

Metrosyl Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-20-1995

Reported in : (1995)(77)ELT130TriDel

Appellant : Metrosyl

Respondent : Collector of Central Excise

Judgement :

1. This appeal arises against the order passed by the Collector of Central Excise, Patna. By his order-in-original dated 12-10-1987, the Id. Collector has upheld the allegation that they were not entitled the benefit of exemption under Notification No. 89/79-C.E., dated 1-3-1979 in respect of T.I. 68 goods manufactured and cleared from M/s. Metrosyl (the appellant herein) during the financial year 1979-80, 1980-81 and 1981-82 (upto Jan'82). A show cause notice dated 20-9-1982 had alleged that the appellants were conducting their business independently but were so closely related and associated with the company namely M/s.

Metroark Pvt. Ltd., 345, Parnashee Pally, Calcutta that they appeared to be one entity. In this regard the show-cause notice has also alleged that during this period the excisable goods valued at Rs. 1,30,63,279.42 were cleared without payment of duty amounting to Rs. 10,45,062.35 in violation of provisions of Rules 9, 173B, 173C, 173F, 173G(4) of the Central Excise Rules, 1944. Therefore, the department has also invoked larger period by invoking Rule 9(2) which deals with clandestine removals and has also invoked the penalty provision of Rule 173Q. The Collector has also imposed a fine of Rs. 50.000/- under Rule 173Q of the

Central Excise Rules, 1944. The defence of the appellants had been that the appellant is a proprietary concern, whereas M/s.

Metroark is an independently incorporated Private Ltd. Company under the Companies Act, that there are two independent legal entities and as such there is no justification to ignore this position and consider them as one entity. They had also challenged the statement dated 24-3-1983 given by the Manager (Finance & Accounts) namely Shri R.S.Jha on the ground that the statement had been recorded under duress.

The department had alleged that the local office of M/s. Metroark Pvt.

Ltd. was being utilised for keeping all the records of Metrosyl without payment of any -i rent. In many of the files, there is no distinction between Metroark and Metrosyl and papers relating to them were filed together. This factual position had been confirmed by Shri R.S. Jha.

The department had further alleged that the telephone was being utilised by both the parties which was a common telephone. The services of Shri Saroj Ranjan Mukherjee was being utilised for working of Metrosyl. Ld. Collector has held that the statement of Shri Jha was recorded voluntarily that the evidence of commonness between both the concern is established on the basis of the use of common telephone, common premises and on the basis of the service of Shri Saroj Ranjan Mukherjee being common to both the concern. Ld. Collector has also held that the correspondence revealed that there has been instructions relating to affairs of Metrosyl such as advises regarding payment, forwarding of cheques, installation of telephones, enquiry of balance in account, enquiry about statements to be I furnished to S.B.I. Income Tax certificate, despatches of consignments, financial arrangements, bank statement, manner of dealing the excise duty matters which are to be found as per the instructions of Shri S.R. Mukherjee of Metrosyl.

Therefore, the Collector has held that these nature of transactions indicate that both the companies are one and the same. He has also found that one Mr. Anand Para, an employee of Metroark was keeping money account of Metrosyl.

Therefore, the Id. Collector has held that Shri Saroj Ranjan Mukherjee is the main person controlling the business activities of both Metroark and Metrosyl that he is the father of the proprietor of Metrosyl the appellant herein namely Sumitra Ranjan Mukherjee. Therefore, he has held that the doctrine of lifting of veil is fully applicable in this case and hence has upheld the charges framed by the department.

2. The appellants have challenged these findings on several grounds. At the outset, it is their plea that these companies are independent entities and there is no commonness or funding or sharing of profits.

