IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

E/412 to 414/2007

(Arising out of Orders-in-Appeal No. 20, 21 and 22/2007 (M-IV) dated 14.3.2007 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Airflow Equipments India Pvt. Ltd.
G. Dakshinamoorty
D. Venkatesan — Appellants

Vs.

Commissioner of Central Excise, Chennai – IV — Respondent

Appearance

Shri M. Karthikeyan, Advocate for the Appellants
Shri S. Govindarajan, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **26.07.2017**

Final Order Nos. 43007- 43009/2017

Per Bench

The appellant namely M/s. Airflow Equipments India Pvt. Ltd. (hereinafter referred to as M/s. Airflow) are manufacturers of grills, dampers, diffusers etc. of aluminum used in the centralized air-conditioning system and aluminum door window frames etc. and grill dampers etc. meant for railway coaches. They are not registered with the Central Excise Department.

Customs, Excise & Service Tax Appellate Tribunal

Based on intelligence that M/s. Airflow is evading payment of excise duty by clearing goods on invoices raised in the name of dummy unit M/s. Bala Enterprises (hereinafter referred to as M/s. Bala), the officers of DGCEI, Chennai conducted simultaneous search operations in the said premises on 5.12.2002 resulting in recovery of documents. The data stored in two computers containing accounts pertaining to M/s. Airflow and M/s. Bala were extracted by transferring them to CD ROM. Shri D. Venkatesan, and his wife Smt. V. Revathy, are Managing Director and Director of M/s. Airflow respectively.

2. On the rear of the premises of M/s. Airflow, one more unit by name and style M/s. Bala Enterprises (hereinafter referred to as M/s. Bala) is situated. Shri G. Dakshinamurthy, father of Shri D. Venkatesan is the proprietor of M/s. Bala, which is also said to be engaged in the manufacture aluminum grills, dampers, louvers etc. On the evidence unearthed and investigation conducted it appeared that

- M/s. Airflow had manufactured aluminum products and cleared them under invoices of Bala
- M/s. Airflow had deliberately suppressed the actual production and clearance in their statutory documents by showing part of the clearances as being cleared by Bala
- M/s. Airflow and Bala had cleared goods to different parties under invoices having same serial number, in

other words, they had maintained parallel set of invoices to clear the goods.

- ➢ M/s. Airflow did not obtain Central Excise registration even after crossing the exemption limit of Rs. One crore in a financial year by suppressing actual clearances by resorting to issue of bogus invoices / parallel set of invoices

3. Thus, show cause notice was issued proposing to club the clearances of M/s. Airflow and Bala and proposing to demand duty to the tune of Rs.12,51,891/- along with interest and also proposing to impose penalties besides proposing to impose separate penalties on M/s. Bala and Shri D. Venkatesan, MD of M/s. Airflow and Shri Dakshinamurthy.

4. After adjudication, the original authority held that the value of clearances of M/s. Airflow and M/s. Bala are liable to be clubbed together for the purposes of computation of value of clearances of M/s. Airflow for payment of central excise duty and confirmed demand of duty of Rs.10,79,216/- along with interest and imposed equal penalty besides imposing separate penalty of Rs. One lakh each on the other appellants. M/s. Airflow was also given the benefit of CENVAT duty credit on the inputs to the tune of Rs.3,30,596/- which was ordered to be adjusted against the duty demand. Being aggrieved by the above order, the appellants filed appeals before Commissioner (Appeals) who upheld the clubbing of clearances of both the

units as well as the duty demand and the penalty imposed under section 11AC of Central Excise Act, 1944. However, he set aside the penalty of Rs. One lakh imposed on M/s. Airflow. Hence, appellants are now before the Tribunal.

