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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/5651/2004, E/104-106/2006 - EX[DB] Date **13/10/2011**
E/409-413/2009-EX

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

To :
M/S DIWAN SAHEB FASHIONS PVT.LTD.
5/21,W.E.A.,AJMAL KHAN ROAD,KAROL BAGH, NEW
DELHI
110005

M/S DIWAN SAHEB FASHIONS PVT.LTD. Appellant

Vs

C.C.E. DELHI I Respondent

I am directed to transmit herewith a certified copy of **Final order No.875-883** **2011** **EX[DB]** dated 11-10-11 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 I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
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12. Office Copy
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Assistant Registrar
(Excise Appeal Branch)

P.T.O.-2,

14. MR. M.L. DIWAN,
M/S EAST WEAT ATTIRE.
B-2 BASEMENT SUNDER KIRAN BLDG.
6/41 WEA,KAROL BAGH N.DELHI

15. SMT. USHA DIWAN,
M/A ETHNOCITY
B-I BASEMENT SUNDER KIRAN
BLDG. 6/41 WEA,KAROL BAGH NEW DELHI

16. M/S. DIWAN SAHEB FASHIONS PVT. LTD.
(FORMERLY)M/S DIWAN SONS INDIA PVT.LTD.
23/5 E,EAST PATEL NAGAR,NEW DELHI

17. MR. SUDHIR DIWAN,
18. MR.SURINDER DIWAN,
5/21,W.E.A., AJMAL KHAN ROAD,
KAROL BAGH, N. DELHI-5

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing : 14.9.2011
Date of Pronouncement : 11-10-2011

Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter 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?	No
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Excise Appeal No. 5651 of 2004

(Arising out of Order-in-Original No. 27-29/2004 dated 31.8.2004 passed by the Commissioner of Central Excise, New Delhi)

M/s Diwan Saheb Fashions Pvt. Ltd. — Appellant

Vs.

CCE, Delhi-I — Respondent

Excise Appeal No. 104 to 106 of 2006

(Arising out of common Order-in-Original No. 144/2005 dated 18.10.2005 passed by the Commissioner of Central Excise, New Delhi)

M/s Diwan Saheb Fashions Pvt. Ltd.
Mr. Surinder Diwan
Mr. Sudhir Diwan — Appellants

Vs.

CCE, Delhi-I — Respondent

Excise Appeal No. 409 to 413 of 2009

(Arising out of common Order-in-Original No.30/2008 dated 31.12.2008 passed by the Commissioner of Central Excise, New Delhi)

M/s Diwan Saheb Fashions Ltd. Appellants
Shri Sudhir Diwan, Director
Smt. Usha Diwan
Shri Surinder Diwan
Shri M.L. Diwan

Vs.

CCE, Delhi-I Respondent

Appearance:

Appeared for Appellant : Shri B.L. Narasimhan, Advocate
Appeared for Respondent : Shri Sumit Kumar, DR

CORAM: Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Shri Mathew John, Member (Technical)

FINAL Order No: 875-883/2011-EX dated............

Per Mathew John:

This proceeding is for deciding 9 Appeals. The dispute relates to the period April 2001 to July 2004, though period relating to each appeal varies within this period. The main Appellant M/s Diwan Saheb Fashions (Pvt.) Ltd. was known as M/s Diwan Sons (India) (Pvt.) Ltd. during the said period (hereinafter referred to as "Diwan Sons").

2. The Appellants were engaged in the manufacture of readymade garments falling under Chapter Heading 6201 of the First Schedule to the Central Excise Tariff Act, 1985 with their brand name, that is "Diwan Saheb", selling garments under certain other brand names and also stitching garments out of fabric bought by customers from their shop or

brought by the customers from outside. The Appellants were paying excise duty on readymade garments which they got manufactured on job work basis by supplying raw materials to their job workers. In respect of such goods though the manufacturing activity was undertaken by the job workers, they were paying excise duty in view of the special provisions under Rule 7AA of the Central Excise Rules, 1944 and its successor rules namely, Rule 4 of Central Excise Rules, 2001 and Rule 4 of Central Excise Rules, 2002. The duty liability on such goods is not under dispute in the present proceedings. But this fact is relevant for appreciating the dispute at hand.

3. The dispute in these Appeals is in respect of those cases where their customers came to their shop and purchased fabric and thereafter gave it to the Appellants to get garments stitched according to the measurement of individual customers. There were also cases where some customers bring fabric bought by them from other shops and give it to the Appellants for getting it stitched. On garments so stitched they were affixing a label "Specially Tailored by Diwan Saheb Designs for Men". The question is whether the Appellants were liable to pay excise duty in respect of garments stitched by them from fabric bought or brought by the customers. The Counsel for Appellants clarifies that tailoring of fabric brought or bought by the customers is done by Diwan Sons only and not by the other two Appellants viz. M/s Ethnocity and M/s East West Attire.

