

Rajdoot Paints Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-12-2004

Reported in : (2004)(171)ELT230TriDel

Judge : S Kang, a T V.K.

Appellant : Rajdoot Paints

Respondent : Commissioner of Central Excise

Judgement :

1. As in these thirteen appeals, eight filed by the assesseees against different Orders-in-Original and five filed by Revenue - the issues involved are interlinked, these are being taken for decision together.

2.1 Shri V. Lakshmikumaran, learned Advocate, submitted that all the eight assesseees manufacture various brands of paints and varnishes, having their own separate factory, and avail of the benefit of small-scale exemption Notification Nos. 175/86-C.E., dated 1-3-86 and 1/93-C.E., dated 1-3-1993; that M/s. Rajdoot Paints Ltd. (Rajdoot in short) were initially a marketing company and traded in paints; that due to increase in sales a manufacturing unit was set up mainly for the manufacture of dry distempers and primers; that they subsequently started manufacturing paints; that they, being a marketing company, also purchase paints of various brands from manufacturers, who are availing the benefit of SSI exemption; that different show cause notices dated 2-11-1995 were issued to all the assesseees after visit by the officers of the Directorate General of Anti Evasion

on 18-10-94 the factory and the office premises of the assesseees all over India and resuming the records and investigation; that the main allegations in show cause notices are : (a) SSI exemption should be denied by clubbing the clearances of Rajdoot with the clearances of other SSI units, (b) value for the purpose of assessment should be the price at which the goods were sold from the depot.

2.2 He, further, mentioned that in view of the detailed replies filed by all the assesseees, the Commissioner, under the impugned orders, dropped the charges of clubbing of clearances; that, however, she has denied the benefit of SSI exemption on a new ground, which was not alleged in the show cause notice that the turnover of Rajdoot (i.e.

manufactured plus traded) exceeded the limits prescribed in exemption Notification; that she also held that the value of the goods has to be determined in terms of Rule 7 of the Central Excise (Valuation) Rules, 1975, and the value has to be the price at which the goods had been sold at the depots.

3.1 The learned Counsel, arguing on behalf of M/s. Rajdoot, submitted that the Department had conducted detailed investigation and verified the details of brand names used, the price charged at the factory gate and at the depots during the period April, 1990 to March, 1994; that no objection was raised for use of the brand name of other SSI units, nor was any objection raised on the trading activity; that, however, the demand was raised only on the ground that the brand name "Spreed" belonged to an ineligible person and demand of duty was confirmed which had been set aside by the Tribunal vide Order Nos. 496-502/2000, dated 25-10-2000 [2001 (134) E.L.T. 281 (Tribunal)]; that as the entire period (October, 1990 to September, 1994) was covered during earlier investigation, the present proceedings are hit by doctrine of constructive res judicata. Reliance has been placed on the decision in C.C.E. v. Pace Marketing Specialities Ltd., 2000 (119) E.L.T. 77 (T) wherein it has been held when an earlier notice had been issued and adjudicated upon on the basis of agreement and all the allegations ended in favour of the appellants; that "another look into the same agreement for fishing out some new materials is not permissible".

3.2 He, further, contended that the Commissioner, under the impugned order, has denied the benefit of SSI exemption Notification on a new ground not-contained in the show cause notice; that accordingly the impugned order is liable to be set aside for this reason itself in view of the decision in the case of Phoenix Electric India Ltd. v. C.C.E., 2000 (125) E.L.T. 1233 and Baboobhai Patel & Co. v. C.C.E., 1993 (68) E.L.T. 734 (Bom.). The Bombay High Court has held that the Tribunal's order cannot be sustained as "the Tribunal has clearly made out a new case." He also mentioned that in any case, the SSI exemption cannot be denied by taking into account their turnover as trader; that the Commissioner, while dropping the demand has categorically held that the demand has to be on the manufacturer of the paints and since Rajdoot was not the manufacturer of the paints sold by other units, the eligibility or otherwise of the benefit of SSI Notification is to be based only on the value of the clearance of a manufacturer; that the Notification grants the benefit of SSI exemption based on the value of the clearances of the goods manufactured; that Notification does not refer to the sale of the traded goods; that, therefore, looking into the sale of the traded goods for determining the eligibility or otherwise is incorrect and the order is liable to be set aside.

