CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH
Court-I
Appeal No.E/575,580,577,576,577,579/2007

(Arising out of OIA No.79-84/CE/Appl/DLH-IV/2006 dt.2.11.2006passed by the CCE (Appeals), Delhi-I)

Date of hearing: 19.02.2019

Date of Decision: 01.04.2019

M/s. M.G.Industries **Appellant**
M/s. Glorious Corporation
M/s. Sonex Industries
M/s. Sonex Decor Pvt.Ltd.
Shri Harvinder Singh,
Shri Jaspal Singh

Vs.
CCE, Faridabad **Respondent**

Present for the Appellant: Shri Kamaljeet Singh, Advocate
Present for the Respondent: Shri H.Singh, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Bijay Kumar, Member (Technical)

FINAL ORDER NO.60289-60294/2019

PER: ASHOK JINDAL

The appellants are in appeal against the impugned order wherein the clearances have been clubbed with clearance of M/s. M.G. Industries and benefit of SSI exemption under Notification No.8/03-CE dt.1.3.2003 has been denied. Consequently, the duty has been confirmed along with interest and penalties on all the appellants have been imposed.

2. The facts of the case are as under:-

2.1 The appellant No.1 i.e. M/s. M.G. Industries, 2173A, Jawahar Colony, Faridabad is registered with Central Excise having partners S/Shri Jaspal Singh S/o Mohinder Singh, Harvinder Singh S/o Shri Mohinder Singh & Mohinder Singh S/o Shri Bishen Singh; engaged in the manufacture of metal and plastic parts of vertical blinds, Venetian blinds, drapery rods, false ceiling and its parts made of Aluminium/steel from 25.9.1997 to June, 1998 at Plot No.2173A, from 1999 at Plot No.2173 and also having another factory at 2095. In the classification list filed under Rule 173B, they declared that they do not have another manufacturing unit in India. The appellant No.1 unit established in March, 1995 for manufacture of plastic and sheet metal components of blinds and false ceiling ofAluminium and galvanized plain and coated sheet were not then registered with central excise.

2.2 The appellant No.2 i.e. M/s. Glorious Corporation, 77, Village Saran, Faridabad is an unregister unit having partners Shri Jaspal Singh S/o Mohinder Singh and Harvinder Singh S/o Shri Mohinder Singh; were engaged in the manufacture of plastic and metal components of Sofia rods and coated plastic sofia rods under Chapter heading 3925.99.

2.3 The appellant No.3 i.e. M/s. Sonex Industries, 76, Village Saran/2173A, Jawahar Colony, Faridabad is a registered unit with central excise having partners Shri Harvinder Singh S/o Mohinder Singh, Smt. Mohinder Sandha W/o Shri Harvinder Singh and Smt. Manjeet Kaur w/o Shri Jaspal Singh; were engaged in the manufacture of coated fabric of polyester viscose yarn, vertical blinds, venation blinds and drapes. In the classification list under

Rule 173B, they had declared that they do not have any other manufacturing unit in India. The appellant unit was taken over by appellant No.1 w.e.f.1.04.2001.

2.4 The Appellant No.4 i.e. M/s. Sonex Decor Pvt.Ltd., K-38-A, Kalkaji, New Delhi is an unregistered firms, is a private limited company with Directors S/Shri Harvinder Singh and Jaspal Singh both sons of Shri Mohinder Singh; came into existence in October, 1999; were engaged in the manufacture of vertical blinds and venation blinds and also in the trading of sofia rods, drapery rods manufactured by appellant No.1 and No.2 and of other manufacturers. Prior to this they had been working under the name and style of M/s. Euro Decor at the same premises under the proprietorship of Shri Jaspal Singh.

2.5 All the partners of three units (appellant No.1 to 3) at Faridabad and Directors of the unit at Delhi are related and residing at 2093. The machinery installed at the factory premises bearing No.2093 & 2095, Jawahar Colony under the possession of appellant No.1 were sold to appellant No.2 by appellant No.1 vide Bill No.206 dt.31.3.2001 for Rs.727011/- and w.e.f.1.4.2001, appellant No.2 started manufacturing activities at both the plots 2093 and 2095 which were under the possession of appellant No.1 upto 31.3.2001.

2.6 The adjudicating authority held that there is financial flow back, mutual lending and borrowing etc. Amongst the units; collection of sale proceeds on behalf of each other; joint control exercised by Shri Harvinder Singh and Shri Jaswal Singh on all the four units; common managerial control; partners/directors being members of the same family; and common use of facilities of telephone, fax, computer, office equipment, staff etc. Therefore clearances made by the units have clubbed with M/s. M.G. Industries. Consequently, duty has been confirmed along with interest by denying the benefit of Notification No.8/03-CE dt.1.3.2003 and penalties were also imposed on all the appellants. The said order was appealed before the Commissioner (Appeals), who confirmed the adjudication order. Hence, these appeals.

3. Ld. Counsel for the appellants submits that the impugned order is full of contradictions. The adjudicating authority confirmed the demand by clubbing the value of clearances of all the four appellants and imposed penalty on the firms and its directors/partners on the following grounds:-

(i) financial flow back, mutual lending and borrowing etc. Amongst the units;

(ii) collection of sale proceeds on behalf of each other;

(iii) joint control exercised by Shri Harvinder Singh and Shri Jaswal Singh on all the four units;

(iv) common managerial control;

(v) partners/directors being members of the same family; and

(vi) common use of facilities of telephone, fax, computer, office equipment, staff etc.