4. There is also another issue involved that two other proprietorship concerns namely East West Attire of Shri M. L. Diwan (father of Shri Surinder Diwan) manufacturing goods under the brand name of "Ethnic Fusion" and Ethnocity of Smt. Usha Diwan (wife of Shri. Surinder Diwan)

manufacturing goods with the brand name "Ethno") were only on paper and were in fact operated as if all the three entities were one, by the Management and employees of Diwan Sons and using the resources of Diwan Sons and the entire profit of all the three entities were shared by the same family. The case made out by Revenue is that these firms did not have any separate existence and were floated just to avail the benefit of small scale exemption, in respect of garments shown to have been manufactured by these two firms. The revenue involved on account of this dispute is only to the extent of Rs 36,05,108/-, according to the Appellants. The Appellants pray for refund of Rs. 27,22,000/-, along with interest, already deposited by them on this count.

5. Thus the issues which are being contested by the Appellants in these Appeals are the following :-

(i) Whether garments made out of material brought or bought by the customer and given to them for stitching were excisable.

(ii) If excise duty was to be paid on such goods who were liable to pay duty-whether the Appellants or whether the persons supplying fabric.

(iii) Whether it is legally permissible to club clearances of the two allegedly dummy units, M/s East West Attire & M/s Ethnocity in the hands of M/s Diwan Sons (P) Ltd.

6. Three Show Cause Notices issued by Revenue raising excise duty demand on the above issues for the period April 2001 to March 2003 were adjudicated by Order-in-Original No. 27-29/04 dated 31.8.2004 which resulted in confirmation of duty demand of Rs.2,06,46,457/- along with appropriate interest. Further, penalty equal to the said duty amount was

imposed on the Appellant company under Section 11AC. Further penalty of Rs.25 lakhs each was imposed on Shri Surinder Diwan and Sudhir Diwan, Directors of M/s Diwan Sons India (Pvt.) Ltd. under Rule 26 of the Central Excise Rules 2002 and penalty of Rs.5.00 lakhs each was imposed on Shri M.L. Diwan of M/s East West Attire and Smt. Usha Diwan of M/s Ethnocity under Rule 26 of Central Excise Rules, 2002. Aggrieved by the order, the Appellants had filed Appeals before the Tribunal. The Tribunal disposed of the Appeals vide its order Nos 237-241/2008-EX.(DB) dated 2.5.2008. In the said order, the Tribunal held as under:

"**8.** In view of the above, while holding that -

(a) the clearances of Ethnocity and East West Attire are liable to be clubbed with the clearances of Diwan Sons for the purpose of SSI exemption notification and duty demand on this basis raised vide Show Cause Notice dated 12-8-2003 is not time-barred; and

(b) the garments made as part of "tailoring activity" as per individual customer's measurements and specifications are excisable and the same are not eligible for exemption under Notification No. 76/86-C.E.

we remand the matter to the adjudicating authority for determining whether in terms of the provisions of Rule 7AA of the Central Excise Rules, 1944 and its successor Rule 4(3) of the Central Excise Rules, 2001/2002, the liability to pay the duty in respect of the garments made as part of tailoring activity of Diwan Sons, as per individual customer's measurements and specifications is of Diwan Sons and re-determining the duty liability of Diwan Sons and also the quantum of penalties on Diwan Sons and other Appellants in the light of his findings on this point. Appellants are to be given an opportunity of personal hearing before decision on the above issues. The appeals are disposed of in the above terms."

7. Aggrieved by the said order, the main party, M/s Diwan Sons, filed an Appeal with the Supreme Court. The Supreme Court vide order dated 27.3.2009 in Civil Appeal No. 5173/2008 ordered as under :-

> "In this case the matter needs to be remitted to the Tribunal to decide whether there existed dummy units set up by the assessee as alleged by the department, if so, whether transactions undertaken by the assessee have been routed through the dummy units. It is in this context that the Tribunal will also decide as to who was the real manufacturer of the items in question. Depending on the answers to the above issues the Tribunal will then decide the question regarding applicability of Exemption Notification.
>
> Accordingly the impugned judgment is set aside, the matter is remitted to the Tribunal for consideration in accordance with law.
>
> Accordingly, the appeal is disposed of with no order as to costs."

8. Thus the original Appeals have been remitted back by the Supreme Court to the Tribunal for de novo decision and the Appeals are restored to its original numbers which are **Excise Appeal No. 5651 of 2002**. On the issue of garments stitched from fabrics bought or brought by the customers another Show Cause Notice for the period 1.12.2003 to 8.7.2007 was issued which was adjudicated by Order-in-Original No. 144/2005 dated

17.10.2005. The parties have filed Appeal Nos. E/104 to 106/2006 against that order which appeals also are being considered in this order. Further, in the meanwhile, the adjudicating authority completed the de-novo adjudication vide Order No. 30/2008 dated 31.12.2008 re-confirming the entire duty demand in the first order and imposing the same amount of penalties. Against this order also, the Appellants have filed appeals and the Appeal Nos. **E/409-413/2009** are against that de-novo order.

