

**Dugar Electronics Vs. Collector of Central Excise**

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

**Decided On :** Jan-31-1994

**Reported in :** (1994)(71)ELT462TriDel

**Appellant :** Dugar Electronics

**Respondent :** Collector of Central Excise

**Judgement :**

1. M/s. Dugar Electronics (hereinafter referred to as 'Dugar'), and M/s. Peico Electronics and Electricals Ltd. (hereinafter referred to as 'Peico') have filed the present appeals against the order No.26/Electric goods/Collector/CE/Cal. 11/1987, dated 9-6-1987, passed by the Collector of Central Excise, Calcutta-II, Calcutta.
2. Both the appeals arise out of a common order, were heard together, and are being disposed of by this common order.
3. It was alleged in the show cause notice, dated 10-3-1986 that both Dugar and Peico had suppressed vital facts for deciding the normal price of the tape recorders manufactured by Dugar on behalf of Peico, and supplied to Peico, at suppressed prices, without taking into consideration the various factors, that build up the cost of production, and whose cost was borne by Peico. Central Excise duty amounting to Rs. 40,56,907.12 was demanded in the show cause notice.
4. The Collector, Central Excise, Calcutta-II, in his Order-in-Original dated 9-6-1987, held that products in question which were supplied by Dugar to Peico, were

liable to be assessed to Central Excise duty, on the basis of the prices at which the products were sold in the wholesale market, by Peico. After giving abatement on account of Central Excise duty and sales tax, the duty demanded was worked out at Rs. 30,45,490.02. It was observed that although Peico had claimed abatement on account of additional sales tax, turnover tax, equalised freight etc., they did not furnish the quantum of the above deductions, and did not file supporting documents. Hence, the adjudicating Collector of Central Excise did not consider these deductions. A penalty of Rs. 5 lakhs on Peico, and Rs. 1 lakh on Dugar was imposed under Rule 173Q of the Central Excise Rules, 1944 (hereinafter referred to as the 'Rules').

5. In the Cross Objections filed by the Revenue, it was mentioned that the modus operandi adopted by the appellants was detected after investigation. It was found that Peico had paid for the development of the moulds, dies, jigs etc. and supplied testing equipment free of cost, to Dugar. It was also stated that although price lists were filed in Part VII of the price list proforma, it was not disclosed that the products would be marketed at higher prices, and as if manufactured by Peico.

6. The matter was posted for hearing on 10-11-1993, when Shri Anil Diwan, Sr. Advocate with Ms. Amrita Mitra, Advocate appeared for Peico.

Shri A.N. Haksar, Sr. Advocate appeared for Dugar. The respondent were represented by Shri Prabhat Kumar, S.D.R.7.1 Shri Anil Diwan, the learned Senior Advocate stated that the charge levelled against Peico was that the goods - tape recorders - were manufactured by Peico in the factory of Dugar, inasmuch as (1) brand name 'Philips' was put on the tape recorders; (2) on the cartons, the legend 'manufactured' by Peico was given; (3) in respect of certain items used in the manufacture of tape recorders, specifications were given by Peico to the third parties; (4) Peico gave moulds to third parties for producing certain parts of the tape recorders, and the moulds had been produced by other parties on behalf of Peico; (5) final products were tested by equipment which belonged to Peico.

7.2 The learned Sr. Advocate contesting the charge as above, made the following submissions :- (1) Use of brand name does not mean that Peico became the manufacturer. Peico had a right to inspect and reject if the goods did not conform

to the specifications; (3) Dugar were independent partnership concern, with separate registration number for SSI, Factory Act, ESI etc; Peico were a Limited Company; (4) There was no allegation discussed in the adjudication order; that Dugar was a dummy unit; (5) Nothing has been concealed, and the larger period of limitation was not applicable; and (6) No penalty should have been imposed on Peico, as there was no mens rea.

7.3 The learned Sr. Advocate cited a number of decisions in support of the points made by him, that the customer supplying the raw materials to another, for manufacture of the goods in accordance with his drawings and specifications, is not a manufacturer; and that the manufacture of goods with customer's raw materials, and according to the customers' specifications and design, does not render the actual manufacturer as a 'dummy'. Such a customer could not be treated as a 'manufacturer' of such goods.