4. He submits that the benefit of SSI exemption notification has been denied to all four units yet the demand has been confirmed on M/s. M.G. Industries which is wholly contrary to law and facts. There is no allegation in the show cause notice that the other three units were dummy or non existent. Therefore, in the absence of any allegation or evidence in this respect, the confirmation of duty

demand against M/s. M.G. Industries is contrary to legal provisions. The duty demand merits to be quashed on this ground alone.

4. He further submits that the imposition of penalty on the three units i.e. Glorious Corporation, M/s. Sonex Industries and M/s. Sonex Decor (P) Ltd. under Rule 173Q read with section 11A and 38 of Central Excise Act, 1944 and under Rule 25 of Central Excise Rules, itself would prove that the department itself has considered these units to be manufacturer of excisable goods. When the department itself is treating these units as manufacturing units, the demand of duty only from M/s. M.G. Industries and imposing penalties on the other manufacturing unit is contrary to law. Al the units have time and again contended that they are independent and separate units having separate existence, carrying on separate manufacturing activity and are registered separately with various statutory authorities. Therefore, it was not proper on the part of the adjudicating authority to club the clearances of these units into clearances of M/s. M.G. Industries for demanding duty.

5. He further submits that the adjudicating authority failed to appreciate that in the show cause notice there was a proposal to deny the benefit of exemption notification to all units. On the one hand the department alleged that differential duty has been evaded by all the units, therefore, an allegation was made that the duty was liable to be demanded and recovered from M/s. M.G.Industries who according to the department a firm floated the other units. However, in the next para, all the units were called upon as to why duty should not be demanded from all the units. In the next show cause notice dt.20.3.2002 there was no proposal to demand duty

from M/s. M.G. Industries. The duty was proposed to be demanded only from all the existing units. The denial of exemption to all the four units and demand of duty from one unit cannot be co-existent simultaneously. In the show cause notice there was no proposal to club the clearances of all the units but to deny the benefit of SSI exemption to all the four units.

6. He further submits that the adjudicating authority failed to appreciate that all the units are working independently at separate plot, having separate sales tax, income tax registration etc. and there is no financial flow back which establish that all the units are related to each other. The dealings amongst all the units are purely arm's length and do not have any nexus with the manufacturing and sales of goods manufactured by the individual firms or company. That in the present case, the Private Limited company, namely, M/s. Sonex Decor (P) Limited, the trading company who purchased the goods from the market and sell them as a trader was also included for denial of benefit of exemption notification.

7. He submits that it was not a case where any clubbing was justified. The adjudicating authority has simply relied on some financial transactions amongst all the units and simply clubbed the clearances. They had explained the various financial transactions and had stated that there could be case of temporary financial accommodations which duly reflected in the books of accounts and were duly returned. This fact could not be made the basis for denying a statutory benefit flowing from statutory notifications which accrue benefit to a small scale unit.

8. He submits that all the units are independent units incorporated/started at different point of time were situated at different premises, were engaged in the manufacture of different products. All the units are separate entities in the eyes of law performing all the statutory obligations separately. Therefore, they were rightly entitled for the benefit of SSI exemption notification issued from time to time. Even assuming for arguments' sake that there were certain financial transactions amongst these units, the same were duly accounted in the books of account by each unit. Mere fact that some amounts were borrowed by one unit from other without payment of interest cannot be made the sole basis for clubbing the clearances of all the units. In the present case one unit is trading unit at New Delhi which has also been clubbed which clearly shows that the department has not applied its mind properly. The adjudicating authority failed to take note of the judgements which were squarely applicable in their case and cited by them in their reply to show cause notice. The adjudicating authority has relied on some judgements which were not applicable to the facts of the present case. There were certain financial transactions which were duly explained and were duly recorded in the books of account. Even assuming that some entries remained unexplained, that itself was not sufficient to deny the SSI benefit to them.

9. He further submits that the majority of the duty demand was barred by limitation. It is on record that all the appellant were enjoying the benefit of SSI exemption in their own right. They were independent units having different composition, manufacturing

different products, they were rightly entitled for the SSI benefit. It is not the case of the department that any of the units had exceeded the exemption limit. There was no justification for the department to allege suppression, mis-statement against these units. Any demand of duty beyond a period of one year is otherwise barred by limitation and could not have been confirmed by the adjudicating authority.

10. On the other hand, Ld.AR submits that all the units controlled by one family member. There were clear transactions showing financial flow back and mutuality of interest between the units as explained in the impugned order. Moreover, there is common use of facilities such as telephone, computer, fax office equipment etc. Therefore, he prayed that the clearances made by all the units are to be clubbed in the light of the following decisions:-

1. M/s. U.K.Machine Tools P.Ltd. vs. CCE, Chandigarh-1999 (114) ELT 1009 (Tri.)
2. M.D.Kedia vs. CCE, New Delhi-2003 (159) ELT 909 (Tri.)
3. Rao Industries vs. CCE, Bangalore-2006 (199) ELT 672 (Tri.-Bang.)

