

Mukut Pipes Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-26-2004

Reported in : (2005)(182)ELT345TriDel

Judge : A T V.K., P Bajaj

Appellant : Mukut Pipes Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. In these three appeals, the issue involved is whether M/s. Mukut Pipes Ltd. and M/s. Surindra Engg. Co. Ltd. are related persons in terms of Section 4 of the Central Excise Act.

2. Shri K.K. Anand, learned Advocate, mentioned that M/s. Mukut Pipes Ltd., appellants No. 1 manufacture ERW/SAW/MS Pipes and M/s. Surindra Engg. Co. Ltd., Appellant No. 2, manufacture MS Pipe with -- location units; that the Central Excise officers searched the premises of the Appellants No. 1 on 16-1-2001 and found that they were clearing MS Pipes of various dimensions to the various sites of M/s. Maharashtra Jeevan Pradhikaran and Pimpri Chinch-wad Municipal Corporation in the account of the Appellant No. 2, on the basis of purchase Order raised by the Appellant No. 2 from their Head Office at Mumbai; that it is the case of the Revenue that Appellant No. 2 had raised purchased Orders in favour of the Appellant No. 1 at a lesser price than the original contracted price and that both the Appellants have cross share holdings, have common directors, common

authorized signatory for operation of bank accounts, common funding, common marketing and common management control; that they are related persons having interest directly or indirectly in the business of each other attracting provisions of Proviso (iii) to Section 4(l)(a) of the Central Excise Act; that consequently the correct price would be the price at which the goods are ordinarily sold by the Appellants No. 2; that it is also the case of the Revenue that they had paid duty on base pipes whereas the contract was for guniting, epoxy painted or tapecoated MS Pipes and no duty had been paid on subsequent value additions on account of epoxy painting and guniting.

3.1 The learned Advocate submitted that both the Appellants No. 1 and 2 are not related person as companies are independent legal entities; that in terms of Section 4 (4) (c) of the Central Excise Act, Related person means : (i) There should be mutuality of interest between two persons, whether direct or indirect, in the business of each other. The interest does not necessarily mean that there should be a possibility of only pecuniary advantage, it may equally be the livelihood of a pecuniary loss.

(ii) The relationship between them should not be at arms length or on principal to principal basis and there should be some extra commercial considerations.

3.2 He mentioned that in the present matter, there is no shareholding of each other; that the mere fact that some directors are having shares can not be made the basis for treating both the Appellant No. 2 as the related person of the Appellant No. 1; that the directors are separate from the companies and their shareholding in independent capacity can not have any bearing on the independent nature of the company. He, further, mentioned that the transaction between the Appellants No. 1 & 2 were on principal to principal basis; that the instances of various payments made by one in other company's account were commercial transactions and were duly accounted for in the books of account.

3.3 The learned Advocate submitted that Proviso (iii) to Section 4(1) (a) of the Central Excise Act is not attracted since the Proviso applies to the situation where "the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except through a related person"; that during the

relevant period [May, 1996 to June, 2000], the Appellant No. 1 had sold the goods worth Rs. 23.48 crores to the Appellant No. 2 as against the total turnover during four financial years was Rs. 151 crores approx.; that the Appellant No. 1 had thus sold only 18% of their total sale to Appellant No. 2 and as such Appellant No. 2 can not be their related person. He relied upon the decision in the case of *Cosmos (India) Rubber Works v. Union of India*, 1988 (36) E.L.T. 102 (Bom.) wherein the Bombay High Court has held that the language of this Proviso clearly shows that it applies only where all the goods are sold through a related person. If some of the goods are sold to persons or entities other than the related persons, naturally the proviso would not come into operation. Reliance has also been placed on the following decisions : (ii) *Kirloskar Cummins Ltd. v. Union of India* -1991 (51) E.L.T. 325 (Bom.) wherein the Bombay High Court has held that proviso (iii) is not attracted because the goods are generally not sold by the assessee except to or through related person.

3.3 He also contended that their case is squarely covered by the law laid down by the Supreme Court in the case of *Alembic Glass Industries Ltd. v. CCE & Cus.*, 2002 (143) E.L.T. 244 (S.C.) in which the assessee and its purchaser were holding some share in each other and having common Chairman and the three Directors, the Supreme Court has held that "the shareholders of a public limited company do not, by reason only of their shareholding, have an interest in the business of the company. Equally the fact that two public limited companies have common Directors does not mean that the one company has an interest in the business of the other. It is therefore, not possible to uphold the conclusion of the Tribunal that the assessee and the chemical company were related persons." Reliance has been placed upon the decision in *Renowned Auto Products Mfrs Ltd. v. CCE*, Chennai - 2003 (157) E.L.T.172 (T) and *Mahabir Industries (RMD). v. CCE*, BBSR II, 2004 (170) E.L.T. 27 (T) wherein it has been held by the Tribunal that "Commonness of some of the partners or their being close relations, having common facilities etc. can not be made the basis for holding the buyer unit as a related person of the manufacturing unit unless there is a mutuality of interest between the two and a financial flow back from the buying unit to the manufacturing unit". He submitted that there is no mutuality of interest which is necessary to treat the buyer as a related person as held by the Supreme Court in