7.4 A number of decisions were also cited in support of the contentions that no duty could be demanded and no penalty could be imposed on Peico, in the circumstances of the case.

7.5 An alternate plea was made for giving the benefit of various permissible deductions.

8.1 On 11-11-1993, Shri A.N. Haksar, the learned Sr. Advocate advanced arguments on behalf of Dugar. He submitted that the order of the Collector proceeds on the assumption that Peico exercised complete control over Dugar. In this connection, he stated that for the goods produced by Dugar, Dugar were the manufacturer, and Peico were the customer. In the circumstances of the case, Peico could not be considered as the manufacturer of the goods produced by Dugar. He referred that except for 4 to 5% of the components/parts, no mould was required, and that mere supply of raw materials, will not make the supplier, a 'manufacturer', and that in this case Dugar are the manufacturer. There could be no two manufacturers for the same goods.

(1) Demand of differential duty has been made both from Dugar and Peico, and that there could be no demand from two persons; (2) On Dugar, penalty has been

imposed under Rule 173Q without mentioning any particular Sub-rule of that rule.

(3) Their relevant price lists had not been approved, and were returned by the Central Excise officers, and the assessments were made provisional, and as such no penalty should have been imposed.

8.3 The learned Senior Advocate cited a number of decisions in support of the points made by him.

9. Shri Prabhat Kumar, the learned S.D.R. referred to the intelligence collected, and stated that it was not on one fact, but on the entire facts and circumstances in each individual case that decision has to be given as who is the 'manufacturer'. He submitted that printed circuit boards were approved by Peico; even rates were approved by Peico. The firm Dugar was floated by Peico, and the statements given by the various persons had not been retracted.

Price agreed between Dugar and Peico was not on principal to principal basis. It was not a case of flow back but of spill over. The learned S.D.R. also submitted that the various decisions quoted by the appellants were regarding small scale exemption scheme where there were provisions relating to clubbing. This is not the issue here. Shri Prabhat Kumar, the learned S.D.R. cited a number of decisions in support of his arguments that when there is a wilful suppression of particulars, extended period of limitation could be invoked, the visits of departmental officers to factory were of no avail in case of misdeclaration, and mens rea was not an essential ingredient for imposition of penalty, in a clear case of violation of the rules. He also referred that as the assessments were provisional, the demand of duty was not hit by time bar.

10. In rejoinder, on 12-11-1993, Shri A.N. Haksar, the learned Senior Advocate submitted that there could be no two opinions that all the facts have to be taken into account, but added that in the instant case everything was not controlled by Peico, and that there could be no liability on both Dugar and Peico. He stated that the firm Dugar was not floated by Peico and that it was an old firm, and started working for Philips only from 1984.

11. We have carefully gone through the facts and circumstances of the case, and have given our due thought and consideration to the submissions made on behalf of the appellants, and on behalf of the respondent.

12. In both these appeals, the main issue for our consideration relate to the 'valuation'. In para 2.8 of the show cause notice, conclusion was reached as under :- "All the above facts lead to reasonable belief that the 'said company' and the 'said firm' wilfully suppressed the above facts of production of the 'said goods' and removed the same by mis-representing and by not disclosing to the proper Central Excise officer the above facts which were absolutely vital in deciding the 'normal price' claimed by the 'said firm' in the price lists submitted during the period from August 1983 to September, 1985 under Section 4 of the said Act." 13. M/s. Dugar were engaged in the manufacture of tape recorders, falling under Item No. 37AA of the erstwhile Schedule to the Central Excises and Salt Act, 1944 (the old Tariff). Their factory registration was dated 1-11-1983. Their Central Excise licence was dated 19-8-1983.

