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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/3765/2005-3767/2005 Date 30/04/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To: 2. MR. A.K. GANDHI, 3. MR. S.K. GANDHI,
M/S. BOX & CARTON INDIA PVT.LTD.
16/2, MATHURA ROAD, PLOT NO.11 FARIDABAD
M/S. BOX & CARTON INDIA PVT.LTD.

Appellant
Vs
C.C.E. DELHI IV
Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 195-197/08 **Excise** dated 24-4-08 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. DELHI IV
   NEW CGO COMPLEX, NH-IV, FARIDABAD, HARYANA 121001.
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
3. SDR.
4. ~~JCDR~~.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Excise Appeal No.3765 to 3767/05

[Arising out of Order-in-Original No.25/RH/Adj/2005-06 dt.12.9.05 passed by the Commissioner of Central Excise, Faridabad)

For approval and signature:
Hob'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

1.	Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?		No
2.	Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?		Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Yes
4.	Whether order is to be circulated to the Department Authorities:	:	No

M/s. Box & Carton India Pvt. Ltd. Appellant

Versus

CCE, Delhi-IV Respondent

Appearance

Sh. B.L.Narsimhan, Adv. For Appellant

Sh. H.K.Thakur, Authorised Departmental Representative(JCDR) For Respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDEN
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

Date of decision: 24.4.08

FINAL Order No. 195 - 197/08-EX

Per Rakesh Kumar:

These three appeals have been filed by M/s. Box & Carton(India) Pvt. Ltd., 16/2, Mathura Road, Faridabad (hereinafter referred to as BCI), Shri A.K.Gandhi, Director of BCI and Shri S.K.Gandhi, Partner of M/s. Super Fine Packaging, 16/2, Mathura Road, Faridabad(hereinafter referred to as SFP) against Order-in-Original No.25/RH/Adj./2005-06 dt.12.9.05 passed by the Commissioner of Central Excise, Delhi-IV. By this order, the Commissioner ordered-(a) clubbing of clearances of BCI and SFP for the purpose of determining the aggregate value of clearances in terms of SSI exemption Notification No.8/99-CE dt.28.2.99, Notification No.8/2000-CE dt.1.3.2000, Notification No.8/2001-CE dt.1.3.2001, Notification No.8/2002-CE dt.1.3.2002 and Notification No.8/2003 dt.1.3.2003; (b) confirmed the demand of duty amounting to Rs.49,39,323 against BCI under proviso to Section 11A(1) of Central Excise Act,1944 alongwith interest on this duty at the applicable rate as per the provision of Section 11AB; (c) imposed penalty of Rs.49,39,323/- on BCI under Section 11AC; (d) imposed penalty of Rs.15 lakhs on BCI under Rule 25(1) of Central Excise Rules,2001/2002 read with erstwhile Rule 173Q(1) of Central Excise Rules,1944 and (e) imposed penalty of Rs.2 lakhs on Shri S.K.Gandhi, penalty of Rs.5 lakh on Shri A.K.Gandhi under Rule 26 of Central Excise Rules,2001/2002 read with erstwhile Rule 209A of Central Excise Rules,1944.

2. SFP is a partnership firm incorporated since 1985 with Shri A.K.Gandhi and Shri S.K.Gandhi, who are real brothers, as its partners. Since 1.4.02 when Shri A.K.Gandhi retired from the partnership, SFP has become a proprietorship firm of Shri S.K.Gandhi. However, except for Rs.25,000/-, Shri A.K.Gandhi's share of capital has not still been returned by Shri S.K.Gandhi, on which according to him, he is paying interest to Shri A.K.Gandhi. SFP is registered as small scale unit and has been availing of duty exemption under Notification No.8/99-CE dt.1.3.99 and its successor notifications. SFP took Central Excise Registration only in Sept'03, as earlier it was claiming to be fully under exemption and was filing annual declaration.

2.1 M/s. BCI is a private limited company incorporated since 1995 and its Directors are Sh. A.K.Gandhi, his wife Ms. Reena Gandhi, Ms. Pushpa Gandhi wife of his brother Shri S.K.Gandhi. BCI has, since beginning, been paying full duty.

2.2 Both the units are situated at adjacent plots and manufacture the same products – Corrugated Boxes falling under sub-heading 4819.00 and Polythene Bags falling under sub-heading 3923.00.

