

Trac Air Conditioning Systems Vs. Commr. of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Nov-02-2004

Reported in : (2005)(180)ELT327Tri(Bang.)

Judge : S Peeran, J T T.K.

Appellant : Trac Air Conditioning Systems

Respondent : Commr. of C. Ex.

Judgement :

1. As the issues are related we decide all the four appeals in this order. The facts of the case in respect of appeal No. E/106 and 107/2000 are as follows :- 2. The appellants Track Air-conditioning Systems Ltd., (TASL for short) also known as M/s. Track Fujico Air Systems Ltd. Konigal are engaged in the manufacture of air-conditioning equipments and parts which are excisable. They manufacture two types of air-conditioners namely :- 3. On the basis of intelligence that the appellants were evading Central Excise duty, investigations were conducted. The appellants were clearing the goods manufactured by them through M/s. Track Air Conditioners (P) Ltd. Bangalore (Known as TAPL) having sales offices at Bangalore, Hyderabad and Chennai. The management of both M/s. TASL & M/s. TAPL was common and they were controlled by one Shri Anil Dev Director of both the companies. The purchase orders were obtained by splitting the order into two parts namely, Part A and Part B. Part A of the order is addressed to M/s. TASL for supply of equipment and part B would be addressed to M/s. TAPL for ancillary works/ installation/erection/commissioning of the equipment. The equipments were

also cleared to M/s. TAPL adopting lesser assessable value when compared with the price at which they were cleared to the other customers. During investigation, the officers found that one evaporator unit and three condenser units in fully manufactured condition were not accounted in the statutory RG I Register. The goods valued at Rs. 70,787/- were seized on 27-5-1998. Some shortages of goods were also noticed. A show cause notice dated 23-11-1998 was issued for various violations of the Central Excise Law. Shri Anil Dev Director TASL was also issued with a show cause notice for penal action under Rule 209A of the Central Excise Rules, 1944.

4. On the basis of the facts gathered during investigation, the Commissioner came to the conclusion that M/s. TASL and M/s. TAPL are related persons within the meaning of Sub-section 4(c) of Section 4 of the Central Excise Act, 1944. Further he held that the goods which are not accounted for in the statutory register are liable for confiscation. It was also established that the appellants claimed abatement towards freight charges in excess of actual amount incurred.

It was held that the appellant is liable to pay differential duty of Rs. 1,85,916/-. The Commissioner held that there was under-valuation in respect of excisable goods cleared to M/s. TAPL and appellant is liable to pay differential duty of Rs. 10,80,114/- on this account. The Commissioner found that the appellants availed irregular Modvat credit to the tune of Rs. 47,456/- as they had cleared certain components on which Modvat credit had been taken without payment of Central Excise duty or without reversing the appropriate Modvat credit. He further held that the amount collected by M/s. TAPL for work erection and commissioning of air-conditioning equipment manufactured by M/s. TASL is includible in the assessable value and a differential duty of Rs. 40,43,034/- is recoverable under Rule 9(2) of the Central Excise Rules read with Section 11A of the Central Excise Act, 1944.

The following penalties were imposed :-
-----Amounts Provisions of Law Interest
under Section 11AB was also demanded. M/s. TASL and Shri Anil Dev, the appellants in the above case have strongly challenged the findings of the adjudicating authority.

5. Shri S. Raghu learned Advocate appeared for the appellants and Shri L. Narasimha Murthy, learned SDR appeared for the respondents.

6. The learned Advocate relied upon larger number of case laws to show that M/s. TASL and TAPL are not related. In *Alembic Glass Industries v. CCE* [2002 (143) E.L.T. 244 (S.C.)] it was held that the fact that two Public Ltd. Companies have common director does not mean that one Company has an interest in the business of the other. In *Collector of Central Excise, Aurangabad v. Electro Services (P) Ltd.* [2001 (127) E.L.T. 828 (Tri. - Del)], the CEGAT held that the assessee should not be treated as related person merely because partners of the assessee are not directors of the buyer Company. In *Plus Cosmetics Pvt. Ltd. v. CCE, Kanpur* [1999 (108) E.L.T. 71 (Tri.)], the CEGAT held that payment adjustments between buyer and seller is not sufficient for holding buyer to be favoured and incurring of all sales promotion and advertisement expenses by buyer also does not make him a related person. The learned Advocate contended that M/s. TASL and TAPL are separate legal entities and they cannot be considered as related persons. The Commissioner has taken into account, the following facts to arrive at the conclusion that M/s. TASL and M/s. TAPL are related.

(1) Both units are family concerns of with Shri Anil Dev as common Director.

(2) Shri Pasha, Ex-Director of M/s. TASL conceded that he was merely a dummy director and Shri Anil Dev managed every thing.

(3) M/s. TAPL procured orders and directed the customers to place purchase orders on M/s. TASL for equipment and on M/s. TAPL for erection and installation.

(4) M/s TAPL looked after warranting for the equipments also and M/s. TASL had paid a small-specified amount towards warranty services.

M/s. TAPL promoted the sale of the equipment manufactured by the appellants.

(5) Brand name 'TRAC' was used in the letterheads of both the Companies. The office premises of both the Companies were located in the same place and rental expenses were borne by M/s. TASL only.

(6) M/s. TASL were collecting invoice proceeds of M/s. TAPL for having done the ancillary work and later transfer the same to the account of M/s. TAPL. Similarly TAPL were collecting the invoice proceeds of M/s. TASL for the equipment and later transferred the same to the account of M/s. TASL.