4.1 Regarding the aspect of valuation, the learned Advocate submitted that the goods manufactured by them are sold at the factory gate as well as from depots and the price charged by them for the clearances made at the factory gate has not been disputed by the Revenue and in fact it has been accepted as there is no demand on the sales made at the factory gate; that thus when the price at the factory is accepted as the normal price, the depot price is not relevant; that the quantum of sale at the factory gate has no relevance for adoption of price or the rejection of the same; that, moreover, the quantity of the clearance at the factory is not negligible; that, therefore, the proposal to proceed to Section 4(1)(b) of the Central Excise Act, 1944 cannot arise. He relied upon the judgment in the case of Indian Oxygen Ltd, v. C.C.E., 1988 (36) E.L.T. 723 (S.C.) and the decision of the Tribunal in HMT Ltd. v. C.C.E., 1989 (41) E.L.T. 602, Samcor Glass Ltd.

v. C.C.E., 2001 (130) E.L.T. 783 and Geep Industrial Syndicate Ltd. v.C.C.E., 4.2 Finally, he submitted that the demand is time-barred; that as the Commissioner has not upheld the clubbing of value of clearances for the purpose of denying the

exemption, the basis for invoking the extended period of limitation no longer survives as the demand has been confirmed on entirely new ground; that, further, during investigation conducted in 1991 and 1994, their en-Lire operation viz., the brand names used, the sales at the factory gate, stock transfer to depots, the price charged at depots were all verified and proceedings were initiated; that during the search in 1991, Shri Tulsiram Tewari had disclosed in his statement the contents of the containers and the printing on them; that a sample of container was taken; that thus the facts were within the knowledge of the Department right from 1991 and as such there cannot be an allegation of suppression with an intent to evade payment of duty; that the use of brand names of other units was also indicated in the classification lists filed from time to time; that the entire demand has been made relying upon the statutory documents which were all filed along with the monthly returns R.T. 12s which had been duly approved/assessed; that as the reliance has been placed on the statutory records; there can be no allegation, of suppression. Reliance has been placed on ITI Ltd. v. C.C.E. - Final Order No. A/263/2001-NB(DB), dated 30-3-2001 and Tony Electronics Ltd. v. C.C.E., Final Order No. A/1198/97-NB, dated 23-12-97. He also mentioned that for these reasons, no penalty is also imposable on them under Rule 173Q of the Central Excise Rules, 1944.

5. In respect of appeal filed by M/s. U.K. Paints (India) Ltd., the learned Counsel mentioned that the adjudicating authority has held in Order-in-Original No. 15/2001 that the brand names 'Rajdoot' and 'New Rajdoot' belong to Rajdoot Paints and the same were used by M/s. U.K.Paints' and since the turnover of Rajdoot Paints as a manufacturer and trader exceeded SST exemption limit, U.K. Paints are ineligible for the exemption. He submitted that the brand name "Rajdoot" is owned and registered in the name of U.K. Paints which is evident from the Certificate dated 6-1-1966 granted by Trade Marks Registry; that they never used the brand name 'New Rajdoot' and as such the eligibility or otherwise of Rajdoot Paints has no bearing on the eligibility of U.K.Paints; that in any case, even if the brand name belongs to Rajdoot Paints, they would be eligible for the benefit of SSI exemption as Rajdoot Paint is eligible for the exemption. He, further, submitted that as regards valuation, the Commissioner has held that the undervaluation aspect is based upon the concept of related person; that the concept of related person was

not an allegation in the show cause notice; that the Commissioner has also ignored the value available at the factory gate and adopted the selling price of the paints from depots; that the price charged to Rajdoot Paints was equal to the price charged to the other customers at the factory gate; that the entire demand is time-barred in view of the fact that the entire demand is based on the statutory records.

6. Regarding appeals filed by M/s. Harman Paints, Kanwar Paints, Spred Coating Pvt. Ltd. and Architect Paints, the learned Counsel mentioned that the brand name 'Rajdoot' is owned by U.K. Paints; that since these assesseees never used this brand name and only used the brand name of a manufacturer, who was eligible for SSI benefit, the eligibility or otherwise of RPL has no bearing on their eligibility; that the value charged for the clearance to Rajdoot Paints was equal to the value charged to other buyers at the factory gate. He also submitted that show cause notices demanded duty from these assesseees and Rajdoot Paints jointly and severally; that, however, the Commissioner has specifically held that these assesseees are manufacturers and are liable for duty; that the Commissioner has dropped the proceedings against Rajdoot Paints Ltd. 7. Regarding M/s. Yak Paints Pvt. Ltd. and M/s. Arinso Associates Pvt.

