

**Utility Engineers (i) Ltd. Vs. Collector of Central Excise**

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

**Decided On :** Feb-21-1994

**Reported in :** (1994)(72)ELT350TriDel

**Appellant :** Utility Engineers (i) Ltd.

**Respondent :** Collector of Central Excise

**Judgement :**

1. M/s. Utility Engineers (I) Ltd., Panchsheel Park, New Delhi, have filed the present appeal against the Order-in-Original No. 21/90, dated 3-1-1990, passed by the Principal Collector of Central Excise, New Delhi.

2. The appellants were engaged in the designing, manufacturing, supplying, installing, erecting, testing and commissioning of central air-conditioning and refrigeration plants, under works contracts. The assessee had two manufacturing plants, one at Dundehara (Haryana), and the other at Dharuhera (Haryana), where they were engaged in the manufacture of refrigerating and air-conditioning appliances and machinery and parts thereof, falling under item No. 29A of the erstwhile First Schedule to the Central Excises & Salt Act, 1944 (the old Tariff). Some items manufactured were falling under item No. 68 of the old Tariff. The goods manufactured by them along with the goods manufactured by other manufacturers, and the goods procured from the market, were used by them in the execution of their works contracts.

3.1 In the show cause notice dated 27-6-1986 the following allegations were levelled against the appellants :- (1) The assessee charged higher prices from their customers than the prices declared to the Central Excise Department in respect of package type air-conditioners, evaporators, condensers, cooling coils etc.

(2) They, without obtaining Central Excise licence and without observing prescribed central excise formalities, produced complete compact units (such as 'Utility' brand package chillers, water chilling machines, air handling units, fan coil units, package type air-conditioners, 'Utility' brand condensing units etc.), at sites, and cleared the same for sale prior to their installation. They were raising invoices for such units as a whole, while paid central excise duty only on some of the parts produced by them in their factory (such as shell and tube condensers, chiller coils, cooling coils, compressors etc.) some parts were removed without payment of central excise duty as exempted. Some parts were obtained from outside.

(3) Bills for higher prices were issued from their Head Office, and this fact was not disclosed to the department.

(4) They remained in exemption limit by virtue of their under-valuation during the year 1981-82, and a part of the year 1982-83.

3.2 Central Excise duty amounting to Rs. 10,47,82,710/- was demanded in the show cause notice aforesaid.

4.1 Before the adjudicating Principal Collector of Central Excise, among other submissions, they pointed out that "their was a case of works contract as against sales and in their case material was supplied and labour deployed for completion of contract but there was no sale of material". (Internal page 26 of the order-in-original). The Principal Collector of Central Excise has discussed this matter in Para 88 of his order, and has observed that the issue relating the works contract was not relevant to the case.

4.2 They had also pointed out a number of discrepancies in respect of the demands raised in the show cause notice. The adjudicating Principal Collector of

Central Excise mentioned in Para 84 of his order that by and large they were not accepted.

5.1 Under his adjudication order dated 3-1-1990 the Principal Collector of Central Excise, New Delhi held as under : Charge-1 : Under valuation of goods manufactured - established (para 89).

Charge-II : Manufacturing of compact packaged units ready assembled at site prior to installation in air-conditioning plant - held that the party had manufactured goods at sites prior to installation and therefore were liable to take out L4 licence and pay the Central Excise duty (Para 90).

Charge- III : Failure to inform the deptt. about their sales pattern and non-production of Delhi registered office documents -charge established (Para 91).

Charge-IV : Clandestine removal of fully manufactured goods without payment of duty - charge established (Para 92).

5.2 He confirmed the demand of duty of Rs. 10,47,82,710/-, and imposed a penalty of Rs. 1 crore.

6. Among various other grounds, the appellants had contended in the appeal before us that the Collector of Central Excise had not dealt with the various discrepancies which have been pointed out to him with regard to the show cause notice issued to them, but he has merely stated that the same were not accepted. It was submitted that when the discrepancies were specifically pointed out, it was the duty of the Collector to examine the discrepancies and to redetermine the exact amount of duty payable (ground-VII under Para 13 of the Appeal Memo).