Union of India v. Atic Industries Ltd., 4. The learned Advocate also mentioned that the process of epoxy painting and guniting was not carried by the Appellant No. 1 and, therefore, these expenses can not be included in the assessable value of M.S. Pipes; that the activity of epoxy painting by Appellant No. 2 does not amount to manufacture. He further contended that duty is not chargeable on account of increased prices; that the amount on which duty Rs. 1,09,348 has been calculated had not been received by them. He mentioned that the contract entered into with Surinder Engg Co. Ltd. by Pimpri Chinchwad Municipal Corporation was for a number of jobs; that Tender Purchase Orders are placed for a consolidated amount without giving the break up of each nature of work involved in the contract.

Finally he submitted that there is no evidence to show that extra money was given by Appellant No. 2 to the Appellant No. 1. Finally, he mentioned that no penalty is imposable on any of the Appellants; that besides discharging their duty burden correctly, the issue is a legal one and therefore it can not be said that the Appellants had suppressed or mis-stated any material fact with intent to evade payment of duty; that with regard to Appellant No. 2, there is neither any allegation in the show cause notice nor there is any finding that they knew or had reason to believe that the goods which he was dealing with were liable to confiscation; that thus Rule 209A of the Central Excise Rules, 1944 is not applicable; that Shri Kuljinder Singh Ahluwalia, Managing Director of M/s. Surindra Engineering Co. Ltd. is also accordingly not liable to any penalty under Rule 209A of the Rules.

5. Countering the arguments, Shri R.C. Sankhla, learned Senior Departmental Representative, submitted that both M/s. Mukut Pipes Ltd. and M/s. Surindra Engg. Co. Ltd. are related persons as both of them have cross shareholding Chairman, Managing Director and Directors are common and also close relatives having blood relations, the authorized signatory of these companies for operation of bank accounts is common, employees are inter transferable within the group companies and the marketing is being controlled from their corporate office; there is common funding among group companies including the Appellants No. 1 and 2; that the Appellant No. 1 supply the goods to Appellant No. 2 at lower price as compared to independent buyers; that Mukut Pipes Ltd. was formed as closely held company by Shri Bhupinder Singh Ahluwalia and his two sons Rajinder Singh

and Kuljinder Singh as Directors and person acting in concert hold 60.54% of the total paid up share capital of the company; that Appellant No. 2 enters into agreement with various buyers and the Orders so obtained are split up among the Group Companies. The learned Senior Departmental Representative, further, submitted that both the Appellants have their bank accounts in the same bank, namely Punjab & Sind Bank with common authorized signatories for the operation of the bank accounts thereby facilitating the transfer of funds between the Appellant No.1 and 2 according to the requirement of the day to day working; that they were found to be transferring funds frequently in one another's account without charging of any interest; that perusal of bank statement of Appellant No. 1 and the general ledger of Surindra Engg. Co. Ltd. has revealed that Appellant No. 2 is transferring funds in the current account of the Appellant No. 1 for their business operations and at the same time when the Appellant No. 2 is in need of funds, they are receiving transfer entries to their bank account from the Appellant No. 1; that these transactions can not be termed as based on any commercial consideration and is inter-locking and interlacing of the finances of the two companies; that a similar facility is available in Punjab National Bank. The learned Senior Departmental Representative relied upon the decision in the case of CCE v. I.T.E.C. (P) Ltd., 2002 (145) E.L.T. 280 (S.C.) wherein the Supreme Court has held, when the manufacturer and buyer were having common directors and that they were relatives of one another and both the companies were family concerns and were beneficiaries of their ventures and the benefit of both the companies were shared by members of one and the same family, that they are related persons as the mutuality of interest between the two is apparent. Reliance has also been placed on the decision in the following cases :Powertech International v. CCE, Mumbai-III - 2001 (131) E.L.T. 461 wherein buyer company has been held to be related person as director of buyer Co. was Power of Attorney of manufacturing Co.

which was also using brand name of buyer Co., that they were having same office and one company was bearing financial burden of the other occasionally without charging for the same.Narendra Industries v. CCE, Rajkot - 2001 (132) E.L.T. 141 (T) wherein the Tribunal has held M/s. LMS Marketing P. Ltd. as the related person of the Appellant as there were common Directors, entire production of the

Appellant was sold to M/s. LMS Marketing who had paid interest free advances to the Appellants, expenses towards sale promotion activities, after sales services and maintenance of office were borne by the marketing company. *Nirlex Spares (Pvt.) Ltd. v. CCE, Rajkot - 2001 (133) E.L.T. 161 (T)* wherein the marketing company was held to be a related person of the Appellant when mutuality of interest was clearly indicated through supply of entire production to marketing company, Supervision and making of all drawings of the new product by a director of the marketing Co., looking after sales promotion activities and incurring expenditure on advertisement and office expenses and other financial transactions between the two, etc.

