by the show cause notice was any part of any article. There are two Chapter Notes in Chapter 94, which are relevant to the Headings 94.01 to 94.03. These are Note (2) and Note (3). While Note (2) relates to complete articles, Note (3) refers to parts. Therefore, it is Note (2) which is relevant to the instant case and the same reads as under :- "The articles (other than parts) referred to in Heading Nos. 94.01 to 94.03 are to be classified in those headings only if they are designed for placing on the floor or ground.

The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other : (a) Cupboards, bookcases, other shelved furniture and unit furniture; Admittedly, most of the items held dutiable by the Commissioner are designed for placing on the floor or ground and, therefore, their classification under Heading 94.03 is in order. The second paragraph of the above Note (2) is in the nature of a proviso to the first paragraph of the Note. Even if any of the articles is designed to be hung or to be fixed to the wall or to stand one on the other, it is to be classified

under the same heading. Cupboards, wardrobes and other shelved furniture are in this category. Ld. Commissioner has eminently pressed the Note (2) into service and rightly held the subject goods to be classifiable under Heading 94.03. We uphold the order of the Commissioner classifying the goods under Heading 94.03. It has been strenuously argued before us that, by virtue of their visual appeal, ornamentation, etc., the goods should be considered as 'handicrafts' attracting the benefit of exemption under Notification No. 76/86. As rightly submitted by ld. SDR, the appellants have not been able to establish that any of the subject goods could be held to be handicrafts on the tests laid down by the Apex Court in Louis Shoppe. On the question whether any furniture can be treated as handicraft within the meaning of the Notification, the Hon'ble Supreme Court's ruling in Louis Shoppe is the final authority. The relevant part of the judgment of the Apex Court is extracted below :- "The question is whether wooden furniture by itself can be treated and "handicrafts" within the meaning of Notification No. 76 of 1986, dated February 10, 1986? It must be said straightway that furniture as such does not qualify as handicrafts. It may be characterised as "handicrafts" if the following tests are satisfied : "(1) It must be predominantly made by hand. It does not matter if some machinery is also used in the process.

(2) It must be graced with visual appeal in the nature of ornamentation or in-lay work or some similar work lending it an element of artistic improvement. Such ornamentation must be of a substantial nature and not a mere pretence." Whenever the above question arises, the authorities shall examine the matter from the above stand-point and pass orders accordingly The above principles shall apply to all pending matters and to all matter arising hereinafter." Their lordships have laid down two tests for characterising any wooden furniture as "handicraft". There is no dispute in the instant case that the first test laid down by the Court has been satisfied. However, in relation to the second test laid down by the Court, both sides have agreed that it is a matter of subjective satisfaction to determine whether the furniture under consideration is graced with visual appeal in the nature of ornamentation or in-lay work or some similar work lending it an element of artistic improvement. In the instant case, ld.Commissioner has found thus : "There is not any substantial ornamentation or special visual appeal in the goods such as is normally found in the works of traditional handicrafts, or delicate, workmanship

and special aesthetic appeal" We are not inclined to interfere with this subjective finding of fact, in the absence of any reliable evidence on record to prove to the contrary. The subject goods, already classified under Heading 94.03, will, therefore, be held to be chargeable to duty at normal tariff rate.

6. The question now before us is who manufactured the above goods. The agreements entered into between M/s. Interscape and M/s. ITC had clearly held out the work as "manufacture of furniture items." The work was to be done by M/s. Interscape on labour contract basis as per the drawings and specifications supplied by M/s. ITC, and any wastage thereof was to the contractor's account. The responsibility of organising material movement was with the contractor. In respect of all labour directly or indirectly employed for the contracted works, M/s.

Interscape had to comply with the provisions of the Contract Labour (Regulation & Abolition) Act (1970), the Minimum Wages Act (1948), the Payment of Wages Act (1936) and all other laws made for the benefit of labourers. It was open to them, under the contract, to employ sub-contractors to execute the works. But, in that case, M/s.

Interscape were liable to ensure that all the ob- ligations of the contractor were duly carried out by the sub-contractor. The work was executed by M/s. Interscape through sub-contractors in 1992-93, with the raw materials supplied by M/s. ITC and as per the specifications, drawings and designs supplied by them. Though it was claimed on behalf of the M/s. Inter- scape that the entire work had been done by their sub-contractors under inde pendent agreements entered into between them and such sub-contractors on a principal-to-principal basis, there is no evidence on record to substantiate this claim. It is an undisputed fact that M/s. Interscape had furnished bank guarantee to M/s. ITC for the value of the raw material supplied by the latter and that any wastage of raw material was to the former's account. M/s. Interscape has had no case that they, in turn, had bound their sub-contractors in a similar manner. This clearly shows that it was M/s. Interscape who actually worked on the raw mate rial supplied by M/s. ITC, and not the so-called sub-contractors who could only be treated as hired labourers who worked directly under M/s. Interscape for la bour charges. The salient terms and

conditions of the contract, already men tioned, can be seen to operate in aid of this conclusion. Therefore, we have to concur with the Commissioner's finding that M/s. Interscape had performed the activity of manufacture of the furniture items, with their own labour or hired labour and with raw materials supplied by M/s. ITC and as per the specifica tions, drawings and designs supplied by them. Thus, M/s.

Interscape are liable to pay duty of excise on the furniture items.

7. It has been contended by the appellants that the demand is barred by limitation. We are unable to accept this contention inasmuch as it is a proven fact that M/s. Interscape had suppressed the manufacture and, clearance of furniture before the department with intent to evade payment of duty, thereby attracting the proviso to Section 11A(1) of the Central Excise Act. M/s. Interscape were, admittedly, engaged in such manufacturing activity in the past also and had been paying duty under protest. They could have done so in 1992-93 also. Had they done so, their present contention that they had manufactured and cleared the goods in question without payment of duty under a bona fide belief that the goods were exempt from payment of duty would perhaps have stood to reason. In their reply to the SCN, they said that they had never claimed even the benefit of small scale exemption. Their payments of duty under protest were not based on Notification No. 76/86 either.

