Wox Coolers P. Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-11-1995

Reported in : (1996)(82)ELT342TriDel

Appellant : Wox Coolers P. Ltd.

Respondent : Collector of Central Excise

Judgement :

1. These four appeals are against the order of the Collector of Central Excise, Nagpur. In his order, the Collector has held that the second to fourth appellants, who are the manufac-turers of evaporative type coolers, but 'creations' of the first appellant. He held the first appellant to be the manufacturer of all the goods. He consequently denied the benefit of Notification 80/80-C.E., dated 19-6-1980 for the year 1981-1982 and 1982-1983. He imposed a penalty of Rs. 30 Lakhs on the first appellant under Rule 173Q of the Central Excise Rules, 1944.

2. Shri V. Laxmi Kumaran, advocate explained that the technology for manufacture of the coolers had been obtained by the first appellant from Shri R. N. Kher under an agreement. It manufactured and cleared the goods in 1981-82 and 1982-83 after filing the declaration claiming the benefit of Notification 80/80. He said that the first appellant had entered into agreements with the other five appellants in November, 1981. These agreements provided that these five would manufacture coolers using the technical know-how available with the first appellant. The only restriction imposed was that they would sell the coolers manufactured by them to the first appellant or to his nominees at a price which was to be mutually decided

but would not exceed 80% of the price at which the first appellant sold them. No other fee or royalty was payable. There was absolutely no control by the first appellant of any kind over the manufacturing or other operations. The requirement that books of accounts would be made available was necessary so that the first appellant could decide royalty payable by it to Shri Kher. The maintenance of accounts was in any case required by the law governing grant of patent, and was a normal condition in such agreements. He placed on record the terms of a model agreement in the book on the subject published by Sweet and Maxwel and pointed out that para 3 B 08 provided for keeping such accounts. There was nothing suspicious or out of the ordinary in maintaining of accounts. The fact that its the actual production was to be bought back by the grantor, did not lead to the conclusion that it had any control over the manufacturing operation of the others. No raw material was supplied or financial assistance rendered. There was no condition or restriction apart from these. These were therefore, transactions between principals . He placed on record a chart according to which some of the facts mentioned by the Collector in his order, were sought to be rebutted as being erroneous. He pointed out that there is a series of case law to say that common management, common directors, common partners, common staff and telephone, sale to one person etc. could not justify the clubbing. He particularly relied upon the decisions of this Tribunal in the following cases :Swastik Engg Works and Ors. v. C.C.E., Ahmedabad 1994 (51) ECR 363 - Elgi Tyre & Tread Ltd. and Ors. v. CCE, CoimbatoreBasant Industries v. CCE, Kanpur 3. Shri Somesh Arora, DR argued that there were features in the agreement which clearly led to the conclusion that the manufacture by the five appellants was according to the control and dictate of the first appellant. The goods were only to be sold to the first appellant or its nominee at a price which should not exceed the limit laid down by it. The agreement prohibited manufacturers from making coolers other than those specified by the grantor.The Collector has cited sufficient evidence such as common premises etc. The accumulated effect of these would not permit any conclusion other than that these five units were a front or a shall , the actual manufacturers in fact being the first appellant. He cited the decision of this Tribunal in the case of Spring Bell v. CCE -1994 (72) E.L.T. 734 and Unique Resins v. CCE -1993 (68) E.L.T. 427.

4. In rebuttal Shri Laxmi Kumaran, pointed out that in actual fact, the condition relating to market price had not been enforced. Prices had been negotiated and settled at different points in time and negotiated price was about Rs. 100 higher than the prevailing market price. The appellants did not have the common office, or common phone number. One of the five manufacturers had sold coolers worth Rs. 59, 000/- in the open market.

5. There is no allegation in the show cause notice that the six appellants have a common premises and telephone. The Collector's findings, in this regard, is therefore clearly in excess of material in the show cause notice and therefore cannot be relied upon for this conclusion. Each of the six appellants is a separate legal entity and separately registered with sales tax and income tax authorities. The fact that there may be some common directors is by itself is not sufficient to hold that each are not independent legal entities.

6. The question that now arises is therefore, whether the facts that the price of the coolers was fixed and most of the production supplied to the first appellant would by itself justify the conclusion that these five were dummy or artificial creations of the first appellant.

The Supreme Court in the Cibatul Ltd. case has held that where, according to an agreement the goods have been produced by the seller in accordance with the manufacturing programme drawn up jointly and according to the standards laid down, and to be supplied at a agreed price, it could not be said that buyers of the excisable goods was their manufacturer. The following passages from this Tribunal's decision in Alfa Toyo v. Collector "A dummy unit is a unit, which is not in existence in reality, but it is merely created on paper only. In other words, the physical existence of such a unit is not to be found in terms of investment of capital, machinery and labour. The unit which creats such a dummy unit, utilise the dummy unit for the purpose of tax evasion.

Therefore, the courts have clearly distinguished on facts each of the cases and have now settled the issue by holding that mere evidence of Directors being common or utilisation of telephone, labour or machinery by itself is not a ground to consider an unit is in existence, but if it is totally controlled in terms of money flow-

back, profit sharing, management control, and it had been created with a view to evade taxes by a series of acts of omission and commission, by manipulation of accounts and records then in such an eventuality, the clearances of dummy unit can be clubbed. As rightly pointed out by the Id. senior advocate there is no definition of the term "dummy unit", but what flows from the judgments cited by him is that a dummy unit is a unit, created by the main unit with a view to evade taxes and that the first main unit totally controls its activity in terms of profit sharing, management control, decision making, and acts of such nature. The dummy unit would be a mere facade one and in reality it is one and the same with the main unit. In this particular case, there is no such evidence at all, to show that such an arrangement is in existence. The mere fact of management control and a few directors being common and also by the fact that interest free loans are being given to the other units by the first unit, these factors, by itself, is no ground for holding them as dummy units and for ordering clubbing of all their clearances, and to deny the benefit of the exemption notification." 7. By applying the criteria laid down in this decision, we do not find it possible to agree that the restrictions on the pricing and manufacture of other goods results in the agreement being anything other than one between a buyer and the seller who uses the patent of the buyer. In the absence of evidence to show any degree of control by the first appellant over the management and production of the others or financial control we do not find it possible to hold that the first appellant is the manufacturer of the goods. In the circumstances, we allow the appeals.