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

COURT NO. III

DATE OF HEARING : 25/05/2017.
DATE OF DECISION : 25/05/2017.

Excise Appeals No. 50733 – 50737 and 50741 – 50747 of 2014

[Arising out of the Order-in-Original No. 30-31/COMMR/IND/CEX/ 2013 dated 30/09/2013 passed by The Commissioner, Customs, Central Excise & Service Tax, Indore.]

CCE, Indore Appellant

Versus

M/s Jupiter Stationery Pvt. Ltd.]
M/s Sprearhead Diagnostics & Systems Pvt. Ltd.]
M/s Colors of Fun Arts Materials Pvt. Ltd.]
M/s Neha Stationery Pvt. Ltd.]
M/s Sandhya Sales Agencies Pvt. Ltd.]
M/s Neptune Stationery Pvt. Ltd.] Respondents
M/s Kores (India) Ltd.]
M/s Mars Stationery Pvt. Ltd.]
M/s Nandini Stationery Pvt. Ltd.]
M/s Pranav Packwell Pvt. Ltd.]
M/s Balaji Milti Colors Pvt. Ltd.]
M/s Kool Toolz Art Materials Pvt. Ltd.]

Appearance

Shri M.R. Sharma, Authorized Representative (DR) – for the appellant.

S/Shri Vishal Agarwaland Alok Barthwal, Advocates – for the Respondents.

CORAM: **Hon'ble Shri Anil Choudhary, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 53606-53617/2017 Dated : 25/05/2017

Per. B. Ravichandran :-

Revenue filed these appeals against the order dated 30/09/2013 of Commissioner of Central Excise, Indore. The brief facts of the case are that M/s Kores (India) Ltd. [Kores] are engaged in manufacture and marketing of stationery items like staple pins etc., either manufactured by them or obtained from other manufacturers. In October 1996, the Revenue conducted investigations with Kores and various small scale units who were supplying the stationery items, manufactured by them to Kores. After completion of investigation, the Revenue entertained a view that Kores had floated many units in order to improperly avail small scale exemption. Proceedings were initiated against Kores by show cause notice dated 25/03/1997 proposing the clubbing of all clearances from 4 different SSI units and to demand Central Excise duty. The proceedings concluded by an order dated 30/03/1998. On appeal, the said order was upheld by the Tribunal vide final order dated 27/06/2000. The matter was taken up to Hon'ble Madhya Pradesh High Court by Kores. The Hon'ble High Court vide their order dated 17/11/2005 remanded the case back to the Original Authority for fresh adjudication.

2. On denovo adjudication, the Original Authority confirmed the demand vide his order dated 30/03/2010. Appeals were filed against the said order by Kores and SSI units. The case was decided by the Tribunal vide final order 52954 – 52961 of 2015 –

EX dated 10/09/2015. The order of the Commissioner was set aside.

3. The Revenue held the same view for the subsequent period and the show cause notices were issued to Kores and other SSI units. The cases were adjudicated by the Original Authority. However, the Tribunal vide final order No. 299 – 323/2010 dated 28/04/2010 remanded the case back to the Commissioner for a fresh adjudication. In the remand proceedings vide order dated 30/08/2012, the Adjudicating Authority dropped all proceedings against Kores and SSI units. The Revenue filed appeals and the Tribunal dismissed these appeals vide final order No. 50366 – 50374 of 2017 dated 18/01/2017.

4. The present proceedings relate to purchase of staple pins by Kores from 6 different manufacturers located in rural areas, availing small scale exemption. These rural units got staple pin manufactured on job work basis from 4 other small scale units [urban units]. Earlier these 4 urban units used to supply staple pins in bulk without packing in brand name of Kores.

5. Staple pins, liable to duty under Central Excise Tariff Heading 8305, are covered by Third Schedule of the Central Excise Act, 1944. For the products covered by this Schedule, the process of labeling or relabeling will amount to manufacture. Duty has to be discharged in terms of Section 4A, based on MRP less abatement.