11. Heard the parties and considered the submissions.

12. On careful consideration of the submissions made by both sides, we find that first ground for clubbing clearances of all the units is that all are controlled by one family member, therefore, their clearances are to be clubbed. We find that M/s. M.G.Industries is a partnership firm having 3 partners, namely,S/Shri Jaspal Singh S/o Mohinder Singh, Harvinder Singh S/o Shri Mohinder Singh & Mohinder Singh S/o Shri Bishen Singh

whereas M/s.Glorious Corporation having partners Shri aspal Singh S/o Shri Mohinder Singh and Shri Harvinder Singh S/o Shri Mohinder Singh and M/s. Sonex Industries, having partners Shri Harvinder Singh S/o Shri Mohinder Singh, Smt. Mohinder Sandha W/o Shri Harvinder Singh and Smt. Manjeet Kaur w/o Shri Jaspal Singh. The allegation of the Revenue is that all three units are partnership firm and having common partners. That cannot be the sole ground to club the clearances of all the units. Moreover, M/s. Sonex Decor Pvt.Ltd., is a private limited company is a separate firm with its Directors, therefore, the same cannot be the ground to club the clearances of all the units. Other reason for clubbing of clearances of all the units are having financial flow back, mutual lending and borrowing etc. amongst the units; collection of sale proceeds on behalf of each other; joint control exercised by Shri Harvinder Singh and Shri Jaspal Singh on all the four units; common managerial control; partners/directors being members of the same family; and common use of facilities of telephone, fax, computer, office equipment, staff etc.

13. We take note of the fact that all the units located at different locations having separate income-tax, sales tax, central excise registration. All units are having electricity connection, their own machinery and plant to manufacture their final products and maintaining their separate records such as manufacturing, purchasing, sale etc. The appellants are having bank accounts separately. There are some instances where some payments have been received by another person on behalf of the other but the same has been transferred to their respective account and during

the course of their business if they have taken any money from the other company the same has been repaid. These facts have been recorded in the impugned order.

14. Similar issue was examined by Hon'ble Supreme Court in the case of Rollatainers Limited vs. CCE, Delhi-III-2004 (170) ELT 257 (SC) wherein the facts of case are as under:-

> " 2. Brief facts which are necessary for the disposal of both appeals are as under. M/s. Rollatainers Limited (hereinafter referred to as the 'appellant'), is a limited company registered under the Companies Act, 1956. The appellant is engaged in manufacture of various products in seven of its factories situated in different premises, each of them duly and separately registered with the Central Excise Department. Out of the seven factories, two factories which are relevant for the purpose of these appeals are : (i) Paper Board Factory and (ii) Specialty Paper Factory. The paper board division is situated in Shed No. 1, Narela Road, Kundli and engaged in manufacture of duplex board independently with its own set of plant and machinery, staff and workers, raw material and utilities like electricity, water etc. Specialty Paper Factory is situated in Shed No. 3, Narela Road, Kundli and engaged in manufacture of paper independently with its own set of plant and machinery, staff and workers, raw material and utilities like electricity, water etc. Prior to May, 1998, the Specialty Paper Factory was situated at Dharuhera with accumulated stock of finished goods. The appellant decided to transfer such finished stock of Specialty Paper Factory to Paper Board Factory and dispose of the accumulated stock of finished goods under the Central Excise registration issued to Paper Board Factory. The ground plan of the Paper Board Factory prior to May, 1998, showed Shed No. 3 as a godown for storage of its raw material, namely waste paper. Thereafter, the ground plan was amended in May, 1998, to show the Specialty Paper Factory in Shed No. 3 for storing the finished goods manufactured at Dharuhera and clearing them on payment of duty. Accordingly, classification list was also filed for the purpose of clearing the stock manufactured at Dharuhera. Subsequent to erection of the plant and machinery of Specialty Paper Factory shifted from Dharuhera to Shed No. 3, Narela Road, Kundli and manufacture of paper in such separate premises by separate staff and workers who were earlier employed at Dharuhera, were engaged and the appellant applied for Central Excise registration as provided under Rule 174(3) of the Central Excise Rules, 1944. No portion of the manufacturing process of Paper Board Factory was ever carried on in Shed No. 3 wherein exclusively Specialty Paper Factory operations were

carried out. The registrations issued to the Paper Board Factory and the Specialty Paper Factory were premises specific as stipulated under Rule 174(3) which reads as under:

"Every registration certificate granted shall be in the specified form and shall be valid only for the premises specified in such certificate."

In the said case, the Hon'ble Supreme Court has observed as under:-

" 7. There is no two opinion that both the factories are near to each other and it is owned by the same owner and the common balance sheet is maintained. But, by this can it be said that both the factories are one and the same ? The definition of the 'factory' as defined in Section 2(e) of the Central Excise Act, 1944, reads as under :

"(e) 'factory' means 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 these goods is being carried on or is ordinarily carried on;"

8. Simply because both the factories are in the same premises that does not lead to the inference that both the factories are one and the same. In the present case, from the facts it is apparent that there is no commonality of the purpose, both the factories have a separate entrance, there is a passage in between and they are not complimentary to each nor they are subsidiary to each other. The end product is also different, one manufactures duplex board and the other manufactures paper. They are separately registered with the Central Excise Department. The staff is separate, their management is separate. It is also not the case of revenue that end product of one factory is raw material for the other factory. From the above facts it is apparent that there is no commonality between the two factories, both are separate establishments run by separate Managers though at the apex level it is maintained by the appellant company. There are separate staff, separate finished goods. Simply because both the factories may have common boundaries that will not make it one factory. Accordingly, we are of the opinion that the view taken by the Tribunal does not appear to be well-founded and likewise, the view taken by the Commissioner, Central Excise. Accordingly, we allow both these appeals, set aside the order of the Tribunal passed on June 7, 2002 as well as the order passed by the Commissioner, Central Excise, New Delhi-III on September 28, 2001 in both the appeals. No order as to costs."

