

Spl Machinery Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jan-21-1994

Reported in : (1995)(75)ELT362Tri(Chennai)

Appellant : Spl Machinery

Respondent : Collector of Central Excise

Judgement :

1. This appeal is against the order of the Collector of Central Excise, Coimbatore dated 10-5-1990. The learned Consultant for the appellant submitted that the learned lower authority has re-adjudicated the matter after a remand order by the Tribunal. The learned Consultant submitted that the learned lower authority has gone beyond the direction given by the Tribunal and has held against the appellant on a totally new ground which itself is not maintainable in law. He pleaded that the learned lower authority in the earlier order had held in favour of the assessee on a number of points and had entered finding that the production of the two units involved i.e. M/s SPL Machinery and M/s. Kamal Industries had to be clubbed for the reason that the power connection that the appellants shared and the machinery belonging to one Unit was used by the other and no compensation was paid by the respective users to the other. In this connection he drew our attention to paras 12 and 13 of the earlier order of the Collector bearing No.Collr /93/87, dated 19-11-1987 which are reproduced below for convenience of reference : "12. In fact the only evidence which is of material interest is in the nature of the following facts: (i) that M/s Kamal Industries and M/s SPL Machinery have a

common power/service connection.

(ii) that no documentary evidence has shown that one lathe belonging to M/s SPL Syndicate and one lathe belonging to M/s SPL Machinery were installed in the premises of M/s Kamal Industries; (iii) that some processes of manufacture of one unit were being undertaken in another unit.

13. It is of course perfectly legal to share a power connection and also to share machinery or to lend machinery by one to another. In such cases, what is required to be shown in defence is that there was adequate compensation for such purchase of power or for such, borrowing of machinery. Admittedly in this case no such evidence has been led by the respondent. Admittedly this is a slender evidence.

The cases of bifurcation are difficult to establish. As long as the paper entries are made properly it is impossible for the Department to establish that the units are in fact one. Therefore, in cases where the evidence is even slender, advantage should be given to the Department." He pleaded that on all other points, which were alleged in the show cause notice the Id. lower authority did not draw any adverse inference and had ruled in favour of the assessee. In this connection he drew our attention to paras 8 to 11 of the impugned order. He pleaded that the only factors which weighed with the learned lower authority are those which have been set out at sub-paras (i) to (iii) of para 12 reproduced above. He pleaded that the Tribunal while passing the remand order remanding the earlier order of the adjudicating authority had directed for the verification of the facts relating to these three points and he referred me to terms under which this Bench had remanded the matter to the original authority for de novo adjudication. He pleaded that in para 5 of the order of the Tribunal order bearing No. SRSB No. 43/1988 dated 1-9-1988 the Tribunal observed that the main basis for clubbing the clearances and demanding duty is on the fact that there was no evidence produced for separate payment by the units for the purchase of power and the lack of evidence for the payment for sharing of the machinery and processing charges and that the appellant had produced before the Bench evidence in relation to purchase of power in the form of ledger entries and receipt from the electricity board in addition

to labour payment bills and vouchers evidencing payment for job charges done in the units. The Tribunal also observed that while the Collector's order indicated existence of two lathes, the show cause notice referred to only one lathe. The learned Consultant pleaded that this observation of the Tribunal would show that the area to be traversed on remand by the Tribunal was limited to the observations of the Tribunal and also the points which weighed by the Collector while passing the earlier order dated 11-8- 1987, while holding that the two units had to be clubbed. He pleaded that in the impugned order before us, the lower authority as would be seen from para 11, has accepted the appellant's contention that they are to be charged for use of the machinery of the other unit and also there was one lathe and not two lathes as had been pleaded by the appellant. He further pleaded so far as the electricity charge is concerned, here again the fact of payment for the use of power by the appellant was there by evidence on record.

He pleaded that once the points which weighed with the learned adjudicating authority in the earlier order had been met, the learned lower authority had no option but to rule in favour of the assessee, since on all other points, the original authority had already entered a finding that those points could not be factors from which any inference could be drawn whether there are two units and whether the two were functioning as one.

2. The learned DR adopted the reasoning of the original authority in the impugned order and pleaded that the lower authority has rightly held that clearances of both the units should be clubbed and the appellant should be called upon to pay duty.