6. The units located in rural areas have cleared staple pins claiming small scale exemption under Notification 8/2003-CE which provided exemption up to the turnover of Rs. One crore.

7. The dispute in the present appeals relates to the clearances made by these rural units during the period 2003-2004 to 2007-2008. The proceedings initiated against these units and Kores sought to demand Central Excise duty from them, jointly and severally, on the ground that the goods have been actually manufactured and cleared by the 4 urban units. It was alleged that the rural units have not undertaken any activity other than raising invoices. Both these rural as well as urban units were related to Kores as they were created and managed by people who were ex-employees of Kores. It was further alleged that Kores had made advances to these units for procurement of materials. These units were alleged to be dummies and, as such, all their turnover was sought to be clubbed with that of Kores to arrive at the duty liability. The allegations in the proceedings were mainly based on the investigation conducted in October 1996. Based on the said investigation multiple proceedings were initiated by the Revenue against Kores and others. The main thrust of all the proceedings is to hold that Kores is the only legitimate unit and all other SSIs were only dummies created by Kores in order to avoid Central Excise duty by availing SSI exemption.

8. The impugned order examined the background facts and after considering the proposals in the show cause notice and the submissions of the noticees, concluded that the rural units had in fact were involved in packing and labeling activities and were not dummies of Kores. It was further recorded that there was no financial flow back or over-reaching managerial control by Kores. The transactions were held to be on principal to principal basis. The Original Authority dropped the proceedings against Kores and other SSI units.

9. The Revenue is aggrieved by the above said order of the Commissioner. In the grounds of appeal, the Revenue contended mainly on the following points :-

(a) The Commissioner has erred in holding that in the instant case all the SSI units are independent Private Ltd. Companies registered with the Registrar of Companies under Companies Act, 1956, District Industries Center, Sales Tax, Income Tax, Factory Act, ESIC Act etc. and have separate legal existence and cannot be held as dummy units of KIL ;

(b) The Commissioner has erred in holding that the allegation of the rural units (Respondent No. 06 to 12) being dummy units is self contradictory since Central Excise duty has been demanded by the department from Respondent No. 6 to 12 individually in the impugned SCN (though jointly and severally with Respondent No. 1), which clearly shows that the show cause notice itself has endorsed the nature of independent identify/existence of each of such units ; and

(c) The Commissioner has erred in holding that dealing between rural units (Respondent No. 06 to 11) and Kores inclusive of all the urban units (Respondent No. 01 to 05 & Respondent No. 12) was on Principal to Principal basis and that the charge of dummy units fails in the instance case".

10. The learned AR elaborated the grounds of appeal and submitted that the Original Authority did not examine, in detail, with reference to manufacturing premises, money and manpower available with these small scale units. The evidences presented will show that these small scale units were nothing but fragmented establishments of Kores. Cumulatively taken the evidences will establish the modus operandi adopted by Kores to evade Central Excise duty. The main thrust of the present case is that staple pins were manufactured and packed by Kores in its 4 units at Pithampur. The paper work was so managed to show that the staple pins were package at the rural units which were also nothing but creation of Kores, as dummies. Kores availed inadmissible benefit under Notification 8/2003-CE and, as such, the demand is correctly made against Kores jointly and severally with respective dummy units.

11. The learned Counsel for the respondents submitted that the Revenue had initiated multiple proceedings for various periods against Kores and other small scale units, supplying staple pins to Kores, based on single investigation carried out in 1996. The matter reached twice, to the Tribunal for the earlier periods and on both the occasions, vide final orders dated 10/09/2015 and

18/01/2017, the Tribunal categorically held that the Department could not establish the legal provision under which the clubbing of turnover of various individual units can be done. The Tribunal further observed that presumption by the Revenue that any relationship or commonality of interest in connection with business dealing will make the two legal entities "as related persons" and such relationship will make the small scale unit as a dummy unit, is not legally sustainable. It was concluded that the turnover of related persons cannot be *per se* clubbed together for arriving at the threshold limit of SSI exemption.

