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

Appeal No. E/3028-3030/2010 [DB]

[Arising out of Orders in Appeal No. 287-289/CE/D-II/2010 dated 06.07.2010 passed by the Commissioner (Appeals), Central Excise & ST, New Delhi]

D.M. Gears Pvt. Limited ….Appellant
Sanjay Gambhir
Rajiv Gambhir

vs.

Commissioner of Central Excise & S.T., Delhi ….Respondent

Appearance:

Rep by. Ms. Seema Jain, Advocate for the Appellants.
Rep by. Shri G.R. Saini, DR for the Respondent

CORAM:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing: 09.12.2016

Date of Pronouncement: 24.02.2017

FINAL ORDER NO. 50461-50463/2017- EX(DB)

Per V. Padmanabhan

The present appeals are directed against the Order-in-Appeal dated 06.07.2010. Since these three appeals are arising out of the same order, they are being disposed of by way of this common order.

2. The appellant company - M/s. D.M. Gears (P) Limited (hereinafter referred to as DMGP), a private limited company with Shri Rajiv Gambhir and Shri Sanjay Gambhir, Directors, is engaged in the manufacture of motor vehicle parts, viz. gears for automobiles and tractors. M/s. DD Industries Limited

(hereinafter referred to as DDIL) is another private limited company engaged in the manufacture of propeller shafts and sleeve yoke for motor vehicles. M/s. D.D. Sales Corporation (hereinafter referred to as DDSC), a partnership company is a trading firm engaged in the trading of the goods manufactured by DMGP and DDIL. All the goods manufactured by DMGP are sold to M/s. DDIL who sell them again to DDSC and it is DDSC which sells the goods to independent buyers. The partners of DDSC are Shri Rajiv Gambhir son of Shri Surinder Kumar, Smt. Uma Gambhir, wife of Surinder Kumar and Ms Reena Gambhir wife of Sanjay Gambhir. Directors of DDIL include Shri Surinder Kumar, Shri Sanjay Gambhir s/o Shri Surinder Kumar, Shri Rajiv Gambhir s/o Shri Surinder Kumar and other close family members of Shri Surinder Kumar who together owned 50% shares. Directors of DMGP, among others persons, are Rajiv Gambhir and Sanjay Gambhir. Both DMGP and DDIL are availing the SSI exemption. The department conducted enquiries in respect of these companies, from which it appeared that DMGP, DDIL and DDSC were being run and controlled by the members of the same family; that the same were being run as one unit and as such DDIL had no independent existence, that they are interconnected units and their combined turnover is higher than the exemption limit for SSI exemption under Notification No. 8/2003 dated 1.3.2003. On this basis, a show cause notice dated 31.3.08 was issued to DMGP, DDIL, DDSC, Shri Sanjay Gambhir and Shri Rajeev Gambhir for:-

(a) clubbing the clearance of DMGP with DDIL and for determining their liability for SSI exemption and on this basis, recovery of Central Excise duty amounting to Rs.27,40,247/- from DMGP under proviso to Section 11A(1) of Central Excise Act along with interest under section 11AB;

(b) imposition of penalty on DMGP under section 11AC of Central Excise Act, 1944; and

(c) Imposition of penalty on DDIL, DSSC, Shri Sanjay Gambhir and Shri Rajeev Gambhir under Rule 26 of Central Excise Rules 2002.

2.1 The Show cause notice was adjudicated by the Joint Commissioner vide order in original No. 52/08-09 dated 05.2.2009 by which --

(a) duty demand of Rs. 27,40,247/- was confirmed against DMGP under proviso to section 11A(1);;

(b) penalty of equal amount was imposed on DMGP under section 11AC of Central Excise Act; and

(c) penalty of Rs. Five lakhs each was imposed on Shri Sanjay Gambhir and Rajeev Gambhir under Rule 26 of Central Excise Rules.

2.2 On appeal to Commissioner (Appeals) by DMGP, Shri Sanjay Gambhir and Rajeev Gambhir, the Jt. Commissioner's order was upheld by order-in-appeal dated 6.7.2010. Against this order of the Commissioner (Appeals), these appeals have been filed.

