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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/2916-2921/2004 - EX[DB] Date 26/06/2009

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

To :
C.C.E.BHOPAL
48,ADMINISTRATIVE AREA AREA HILLS
HOSHANGABAD ROAD BHOPAL
C.C.E.BHOPAL Appellant

Vs

M/S WERAWELL TRYES & TUBES PVT.LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 425-430/2009- **EX[DB]** dated 26-5-09

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   M/S WERAWELL TRYES & TUBES PVT.LTD.
   PANKHA BETUL M.P
2. Adv. / Consult SH. NAVEEN MULLICK, ADV,
   B-388, MEERA BAGH,
   N. DELHI - 63
3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
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(...strar
...anch)

19. M/S VERMA TYRES,
PANKHA BETUL M.P.

P.T.O.-2

20. M/S DEVI TYRES,
PANKHA BETUL M.P.

21. M/s. S. K. TYRES,
PANKHA, BETUL (MP)

22. SHRI SAM VERMA,
M/S. WEARWELL TYRES & TUBES (P) LTD,
PANKHA, BETUL (MP)

23. SHRI K.K. MEHTO,
M/S. WEARWELL TYRES & TUBES (P) LTD,
PANKHA, BETUL (MP)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Central Excise Appeal No.2916 to 2921 of 2004

[Arising out of Order-in-Original No.8-18/Commr/C.Ex/03 dated 28.2.2003 passed by Commissioner, Customs & Central Excise, Bhopal]

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, 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?	:	Yes
2. Whether it should 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?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

<u>E Appeal No.2916 of 2004</u>

Commissioner of Central Excise — Appellant
BHOPAL

Vs.

M/s. Wearwell Tyres & Tubes P. Ltd. — Respondent

E Appeal No.2917 of 2004

Commissioner of Central Excise BHOPAL — Appellant

Vs.

M/s. Verma Tyres — Respondent

E Appeal No.2918 of 2004

Commissioner of Central Excise BHOPAL — Appellant

Vs.

M/s. Devi Tyres — Respondent

E Appeal No.2919 of 2004

Commissioner of Central Excise BHOPAL — Appellant

Vs.

M/s. S.K. Tyres — Respondent

E Appeal No.2920 of 2004

Commissioner of Central Excise BHOPAL — Appellant

Vs.

Shri Sam Verma — Respondent

E Appeal No. 2921 of 2004

Commissioner of Central Excise BHOPAL — Appellant

Vs.

Shri K.K. Mehto — Respondent

Appearance:

Shri Virender Choudhary, SDR for the Appellant
Shri Naveen Mullick, Advocate for the Respondent

CORAM:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

Date of Hearing/decision : 26.5.2009

Final **ORAL ORDER NO.** 425 to 430/09-EX

Per M. Veeraiyan (for the Bench):

These six appeals are by the Department against the order of the Commissioner No. 8-18/Commr/C.Ex/03 dated 28.2.2003 which was passed in de novo proceedings in pursuance of CEGAT's Final Order No. 226-261/2000-C dated 3.5.2000.

2. M/s. Wearwell Tyres & Tubes P. Ltd., the main respondent (hereinafter called respondent No. 1) is a registered manufacturer of tyres and they were paying duty at the normal rates. The three firms namely, M/s. Verma Tyres (hereinafter referred to as respondent No. 2) M/s. Devi Tyres (hereinafter referred to as respondent No. 3) and Shri S.K. Tyres (hereinafter referred to as respondent No. 4), were reportedly started by Shri Sam Verma of M/s. Wearwell Tyres & Tubes P. Ltd. They were also registered as units for manufacture of tyres and they were availing exemption under Notification No. 231/85 and paid the duty at 50% of rate of duty otherwise leviable on such goods in terms of said Notification. Shri Sam Verma is Director of M/s. Wearwell Tyres & Tubes P. Ltd. and Shri K.K. Mehto is Managing Director of M/s. Wearwell Tyres & Tubes P. Ltd. who are the other respondents.