Ltd., the learned Advocate reiterated his submissions about eligibility to SSI exemption Notification, valuation and invocability of extended period of limitation for demanding duty.

8.1 Countering the arguments, Shri R.D. Negi, learned S.D.R., submitted that Rajdoot Paints Ltd. have an associate group of nine manufacturing units for manufacture of same brand of paints; that all these units are owned by members of Dhingra family; that all the assesseees were having common office and common premises; that Shri G.S. Dhingra, in his statement dated 28-2-1995 had admitted that he was providing guidance and advice regarding purchase, finance, technical, etc.; that all the units were purchasing the metal containers from Asian Packaging and Captain Manoj Kumar, Factory Manager, had deposed in his statement that they were manufacturing metal containers of various brands; that in respect of metal containers for Rajdoot, he deposed that the name of the paint and relevant instructions were printed on the containers as under : Spred manufactured by

Rajdoot Paints Ltd., 19, DDA Commercial Complex Extension, Zamrudpur, New Delhi.

8.2 Learned S.D.R. mentioned that Captain Manoj Kumar also deposed that the printing on the metal containers was as per the orders received from Rajdoot. He contended that all the containers thus bore the acronym of Rajdoot Paints and not of other units; that the names of actual manufacturers or their monograms like U.K. Paints, Yak Paints, etc., were not mentioned at all on any of the containers; that the material to be printed on the metal containers was on the basis of instructions and orders received from Rajdoot Paints; that it is thus apparent that the products of all units other than Rajdoot Paints were being sold in the open market as the products of Rajdoot Paints and accordingly their eligibility (Rajdoot Paints) to avail SSI exemption had been rightly determined in terms of their total turn-over; that as the total turn-over exceeded Rs. 3 crores in the relevant financial year, they were not eligible for the benefit of SSI exemption Notification; that, consequently, products of assessee Nos. 2 to 8 would be clearly ineligible for the SSI exemption as their products were sold in the market bearing the brand name and monogram of Rajdoot Paints who were not eligible for the SSI exemption. He relied upon the decision in U.K. Machine Tools Pvt. Ltd, v. C.C.E., 1999 (114) E.L.T.1009 (T) wherein the Tribunal has held that common procurement of raw materials, centralised payments to employees, common storage facilities, common operation of bank accounts and other financial arrangements establish that the units were not independent and, therefore, the value of clearances of all units is to be clubbed for purposes of small-scale exemption and mentioned that the appeal against the said decision has been dismissed by the Supreme Court as reported in 2000 (119) E.L.T. A84, 9. The learned S.D.R., further, submitted that almost the entire production was sold by Rajdoot Paints from their depots at their listed prices; that the prices at which the goods were sold from depots were much higher than their ex-factory price; that sale of a very small quantity of paints at factory gate to some individuals or Government officials cannot be considered to be sale to independent buyers; that as such normal price did not exist at the factory gate and accordingly the assessable value has to be determined in terms of the price at which the goods had been sold at the depots. He relied upon the decision in Government of India v. Madras Rubber Factory, 1995 (77) E.L.T. 433 (S.C.)

wherein it has been held by the Supreme Court that "no direction can be given to the authorities to adopt the price at which the assessee sells its goods to the Government as the price in respect of its total sales. Firstly, by virtue of proviso (1) to Section 4(1)(a), the Government would be a class by itself and the price charged to it would be relevant only to the goods sold to it. So far as depot sales are concerned, they are to a different class or classes of buyers and in respect of goods sold to them, the price charged to each of such class of buyers would be normal price. The price charged to one class of buyers cannot, therefore, be directed to be adopted as the price in respect of all the classes of buyers." 10. Regarding demand being time-barred, the learned S.D.R. mentioned that the assessees had suppressed various facts from the Department, such as purchase of raw materials being centralised, placing of order for containers and the control over sales, publicity by Shri G.S.Dhingra; that there was wrongful declaration about factory sales; that thus extended period of limitation is invocable. He relied upon the decision in *Bathija Enterprises and Ors. v. C.C.E., Bombay-II*, 2000 (115) E.L.T. 720 (T) = 2000 (36) RLT 181 (T).