It has been held by the Hon'ble Supreme Court that clearances of two factories within the same premises, same owner and common balance sheet with common boundaries but having separate staff, separate management, separate passage, separate entrance with separate central excise registration and producing different end products, cannot be clubbed together.

15. We further take note of the fact that similar issue came up before this Tribunal in the case of Dirba Pipes Pvt.Ltd.-2017 (347) ELT 529 (Tri.-Chan.) wherein the facts of the are as under:-

" 2. The facts of the case are that the respondents are engaged in the manufacture of ERW pipes and registered with the Central Excise department. They are availing SSI exemption benefit under various Notifications as applicable from time-to-time and had been availing the Modvat/Cenvat credit facility to discharge their duty liability on their final products. Based on intelligence gathered, DGCEI conducted raid on various factory, office, business, godown and residential preemies of the respondents on 29-11-2001. Furtherance to investigation, the show cause notices were issued to the respondents on account of that the clearances of four units should be clubbed together and the benefit of SSI exemption should not be given and demanding duty on account of clandestine manufacture and clearance of excisable goods by the respondents. The matter was adjudicated, the Commissioner in the impugned order set aside charges alleged against the respondents and dropped the proceedings initiated through the show cause notices. Aggrieved with the said orders, the Revenue is in appeals before this Tribunal."

In the said case, this Tribunal has observed as under:-

" 18**.** Therefore, on organisational structure, it cannot be held that all the units are controlled by one person.

All the units are independent separately incorporated private limited companies under the Companies Act, 1956;

All the units are separately registered under the Central Excise although and fall within the same the Central Excise range and division;

All the units registered as SSI unit with the Directorate of Industries, they have their own investment of capital, machinery and work force;

They have their own financial sources and credit facilities;

All units have separate factories and manufacturing facilities;

All the units have purchased the machinery owned by them and also all the raw materials required for manufacturing from their own resources;

All the salaries, wages are paid by the all the units from their own sources of finance;

All the units have their own Sales Tax and Income Tax Registration;

All the units had paid their own electricity Bills;

All the units have separate electricity and telephone connections.

19. These facts have not been controverted by the Revenue. The only allegation is that Shri Ashok Kumar and Shri Meghraj have controlled all the four units having common Directors in all the units. In fact as per organisational structure, they are not the directors in all the four respondents company and there are common Directors in all four respondents' companies. We have seen that two Directors are not related to the Directors of other three companies. From that, it cannot be said that these units have been managed by Shri Ashok Kumar and Shri Meghraj. We have seen that Directors of the two companies have related to the other, it does not mean that they are only one with other companies are dummy as held by in the case of *Nova Industries Pvt. Ltd.* (supra) wherein this Tribunal has observed as under :

> 15. First, we will deal with the issue whether the clearance of M/s. DSA can be clubbed with the clearance of M/s. NOVA. In the impugned order, the allegation against the appellant is that both the companies were promoted by Shri D.V. Khanna himself as Managing Director of both the companies and Director in both the companies are same. It is also found that by the Adjudicating Authority, the salesman/dealers to be decided mutually and marketing of both the companies were commonly and salary of employee of M/s. Nova was paid from M/s. DSA and commission of employees of M/s. NOVA was paid from M/s. DSA's account. The annual incentives were given to the dealers on the basis of combined sales of both the units. Moreover, the shareholding in both the units by the Directors is almost common. Sometimes, money was given to each other but nothing was shown in the balance sheet. Therefore, clearance of both the units are to be clubbed as the same are managed by Shri D.V. Khanna, Managing Director in the clearance of NOVA.
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> 16. We also find that in this case, both the units are private limited and registered with the Registrar of Companies and both the units are having their units separately located with a distance in some industrial area but there is no common gate for both the companies. Further, both the companies are registered with Income-tax Department, Sales-tax Department, Central Excise Department, Director of Industries, etc. as separate units.

The registration of Central Excise was granted to both the units although the documents were signed by Shri D.V. Khanna for filing returns or correspondence with the department but they were never objected to. We also find that in this case although both the companies are having different brand names of their product such as NOVA/DSA. The units are having their own separate machinery having manufacturing the goods and same have been cleared on payment of duty by availing SSI exemption of both the units separately. The only allegation is that sometimes, salary of one of the employees was paid by the other firm or they are managed by one person. Moreover, the dealers get the commission on the combined sales of both the companies. These things cannot constitute that there was a mutuality of interest and therefore, clearances of one unit cannot be dubbed with the clearance of other unit.

17. We find that this issues has come before the Tribunal in various cases whereas in the case of *Bullows India Pvt. Ltd.* v. *CCE*, reported in 2012 (284) E.L.T. 584 (T) (supra) wherein this Tribunal has observed as under :

> We find that in the present case the issue is whether the appellants are entitled for the benefit of Notification 175/86-C.E. and subsequently Notification 1/93-C.E., therefore, the ratio of the above decision of the Hon'ble Gujarat High Court is fully applicable on the facts of the present case. The Hon'ble High Court held that the Revenue has to establish that there was mutuality of interest or financial flowback of the funds and in such cases the clearances of the holding and subsidiary private limited companies can be dubbed. In the present case we find that even in the show cause notice there were no such allegations. In the show cause notice the only allegation is that the holding company has share capital in the subsidiary company. There is no evidence regarding financial flowback on record. In these circumstances and respectfully following the decision of the Hon'ble Gujarat High Court, the impugned order is set aside and the appeals are allowed. The cross objections filed by the Revenue are disposed off accordingly.

