

Diamond Engineering and Trading Vs. Collector of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-13-1987

Reported in : (1989)(44)ELT92TriDel

Appellant : Diamond Engineering and Trading

Respondent : Collector of C. Ex.

Judgement :

1. Show cause notice dated 13-10-1980 was issued to the two appellants M/s Navyug Engineering and Trading Corporation and M/s Diamond Engineering and Trading Corporation alleging that they had manufactured and removed brass screws worth Rs. 85,459.23P without payment of Central Excise duty and that duty thereon was proposed to be demanded from them under Rule 10-A of the Central Excise Rules and that penalty was also proposed to be levied and directing them to show cause why such action as above mentioned should not be taken. The show cause notice was on the basis that though the two units were claimed to be separate they were in reality one, run and administered by Shri D.D.Malhotra, the sole proprietor of M/s Navyug Engineering and Trading Corporation but that part of the production was falsely shown to be that of M/s Diamond Engineering and Trading Corporation in order to avail benefit of exemption notification for each of them. Both appellants replied denying the said charges. On adjudication the Additional Collector of Central Excise, Chandigarh, under his order dated 22-1-1982 held the charges established. He, therefore, demanded from both, under Rule 9-A(5) of the Central Excise Rules, duty on the

excess value of clearances of Rs. 85,459.23P and further imposed on each of the appellants a penalty of Rs. 25,000/-. On appeal the Central Board of Excise and Customs, under order dated 13-7-1982, upheld the finding of fact of the Additional Collector that the two units were in reality one only, run by Shri D.D. Malhotra. But the Board further held that the extended period of limitation would not be available for demanding duty and hence the duty demand which extended to a period beyond the normal 6 months period cannot be upheld. The penalty on each of the appellants was reduced to Rs. 10,000/-. It is against the said order that these two appeals have been preferred. Since common questions of fact and law arise for determination in both appeals they were heard together.

2. We have heard Shri J.S. Agarwal, Consultant for the appellants and Shri K.C. Sachar for the Department.

3. On the question of fact as to whether the two appellants were independent entities, each manufacturing brass screws (falling under T.I. 51-D CET) for itself or whether they were in reality one only though two different firms were purported to be Constituted, the case for the Department, and the grounds for acceptance thereof, have been set out in the order of the Central Board of Excise and Customs in paragraphs 22 to 29 as follows: "22. The points in favour of the appellants are that the two units are registered separately and for each a separate Central Excise licence has been obtained. Moreover, both the units have different constitution.

23. The points against the appellants are firstly, that both the Units are within the same family set-up inasmuch as the partners of the First Appellants are the brother and the wife of the proprietor of the Second Appellants. Therefore, the benefit accruing to each of these two units remains within the family.

24. Secondly, the administrative control of both the Units were being exercised by Shri D.D. Malhotra.

25. Thirdly, for this purpose he was using a fictitious name "B.B. Khanna", in regard to the First Appellants.

26. Fourthly, the invoices and records of both these firms had been written by the same person i.e. the same Shri D.D. Malhotra.

27. Fifthly, the Board finds that the point of fact established in the Order of the Additional Collector that the two Units were in effect being administered by one man has not been denied in appeal by the Appellants.

28. Sixthly, the Appellants have also not been able to produce any evidence to contradict the Additional Collector's finding that no machinery for manufacture of brass screws was installed in the premises of the First Appellants during the relevant period.

29. The Board after considering the points for and against is of the view that both these units were in effect functioning as one Unit only and the legal "facade" of separate entities had been created in order to avail of the exemptions under the aforesaid Notification.

Once this "facade" or "veil" is lifted, the "face" that confronts one from all directions is that of Shri D.D. Malhotra, the puppet Master who was pulling the strings of both the Units." It is these grounds that were urged before us also for confirming the findings of the lower authorities on the said questions of fact.

4. It appears to us, on a careful consideration of the allegations made in the show cause notice and the evidence relied upon by the lower authorities for the conclusion as above, that the said conclusions are incorrect. As observed in paragraph 22 of the order of the Board (as also in the order of the Additional Collector) the two units are legally separate entities, one being a sole proprietary concern (M/s Navyug Engineering and Trading Corporation), the other being a partnership concern (M/s Diamond Engineering & Trading Corporation).