3. Acting on an information that BCI is clearing their goods from SFP without payment of duty, the premises of both the units were searched by the Central Excise Officers of Delhi-IV Commissionerate on 27.3.03 and enquiry was made with Shri A.K.Gandhi, Shri S.K.Gandhi and the employees of both the units. On enquiry with Shri A.K.Gandhi, Shri S.K.Gandhi and their employees and scrutiny of the records seized, the following facts are merged:

(1) At the time of the officers visit to the premises of BCI, Shri S.K.Gandhi was present and a cabin with his name plate was found in the office premises of BCI and in fact at that time he introduced himself as Director of BCI, though subsequently it was found that he was proprietor of SFP and at that time, on paper he was supposed to have nothing to do with BCI. At that time, in the adjoining SFP it was found that only the polythene bags were being manufactured, though the machines for manufacture of corrugated boxes were also installed. There was neither any electricity connection in the SFP nor there was machinery for printing the cartons.

(2) On enquiry with Shri A.K.Gandhi, it was found that he is the active Director and the other two Directors Ms. Reena Gandhi and Ms. Pushpa Gandhi are inactive Directors. Both the units had

common telephone connection and fax installed in the premises of BCI and accounts of both the units were being maintained by the same Accountant Shri A.K.Gulati.

(3) On scrutiny of a file recovered from the premises of BCI, It was found that on a number of occasions, the raw material for the manufacture of finished goods, procured in the name of SFP, had, actually, been received in the factory premises of BCI and in fact the raw-material for both the units was being received under the same Salex Tax No.FBD/HGST/120298 dt.26.3.85 which belongs to SFP.

(4) From a file recovered from BCI, some letters issued from BCI to their customers – M/s. Maturi Udyog Ltd. and JCT Ltd. were found wherein BCI had offered to supply the corrugated boxes through their 'associate concern SFP'.

(5) Though on paper BCI with Shri A.K.Gandhi, Ms. Pushpa Gandhi and Ms. Reena Gandhi as Directors and SFP with Shri S.K.Gandhi as proprietor, claim to be independent units, it was found that on numerous occasions, Shri S.k.Gandhi had signed BCI letters to the customers of BCI and similarly Sh. A.K.Gandhi has signed the letters of SPF to its customers, while Sh. A.K.Gandhi and Shri

S.K.Gandhi had not authorized each other to sign the letters of each other's company.

3.1. It is the view of the above that the SCN dt.1.9.04 was issued to BCI, SFP, Shri A.K.Gandhi and Shri S.K.Gandhi proposing to club the clearances of BCI and SFP for the purpose of exemption Notification No.8/99-CE and successor notifications and recovery under Section 11AC of the Act, of allegedly short paid duty amounting to Rs. 57,44,900/- for the period from 1.8.99 to 31.3.04 alongwith interest on this duty under Section 11AB and also for imposition of penalty on BCI, Shri A.K.Gandhi and Shri S.K.Gandhi.

4. Heard both the sides.

4.1 Appearing on behalf of the appellant Shri B.L.Narsimhan made the following submissions:

(1) The SCN is bad in law as it fails to identify as to who is the main manufacturer and who is the dummy unit and on this ground itself the Commissioner's order should be set aside. In this regard, reliance is placed on the Tribunal's judgment in the case of P.K.Industries vs CCE reported in 2004(163)ELT.204.

(2) The Commissioner's order demands duty from BCI by clubbing the clearances of BCI with the clearance of SFP, which is a SSI unit, while BCI was paying full duty and never claimed the benefit of SSI exemption 8/99-CE on its successor notifications. Therefore, there is no question of denial of the SSI exemption to BCI and consequential demand of duty from them.

(3) There is no evidence to show that the BCI and SFP constitute one manufacturer. Commissioner's findings on this point as recorded in para 73 of his order are to the contrary.

(4) Since BCI and SFP are located on separate plots and each unit has separate entry and exist gate, has separate machinery for manufacture of finished products, has separate set of employees, separate raw-material procurement, separate sales tax and P.F. registration, separate Central Excise registration, separate income tax Pan number and file separate income tax returns and since while BCI is a private limited company and SFP is a proprietorship concern, the two are separate and independent entities and there is no question of treating the two as one and the same. As per the Board's circular No.6/92 dt.29.5.92, Limited companies are to be treated as separate legal entity and would be eligible for separate exemption.