18. Further, we find that, in the case of *CCE* v. *Sharad Industries* reported in 2013 (294) E.L.T. 561 (T) this Tribunal again observed as under :

> We, after appreciating the submissions of both the sides find that there is not much dispute on factual position. It is not the Revenue's case that two units owned by Smt. Kamlesh Gupta and her husband ShriAvdesh Kumar Gupta not complete units having all the necessary machines and infrastructure for manufacture of their final product. Both the units have separate Sales Tax Registration, Industries Registration, Income Tax Registration, Electricity Connection, Telephone Connection & ESI Registration, etc. Merely because there is a door between the two units and power of attorney stand given to her husband to look after the job of her unit, by itself cannot be held to be a ground for holding both the units as one. Admittedly, husband and wife are entitled to their own business and if the husband is looking after the business of the wife that will not make the unit owned by the wife as a dummy unit. The prime requirement, for dubbing the clearance of two units is not

having complete independent machinery and infrastructure to manufacture the goods. If both the units are complete by itself, capable of manufacturing the goods without any help from the other unit, it has to be held that both the units are independent units. The various decisions of the Tribunal referred to and relied upon by Commissioner (Appeals) in his impugned order are applicable to the facts of the present case. It stands held in precedent decision that financial flowback and financial intertwining between the two units is the main reasons for reflecting upon the fact of their being independent or not. One such reference can be made to in decision of the Hon'ble High Court in the case of *M/s. RenuTandon* v. *Union of India* - 1993 (66) E.L.T. 375 (Raj.); Similarly, in the case of *M/s. Electro Mechanical Engg. Corporation* v. *CCE, Jaipur* - 2003 (152) E.L.T. 194 (Tri.), *Girish Electricals Industries* v. *CCE, Mumbai* - 2004 (167) E.L.T. 299 (Tri.) it was held evidence of common office premises, common staff and common maintenance of records, etc. cannot be held to be sufficient to club the clearances of the units, who have different registration in all the departments and in the absence of any financial flowback.

19. We further, analyse the decision of *Ennar Cements Pvt. Ltd*. v. *CCE* reported in 2013 (292) E.L.T. 245 (T) (supra) wherein this Tribunal has observed as under :

"We have gone through the records of the case carefully. The appellants are two Private Limited Companies. They have separate existence. The investigation reveals that the clearances of one unit were done with the other and *vice versa* in order to remain with the exempted limit and thereby evading payment of Central Excise duty. If that is the case, the investigation ought to have decided the real clearances of each unit and demanded the duty accordingly in respect of each unit. However, in the present case, the duty has been demanded collectively from both the units. If the Department feels that out of the two units, one unit is dummy, then the dummy unit should have been identified. In that case, the value of the clearance of dummy unit could have been clubbed with the clearance of the real unit and duty demanded. This has not been done.

The learned Commissioner in the impugned order has given the following findings:-

> "70(ii) Whether each unit is entitled to a separate limit (under the SSI exemption notification) as per the Board's Circular No. 6/1992, dated 29-5-1992.
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> I have perused the Circular No. 6/1992, dated 29-5-1992 [issued from F. No. 213/15/92-CX-6] issued by the Central Board of Excise and Customs, New Delhi in the context of SSI exemption Notification No. 175/86-C.E., dated 1-3-1986. In the said Circular, the board had, *inter alia*, clarified that the limited companies, whether

> public or private, are separate entities distinct from the shareholders composing it and hence, each limited company is a manufacturer by itself and would be entitled to a separate exemption limit. It is not in dispute that M/s. Ennar Cements and M/s. Seshashaila Cements are private limited companies registered separately under the Companies Act and each of them have separate factories. Taking various facts into account I have already held in my findings on (i) above that the management [of both the units] is one and the same and both the units are not independent to each other, thereby they are to be treated as a single manufacturer having more than one factory. Hence, the clarifications given by the Board in the said Circular dated 29-5-1992 are not applicable to the facts of the present case."

On perusal of the above findings of the learned Commissioner, it is clearly stated that each appellant's company is separate. In respect of the Board's Circular, the clearances of the limited companies cannot be clubbed. The Commissioner has clubbed it and demanded duty collectively. This is not legal and correct and it is contrary to the Board's Circular."

20. We further find that in the case of *Alpha Toyo Ltd.* v. *CCE, New Delhi* reported in 1994 (71) E.L.T. 689 (Tribunal) this Tribunal has observed as under :

SSI exemption - Clubbing of clearances common Managerial Control, a few common directors and advancing of interest free loans by main unit to other units not sufficient to make other units as dummies when they are having independent control or money flowback to the main unit - Clearances not clubbable - Situation not to be confused with that of related person concept under Section 4(4)(c) of Central Excises & Salt Act, 1944 - Notification No. 175/86-C.E., dated 1-3-1986 - Section 5A ibid.

21. In the case of *RenuTandon* v. *Union of India* reported in 1993 (66) E.L.T. 375 (Raj.)

Exemption - SSI Exemption - Clubbing of clearances - Two units situated at same premises, manufacturing similar product, having some common management, office and labour and common electric connection - One unit owned by father-in-law and the other by daughter-in-law and work of both units looked after by her husband - In absence of evidence of common finding and financial flowback, two units not treatable as one and their clearances not clubbable - Notification No. 175/86-C.E., dated 1-3-1986.