9. The first point argued by both sides was whether the remand made by the Supreme Court vide its order dated 27.3.2009, as reproduced above is an open remand to the Tribunal to decide all the issues involved or it is a restricted order to decide only whether the dummy units through whom some alleged transactions have taken place were really dummy units and to decide who was the real manufacturer of the garments cleared in the name of East West attire and Ethno City and then decide the applicability of SSI exemption notification. It is noted that no specific notification has been mentioned by Hon'ble Apex Court.

10. The ld. Advocate for the Appellant submits that in the first place, the issues of excisabliity of garments stitched from fabric bought or brought by the customers and the clubbing of the clearance of the two units in the hands of M/s Diwan Sons and the issue of time bar were the issues decided against the Appellant in the decision dated 02-05-08 of the Tribunal and this decision was appealed against in the Hon'ble Supreme Court. Other issues raised stand remanded to the lower authority by the Tribunal by the first decision. He submits that there has to be necessarily a decision with reference to the issues remanded. Secondly, the Appellant argues that whenever an order is set aside by the higher Court and the matter is

remanded to the lower authority without any specific ruling on any of the issues involved, such order has to be understood as an open remand. For this argument he relies on the decision of the Supreme Court in **Orient Papers and Industries Ltd. and Another Vs. Tehsildar-Cum-Irrigation Officer and Others** reported in (1998) 7 SCC 303.

11. Ld. SDR, on the other hand, submits that from the order of the Supreme Court, it is very clear that the issue as to the dutiability of garments stitched from fabric bought or brought by the customers was the issue in dispute before the Supreme Court and the Supreme Court after hearing both the sides has not given any specific rulings on this issue but has remitted the matter for deciding the issue whether the other two units were dummy units. So the Tribunal can examine only the issue whether the other two units were dummy units and then decide the eligibility for exemption to small scale units. He relies on the following decisions:

(i) Paper Products Vs. CCE- 2007 (214) ELT 161 SC

(ii) CCE Vs. Hindustan Lever Ltd-2000 (12) ELT 3 (SC)

(iii) Mohan Lal Vs. Anandibai 1971 (1) SSC 813

12. We have considered arguments on both sides. We find that in the decisions quoted by the Ld SDR, there were rulings by a higher authority on certain issues and thereafter the matter was remitted for re-adjudication with reference to specific facts and other issues. In this case the Honourable Apex Court has given no rulings or findings but has given certain directions, mainly in the matter of goods manufactured by the two allegedly dummy units. There are no findings or directions in other matters. So other matters have to be examined keeping in mind of the decision already given by the Tribunal vide its order dated 02-05-08 which was not

overruled by the Apex Court in its order dated 27-03-09 though the order itself has been set aside giving directions on other issues. The decision of the Supreme Court in the case of **Orient Papers and Industries Ltd.** supports only this view.

13. We have heard the Ld. Advocate for the Appellant on the issue whether the impugned activity amounts to manufacture of excisable goods. The main argument raised by the Advocate is based on the legislative intent as clarified by the Board vide F. No. B4/5/2001-TRU dated 30.4.2001 issued at the time of imposing duty on readymade garments as under :-

> "3. It is understood that readymade garments, particularly those bearing brand names, are manufactured in a big way through job workers. Not only that, stitching and other ancillary activities are entrusted to different job works, sometimes smaller ones. Keeping this aspect in view it has been decided that in the case of garments manufactured on job work basis, the liability to pay the excise duty shall be on the person who gets the goods manufactured on his own account from the job-workers (called merchant manufacturer in common excise parlance) and not on the job workers. Rule 7 has been suitably amended for this purpose and a new Rule 7AA has been inserted. The duty liability has to be discharged by the merchant manufacturer as if the garments have been manufactured by him on his own."

14. The second argument is that garment stitched according to measurement of particular customers is not marketable and hence no

excise duty is payable because these are not marketable goods. He relies on the decision of the Tribunal in the case of C.C.E.Vs. Gujarat Narmada Valley Fertilizers Corpn. Ltd. 2001 (130) ELT 710 in the matter to argue that tailor made goods for the need of a particular customer are not marketable. Further he argues that tailoring activity amount to rendering service and hence cannot be subjected to excise duty. They further rely on the decision of Hon'ble Supreme Court in the case of in Hindustan Shipyard Vs. State of A. P.-(2000) 6 SCC 579 and relies on para-16 of the order which is reproduced below :-

> "16. Two simple illustrations may be given to demonstrate applicability of the above said principles. A customer goes to a tailoring shop accompanied by a suit length in his hands and entrusts the same to the tailor for stitching a suit for him as per his measurements. The tailor by devoting his skill and labour stitches the suit and delivers the same to the customer. In this process the tailor utilises lining, buttons and threads of his own. The transaction would remain a contract for work and labour. The settlement suit delivered by the tailor to the customer is not a sale. It would not make any difference if the customer would have selected a piece of fabric of his own choice for a price to be paid or paid and having purchased the suit length left it with the tailor for being stitched into a suit. The property in the suit length had passed to the customer and physical possession over the suit length by the tailor thereafter was merely that of a bailee entrusted with the suit

