

Rafique Mallick Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-29-2005

Reported in : (2005)(102)ECC545

Judge : S T S.S., T Anjaneyulu

Appellant : Rafique Mallick

Respondent : Commissioner of Central Excise

Judgement :

1. Appellants is a proprietor of a firm in name and style of M/s Metro Shoes, in appeal against an order directing the levy and payment of duty under Central Excise Act, 1944, on unbranded footwear in loose form, received from Clobbers at a godown at Jetha Warehouse Compound.

Dr. Ambedkar Road; where labels were put on footwear so received, pair of shoes were packed in unit containers after such labeling, MRA declaration, logo, bar coating, after checking the footwear received.

The shoes so labeled and packed were dispatched to Show Rooms all over for sale. The cobblers (karigars) would bill the appellants and the appellants in turn with mark up M/s Metro Shoes Pvt. Ltd., a closely held private limited company.

1.2 With amendment to Section 21F, with effect from 1.3.2003, the appellant applied for and took a registration in the name of the proprietary form and were paying duty, albeit under protest.

Consequently the appellant, as submitted.

"started independent activities of manufacturing and trading and earmarked separate areas out of the godown for these activities. In such manufacturing units, the 'karigars' now send unbranded goods in loose form (not packed in packs to the godowns. Thereafter, labels are put on the goods and the goods are packed in boxes and cartons.

The MRP is then fixed on the goods and the bar coding is also done.

On a weekly basis, these goods are transferred to the trading unit of Metro Shoes (a proprietary concern of the Appellants) after raising excise invoices. From the trading unit goods are then sold to Metro Shoes Pvt. Ltd. and dispatched to the showrooms. The 'karigars' raise their invoices on the Appellants and the Appellants raises their invoice on Metro Shoes Pvt. Ltd. including the markup.

The excise duty is then deposited by the Appellant as per the provisions of the said Act.

The Appellant says that the Appellant also receives footwear from the karigars in a finished form in boxes bearing the MRP. These footwear which are received from the karigars in the boxes sent by the karigars, are then labeled with the label of the Appellants trading name Metro Shoes. Although the Appellants does not put any label on the card board boxes, on the instructions of the Excise Authorities, the Appellant has been paying Excise duty on such goods procured from the karigar at the effective rates. It is clear that in such cases the Excise Duty if at all is payable only by the karigars and that the goods were effectively manufactured goods capable of being sold across the shelf and hence marketable. The labeling of the said goods by the Appellant or on his behalf does not either change the identity of the goods and/or its marketability. Despite this clear position and despite the fact that no labeling is put on the containers, the Appellants has been paying duty under the provisions of the amended definition of 'manufacture' on the insistence of the Excise Authorities.

The Appellant also further submits that the Appellants receive the footwear and the labeling or relabelling viz. affixing of Metro brands is carried out only on the footwear and not on the boxes.

Despite the fact therefore, assuming whilst denying that the amendment to the definition of manufacture as contained in the Finance Act, 2003 is constitutional, the Appellant submits that he does not carry on any labeling or relabelling of the containers but in fact the labeling is done only in respect of the goods. Thus, in any event, the Appellants, activity of labelling the goods does not amount to manufacture so as to fall within the ambit of the charging section i.e. Section 3 of the said Act.

The Appellant states that the Appellant was thus constrained to file a writ petition viz., writ petition No. 2733 of 2003 before the Hon'ble High Court, Bombay challenging the Constitutional validity of Section 127 of the Finance Act, by which the definition of 'manufacture' in Section 2, Clause (2) of the Central Excise Act, 1944 was amended.

The Appellant says that the said writ petition came up for hearing before Their Lordships the Hon'ble Mr. Justice Lodha and Mr. Justice Devadhar when Their Lordships after hearing the submissions while allowing the Appellant to withdraw the Petition directed the Department to issue a Show Cause Notice to the Appellant under Section 11(A) of the Central Excise Act, 1944. The Appellant was directed to file a reply to the Show Cause Notice within the stipulated time.