3. Heard both sides.

4. Relevant facts in brief are as follows:

a) The respondent No.1 started manufacturing tyres with an installed annual capacity of 6,00,000 tyres in 1983 and entire activities were managed by Shri Sam Verma. The other three units (respondents No.2,3 & 4) started manufacturing from December, 1986, June, 1987 and November, 1987 respectively. They were started for the purpose of manufacture of bus and truck tyres each with a capacity of 10,000 tyres per annum. Each of the respondent No. 2,3 and 4 availed small scale exemption in terms of notification 231/85 dated 11.11.85 claiming that the aggregate value of tyres and tubes and flabs cleared for home consumption on behalf of each of them was below Rs.2 crores and accordingly, paid concessional rate for clearances upto Rs.50 lakhs for each of the financial year.

b) The officers visited the factory premises on 2.2.89 and resumed various documents ranging from project reports for setting up the three small scale firms, internal correspondence, correspondence between the respondent firms and the bank, balance sheet for the various companies and other private records relating to procurement of raw materials, cash transaction etc. On the basis of scrutiny of records, Collector (presently known as Commissioner) issued 11 show cause notices on various dates starting from 12.12.89 alleging that respondents No. 2, No.3 and No.4 did not have adequate machinery to manufacture such type of tyres and tubes; that they did not invest sufficient funds to enable them to manufacture tyres and tubes; that they did not have land in possession for running the factories; that they received "green tyres" from respondent No.1 and undertake only minor processes; that the entire activities of respondent No.2, 3 and 4 were controlled by Shri Sam Verma of respondent No.1. The tyres were manufactured with the brand name of respondent No.1 and the entire quantity so manufactured by respondent No.2, 3 and 4 were sold back to respondent No. 1; that the sale by respondent No.1 to respondents No.2, 3 and 4 and sale back by respondents No. 2, 3 and 4 to respondent No. 1, were make belief arrangements and they have sought financial accommodation with the bank for such arrangement. The entire activities of respondents No.2, 3 and 4 were controlled by officers of respondent No.1 and three respondents ~~them~~ were sham units/ satellite units of respondent No. 1. Therefore the eligibility criterion prescribed under 231/85 should also take into account clearances made by respondent No.1 which was more than Rs.2 crores and therefore, the respondent No. 2,3, and 4 were not eligible for the exemption availed by them. Accordingly, the 11 show cause notices proposed a total demand of Rs.1,65,05,336/- covering the period from December, 1986 to March, 1994. The Commissioner vide the impugned order taking into consideration defence submissions contained in the reply to the show cause notice and those advanced at the time of personal hearing dropped the proceeding.

5. Learned SDR assails the order of Commissioner on the ground that every important evidence has been ignored by the Commissioner. He took us through some of the documents which, according to him, the Commissioner has omitted to consider in proper perspective. For example, the internal communication dated 28.3.88 refers to plan for showing

despatch of 66 number of tyres before 31.3.88 even though they were not physically manufactured. This documents show that the respondents have indulged in manipulation of records. He also relied on a letter dated 1.12.88 written by one Shri A.K. Roy, Chief Coordinating Manager of Wearwell Tyre and Tube Industries (P) Ltd. to the Branch Manger, Central Bank of India, Bhopal wherein certain accommodation was asked for in relation to sale of green tyres by respondent No.1 to respondents No. 2, 3 and 4 and sale of tyres back by respondents No. 2, 3 and 4 to respondent No. 1. He submitted that the Commissioner has failed to appreciate the facts that the entire activities starting from procurement of raw materials and the decisions relating the quantum of production and the quantum of clearance by small scale units were controlled by officials of respondent No.'1'; that the three small units did not have sufficient manufacturing facility to independently manufacturer tyres which were meant for trucks and buses; that the show cause notices have alleged that respondent No. 1 had provided land to small units on lease basis and supplied steam to the smaller units; ~~were said to be recovered by Duty Agreement~~; that tyres were manufactured only with the brand name of respondent No. 1 and sold to respondents No.2,3 and 4 and therefore, respondents No.2, 3 and 4 did not have independent existence and they could have been rightly considered as sham units or satellite units of respondent No. 1 and the clearance of respondent No. 1 was more than Rs.2 crores in every financial year, the respondent No. 2, 3 and 4 are not eligible for exemption under Notification No.231/85.

6. Learned Advocate for the respondents reiterates the findings and reasoning of the Commissioner.

7.1 We have carefully considered the submissions from both the sides. We find that show cause notices have been issued based on certain documents resumed from the respondent No.1. The show cause notices relied on nearly 1300 pages of various documents. Some of the documents through which learned SDR took us through, threw doubt about activities of the respondents. Surprisingly, no statement of any of the person who has authored the documents has been relied upon. Infact, there is indication that no statement has been taken from any of the persons concerned. The show cause notices were based on mere inference of various documents adopted by the department. None of these documents have been shown to the witnesses and their version obtained. We are surprised that such a massive demand has been proposed based on "incriminating documents" resumed from the possession / control of the respondents and without deciding the veracity of the same in the investigation. The version of the respondents were available only in the replies to the show cause notice.