3. We observe that in the show cause notice issued the charges have been framed on the facts set out in para 9 of the show cause notice which is reproduced below: "9. From the four mahazars drawn for these three units the following facts have been noticed: (i) That Kamal Industries and SPL Machinery are having common power/service (domestic, power for 3 phase and welding line); (ii) Though by virtue of entity they are separate, it was noticed as one since the door for both the units was kept open for the movement; (iii) That one Air Compressor and hand sprayer for painting were found kept in the painting place at M/s. Kamal Industries where finished painted motors without name plates were found. In the rest of two

units neither the Air Compressor nor the sprayer for painting was available even the precincts for painting done at SPL Machinery and Syndicate was noticed; (iv) That the testing equipment for testing motors alongwith the Pressure Testing meter with stand was installed at M/s. SPL Machinery only which proved beyond doubt that the motors were tested with the said testing equipment. This is further corroborated with the fact of 85 electric motors in finished condition kept in the said Test stand. The said machine was not available at M/s. Kamal Industry and SPL Syndicate.

(v) Neither the finished nor unfinished electric motors were available at M/s. SPL Syndicates at Ganapathy where the main manufacturing was wet grinders only and especially at SPL Syndicate grinding stones, fixing stones etc. was noticed and the said unit does not even possess the pressing machine for pressing stampings.

(vi) Store room was available at M/s. SPL Machinery where castings for motor bodies, legs, covers, etc. were found. One shelf at Kamal Industries (Rathinapuri) was noticed with motor parts, stampings, etc. [some of them noticed at Kamal Industries (Ganapathy premises).] Whereas SPL Syndicate was not found with any raw material i.e. castings for motor bodies, covers, legs, etc. which stored with grinders and grinder stones only." And also based on the inference drawn/set out in paras 10 and 12 of the show cause notice, which for convenience of reference are reproduced below : "10. Since the three units have claimed in their sales invoices for sale of Electric Motors and the factual position as seen from the mahazars discussed to above will clearly bring home the fact that M/s. SPL Syndicate did not manufacture electric motors at all in their premises and M/s. Kamal Industries and M/s. SPL Machinery having a common passage and the painting work was done at M/s. Kamal Industries by their Air Compressors/hand sprayer and the motors were tested at SPL Machinery in their testing machine, it is evident that manufacture of electric motors was undertaken at M/s. Kamal Industries and M/s. SPL Machinery only. These two units undertake part of the process for the motor production and finally painted at Kamal Industry and tested at M/s. SPL Machinery. Electric Motors thus manufactured were sold by raising invoices at three different units." "12. From the statement referred to above, the

fact reflected in the mahazar for testing, painting electric motors, the premises of Kamal Industries and SPL Machinery was utilised with the Air Compressor and Testing Equipment installed at the respective premises for the sale invoices for electric motors claimed by all these three units.

Further Kirloskar Machine of M/s. SPL Machinery was found installed at Kamal Industry. This fact is further corroborated by the statement of Shri S. Karudhia given on 21-12-1985 that the boxes manufactured on job work by his wife's firm were handed over to SPI Machinery only though indents were raised for all three units." The learned Collector, who adjudicated the case earlier, after taking into consideration the evidence and pleas made, while analysing the position as to whether the units should be treated as one for the purpose of excise levy, has observed as under: "In other words, where it is shown that such units are separate entities and that there are no transaction between them without consideration, the charge of fragmentation cannot be proved. In such cases, it is the degree of evidence suggesting inter-dependence that would decide a particular case." "In fact, the mere existence or otherwise of a full range of machinery for manufacture of certain products does not become a determining factor. Sometimes for reasons of constraint of space, funds or technology, certain processes are got done from outside labourers. It is thus possible to manufacture excisable products with a few key machines only or in extreme cases without a single machine. The excise procedure also acknowledges these facts and makes provision for movement of goods for such processing without payment of duty. The fact that in the premises of the two units a range of machineries existed actually goes in favour of the respondent." He has further taken note of the position set out in the show cause notice and has stated as under : "The Show Cause Notice itself in paragraph 9(ii) of the Annexure-II confesses that M/s. Kamal Industries and M/s. S.P.L. Machinery were separate legal entities....