6. Regarding epoxy painting charges, the learned Senior Departmental Representative, submitted that the Appellant No. 1 had discharged the duty on bare pipes at a price not quoted in the rate contract and no duty has been paid on subsequent value addition on account of epoxy painting; that the contract rates were inclusive of Excise Duty for cement lined, guinted, epoxy painting or tape coated MS pipes; that moreover the Excise duty is payable on the goods in the State in which the same are cleared from the factory; that since the goods are to be supplied as per contract and subsequent value addition was made on account of epoxy painting and amount collected from customers on account of Central Excise duty is recoverable under Section 11D of the Central Excise Act. Regarding duty demand on account of increased price, he mentioned that the Commissioner has given a specific finding that price was later on increased by way of revised rate contract and the Appellants had received the payments by raising commercial invoices in the name of the buyers. He finally, mentioned that penalties are imposable as appropriate duty of Excise has not been paid by the Appellants. In rejoinder, the learned Advocate emphasised that there is no single instance of transfer of funds.

7.1 We have considered the submissions of both the sides. Section 4(1) of the Central Excise Act, during the relevant period, provided that the value shall be deemed to be the normal price, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person

and the price is the sole consideration for the sale. In case buyer is a related person, value shall be as per Proviso (iii) to Section 4(1) of the Act which reads as under: "(iii) Where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons), who sell such goods in retail." 7.2 The expression "related person" has been defined in Section 4(4)(c) of the Central Excise Act as under : "(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.

Explanation - In this Clause "holding company", "subsidiary company" and "relative" have the same meaning as in the Companies Act, 1956 (1 of 1956)." 8.1 It has been contended by the learned Advocate that the Proviso (iii) to Clause (a) of Sub-section (1) of Section 4 of the Central Excise, which provides for treating the price at which the related person sells the goods to be the normal price for the purpose of levying the duty, is not applicable to the facts of the present matter since the Appellants No. 1 has not so arranged that the goods manufactured by them are generally not sold by them in the course of wholesale trade except to or through a related person. In support of his contention, he has submitted that M/s. Mukut Pipes Ltd. has only sold 18% of their total sale to M/s. Surindra Engineering Co. Ltd. and majority of the sales by the Appellant No. 1 was to independent buyers.

This factual submission has not been controverted by the Revenue. The language of Proviso (iii) to Section 4(1)(a) of the Act clearly shows that it applies only where all the goods are sold to or through a related person. If some of the goods are also sold to persons other than the related persons, this Proviso will not be applicable. The Bombay High Court has held in the case of Kirloskar Cummins Ltd., supra, when out of the total production 90% are sold directly to wholesale deals and 10%

are sold through the related person, that proviso (iii) will not come into play because the engines are generally not sold by the assessee to or through a related person. Most of the engines manufactured by the company are sold to the industrial consumers and, therefore, the sales clearly falls within the expression "wholesale trade". The price charged by the subsidiary company to their purchasers can not be taken into consideration for determining the assessable value. The Supreme Court in the case of Union of India v. Kantilal Chunilal -1986 (26) E.L.T. 289 (S.C.) has not upheld the action of the Department in taking the wholesale cash price of excisable goods at the price sold by the wholesale dealers though one of the dealers (M/s. Alok Textile) was related to Director of the manufacturing company because the goods manufactured by them were sold to about 15 to 20 wholesale dealers. The Supreme Court has held that "the wholesale cash price at which the excisable goods were sold by the respondents to M/s. Alok Textiles and other wholesale dealers was the only price liable to be taken for determination of the value for the purpose of levy of excise duty...." 8.2 Appellants, however, have not brought on record any material/evidence to show that the goods sold by the Appellants No. 1 to the Appellants No. 2 were the same which were supplied to other buyers. It is an admitted fact that the impugned goods were manufactured and cleared by M/s. Mukut Pipes Ltd. as per the specifications prescribed by the Project Authority who has awarded the contract to M/s. Surindra Engineering Co. Ltd. As these supplies are made only through the Appellants No. 2, no normal price on the basis of which their assessable value can be determined is available. It is, therefore, to be examined as to whether both Appellants No. 1 and the Appellants No. 2 are related persons. The learned Senior Departmental Representative has emphasised that both of them are related persons as they have mutual interest in the business of each others and as such they satisfy the definition of related person as given in Clause (c) of Sub-section (4) of Section 4 of the Central Excise Act. We find force in the contention as the Appellants have not disputed the facts that both the companies have common authorized signatory for operating the bank accounts and the payments were made from one company's account to another Company's account. The learned Senior Departmental Representative has drawn our attention to the allegation contained in Para 9.4 (b) of the show cause notice wherein it is charged that a

