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

Appeal No. E/2163-2170, 2202, 2250-2251, 2263/2012-EX(DB)

[Arising out of Order-in-Appeal Nos. 18/2012, 22-25/2012, 26/2012, 28-42/2012 and 27/2012 all dated 30.03.2012 all passed by the Commissioner of Central Excise, Udaipur]

M/s. Suzuki Processors **….Appellants**
M/s. PGO Processors
Shri P C Jain, Director
Shri O P Nawal, Director
Shri G S Sankhla, Director
Shri R K Maheshwari, MD
Shri Mahaveer Heda, Prop
Shri D L Laddha, GM
M/s. PGO Processors
M/s. PGO Processors
M/s. Suzuki Synthetic Pvt. Ltd.
Shri Suzuki Textiles

Vs.

CCE Udaipur **….Respondent**

Appeal No. E/ 2289-2292 & 2487-2490 /2012-EX(DB)

[Arising out of Order-in-Appeal Nos. 22-25/2012 and 28-42/2012 both dated 30.03.2012 and both passed by the Commissioner of Central Excise, Udaipur]

C.C.E., Udaipur **….Appellants**

Vs.

M/s. PGO Processors **….Respondent**
M/s. Suzuki Processors

Appearance:

Sh. V Lakshmikumaran and Shri Rahul Tangri, Advocates for the Appellants
Sh. H C Saini, DR for the Respondent

CORAM:

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

Date of Hearing : 12.04.2017
Date of Pronouncement: 06.06.2017

FINAL ORDER NO. 53712-53731-EX[DB]

Per V. Padmanabhan:

12 appeals are filed against the impugned orders and have been filed by the manufacturer as well as employees of the manufacturing companies. In addition, 8 appeals are filed by the Revenue against the same impugned orders. The appeals and the impugned orders deal with the common controversy encompassing 3 distinct legal entities viz., M/s. Suzuki Textiles Ltd. M/s. PGO Processors Pvt. Ltd. and M/s. Suzuki Synthetic Pvt Ltd. All the above appeals are being disposed of through this common order.

2. All the appeals were heard together in which Shri V Lakshmi Kumaran and Shri Rahul Tangri learned advocates represented all the

appellants as well as Shri H C Saini, learned AR, appeared for Revenue.

3. The brief facts are as under:

(a) M/s. Suzuki Processors, Bhilwara were engaged in processing of grey fabrics. They used to pay central excise duty on the processed man-made fabrics of their own on the basis of the sale price of such fabrics in accordance with the provisions of section 4(1)(a) of the Central Excise Act, 1944. In respect of the fabrics processed on job work basis, duty was being paid on the basis of cost of grey fabrics plus the job charges in accordance with principles laid down by the Supreme Court in the case of ***Ujagar Prints vs. Union of India (1989 (39) ELT 493 (SC)];***

(b) Suzuki entered into two separate agreements with a private limited company named M/s. PGO Processors Pvt. Ltd. Bhilwara (hereinafter referred to as "PGO' also) for a period of three years w.e.f. 3.6.97. One agreement was for utilizing plant and machinery for processing of man-made fabrics and the other was for rent of the land and building (where the process house was installed.. On execution of these two agreements with PGO, Suzuki wef 2.6.97 got their Central Excise Registration amended and PGO applied to Department on the same date for obtaining Central Excise Registration PGO were granted Central Excise Registration on 3.6.1997 and the process house was run in the name of PGO. Consequently, the manner of determination of value for payment of duty in respect of fabrics belonging to Suzuki was changed. The processing was shown to be undertaken by PGO on job basis for Suzuki. The status of Suzuki therefore, changed to that of a supplier of raw materials (Grey fabrics), who would send the grey fabrics for processing on job work and would receive back the fabrics after processing by paying job charges or processing charges. In the case of fabrics processed on job work basis, the value was determined under the provisions of rule 7 of the Central Excise Valuation Rules, 1975 in accordance with the principles laid down by the Supreme Court in their decision in the case of ***Ujagar Prints Ltd. [1989 (39) ELT 493 (SC).*** The value was determined on the basis of the cost of grey fabrics plus the processing charges and it did not include the profit margin / selling expenses of the trader who supplied the fabrics for job work.