5. On behalf of the appellants, ld. counsel Shri M. Karthikeyan reiterated the grounds of appeal and made oral submissions, which are summarized as under-

(i) M/s. Airflow is a private limited company and M/s. Bala is a sole proprietary concern. That the clearances of M/s. Airflow which is a private limited company cannot be clubbed with the sole proprietary concern as the company is a separate legal entity. He relied upon the CBEC Circular No. 6/92 dated 29.5.1992 as well as the decision of the Hon'ble Supreme Court in the case of ARCA Controls Pvt. Ltd. – 2003 (158) ELT 272 (SC) and Supreme Washers (P) Ltd. - 2003 (151) ELT 14 (SC). It is submitted that in the show cause notice it is stated that M/s. Bala had only powder coating machineries and that they did not have machineries for production of aluminum products. That department has not been able to prove the same. It is to be noted that M/s. Bala has separate electricity connection and sales tax registration. They were also assessed to income tax separately. From the balance sheet of M/s. Bala for the relevant years, it could be seen that they had owned the machineries and therefore it cannot be considered that M/s. Bala is a dummy unit of M/s. Airflow.

(ii) That the department has been carried away by the fact that Shri G. Dakshinamurthy, who is the sole proprietor of M/s. Bala is the father of the D. Venkatesan who is the Managing Director of M/s. Airflow. Though they are having father and son relationship, two units are separate and the department has not been able to show any flow of profit from one unit to another. Without such flow of profit, the value of clearances of the two units cannot be clubbed together.

(iii) The premises of both M/s. Airflow as well as M/s. Bala is owned by Shri G. Dhakshinamurthy and a portion of it is leased out to M/s. Airflow. Thus, the department has assumed that M/s. Bala is a dummy unit of M/s. Airflow merely because the units were functioning from adjacent premises.

(iv) Even though the department alleges that M/s. Bala is a dummy unit, the existence of the said unit is not at all disputed. Since M/s. Bala has separate registration with Income Tax as well as sales tax authorities. That therefore, M/s. Bala cannot be considered as a dummy unit.

(v) Another allegation is that money has been transferred from M/s. Bala to M/s. Airflow and certain illustrative transactions were listed in the show cause notice. It is also observed in the show cause notice that certain bills of purchase of raw materials by M/s. Bala has been paid by M/s. Airflow. The show cause notice as well as the orders passed by the authorities below considered these transactions in an isolated

Customs, Excise & Service Tax Appellate Tribunal manner. A composite view of the above transactions would show that though the purchase bills of M/s. Bala had been paid by M/s. Airflow but the same has been paid back by M/s. Bala to M/s. Airflow which is nothing but a commercial transaction. These are reflected in the ledger accounts of the premises. That such transactions are nothing but short-time borrowings which have been paid back in due course of business. That therefore this cannot be a ground to hold that the value of clearances of M/s. Bala has to be clubbed with that of M/s. Airflow. Other than this commercial loans which were paid back, the notice does not allege any flow back of profit from one unit to another which is most essential ingredient for clubbing the value of clearances of two existing units. That in the absence of evidence, the department has clubbed the clearances of both the units thereby denying the benefit of SSI exemption to M/s. Airflow.

(vi) The ld. counsel contends that the authorities below have not gone into the details of the accounts as well as transactions. It would clearly show that the appellant has been able to explain the transactions as well as the alleged cash flow in the show cause notice. It is stressed by the ld. Counsel that the authorities have not appreciated the evidence in its entirety and therefore the demand raised is without any factual basis.

6. Against this, the ld. AR Shri S. Govindarajan reiterated the findings in the impugned order. He submitted that both the units were engaged in the manufacture of aluminum products. The machineries installed in the premises of M/s. Airflow were (a) fly press, (b) folding machines (c) manual operated cutting machines (d) power operated cutting machines (e) hand operated cutting machines (f) hand and power operated welding machine (g) bench grinder, (h) power press, (i) power operated drilling machine and (j) compressor. M/s. Airflow did not have the machines for powder coating and such machines namely thermax powder coating booth and drying oven was installed in the premises of M/s. Bala. Thus, the machinery required for manufacture of grills, dampers etc. are installed in the premises of M/s. Airflow and machineries required for powder coating are installed in M/s. Bala. Further, there was no separate office premises for M/s. Bala and the office and staff of M/s. Airflow were being utilized for the manufacturing activity of M/s. Bala. Thus, M/s. Bala was not having any manufacturing facility though they were clearing aluminum products such as aluminum grills, dampers etc. Further, day to day affairs of M/s. Bala was run by Shri D. Venkatesan, who is the Managing Director of M/s. Airflow. That Shri G. Dhakshinamurthy, father of Shri D. Venkatesan admitted this in his statement dated 29.7.2004. That therefore the contention that both are separate entities cannot be accepted.