7. The matter was posted for hearing on 5-1-1994 and 6-1-1994, when Shri M. Chandrasekharan, Sr. Advocate with Shri J.S. Agarwal, Advocate, appeared for the appellants. Shri Siddarth Kak, Joint CDR and Shri B.K.Singh, SDR represented the respondent.

8. Shri M. Chandrasekharan, the learned Sr. Advocate explained the activities of the appellants as manufacturer of excisable goods and as contractors for works

contracts, for designing, erection, installation and assembling of air-conditioning plants. The various appliances, equipment and other items necessary for completion of the jobs were partly manufactured by them in their own factories and partly were got manufactured from other manufacturers. Some items were purchased from the open market. Depending on the nature of the job, the completion of the works contracts took from three months to five years. He referred to the affidavits at pages 745 to 765 of the paper-book to show that it was not technically feasible to manufacture identifiable units at site before their installation in the location. He, however, agreed that these affidavits were not before the adjudicating Collector. He also stated that the Collector had not discussed the various discrepancies in the show cause notice which the appellants had brought to his notice. The learned Sr. Advocate referred to the written submissions filed by him, and stated that the Central plants are immovable in nature and are not goods and those are not excisable. He also submitted that the works sites where activities of installation, erection and commissioning etc. of central plants are undertaken cannot be termed as 'factory' under the provisions of the Central Excises & Salt Act, 1944 (hereinafter referred to as 'Act'). He referred to the nature of works contracts and the billing pattern to show that the prices indicated in their invoices were only on Pro rata basis and did not represent their assessable values. The learned Sr. Advocate submitted that a part of the demand was hit by time-bar and that no basis there was no case of any clandestine removal and for invoking the extended period of limitation. The learned Sr. Advocate cited a number of decisions, in support of the arguments advanced by him.

9. Shri Siddarth Kak, the learned JCDR explained the basic issues involved in this case and stated that no duty was being demanded on the plant as such, but the duty has been demanded on the various compact items which were manufactured at the site. He discussed the various paragraphs in the show cause notice and explained the charges levelled against the appellants. Various annexures to the show cause notice were gone into and in particular reference was made to the annual reports of the assessee wherein the detail of the goods manufactured by them have been listed. He submitted that the charges were based on the assessee's records. The demand is based on the documents recovered from their

Delhi office. In particular he invited attention to the appellant's annual reports wherein production of air-handling units etc. had been entered, but no duty was paid thereon. As regards the contention of the appellants that they were engaged in installing items in permanent structure, the learned JCDR referred to the contracts with M/s. Ritu Pharma Needs (P) Ltd. at page 106 of the paper book wherein it has been mentioned that the masonry work was to be done by the owner. He submitted that the goods such as condensing units, water cooling condensor etc. have been identified by the brand name of the manufacturer 'Utility'. On the question of limitation it was submitted that it was the date of the RT-12 returns that was relevant for the show cause notice. Referring to the Tribunal's decision in the case of Aruna Industries v. CCE -1986 (25) E.L.T. 580 (Tribunal), relied upon by the appellants, the learned JCDR referred that the Tribunal in that case were dealing with a situation wherein the agreements were for construction, that is supply of fabrication and erection of structural steels and cladding works. The contracts comprised of the construction and the completion of the works. There was nothing in the contracts to hold that there was a sale of raw-materials by one party to the other.

He submitted that the facts in that case before the Tribunal were different.

10. The matter could not be concluded on 6-1-1994, and was taken up on 7-1-1994 when the learned JCDR continued his arguments.