(5) The Commissioner's conclusion that SFP and BCI constitute one unit is totally wrong. The factors like raw-material purchased from the same supplier, adjacent location of the two units, common staff, common telephone No. and fax No., common electricity connection and S.K.Gandhi of SFP signing the BCI's letters and Shri A.K.Gandhi of BCI signing of SFP's letters or BCI and SFP sharing the same common office are not relevant at all for determining the question as to whether BCI and SFP are two independent units or the two are one and the same.

(6) In this case, there is no suppression, as BCI were filing R.T.12/GR-1 returns during the period of dispute, and SFP, availing SSI exemption, was filing annual declaration regarding value of clearances. Therefore, major period of SCN from Aug'99 to July'03 is time barred. In any case, since the officers visited the unit of BCI and SFP was on 27.3.03 and the SCN had been issued on 1.9.04, the Department had knowledge about the alleged relationship between BCI and SFP since 27.3.03 and therefore, the demand for the period from 27.3.03 to 31.7.03 is time barred. In this regard, reliance is placed of the Larger Bench of the Tribunal in the case of Nizam Sugar Factory vs CCE reported in 1999(114)ELT.423.

(7) Since the demand of duty against BCI is without any basis or justification, there is no ground for imposition of penalty on Shri A.K.Gandhi and Shri S.K.Gandhi under Rule 26 of Central Excise Rules.

(8) In any case, the quantification of demand is incorrect. If the clearances of SFP are clubbed with the clearances of BCI, the demand of duty against BCI would be only Rs.27,95,873/- as in the event of clubbing the clearances of BCI with those of SFP, BCI would become eligible to claim Cenvat credit amounting to Rs.12,74,311/- in respect of the raw materials purchased and received by SFP and besides this, would also be eligible for abatement of duty amounting to Rs. 5,80,642/- on account of clearances for export made by SFP.

4.2 Shri H.K.Thakur, Ld. JCDR appearing on behalf of the Department emphasized that in view of the facts narrated in para 2 to para 11 of the Commissioner's order, SFP is just an extension of BCI and the goods manufactured by BCI were being cleared through SFP by wrongly availing the SSI exemption.

5. We have considered the rival submissions. The undisputed facts are as under

(1) While SFP is a proprietorship concern of Shri S.K.Gandhi since 1.4.02(earlier a partnership concerned with his real brother Shri A.K.Gandhi

as the other partner), BCI is a private limited company with Shri A.K.Gandhi, Ms. Pushpa Gandhi wife of Shri S.K.Gandhi and Ms. Reena Gandhi, wife of Shri A.K.Gandhi as Directors and since admittedly Ms. Reena Gandhi and Ms. Pushpa Gandhi are inactive Directors, BCI is being run by Shri A.K.Gandhi, the real brother of Shri S.K.Gandhi, the Proprietor of SFP. Both the units are situated on adjacent plot.

(2) While both the units have machinery for manufacture of corrugated boxes and polythene bags, SFP does not have any power connection and claim to be running the machinery by an electric generator SFP does not has any printing machinery for printing the carton.

(3) Both the units have a common telephone and fax number installed in the premises of BCI and share common staff and common office located in BCI's premises.

(4) It has not been disputed that on many occasions, Shri S.K.Gandhi has signed the letters of BCI and Shri A.K.Gandhi signed the letters of SFP without any such authorization.

(5) The raw material procurement is not only procured from the same source and under a common sales tax registration number in the name of SFP, but it has also been found that on numerous occasions, the raw material procured in the name of SFP was actually received in the premises of BCI.

(6) On several occasions, BCI has written to his customers offering to supply corrugated boxes through SFP. BCI vide letter dt.24.9.01 had intimated to Maruti Udyog Ltd. that they have a stock of 5335 boxes which can be supplied through their associate concern SFP in which case they would not be charge with excise duty. Similarly, BCI vide their letter dt.14.3.2000, intimated M/s. JCT that since 16% excise duty has been imposed on corrugated boxes, they can supply the corrugated boxes through their sister concern SFP, which is an exempted SSI unit and M/s. JCT was requested to issue a purchase order in the name of SFP. This letter to JCT had been signed by Shri S.K.Gandhi on behalf of BCI though on paper Shri S.K.Gandhi was supposed to have nothing to do with BCI.