12. The learned Counsel submitted the Original Authority examined elaborately the various allegations made in the show cause notice with specific emphasis on financial controls and administrative/managerial controls of Kores on these SSI units. He drew our attention specifically to the findings recorded in paras 25.13, 25.20, 25.21 and 25.26 of the impugned order.

13. Considering that the very same set of evidences collected in the investigation of 1996, is contended to the supporting the case of the Revenue, the learned Counsel for the respondent submitted that the final orders of the Tribunal covering the very same set of facts are correctly applicable to the present appeals also. The Original Authority, in fact followed similar reasoning, though the order was issued prior to these final orders of the Tribunal. As such, the learned Counsel contended there is no merit in the appeals filed by the Revenue.

14. We have heard both the sides and perused the appeal records. The thrust of the Revenue’s appeals against the findings of the Original Authority is revolving around the financial and managerial controls alleged to have been exercised by Kores on these small scale units. We note that, first of all, the notice issued to demand Central Excise duty should clearly identify the person from whom such duty is being demanded. There can be no demand invoking the concept of jointly and severally. The plea of the Revenue is that notices were issued to the dummy units in order to satisfy the principals of natural justice. In such case, the notices are to be restricted, if at all, only to penal proceedings as no duty can be demanded from such purported dummy units.

15. Regarding the allegation of administrative and managerial control, the Original Authority observed as below :-

> “25.13 The allegation of administrative and managerial control is primarily based upon the allegation that the units of Noticee No. 2 to 12 were run by Noticee No. 1 by planting its trusted employees/ex-employees and their relatives as share holders and dummy directors in the SSI units. However, I find from the show cause notice and the records of the case that none of the directors or share holders of Noticee No. 2 to 12 were present employees of Noticee No. 1. As far as the ex-employees of Noticee No. 1 being share holders or directors of SSI units is concerned, I am of the view that if some of the share holders or directors had been ex-employees of Noticee No. 1, this by itself cannot lead to the inference that the Noticee No. 6 to 12 are dummy of Noticee No. 1. From the show cause

notice, it is also noticed that none of the directors or share holders of these SSI units were under established control of any officer/employee of Noticee No. 1. The investigation at the end of the Noticee No. 1 or statement of its employee i.e. Noticee No. 14, Shri A.K. Chopra, Director (Finance) has not shown or revealed such fact. I also find that no evidence has been found in the premises of Noticee No. 2 to 12 which can substantially and cogently lead to the inference that Noticee No. 1 were controlling the SSI units through the Directors or share holders of SSI units. Thus, in absence of such evidence and financial or managerial control, no adverse inference of the SSI units being dummy of Noticee No. 1 can be drawn. There is no evidence on record which can further show that the Directors, by virtue of being past employees of KIL, were working under the control of KIL. I, therefore, observe that this allegation cannot be made a basis to hold the SSI units as being under control of KIL or its dummy. As regards allegation of the show cause notice that some of the directors/ share holders of the noticee No. 2 to 12 units were relatives of serving Directors of KIL, even if it is assumed that directors of SSI units were relatives of existing directors of KIL, even if it is assumed that directors of SSI units were relatives of existing directors of KIL, such relationship can be viewed on personal basis and not on organizational basis unless there is financial or managerial control over SSI units by Noticee No. 1. In the instant case, all SSI units are independent Private Limited companies registered with Registrar of Companies under Companies Act, 1956. Each company is an artificial person and it has independent legal entity irrespective of fact who is the Director or Share holder of the Company, therefore, this cannot be the reason for holding the SSI companies as dummy where the Director of one Company is relative of other Company. Hence, I am of the view that merely for the reason that some of the Directors of SSI companies being ex-employees/relatives of Noticee No. 1 would not construe that there was managerial or administrative control of Noticee No. 1 would not construe that there was managerial or administrative control of Noticee No. 1 over SSI units (Noticee No. 6 to 12). As discussed above, mere relationship on personal basis in no way affect the independent legal entity of a private limited company which is formed under a statute, when no tangible evidence are present to emphatically support otherwise".

