

Pimpri Gases Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-23-1990

Reported in : (1990)(49)ELT474TriDel

Appellant : Pimpri Gases

Respondent : Collector of Central Excise

Judgement :

1. Both these appeals arise out of a common adjudication order and facts of these appeals are common. Issues involved therein are also common. So, we have heard them together and dispose them of by this common order. Facts, stated in the appeal memo, are briefly summarised as under : The appellants, M/s. Sanghi Gases of Appeal No. E/661/87 (hereinafter referred to as Sanghi Gases), are engaged in the manufacture of Oxygen & Nitrogen Gases and Oxygen/Nitrogen gas plants falling under T.I. 14H and T.I. 68 of the erstwhile First Schedule of the Central Excises & Salt Act, 1944 (hereinafter referred to as the Act). The appellants started manufacturing aforesaid products since 1-6-1980. Formerly, the firm, which is a partnership firm, was known as M/s. Shivaji Oxygen, but as the name referred to historical personality, the name had to be changed and the change was carried out in L4 licence also. Partners in the firm were Mrs. Pushpa R. Sanghi and Mr. Nitin R. Sanghi, whose names were shown as partners in the L4 licence w.e.f. 1-9-1983. L4 licence was issued on 3-11-1980. The appellants followed Chapter VIIA Procedure (SRP) for clearance of the goods. They had filed classification lists w.e.f. 1-4-1983, 1-4-1984 and 1-4-1985 which had been

approved from time to time. Appellants were granted exemption under Notification No. 80/80-C.E., dated 19-6-1980, as amended by Notification No. 83/83-C.E., dated 1-3-1983 and 85/85-C.E., dated 17-3-1985 for their product falling under T.I. 14H. Records of the appellants were audited from time to time by Central Excise Audit Parties and CERA parties. Acting on information, the officers of the Central Excise (Preventive), Anti Evasion, visited the factory premises of the appellants and also of Pimpri Gases, appellants of Appeal No. E/660/87 (hereinafter referred to as Pimpri Gases). The officers made some enquiry, resumed some records and recorded statements of some persons including a partner of the appellants and some employees. Consequent thereupon, a show cause notice was issued to both the appellants alleging that both the appellants are so associated in business with each other that they do not appear to have any principal to principal dealings and they have many points of commonness and they appeared to have evaded Central Excise duty by fragmenting the value of clearances of the units between each other and thus incorrectly availed of benefit of exemption available to small scale industries under various notifications. Points of commonness were stated in the attached annexure 'A' to the show cause notice. It was also alleged that investment in machinery in M/s. Sanghi Gases was more than the prescribed limit in the small scale industries exemption notification. On this basis, the appellants were called upon to show cause why: a) Exemption availed by them under the Notification 80/80-C.E., dated 19-6-1980 & 85/85-C.E., dated 17-3-1985 (all as amended upto date) for T.I. 14H products should not be denied to them.

b) Central Excise differential duty of Rs. 10,63,922.75 for the period from 1-4-1982 to 28-2-1986 should not be recovered from them under the provisions of Rule 9(2) read with proviso 1 to Section 11A *ibid*. The details of the differential duty worked out is as per Annexure-B. c) Exemption availed by M/s. Sanghi Gases under Notification Nos.

77/83, dated 1-3-1983 and 77/85, dated 1-3-1985 for T.1.68 should not be denied to them.

d) Central Excise duty of Rs. 3,15,859.87 for the period from 1-4-1983 to 28-2-1986 should not be recovered from them under the provisions of Rule 9(2) read

with proviso 1 to Section 11A/Wrf. The details of the differential duty worked out is as per Annexure-C. e) A penalty should not be imposed on them under the provisions of Rule 9(2) and/or Rule 173Q and/or Rule 210 ibid.

2. M/s. Pimpri Gases have stated in their appeal memo that they are engaged in the manufacture of Acetylene Gases falling under TI 14H and Lime Sludge falling under T.I. 68 of the erstwhile First Schedule of the Act and they have started manufacturing since January, 1983.

Formerly, it was known as M/s. Poona Acetylene and subsequent change in the name was carried out in L4 licence. The unit is a proprietary concern and Shri R.K. Sanghi is the proprietor thereof. The unit follows SRP for clearance of their goods. They had filed classification lists from time to time and were approved. The unit was granted exemption under Notification No. 80/80-CE as amended by Notification Nos. 83/83-CE and 85/85-CE. Their records were also audited from time to time by Central Excise and CERA Audit parties. These appellants also received show cause notice dated 2-6-1986 to show cause as per above.