But, their Counsel has argued that, in view of the said Notification, they believed bona fide that the furniture items were exempt from duty.

He has further argued that the Tribunal's decision in the case of Louis Shoppe [1995 (75) E.L.T. 571] (which gave a liberal meaning to "handicraft" to include hand-made furniture within its ambit, and which later on came to be set aside by the Apex Court vide (83) E.L.T. 13) had also worked to strengthen such belief. These arguments which are fact-centric are not supported by anything contained in the party's reply dated 3-10-1996 to the SCN. We, therefore, reject the plea of bona fide belief. We have not found any evidence on record to disprove the department's allegation that M/s. Interscape suppressed the manufacture and clearance of furniture with intent to evade payment of duty. Had they had no such intent, they would have disclosed their activity to the department and claimed the

benefit of exemption (if any). We, therefore, hold that the allegation of suppression of facts with intent to evade payment of duty in this case is sustainable against M/s. Interscape and, therefore, the extended period of limitation has been rightly invoked against them. M/s. Interscape have to pay the duty of excise confirmed by the Commissioner. However, the demand of duty raised by the Commissioner on M/s. Hotel RPS cannot be sustained inasmuch as they are not the manufacturers of the goods and such a demand was not proposed in the show cause notice.

8. As it is not disputed that the goods were removed by M/s.

Inter-scape without coverage of Central Excise gate passes and without payment of duty, and as mens rea has been found against them, the provisions of Rule 173Q are attracted and the goods are liable to confiscation as rightly held by the Commissioner. Option to redeem the goods was rightly given under Section 34 of the Central Excise Act to the owners of the goods, viz. M/s. Hotel RPS. However, in the facts and circumstances of the case, the quantum of redemption fine imposed by the adjudicating authority is too high and the same requires to be reduced to a reasonable limit. As we have already upheld the confiscation of the goods under Rule 173Q, we have also to concur with the Commissioner's decision to impose penalty on M/s. Interscape under the rule. The penalty of Rs. 20 lakhs imposed by the Commissioner on M/s. Interscape under the said Rule is, however, too harsh in the facts and circumstances of the case and the same will also be reduced.

Penalties have also been imposed on Shri Vinoo K. Naik and M/s. Hotel RPS under Rule 209A. The reason stated by the Commissioner is that Shri Vinoo K. Naik and M/s. Hotel RPS were "responsible for dealing in the goods." This is, but, not enough for a penalty under the rule. There is no finding in the impugned order that the above parties in any manner dealt with the subject goods with the knowledge or belief that the goods were liable to confiscation. In the absence of such a finding, the penalties cannot be sustained. Moreover, the penalty on the proprietor has to be vacated when the one on the proprietorship concern remains. Interest has been demanded by the adjudicating authority on the duty to be paid by M/s. Interscape. This demand is under Section 11AB of the Central Excise Act.

This provision of law (which was enacted only w.e.f. 28-9-96) was not in force during the period of dispute (1992-93) and, therefore, the demand of interest cannot be sustained in law.

9. The essential facts in appeal No. 2337 of M/s. Interscape are not significantly distinguishable from those involved in their appeal No.2335. The only apparent difference is that, unlike in their contract with M/s. ITC for the works at the site of Hotel RPS, M/s. Interscape carried out similar works at the site of U.B. Palace (Jodhpur) under oral orders from the latter and not under any written agreement. But, this difference is of no consequence for the case on hand. All the points raised by the two sides in appeal No. 2335, in relation to demand of duty confirmed against M/s. Interscape on furniture items as also to penalty imposed on them, were agitated with equal fervour in appeal No. 2337 also. Our decision on the issues in the former appeal must apply with equal force to the latter. Accordingly, the Commissioner's order confirming the demand of duty of Rs. 11,20,117/- against M/s. Interscape will be upheld. As the confiscation of the goods ordered by the Commissioner under Rule 173Q is not under challenge in this appeal, there is no reason for us to interfere with the imposition of penalty under the rule except in respect of the quantum thereof. We are of the view that, in the facts and circumstances of the case, the quantum of the penalty imposed by the Commissioner is excessive.

(i) The demand of duty confirmed against M/s. Interscape in the Commissioner's Order No. 26/97, dated 26-11-97 is upheld; the demand of interest under Section 11AB is set aside; the penalty imposed on the party under Rule 173Q is sustained but only to the extent of Rs. 8 (eight) lakhs. Appeal No. E/2335/98-D stands allowed in part.

(ii) The penalty imposed on Shri Vinoo K. Naik under Rule 209A is set aside. Appeal No. E/2336/98-D stands allowed.

(iii) The penalty and demand of duty on M/s. Hotel Rajputana Palace Sheraton (Jaipur) are set aside. The confiscation of goods is upheld but the quantum of redemption fine is reduced to Rs. 3.5 lakhs.

Appeal No. E/216/98-D stands allowed in part.

(iv) The Commissioner's Order No. 26/97, dated 26-11-97 stands modified to the extent mentioned above.

(v) The demand of duty confirmed against M/s. Interscape in the Commissioner's Order No. 20/97, dated 17-12-97 is upheld; the penalty imposed on them is sustained but only to the extent of Rs. 1 lakh; the Commissioner's order is upheld with modification to this extent. Appeal No. E/2337/98-D stands dismissed, but with reduction of the quantum of penalty as above.

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