16. After examining the various specific allegations regarding the deployment of staff, control of the said staff, the relationship of staff with Kores, the Original Authority concluded as below :-

"25.20 As per above detailed discussion, I am of the view that there is little substantive evidence to establish any financial and/or managerial control of Noticee No. 1 over Noticee No. 6 to 12 and there is no evidence to prove that there is any financial flow back from Noticee No. 1 to Noticee No. 6 to 12 and/or vice versa. Consequentially, in absence of any tangible evidence, all the notices Nos. 6 to 12 are to be treated as independent legal entity as Pvt. Ltd. companies. From the records and submissions of the Noticees, it is seen that all the SSI companies i.e. Noticee No. 6 to 12 were –

a. Having their own leased factory premises.
b. Having employed & paid labourers for manufacturing activities.
c. Having their separate power connection from MP Electricity Board.
d. Maintaining their separate books of accounts and related documents.

e. Having their own source of funds.

f. Have separately registered themselves with ROC, District Industries Center, Sales Tax, Income Tax, Factory Act, ESIC Act etc. and assessed independently under their laws from time to time and having valid registrations till date.

g. Have submitted separate duly audited balance sheet and annual return to the Registrar of Companies, Gwalior and other authorities wherever required.

25.21 From the above independent facts also, Noticees No. 6 to 12 cannot be treated as dummy units. Here I observe that though it is permissible to lift the corporate veil while dealing with the companies, yet it can be done only if credible and cogent evidence is brought on record by the investigation to prove that companies are sham creation of a particular person/company. The burden of proving the companies as dummy of another company/ person is entirely upon the investigation. In this case, the evidences on record do not go beyond creating suspicion. The evidences are sketchy and nebulous. It is settled law that suspicious howsoever grave cannot take place of proof. The allegations made in the show cause notice do not even by applying the test of preponderance of probability establishes that SSI units were dummies of Noticee No. 1”.

17. The Original Authority relying on the assertions made in the show cause notice held that the rural SSI units were engaged in packing of staple pins with Kores brand. This was evidenced even during the searches conducted by the officers, in two of the such units. The Original Authority also found that while the demand

was raised against the rural units, no such demand was made from urban units in the proceedings.

18. We note that the status of various urban units as having independent existence has already been decided by the final orders of the Tribunal dated 10/09/2015 and 18/01/2017. As such, no demand can be raised against Kores by clubbing the turnover value of these urban units. We note that in the final order dated 10/09/2015, the Tribunal observed as below :-

> "7. We have examined the impugned order closely. The learned Commissioner while examining the applicability of Board's circular No. 6/92 dated 29.05.1992 held that the said circular does not debar clubbing of clearance of 2 or more companies if they are having common finance and management. He held the contents of the circular as not applicable to the present case. We find that the ld. Original authority has misdirected himself while considering implication of the Board's circular. While he held the appellants are having common finance and management, hence clubbing of turnover is permissible in para 69 he observed that there is no allegation in the present case that the SSI units were dummy. He observed that the existence of SSI units has been accepted. He further goes ahead and states that SSI units were administratively and financially controlled by the main appellant through noticee no. 6 & 7. Hence he concluded that the turnover can be clubbed. We are unable to appreciate the legal basis for such assertion. The Original Authority having arrived at the conclusion that the SSI units were not dummy and are having separate existence goes ahead and orders the clubbing of turnover only on the ground of administrative and financial control. Even this administrative and financial control has not been

categorically established except for some inferences bases on statements and correspondence. The SSI units in the present case were all independently registered Pvt. Ltd. Companies. Their existence as legal entities have been accepted as a fact by the original authority. Even if it is said that the main appellant is having certain financial and administrative influence over the SSI units, this is not sufficient to club the turnover of all these SSI units. At best it may have the effect on valuation of excisable goods cleared or purchased by these appellants among themselves. In other words, even if it is considered that there may be related reasons transaction among the appellants this has no effect on their standing as separate legal entities. The provisions of notification no. 1/93-CE are to be examined in order to decide whether or not such clubbing is covered by any of such provisions. Para 3 of the said notifications states that nothing contained in this notification shall apply if the aggregate value of the clearances of all excisable goods for home consumption:

a) by a manufacturer from one or more factories, or
b) from any factory, by one or more manufacturers had exceeded Rs. 200 Lakhs in the preceding financial year.

