

**Unity Industries, Sonic, Sotex Vs. Commissioner of Central Excise**

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

**Decided On :** Jul-15-2005

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

**Appellant :** Unity Industries, Sonic, Sotex

**Respondent :** Commissioner of Central Excise

**Judgement :**

1. This appeal relates to clubbing and clandestine removal. The clubbing is proposed in the case of following four units: (i) M/s Sotex - a proprietary unit of Shri M M Majithia, constituted in 1991 and registered as SSI unit by District Industries Central since 1991; (ii) M/s Unity, a partnership concern of Shri V V Rajani and Shri Shantilal Somani. Constituted in 1988 and registered as SSI unit by District Industries Centre in 1988; (iii) M/s Sonic, a proprietary unit of Mrs Anilaben Majithia, wife of Shri M M Majithia, constituted in 1989 and exempt from licensing; (iv) M/s Stelex came into being as a proprietary concern of Shri M M Majithia in Sept 1993. It was sold to Krishna Textile Works who used the same till Shri Majithia took over the same on monthly basis from 1.7.1997 to 31.10.1997.

2. The period of demand is 1993-94 to October 1997 amounting to Rs. 1,45,29,754/- A mandatory penalty of equal amount under Section 11AC and a penalty of Rs. 10.00 lakhs on M/s Sotex under Rule 173Q, fine in lieu of s. 10,00 lakhs on M/s Sotex for redemption of plant etc and penalty of Rs. 10.00 lakhs on Shri M M Majithia and Rs. 2.00 lakhs on Shri V V Rajani under Rule 209A and interest under Section 11AB was demanded.

3. All units manufacture branded as well as non branded S S watch straps. SSI exemption under relevant notification was available only to unbranded straps and 85% of the production is that of branded straps which had been cleared on payment of duty by respective units. These units admittedly have full range of machinery for manufacture of watch straps as is evident from the notice as well as in the Order-in-Original.

4. Appellants produced audited accounts which are subject to statutory audit and Income tax and other supporting documents to show that : (a) Units are geographically apart, having their funding and financial arrangement; (b) They hold separate central excise registration, SSI registration and are assessed to income tax, sales tax and central excise separately; (c) They are purchasing raw material independently and are also selling their goods to various purchasers independently; (d) They are maintaining books of accounts separately for purchase and sale of finished goods; (e) They have filed separate classification lists, price lists, RT12 returns which have been regularly assessed by the department; (f) They are periodically visited by central excise range staff, internal audit parties, AG audit party etc; (g) They are subjected to tax audit under Section 44 of the Income Tax Act and reports are being submitted to Income Tax department regularly certified by Chartered Accountant; (h) They have their own separate supervisors and own separate labour.

5. The units were visited by the officers on 15.10.1997 and pursuant to enquiries made and statements of the supervisors and Shri Majithia recorded, a case was made out and Show Cause Notice dated 7.4.1998 was issued. The notice proposed that M/s Sotex was the main unit and that other units were only name sake and were declared only to be separate unit on paper. The notice relied upon; (iii) Main raw material viz SS coils being slitted at M/s Sotex or at Precision Slitters, Amod.

Allegations were also based and made on financial transaction as observed from the Notice as well as on clandestine removals of unaccounted goods by M/s sonic, M/s Unity and M/s stelex on the basis of private gate pass books which ex facie reveal to be removals of semi finished buckles, pins, links etc which were made

and clearances effected to M/s Sotex., who had extra idle capacity to manufacture straps found such parts.

(a) Independent nature of these units passed on detailed bank accounts as well as balance-sheets and other documents to indicate that the money obtained from other units were duly accounted and repaid and wherever necessary bank loans were obtained independently and thus there should be no finding of financial flow back which could be upheld in this case.

(b) Contending that the balance sheet did show that there was separate capital accounts of the concerned partners and or proprietors, as the case may be, and there was no flow back of any profit.

(c) Allegation that M/s Sotex was sending raw material to all the units was incorrect and that balance sheet shows that all purchase and consumption of raw materials were independent and a chart showing purchase and consumption of raw material was also enclosed to the reply pointing out that all unit actually cleared branded goods on payment of duty.

(d) Submitted to that M/s Sotex used to send components to other units for further processing, finishing etc and such finished parts were against sent back to Sotex by other units depending on the idle capacity. It was pointed out that balance sheets showed that job work charges have been regularly paid by Sotex for this process.