The two held separate Central Excise licence, though the licence of M/s Diamond Engineering and Trading Corporation appears to have been surrendered at a later stage, evidently on the ground that their clearances were within the exemption limits and hence no licence was required. Shri D.D. Malhotra of M/s Navyug Engineering and Trading Corporation (NETC in short) has mentioned in his

statement dated 1-8-1980 that he had not surrendered his licence as he intended to expand his business, though, according to him, till then, his clearances were within the exemption limit. In the circumstances the mere fact that M/s Diamond Engineering and Trading Corporation (DETC in short) was a partnership of Shri G.D. Malhotra and Mrs. Hiro Malhotra wife of Shri D.D. Malhotra would not by itself be sufficient to establish that the two units were in reality one, though a legal facade was created of separate identity.

5. In the show cause notice, as well as in the order of the Additional Collector and in the order of the Central Board, it has been observed that Shri D.D. Malhotra was using the fictitious name "B.B. Khanna" with reference to DETC. An inference had been drawn therefrom that it was Shri D.D. Malhotra that was in reality operating under the name of DETC also. It appears to us that the lower authorities were in error.

On 8-5-1980 Central Excise authorities appear to have visited NETC and found at that time a person present who introduced himself as Shashi Bhushan, Manager of the firm. The show cause notice proceeds to state that it was later on found that this person, who claimed to be Shashi Bhushan, Manager of NETC, was none else than Shri D.D. Malhotra, sole proprietor of NETC. After some further investigation a further visit had taken place on 1-8-1980 and again on 2-8-1980. At that stage a statement had been recorded on 1-8-1980 from Shri D.D. Malhotra.

Another statement had been recorded on 2-8-1980 from one Shri Bharat Bhushan Khanna (B.B. Khanna). It is impossible to accept that B.B. Khanna was the same person as D.D. Malhotra since the authorities themselves had recorded statements separately from these two persons, one on 1-8-1980 and the other on 2-8-1980. It is therefore beyond doubt that B.B. Khanna and D.D. Malhotra were different and distinct individuals. It maybe that Shashi Bhushan (maybe S.B. Khanna) may have been the name under which Shri D.D. Malhotra introduced himself initially to the Central Excise authorities on 8-5-1980 but subsequently accepted his proper identity. Though the show cause notice reads as if Shashi Bhushan refused to tender any statement (evidently on 8-5-1980) we have in the paper book filed by the appellants a typed copy of a statement dated 8-5-1980

purported to be by Shri D.D.Malhotra. But this statement is not attested by the Central Excise officer and we have therefore no information whether the copy contained in the paper book is a copy of any statement recorded on 8-5-1980 by the Officers from Shri D.D. Malhotra. We note that in this statement dated 8-5-1980 (as found in the copy in the paper book), Shri D.D.Malhotra has stated that the affairs of DETC are being looked after by one Shri B.B. Khanna. It is this B.B. Khanna who has given a statement on 2-8-1980 confirming that he was looking after the affairs of DETC. Therefore, it appears to us that the Additional Collector as well as Central Board were not correct in concluding that Shri D.D. Malhotra, was looking after the affairs of both the firms. We may note that in the show cause notice (in para 3 thereof) there is a reference to the officers recording a statement from Shri D.D. Malhotra on the day after the first visit on 8-5-1980 i.e. evidently on 9-5-1980. No copy of any statement of Shri D.D. Malhotra dated 9-5-1980 has been produced. We are not quite sure whether it is this statement that is found in the paper book though dated 8-5-1980.