length. However, if the tailor promises to stitch and deliver the suit for a price agreed upon, investing his own fabric and stitching materials such as lining, buttons and threads, and utilising his own skill and labour then though the customer might have chosen the piece of fabric as per his own liking as to the texture, colour and quality and given his own instructions in the matter of style, the transaction would remain a contract for sale of goods, that is, a stitched suit piece inasmuch as the object of the contract was to transfer property in the stitched suit piece along with delivery of the suit by the tailor to the customer, all investments, whether of material or of skill and labour having been made by the tailor incidental to the fulfilment of the contract. Yet another illustration is provided by Benjamin (ibid.. para 1.046). A doctor or veterinary surgeon who supplies medicines does so as an incident to a contract for professional services, which include diagnosis and advice over and above any work in the making up of the medicine. In contrast, a chemist who makes up a prescription sells it, since his work and skill goes entirely into the product – it is simply a component reflected in the price of the goods. Benjamin concludes – "where work or skill is involved over and above what goes into the making of the goods delivered, it is possible and often correct to view the contract as 'substantially' one for work or services. "In our opinion a reverse case would be one of sale. Benjamin gives yet another

> illustration. A meal supplied to a customer in a restaurant is a sale of goods, the element of service being subsidiary; but a meal supplied to a lodger or a resident hotel guest is part of a contract for services."
> (emphasis supplied)

15.1 The counsel for the Appellant also contests that when excise duty was imposed for the first time on textile fabrics in the year 2001, the highly decentralised manufacturing operations in the textile industry was recognised by the Government and it was considered that it is not possible to collect excise duty from each of the job workers who does one or two of the many processes involved in manufacturing textile fabrics and articles therefrom. Therefore, the Government introduced Rule 7AA of the Central Excise Rules 1944 which read as under:-

> "**7AA. Recovery of duty on articles of apparel manufactured on job work**.-Every person who gets the goods, falling under Chapter 62 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), produced or manufactured on his account on job work, shall pay the duty leviable on such goods, at such time and in such manner as may be specified under these rules, whether the payment of such duty be secured by bond or otherwise, as if such goods have been manufactured by such person:
>
> Provided that such person may authorise the job worker to pay the duty leviable on such goods on his behalf and the job worker so authorized undertakes to discharge all liabilities and comply with all the provisions of these Rules:

> Explanation.- For the purposes of this rule, the expression "job worker" shall be deemed to mean the person who undertakes the process or processes that brings into existence the finished goods, complete in all respects, falling under Chapter 62 of the said First Schedule, in his factory. For the removal of doubt, it is further clarified that the job-worker may also get part of the processing required for the manufacture of the said goods done by another person but should bring back the same for the completion of the manufacturing process in his factory."

15.2 Rule 7 which prescribed that manufacturer of excisable goods have to pay excise duty before clearance of excisable goods from their factory was also amended to add a proviso as under:-

> "Provided further that in respect of goods falling under Chapter 62 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), manufactured on job-work, the provisions of these rules shall apply subject to the provisions of rule 7AA"

16. He points out that this rule was retained as Rule 4 in Central Excise Rules, 2001 and also as Rule 4 of Central Excise Rules, 2002. As per these rules the responsibility to pay excise duty rests on the persons supplying the raw materials, though this rule is in contradiction with the decision of the Supreme Court in the case of **Collector v. Kerala State Electricity Board - 1992 (62) E.L.T. A52 (S.C)** and other cases. The Appellant had accepted the liability under this rule and that is the reason why they paid excise duty on readymade garments manufactured by their job

workers out of materials supplied by them. If the job workers were to be considered to be liable to pay excise duty they did not have to pay any excise duty on such goods. The Appellant is not contesting excise duty paid by them on such goods. The Appellant is only arguing that for the fabrics bought or brought by the customer to the Appellants also the same rule should be applied. That is to say excise duty liability, if any, on such garments was to be paid by the individual customers and not by the Appellant.

17. The Tribunal in its previous order dated 2.5.2008 had specifically directed that this issue has to be examined by the Adjudicating Authority in de novo proceeding with reference to Rule 7AA and successor Rules. In the order dated 31-12-2008 passed by the Adjudicating Authority in de-novo proceedings he deals with this issue at pages 39 and 40 of the Order-in-Original without any numbers for paragraphs. He rejected the argument of the Appellant on the ground that acceptance of this argument would amount to turning upside down the decisions of the Apex Court in the case of **Kerala Electricity Board Vs CCE (Supra)** and hence he came to the finding that the Appellant has to pay duty for garments stitched out of fabrics bought or brought by the customers. He points out that the Adjudicating Authority has not at all discussed Rule 7AA and its successor rules. He argues that upsetting of the legal position in the matter established by the decision of Apex Courts has been done by the Government with the clear intent to do so in the peculiar nature of the textile industry and the rules were made after the decision of the Apex Court in many such cases were known, and thereafter the department cannot just take a U-turn and fasten liability on the Appellant for the impugned activity. Further in the matter of this liability the Counsel claims exemption under Notification 12/2001-CE

dated 01-03-2001 up to 30-04-2001 (when it was rescinded) and for the period after 01-03-2003 he claims exemption under Notification 7/2003-CE dated 01-03-2003 (S. No. 43).