In addition to the production of tape recorders on their own behalf, they also produced tape recorders for Peico under Peico's brand name 'Philips', as per Peico's specifications and drawings, almost from the very beginning of their manufacturing operations i.e. from August, 1983 itself. The size, design and appearance of the outer body of the tape recorders to be produced were specified by Peico. Peico were having their own manufacturing facilities also wherein similar goods were produced by them. Moulds for 'top cabinet', 'under-case' and 'cassette door', and the dies for 'printed circuit boards' were got produced by Peico at their own cost, and were supplied free to the producers of those top cabinet, under case, cassette door and printed circuit boards. The fabrication cost for these components (produced out of moulds/dies supplied to them free, by Peico), was negotiated by Peico with such producers. The components were supplied by these producers, both to Dugar and Peico. Some testing equipment was also supplied free by Peico to Dugar. The goods were marked as of 'Philips' brand, and as produced by Peico. As soon as the supplies were lifted by Peico, they formed part of the stocks of Peico; and were marketed to authorised Philips dealers, through Peico's sales network, under Philips name, with the same price pattern (including

discount), with the Philips own warranty, as the similar goods produced, in Peico's own factory/factories were marketed/priced/sold, with no distinction, whatsoever, at the level of the Philips authorised dealers, and the customers.

14. For the Philips brand tape recorders produced for and supplied to Peico, Dugar submitted the price list in part VII of the proforma for determination of the value under Section 4 of the Act. Part VII of the proforma for determination of value under Section 4 of the Act is for the situation not covered by any of the earlier parts (I) to (VI). The price lists were, however, not approved, and the assessments remained provisional under Rule 9B of the rules.

(1) Peico got the moulds specifically for their purposes as per their specifications and drawings at considerable cost for (1) Top cabinet; (2) under-case; and (3) cassette door. The three components of the tape recorders were developed by Peico at its own cost, and belonged to them (para 6 and ground 'S' of the appeal); (2) Peico supplied these moulds to the parties (selected by them after surveying the market), who manufactured these components by using such moulds, (such moulds having been supplied to them by Peico, without any charge), and as per size, design and appearance specified by Peico (para 6 and grounds 'K' and 'S' of the appeal); (3) The components manufactured by using these moulds were supplied by the above parties, to Dugar. They were supplying these components to Peico also. (Para 6 and ground 'K' of the Appeal).

(4) Common suppliers were supplying printed circuit boards both the Peico and Dugar. The cost of dies were paid by Peico. (Peico's letter dated 1-2-1985; para 6 and ground 'K' of the Appeal).

(5) The amounts to be paid by Dugar to such suppliers of (1) top cabinet; (2) under-case; (3) cassette door, all produced out of the moulds belonging to Peico; and (4) Printed circuit boards were negotiated by Peico (Para 7 and ground 'K' of the Appeal).

(1) While working out the unit price of (a) top cabinet; (b) under-case and (c) cassette door, only the cost of fabrication, without the cost attributable to moulds, has been taken into account (statement of the Manager, Supreme Industries,

referred to at page 5 of the show cause notice; (2) Two testing jigs specially developed by Peico to check the quality of their product, were supplied by Peico to Dugar, without any charge; (3) On the cartons of the product, it was inscribed that the goods have been manufactured by Peico. Peico's registration number was also embossed on the sets; (4) There was said to be no written agreement between Peico and Dugar, and it was stated that their dealings were verbal, and through purchase orders only.

16. Under the main definition case of Section 4(1)(a) of the Central Excises and Salt Act, 1944, (hereinafter referred to as the 'Act'), where the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of that Section, be deemed to be the normal price thereof that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale.

17. In the case before us, the assessee - Dugar - have themselves admitted that their prices did not fall within the main definition case of Section 4(1)(a) of the Act.

18. It is provided under Section 4(1)(b) of the Act that where the normal price of the goods under assessment is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent of such value, determined under the Central Excise (Valuation) Rules, 1975, shall be deemed to be the 'value'.

19. Dugar had filed the price lists in Part-VII of the price list proforma which relates to the situation not covered by any of the Parts (I) to (VI). Union of India v. Bombay Tyre International, 1983 (14) E.L.T. 1896 (SC) have held that the value of the article for the purpose of the excise levy cannot be confined and limited to the manufacturing cost and the manufacturing profit in respect of that article, and that the various items of expense composing the value of the article, several components (including those which have enriched its value and given to the article its marketability in the trade), which have poured into that value, are includible for arriving at the assessable value (refer paras 13, 21, 33, 40 and 49 of the Hon'ble

Supreme Court decision).