Various documents of common purchase of raw materials and reliance of no clubbing in this case were also produced.

(e) On the issue of alleged clandestine removal, it was submitted that gate passes themselves show all processes being carried out and products were removed on such documents and they were only parts of watch strap not complete watch straps in any case and there was no evidence lead in the Show Cause Notice or otherwise by any statement brought on record that the said gate passes represent complete watch strap manufactured and thereafter cleared sown as parts, (f) It was also submitted that while working out total production figure in order to

ascertain SSI limits, the department has sought to rely upon the statements of supervisors of three unit and on making undisclosed calculations worked out the production as per production capacity and the figures have been taken together to make out a case was not permissible in fact and in law. In any case, it was submitted that the demand has not been raised on the basis of the aforesaid calculations and it was pointed out that M/s Stelex only operated from 1.7.1997 to 30.10.1997. Clubbing therefore cannot be upheld. (g) It was also submitted in the replies that a similar case of search operation was conducted against the units on 11.9.93 and even at that stage Krina Text was found at the premises of M/s Stelex.

Even at that stage, a case was only made out against the other three units and not against M/s Stelex. Details with regard to 1993 visit along with documents have been supplied to demonstrate that the department was aware of such facts even as far back in 1993 and no case of clubbing was made out. Hence the present proposal made was barred by limitation.

(a) Shri M M Majithia manages and controls all the units. Hence, there is single administration control, (b) finance flow back as units are taking financial assistance from one another; And therefore held that the units were not separate entities and they were facets of same firm and held that the units were floated in different name but were controlled by one clearances were to be clubbed. With regard to clandestine removal, the Commissioner relied upon gate pass books as alleged in the Show Cause Notice and confirmed the demand of imposition of penalty. However, he directed recovery of entire duty amount from M/s Sotex though Show Cause Notice sought to recover duty individually from each units.

8. (a ) In appeal, against this order of the Commissioner, the Tribunal passed its order dated 18.5.2001 holding that duty could not be demanded beyond the charge in the Show Cause Notice. Therefore, the demand of duty on M/s Sotex was quashed, except to the extent as demanded in the Show Cause Notice. It was found that the stand of the department is internally inconsistent and that though such stand could be supported under para 2 of the notification, there is no charge as such in the order or in the Show Cause notice. The appeal of Sotex was

remanded for redetermination for this limited purpose only. It was allowed on the ground that the demand on watch scrap and remanded for consideration of issue of clubbing only to the extent of the demand raised on M/s Sotex. All other three appeals were allowed.

(b) A clarificatory order was passed on 22.5.2003 which clarified that instead of three appeal being allowed, four appeals allowed being that of appeal of the appellant Shri V V Rajani was also allowed. Consequent to the order on remand, Commissioner passed order dated 14.3.2003 reconsidering all issued afresh and confirmed the same demands in the same manner as in the earlier order holding that all the three firms except M/s Sotex are dummy units and that there is absolutely no finding arrived on financial flow back in light of the fact that Commissioner was satisfied with the explanation of the appellants.

There is also no finding on the issue of clandestine removal. He confirmed the demand. Hence the present appeals.

(a) It is an admitted position that the show cause notice has a reference to all the four units required to be termed as one unit and their values of clearances were required to be clubbed together and eligibility to SSI exemption notification was to be determined afresh, yet the notice demands duty separately from each of the units. The demands in the notice are in conflict with the charge.

Such notices are required to be set aside. The order impugned is demanding duty of Rs. 1,45,29,754/- from M/s Sotex, the proprietary firm of Shri M M Majithia. The demand cannot be upheld, since the demand in the show Cause Notice proposed to be recovered from M/s Sotex was not a figure of Rs. 1,45,29,754/- but much less, the present proposal to confirm the duty demand beyond which was proposed in the Show Cause Notice at Rs. 35,806/- & Rs. 2884/- cannot be upheld. (b) The finding that the three units are just dummy units cannot be upheld when the department is recognizing separate clearances and duty demands on these other units.

(c) Except for M/s Sotex, the independent existence of the other partnership concerns and proprietary concern cannot be doubted. It is another matter that they

may be under the total control of Shri M M Majithia, that ipso facto cannot label them as dummy non existent units. They have independent SSI registration and Central Excise registration and declaration filed and have separate audited Balance Sheets & located geographically apart.

iii. Value of clearances as per estimation on the basis of production capacity per day as per company and statements of supervisors.