18. In the case of readymade garments manufactured by the alleged dummy units viz. M/s Ethnocity and M/s East West Attire, the argument of the Appellant is mainly a legal argument and not on questions of fact as to whether the Appellant company was doing the entire activities of the two units. The argument raised is that for clubbing the clearances in the name of M/s Ethnocity and M/s East West Attire, a Show Cause Notice should have been issued to these entities but no such notice was issued. He relies on the decision of the Tribunal in the case of Ramsay Pharma (P) Ltd. Vs. CCE 2001 (12&0ELT 789 (Tri-Del) where this issue is very clearly decided that such clubbing cannot be done without issue of notice to the individual units also. Though the notice issued to the Appellant was also issued to the alleged dummy units proposing imposition of penalty, he argues that in that notice the alleged dummy units were not asked why clearances in their name should not be clubbed with value of clearances of Diwan Sons and duty demanded from Diwan Sons. So it is argued that the order based on such SCN is bad in law.

19. The Counsel also submits that duty liability has not been worked out considering the cum-duty benefit that should have been given to the Appellants while quantifying assessable value. The Counsel also submits that the value of Apparels should have been determined under provisions of Notification No. 20/2001-CE (NT) dated 30-04-2001 under which tariff values are fixed for payment of duty on articles of apparel falling under chapter 62. He further points out during the period 01-03-2001 to 30-04-

2001, garments not bearing a registered brand name was exempted from duty under Notification 12/2001-CE dated 01-03-2001. Their brands were not a registered brand name during the said period and they should be given the benefit of the notification for the said period.

20. He also points out that there is no specific finding regarding culpability of each of the individuals on whom penalty has been imposed.

21. The Ld SDR submits that the question whether stitching of garments amount to manufacture is already settled in the proceedings so far in these appeals. He further relies on the decision of Regional Director Employees State Insurance Corporation Vs Ram Chander- 1987 (32) E.L.T. 231 (S.C.) to buttress his argument that stitching of garments amounts to manufacture. He also submits that the garments made to measurement of one individual can fit many other individuals and that is why readymade garments are made and sold. In this respect the garments are different from structural considered by Tribunal in the case of Gujarat Narmada Valley Fertilizers Corpn (Supra)

22. Ld. SDR also submits that when goods are got manufactured through a job worker the law is settled that the job worker is the manufacturer and not the persons supplying raw material. So in the case before us also the job worker viz. M/s Diwan Sons was the manufacturer and not the customers who bought or brought fabric for stitching. The Ld SDR did not make any submissions with reference to Rule 7AA either during oral hearing or in the written submissions submitted on 21-09-2011.

23. In the matter of clubbing of clearances of M/s Ethnocity and M/s East West Attire, the SDR argues that the Appellants have not rebutted any of the factual evidence brought forth by Revenue. Revenue has produced

evidences like control of all three units by one person, flow of money among the units and the fact that these units were set up only when excise duty was imposed on readymade garments. He also relies on the statement of various employees working for the two firms as also the statement of Shri. Sudhir Diwan and Shri. Surinder Diwan Directors of M/s Diwan Sons to the effect that these units were working using work force paid by Diwan Sons. Using common financial resources under the supervision of the same Management and sharing profits within the same family and also that the two units were set up only for avoiding central excise duties. He further points out that the SCN was issued to the Proprietors of the other two firms and the notice proposed to club clearances of all the three units. So the argument that the notice was not addressed to them in their capacity as the proprietor of that unit asking them to show cause why the values should be clubbed is only a technical objection and if they had any real case they had enough opportunity to put up their defence. In support of his argument, he relies on the decision of the Apex Court in the case of CCE Versus V. Madhu @ C.V. Maadhesh-2002 (146) ELT 252 (SC). He further relies on the decision of the Tribunal in Harnik Nutrients Pvt. Ltd Vs. CCE 2009 (238) ELT 235 (Bom) and in Chaitanya Polypack Industries Vs. CCE 2005 (179) ELT 581 (Bang).

24. In the case of time bar the Ld SDR submits that it is already settled in the proceedings so far in these appeals that these demands are not time barred. He further relies on the decision of the Supreme Court in the case of CCE Vs. **Mehta & Co.** reported at 2011 (264) ELT 481 (SC).

25. Further, he argues that in this case of clandestine removal the benefit of working out assessable value considering the amount realised as cum-duty realisation cannot be given and the amounts realised from the customers should be taken as the assessable value.