Although two directors of the Private Ltd. Company are related to the applicant herein, yet they are independent entity. It has been pleaded that the appellant was receiving inputs from the Private Ltd. Co. and manufacturing the goods on the basis of contract on job work basis and was only receiving job charges. It has also been stated that the appellant commenced production of Silicones out of the material supplies by the Private Ltd. Company w.e.f. 24-9-1979 and that during the period from 24-9-1979 to 14-1-1981, the total number of workers employed by the appellant was less than 10 and therefore, for this period they were fully covered by Notification No. 85/79, dated 1-3-1979 which exempted in premises which was not a factory within the meaning of Section 2(m) of the Factories Act, 1948 that is the factory employed less than 10 workers, although it might have been belonging to the same manufacturer. It has been submitted that even by the department argument if they are to be clubbed even then the benefit of this notification cannot be denied as during this period as per the evidence produced the number of workers were less than 10 and hence the clearances made during this period and the duty thereon was less than the exemption limit. It has been further stated that w.e.f. 15-1-1981 to 31-3-1981 the total value of clearances were Rs. 12,11,777'/. There was no clearance from the private limited company during the said period since the factory of the company was under 'Lock-out'. It has been submitted that no duty was payable on the said value of Rs. 12,11,777/- since it has been exempted the virtue of Notification No.89/79, dated 1-3-1979. It was further submitted that during the period from 1-4-1981 to 31-1-1982 the total value of goods cleared by the appellant was Rs. 25,05,911 /-(including bulk drugs, the

clearance value of Rs. 9,06,300/-) and the value of the goods cleared during the said period by the private limited company was Rs. 50,06,471/-. It is stated that in terms of Notification No. 105/80, dated 19-6-1980, the goods falling under T.I. 68 was exempted upto first clearance value of Rs. 30 lakhs. Therefore, duty if any, was leviable on Rs. 36,06,082/- (Rs. 75,12,382/- minus Rs. 9,06,300 + 30,00,000/-) the duty (c)8% ad valorem on the said amount of Rs. 36,06,082/- comes to Rs. 2,88,487/-.

It is submitted by them that the Id. Collector without examining the position with reference to the fact has confirmed the duty as impugned in the notice which is arbitrary and illegal. It is also pleaded that the demands are time barred and that the clearances were not clandestine and hence Rule 9(2) is not applicable in the present case.

It has been submitted that Rule 9(2) can be invoked only if the department has not been made aware of the manufacture and that the appellants have been caught unaware by a raid conducted by the department and that there has been no declaration filed by the appellants. It is stated by the appellants that both the Private Limited Company and the appellant herein had filed declaration and had also given the details of production to the department. There has been visits by the Inspector and also written a letter No. 31-1-1981 which had been replied to by the appellants. The correspondence and the declaration clearly indicates that the department was fully aware of the production and clearances by the appellant and the Private Ltd. Company and therefore, question of invoking Rule 9(2) are alleging suppression and invoking larger period does not arise in the present case. It has also been submitted that the Private Limited Company has not been issued a show-cause notice and without notice to them, their clearances cannot be clubbed with the appellant and such proceedings are bad in law.

3. We have heard Shri K.K. Banerjee, Id. Advocate for the appellant and Shri Sharad Bhansali, Id. SDR for the Revenue. Reiterating the grounds of appeal and more particularly the above grounds, the Id. Advocate submitted that now it is a settled law that the clearances of two independent legal entities cannot be clubbed unless the other company is a dummy one which has been set up with a sole view

