

Philips Electronics Vs. Commissioner of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-11-2006

Reported in : (2006)(110)ECC464

Judge : R Abichandani, S T T.V.

Appellant : Philips Electronics

Respondent : Commissioner of C. Ex.

Judgement :

1. There are two stay applications; (1) Stay Application No. 2017/06 filed along with Appeal No. E/2467/06 pertains to M/s. Philips Electronics Ny (hereinafter referred to 'Philips Holland'); and (2) Stay Application No. 1998/06 filed along with Appeal No. E/2442/06 pertains to M/s. Philips Electronics India Ltd. (hereinafter referred to as 'PIL').

2. Both these appeals have challenged the order of the Commissioner of Customs & Central Excise, Chandigarh, made on 17-4-2006. In the impugned order, the Commissioner after sieving and weighing the fact of the matter has arrived at the conclusion that the appellants were engaged in activities in such a manner that the provisions of Central Excise Act got violated causing injury to the Revenue. It was also inferred that M/s. Punjab Anand Lamp Industries (hereinafter referred to as 'PALI') and M/s. Philips India were related persons in terms of Section 4(4)(c) of the Act and as a result, Central Excise Duty on excisable goods cleared by PALI to Philips India were to be charged at a price at which Philips India sold the said

goods to their first independent buyer. In the result, a sum of Rs. 5,13,78,778/- was demanded from PALI. Penalty of equal amount was also imposed on them.

In addition, a penalty of Rs. 2.50 crores each was imposed on Philips India and on Philips Holland under the impugned order, the Commissioner went ahead confiscating the land, building, plant and machinery giving, however, an option to PALI to redeem the same on payment of a redemption fine of Rs. 1 crore.

3. As both the stay applications pertain to the same order of the Commissioner, we deal with the matter jointly.

4. A perusal of the record indicates that the whole issue has boomeranged from a seemingly innocuous looking agreement entered into between Philips Holland with Punjab State Industrial Development Corpn.

and Punjab Anand Lamp Industries (hereinafter referred to as 'Anands') on 19-12-1983. This agreement referred to as "Co-operation Agreement" contained many a clause, which like claws held together Philips Holland and PIL into a subtle bondage. In this context, the statement made by Shri G.P. Singh, Company Secretary, on 23-10-1998 has lucidly brought out the fact that the word "Philips" (as mentioned in the Memorandum of Articles of Association) was smartly defined to mean Philips Electronics NV (Philips Holland) and Philips India Ltd. (PIL).

Regarding the constitution of the Board, Shri G.P. Singh stated that as on 17-9-1998 (i.e. the day of the last AGM), out of the six Directors of the Company, four Directors, namely, S/Shri R.B. Putatuda, W.R.Pool, S.V. Rohankhedkar and S. Dasgupta were the nominees of "Philips", in addition to this, Ash. A Brandts was also nominated by "Philips" as an Alternate Director to Sh. W.R. Pool (Absentee Director), Shri Pradeep Anand was a nominee of Anand & Associates and Sh. Surinder Talvvar was a whole-time paid Director working as the MD of PALI. He has further confirmed in his statement that in view of the above structure of the Board, "Philips" was having the control over the management of the company i.e. PALI. He also stated that PALI held 7,23,000 No. Equity share of Rs. 10 each (Total Rs. 72,30,000/-) of M/s. Philips Medical Systems India Ltd., a subsidiary of M/s. Philips.

5. Though PALI was conceived as a joint venture, Article 4 of the said agreement articulated that PALI would not market its product directly and the same would be sold only to PIL and Anand in the ratio of 90:10 with the brand name owned or licensed to them. The impugned order has also found that there existed an extraordinary relationship between PALI and PIL and for that reason PIL was the "related person" to PALI. He also found that the prices and conditions envisaged at the time of agreement and subsequently incorporated in the Lamp Sales Agreement between PALI and PIL, and PALI and Anands were devised in such a way so as to leave for Philips and Anands a reasonable margin between the ex-factory price of PALI and the price level of the wholesale trade. In the said agreement it was decided that the whole of the production of PALI would be shared by Peico (company promoted by NVPG and also its licensed brand name user) and Anands without any formal or informal approval from PALI. The smart investigation conducted by the Directorate General of Central Excise Intelligence in this case also brought the cat out of the bag: a secret understanding between PIL and PALI dated 9-9-1985. The text whispers as follows: "To Compensate Mr. C.L. Anand for his investment and efforts in PALI, it was decided that Mr. C.L. Anand will receive an interest-free advance of Rs. 15 mn which, in ten years, would be written off. This amount was made available to PUNJAB ANAND BATTERIES LTD. on October 10, 1984 and is constructed in such a way that it is connected with the deliveries of batteries from this company to Peico. In case Mr. Anand would not fulfil the undertakings as mentioned hereinafter, we can, at any time, legally insist on repayment of the remaining amount of this advance. In case of such a situation, we propose to recover the amount by non-payment of pending invoices of batteries supplied to us. The total supply on a yearly basis in 1985 f.i. is about Rs. 40 mn.