26. We have considered arguments on both sides. The decision of the Apex Court in the case of **Hindustan Shipyard Ltd. Vs. State of A.P.** is only to the effect that there is no sale involved when a tailor stitches garments from goods supplied and returns it to the customer. The issue of manufacture is not examined in the order. On the other hand the Apex Court has clearly held in the case of **ESIC** (Supra) that stitching of cloth amounts to manufacture. The issue whether the garments made to the measurement of one individual is something that can be brought and sold in the market also needs consideration. Readymade garments are also stitched according to certain measurements for different sizes and if such garments can fit many customers there is no reason why a garment made for one individual cannot fit another person. So the argument that such garments cannot be sold in the market is not acceptable. For deciding marketability, what is to be considered is not whether it is actually brought to the market and sold but whether it can be brought to the market and sold. By this criteria, we are of the view that tailor-made garments stitched to the measurement of one individual is also goods which can be brought and sold in the market and thus are excisable. The argument with reference to the budget speech is a very week argument because reference to such material extraneous to the enacted law can be made only in situations where there is some doubt regarding scope of words and expressions used in the concerned enactment. Further it is seen the budget proposal itself got changed as normally happens during the consideration stage of the

budget as evidenced by rescinding of notification No. 12/2001-CE. So we do not find any reason to deviate from the earlier decision dated 02-05-08 of the Tribunal in the matter of dutiability of the garments stitched from fabrics bought or brought by customers.

27. Under the special provisions made as per Rule 7AA of the Central Excise Rules, 1944 and its successor rules, the responsibility to pay duty on textile articles got manufactured on job-work basis is put on the person who gets goods manufactured on job-work basis. He has to discharge such liability "as if he is the manufacturer". This rule does not say anywhere that the person supplying the raw material would be the manufacturer. The rule only says that such person has to discharge the liability and that in the normal course is done by the manufacturer. So the view that Rule 7AA will upset judicial decisions like that of the Apex Court in the case of Kerala Electricity Board & Others (supra) is not correct. The matter as to who is the manufacturer when raw material is supplied by a person and manufacturing activity is done by another first arose in the context of deciding eligibility for exemption notification issued under section 5A of the Act mentioning criteria with reference to the manufacturer. The finding that the person doing manufacturing activity is the manufacturer was applied for deciding who has to pay duty, as per the provisions of Central Excise Rules also because as per the Rule such liability is normally on the manufacturer. But these are different issues. There is no ruling by the Courts that a Rule cannot be framed to make the supplier of raw material liable to pay duty. This is to say that there is no ruling that a Rules like Rule 7AA and its successor rules are bad in law. That is to say even when the manufacturer of the goods is the job worker, the liability to pay duty can be on another. This position becomes very clear if the definition of assessee

and the Rules prescribing who has to pay duty are scrutinized. Rule 7AA was for making a deviation, for textile goods, from the general rule that manufacturer has to pay duty. The position becomes clear when Rule 4 of Central Excise Rule as it existed prior to 25-03-200 (After 25-03-03 similar provisions were incorporated as a new rule 12B), is examined. This is re-produced below.

"**4. Duty payable on removal.** - (1) Every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided :

Provided that the goods falling under Chapter 61 or 62 of the First Schedule to the Tariff Act, produced or manufactured by a job worker may be removed without payment of duty leviable thereon and the duty of excise leviable on such goods shall be paid by the person referred to in sub-rule (3), **as if such goods have been produced or manufactured by him**, on the date of removal of such goods from his premises registered under rule 9.

Explanation. - It is hereby clarified that where such person has authorised the job worker to pay the duty leviable on such goods under sub-rule (3), such duty shall be paid by the job worker on the date of removal of such goods from his registered premises.

(2) Notwithstanding anything contained in sub-rule (1), where molasses are produced in a khandsari sugar factory, the person who procures such molasses, whether directly from such factory or otherwise, for use in the manufacture of any commodity,

whether or not excisable, shall pay the duty leviable on such molasses, in the same manner as if such molasses have been produced by the procurer.

(3) Notwithstanding anything contained in sub-rule (1), every person who gets the goods, falling under Chapter 61 or 62 of the First Schedule to the Tariff Act, produced or manufactured on his account on job work, shall pay the duty leviable on such goods, at such time and in such manner as may be specified under these rules, whether the payment of such duty be secured by bond or otherwise, as if such goods have been manufactured by such person :

Provided that such person may authorise the job worker to pay the duty leviable on such goods on his behalf and the job worker so authorised undertakes to discharge all liabilities and comply with all the provisions of these rules.

Explanation I. - For the purposes of this rule, the expression "job worker" shall be deemed to mean the person who undertakes the process or processes that brings into existence the finished goods, complete in all respects, falling under Chapter 61 or 62 of the said First Schedule, in his factory. For the removal of doubt, it is further clarified that the job-worker may also get part of the processing required for the manufacture of the said goods done by another person but should bring back the same for the completion of the manufacturing process in his factory.

Explanation II. - For the purposes of this rule, excisable goods manufactured in a factory and utilised, as such or after subjecting to any process, for the manufacture of any other commodity, in such factory shall be deemed to have been removed from such factory immediately before such utilisation."