of defrauding the Revenue and to evade payment of taxes. He submitted that both the units were geographically apart as the appellant being a Patna and the Private Limited Company being situated at Calcutta. The Calcutta concern had only a office and with a telephone facility at Patna which was being shared. The fact that advise was given by an elderly person i.e. father of the appellant to manage the concern would not by itself sufficient to club the clearances. There is merely a managerial control and that there is a difference between managerial control and financial control. The appellants had only carried out job work and did the work on the basis of the job work charges and that there was nothing to show on record that both the companies had been operating together and at the instance of the Calcutta Company. He submitted that both the units have been independent by operating for a long period of time registering themselves under separate legislation and therefore, their clearances cannot be clubbed. He submitted that even if a worse situation arises and for argument sake if the concerns are clubbed together even then a liability against the appellant cannot be fixed in the absence of any show cause notice against the private limited company. Even on a computation of duty, the demands raised is not sustainable and he pointed out to the grounds upon which the demand would be reduced to the merely negligible amount. He submitted that the department has not taken production value for clubbing of private limited company, Calcutta for the period March '81 to Jan '82. The department has taken the same charges of the private limited company and demanded duty from the appellants, which cannot be done in view of the fact that the appellants had charged only job charges. Therefore, the valuation of the goods is also not properly done. The Id. Counsel has relied on the large catena judgment of the Tribunal which has laid down that two independent units which are independently incorporated and seperately legal entities being geographically apart cannot be clubbed for the purposes of denying the exemption Notification. The following of the citations relied by the Id. Counsel are: Swastika Metal Works v. Collector of Central Excise -1989 (43) E.L.T. 320 Kinjol Electricals (P) Ltd. v. Collector of Central Excise - 1989 (43) E.L.T. Prabhat Dyes & Chemicals v. Collector of Central Excise -1992 (62) E.L.T. 469 4. Vivomad Labs. (P) Ltd. v. Collector of Central Excise -1991 (53) E.L.T. 152 Prima Control (P) Ltd. v. Collector of Central Excise, Pune - 1994 (72) E.L.T. 62 Cheryl Labs. v. Collector of Central

Excise, Hyderabad -1993 (65) E.L.T. 596 (Tri.)Alpha Toys (P) Ltd. v. Collector of Central Excise, New Delhi -1994 (71) E.L.T. 689Steel Tractors (Mysore) Pvt. Ltd. v. Collector of Central Excise, Bangalore 4. Ld. SDR submitted that these grounds have not been pleaded by the appellants before the Collector and therefore, they should not be permitted to be raised before the Tribunal. He pointed out to the findings of the Collector and submitted that the records clearly indicate that both the units were same with common managerial control and therefore, the Collector was justified in lifting the corporate veil and holding that both the units were one and the same. Pointing out to the Inspector's letter to the appellant seeking details of clearances, Id. SDR submitted that this letter by itself is not sufficient to hold that the department had the entire knowledge of the appellant's activities. It is only by the raid and further investigation of records, it came to light the clandestine manner by which both the concerns were carrying out the activity. Therefore, merely visits of the Inspector or correspondence cannot be set to be a ground to invoke a larger period. In this regard, he has relied on the ruling rendered by the Tribunal in the case of Shree Ganjanam Fabrics Distributors GFD Sanghi and Ors. v. Collector of Central Excise, Pune -1992 (43) E.C.R. 172 (Tri.). He has also relied on the judgment of the Tribunal as per final Order No. 166-168/93-C, dt. 18-5-1993 as rendered in the case of Supreme Engineering Works and Ors. v. Collector of Central Excise, Pune.

5. We have carefully considered the submissions made by both the sides and perused the records. The evidence of the records and the citations relied upon before us. The department has proceeded on the basis that the private limited company situated at Calcutta and the proprietor concern is in existence in Patna and their clearances can be clubbed together as the appellants are not conducting their business independently but they are so closely related and associated with the Private Limited Company at Calcutta that they appear to be one entity.

It is also alleged that the appellant is nothing but part and parcel of M/s. Metroark (P) Ltd. working for them and under their directions, having no independent entity of their own and has been created solely with the intent to evade payment of duty due. The evidence relied in respect of this allegation is the person of local office of the Private Limited Company in Patna which has been utilised for keeping all the

records by the appellant without payment of any rent, and that there is no distinction in many files to pertain thus proving that the two units were separate in name and for all practical purposes are one and the same. In this context, the statement of Shri R.S. Jha has been relied.

The next ground is with regard to the telephone held by the appellant was being utilised by the Private Ltd. Company, without payment of any charges and thus it proves that the two units are not separate, and for this also the statement of Shri R.S. Jha has been relied. The next ground is to say that some of the employees worked for both the units, thus proving that both units are one entity. It has also been alleged that one Shri Swaraj Ranjan Mukherjee has been found to give several instructions to the appellant's concern when he is in no way be connected with the appellant. There is also a letter from Shri B.N.Mitra Manager of M/s. Metroark has given instructions to Shri B.K. Basu that no sale is effected without his consent. M/s. Metrosyl is also importing certain raw materials as per their returns cleared to 1981-82 and that they were engaged in job work on behalf of M/s. Metroark.