22. In the case of *Vivomed Labs. (P) Ltd.* v. *Collector of C. Ex.* reported in 1991 (53) E.L.T. 152 (Tribunal)

Exemption to SSI Units - Clubbing of clearances - Units registered separately under Income-tax Act, Sales

> Tax having separate Central Excise Licenses and also financed through separate application for loan from financial institutions - Shareholders in all the firms not the same group of persons - Tie up with Medly Pharmaceuticals for marketing purposes explained inasmuch as the services rendered being paid for in terms of agreement between them - Clubbing of clearances of units not justified in absence of conclusive evidence of financial flowback among them - Notification No. 83/83, dated 1-3-1983, No. 85/85, dated 17-3-1985 and No. 175/86, dated 1-3-1986.
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> 23. We also find that the activity of the appellants were in the knowledge of the department as they were registered with the Central Excise Department and units are located in the same range, therefore, extended period of limitation is also not invokable for dubbing the clearance of DSA with NOVA.
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> 24. From the analysis of the above decisions and the facts of the case before us, we find that both the units are separately located having separate registrations and dealing separately. We also find that there is no financial flowback, therefore, there is no mutuality of interest between the units. Accordingly, clearances of both the units cannot be clubbed together.
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> 25. In these circumstances, the charge of dubbing of the clearance of M/s. DSA with M/s. NOVA is not sustainable and the same is set aside.

20. We find that learned AR relied on the decision of the Apex Court in the case of *Modi Alkalies & Chemicals Ltd.* [2004 (171) E.L.T. 155 (S.C.)]. In the said case, the facts were as under:

> Respondent no. 1 - M/s. ModiAlkalies & Chemicals Ltd. (in short 'MACL') is engaged in the manufacture of caustic soda of which Hydrogen gas is a by-product. The Central Excise Authorities noticed that in reality MACL was engaged in the manufacture of Hydrogen gas falling under sub-heading 2804.90 of the schedule of the Central Excise Tariff Act, 1985 (in short 'Tariff Act'). But with a view to evade payment of excise duty it floated three front companies, namely, respondent nos. 2 to 4 i.e. M/s. Mahabaleshwar Gas & Chemicals Pvt. Ltd. (for short 'MGCPL'), Shri Chamundi Gas and Chemicals Pvt. Ltd. (for short 'SCGCPL') and M/s. Nippon Gas and Chemicals Pvt. Ltd. (for short 'NGCPL'). All the three front companies were in vicinity of the factory of MACL. What in reality happened was that through pipelines Hydrogen gas was sent to the three front companies for compressing and bottling the gas. The sole object was to avail benefit of exemption given to small scale industries under the Central Excise Notification No. 1/93, dated 28-2-1993 and thereby evade payment of Central Excise duty. With a view to unravel the truth, Director General of Anti-Evasion (for short 'DGAE') searched the factory and office premises of MACL and the three front companies on 27-9-1996. It was found that all the three bottling units were located in one single shed and were separated from each other by small brick walls of about 4 ft. height. The Directors of the three front companies were employees of either MACL or other

> Modi Group of companies and tney were frequently changed. They had common staff for maintenance of records, and operation of the units. The main plant and machinery i.e. cylinders had been supplied only by MACL and the total finance was provided by MACL as unsecured loans or had been arranged by finance companies whose whereabouts were not even known to the Directors of the three front companies. Marketing of the products was done by one RiteshBeotra, a so-called Director of SCGCPL who was working as Deputy Manager (Marketing) in M/s. Modi Gas & Chemicals Sales Depot at Delhi. He was marketing various gases manufactured by a Modi group concern and was answerable as an employee of MACL. It was, therefore, concluded that MACL had control over Hydrogen gas even after the stage of bottling till it was sold to the customers. The Balance-sheets and other financial statements of the three units revealed that whatever income they earned had gone to MACL in the form of lease rent of cylinders. One Mr. Sita Ram Goswami, Accountant of MACL and Mr. Ashok Kumar, Chief Operating Officer of MACL admitted that some amount of cash was also collected by MACL over and above the invoice prices of Hydrogen gas supplied by three companies. It was noted that while front companies were being supplied gas by MACL @ 0.50 per unit, till August, 1996, the same gas was sold by the three companies @ Rs. 5/- per unit. Keeping in view all these factors the authorities were of the view that MACL had created the three companies with the fraudulent intention to avail benefit of exemption granted under Central Excise Notification No. 1/93, dated 28-2-1993 and has mis-declared the assessable value in the invoices with the intention to evade central excise duty.

21. On these set of facts, the Apex Court came to the conclusion that the benefit of exemption notification is not available and were fraudulent intention to evade the benefit of SSI exemption. The said facts are not in the case in hand, therefore, the said decision is not applicable to this case.”

16. We further take note of the fact that in the case of Nova Industries Pvt.Ltd.-2015 (327) ELT 103 (Tri.-Del.) wherein the facts of the case are as under:-

> **2.** The facts, in brief, are that M/s. Nova and M/s. Deluxe Sanitary Appliances Pvt. Ltd. (DSA) were engaged in the manufacturing of sanitary appliances. The factory premises and residence of the employees were searched by the Revenue Officers on 28-10-1999. Certain records were recovered from the factory and the residence of the employees showing clearances of goods without payment of duty. During investigation, it was found that both the units were controlled by one, Shri. D.V. Khanna. Therefore, Adjudicating Authority clubbed the clearances of both the units on the ground that both the units belong to one family and denied the benefit of SSI exemption notification on the ground that clearance of previous financial year exceeds the limit of clearance provided under SSI exemption notification.