Even though, M/s. Airflow is a company having independent legal existence, the corporate veil can always be lifted to find out the persons who are actually responsible for the illegal activities undertaken in the name of company. The statements given by Shri D. Venkatesan and Shri G. Dhakshinamurthy would prove the evasion of duty by creation of the dummy unit M/s. Bala. Though M/s. Bala is having separate electricity connection and filed separate income tax returns, it is seen that there are money transactions between the two units. The purchase of the raw materials on the invoices raised in the name of M/s. Bala was paid by M/s. Airflow and there was creation of parallel invoices by both the units. Thus, only one set of invoices were accounted by them showing the clearances for lesser value while the other set recovered by department from the customers contain huge values. Again periodical transfer of money from M/s. Bala's bank account to M/s. Airflow's bank account was being done while records show that M/s. Bala is selling aluminum products to M/s. Airflow. Such flow back of cash would squarely evidence that M/s. Bala is a dummy unit. That therefore the clubbing of the value of clearances of both the units done by the authorities below and the confirmation of duty and penalties imposed is legal and proper.

7. Heard both sides.

8. The gist of allegations raised is that M/s. Airflow was not registered with Central Excise Department and was wrongly availing SSI benefit under the notification by suppressing its value of clearances by clearing goods through another unit M/s. Bala. M/s. Airflow is a private limited company and M/s Bala is a proprietorship concern. According to the department, M/s, Bala is a dummy unit of M/s Airflow. Admittedly M/s. Bala has a separate sales tax registration and is a separate income tax assessee. Thus it is a separate unit before all public authorities for compliance of various laws. Shri G. Dakshina Moorthy the father of Sh. D. Ventakesh who is managing director of M/s. Airflow, is the proprietor of M/s. Bala. It is settled law that merely because the directors are related to the proprietor/partners of the other unit, such unit cannot be said to be a dummy unit. The appellants have strongly contested that M/s. Bala is not a dummy unit, and that its existence not being disputed by department, it cannot be said to be a dummy unit. In the present case, show cause notice was issued to M/s. Bala and separate notice to G. Dakshina Moorthy proprietor of M/s. Bala. They have filed replies refuting the allegations especially contending that both units are separate and that their clearances cannot be clubbed together. The reasons by department to club the clearances are as under.

(i) Air Flow and Bala are closely related companies wherein the father is proprietor of Bala and his son & daughter-in-law are the M.D. and Director of Air Flow.

(ii) Both the companies are functioning in the same premises even though separate door numbers have been provided for correspondence purposes.

(iii) Day to day activities of Bala is being looked after by Shri. D. Venkatesan, M.D. of the Air Flow.

iv) There are no employees in the roll of Bala and the employees of Air Flow only are being utilized for Bala.

(v) Purchase orders have been placed by customers on Bala, but the goods have been delivered under the invoices of Air Flow.

(vi) There were no machineries for the manufacture of goods at Bala except powder coating unit and drier. Therefore, the goods could not have been manufactured at Bala, even though on record sales invoices have been issued in the name of Bala.

(vii) Air Flow had made payments in respect of raw materials purchased in the name of Bala.

(viii) Huge amounts were being transferred on many occasions from the bank account of Bala to the bank account of Air Flow.

9. Undisputedly, M/s. Bala has a separate electricity connection. M/s. Bala has been paying sales tax and also tax on their income. The show cause notice proposes to club the

clearances of M/s. Bala with that of M/s. Airflow in the following manner.

(a) The clearances from Bala to Air Flow are not taken into account for quantification of duty in as much as those goods had ultimately been cleared from Air Flow to customers under invoices and Bala has no machinery for manufacture. The clearances to customers under the invoices of Bala, both accounted by Bala and not accounted by Bala, are taken into account for quantification of duty.