11. In reply, learned Advocate submitted that the Commissioner had passed eight different Adjudication Orders; that, however, the Revenue has only filed five appeals and no appeals have been filed against the Orders-in-Original passed in respect of U.K. Paints, Rajdoot Paints and Yak Paints (P) Ltd.; that the traded items cannot be taken together for the purpose of determining the eligibility to SSI Notification; that as duty demand has been confirmed against the individual assessee, the ratio of the decision in *Gajanan fabrics Distributors v. C.C.E., Pune*, 1997 (92) E.L.T. 451 (S.C.) would apply.

12.1 We have considered the submissions of both the sides. One of the main allegations levelled in the show cause notices is that all the units are one and the same and have been bifurcated under different names and nomenclature for the purpose of defrauding Central Excise duty. The adjudicating authority has passed different Adjudication Orders in respect of individual assessee and has confirmed the demand of duty individually. The assessees have contended that the Commissioner has held in different Adjudication Orders that each unit is a manufacturer in its own right. We observe that no finding has been recorded by

the Commissioner to the effect in any of the impugned orders that all the units are one and the same and have been bifurcated for the purpose of defrauding Central Excise duty. In fact the Commissioner has given the following finding in impugned order No.16/2001 (in respect of Rajdoot Paints): "..... the stock of products manufactured by associate firms of the Noticee was being packed in the metal containers bearing the name, address and monogram of the Noticee, who were selling the same as their own product along with their own product..... It is thus clear that the product of their associate manufacturing units was being sold in the open market as their own....." 12.2 There is no appeal filed by the Revenue against the said finding.

Similarly, in the impugned orders in respect of U.K. Paints, Yak Paints and Arinso Associates, the Commissioner has recorded the following findings : "It is on record that the Noticee were manufacturing paints/varnishes of various brands and selling their entire production exclusively to RPL." (Para 32 of O/O No. 15/2001; Para 39 of O/O No. 14/2001 and Para 35 of O/O No. 11/2001) 12.3 In respect of other 4 units, the Commissioner has recorded the following findings : "Since Noticee No. 1 are the manufacturers, the duty liability falls squarely on them and they are liable to duty short-paid. The proceedings against Noticee No. 2 would thus not stand." (Para 60 of O/O No. 12/2001 Re. Kanwar Paints; Para 60 of O/O No.18/2001 Re. Harman Paints; Para 58 of O/O No. 13/2001 Re. Spread Coating; Para 60 of O/O No. 17/2001 Re. Architect Paints. In all these orders, Rajdoot Paints are noticee No. 2) 12.4 Thus, it has been held by the Commissioner that all the units are manufacturers in their own right and they are selling their entire production to Rajdoot Paints. In appeals filed by Revenue, it has not been contended by the Revenue that those units are not manufacturer.

We, therefore, agree with the learned Advocate for the assesseees that the charge of all units being one and the same has not been confirmed by the Commissioner in all the impugned orders.

13.1 The Commissioner, however, has denied the benefit of small-scale exemption Notification to all the units on the ground that the turnover of Rajdoot Paints is more than Rs. 2 crores in each financial year as a manufacturer and

trader and as such they are not eligible for S.S.I.exemption. Consequently, the mischief of para 7 of Notification No.175/86-C.E. (or para 4 of Notification No. 1/93-C.E.) would be attracted and as the other units No. 2 to 8 were selling the goods manufactured by them in the metal containers bearing the brand name of Rajdoot Paints who are not eligible for the grant of exemption under Notification No. 175/86 or 1/93-C.E. they are also not eligible for the benefit of SSI exemption. We do not find the reasoning of the Commissioner acceptable. Para 3 of Notification No. 175/86-C.E. as well as 1/93-C.E. reads as under : "Nothing contained in this Notification shall apply if the aggregate value of clearances of all excisable goods for home consumption - (b) from any factory, by one or more manufacturers, had exceeded rupees two hundred lakh in the preceding financial year." 13.2 Explanation I to Explanation IX of the Notification 175/86-C.E.explain the expression 'value' and 'aggregate value of clearances'.