However, as per their production returns submitted to DGTD as well as to the Director (Industrial) Govt. of Bihar, it has been shown that the total production as their own production, proving thereby that the so-called job work done by M/s. Metrosyl was not job-work but their own production. The appellant has also asked telegraphically for funds from M/s. Metroark and also for payment of salary for their staff. In the like manner, the allegation in the show-cause notice proceedings certain administrative directions and to the appellants for the Private Limited Companies in connection with the bank transactions. The question before us is as to whether these instances are sufficient to hold that the Private Limited Company at Calcutta is the controlling authority of the proprietor concern at Patna and Patna Unit has been set up on their instance. The Tribunal had gone in great detail in the similar circumstances cited by the department in the show-cause notice and has negatived each of them as a factor for clubbing both the units, as can be seen from several citations brought to our notice by the appellants. Both the units are geographically apart and are independently constituted having separate management and separate financial control and financial funding. The instances

cited by the department are mostly in the nature of managerial control, commonality of use of premises, telephone staff and mutual business interest. These are not the grounds on which the two units can be considered as one or the same. The department has to show that the appellant concern is a dummy unit inasmuch as the appellant had no role to play and they had no factory of their own and without any production or independent status or funds and that the Private Limited Company had completed financial control and profit share. The department has also to show that the appellant is a set-up concern for the purpose of evading duty.

In this regard on a careful consideration of the material before us, we are of the opinion that the department has failed to establish the charge. The appellant had been carrying on job work activity by receiving inputs from the Private Limited Company at Calcutta under indenture of agreement and entered into on 8-1-1979 and subsequent agreement dated 27-10-1980.

The Private Limited Company wrote to the Supdt., Customs & Central Excise, Deoghar, Bihar. By their letter dt. 16-2-1980 they are supplying the raw materials to the appellants and getting manufactured their product on job work basis and sought guidance in this regard.

They again wrote on 5-5-1980. The appellant also wrote a letter to the Supdt. on 28-7-1980 enclosing declaration and also declaring the details of products, packing and value of the products. The Inspector by his letter dt. 30-1-1981 wrote to the appellant by which he has stated that he visited the factory several times and instructed the employees on duty at factory to submit the up-to-date figures. By this letter the Inspector has asked them to submit details figures of clearance value as well as the job work done by them. By letter dt.

5-2-1981, the appellant wrote to the Supdt. giving further details.

They also again corresponded on 7-2-1981 giving further details of clearances. The show cause notice has come to be issued on 20-9-1982.

Therefore, on the basis of these facts the appellants contending that the department is fully aware of all the details of manufacture, details of clearances, relationship between the Private Limited Company at Calcutta and themselves and therefore, larger period cannot be invoked. There is a force in this argument. On a very careful consideration of the material on record it is very clear that both the Calcutta Company as well as the appellant had informed the department about the details of transactions as well as the manufacturing detail including the clearances made by them. The Inspector has also visited there and has collected all the details. In a circumstance like this the question of invoking Rule 9(2) and alleging clandestine removal would not be sustainable. The department has proceeded on the premise that there is a suppression, on the basis of collection of details from records and on the basis of allegations made in the show cause notice.

We are of the considered opinion that the nature of transaction is more of business and commercial transaction and the Tribunal has held that commonality of Directors, Telephone, premises and use of business premises is no ground to club the clearance of both the units, as is being one or the same. In that view of the matter, we have upheld that there is no suppression in the present case and the larger period cannot be invoked in the facts and circumstances of the present case.

The appellant has also raised a very important issue that the show-cause notice to the private limited company has not been issued nor proceedings raised against them and as such in the light of the allegation that the appellant being part and parcel as Private Limited Company, the proceedings should have been against the Private Limited Company and demands be confined on them. In this context, the Id.