> During the course of search, private records were recovered and it was alleged that on the basis of these private records, goods were cleared without payment of duty. The show cause notice was issued to deny of SSI exemption notification to both the units and clubbing the clearance of both the units in the name of M/s. Nova Industries Pvt. Ltd.and to demand duty on the basis of private records recovered from the residence of employees to allege that goods had been cleared clandestinely without payment of duty. Therefore, duty is demandable along with interest and penalty on all the appellants were also proposed. The show cause notice was adjudicated, benefit of exemption notification was denied. Clearances of both the units were clubbed with the clearance of Nova. The charge of clandestine removal was also confirmed. Therefore, duty of Rs. 3,69,66,630/- was demanded from Nova along with interest and equivalent amount of penalty was imposed and penalties on the co-appellants were also imposed.

In the said case, this Tribunal has observed as under:-

> **16.** We also find that in this case, both the units are private limited and registered with the Registrar of Companies and both the units are having their units separately located with a distance in some industrial area but there is no common gate for both the companies. Further, both the companies are registered with Income-tax Department, Sales-tax Department, Central Excise Department, Director of Industries, etc. as separate units. The registration of Central Excise was granted to both the units although the documents were signed by Shri D.V. Khanna for filing returns or correspondence with the department but they were never objected to. We also find that in this case although both the companies are having different brand names of their product such as NOVA/DSA. The units are having their own separate machinery having manufacturing the goods and same have been cleared on payment of duty by availing SSI exemption of both the units separately. The only allegation is that sometimes, salary of one of the employees was paid by the other firm or they are managed by one person. Moreover, the dealers get the commission on the combined sales of both the companies. These things cannot constitute that there was a mutuality of interest and therefore, clearances of one unit cannot be clubbed with the clearance of other unit.
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> **17.** We find that this issues has come before the Tribunal in various cases whereas in the case of*Bullows India Pvt. Ltd.* v. *CCE,* reported in 2012 (284) E.L.T. 584 (T) (supra) wherein this Tribunal has observed as under:
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> > We find that in the present case the issue is whether the appellants are entitled for the benefit of Notification 175/86-C.E. and subsequently Notification 1/93-C.E., therefore, the ratio of the above decision of the

Hon'bleGujarat High Court is fully applicable on the facts of the present case. The Hon'ble High Court held that the Revenue has to establish that there was mutuality of interest or financial flowback of the funds and in such cases the clearances of the holding and subsidiary private limited companies can be clubbed. In the present case we find that even in the show cause notice there were no such allegations. In the show cause notice the only allegation is that the holding company has share capital in the subsidiary company. There is no evidence regarding financial flowback on record. In these circumstances and respectfully following the decision of the Hon'ble Gujarat High Court, the impugned order is set aside and the appeals are allowed. The cross objections filed by the Revenue are disposed off accordingly.

18. Further, we find that, in the case of *CCE* v.*Sharad Industries* reported in 2013 (294) E.L.T. 561 (T) this Tribunal again observed as under:

We, after appreciating the submissions of both the sides find that there is not much dispute on factual position. It is not the Revenue's case that two units owned by Smt. Kamlesh Gupta and her husband ShriAvdesh Kumar Gupta not complete units having all the necessary machines and infrastructure for manufacture of their final product. Both the units have separate Sales Tax Registration, Industries Registration, Income Tax Registration, Electricity Connection, Telephone Connection & ESI Registration etc. Merely because there is a door between the two units and power of attorney stand given to her husband to look after the job of her unit, by itself cannot be held to be a ground for holding both the units as one. Admittedly, husband and wife are entitled to their own business and if the husband is looking after the business of the wife that will not make the unit owned by the wife as a dummy unit. *The prime requirement, for clubbing the clearance of two units is not having complete independent machinery and infrastructure to manufacture the goods. If both the units are complete by itself, capable of manufacturing the goods without any help from the other unit, it has to be held that both the units are independent units.* The various decisions of the Tribunal referred to and relied upon by Commissioner (Appeals) in his impugned order are applicable to the facts of the present case. It stands held in precedent decision *that financial flow back and financial intertwining between the two units is the main reasons for reflecting upon the fact of their being independent or not.* One such reference can be made to in decision of the Hon'ble High Court in the case of *M/s. RenuTandon*v. *Union of India* - 1993 (66) E.L.T. 375 (Raj.). Similarly, in the case of *M/s. Electro Mechanical Engg. Corporation* v. *CCE, Jaipur* - 2003 (152) E.L.T. 194 (Tri.), *Girish Electricals Industries* v. *CCE, Mumbai* - 2004 (167) E.L.T. 299 (Tri.) it was held *evidence of common office premises, common staff and common maintenance of records, etc. cannot be held to be* *sufficient to club the clearances of the units, who have different registration in all the departments and in the absence of any financial flow back.*

19. We further, analyse the decision of*Ennar Cements Pvt. Ltd* v. *CCE* reported in 2013 (292) E.L.T. 245 (T) (supra) wherein this Tribunal has observed as under :

"We have gone through the records of the case carefully. The appellants are two Private Limited Companies. They have separate existence. The investigation reveals that the clearances of one unit were done with the other and vice versa in order to remain with the exempted limit and thereby evading payment of Central Excise duty. If that is the case, the investigation ought to have decided the real clearances of each unit and demanded the duty accordingly in respect of each unit. However, in the present case, the duty has been demanded collectively from both the units. If the Department feels that out of the two units, one unit is dummy, then the dummy unit should have been identified. In that case, the value of the clearance of dummy unit could have been clubbed with the clearance of the real unit and duty demanded. This has not been done.