(b) The clearances made from Air Flow, both accounted and not accounted are taken into account for computation of duty.

(c) Wherever the figures are available, the value of clearances is arrived at after deducting the amount of sales tax paid thereon.

(d) The value of clearances of Air Flow and Bala are clubbed for the reasons stated in pre pages.

(e) The value of clearances are arrived at for each financial year in the way mentioned above, the duty is arrived at after giving the due exemption of Rs. One crore for the SSI limit.

10. M/s. Bala has supplied goods to M/s. Air Care Engineers, and M/s. Adit Association. The purchase orders to these customers were placed by M/s. Bala and the invoices were also raised in the name of M/s. Bala. The payments were received in the account of M/s. Bala. Only because these invoices contained the signature of D. Venkatesan, the

department alleges that the goods are actually supplied by Airflow and no goods have been supplied by M/s. Bala. Again, in regard to M/s. Ambassador Pallava, the payments are received by M/s Bala via cheque for the goods supplied which is reflected in their bank statement. It is not disputed that M/s. Bala was paying sales tax as well as income tax based on the clearances made. Revenue now proposes to make M/s. Bala a dummy unit as if it existed for name sake on papers only. Thus no demand is raised on M/s. Bala. Only because Sh. D. Venkatesan was helping to manage the affairs of the proprietorship concern run by his father, that will not by itself make the unit a dummy unit. The Board vide circular dated 17.5.1993 has clarified as under:-

> *"It should be understood that industrial undertaking is different from its forms of ownership. The forms of ownership as stated in the notification are of three types vig; proprietary, partnership and company. As per clause C(i), C(ii), and C(iii) of the notification the provisions of "controlled" and " clubbing" will apply only to similar forms of ownership of industrial undertakings. e.g; an industrial undertaking owned by a proprietary concern cannot be clubbed with one owned as a company OR an industrial undertaking owned by a partnership firm cannot be clubbed with an industrial undertaking owned as a proprietary concern irrespective of the concerned persons (proprietor, partner or equity holder.) being common. In other words in the above examples, the provisions of "controlled" and "clubbing" will not apply."*

11. The Hon'ble High Court of Karnataka had discussed this very issue in Kentrode Pvt. Ltd Vs. Jt. Director (SSI) Government of Karnataka 1999 (108) ELT 616 (Kar.). In the

case before us, even though M/s. Bala has paid sales tax and income tax, the clearances made by M/s. Bala is clubbed with M/s Airflow. The lower authority observed that though M/s. Airflow is a private limited Company, the corporate veil can be lifted. The Ld. AR has relied upon the decision rendered by Tribunal in the case of British Scaffolding India Pvt. Ltd. Vs. CCE, Delhi – 2014 (313) ELT 87 (Tri. - Del). In the said case, the facts were that all the units in question were companies. They were either a private limited company or a public limited company and the Tribunal was of the view that the Circular No. 6/92 date 29.05.1992 is not applicable. The Tribunal in the case of M/s Balsara Hygiene Product Ltd. Vs. CCE, Vapi – 2012 (278) ELT 526 (Tri. – Ahmd.) held that mere fact of management control or grant of interest free loan is not sufficient to hold the units as a dummy unit in the absence of any flow back and / or profit sharing. The said decision was affirmed by Hon'ble Supreme Court as reported in 2015 (321) ELT A46 (SC). The appellant has strongly contended that there was no flow back of money or sharing of profit. They have also submitted that the illustrations of fund transfer shown in show cause notice were only temporary funds paid by M/s. Airflow to M/s. Bala and the same was paid back. The department has mainly relied on these few illustrations and has not taken or considered the entire transactions. On perusal of record this argument is not without substance. In our view, the facts require reconsideration and we deem it fit to remand the matter to the adjudicating authority, leaving all issues open.

12. In the result, the impugned order is set aside and the matter is remanded to the adjudicating authority for denovo adjudication who shall give reasonable opportunity to the appellant for furnishing evidence ~~of~~ and personal hearing. The appeal is allowed by way of remand.

(Operative portion of the order was pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex