

**Sapna Engineering Vs. Commissioner of C. Ex.**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** May-27-2005

**Judge :** S T S.S., T Anjaneyulu

**Appellant :** Sapna Engineering

**Respondent :** Commissioner of C. Ex.

**Judgement :**

1. The appellants are engaged in the manufacture of parts of Air Conditioning and Refrigeration appliances falling under Chapter Headings 8415 and 8418 of the Schedule to the Central Excise Tariff Act, 1985 in their factory at 313, Thakkar Industrial Estate, Mazgaon, Mumbai-10. The officers of DGCEI, acting on an intelligence, searched the appellants factory and office on 22-7-1997 and statements of the appellants proprietor and manager as also various officials of M/s.

Voltas Ltd. were recorded which culminated in issue of Show Cause Notice dated 26/28-9-1998 demanding duty of Rs. 32,69,001/- from the appellants on the ground that the goods cleared in the guise of repaired and reconditioned coils and condensers under invoices of M/s.

Neha Refrigeration were goods manufactured by the appellants in their factory. The other appellant is the Manager of M/s. Sapna Engineering.

2. On adjudication, the Id. Commissioner vide the impugned Order confirmed the demand against the appellants and imposed penalty on both the appellants and dropped the proceedings against M/s. Voltas Ltd. and Ors. Hence these appeals.

(i) There is a categorical finding in the impugned Order that M/s.

Voltas Ltd. used to receive Air conditioners and water coolers from the customers for repairs and the documents also showed that M/s.

Voltas Ltd used to send defective coils to M/s. Neha Refrigeration for repairs and received back after repairs, and we find that this is not under challenge.

(ii) It was alleged in the Notice that M/s. Neha Refrigeration is a fictitious manufacturing firm existing only on paper. However, the Id. Commissioner considered M/s. Neha Refrigeration to be existing entity potentially capable of engaging in business but did not exist as a manufacturing unit of condensers. No Show Cause Notice was issued to M/s. Neha Refrigeration and therefore M/s. Neha Refrigeration had no opportunity to establish the genuineness of the contents recorded in their invoice and in identical situations, the Tribunal in the following cases has held that it is necessary to issue a notice to the alleged dummy units when the Revenue seeks to dump one unit as a dummy unit of another and that it is for the adjudicating authority to go into the question by analyzing the evidence whether one was a dummy of another but the issue could not be pre-determined by limit issue of Show Cause Notice to only one unit which is considered to be the real unit. *Ogesh Industries v. CC* (d) Failure to issue such notice to one of them was held to be bad in law and appeals were allowed only on this point.

(iii) Statements of various officials of M/s. Voltas Ltd. confirmed dispatch of defective coils to M/s. Neha Refrigeration and their receipt after they are duly repaired, from M/s. Neha Refrigeration.

The only evidence to support the allegation in the Notice was retracted statements of the proprietor and Manager of the appellants as well as that of Shri Manoj Sharma. However, these statements were immediately retracted, and sans these

retracted statements and the finding arrived as regards M/s. Voltas by the adjudicator lead to infer that repair activity only was indulged.

(iv) Though the appellants had referred and relied upon the Chartered Engineer's certificate to substantiate their claim that they could not have manufactured all these parts of air conditions and refrigerators as they did not have the capacity to manufacture all these quantities of coils and condensers as alleged, the Id.

Commissioner, while passing this order, completely overlooked this submission of the appellants, which goes to the root of the issue to determine the nature of the activity.

(b) The Id. Jt C.D.R. submitted that the real manufacturer is liable to pay duty and that the judgments cited are not relevant and the Revenue's case is based on the statements. He, however, fairly conceded to a query, as to the evidence of manufacture and whether co-relation between the raw materials and finished goods had been done by the Department, and submitted that there is no such evidence of manufacture and no such co-relation had been done.

4. After hearing both sides and considering the submissions, it is found that: (i) the Show Cause Notice issued to the appellants M/s. Sapna Engineering, demanding duty in respect of the goods cleared under the invoices of M/s. Neha Refrigeration alleging that it was floated by the appellants, and it existed only on paper as it did not have any factory or manufacturing facility for manufacture of condensers or evaporator coils or other parts of air conditioning and refrigerating appliances. That the goods on which duty had been demanded were cleared in the documents of M/s. Neha Refrigeration.

However, no Show Cause Notice has been issued to M/s. Neha Refrigeration asking them to show cause as to why M/s. Neha Refrigeration should not be considered as a dummy unit of the appellants. The Ld. Advocate for the appellants have referred to the judgments cited above in the case of Ogesh Industries, K.R. Balachandran and Poly Resins in support of his contention that the Show Cause Notice is vitiated and bad in law as no Show Cause Notice was issued to M/s. Neha Refrigeration and therefore M/s. Neha Refrigeration did not

have opportunity to establish genuineness of the contents recorded in the documents. Therefore, the proceedings should fail on this account.

(ii) The Id. Commissioner, in his findings, has considered M/s. Neha Refrigeration as an existing entity potentially capable of engaging in any business but did not exist as a unit engaged in the manufacture of condensers, evaporators etc. Thus, when the Id. Commissioner has himself agrees and finds nothing amiss about the existence of M/s. Neha Refrigeration, as an existing entity, potentially capable of engaging in business, the Show Cause Notice ought to have been issued to M/s. Neha Refrigeration along with Appellants asking M/s. Neha Refrigeration to show cause as to why M/s. Neha Refrigeration should not be considered as a dummy unit of the Appellants. That not having been complied, we would hold that the entire proceedings initiated by the Show Cause Notice are vitiated and bad in law and accordingly the impugned Order is not sustainable in law and accordingly the impugned Order is required to be set aside the same on this ground alone.

(iii) Even on merits we find that the statements of employees of M/s. Voltas Ltd. confirm regarding the fact of dispatch of defective coils to M/s. Neha Refrigeration and its receipt after due repairs from M/s. Neha Refrigeration as could be seen from the extract of statements of Shri R. Kharve, Service Manager of M/s. Voltas Ltd. (para 4.8 of show cause notice, extract of statement of Shri Jayant S. Dandekar, Foreman of M/s. Voltas Ltd. para 4.9, extract from the statement of Shri K.R. Kallianpur, Materials Manager, M/s. Voltas Ltd. para 4.4 to 4.15 of the SCN. This factual position was also reiterated and got confirmed during the cross-examination of Shri G.R. Naik, Inventory Clerk of M/s. Voltas Ltd. The Id. Commissioner completely ignored all these depositions in his findings though specifically relied and referred to by the noticees in their written submission. The Order is arrived without considering the submissions and is not based on facts.

(iv) The Id. Commissioner, has relied on the statements by holding that the statements are considered voluntary and are admissible as evidence unless the persons produce evidence to the contrary. We find that the statements were immediately retracted and further independent evidence in the present case, by way of employees of M/s. Voltas Ltd. all having stated that they had sent defective

coils for repair to the Appellants and the documentary evidence shows that the goods were cleared in the name of Neha Refrigeration, therefore, when such independent evidence is available about the defective and damaged coils being sent by M/s. Voltas Ltd. and they were repaired by M/s. Neha Refrigeration, no reliance can be placed on statements, which were retracted, when there is no corroboration in material particulars. Further when independent evidence confirm about sending defective coils and is repairs by M/s. Neha Refrigeration and that is not challenged.

(v) Evidence that the appellants have actually manufactured the coils ab initio on which duty has been demanded does not exist. The Id. Commissioner has not even noted the Appellant's submission with reference to Chartered Engineer's certificate that the Appellants did not have capacity to manufacture all the parts of Air conditioners and Refrigerators on which duty demand has been made and arrived at any finding thereon. Further, to our query as to whether there has been co-relation with reference etc. purchase of raw materials by the appellants with the goods manufactured, the Id.

Jt. CDR stated that no co-relation is available in the SCN. This feels us to find that the basis for raising demand and leveling allegations against the appellants.

(vi) The comparison of costing of the repaired coil with that of new coils, as contained in para 4.15 of Annexure-A to the SCN and which the appellants explained that the comparison is unrealistic as Excise duty payable on coil is not taken into account and the cost of the new coil would work out to Rs. 3000/- whereas the repaired coil would cost only Rs. 2070/- and this is not controverted in the impugned Order which records that the apparent imprudence was merely a cause of suspicion which was not a ground in itself and further even if the cause of suspicion is proved incorrect that would not scrap the allegations when it found that when the basic premise of the notice itself is disproved, then there ought to have been strong clinching evidence to confirm the allegations in the Show Cause Notice other than retracted statements. In this case we find that the independent evidence supports the contention of the appellants that the defective coils were repaired by Neha Refrigeration and duly confirmed by all the employees of Voltas

Ltd. and the Id.

Commissioner has completely exonerated M/s. Voltas Ltd. We find no material to uphold the charges as made out in the notice and determine on suspicion.

(vii) We find that the demand of duty is not sustainable as M/s.

Neha Refrigeration only as found cleared repaired coils. Repairing does not call for a levy under the Central Excise law. This Tribunal in the case of Shriram Refrigeration Industries Ltd. v. CCE, Hyderabad (Tri.) has held that repairing does not amount to manufacture, these decisions confirmed by the Hon'ble Supreme Court in their judgment reported in 1999 (113) E.L.T A121 (S.C.) being bound and following this position in law, no penalty on the appellants, M/s. Sapna Engineering and Ors. i.e., Shri S.P. Sharma, Manager, Sapna Engineering is not called for and is to be set aside.

5. Accordingly the impugned Order is set aside and the two appeals are allowed with consequential relief, if any.

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