Both the appellants submitted their reply to show cause notices.

Collector of Central Excise & Customs, Pune adjudicated the matter by the impugned order and : (i) confirmed the demand of Rs. 10,63,922.75 under Rule 9(2) read with Section 11A of the Act to be paid by M/s. Sanghi Gases.

(ii) Confirmed the demand of Rs. 3,15,859.87 to be paid by M/s.

Sanghi Gases under the provisions of same Rule and Section of the Act; and (iii) Imposed a penalty of Rs. 3 lakhs each on M/s. Sanghi Gases and Pimpri Gases, Pimpri under Rule 1730 of Central Excise Rules, 1944 (hereinafter referred to as Rules).

Aggrieved by the said order, both these appellants have preferred these appeals.

2A. We have heard Sh. A.V. Phadnis Id. Advocate for M/s. Sanghi Gases and L.A., Sh. V. Lakshmikumaran for M/s. Pimpri Gases and Sh. V.Chandersekharan, Id. S.D.R. for the respondents in both the appeals.

3. As per the impugned order, the issues involved in this case are as under : (i) whether M/s. Sanghi Gases & Pimpri Gases have got interest in the business of each other and whether they can be clubbed together; (ii) whether the value of air separating column purchased from Sanghi Oxygen, Bombay was undervalued so that Sanghi Gases get exemption under Notification No. 77/83 on the basis that the value of plant and machinery is less than 20 lakhs.

4. The Collector has, as stated in the impugned order, found from the records that M/s. Sanghi Gases was formerly known as M/s. Shivaji Oxygen holding L4 licence. It was a partnership concern of 3 partners, Sh. R.K. Sanghi being one of them. The partnership was dissolved in 1983 and a new concern, namely, M/s Pimpri Gases was started by Sh.

R.K. Sanghi as the proprietor. So, only two partners (named above), who happened to be the wife and son of Sh. R.K. Sanghi continued to be the partners of M/s. Sanghi Gases. So, in the view of the Collector, the two concerns belonged to the family group of Sh. R.K. Sanghi. He has, further held as under : (i) Common use of staff - As discussed in detail in the impugned order at page 11 of the copy, there was common use of staff between the two concerns. We are not narrating details as it is not necessary for the purpose of deciding these appeals, but we note that there was some common staff at the relevant time serving both the appellants.

(ii) Financial assistance - M/s. Sanghi Gases had placed an order for supply of oxygen plant with M/s. Dalai Mckenna and M/s. Pimpri Gases also placed an order for such a plant for which Pimpri Gases had made payment of Rs. 4,69,582.57. Subsequently, the order of M/s.

Pimpri Gases was cancelled. So, M/s. Dalai Mckenna requested M/s.

Sanghi Gases to adjust the amount by paying to M/s. Pimpri Gases.

The Collector found some discrepancy in version of both the appellants and M/s. Dalai Mckenna and found that they do not tally with each other. So, he has held as under : "Hence the evidence produced cannot be relied upon and that there has

been a financial assistance between the two units cannot be ruled out. In any case, even if, their plea is accepted, it will be seen that these units have been functioning as one." (iii) Common telephone - The Collector observed that the telephone belonged to M/s. Sanghi Gases and extension was provided to M/s.

Pimpri Gases which was not in the same premises. It was also admitted by Sh. R.K. Sanghi that the telephone was in his personal name, but was installed in Sanghi Gases and installation charges were paid by M/s. Sanghi Gases and bills are also paid by M/s.

Sanghi Gases. So, as held by the Collector, this would show that both the units had interest in the business of each other.

"Though the other circumstances such as sale-purchase of each other's products, purchase of Calcium Carbide by Sanghi Gases for Pimpri Gases and payment adjustment of payment against the sales of Acetylene Gases to Sanghi Gases, supply of material to Pimpri Gases and use of trucks belonging to Sanghi Gases by Pimpri Gases are claimed to be innocuous in nature and as per the trade practice, the said circumstances support the above Findings that both the units have got mutual interest in the business of each other. Hence it would be justified if both the units are clubbed together for the purpose of exemption." (v) Supply of Machinery - M/s. Sanghi Gases, Pimpri had purchased an air separating column from M/s. Sanghi Oxygen, Bombay at declared price of Rs. 3.5 lakhs. But, as stated by the Collector, during the investigation, it was revealed that the value of this column was under-valued and on the basis of evidence on record, it was held that there was difference in value of Rs. 3.65 lakhs and adding that value to the total value of machinery and plant, as declared by the appellant, M/s. Sanghi Gases, the total value of machinery and plant came to Rs. 20,17,914.57, so the investment actually had exceeded Rs. 20 lakhs and so, as per the Collector, M/s. Sanghi Gases were not entitled to avail of benefit of exemption under Notification Nos. 77/83-C.E. and 77/85-C.E.5. The Collector also held that both the appellants had adopted colourable device to avoid tax and had deliberately suppressed the facts and so facts of the case attracted the provisions of Proviso to Section 11A of the Act. So he passed the orders as stated above.