6. The Additional Collector as well as the Central Board have placed strong reliance on their finding that during the relevant period DETC had no machinery at all, though they owned a room opposite the premises of NETC. Shri Agarwal contends (and this has been the contention of the appellants before the lower authorities also) that there is no basis at all for this finding. Admittedly no panchnama was drawn up either on 8-5-1980 or on 1-8-1980 as to what was found in the premises admittedly in the occupation of DETC. Nor had any statement been recorded from any body in which there is either a statement or an admission about no machinery being found in the said premises on these dates. Nor does anybody appear to have been examined during the adjudication proceedings to speak to the fact that either in May, 1980 or in August, 1980 no machinery was found installed in the premises in the occupation of DETC. As could be seen from the reply to the show cause notice, the summary thereof in the order of the Additional Collector and also the submissions made before the Additional Collector during adjudication, both appellants had taken objection to this averment that no machinery was found installed in the premises of DETC. On the other hand the appellants had produced several records to establish that DETC had purchased machinery for being used by them for the manufacture of brass

screws. The finding of the Additional Collector on this question is that while such machinery may have been purchased they must all have been removed subsequent to 1978. Therefore, the Additional Collector in fact concedes that DETC had purchased machinery for manufacture of brass screws but concludes that these should have been dismantled and disposed of. Such a conclusion appears to be entirely unwarranted in the absence of any allegation to that effect in the show cause notice or any evidence in support thereof during adjudication. In the circumstances the finding of the Central Board that the appellants had not been able to produce any evidence to contradict the Additional Collector's finding abovesaid cannot also be supported.

7. The Additional Collector as well as the Board have proceeded on the basis that the invoices as well as the records of both firms had been written and maintained by the same person i.e. Shri D.D. Malhotra, using the name B.B. Khanna with reference to DETC. As pointed out by Shri Agarwal this conclusion is also raised on no evidence whatever. As earlier mentioned the reference in the show cause notice was that Shri D.D. Malhotra masqueraded as Shri Shashi Bhushan on 8-5-1980. The subsequent allegation in the show cause notice was that the signatures of B.B. Khanna on the Bills and invoices of DETC appear to be that of Shri D.D. Malhotra. Except making such a bald allegation to the said effect no material had been disclosed in the show cause notice to support the said allegation. It is not disclosed in the show cause notice as to who was the person who compared the signatures and arrived at the said opinion. This allegation had also been denied in the replies to the show cause notice and such denial reiterated during adjudication. But yet, without disclosing the reasons for such an opinion, and without disclosing as to who was the person who formed the said opinion, the order of the Additional Collector proceeds on the basis as if the said allegation had been proved. It is this conclusion that has been accepted by the Board also. In the absence of any material to support the said allegation the conclusion that the allegation was proved cannot be accepted.

8. Another circumstance that appears to have been relied on by the lower authorities was that certain sales by DETC were of material manufactured by NETC under their brand name. In the statements of Shri D.D. Malhotra and Shri

Bharat Bhushan, recorded on 1-8-1980 and 2-8-1980, they have referred to the fact that the goods manufactured by NETC were occasionally being purchased by DETC for supply to their customers whenever the manufacture by DETC was not sufficient to meet the said demands. The Department does not even appear to have verified the correctness of these statements by going into the question whether the said sales by DETC were accounted for in the clearances by NETC.⁹ It is therefore seen that all the reasons mentioned in the order of the Central Board in para 22 to 29 (as extracted earlier) were thus not founded on properly established facts but were merely by way of surmises based on allegations which themselves had no factual basis.

Hence the conclusion of the lower authorities, as if DETC was merely a fictitious firm without any actual production by itself and as if it had been brought into existence merely to clear the goods manufactured by NETC but without bringing the same into the account of clearances of NETC, is not correct. It is on the basis of this conclusion that these appeals have to be disposed of.

10. We had already seen that the Central Board had held that so far as the demand for duty is concerned the same will have to be restricted to the normal period of 6 months prior to the date of show cause notice since the demands related to the clearances for the financial year 1979-80 but the show cause notice issued more than 6 months after 1-4-1980. The result was that so far as the demand for duty is concerned it has been entirely set aside by the order of the Central Board itself. Therefore, in the present appeals we are concerned with the question of the liability for penalty only. For the reasons stated earlier we hold that no penalty could be imposed on either of the appellants. These appeals are accordingly allowed and the orders of the lower authorities are set aside.

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