3. Heard both sides.

4. Ms. Seema Jain, Advocate, learned Counsel for the appellants, pleaded that the clearances of DMGP have been clubbed with that of DDIL only on the ground that they are two interconnected units; that the issue is when two persons are related persons, can the SSI exemption benefit under notification No. 8/2003-C.E. be denied to a unit by clubbing the clearance of that unit with the clearances of another unit. She submitted that the issue of clubbing two units has nothing to do with being related persons. On denial of SSI exemption to them, she explained that DMGP and DDIL are two independent private limited companies with separate directors and separate Central Excise registration; that the two companies manufacture different products and use two different brand names; that just because some of their directors are common

and all the clearances of DMGP are to DDIL who market the same through DDSC, it cannot be said that DDIL is a dummy company having no independent existence; that there is no evidence to prove that DDIL was a dummy company floated by DMGP; that in view of this, the impugned order clubbing the clearance, denying the benefit of SSI exemption to them and on this basis demanding duty from DMGP and imposing penalty on DMGP and other persons is totally incorrect and may be set-aside.

5. Shri G.R. Singh, the learned DR, reiterated the findings of the Commissioner (Appeals) in the impugned order in appeal and emphasized that there is evidence on record clearly indicating that DDIL was a dummy company being controlled and managed by DMGP; that though these two units have two different brand names, the two brand names /logos are very similar, that the evidence on record shows that not only the registered office of DMGP, DDIL and DDSC is located in the same premises, employees of the three companies are fully interchangeable; that D.K. Jain, DGM (Marketing) of DDSC in his statement dated 21.11.2006 has categorically stated that DDSC has incurred expenses of packing material, freight cartage, advertisement, sales promotion etc. in respect of the goods manufactured by DMGP and DDIL; that Shri Anil Kumar, CEO of DDSC in his statement dated 23.11.06 has categorically stated that DDSC was a marketing firm and DDSC had purchased its goods for marketing from DDIL and DMGP and had never purchased any goods from any other company and that all the three units were being controlled by members of the same family and there was huge difference between the prices at which the goods were being sold by DMGP to DDIL and that at which the goods were being finally sold by DDSC. He, therefore, pleaded that the impugned order may be upheld.

6. We have carefully considered the submissions of both sides and perused the records. The members of Gambhir family have over 90% share holdings in both DMGP and DDIL and as partners of DDSC control the DDSC. Though DMGP and DDIL were using different brand names, logo being used by DMGP consists of word “DM”, and the logo of DDIL is “DD”. The Commissioner (Appeals) observed that the logos are printed in almost identical manner and similarly inscribed in a circle placed in a rectangular space with the same dimensions and as such, prima facie they looked identical. Evidence on record also indicated that DMGP and DDIL were being run as a single unit, and not only DMGP and DDIL are sharing the same office space, their employees also appear to be common. He further observed that there is huge difference between the price at which the goods manufactured by DMGP and sold to DDIL and also those made by DDIL, when sold to DDSC and the price at which DDSC in turn sold the same goods to independent buyers. It is also seen that ever since the MRP based assessment under Section 4A was introduced in respect of motor vehicle parts, DDSC was closed down which prima facie shows that the purpose of this arrangement was for depressing the assessable value of the goods. Accordingly, Commissioner (Appeals) has passed the impugned order clubbing the value of clearances of DMGP and DDIL denying the SSI exemption and ordered for paying duty at the prices at which DDSC has sold to independent buyers.