28. This rule does not state that for textile items job-worker is not the manufacturer. It only says that the duty is to be paid by the person supplying the material as if he is the manufacturer. So this position is not in contradiction with the ruling of the Apex Court in Kerala Electricity Board to the effect that the job-worker was the manufacturer and duty liability should have been determined in his hands. So we are the view that the Appellant had no obligation to pay excise duty on garments stitched out of fabrics bought or brought by the customers. Thus the argument that in the case of textile goods got manufactured on job work basis during the period 2001-2004, the job worker has to discharge excise duty liability is not acceptable. Further if duty liability is determined as if the customer is the manufacturer he should be eligible for exemption for SSI units also. But this issue need not be determined in this proceeding because the persons liable to pay duty are not before us. Therefore, the entire duty demanded on this count demanded from the Appellants is not sustainable. So we are not dealing with exemptions under Notification 12/2001-CE dated 01-03-2001 to 30-04-2001 (when it was rescinded) and under Notification 7/2003-CE dated 01-03-2003 (S. No. 43) and also the issue of valuation under Notification 20/2001 CE (NT) dated 30-04-2001 raised in respect of such goods.

29. The next issue to be examined is about the clubbing of the value of clearances of M/s Ethnocity and M/s East West Attire with that of M/s Diwan Sons, the Appellants are not disputing any of the facts pointed out in the Show Cause Notice. They are only raising the issue that Show Cause Notice proposing clubbing of the value of clearances in the hands of Diwan Sons has not been issued to the two concerns. In fact even during the investigation stage the concerned persons had taken a stand that they were

willing to pay duty liability on this count and they paid duty amount of Rs. 27,00,000/- and interest of Rs.22000/-.

30. However the Hon. Apex Court has directed in its order dated 27-03-09 that Tribunal should decide-,

(i) whether there existed dummy units set up by the assessee
(ii) if so, whether transactions undertaken by the assessee have been routed through the dummy units.
(iii) who was the real manufacturer of the items in question.
(iv) Depending on the answers to the above issues the Tribunal will then decide the question regarding applicability of Exemption Notification.

So these issues have to be decided first though the Counsel for Appellant did not argue on these points. Further it is noticed that in the written submissions given before the hearing the Appellants have contested the issue stating that they have only purchased readymade garments from the two units and sold the same from their trading premises and that M/s Diwan Sons had no connection with these two firms which were independently managed by their proprietors. The written submissions also mention the following case laws in support of their argument:

(i) Renu Tandon Vs. UOI- 1993 (66) ELT 375 (Raj)
(ii) CCE Vs. Saint Laborataries- 2006 (201) ELT 85
(iii) CCE Vs. Vasper Concepts-2006 (196) ELT 95
(iv) Studioline Interior System Vs. CCE-2006 (201) ELT 250
(v) Alpha Toyo Ltd Vs. CCE -1994 (71) ELT 689
(vi) CCE Vs. Sotex-2007 (209)-2007 (209) ELT 9(SC)
(vii) CCE Vs. Auto India-2007 (213) ELT 436
(viii) Shilpachem Vs. CCE-2005 (187) ELT 360

(ix) Summerking Electricals Vs. CCE-2004(176) ELT 302

(x) Bright Paints &Chemicals Vs. CCE-2007 (216) ELT 36

(xi) Jifcon Tools Pvt Ltd Vs. CCE-2007 (208) ELT 345

30.1 Issue (i). The evidence collected shows that these firms had no employees, no equipment or other manufacturing facilities. They were stated to be supplying fabric and branded stickers to M/s Impex India and getting goods manufactured and the manufactured goods were sent to the show rooms of Diwan Sons for sale to customers. The statement of the store keeper, Shri. Bahadur Prasad, shows that the raw materials for all the three entities were managed from the same store by the same persons. Proprietors of both the firms admitted that the day-to-day affairs of both the firms were managed by Shri. Surinder Dhawan. It is also accepted that the profits are shared by the family members. In fact in the entire records the only aspects that can suggest any independent existence are separate sales Tax Registrations and separate brand names for products stated to be belonging to these firms. Against these facts, we have considered the decisions relied upon by the counsel in his written submissions and the decisions pointed by the SDR as below:

(i) CCE Vs. Aldec Corporation- 2005 (188) ELT 241 SC

(ii) CCE Vs. Modi Alkalies & Chemicals Ltd-2004 (171) ELT 155 (SC)

(iv) Supreme Washers (P) Ltd Vs. CCE-2003 (151) ELT 14 (SC)

(v) CCE Vs. V. Madhu- 2002 (146) ELT 252 (SC)

(vi) Harnik Food Industries Vs. CCE-2009 (243) ELT 322

As observed by the Hon Apex Court in the case of Modi Alkalies & Chemicals Ltd (Supra) the question whether units are dummy units is to be decided on the basis of the facts and circumstances of each case and there cannot be any fixed rule about it. The facts as recorded in para 3 (vi), 3(vii), 3 (x), 3 (xvii), 3 (xviii), 3 (xxii) which were not controverted by the Counsel leads to the conclusion that these two firms were only dummy units existing only on paper.

30.2 Issue (ii). It is clear that M/s Diwan and Sons were routing some of the material supplies through these dummy units to the job-workers and getting the goods manufactured.

30.3 Issue (iii). Going by the decision of the Apex Court in the case of KSEB the manufacturers of the goods manufactured in the brand-names were the job workers like M/s Impex India. But considering the special provisions of Rule 7AA and successor rules, M/s Diwan Sons has to pay excise duty on the goods which were manufactured with the brand names of "Ethno" and "Ethnic Fusion".