The fact in this case that the owners of these two units are related to each other does not therefore support the case of the Department." Further the motors in the two units have a common brand name did not weigh with the Collector to hold against the appellants for clubbing of the production of the two units for excise purposes and the only evidence which weighed with him to hold that the

clearances of the two units should be taken together were : " (i) that M/s. Kamal Industries and M/s. S.P.L. Machinery have a common power/service connection; (ii) that no documentary evidence has shown that one lathe belonging to M/s. S.P.L. Syndicate and one lathe belonging to M/s. S.P.L.

Machinery were installed in the premises of M/s. Kamal Industries; (iii) that some processes of manufacture of one unit were being undertaken in another unit." However, since the appellants could not show that they had paid compensation for the purchase of the power to the other units, he held that this was a slender evidence which pointed out to the operations of the two units and in a circumstance like this he held that this slender evidence was enough to interpret the position to the advantage of the Department. One more factor which weighed with the Collector was that one manufacturer was manufacturing boxes for all the three units and that these boxes were being handed over to M/s. SPL Machinery. This order of the Collector dated 19-11-1987 bearing No. 93/87 on appeal was remanded by the Tribunal vide order No. SRSB/43/1988 dated 1-9-1988 with the following observations : "However, the appellant has now submitted before us that they do possess such evidence in relation to purchase of power in the form of the ledger entries and receipts from the Tamilnadu Electricity Board and also that they have with them labour bills and vouchers evidencing payment for job charges done in the units. There is also an apparent ambiguity in the finding relating to the machinery as the Collector's order indicates the existence of two lathes, whereas the show cause notice refers to only one. In the circumstances we hold that it will be appropriate for the Collector to evaluate the evidence that the appellants claimed to be in their possession to prove separate payment for purchase of power and payment for job charges and also to give a fresh finding regarding the existence and ownership of the machinery, because the evidence which the appellants referred to now before the Tribunal, had not been admittedly produced before the adjudicating authority for him to give a . finding thereon." It is seen from the above that the learned Collector in his order, while accepted the position that the two units were separate legal entities and had enough machinery installed at each of the two units to be able to manufacture the motors by either in house activity or some activity being carried out from outside, held the two units to be functioning as one for the purpose of production of electric motors for the reason

that there was slender evidence in regard to common use of power without compensation being paid by one unit to the other for the consumption of power and also for the reason of sharing of some machinery. However, we find from the impugned order passed by the learned Collector after remand and that he has accepted the fact of compensation being paid for the use of the power by one unit and also for the use of the machinery by one unit to the other, but he has gone on to observe in paras 10.6 and 11 as under in this regard : "10.6 It is true that there was only one lathe in the building owned by M/s. Kamal Industries. Similarly, it is also true that there was only one compressor and hand sprayer for painting, in the area purportedly occupied by M/s. Kamal Industries. Further, there was only one testing equipment for testing motors with M/s. SPL Syndicate.

11. Thus, it can be seen that between M/s. Kamal Industries and M/s.

SPL Syndicate there had been some machinery which were in common use. By a clever method of entering into an agreement for paying labour charges they had tried to circumvent the law. It must be noted that at the material point of time, both these units were manufacturing motors for wet grinders. Therefore, it is very obvious that the machinery like compressor, paint sprayer, motor testing equipment, etc., have been used by both the units, though allegedly owned by one manufacturer." It is also seen that in regard to power there was some evidence of payment towards electricity dues by one of the units concerned and the learned Collector's finding in this regard in para 10.5 of the impugned order is reproduced below: "10.5. Shri P.L. Meenakshi Sundaram happens to be the owner of the premises in which both these units were functioning at the material time. He is the brother of Shri P.L. Sivasamy (one of the partners of M/s. SPL Syndicate). In view of the fact that Shri Meenakshi Sundaram is the owner of the building, necessarily the electricity connection has to be in his name. In fact, it was so. There were three connections, namely, Sl. No. 134 (domestic connection), Sl.