5.1 The explanation given for Sh. S.K.Gandhi of SFP signing without any authorisation from BCI, the letters on behalf of BCI(reminding the buyers for payment as well as quoting the rates of corrugated boxes manufactured in BCI) and Sh. A.K.Gandhi of BCI signing, without any authorization from SFP, letters on behalf of SFP to SFP's customers; receipt in the premises of BCI of the raw material purchased in the name of SFP and numerous instances of BCI offering to supply corrugated boxes to its customers through SFP to enable them to save the excise duty, are not at all satisfactory.

5.2 From the above facts the inescapable conclusion would be that though on paper BCI and SFP bear the label of separate corporate identity – BCI a private limited Company with shri A.K.Gandhi, his wife and wife of Shri S.K.Gandhi as Directors and SFP, a proprietorship concern of Shri S.K.Gandhi, behind this corporate veil, the two concerns are being run as one unit. The absence of machinery for printing cartons in SFP and there being no power connection in it coupled with the above mentioned letters of BCI to its customer offering to supply the corrugated boxes through SFP are a clear indication that SFP is just an extension of BCI and two units were being run as one unit only and the goods actually manufactured in BCI were being cleared through SFP claiming SSI exemption. The Commissioner, therefore, has rightly clubbed the clearances of the two units and demanded duty from BCI by denying the benefit of SSI exemption to SFP.

5.3 It has been pleaded that in para 73 of the Commissioner's order, the Commissioner has given a finding that the BCI and SFP are independent units. But on going through para 73 of the order, it is found that what the Commissioner has observed that it has not been disputed i.e. BCI and SFP are working units. There is no finding of the Commissioner that the two are independent units.

5.4 It has been pleaded that since BCI had never availed the SSI exemption and therefore, there is no question of denying the same to it and no question of demand of duty from them. This contention is not acceptable, as when, as discussed above, the BCI and SFP are being run as one unit and SFP was being used by BCI for clearance of its goods without payment of duty, the clearances of SFP have rightly been clubbed with the clearances of BCI and duty has been rightly demanded from BCI on this basis invoking proviso to Section 11AC(1) of the Act. For this it is not necessary to invoke clause 2(vi) & 2(vii) of exemption Notification No.8/99-CE and corresponding clauses of successor notifications Just because these clauses have been invoked, the demand of duty does not get vitiated.

6. It has been pleaded that some the officers had visited the units on 27.3.03 and the SCN had been issued on 1.9.04, for demand of duty for short paid duty for the period from 1.8.99 to 31.3.04, the duty demand for the period from 27.3.03 to 31.7.2003 is time barred and in this regard, the reliance has been placed on the Tribunal judgment in the case of Nizam Sugar Factory vs CCE reported in 1999(114)ELT.429. However, this judgement does not help the appellant as in this case, it has been held that the date of knowledge of the departmental officers in respect of clandestine removal of goods/suppression of facts is not relevant for the purpose of computing the period of five years and the date for this purpose is the "relevant date" as defined in Section 11A(3).

7. It has been pleaded that in any case the quantification of duty demand is incorrect and would get reduced to Rs.27,95,873/- as (a) in the event of clubbing the clearances of SFP with the clearances of BCI, the BCI would become eligible to claim input duty credit of Rs.12,74,311/- in respect of inputs received by SFP for manufacturing operation and (b) export sales of Rs.36,29,012/- involving excise duty of Rs.5,80,642/- made by SFP during the period of dispute. However, the Commissioner in his order has given a clear finding that inspite of being asked, BCI have neither furnished the documents showing the procurement of raw material by SFP nor have furnished any documents in support of their claim that SFP made export sales of Rs.36,29,012/- involving duty of Rs.5,80,642/- and therefore, their claim for reduction in duty demand was rightly rejected.

9. In view of the above, we find no merit in these appeals and the same are dismissed.

Pronounced on 24.4.08

(Rakesh Kumar)
Member Technical

(S.S.Kang)
Vice President

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