30.4 Issue (iv) As per provisions of Rule 7AA and its successor Rules M/s Diwan Sons have to pay excise duty as if the goods were manufactured by them. Since they do not qualify for exemption for SSI units and were in fact paying excise duty on goods shown as manufactured on their own account, they will not be eligible for SSI exemption on goods got manufactured by them with the brand names of "Ethno" and "Ethnic Fusion".

31.1 Now it is proper to examine the legal submission made by the Counsel for the Appellant that no notice was issued to the two firms M/s East West Attire and M/s Ethnocity. He relies on the following decisions in support of his argument:-

(i) CCE Vs. N. Manikandan-2009(246) ELT 349 (Tri-Chennai)

(ii) Ramsay Pharma (P) Ltd Vs. CCE-2001(217) ELT 789 (Tri-Del)

Out of these cases, the Counsel is relying more on the first case because in that case the notice was issued to one of the partners of the allegedly dummy unit for imposition of penalty but no notice was issued to the allegedly dummy firm itself. Still the Tribunal held that order for clubbing the clearances of the allegedly dummy firm with the other firm cannot made for the reason that no notice was issued to the allegedly dummy firm. In the second case the two parties involved were two limited companies and there was no notice to the allegedly dummy company at all.

31.2 It is not denied that the proprietors of the two firms M/s Ethnocity and M/s Eastwest Attire were parties to the Show Cause Notices and they were fully aware of the proposal to club the clearances as contained in the SCNs and they have replied to the Show Cause Notices. So the argument that there was no separate Show Cause Notices addressed to them in their capacity as the partners as the said firms proposing clubbing of their clearances with that M/s Diwan Sons is not a valid argument. In this matter the decision in the case of N. Manikandan (Supra) is on a different footing because the allegedly dummy unit was a partnership firm with many partners and the notice was issued to only one of the partners for imposing penalty on him. In the facts of this case we do not agree with the contention that there was no notice to the two firms because these firms were proprietary concerns and the notice was issued to the Proprietors of the two concerns which SCN had the proposal to club the clearances of the two concerns with that of M/s Diwan and Sons. They replied to the notices and have been parties at all stages. So we do not see any merit in the argument that there was no adequate notice to the parties concerned. Therefore, the excise duty demand for duty short paid on this account is maintainable. Since the fact that these were dummy units had been suppressed from the department and could be unearthed only by detailed investigation, the extended period of five years can be invoked for issue of Show Cause Notice in the matter.

32. In the matter of assessable value of these goods we observe that as per page 83 of the order dated 31-08-2004 the goods are assessed as per tariff values given under Notification 20/2001 CE (NT) after allowing abatement of 40% from MRP. Such valuation was not adopted only for calculating duty liability on the stitched garments which demand is being set aside in this order. However we could not find such clear finding in the order dated 17-10-2005. This issue may be re-examined by the adjudicating authority if valuation of goods has not been done as per tariff values Notified under Notification 20/2001 CE (NT). In the matter of the claim that garments were handicrafts, no argument was raised by the Counsel in this proceeding though such claim was made in the first round of litigation. We are in agreement with the earlier finding that the garments cannot be given exemption meant for handicrafts.

33. Thus the demand confirmed on account of clubbing of the clearances of M/s East West Attire and M/s Ethnocity with that of M/s Diwan and Sons is upheld and other demands are set aside.

34. We notice that the quantum of duty involved on account of the issue of clubbing is not coming out very clearly in the impugned order because such demand is jumbled with a few other issues and hence it needs to be re-determined. The claim for exemption under Notification 12/2001-CE for the period 01-03-2001 to 30-04-2001 also needs to be examined and the consequence of such claim on the duty demanded needs to be determined. The question whether the valuation has been done as per Notification 20/2001-CE (NT) needs to be looked into once again. We also notice that the Appellant have substantially paid the duty on this count and had at the

investigation stage expressed their willingness to settle this matter if that was the only issue involved. However the adjudication order in the first round and second round confirmed duties far in excess of the amount due on such issue and they were also not given an opportunity to pay the full duty liability, interest and 25% of duty evaded as penalty as per provisions of section 11 AC of the Act. So considering the decision of the Delhi High Court in K.P. Pouches Pvt. Ltd. v. Union of India-2008 (228) E.L.T. 31 (Del.) we order that the respondents should be given an opportunity for settling the matter by payment of the dues as envisaged in section 11AC of the Act. Further the role played by each of the persons may be specifically stated and penalty determined considering the lower duty liability that would arise as per this order and the co-operation extended by the Appellants by making advance payment of Rs. 27,00,000/- and interest of Rs.22,000/-made by the main company during investigation stage.

35. Thus the appeals are disposed of accordingly by setting aside the impugned order except to the extent indicated above and for quantification of duty and deciding penalties.

(Pronounced in open Court on 11-10-2011)

(Jyoti Balasundaram)
Vice President

(~~Mattew~~ John)
Member (Technical)

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