Mr. C.L. Anand has accepted the following undertakings as conditions for this agreement: (1) He agrees to make no further claims on Peico or Philips Eindhoven for the PALI project and the execution thereof.

(2) He agrees that Peico will have the right to take up 100% of the lamps produced by PALI IF Peico desires so. However, for two important reasons, it is to be preferred that Mr. Anand takes at least a certain percentage of the production of

PALI: Regarding excise : If Peico would take up 100% of the production, we would be liable to pay excise duty on net selling price instead of PALI'S billing price. We should, for obvious reasons, avoid this.

Regarding MRTTP : being the only buyer of PALI products is against MRTTP and as such not acceptable to the Government and especially the financial institutions have pointed out this problem to us. It is only because PALI has entered into an official contract of delivering 10% of their supplies to Mr. Anand that we could get a legal opinion from Crawford Bayley, which was accepted by the financial institutions, that the Peico sales agreement with PALI did not need prior MRTTP approval.

(3) As the burden of this agreement falls entirely on Peico, and Peico Management. If required, has to defend this arrangement to their shareholders, Mr. Anand has agreed to honour (b) the fact that Peico's deliveries to PALI will be based on normal commercial prices as charged by Peico to other third parties.

(4) Mr. Anand has further agreed that he will act in every respect according to the existing agreements between Philips. Peico and himself.

For obvious reasons, we do not have a signed version of this understanding (this being illegal in India and would be very dangerous to the parties concerned). Therefore, this document should be kept only in the Legal Department in Eindhoven, to be referred to if necessary and to ensure smooth continuity of the agreement entered into. I would appreciate it if P.D. Light, as agreed upon during our discussions in Eindhoven when finalising this subject, will put their signature on this document as a token of their approval.

Mr. C.L. Anand is aware of the contents of the various points in this agreement and has agreed to stand by them, as we from the Peico side have assured him.

6. According to this understanding, it is evident that Shri C.L. Anand of Anands would receive an interest free advance of Rs. 1.50 crore from PIL, which was to be written off in 10 years. This amount was made available to Anands on 10-10-1984 and was constructed in such a way that it was connected with the delivery of

batteries from Anand to Philips India. In lieu of the amount of Rs. 1.50 crore, Shri C.L. Anand was expected to fulfil the following conditions: (i) that he would have no further claims on Peico/NVPG for the PALI and execution thereof.

(ii) that Peico would have the right to take up 100% of the lamps manufactured by PALI, if Peico desired so.

(iii) that Shri C.L. Anand also agreed to honour a margin of 15% on lamps as stated in the selling agreement. And that Peico's deliveries to the PALI (of raw material etc.) would be normal commercial prices.

(iv) that Shri C.L. Anand would act in every respect according to the existing agreements between NVPG, Peico and himself.

What is more glaring here is the fact that parties of this agreement were well aware of the hawks hovering in the blue sky, as the following passage would suggest: For obvious reasons, we do not have a signed version of this understanding (this being illegal in India and would be very dangerous to the parties concerned). Therefore, this document should be kept in the legal department in Eindhoven (the Netherlands), to be referred to if necessary and to ensure smooth continuity of the agreement entered into.