"There is no evidence of any flow of capital between the two appellants and there is no evidence that one appellant had any financial interest in the other unit." 7. So, unless that is established, it cannot be held that one unit was a dummy of the other unit or was set up by the other unit only with a view to avail of benefits of exemption notifications, in question. The only evidence of financial assistance, relied upon by the Collector, is about transaction between M/s. Pimpri Gases, Sanghi Gases and M/s.

Dalai Mckenna for the purchase of oxygen plant. The Id. Advocate referred to documents on record and submitted that these were genuine transactions and it did not involve any financial assistance by one unit to the other unit. As far as use of common staff and telephone is concerned, he submitted that these do not prove that the units were one or that they had mutual financial interest. He cited (1) Jagjivan Das and Co. v. C.C.E., Bombay-I - 1985 (19) ELT 441 (Tribunal) and (2) Shree Packaging Corporation, Hyderabad v. Collector of Central Excise, Hyderabad He adopted arguments advanced by L.A., Sh. Lakshmi Kumaran. About the value of purchase of air separating columns supplied by M/s.

Sanghi Oxygen, he submitted that the value of the transaction was accepted by the jurisdictional Central Excise Authorities in whose jurisdiction, M/s. Sanghi Oxygen are located and no inquiry had been held as far as M/s. Sanghi Oxygen are concerned. Moreover, the evidence, relied upon by the Collector, is not at all reliable and nothing turns upon that evidence.

9. Sh. Chandersekharan, Id. S.D.R. for the Revenue reiterated what is stated in the adjudication order. He, further submitted that Sh. Ram Avtar, who was an employee of M/s. Sanghi Gases, had produced some vouchers, he was not cross-examined by the appellants and so the Collector relied upon those vouchers and conclusion arrived at by the Collector is proper. So, the value of investment under machinery and plant exceeded the prescribed limit.

10. We have carefully perused the records and considered the arguments by both the sides.

11. As far as constitution of both the firms is concerned it is not in dispute that M/s. Sanghi Gases is a partnership firm which has two partners and they are admittedly the wife and son of Sh. R.K. Sanghi and Sh. R.K. Sanghi is the proprietor of M/s. Pimpri Gases. But, then, only because they are very close relatives, it cannot be said that there is any commonality of financial interest between the two firms.

As far as common use of staff and telephone is concerned, even though what has been found by the Collector, is factually correct, then also it would not prove that both the units were one in eyes of law. This issue is already decided in following cases cited by the appellants : 1. Jaswant Sugar Mills Ltd., Meerut v. UOI and Ors. -1981 (8) ELT 177 (Del.) - wherein considering the effect of a person being a partner in one firm and proprietor of another firm in connection with Section 2(f) of the Act and Notification No. 13/65, in para 11, the High Court has held as under : "The 'manufacturer' is a person or entity who is directly controlling or is responsible for the manufacture of a product. As such, the petitioner could not be said to be a 'manufacturer' in firm at Bijnor where he was only a partner when compared to the factory at Meerut where he was the sole proprietor. Therefore, for the purposes of the firm at Meerut, he would be a distinct person from what the petitioner qua manufacturer of sugar was at Bijnor.

Therefore, the production of sugar at Bijnor and Meerut mills could not be clubbed together for grant of rebate under the aforesaid notification." 2. Jagjivan Das & Co. (supra) wherein, the Tribunal was considering effect of circumstances such as use of common premises and common use of some machinery, etc., telephone, telegraphic address, conveyance of partners, etc. in connection with Section 2(f) of the Act and the Tribunal has held as under: "Giving of a common telephone as address by the three firms which consist of relations, when telephones are difficult to get in bigger cities, use of table space by one firm in the shop-cum-office of another, which is a common practice in commercial towers; use of a common telegraphic address, which is used by a number of shops in the same complex, location of the three factories in the same compound within the knowledge of the Excise authorities, commonness of partners; occasional use of buffing machine of one firm by others, and mutual financial transactions without charging of interest, etc. are not conclusive circumstances to show that the clearances of the

appellants were for and on behalf of the others." 3. Shree Packaging Corporation (Supra) - Here the facts were common storage of raw-materials and employment of work force of one firm and another in certain circumstances and the Tribunal has held that these are not such circumstances which would prove that the firms were not independent.