(7) In the letter dated 9-4-1998, addressed to Canara Bank, Bangalore it is stated that the appellants proposed to take over M/s. TAPL in view of the fact that it may not be proper to take purchase orders from customers in the name of two companies and that due to changed tax scenario, there was no tax benefit by having two separate companies and also to avoid unnecessary confusion in calculation of excise, sales tax and income-tax benefits.

(8) The salary of Shri Sanjeev an employee of M/s. TASL was paid by M/s. TAPL and was adjusted by passing a journal entry.

7. The Commissioner has also relied on the decision of the Hon'ble Supreme Court in Calcutta Chromotype Ltd. v. Collector of Central Excise [1998 (99) E.L.T. 202 (S.C.)] where it is held that there is no bar on the authorities to lift the corporate veil and the principle that a Company under Companies Act is a separate entity and therefore where the manufacture and the buyer are two separate entities and cannot be related within the meaning of Section 44C of the Central Excise Act is not of universal application.

8. On a careful consideration of the matter, we are of the view that the appellants and M/s. TAPL for all practical purposes function as a single unit only and transaction between the appellant and M/s. TAPL does not appeared to be on a principal to principal basis. The Commissioner has enumerated several grounds to hold that the appellants and M/s. TAPL are related. Each ground in itself may not be sufficient to hold that they are related. However looking into the totality of circumstances, it is very clear that there is mutuality of interest between the appellants and the M/s. TAPL. This is also very clear from the letter of the appellants addressed to Canara Bank. We are inclined to agree with the Commissioner that the appellant and M/s. TAPL are related.

9. The learned Advocate cited number of case laws to show that the goods which are not entered in RG I and not cleared from the factory are not liable for confiscation. Though according to the department, proper entry in the RG I register was not made, there is no charge that the appellants had removed the goods without payment of duty. Under these circumstances, the Commissioner's Order of confiscation of the goods is not sustainable in view of the settled case law on the subject.

10. As regards freight, the appellant is entitled to claim abatement of the actuals only. Claiming abatement in excess of the actual freight is not permissible. In view of the clear findings of the Commissioner on this aspect, the appellant is liable to pay the differential duty of Rs. 1,85,916/-. The Commissioner's order in this respect is confirmed.

11. As we have already confirmed the finding of the Commissioner that the appellant and M/s. TAPL are related, the price at which the appellants cleared the goods to M/s. TAPL cannot be accepted. It is seen from the Order that sales to independent buyers are at a price higher than those charged to TAPL, hence the price of goods sold to independent buyers should be taken for calculation of the duty. In case, the price to independent buyer is not available, the price at which M/s TAPL sold the goods to other buyers should be taken for calculating the duty. On this basis the differential duty as to be requantified. As it is not very clear as to how the Commissioner arrived at the differential duty of Rs. 10,80,114/- confirmed by him.

As regards the irregular availment of Modvat credit to the tune of Rs. 47,456/-, the appellants have not contested the point. Hence we confirm the Commissioner's decision in this regard.

12. As regard the inclusion of charges for erection, commissioning, etc., the appellants have cited large number of case laws to hold that they are includible in the assessable value. We find that the department has not made out a case that the appellants resorted to under-valuation in the guise of collecting charges for erection and commissioning through M/s. TAPL. Under these circumstances the Commissioner's findings that these charges should be included in the assessable

value cannot be sustained. Hence, we set aside the demand of duty of Rs. 40,43,034/- on account of non-inclusion of the charges of erection and commissioning. Summing up the demands of duty by the Commissioner excepting that on erection and commissioning are upheld. However in respect of goods cleared to M/s. TAPL, the duty liability is to be requantified. Therefore, the penalty under Section 11 AC is limited to the total demand in this order after requantification. Shri Anil Dev appears to be the mastermind in these activities and he is liable for penalty under Rule 173Q. All the other penalties are upheld. Interest under Section 11AB is also payable. Since we find that there is enough justification to invoke the longer period, in view of the suppression of facts regarding relationship between the appellants and M/s. TAPL the question of time-bar will not arise. This disposes of appeal Nos. E/106,107/2000.

13. This is a departmental appeal against the OIA No. 771/01, dated 26-11-2001, wherein the Commissioner (Appeals) had set aside the Order-in-Original passed by the Dy. Commissioner of Central Excise, Bangalore Division. The main issue involved in the Dy. Commissioner's order is the inclusion of charges for ancillary works/erection, commissioning, etc., done by the assessee at their premises are includible in the assessable value. Citing various decisions the Commissioner (Appeals) has held that the erection charges are not includible in the assessable value. In view of our findings relating to Appeal No. E/106/2000 above, we hold that the OIA is legal and proper.

Hence, the departmental appeal is rejected.

14. This appeal has been filed against the Commissioner's OIO 6/02 dated 8-3-2002. In this case, the show cause notice has been issued on 4-6-2001, for payment of differential duty of Rs. 73,98,141 /- on account of under-valuation for the periods from 1997-1998 and 1998-1999. The charges which are framed against the appellants are similar to the one which are dealt with in appeal No. E/106/2000. In the earlier appeal, the period involved was 1996-1997 & 1997-1998. Thus it is seen that the period in both the show cause notices overlapped.

Apart from these facts, in the earlier case, show cause notice was issued, invoking proviso to Section 11A, and the case was adjudicated.

Under these circumstances, for a later period, the department cannot invoke longer period holding suppression of facts. Under these circumstances, the show cause notice dated 4-6-2001 is liable to be set aside. Therefore without going into the merits of this case. We set aside the OIO, as the show cause notice cannot be sustained on account of time-bar.

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