7.2 The Commissioner has taken into account the evidence relied upon in the show cause notice and in fact reproduced para 10 and 11 of the show cause notice and analysed the defence submissions of the parties to the show cause notice and recorded his finding on each of the major evidence sought to be relied upon by the department. The relevant portion of the finding are reproduced below:-

13.1 In view of the CEGAT's order supra, M/s. VT, M/s. DT and M/s. SKT in support of their claim have submitted a list of machinery installed in their respective units and the said list is supported by an inspection report of the inspection done by Manager DIC Betal at the time of granting them the provisional SSI registration. Affidavits and copies of invoices for the purchase of machines have also been submitted by them from which it is apparent that these were not purchased by Shri Sam Verma as alleged in the notice but were purchased by different persons. They had also supplied list of machineries to the Superintendent (P), Central Excise Indore on 03.02.1989 during his visit to the smaller units. Balance sheets of the respective units also show the value of plant and machinery installed, in those units.

13.2 The smaller units have also submitted copies of invoices of steam and other utilities supplied by M/s. WWTL and copy of few pages of ledger showing accounting of the above transactions which confirm that all the transactions between the smaller units and M/s. WWTL were on principal to principal basis.

13.3 They have also submitted copy of panchnama dated 29.01.1987 in respect of M/s. VT wherein it has been clearly mentioned that a green tyre was got manufactured by the Central Excise officers in presence of panchas in the said small unit from raw material stage in order to ascertain as to whether the tyre building machine installed therein is in working condition or not. From the panchnama it is very clear that M/s. VT had facility and machineries to manufacture tyres including green tyres.

13.4 The smaller units have also produced inspection registers kept in their factories wherein the Central Excise officers have made entries during their visit to the factories. From these registers it is seen that the Central Excise officers were visiting the units regularly and conducting necessary checks from time to time. The remarks made by Central Excise officers on different dates in these registers confirm that they had also verified manufacturing of green tyres in those units on different dates.

13.5 It is thus seen from records that the allegation that M/s. VT, M/s. DT and M/s. SKT were not having the adequate machineries to manufacture tyres right from the raw material stage and that they all were having the facility to manufacture tyre only from green stage of tyres is not correct. It is not established that M/s. WWTL, have supplied green tyres to the smaller units but had issued invoices for intermediate goods viz. bead, tread, rubberised textile material. There is no evidence on record to prove it. On the contrary M/s. WWTL in this regard have submitted that CEGAT in a separate case vide its final order No. A/473-78/99-NB(DB) has allowed modvat credit to M/s. VT, M/s. DT and M/s. SKT on tread rubber, bead and rubber sheets combined with textile materials and, therefore, the allegation that green tyres were supplied by them in the guise of bead, tread and rubber sheets was not correct. The CEGAT in its order no. A/473-78/99-NB(DB) has allowed credit considering the fact that there were proper gate passes available for payment of duty on said inputs and these had also been entered in the modvat documents. These modvat documents were being regularly filed by the units to the Range Office and were also being verified by the Central Excise Officers.

14.5 As regards the allegation of supply of tyres at a favourable price by smaller companies to M/s. WWTL, it is observed from records that M/s. WWTL had undertaken marketing of the tyres manufactured by the smaller units and in doing so they had incurred freight charges, other marketing expenses including replacement losses and to cover up these expanses there was a difference of about 11% in the ex-factory price of the smaller units and sale price of M/s. WWTL. As such, the prices cannot be considered as favourable prices. Simple by asking the smaller units that their sale price should not be greater than the ex-factory net price of tyres manufactured by M/s. WWTL plus applicable taxes, it cannot be inferred that M/s. WWTL were controlling the prices of smaller units. It is a normal trade practice that when a unit is marketing the products manufactured by another unit and which are similar to the goods manufactured by themselves, they will purchase the goods from other unit at a lesser value than their own, otherwise they will suffer a loss because they will also be incurring marketing expenses.