7. The learned Counsel for the applicants, informs at the outset, that PALI stands dissolved on 26-4-2003 consequent to the amalgamation which had taken place pursuant to an order passed by the Hon'ble High Court of Punjab & Haryana. He further informs that the excise registration under the Act stands surrendered and a fresh registration in the name of the applicant has since been obtained. According to him, the impugned order is nonest as it is against a party which no longer exist. He also pleads that the provisions of the "cooperation agreement" relied upon by the respondent are no longer valid. He argued that PALI and PIL were not "related persons" as no mutuality of interest existed between them. It was clarified that PALI was not a subsidiary of PIL. It was stressed strenuously that prices were at arms length and no extra consideration floated between the parties who sold and who bought. It was also argued that the show cause notice suffered from time limitation. It was also argued that even before the issuance of the subject show

cause notice, the Asstt. Commissioner had already decided the matter in their favour by passing an order. According to him, the Asstt. Commissioner had confirmed that there was no financial or commercial consideration on the part of PALI while effecting the sale to PIL. In view of this, it was argued that the show cause notice issued at this stage was bad in law and hence not sustainable.

8. The learned authorised representative of the Department argues that PIL had clearly established administrative and financial control over PALI in view of the tripartite agreement and its various clauses.

9. We have heard both sides and closely perused the forest-turned documents at length. Wading through the pages of several agreements, viz. "cooperation agreement" dated 19-12-1983, Lamp Sale Agreement between PALI and PIL dated 5-1-1984 which was later superseded by yet another agreement on 5-7-1996 and the various facts and facets of this investigation - some pulpy and some creamy - namely, transfer of a sum of Rs. 1.50 crores to Shri C.L. Anand, security deposit of Rs. 90 lakhs given to PALI by PIL, supply of one TLD Lamp Machine/Chain to PALI by PIL and all other relied upon documents for several hours, of course with the able assistance from rival parties has enabled us to take a position in this fact-finding mission at a timer footing as we would be discussing below.

10. A copy of Articles of Association of Philips Anand Lamp Industries Ltd. (PALI) placed on record clearly reveals that PALI has clearly functioned as a subsidiary of PIL, clearly proving that they are "related persons" as defined under Section 4(4)(c) of the Central Excise Act. Even being subsidiary, PIL and Philips Holland were treated as a single entity in the Articles of Association. The arrangements made through various agreements made between the players reveals that the price at which PALI would sell to PIL were to be arrived at by reducing the next selling price charged by PIL to its dealers by an amount equal to 15% of the net selling price. In addition, the Lamp Sales Agreement signed by PALI and PIL on 5-1-1984 throws further light as contained. Article 8(d) as to who would bell the cat: In case the manufacturer (PALI) is required by the Central Excise authorities to pay excise duty on the lamps at the rate or assessable value which, in the opinion

of the buyer (Peico), is not warranted by law, the manufacturer shall, if so required by the buyer, take appropriate legal action to dispute such rate or assessable value as the case may be...All reasonable cost and expenses incurred by the manufacturer in relation to such legal action shall be borne by the buyer.

In addition, the various agreements clearly indicate that there was substantial interest between the players which has been made explicit through their various clauses, establishing a clear relationship between PIL and PALI. In the said Articles of Association, it is apparent that 'Philips' holds not less than 51% of the equity capital of the company and has seven nominees on the Board. In the year 1991, the ratio was 63:37 and that out of seven Directors, five were from 'Philips'. In view of this composition, it is crystal clear that a complete and dominant control had been exercised by 'Philips' over PALI. The subsequent agreement called 'Lamp Sale Agreement' also goes to prove that PIL controlled the purchase price of the goods from PALI by referring to its selling price for its dealers. As already discussed, there exists an undeniable supremacy of PIL in determining the price at which PALI could sell. The 'secret understanding' between PIL and PALI has unearthed the modus operandi adopted by 'Philips' to dilute the control of Anands for a consideration. There is no dispute on the recovery and genuineness of this secret document between PIL and PALI.¹¹ In view of the facts and circumstances, we do not find any reason to waive the requirement of pre-deposit. It is, therefore, directed that there shall be an interim stay of the impugned order on the applicants' depositing the entire amount of duty and also 50% (fifty per cent) of the penalty in terms of the impugned order within a period of eight weeks from today, failing which the appeals shall stand dismissed. On depositing the said amount, the balance amount of penalty shall stand waived and recovery stayed during the pendency of the appeals.

12. To come up for reporting compliance and further orders on 13th October, 2006.

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