11.1 The learned JCDR submitted that there was a definite suppression by the appellants; no classification lists or price lists were filed for goods assembled at site, and no invoices from their Delhi office were made available to the department. In this connection he relied upon the Tribunal's stay order in the present matter. Referring to the affidavits now filed by the appellants, the learned JCDR stated that they were not before the Collector and had been filed after the adjudication. They refer to the Plant and not to the sub-assemblies which are the subject matter of the present proceedings. As regards the discrepancies pointed out in reply to the show cause notice by the appellants, he stated that they have been discussed by the Collector in his order-in-original. He, however, agreed that at page 374 of the paper-book, some prima facie mistakes appear to be there; in

some cases there was obvious duplication and in some cases there is difference in numbers.

11.2 The learned CDR in support of his arguments cited a number of decisions.

12. In rejoinder, the learned Sr. Advocate stated that the respondent had tried to make out a new case of sub-assembly, and that the charges were relatable to site and not the factory. He mentioned that the Asstt. Collector of Central Excise had earlier passed his orders on 20-5-1986 on similar issues after examining the contracts. Relying upon the Bombay High Court decision in the case of Blue Star Limited v. U.O.I -1980 (6) E.L.T. 280 (Bom.) he submitted that the assembly and installation of various items at the site could not be considered as sale of ready assembled units so as to attract the payment of central excise duty under item No. 29A(1) or (2) of the Tariff. The Kerala High Court in the case of Calicut Refrigeration Co. v. Collector of Customs & Central Excise, 1982 (10) E.L.T. 106 (Ker.) had an occasion to clarify the scope of the expression "ordinarily sold or offered for sale". It was clarified therein that item No. 29A of the Central Excise Tariff has no application to anything other than what is ordinarily sold or offered for sale as a ready assembled unit, and that the words 'ordinarily sold or offered for sale' in ready assembled unit mentioned in that item would refer to those units which are very well known to the consumer and are available for sale in the market as assembled units. Reference was also made to the Tribunal decision in the case of J.K. Export Industries v. CCE -1983 (14) E.L.T. 2390 (Tri.) wherein it has been held that the plant and machinery erected at site and attached to earth were not dutiable as 'goods'. Further the Tribunal decision in the case of Gujarat Machinery Manufacturers Pvt. Ltd. v. CCE -1983 (13) E.L.T. 825 (Tri.) to the effect that 'plant' is not 'goods' and thus not liable to duty under item No. 68 of the Central Excise Tariff has been affirmed by the Hon. Supreme Court, vide report at page A58 in 1989 (44) E.L.T. Relying upon the Tribunal's decision in the case of Chowgule & Co. (Hind) Pvt. Ltd. v. CCE, 1985 (21) E.L.T. 110 (Tri.), and Madras High Court decision in the case of U.O.I. v. T.S.R. Co. - 1985 (22) E.L.T. 701 (Madras), it was mentioned that advertisement/publicity/label etc. were not determinative for classification of goods or for the purposes of exemption notification.

On the question of limitation it was submitted that once their classification lists and price lists have been approved then the charge of wilful mis-declaration could not be sustained, as held by the Tribunal in the case of Rainbow Ink and Varnish Manufacturing Co. Ltd. v. CCE -1992 (59) E.L.T. 593 (Tri.).

13. We have carefully gone through the facts and circumstances of the case, and have given out due thought and consideration to the submissions made by both the sides.

14.1 This case involves a number of important issues of facts and law however, for various reasons which we briefly indicate below we find that it is not possible for us to take a categorical view in the matter :- (1) The appellants have submitted some affidavits before us which were not placed before the adjudicating Collector of Central Excise.

(2) Various discrepancies in the show cause notice, pointed out by the appellants in their reply to the show cause notice, have not been discussed by the adjudicating authority, but have been disposed of in a cryptic manner.

(3) There is no discussion in the order, about the permissible deductions sought for by the appellants.

(4) In their own annual reports, the appellants had shown production of the various units which are the subject matter of dispute in this case. It is seen that some of the units have been identified by the appellants own brand name. There is no plausible explanation by the appellants as how and where they were got manufactured.