21. In the case of Texmaco Limited v. C.C.E., 1992 AIR SCW 2020, the Hon'ble Supreme Court have observed that the value of the article was the full intrinsic value of the article, inclusive of the cost of the materials and components supplied free by the customer, and irrespective of the fact that no expenditure was incurred by the manufacturer on such components. They added that the assessable value would take into account the full commercial value.

22. The designs in respect of their application to the tape recorders produced by Dugar under the brand name 'Philips', were registered in the name of Peico, under the provisions of the Design Act, 1911 and the Design Rules, 1933. The three major plastic moulded components which go into the making of the outer body of the tape recorders are top cabinet, under-case and the cassette door. The moulds for these components were got prepared by Peico at their cost and supplied free to the parties producing plastic moulded components. The General Manager of M/s. Supreme Industries had stated, "While working out of our overall price for top cabinets, we have not taken into consideration the value of mould, we have developed since M/s. Peico had already paid that cost." As per debit note, dated 30-6-1983, a sum of Rs. 85,000/- was paid by Peico.

23. M/s. Monark Plastics have also stated that the cost of the moulds for 'under-case' of Rs. 78,000/- had been charged from Peico, under bill dated 31-10-1983. Timo plast had charged Rs. 27,040/- for door cassette mould by their bill dated 20-11-1982, from Peico. These documents are on record.

24. The body of the tape recorder was the single most important factor in its marketability. Its design was patented by Peico. It was declared by Peico "the novelty resides in the shape or configuration or pattern or ornamentation of the portable cassettes recorder as illustrated".

The three components which formed the body were moulded articles. The moulds from which these components were made were costly, and paid for by Peico, and were supplied free of charge to the casting establishments. The cost of the moulds did not enter into the charges for these moulded components, and into the charges

for the tape recorders, collected by Dugar from Peico. If Dugar had invested money for the development of these moulds, then necessarily they would have calculated the cost of the tape recorders after taking into account the cost incurred for the development of these moulds, alongwith the life span/productivity of such moulds. After a certain quantum of use, new moulds are taken for use, and the old moulds are discarded. In this case, the producers of the components did not invest for the development of the moulds. Therefore, they did not take into account the cost attributable to moulds while charging the price from Dugar. As the cost has been incurred by Peico, and not by Dugar, to that extent, the charges collected by Dugar from Peico did not include the full cost of the tape recorders, and the price declared was not "the full intrinsic value of the article", and did not represent its "full commercial value" (refer Texmaco case supra).

25. In view of the above, we consider that the declared prices were rightly rejected.

26. As observed by the Tribunal in the case of Rasoi Ltd. v. C.C.E., 1987 (30) E.L.T. 490 (Tribunal), the selling price of manufacturer was rejectable if such price was not the sole consideration even if buyer and seller are not related persons. In that case investment on the gas compressing plant installed in the assessee's factory had been made by the buyer.

27. In para 2.1 of the show cause notice, dated 10-3-1986, it has been alleged that Peico received tape recorders from Dugar at a very low price, than the price at which Peico sold them to their dealers, that is "market value of such goods as capable of being sold with their trade mark as 'Philips'." 28. As we have seen above, the prices paid by Dugar for the plastic moulded components did not include the element of the cost relatable to the moulds. The cost of the moulds had been paid by Peico. To that extent, the cost relatable to the moulds, which should have formed part of the price of the components, got excluded from the price at which the goods were supplied by Dugar to Peico, and therefore, the price collected was not the sole consideration, (being influenced by the consideration that a part of the manufacturing cost has been met by the customer), and the price charged could not form the basis for determining the assessable value under

Section 4 of the Act, read with Central Excise (Valuation) Rules, 1975.

29. Peico themselves were the manufacturers of similar goods. Their own goods entered the stream of trade when their stocks were sold from their depots/branch offices to the authorised Philips dealers, with whom they had an agreement for sale. The goods they manufactured, and the goods they obtained from Dugar formed a common stock for transfer to their depots/branch offices, and sale from the depots etc. to the authorised Philips dealers. It was only when these goods were sold to the Philips authorised dealers through Peico's sales network that "the goods first enter the stream of trade" (refer para 22 of the Bombay Tyre International case, supra).