Advocate has relied on the ruling referred in the case of Cheryl Laboratories (supra). We see lots of force in this contention, the department having considered the appellant to be set up by the Private Limited Company at Calcutta then it would have been proper for the department to have proceeded against the Private Limited Company and raised demand against them. In a similar situation in the case of Cheryl Laboratories, such observations have been made in para 10 of the

stay order. The Tribunal has held that wherein allegation was made that the appellants therein were set-up by M/s. Glen-mark. In that event "the department ought to have made M/s. Glenmark also as a party to the adjudication and confirmed the duty, if in the eye of the adjudicating authorities, it is M/s. Glenmark who are the real manufacturers. This has not been done. The proceedings get vitiated on this sole ground itself.

We also take note of the citation relied before us to held that the appellant concern is an independent unit and their clearances cannot be clubbed with the Private Limited concern situated in Calcutta. The Tribunal has considered in great length various citations as on date in the case of Steel Treaters (Mysore) Put. Ltd. and Ors. v. C.C.E.(supra) and has held that clearances cannot be clubbed as two units are not hired labourer of principal unit, none of units is dummy and camouflage of the other and there is no financial flow back or sharing of profits. This citation covers almost about 23 judgments of the Tribunal and High Court on this issue and these judgments deal extensively and also on the points raised by the department and has held that the clearances cannot be clubbed in the facts and circumstances alleged by the department. The other case which can also be referred is that of M/s. Prima Controls (P) Ltd. where the department also wanted to club independent geographically apart companies, the Tribunal has held that commonness of Directors or even holding the shares by common directors is no ground to club the units in the absence of any financial flowback or profit sharing and the company being set-up as a dummy one. In the case of Alpha Toyo Ltd. (supra) the Tribunal has examined what a "dummy unit" is and has clarified that managerial control is different from money flowback, management, control and profit sharing. The Tribunal has also examined at length the similar allegation made in the case of Vivomad Laboratories (P) Ltd. (supra) has negatived the department's contention. The earlier citation referred to by the appellants in the case of Swastika Metal Works and Kinjol Electricals (P) Ltd. are also directly applicable in the facts of the present case. The Tribunal has also examined in the case of Prabhat Dyes & Chemicals about the close and proprietor of another firm, combined purchase of raw materials, interest free loan by one to the other or common inspection note recorded by officer and has held that there are not material for the purpose of clubbing clearances but both units are separately

registered as small scale units and also with Income Tax and Sales Tax authorities. Therefore, the Tribunal has held that the value of both the units cannot be clubbed.

6. Ld. S.D.R. relied on the ruling rendered in the case of Shree Ganjanam Fabrics Distributors GFD Sanghi and Ors. (supra). This ruling is totally different and this is not applicable to the facts of the present case. The Tribunal has gone in great detail into the facts of the cases held that both the units were situated in the same premises and there were several factors which were in existence by which it could be gathered that both the units were one and the same. The facts of the same are being different, therefore, the citation is not applicable to the present case. The Ld. S.D.R. has also relied on the ruling rendered in the case of Supreme Engineering Works (Final Order No. 166 to 168/93-C, dt. 18-5-1993). In this case also the Tribunal has gone in great detail into the manner in which both the units were functioning and has come to the conclusion that there was definite inter flow of finances of non-commercial character justifying the clubbing of the value of their clearances to deny the exemption under Notification No.175/86. The facts of this case are totally different and that the department has not produced evidence to show that there was financial inter linking of a nature other than normal commercial transaction. Ld.

Advocate has also pointed out that even in an extreme view of clubbing of the clearances, the demands are not sustainable. As we have upheld that both the units are independent and the demands are also time barred, therefore, there is no need to examine this issue. In the result, the appellant succeeds and the appeal is allowed with consequential relief.

7. With due respects to Hon'ble Member (J) my views and orders are as follows :-

8. I observe that when the department considers that 'two' units ostensibly functioning under different name and style and claiming to be distinct legal entities are actually one unit, the appropriate course of action was to issue show causes notice to 'both' such units.