"It is submitted that during the various hearings before the Collector, the Collector has only raised his doubts about the method of billing in a works contract. He had not cast any doubt on the method of assembling, erection and installation of central air-conditioning and refrigerating plants. The Collector has desired basically to know why the appellant had for the purposes of billing its customers, mentioned or assigned values to the materials specified in those invoices. Since the Collector had not raised any disputes regarding the nature of work, the appellant has now

been taken totally by surprise by the Collector concluding that the appellant had manufactured different constituents of the plants and thereafter installed these constituents in the permanent location.

Had the Collector in fact raised doubts regarding the method of erecting, installing and assembling central air-conditioning and refrigerating plants during the hearings, the appellant would have disabused the mind of the Collector by filing appropriate affidavits from persons in the trade. Unfortunately since no such doubt was raised by the Collector, there was no necessity of the appellant filing affidavits before him. In view of the finding of the Collector which has taken the appellant by surprise, it has become necessary for the appellant to annex herewith affidavits from persons in the trade to show how the work of assembling, erecting and installing central air-conditioning and refrigerating plant is carried out, which are marked as an-nexure-H (colly.). As such the order is perverse and deserves to be quashed and ought to be set-aside." 14.3 These affidavits were not before the adjudicating authority. The learned Sr. Advocate representing the appellants had agreed that these affidavits were not before the Collector. The learned Jt. CDR representing the Respondent had also remarked that these affidavits were filed after adjudication of the case. In the interest of justice we consider that the jurisdictional adjudicating Collector should have an opportunity to deal with these affidavits and to comment on the contents thereof.

14.4 The Para 13(VII) of the Grounds-of-Appeal the appellants have mentioned as under : "The Collector has committed a grave error in ignoring the various discrepancies pointed out to him in respect of demands raised in the show cause notice. The appellants had shown that the demands raised were inaccurate and that various items have been included which had not been the subject of the work executed by the appellant. Further more the appellant had shown that the values mentioned in the show cause notice were not correct and this could be ascertained on analysis of the various contracts. Hereto annexed and marked as Annexure-L is a list of discrepancies that had been furnished to the Collector in reply to the show cause notice as well as in the various written submissions. The Collector has not dealt with the discrepancies but has merely stated that the same are not accepted.

It is submitted that when the discrepancies were specifically pointed out, it was the duty of the Collector to examine the discrepancies and to redetermine the exact amount of duty payable assuming that duty was in the first instance payable." 14.5 The list of discrepancies is at pages 772 to 782 of the paper-book. The learned Jt. CDR had agreed that the discrepancies have not been discussed by the Collector in detail, and that prima facie there were some mistakes, duplication, differences etc. These discrepancies have been referred to by the Collector in Para 84 of his order. It is found that in most of the cases the Collector has simply observed that the submissions of the appellants were not accepted. We consider that in the interest of justice the Collector should re-examine this aspect of the matter and bring out the reconciliation, between the figures as in the show cause notice and as put up by the appellants in the above statement.

14.6 The appellants had contended that the invoices/bills raised by them were inclusive of duty of excise, sales tax and other taxes payable on the goods, and that the amount mentioned in the invoices/bills were also inclusive of post-manufacturing expenses like transport/octroi, transit insurance, loading unloading charges etc. In Para 86 of his order-in-original the adjudicating Collector had observed that the party has not given the details of PME nor asked for deductions. He has added that "even considering that it as accepted now it is very late and is hit by the time limit under Section 11B of the Act". We consider that it is not a case of refund, and the deductions permissible under law, if otherwise eligible, have to be considered.