7. First, we examine the question whether sales made by DMGP to DDIL are entitled to the SSI benefit. It is not in dispute that both these entities have separate registered manufacturing premises. It is nobody’s case that there are no equipments in either of the premises and it is also not the view taken by the Revenue that the entire manufacturing happened at one of the two premises and the other is a dummy one. Inasmuch as both the units have separate manufacturing premises with equipments and the fact that they are

manufacturing different automobile parts, leads us to conclude that both are separate manufacturing units. The constitution of the two firms are different. DMGP is a Private Limited Company whereas DDIL is a Limited Company and hence they have separate legal existence and separate registrations not only for Central Excise but also for Sales Tax and other government departments. Under the circumstances, we are of the view that DMGP as well as DDIL are to be considered as separate manufacturing premises and each one will be eligible for the benefit of SSI exemption under Notification No. 8/2003-CE dated 01.3.2003.

8. Second, we turn to the Brand Names of DMGP and DDIL. The view taken by the Revenue is that the two brand names are deceptively similar and likely to be perceived as one and the same in the trade. However, the fact remains that the two brand names are not identical and are being applied on different products manufactured by DMGP and DDIL. There is also nothing on record to suggest that there is any dispute regarding use of brand names. Consequently we take the view that the brand names are different and separate for the two units.

9. Next, we turn to the question, whether DMGP and DDIL are "interconnected undertakings". The concept of interconnected undertaking have been borrowed from Monopolies and Restrictive Trade Practices Act, 1969 into Section 4 (2)(b) of the Central Excise Act, 1944. The concept of interconnected undertaking is applicable for determination of value in terms of Section 4 of the Central Excise Act for the purpose of charging excise duty of goods on which the duty is chargeable *ad-valorem*.

10. We find that members of the Gambhir family have over 90% share holdings in both DMGP and DDIL and as partners of DDSC also control that

company. From the various items covered under the definition of interconnected undertakings, it is evident that all the three entities are to be considered as interconnected undertakings. Once these three are considered as interconnected undertakings then the valuation of goods manufactured by DMGP and / or DDIL and sold exclusively through DDSC, cannot follow transaction value, it will be necessary to take recourse to Central Excise Valuation Rules. It is found that entire goods manufactured by DMGP as well as DDIL are sold only through DDSC after which the goods are sold to dealers.

11. In the impugned order, the valuation of goods has been re-determined on the basis of the price at which DDSC sold the goods to dealers. However, we find that eligible discounts such as, turnover discount, cash discount etc. have not been extended at the time of sales by DDSC. It is the claim of the appellant that they are entitled to the said discounts. Further, they have claimed for admissible other deductions. The eligibility of various discounts/ abatements need to be determined in the light of legal position settled by various case laws of Apex Court, including in recent case of *Purolator India Limited vs. CCE Delhi – 2015 (323) ELT 227 (SC).* For re-determination of value as well as duty liability the cse is remanded to Original Adjudicating Authority.

12. To sum up the discussions, it is decided as follows:-

(i) DMGP, DDIL and DDSC are considered as interconnected undertakings within the meaning as outlined under section 4 of the Central Excise Act read with Monopolies and Restrictive Trade Practices Act, 1969. Accordingly, the value of goods manufactured and cleared by DMGP as well as DDIL and sold exclusively through DDSC, are to be re-determined in terms of price adopted by DDSC when sold to independent dealers. Since various abatements/discounts claimed by the appellant have not been extended, we consider it appropriate to remand the matter to Original Adjudicating Authority to re-determine the value for the purpose of charging excise duty, after extending the eligible abatements/ discounts as per law and the decisions of the Apex Court.

(ii) DMGP as well as DDIL have been held to be separate entities with manufacturing facilities and have manufactured different components bearing different brand names. Accordingly, we hold that both DMGP as well as DDIL will be entitled separately to the benefit of SSI exemption for the relevant years, subject to conditions specified in the exemption notification. The duty liability is to be calculated for DMGP and DDIL after extending the SSI benefit and after taking valuation considering the three entities as interconnected undertakings and adopting the prices at which the DDSC has sold the goods.

(iii) Before passing the de-novo order, the adjudicating authority is directed to extend an effective opportunity to the appellant. Additional evidence may be admitted as per law.

6. In view of the above, the appeal is allowed by way of remand to the adjudicating authority for passing de-novo order, in the light of the discussions above.

[Pronounced in the open Court on 24.01.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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