8. Now applying the provisions of the said para it is apparent that the original authority ordered for combining the turnover of all SSI units with the main appellant considering them as "a manufacturer".

9. We consider that such conclusion is not supported by any tenable evidence. We find that the Ld. Commissioner confirmed the demand and ordered recovery of duty from the 4 SSI units along with their principal M/s. Kores (India) Ltd. When the demand of recovery was confirmed against

these SSI units their identity and separate existence has been recognized. Further, confirming the demand of recovery from the SSI units along with the principal (M/s. Kores (India) Ltd.) indicates ambiguity in the demand to the effect that if there is only one manufacturer in terms of notification no. 1/93-CE the duty liability will arise only against such manufacturer not against two units. If the department recognizes more than one manufacturer clubbing up their turnover is not provided for in the notification. Holding that the SSI units have separate legal existence but turnover has to be clubbed for the purpose of notification no. 1/93-CE is not a tenable legal proposition. There is no clarity on this aspect for the impugned order. There is no supporting evidence for common finance and common management and there is no finding by the original authority that the main appellant has floated, financed and incorporated the SSI units. There is no evidence that the main appellant investing money in SSI units. The main appellant and the other SSI units are limited / Pvt. Ltd. companies respectively and are independent entities irrespective of their Directors / shareholders. We find that there is no evidence that Directors of SSI units are related with M/s. Kores (India) Ltd. as per the provision of Central Excise Act or Companies Act. The financial transactions are of Commercial terms and there is nothing to show the flow back amongst the appellants. There is no profit sharing or combined ownership of assets. This Tribunal in the case of Balsara Hygiene Products Ltd. (Supra) held that mere fact of management, control or grant of interest free loan is not sufficient to hold the units as dummy units in the business of any money flowback/ profit sharing and total control on another unit. In the case of Plasto Containers India Pvt. Ltd. (Supra) the Tribunal held that when the units are having separate directors registered with Registrar of

Companies, separate sales tax, registration, income tax, bank account and separate lease deal of the clubbing of clearances is not legally tenable. In the case of B.K. Office Needs (P) Ltd. 2015 (318) ELT 288 (Tri-Chennai) this Tribunal held that "it is well settled by a series of decisions that mere common partners and proprietor of other concern, and use of staff etc. would not be sufficient to hold that units are one and the same."

10. In Jagatjit Agro Industries 2014 (309) ELT 301 (Tri-Del) this Tribunal held that merely because common electricity connection was used by both the units by itself will not make it a dummy of one another. Similarly, a common accountant or a common store room for raw materials cannot be held to be a reason for clubbing the clearances of both the units.

11. After careful consideration of evidences on record we find that the independent existence and legal identity of the SSI units have not been disputed. In that position we find the financial and management control as discussed in the impugned order has also not been categorically established. The original order also did not assert under which provision such clubbing is called for either in terms of the notification 1/93-CE or the provision of Central Excise Act or Rules made there under. As such we find that the findings of the original authority cannot be sustained and accordingly we set aside the order and allow the appeal with consequential relief, if any".

19. The above said findings were again examined and followed in the final order dated 18/01/2017. We note that the detailed examination and reasoning followed by the Original Authority in the impugned order are in line with the findings recorded by the

Tribunal in the said final orders. As such, we find no merit in the appeals by the Revenue. Accordingly, the same are dismissed.

(Operative part of the order pronounced in the open court.)

(Anil Choudhary)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

PK