30. In this connection, we may refer to the Tribunal's decision in the case of Pawan Biscuit Co. Private Limited v. C.C.E., Patna, 1991 (37) ECR 315 (CEGAT), wherein in para Nos. 26, 26.1 and 27 it has been held that when normal price under Section 4(1)(a) was not ascertainable, the assessable value shall be determined in terms of Rule 6(b)(i) of the Central Excise (Valuation) Rules, 1975, on the basis of value of comparable goods. In that case the biscuits were supplied by Pawan Biscuit to Britannia Industries Ltd. (BIL). The Tribunal observed that BIL was not a wholesale dealer within the meaning of Section 4(4) (e), as the goods did not enter the stream of trade when Pawan Biscuit delivered the goods as per the directions of BIL, to their depots. It was not the first immediate contact between the appellants in that case, and the trade. The first immediate contact with the trade was by the BIL. The Tribunal referred to a number of decisions wherein it has been held, time and again, that the valuation must be on the basis of wholesale cash price at the time when the manufactured goods entered into the 'open market'. The Tribunal held that as the normal price under Section 4(1)(a) was not ascertainable on the facts and circumstances of the case, the assessable values have to be determined under the Central Excise (Valuation) Rules, 1975; and according to the Tribunal, the value could be determined in such a case on the value of comparable goods purchased or manufactured by the assessee, or any other assessee. In that case the price at which BIL was selling in the wholesale market, (as in this case the price at which Peico were selling in the wholesale market), was available. The Tribunal held that the assessable value

shall be determined on the basis of the comparable sale namely the price at which the BIL were selling in the wholesale market.

31.1 The Collector, Central Excise, Calcutta-II in his Order-in-Original has come to the conclusion that "the products are liable to be cleared on payment of proper Central Excise duty on the basis of enhanced proper value under Section 4 of the said Act." While on the basis of the facts on record we have observed above that the charges collected by Dugar from Peico for the 'Philips' tape recorders supplied by them, did not satisfy the criteria of Section 4 value, we find that the adjudicating authority had not discussed all the elements of the "enhanced proper value under Section 4" on whose basis he has sought to charge differential Central Excise duty from the appellants.

Obviously, from the list price at which the 'Philips' authorised dealer sells the goods to the customer, not only the Central Excise duty, sales tax and the other taxes actually paid have to be deducted, but other permissible deductions as per law, also have to be taken note of to arrive at the assessable value. We find that the adjudicating authority had not discussed the basis at which and as to how the differential Central Excise duty has been calculated.

31.2 The appellants have contended that the adjudicating Collector of Central Excise has not permitted the normal deductions under Section 4, on the ground that the details have not been provided. At the stage of hearing on the stay application, they had argued that this will make a difference of about Rs. 10 lakhs.

31.3 In ground 'AA' of their Grounds of Appeal, Dugar have pleaded that "the Collector failed to appreciate that in determining the purported assessable value, permissible deductions in terms of Section 4 of the Act had not been made. No basis whatsoever has been indicated of the purported computation of Rs. 30,45,490.02." 31.4 In ground 'DD', Peico have also pleaded that the Order-in-Original does not disclose any basis for computation of the demand. In ground 'EE' of their appeal Memo, Peico have further pleaded that the permissible deductions have not been allowed by the adjudicating authority while arriving at the revised differential Central Excise duty.

31.5 The Collector, Central Excise, Calcutta-II in this regard had mentioned that while the appellants claimed abatement on account of additional sales tax, turnover tax, equalised freight etc., they had not furnished the quantum of each element, and the related documents in support thereof.

32. In the circumstances of the case, while we agree that the charges at which the tape recorders were supplied by Dugar to Peico, do not constitute the price for the purposes of Section 4 of the Act, and that the basis at which the assessable values could be determined is the price at which Peico sells these goods in the market, there could be no denial of the fact that all permissible deductions, including trade discount to the extent admissible, are to be allowed from such sale price, to arrive at the assessable value. We also find that the computation of the differential Central Excise duty demanded has also not been discussed in the Order-in-Original.