No. 135 (power connection, and Sl. No. 136 (for welding set). It has been mentioned that Shri Meenakshi Sundaram paid the electricity dues of all the three connections. M/s. Kamal Industries paid Rs. 50/- per month for using the electricity to Shri Meenakshi Sundaram.

There is no such contract between M/s. SPL Syndicate and Shri Meenakshi Sundaram. This is rather mysterious." What has weighed with the learned Collector in the impugned order is the two partnership concerns running the two units viz. M/s. Kamal Industries and M/s. SPL Machinery have close relations as partners and the learned Collector has observed that the two firms have been created for the purpose of tax evasion (or avoidance) and his findings against the appellants based on the evidence are set out in para 13 of his order, which is reproduced below : "13. In the instant case it is not disputed that both the units have partners who are closely related to each other. It is also a fact that the units were located in a place owned by a person who again is related to one of the partners. By cleverly creating records as if job work is being done for certain purposes, the parties have tried to avoid payment of duty. It is common knowledge that electricity cannot be resold. In the instant case even this simple law has been violated by entering into a contract between the two units as if part of the electricity charges will be borne by one unit and there is a total absence about the payment of electricity charges by M/s. SPL Syndicate. It is evident that one lathe has been serving both the units and similarly one paint sprayer has been servicing both the units. The labour charges agreement is only a camouflage to overcome the provisions of law. Therefore, I have no hesitation to conclude that this [is] a case of fragmentation of units to enjoy the benefits of exemption notification." The points which have thus weighed with the learned Collector as is seen from the above, are- (iii) the partnership firms being constituted by very close relations of the four partners in the two firms.

We observe that so far as partnership concerns are concerned, the learned Collector who passed the earlier order, has made an observation that in the show cause notice itself the two firms have been held to be independent legal entities and he proceeded to adjudicate the matter after treating them so by considering other evidence which in his [view] had a bearing for the purpose of clubbing the clearances of the two units. We observe that this circumstance of the partners being very close relations can be a factor which can be considered as a corroborative circumstance, if there is any other strong evidence to show that the two units functioned as one financial entity with purchase of raw materials, sale of the goods and other financial operations apart from the control over the units being

in the hands of one person. We observe as such no investigation in this regard was done with the customers or with the workers of the two units to establish whether the two units were functioning as one financial entity. No evidence has been brought on record to show that the orders for the motors were being organised by one of the units and the procurement and disposal of raw materials was also by one of the two units and the two units were functioning as part of the one financial operation. In the earlier order one of the factors which weighed with the Collector, as mentioned earlier, was non-payment of electricity dues. It is seen that so far as Kamal Industries are concerned, evidence has been produced that they were paying monthly charge of electricity to Shri Meenakshi Sundaram, who is the owner of the building in which the two units were located. No evidence, however, has been produced before the learned Collector in regard to the payment of rent by M/s. SPL Machinery. It has to be noted that any payment for electricity which was to be made had to be to Shri Meenakshi Sundaram and it is not if one unit was dependent on the other for electricity. Non-payment of electricity dues by M/s. SPL Machinery or SPL Syndicate cannot be a factor which can be considered for holding the two units as one. In regard to sharing of the same items of machinery, the learned Collector has accepted that there is some evidence of payment for the use but has held that it is a clever ruse to show that the two units are functioning independently.

We observe so long as there is evidence of payment for use of machinery of one by the other, in the absence of any other financial tie up, the same cannot be considered to be clinching evidence for holding the two units as one entity. The learned Collector in the earlier order had picked on the elements of non-payment for power and also regarding one lathe machine of one unit being with the other. The appellants have before the learned Collector explained their position and he has accepted that there was one lathe available. In view of the facts on record, while there may be suspicious circumstance pointing out to the close working of the two units, in view of the position as analysed above by us and also as held by us in a number of cases that unless units can be shown as having been functioning as one financial entity, the benefit of doubt will have to be given to the appellants so far as clubbing of the clearances of the two units is concerned and the two units for excise purposes will have to be treated as two independent

entities. So far as clearances made in the name of M/s. SPL Syndicate is concerned the learned Collector has not entered any findings and we are therefore not going into this aspect. The learned lower authority should pass orders under the law in this regard after giving the appellants an opportunity of hearing.

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