It was necessary to do so, pending final determination as to whether they were really one in the garb of two or distinct entities as claimed, in the interest of natural

justice. This has not been done in this case and to the extent the proceedings suffer from an infirmity.

9. It is also noticed that one of the units is in Patna and the other in Calcutta apparently under the jurisdiction of different jurisdictional officers but that should not be allowed to come in the way of natural justice and appropriate orders from the board could be obtained in such circumstances to authorise one of the officers to investigate and adjudicate relating to the entire case involving both the units or to entrust the responsibilities to the officers who have all India jurisdiction (such as Director General of Inspection etc.).

10. The department was of course entitled to lift the veil and show the reality but that puts the burden on the Department to establish that they are one and the same in their essential features relating to managerial control, manufacture or sale or financial relationship etc.

which would go to show commonality of interest.

11. For these purposes it was necessary as mentioned above to implead the Calcutta Unit of Metroark as well.

12. The question of time bar is inter-twined with that of the merits and the correctness of computation of duty liability if any, could also be examined only in the light of such findings as may be arrived at with reference to the main issues.

13. The impugned order is therefore set aside and the matter is remanded for being re-adjudicated by the proper authority in the light of the above observations and the law with the directions that both the concerned units may be given necessary opportunity to make their submissions and present their case in all respects.

14. In view of the difference of opinion between Hon'ble Member (J) and the Vice President, the matter is submitted to the Hon'ble President for reference to a third member on the following point :- Whether the appeal should be accepted as proposed by Hon'ble Member (J) or the matter should be remanded as proposed by the Vice-President? 15. The reference on the point of difference was posted for

hearing on 19-12-1994 when Shri K.K. Banerjee, Learned Advocate appeared on behalf of the appellant and Shri Sharad Bhansali, Learned S.D.R. appeared for the respondent.

16. Shri Banerjee stated that the appellant is a proprietorship concern which was set up by Shri Soumitra Ranjan Mukherjee as a small scale unit on 26-5-1979 at Jasidih, Patna with the intention of manufacturing various products of silicones. Prior to the receipt of their own imported raw material in July, 1980 the appellant manufactured various products of silicones on job work basis out of raw materials supplied by M/s. Metroark Pvt. Ltd. of which Shri Soumitra Ranjan Mukherjee was also a director. He submitted that pursuant to search and seizure of documents in March, 1982 a show cause notice dated 20-9-1982 was issued alleging that the appellant was a dummy unit of M/s. Metroark Pvt. Ltd. and seeking to deny the benefit of Notification No. 89/89 and 105/80 on the grounds that the local office of the company was being utilised by appellant, the papers of both the company and the appellant were filed together, there were some common employees and a common telephone and Shri Swaraj Ranjan Mukherjee, the father of the appellant, was controlling the affairs of the appellant and the company. The learned Counsel added that in the impugned order the Collector upheld the allegation that exemption under Notification No. 89/79-C.E., dated 1-3-1979 in respect of T.I. 68 goods manufactured and cleared by M/s.

Metrosyl was not admissible during the financial years 1979-80, 1980-81 and 1981-82. Shri Banerjee stated that after taking into account all the allegations and the Collector's findings at length, the learned Member (Judicial) having regard to the detailed arguments of both sides and numerous decisions of the Tribunal passed a reasoned order holding that both the units were independent and the demand was time barred. He contended that in view of the clear finding of the Member (Judicial) that the impugned order is not sustainable there could not be any justification at all for remanding the case for read judication after issue of show cause notice at this late stage to M/s. Metroark Pvt.