33. On behalf of Peico, it has been pleaded that in the facts and circumstances of the case, they could not be considered as 'manufacturer' of the 'Philips' brand tape recorders, supplied by Dugar to them. Dugar have also stated in ground 'C' of their appeal that the manufacturing activity carried on by them could not be ascribed to or said to be done by Peico, and in ground 'S' it has been added that the Collector, Central Excise, erred in holding that Peico were the manufacturer in terms of Section 2(f) of the Act. In ground 'U' of their appeal, Peico have also reiterated the same. A number of decisions were cited to substantiate the plea of both the appellants that supply of raw materials by the buyer, marking the brand name of the buyer on the goods produced, supply of drawings and specifications, and producing the goods as per design and requirements of the customer, do not make the customer the 'manufacturer' of such goods, and do not render the actual manufacturer as a 'dummy'.

34. To our mind, the evidence on record is not adequate to establish that Dugar was floated by Peico, or that Dugar was a dummy unit.

Although, we find that the charges recovered by Dugar from Peico did not constitute the price for determining the assessable value under Section 4, we are of the view that the reasoning adopted by the adjudicating authority that Peico

were the manufacturer of the tape recorders obtained by them from Dugar, is difficult to sustain. It will, however, not make difference for the conclusion reached by the lower authorities that the charges at which the tape recorders were supplied by Dugar to Peico did not constitute the price for determining the assessable value, under Section 4. To quote the Tribunal in the case of Rasoi Limited (supra), "yet we find that the conclusion reached by the lower authorities is not wide off the mark though the said conclusion has been reached via the wrong reasoning and by application of the wrong provision." 35. In the circumstances we consider that the Central Excise duty evaded is recoverable from Dugar, and not from Peico, and that no penalty could be imposed on Peico.

36. In this view of the matter, we do not consider it necessary to discuss the various citations quoted at the bar by the appellants and the respondent in this regard.

36A. The assessments in the case before us were provisional. In Ground 'Z', Dugar, and in Ground 'CC, Peico, of their respective appeals, have admitted that the price lists were provisionally approved by the excise authorities. Under Section 11(3)(ii)(b) of the Act, the relevant date for raising of demand in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, is the date of adjustment of duty after the final assessment thereof. Accordingly, we find that the demand is not hit by limitation. The adjudicating Collector of Central Excise has also come to a finding that there was intentional suppression of the factual position by the appellants.

(2) Peico are not the 'manufacturer' for the 'Philips' brand tape recorders supplied to them, by Dugar, and Central Excise duty evaded in respect of such tape recorders is recoverable from Dugar, and not from Peico; (3) The charges at which the 'Philips' brand tape recorders were supplied to Peico did not constitute the price for determining the assessable value under Section 4 of the Act, and these are correctly assessable at the prices at which Peico sold them to 'Philips' authorised dealers; of course from such prices all permissible deductions including trade discount to the extent admissible, have to be allowed; (4) The differential Central Excise duty evaded, to be paid by Dugar, should be re-calculated after

taking note of the permissible deductions, including trade discount to the extent admissible, from the price at which the tape recorders first enter the stream of trade when they are sold to the 'Philips' wholesale dealers with 'Philips warranty'.

38. As regards the penalty imposed on Dugar, keeping in view the amount of Central Excise duty evaded after re-calculation in the above manner, the quantum needs to be reviewed and re-fixed by the proper adjudicating authority.

39. As a result, the appeal filed by Peico is allowed. For re-calculation of the amount of differential Central Excise duty evaded and recoverable from Dugar, and for the quantum of penalty imposed on Dugar, the matter is remanded back to the competent adjudicating authority.

40. Within a month of the receipt of this order, Dugar will submit necessary details with supporting documents of the deductions which they consider permissible as per law, and as pleaded in Ground 'AA' of their appeal before us, to the jurisdictional adjudicating authority, and thereafter the adjudicating authority will proceed to re-determine the differential Central Excise duty payable by Dugar including penalty, if any, to be imposed, and pass an appealable speaking order after observing the principles of natural justice.

41. The appeals and the Cross Objections are disposed of in the above terms.

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