The learned Commissioner in the impugned order has given the following findings : -

"70 (ii) Whether each unit is entitled to a separate limit (under the SSI exemption notification) as per the Board's Circular No. 6/1992, dated 29-5-1992.

I have perused the Circular *No. 6/1992, dated 29-5-1992* [issued from F. No. 213/15/92-CX-6] issued by the Central Board of Excise and Customs, New Delhi in the context of SSI exemption Notification No. 175/86-C.E., dated 1-3-1986. *In the said Circular, the board had, inter alia, clarified that the limited companies, whether public or private, are separate entities distinct from the shareholders composing it and hence, each limited company is a manufacturer by itself and would be entitled to a separate exemption limit.* It is not in dispute that *M/s. Ennar Cements* and *M/s. Seshashaila Cements* are private limited companies registered separately under the Companies Act and each of them have separate factories. Taking various facts into account I have already held in my findings on (i) above that the management [of both the units] is one and the same and both the units are not independent to each other, thereby they are to be treated as a single manufacturer having more than one factory. Hence, the clarifications given by the Board in the said Circular dated 29-5-1992 are not applicable to the facts of the present case."

On perusal of the above findings of the learned Commissioner, it is clearly stated that each appellant's company is separate. In respect of the Board's Circular, the clearances of the limited companies cannot be clubbed. The Commissioner has clubbed it and demanded duty collectively. This is not legal and correct and it is contrary to the Board's Circular."

20. We further find that in the case of *Alpha Toyo Ltd.* v. *CCE,New Delhi* reported in 1994 (71) E.L.T. 689 (Tribunal) this Tribunal has observed as under :

> SSI exemption - Clubbing of clearances common Managerial Control, a few common directors and advancing of interest free loans by main unit to other units not sufficient to make other units as dummies when they are having independent control or money flow back to the main unit - Clearances not clubbable - Situation not to be confused with that of related person concept under Section 4(4)(c) of Central Excises & Salt Act, 1944 - Notification No. 175/86-C.E., dated 1-3-1986 - Section 5A *ibid.*

21. In the case of *RenuTandon*v. *Union of India* reported in 1993 (66) E.L.T. 375 (Raj.)

> Exemption - SSI Exemption - Clubbing of clearances - Two units situated at same premises, manufacturing similar product, having some common management, office and labour and common electric connection - One unit owned by father-in-law and the other by daughter-in-law and work of both units looked after by her husband - In absence of evidence of common finding and financial flow back, two units not treatable as one and their clearances not clubbable - Notification No. 175/86-C.E. dated 1-3-1986.

22. In the case of *Vivomed Labs. (P) Ltd.* v. *Collector of C. Ex.* reported in 1991 (53) E.L.T. 152 (Tribunal)

> Exemption to SSI Units - Clubbing of clearances - Units registered separately under Income-tax Act, Sales Tax having separate Central Excise Licenses and also financed through separate application for loan from financial institutions - Shareholders in all the firms not the same group of persons - Tie up with Medly Pharmaceuticals for marketing purposes explained inasmuch as the services rendered being paid for in terms of agreement between them - Clubbing of clearances of units not justified in absence of conclusive evidence of financial flow back among them - Notification No. 83/83, dated 1-3-1983, No. 85/85, dated 17-3-1985 and No. 175/86, dated 1-3-1986.

23. We also find that the activity of the appellants were in the knowledge of the department as they were registered with the Central Excise Department and units are located in the same range, therefore, extended period of limitation is also not invokable for clubbing the clearance of DSA with NOVA.

24. From the analysis of the above decisions and the facts of the case before us, we find that both the units are separately located having separate registrations and dealing separately. We also find that there is no financial flow back, therefore, there is no mutuality of interest between the units. Accordingly, clearances of both the units cannot be clubbed together.

> **25.** In these circumstances, the charge of clubbing of the clearance of M/s. DSA with M/s. NOVA is not sustainable and the same is set aside.”

and dropped the proceedings.

17. The case relied upon by the Ld.AR are not relevant to the facts of this case in hand.

18. In the case, of M/s. U.K. Machine Tools P.Ltd. (supra), the units floated by Shri R.K.Luther, proprietor of the main company in the name of his employee showing as directors which is not the case in hand.

19. In the case of M.D.Kedia (supra), one person controlling production and other business activities of all the three units, common land and machinery mortgaged for loan from bank. Money has been taken by one unit from another unit without paying interest and common operations of the bank accounts. There is no such instances took place in the case in hand.

20. In the case of Rao Industries (supra), the trailers manufactured by one unit, payment has been obtained by the other unit. To reduce the value of clearances in the invoices in many cases, the appellant indicated the sale of chassis assembly in the invoices while records procured from the bank indicated the sale of complete trailers. There is no such instance in the case in hand. Therefore, the cases relied upon by the Ld.AR not relevant to the facts of this case.

21. The ground for clubbing has been considered by this Tribunal in the case of Dirba Pipes Pvt.Ltd.(supra) and in the case of Nova Industries Pvt.Ltd. (supra). Hon’ble Supreme Court in the case of

Rollatainers Ltd.(supra) held that clearances of all units cannot be clubbed together. Therefore, following the above said decisions, we hold that the clearances of all the units cannot be clubbed together.

22. We further take note of the fact that M/s. Sonex Decor Pvt.Ltd is a trading unit and clearances made by trading unit cannot be clubbd with clearance made by manufacturing unit.

23. In view of above analysis, we do not any merit in the impugned order and the same is set aside.

24. In the result, the appeals are allowed with consequential relief, if any.

(pronounced in the court on 01.04.2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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