Ltd. as ordered by the Hon'ble Vice President. He contended that the matter having been argued at length and relevant material for decision being available on

record, the case would not be remandable in view of the Supreme Court judgment in the case of M.G. Shahani & Co. (Delhi) Ltd. v. Collector of Central Excise, New Delhi, reported in 1994 (73) E.L.T. 3. He stated that he was also relying on the Tribunal's decision in the case of Talbros Automotive Components Ltd. v. Collector of Central Excise, reported in 1988 (38) E.L.T. 39 in which it was held that when in the show cause notice and in the order passed on adjudication of the matter, no evidence is forthcoming to support the allegations made, the matter would not be remandable. He added that the relevant period in the present case being September, 1979 to January, 1982 it was not remandable in view of the decision in the case of Icycold Commercial v. Collector of Central Excise, Calcutta-I, reported in 1994 (69) E.L.T. 337 in which it was held that remand is not necessary when the matter is old. He stated that any fresh proceedings if initiated on remand by serving notice on M/s. Metroark Pvt. Ltd. would be barred by limitation. He contended that the case of Cheryl Laboratories, reported in 1993 (65) E.L.T. 596 considered by Member (Judicial) was directly applicable to the present case since in that case it had been held that entire proceedings were vitiated since M/s.

Glenmark said to have been set up by Cheryl laboratories was not made a party to the adjudication proceedings.

17. On behalf of the respondents Shri Sharad Bhansali, learned S.D.R. conceded that any proceedings initiated at this stage by issuing show cause notice to M/s. Metroark Pvt. Ltd. will be barred by limitation.

He, however, contended that the matter needs to be remanded for consideration whether in view of the finding that the appellant and M/s. Metroark Pvt. Ltd. were one and the same the duty demandable from the appellant during the relevant period would be determinable on the price at which the goods were sold by M/s. Metroark Pvt. Ltd. 18. I have considered the submissions made on behalf of both sides. It is seen that the show cause notice dated 20-9-1982 alleging that the appellant being a dummy unit of M/s. Metroark Pvt. Ltd. was not eligible for the benefit of the exemption under Notification No. 89/79 and Notification No. 105/80 was issued on the following grounds:- (i) the local office of M/s. Metroark Pvt. Ltd. and their telephone were being utilised by the appellant; (ii) the documents of the

company and the appellant were being filed together; (iii) the services of certain employees of the company were also being utilised by the appellant; (iv) one of the Directors of the company was also issuing instructions in regard to the affairs of the appellant.

It is seen that the findings of the Collector in the impugned order have been dealt with by the learned Member (Judicial) having regard to the evidence on record and a catena of judgments in similar cases and he has held that both units being independent, the charge that the appellant was a dummy unit of M/s. Metroark Pvt. Ltd. warranting the clubbing of the clearances of both units was not sustainable and the demand was also time barred. I am inclined to agree with the learned Counsel for the appellant that it would not be permissible to remand the matter to the lower authority for re-adjudication when the matter has been argued at length and all material necessary for arriving at the decision including the evidence disclosed by the department in support of their case is available on record. In this regard it is seen that in the case of *M.C. Shahani & Co. (Delhi) Ltd. v. Collector of Central Excise, New Delhi* (supra) the Hon'ble Supreme Court had observed that since all the available material was on record and the concerned parties had argued at length the appellate authority should have analysed the evidence and given a factual conclusion instead of remanding the matter to the lower authority. It is seen that in the case of *Talbros Automotive Components Ltd. v. Collector of Central Excise*, (supra) in which it was held that there could be no case for remanding the matter when both in the show cause notice and final order passed on adjudication of the matter no evidence was forthcoming to support the allegation. On the ratio of this decision since no show cause notice was issued to M/s. Metroark Pvt. Ltd. to disclose the charges and the supporting evidence, the matter would not be remandable at this late stage to enable the department to investigate and make out a fresh case against them. In any case, as pointed out by the learned Counsel, the show cause notice in respect of clearances during the period 1979-80 to 1981-82 (upto January 1982) having been issued to the appellants on 20-9-1982, a fresh show cause notice demanding any duty, if issued to M/s. Metroark Pvt. Ltd. on remand of the matter would be barred by limitation.

19. In view of the foregoing, I agree with the findings of the Member (Judicial) and hold that as proposed by him the appeal needs to be allowed.

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