12. In view of the above decisions, in the present appeals also, we are satisfied that use of common telephone, staff, etc. would not go to prove that both the production units are one in the eyes of law. The other circumstances, referred to by the Collector, such as sale-purchase of each other's products, purchase of calcium carbide by Sanghi Gases for Pimpri Gases and adjustment of payment against the sales of Acetylene Gases to Sanghi Gases, supply of material to Pimpri Gases and use of products belonging to Sanghi Gases by Pimpri Gases, are not discussed in details by the Collector, but while summarising the evidence, in the earlier part of the order, it has been stated as under (internal page 4 of the copy): i) Sale-purchase of each other's products - Sanghi Gases is buying dissolved acetylene gases manufactured by Pimpri Gases and Pimpri Gases is buying oxygen and nitrogen gases manufactured by Sanghi Gases as per statement of Sh. Ashok Mangal, Manager of Sanghi Gases.

Accounts of these products are consolidated and no holding charges are recovered from each other on sales/purchase of gas cylinders whereas both these units are charging holding charges to other customers.

ii) Purchase of Calcium Carbide by Sanghi Gases for Pimpri Gases - Calcium carbide required by Pimpri Gases for manufacturing dissolved acetylene gases is purchased by M/s. Sanghi Gases and this payment is adjusted against the sales of acetylene gases made to Sanghi Gases.

iii) Supply of material to Pimpri Gases : Some spare parts of cylinders are supplied by Sanghi Gases to Pimpri Gases without any payment for maintenance of cylinders. About 164 empty cylinders are given to Sanghi Gases by Pimpri Gases on loan basis without any deposit or rental charges.

iv) Use of trucks belonging to Sanghi Gases by Pimpri Gases - Three trucks are owned by Sanghi Gases and are used by Pimpri Gases for transport of gas cylinders and though Pimpri Gases are recovering transport charges from their customers, they are not paying charges to Sanghi Gases. Moreover, when Pimpri Gases transport their goods to M/s. Vashi Oxygen, they are not recovering any transport charges as Vashi Oxygen is a unit managed by Sanghi Group.

13. As rightly contended by the appellants before the Collector, these are all innocuous transactions and these transactions cannot be termed as 'financial assistance' by one unit to another. The Id. Collector has also not discussed in the order how he treats these facts for coming to the conclusion that both the units are one. That apart when admittedly, there are blood relations between the proprietor of one firm and the partners of another firm the use of such common facilities is quite natural. The financial transactions narrated do not reflect financial assistance by one unit to another or they have any mutual interest in the business of each other.

14. Admittedly, both these units are registered as small scale units separately having independent L4 licences, independent business accounts, transactions, sales, purchases, etc. So, in light of the above cited judgments, these factors do not warrant the conclusion arrived at by the Collector.

15. As far as the question of financial assistance is concerned, the Collector has relied upon one transaction of purchase of oxygen plant.

At page 84 of the paper book (Appeal No. 660/87-C) is a copy of account sent by Pimpri Gases to M/s. Dalai Mckenna. In this, there is a debit entry of Rs. 3.00 lakhs dated 30-9-1985 stated to have been sent by Demand Draft to Maharashtra State Finance Corporation. At page 101 is a copy of a letter dated 25-6-1985 from Pimpri Gases to Dalai Mckenna whereby Pimpri Gases placed order for oxygen plant to Dalai Mckenna. At page 99, is a letter from Dalai Mckenm to Pimpri Gases wherein M/s.

Pimpri Gases had been called upon to pay a sum of Rs. 3.00 lakhs to M.S.F.C. as against advance for the purchase of oxygen plant (it may be noted that this

payment has been reflected in the statement of accounts at page 84). At page 98, is a copy of a letter dated 15-10-1985 whereby M/s. Pimpri Gases cancelled the order placed with Dalai Mckenna for the purchase of oxygen plant. At page 97 is a copy of a letter dated 20-10-1985 addressed by Dalai Mckenna to Pimpri Gases whereby they accepted the cancellation and it has been, further, stated therein as under: "We are arranging the refund of your advance money through M/s.