common fund exists in Punjab & Sind Bank, Fort Branch, Mumbai which can be utilised by either of companies as per requirements by advising the Bank regarding transfer of funds from/to two accounts. Funds were also transferred as per General Ledger Account maintained by the Appellant No. 2 which have not been proved to be commercial transactions by the Appellants. It is also the case of the Revenue that similar facility is available in Punjab National Bank, Rajpura where both the Appellants No. 1 and 2 maintain their accounts and transfer of fund is undertaken between them. Exhibit 'L-1' to the show cause notice contained some transfer of funds entries between the two accounts of Punjab & Sind Bank, Mumbai Accounts of Punjab National Bank, Rajpura were also attached with the show cause notice as Exhibit No. 'L-2'. The Commissioner has also recorded his findings in this regard in Para 37 of the impugned Order by observing that the transactions in Banks do not seem to be based on commercial consideration and prove the inter-locking /common funding and inter-facing of the finances of the two companies. The Appellants have not disputed these facts specifically either In the Memorandum of Appeal or at the time of hearing before us. This fact coupled with the facts that there is common management control and marketing control, both the companies belong to same group goes to prove that Appellants No. 1 & 2 are related persons. The Supreme Court in the case of L.T.E.C. (P) Ltd., relied upon by the learned Senior Departmental Representative, has held the two companies as related persons on account of common directors who were relative of each other and both the companies were family concerns and were beneficiaries of their ventures. The learned Senior Departmental Representative has also relied upon the decision in Narendra Industries Ltd., supra, wherein the Tribunal has held the marketing company to be related person of the manufacturing company in view of the totality of facts such as common directors, payment of interest free advances, meeting of Expenses towards sale promotion activities and after sale services by the marketing companies, etc. We, therefore, hold that mutuality of interest exists between M/s. Mukut Pipes Ltd. and M/s. Surindra Engg. Co. Ltd. Accordingly, the price at which the goods are sold by M/s. Mukut Pipes Ltd. can not be the assessable value under the erstwhile Section 4 of the Central Excise Act.

9. The next question arises as to what will be the assessable value for the purpose of charging the Central Excise duty. The learned Advocate has contended that the

price charged by M/s. Surindra Engg. Co. Ltd. is estimated value and not on the actual amount of Purchase Order placed for the manufacture and supply of M.S. Pipes; that the said price is inclusive of all factors like the miscellaneous expenses, excise duty, M.S.T., C.S.T., Works Contract Tax, Freight, Insurance. Octroi and post manufacturing expenses such as unloading, stacking, guarding/cement lining, cleaning and laying, welding etc. We find force in the contention of the Appellants that the duty can not be calculated on the basis of estimated price which is inclusive of so many other factors.

The Central Excise duty has to be charged only on the price of MS Pipes after excluding all the de-ductable expenses and taxes in accordance with law. The price to be taken into consideration is the price of M.S.Pipe alone that is supplied by M/s. Mukut Pipes Ltd. through their related person M/s. Surindra Engg. Co. Ltd. The value can not include any activity undertaken by the Appellant No. 2, on the impugned goods as they are not the manufacturer and they are only related person for the purpose of determination of assessable value. We, therefore, remand the matter to the jurisdictional Adjudicating Authority to determine the assessable value and recompute the amount of duty payable by the Appellants who are at liberty to produce the material/evidence in respect of various deductions claimed by them from the actual price.

For these reasons, the cost of epoxy painting and guinting the pipes will also not be includible in the assessable value of the pipes as the said process has not been established to have been undertaken by the Appellants No. 1. The jurisdictional Adjudicating Authority would also readjudicate the demand of duty on account of increase in price as it is related to the final price settled between the related person and the Project Authority after hearing the Appellants. We also leave the issue regarding imposition of penalty on both the Appellants No. 1 and the Appellants No. 2 open to be decided by the jurisdictional Adjudicating Authority after determining the assessable value and computing the duty to be demanded from them. No penalty, however, is imposable on Shri Kuljinder Singh Ahluwalia, Managing Director of the Appellants No. 2 as the ingredients specified in Rule 209A of the Central Excise Rules, 1944 for imposition of penalty have not been established as the finding against him in the impugned Order merely mentions that

as managing director of the company it is obligatory on his part that the requisite statutory obligations are complied with.

Accordingly, Appeals Nos. E/361/04-NBA and E/370/04-NBA are remanded to the jurisdictional Adjudicating Authority for readjudication. Appeal No. E/362/04-NBA is allowed.

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