15. As we have quoted above, this case involves a number of important issues of facts and law. Although for the reasons indicated above, we find ourselves handicapped in taking a categorical view in the matter, as the matter has been argued before us vehemently and in considerable detail by both the learned Sr. Advocate for the appellants, and the learned Jt. CDR for the respondent, we consider it desirable to briefly discuss the main issues. Our observations are however only tentative and simply to facilitate the decision to be arrived at by the adjudicating Collector in de novo proceedings as we are of the view that it is a fit case which requires to be remanded back for de novo adjudication.

(1) Whether the assembly/fabrication of specified units at site (before their installation in the 'works'), out of different parts, partly manufactured by the assessee in their own factories, and partly procured from outside, can amount to the process of manufacture, and whether the site at which assembly/fabrication is undertaken, can be considered as a factory, make the assessee obliged to take out a central excise licence for each of the site, and to observe other central excises formalities with regard to the units so assembled/fabricated at the sites.

(2) How to assess the goods manufactured by the assessee at their factories and at the sites when the goods form part of a work contract which also includes certain activities which are beyond the purview of Central Excise Law.

16.2 Other issues of classification, valuation, filing of the price lists etc., flow from the above main issues.

17. The appellants were entering into contracts with their buyers for the supply and installation of air-conditioning and refrigerating plants in the premises of the buyers. They were engaged in the manufacturing of excisable goods at their factories from where these goods were cleared on payment of central excise duty. These duty paid goods were transported to their registered Sales Office (Sales Depot) at Delhi and thereafter they were transported to different sites in different parts of the country. From these duty paid parts, and some other parts which were cleared as non-dutiable by them, with other parts brought from the market, certain compact units were first assembled at site and such compact units along with their accessories etc. were installed at the premises which was to be air-conditioned. It is seen from the invoices of the appellant that for such compact units which were assembled at site a much higher price was charged from the customers than the price at which the central excise duty was paid on the parts manufactured by them in their factories. It is seen that at the sites different units such as condensing unit, package chillers, air handling units, fan, coil unit, product coolers, cold-dif-fusors were being assembled prior to their installation in the premises. Some of these units such as package chillers/water chilling machine, air-handling units etc., were identified under their own brand name i.e. 'utility' brand. From the factories, certain parts such as condenser, chiller, cooling coils etc., were cleared on payment of

central excise duty, and certain parts such as air-housing unit, coils, controls etc. were removed as non-dutiable. The allegation is that the assessee manufactured without obtaining central excise licence these ready fully assembled compact packaged units at site and cleared such ready assembled units for sale prior to their installation without payment of central excise duty. It has been alleged that the assembly/fabrication work done at site amounted to the process of manufacture and the assessees were required to obtain L4 licence for each of the sites where the manufacturing activity was performed.

18. The appellants have contested that neither the 'site' could be termed as a 'factory', nor the 'plant' could be construed as 'goods'.

They have denied that they manufacture ready assembled units. They have stated that no manufacturing process was being carried out on those sites.

19. Central Excise Duty is levied and collected on the excisable goods produced or manufactured, but neither all the goods are excisable nor each and every process is a process of manufacture for the purposes of Central Excise levy. There are a number of authoritative judicial pronouncements as what are the 'goods' and as what are the process/processes which amount to the process of manufacture for the purposes of excise levy. We need not to deal with them in detail, presently in view of our consideration that on some factual aspects of the matter the issues have not been fully explained by the appellants and have not been conclusively dealt with by the adjudicating authority.

20. To treat the activities undertaken by the appellants at sites as amounting to the process of manufacture, call for a strict analysis of the processes undertaken.

21. Such preparatory steps as assembling, welding, boring, bolting, cutting etc. may be necessary for fitting the goods into the structure.

Such preparatory steps may not involve bringing into existence a commercially recognised individual article. Suffice it to say that by and large the job work at the site was occasioned by reason of the undertaking to complete the job in hand and not one done as part of a commercial undertaking. At the same time it is seen that

:-----Particulars Units

11----- 22. In Section

2(e) of the Central Excises & Salt Act, 1944, 'factory' has been defined as any premises including the precincts thereof wherein or in any part of which excisable goods other than salt are manufactured or wherein or in any part of which any manufacturing process connected with the production of those goods is being carried on or is ordinarily carried on. While 'land' itself could be a factory as is clear from the provisions of Sections 16 and 17 of the Act, it is necessary that excisable goods should have been manufactured thereon.