Sanghi Gases, Pimpri, Pune-18, who is one of our clients, M/s.

Sanghi will make the payment directly to you." 16. Admittedly, M/s. Sanghi Gases paid this amount to M/s. Pimpri Gases. In our view, this is a perfect business transaction and it cannot be termed as 'financial assistance' by one unit to another. This is a usual business practice and it can be seen that by letter dated 1-9-1985 (at page 100), Dalai Mckenna asked M/s. Pimpri Gases to pay an amount of Rs. 30,000 to one M/s. Balaji Industries Corporation on their behalf against order of oxygen plant. So, we fail to understand how this can be construed as a financial assistance either by Pimpri Gases to Sanghi Gases or by Sanghi Gases to Pimpri Gases.

17. So, as far as the first issue is concerned, the conclusion arrived at by the Collector on the basis of evidence on record, is not justified and cannot be sustained.

18. As far as the second issue is concerned, admittedly, Sanghi Gases had purchased an air separating column from M/s. Sanghi Oxygen for Rs. 3.5 lakhs. It is stated that Sh. R.K. Sanghi proprietor of M/s. Pimpri Gases is the Managing Director of M/s. Sanghi Oxygen. The Central Excise Authorities had recorded statement of Sh. Ram Avtar K.Chandgotia, who was a General Manager of Sanghi Oxygen and he had stated that normal price of air separating column was Rs. 7.50 lakhs.

The Investigating Officer, Sh. K.V. Javale (Superintendent), has stated that he had collected invoices in respect of similar products which had been sold at Rs. 7.50 lakhs and perusing the relevant invoices, the Collector concluded that the real value was Rs. 7.50 lakhs and adding the difference he came to the conclusion that

investment in machinery and plant in Sanghi Gases was more than Rs. 20 lakhs. Copy of the deposition of Sh. K.V. Javale is at pages 163-165. In Cross Examination, he has stated as under : He had not seen the invoice (of the concerned transaction) but he had seen the value of the same in the balance sheet. He did not verify the Central Excise Gate Pass for column in question. He, further, admitted that he did not make any enquiry with M/s. Sanghi Oxygen, but he had recorded statement of Sh. Ram Avtar, who was the General Manager of the firm and said Ram Avtar had given particulars of valuation duly signed by him and on the basis of that statement, the officer had based value of this column. He also stated that there were one or two invoices of air separation column produced by the said Ram Avtar, which were enclosed with the statement of Sh.

Ram Avtar. He, further stated that the Excise Officer from Bombay had raided the premises of Sanghi Oxygen and seized some goods, but he did not verify whether any show cause notice was issued to M/s.

Sanghi Oxygen pertaining to this deal and he also did not verify whether any differential duty was charged on the basis of value arrived at by the Officer. He was specifically put the following question and he answered as under : Q. Did you verify whether the air separator column installed in the Sanghi Gases, Pimpri and the air separator column mentioned in the invoices produced by Sh. Ram Avatar had same components and specifications? 19. It is contended by the appellants, M/s. Sanghi Gases that relations between Sh. R.K. Sanghi and said Ram Avatar were strained and that is why the said Ram Avatar gave such a statement. Whatever, it might be, but apart from that also, the Investigating Officer, has specifically, admitted that he had neither verified the original voucher nor the gate pass under which the column, in question, was cleared. Moreover, he specifically admitted that he did not find it necessary to verify whether the components and specifications of the column, in question, were the same as those shown in other invoices alleged to have been produced by Sh. Ram Avatar and also the Investigating Officer. So, assuming that Sh. Ram Avatar has produced some invoices, then also, the value of the column, in question, cannot be arrived at on the basis of such invoices unless it is established that they had same components and specifications. It is obvious that there can be such columns of different sizes,

components and specifications, and naturally, the value would vary on the basis of these factors. So, the conclusion arrived at by the Collector is not justified. In that case, it cannot be said that investment made by the appellants in machinery and plant exceeds the limit of Rs. 20 lakhs. So, it cannot be said that the appellants had committed violation of any condition of the notifications, in question, and were not entitled to the benefit of exemption under the notifications, in question, whereby, small scale units are covered.

20. In light of the above discussion, we pass the following final order : The appeals are allowed and impugned order is set aside with consequential relief to the appellants.

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