The statement of Mr Sadiq Ali Noorani was thereafter recorded on 3rd April 2004. The appellant says that thereafter, Show Cause Notice dtd 5.4.2004 was issued by the Respondents to the Appellants wherein M/s Metro Shoes, the proprietary concern of the Appellants was required to show cause as to why: (i) the various processes carried out by M/s. Metro Shoes (Unit-1) as amended in para 10(i) and (ii) of the Show Cause Notice should not be construed as manufacture under the amended definition of manufacture under Section 2(f) of the Central Excise Act, 1944 and liable to duty.

(ii) the activity of affixing the brand labels on the footwear (not on the container and repacking the same in unit containers, as detailed in para 10(iii) of the Show Cause Notice should also not be construed as manufacture under the amended definition of manufacture under Section 2(f) of the Central Excise Act, 1944 and liable to duty, (iii) the claim of the assessee of the payment made under protest should not be rejected.

(iv) An amount of Rs. 1,06,75,295 (period 7.5.2003 to 30.9.2003 already paid without protest and Rs. 2,38,24,833 (period 1.10.2003 to 31.3.2004 paid under protest on the footwear manufactured and cleared by the assessee during the period on above, should not be demanded under Section 11A(1) determined as payable under Section 11A(2) and why the amount of Rs. 2,38,24,832 already paid by the Assessee under protest should not be adjusted/appropriated against the amount that may be determined as payable under Section 11 A(2) *ibid*. Hereto annexed and marked as Exhibit C is a copy of the said Show Cause Notice dtd. 5.4.2004 issued to the Appellant by the Respondent".

1.3 The Commissioner passed an order holding the activity carried on by the appellants as amounting to manufacture, under the Central Excise Act, 1944, and held them liable to pay the duty of Rs. 1,06,75,295 for the period 7.5.2003 to 31.9.2003 Rs. 2,38,24,833 for the period 1.10.2003 to 31.3.2004. Hence, this appeal.

(a) The amended definition of manufacture under Section 2 (f) especially-- "(iii) which in relation to goods specified in the 3rd schedule involves packing or repacking of such goods in a unit container or labeling or relabelling of containers including the declaration or alteration of retail sale price on it or adoption or any other treatment on the goods to render the product marketable to the consumer' of Central Excise Act relevant in the fact herein reads as above would include the activity as carried on by the appellants as it is the appellants own case before us, as per para 3.2 of brief facts in this appeal, that 'goods in lease form (not packed) are received which are thereafter checked marked with MRP on the shoes as well as the logo and brand code on the shoes and the box of the unit container for the pair. The Commissioner has also relied on the statements of Shri Sadiq Ali

Noorani, Depot Manager, as seen from para 8 of the order, which is clearly admitting the position of packing being effected of loose quantity of footwear being received.

In this view of the matter, we find that the activity conducted in the premises, of this proprietary concern, would come under the mischief of the amended Section 2(f) of the Central Excise Act, 1944 to call for levy of duty.

(b) The reliance of the Ld. Sr. Advocate on the case of CCE v. Manisha International and Avon Beauty Product (India) P. Ltd., 2002 (83) ECC 522 and Panchsheel Soap Factory, 2002 (145) ELT 527 Lal Int'l Pvt. Ltd. will not be of assistance in this case, this is case is not only of such goods, wherein MRP simplicitor with bar code labels logos were being placed. The position of packing in unit containers, being conducted herein from loose merchandise, was not the fact considered in any of these decisions.

(c) We would therefore uphold the Order as regards duty as such shoes which were packed from loose receipt in the unit boxes and not cases which were already received packed with in the unit boxes i.e.

unit containers, and where bar code MRP logo were only placed as submitted by Ld. Senior Advocate.

3. We would therefore uphold the levy of duty and remit the matter back to the Commissioner to grant abatements, if any, on proof of such shoes having been received in unit containers is produced to the Satisfaction of the Commissioner. Appeal allowed in above terms.

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