15. There is no evidence available in the documents brought on record to reveal that there was an overall control of M/s. WWTL and Shri Sam Verma over smaller units as alleged and it is not proved that all the four units were being controlled by same officers deployed at work site. M/s. WWTL has been promoted by M/s. Akron Tyre Company of Grand Cayman, USA and it hold 98.2% of total shares of WWTL. Shri Sam Verma is President of M/s. Akron Tyres, USA and holds 80% of its share capital. Shri Arvind Verma holds more than 51% shares of M/s. VT and most of the machines of M/s. VT were purchased by him in USA, M/s. DT is owned by Shri Rameshwar Verma and M/s. SKT was promoted by Jayadevi Verma, Rajkumar Verma and Anjana Verma who jointly owns more than 80% of share holding in M/s. SKT. Shri Sam Verma was thus not the 90% owner of these three units as alleged in the notice. All the four companies are private limited companies and are separate legal entities in their own status. There is no evidence on record to prove common control of any unit on others. They have different share holdings, different management, finance etc. and mutuality of interest and common funding between these companies is not proved. Mere marketing of product manufactured by M/s. VT, M/s. DT and M/s. SKT by M/s. WWTL does not make M/s. WWTL as manufacturer in view of the findings of Tribunal in the case of DM Gears Pvt. Ltd. vs. CCE Delhi-I (2002-141-ELT 514T). Regarding overall supervisory control of M/s. WWTL , there is contradiction in para 10 and 11 (page5) of the notice itself. In para 10,

it has been alleged that Shri Rajan Puri, G.M. of M/s. VT, exercising overall managerial and supervisory control of production, finished goods in stock and administrative control of M/s. WWTL, M/s. VT are exercising financial control over M/s. SKT whereas in para 11 it has been alleged that M/s. WWTL are having overall supervisory control over finance, administration, production, supply, payment of duty of M/s VT, M/s. DT and M/s. SKT.

17.2 In the case of M/s. Bentex Industries Pvt. Ltd. and M/s. Bentex Electricals, both the companies were duly registered with the state and Central Excise Authorities as well as Sales Tax Department independently. They both had got their separate registration numbers for the purpose of labour, industrial law, provident fund, income tax etc. Both these companies were earlier issued show cause notices for denying the benefit of SSI exemption on the ground that they were using brand name of another person who was not entitled to the benefit of said exemption. Later on both the companies were issued another show cause notice proposing clubbing of their clearances. The Tribunal in this case (2003-151-ELT 695 T) has held that issuance of earlier show cause notices for denial of SSI exemption goes on to prove that the Department had accepted both the companies as independent/ separate identities and units and as such the Department is now barred from taking somersault and to plead that only one company is the main unit and the other is a dummy one. In the present case also all the four units are duly registered separately with state and Central Government departments for purposes of various laws. M/s. DT M/s. VT and M/s. SKT were earlier issued show cause notices for denial of Modvat credit on bead, tread and rubberised textile material on the ground that they had received green tyres from M/s WWTL in the guise of bead, tread and rubberised sheets. The demands were also confirmed by the Department but the Tribunal in the case has allowed the credit to all the units vide its order No. A/473-78/99-NB(DB) in the case of

Electro Mechanical Engg. Corpn. vs. Commissioner, CE Jaipur (2003-152-ELT 194 T), the Tribunal has observed that confirmation of duty against all the three firms itself is enough to belie the allegations of the Department that the firms no.2 and 3 were dummy of firm no.1.

8. From the above, it is seen that the Commissioner has held that the three units are different and separate units; that they were having machinery installed in the factories; that they had manufactured tyres for bus and trucks from "green tyres" and that there was justification for lesser sale price for the supplies from smaller units to respondent No.1; that the evidence available did not support that there was overall control by respondent No. 1 and Shri Sam Verma on the smaller units.

9. We have not been shown any evidence that the respondent No.2, 3, and 4 are dummy units or sham units as alleged in the show cause notice. We find that units were running as three separate units with separate machinery, separate electricity connection, separate registration with Excise Department, Sales Tax Department and Income tax Department. Under these circumstances, in the absence of reliable evidence, it would not be proper to treat these three units as sham units or dummy units. The allegation in the show cause notices were based on documents whose authenticity was not tested by questioning the concerned persons. The version of the noticees to the relied upon documents were presented by them only before the Commissioner, who has analysed the defence submissions in detail and accepted their submissions. The Commissioner, as adjudicating authority, can not be expected to take the role of investigating officer. The

fact that registration of these units as small scale units was rejected by the State Government is not relevant as the benefit of concessional rate of duty under Notification No. 231/85 is not dependent on registration as small scale units by the State Government.

10. No reliable evidence have been adduced and no valid grounds have been urged to disregard the detailed findings of the Commissioner. Therefore, we do not find any reason to interfere with the order of the Commissioner.

11. In the light of above, we reject all the appeals by the Department.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member(Technical)

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