In this case to our mind this important question has not been discussed fully by the adjudicating Collector.

23. The Collector of Central Excise has observed that the duty has not been demanded on the central air-conditioning plant, but on the goods manufactured at sites prior to their installation. For any activity of this nature, wherein the goods, material, structurals etc. had to be used for installation, construction, fixing etc., as we have indicated above, some preparatory steps are inevitable. Such preparatory steps may involve cutting, boring, assembling, welding etc. Whether such steps bring into existence a new and different article, having a distinctive name, character or vice, has to be determined having regard to the particular facts and circumstances in this case. We find that the matter has not been analysed in the manner as called for.

24. The various decisions cited by both the sides on this point need to be seen in the light of this fact particularly the information relating to the actual production of the goods manufactured by them in their annual reports, and the fact that some of them were identified by their own brand name.

25. As regards the works contract agreements, entered into by the appellants with their customers, it is obvious that they specifically mentioned the goods to be supplied also along with all the necessary details such as description, model, quantity and the amounts to be paid. The appellants have submitted that they were taking works contracts for assembling of central plants at different works sites where those plants were tailor made according to the specifications, and where many activities like masonry work, engineering, installation, supervision and commissioning were involved. They have stated that their contracts were

composite contracts for work and labour. They have also stated that the central excise duty on such expenses on different type of staff incurred was not chargeable. The appellants have contested that the excise duty could not be levied on the entire project. They have admitted that their invoices did not represent the price of any one item, but were raised in instalments in phases as and when the work progresses. It has also been admitted that their prices could not form the basis for co-relating the same with the price lists filed by them in respect of the parts manufactured by them.

They submitted that a lot of factors which were in the nature of invisible expenses like surveying, drawing, designing, engineering, testing, supervision etc., go into the costing of the equipment and appliances installed and assembled at different sites. The appellants were raising consolidated bills towards the sales effected under works contracts at site. The goods manufactured by them in their factories were utilised by them in such works contracts, which also included such activities as supervision, erection, fabrication, testing, conversion etc., and the consolidated bills raised included charges towards these activities too. From the agreement with M/s. Thomson Press (I) Ltd., Faridabad, it is seen that the contract value for the execution of the work described in the agreement included design, fabrication, supply of materials, erection and commissioning. It was noticed that a much higher amount has been charged from their customers in respect of the various items manufactured/assembled/fabricated by them than the amount of which the central excise duty have been paid.

26. Prima facie we feel that in such a situation the correct assessable value of the goods manufactured could only be arrived at after deducting from the contract value, the expenses incurred by the manufacturer for providing labour and other services. Of course, freight charges for transporting goods from the place of manufacture to the site if incurred by the manufacturer and included in such receipts towards erection and commissioning charges, along with other permissible deductions, will be eligible for deduction. In this connection reference may be made to the Supreme Court decisions in the sales tax cases of : (1) Gannon Dunkerly & Co. v. State of Rajasthan, 1992 (3) SCALE 173 and (2) Builders Association of India v. State of Karnataka, AIR 1993 SCW 152.

27. The adjudicating Collector while re-adjudicating the case may study the relevancy, and if considered relevant and applicable, keep the observations of the Hon. Supreme Court in the above cases in view, while arriving at the correct assessable value in respect of the goods manufactured by the assessee.

28. As a result the Order-in-Original passed by the Principal Collector of Central Excise is set aside with the direction to the jurisdictional Collector of Central Excise to readjudicate the case in the light of our above observations. The adjudicating Collector of Central Excise will give an opportunity to the appellants for being heard in the matter and will pass an appealable speaking order after observing the principles of natural justice.

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