Nowhere any Explanation provides that in computing the aggregate value of clearances, value of goods traded by a manufacturer would be taken into account for the purpose of Notification. Once it is not the case of the Revenue that unit Nos. 2 to 8 are dummy units, it cannot be claimed that the goods are cleared by Rajdoot Paints from more than one factories. The goods, in question, have been manufactured and cleared by each unit in their own right and the mere fact that the impugned goods were cleared to Rajdoot Paints will not allow the Revenue to include the value of such goods for determining the aggregate value of clearances of Rajdoot Paints. Even if the goods bear the brand name of Rajdoot Paints, their value cannot be deemed to have been manufactured by Rajdoot Paints. This fact is apparent from Explanation IV of Notification 175/86-C.E. (or Explanation X of Notification No. 1/93) which reads as under : "For the purpose of the Notification, where the specified goods manufactured by a manufacturer, are affixed with a brand name or trade name (registered or not) of another manufacturer or trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer or trader." 13.3 The Revenue thus cannot treat the goods, manufactured by unit Nos.

2 to 8 and bearing the brand name of Rajdoot Paints to have been manufactured by them (Rajdoot Paints) and if goods have not been manufactured by them, their

value cannot be included in the aggregate value of clearance of Rajdoot Paints. The learned Advocate has contended that this is not the case of Revenue that the value of clearances of Rajdoot Paints as manufacturer had exceeded the limits prescribed in the Notification. Thus Rajdoot Paints are eligible to SSI exemption Notification. Once Rajdoot Paints are eligible, mischief of para 7 of Notification No. 175/86-C.E. would not be attracted as the units No. 2 and 8 would be affixing the specified goods with a brand name or trade name of another person who is eligible for the grant of exemption under the Notification. We may mention here that M/s. U.K.Paints has contended that brand name "Rajdoot" is owned by them which is supported by the Registration Certificate issued by Trade Mark Authority. We, therefore, hold that all the units are eligible to avail SSI exemption. However, if individual units have exceeded the specified limit of value of clearances in their individual capacity, they would be liable to discharge their duty liability in accordance with law. The learned Advocate had mentioned at the time of hearing of stay applications that there would be duty liability on all units except Rajdoot Paints and Herman Paints, if the benefit of SSI Notification is allowed to them.

14. Coming to the aspect of valuation, we observe that the adjudicating authority has adopted the depot sale price as most of the production of Rajdoot Paints was being stock transferred to their godowns from where the goods were taken to their depot for sale to the dealers and the sales at factory gate were to some individuals and Government officials which cannot be considered to be sale to independent buyers since they were very small in quantity. On the other hand, the learned Advocate has contended that the quantum of sale at factory gate was not negligible as it was 44.30% in 1990-91, 63.25% in 1991-92, 21.82% in 1992-93 and 11.50% in 1993-94. There is nothing brought on record by both the sides as to whom these sales were made to at the factory gate. Moreover, it has been contended, on behalf of other units, that show cause notice did not propose to hold them and Rajdoot Paints as related persons under Section 4(4)(c) of the Central Excise Act and as such the impugned orders are beyond the scope of show cause notices. We are, therefore, of the view that the valuation aspect needs a re-examination by the adjudicating authority particularly with reference to whether factory gate price was available, whether Rajdoot Paints and other units are related persons, whether the allegation of related person was made in the show

cause notices and whether the demand on this count is hit by lime-limit as specified in Section 11A of the Central Excise Act. Both the sides are at liberty to furnish the material and evidence in this respect. The adjudicating authority will decide this aspect and the question of imposition of penalty after following the principles of natural justice.

15.1 We now take the appeals filed by Revenue. The prayers in four appeals filed by Revenue are : (i) whether the Commissioner was right in demanding duty from the manufacturing unit only (ii) whether the Commissioner was right in not imposing any penalty under Rule 173Q on Noticee No. 2 and in dropping the proceedings against them 15.2 The prayer in Appeal E/2522/2002-C against M/s. Arinso Associates is to set aside the order of the Commissioner for not imposing penalty on M/s. Rajdoot Paints and to pass an order for imposing under Rule 173Q and/or Rule 209A of the Rules on M/s. Rajdoot Paints Ltd. 16. The prayer in appeals is for imposing penalty on M/s. Rajdoot Paints Ltd. in all 5 appeals and for demanding duty from them in 4 appeals. But the appeals have not been filed against M/s. Rajdoot Paints Ltd. The appeals have been filed against the units whom the duty has been demanded from and penalty has been imposed on. As there is no prayer made against any of these units, there is no merit in these appeals which are rejected.

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