The appellants submit that for the year 1994-95, value of clearances declared by the unit is Rs. 66,77,052/- and the value of clandestine clearances is shown as Rs 2,40,61,738/-. These figures when added should result in Rs. 3,07,39,590/-. However, the value taken for calculation of duty is Rs. 3,73,08,790/-. Such misapplication of mind, and upholding of demand thereafter, and reliance on assumed/presumed production on estimation of machines cannot be upheld per se.

(e) The matter of existence of these units and the activity were within the knowledge of the department vide proceedings initiated by Preventive Officers by Show Cause Notice dt 8.3.94 issued to each unit and which culminated in order in appeal by Commissioner dated 3.7.96. The Commissioner's finding in present order impugned on this issue in para 8 is; "8... Moreover the statement of Shri Subhash Karia recorded at that time in connection with adjudicated by the then Assistant Commissioner of Central Excise & Customs, Bharuch vide Order-in-Original dated 24.10.94 confirms my findings in this order that it is only the sotex owned by Shri Mahendra M Majithia, which is the unit and all other units i.e. Sonic, Stelex and Unity are just dummy units fully under the control of Shri Mahendra M Majithia and transactions between them are not at all on principal to principal basis." Which would lead to the only conclusion that the department was fully aware of the charges as found by the Ld Commissioner. There is nothing new in the findings, enquiries and the proceedings now initiated that was not before the departmental officers in 1993-94 when the first case was detected & notice was issued. However, no notice to propose clubbing was issued at that time. If nothing new is coming forth in 1998, to issue the present notice, demanding duties on issues well known in 1993, then the demand is to be held to be barred by

limitation. The bar of limitation by alleging suppression should be held to be in favour of the appellants in the facts of this case. Facts were known to both sides, the allegation of suppression is untenable and reliance on the case of Prabhu Steel Industries Ltd. by the appellants is well founded.

The reliance on the case of Nizam sugar Mills case by the Ld.

Commissioner will not help the revenue in the facts herein. The entire proceedings of demands are therefore required to be quashed on ground of time bar.

(f) The seizures were made on visit of the officers on 15.10.97 and Show Cause Notice was issued only on 7.4.98, these goods were found unaccounted with 3576 watch strips in process of Stelex; 179903 watch straps and 1280 kgs of SS scrap in in Sotex in their RGI register. The said goods had been cleared as per Tribunal's order allowing their appeals. The confiscation now ordered cannot be upheld. The orders of confiscation and redemption fine of Rs. 50,000/- under Rule 173Q without specifying on whom is set aside.

(g) Since the Ld Commissioner has found that SS coil were removed for slitting and not have been found to be diverted for any other purpose, the non following of procedure of Modvat rules will not call for the heavy penalty of Rs. 1.00 lakh under Rule 173Q on Sotex. The same is required to be set aside.

(h) since no duty demands and or confiscation liability under Rule 173Q(1) are being upheld, the confiscation ordered on M/s Sotex under Rule 173Q(2) is not upheld. The same is set aside.

(i) since duty demand on M/s Sotex are not being upheld, the penalty of Rs. 1,45,29,754/- under Section 11AC as imposed is to be set aside.

(j) The duty demand of Rs. 18,900/- on 8400 kgs of scrap found short at M/s Unity along with Rs. 34,000/- demand of duty on watch straps found short at premises of M/s Unity under Section 11A determined on M/s Sotex when M/s Unity is an independent registered assessee under Central Excise Act, 1944, & a partnership firm, the same is misdirected demand and penalty. The same cannot be upheld as imposed on M/s Sotex. The duty demands are also set aside for same reasons.

(k) When no demands on shortages found at M/s Unity are being found & held, there is no cause to visit M/s Sotex with a penalty of 100% under Section 11AC cannot be upheld for the same. That penalty is to be set aside.

(l) since no demands of M/s Sotex are being upheld, the interest demand will abate.

(m) When no confiscation as arrived in this order is being upheld, the penalty under Rule 209A on Shri M M Majithia or Shri V V Rajani cannot be upheld.3.1 In view of the findings herein, the order is set aside and appeals allowed.

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