(c) Department contended that PGO did not bring in any funds for the operations of the process-house. The entire working capital funds were provided by Suzuki. Thus, Suzuki alone had the financial involvement required for running the process-house and accordingly, exercised financial control on the process-house through various means. The rent under the agreement was not paid through their own funds but by credit entry in the accounts of Suzuki, Salaries, wages, power, fuel, coal, raw materials, freight all were financed with funds from Suzuki. It is, thus proved beyond doubt that the transfer of assets on lease to PGO was a bogus arrangement entered into with a view to earning benefit from excise evasion. The lease agreements entered into between the two were bogus. By entering into bogus lease arrangements with PGO, Suzuki conceived a plan to evade payment of duty under which PGO obtained the registration under Rule 174 as a lessee-cum-independent manufacturer and processed the fabrics of Suzuki under the guise of "Job work" and adopted the price based on cost of grey fabrics + the processing charges under Rule 7 of the Valuation Rules, 1975 read with the principles laid down by the Supreme Court in the case of ***Ujagar Prints [1989 (39) ELT 493 (SC)]***

(d) M/s. PGO Processors Pvt. Ltd., Bhilwara vide their letter No. PGO.97-98 dated 24.02.98 informed that from 24.02.98 they would pay Central Excise Duty on Fabrics Processed for M/s.

Suzuki Processors on the sale value as declared by M/s. Suzuki Processors. Therefore, they filed price declarations on the basis of sale value as declared by M/s. Suzuki Processors from 26.2.98 onwards under Rule 173 C of Central Excise Rules, 1944 in respect of Man Made Fabrics so processed for M/s. Suzuki Processors. From 26.2.1998 they were paying duty on selling price of M/s. Suzuki Processors.

(e) Therefore, for a period prior to 24.02.1998 i.e. for the period from 03.06.1997 to 23.02.1998, a show cause notice C. No. V(55) 15/OFF/96/98/322 dated 15.1.1999 was issued to M/s. Suzuki Processors (A unit of Suzuki Textiles Ltd.) proposing inter alia demand of Rs. 2,25,37,010/- on the ground that M/s. Suzuki had floated a dummy unit in the name and style of M/s. PGO Processors (P) Ltd. Bhilwara with an intent to evade Central Excise duty and that Suzuki was a manufacturer within the contemplation of Section 2(f) of the Central Excise Act, in respect of the fabrics processed on their behalf in the process house during the period when the process house was leased out to M/s. PGO Processors (P) Ltd. Bhilwara and accordingly, they were liable to pay duty in respect of fabrics processed on their account in the process-house on the basis of sale price for such fabrics in terms of Section 4(1)(a) of the Central Excise Act, 1944.

(f) Meanwhile, wef 16.12.1998, processed fabrics were covered under section 3A of the Central Excise Act. As per the provisions of Notification NO. 36/98 CE dated 10.12.98, processed fabrics manufactured or produced by an independent processor with the aid of a hot-air stenter were subject to duty at specified rates per chamber per month. For the purpose of the notification, an ‘independent processor’ (manufacturer was defined to mean as a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who also has the facility in his factory (including plant and equipment) for carrying out heat-setting with the aid of power or steam in a hot-air stenter and who has no proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics.

(g) M/s. PGO Processors (P) Ltd., Bhilwara filed a declaration dated 16.12.1998 in terms of Rule 3 of the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 with a view to paying duty at specified rates of Rs.2 lakh per chamber per month on the grounds that they were an ‘independent processors’ within the meaning given under explanation III of the Notification No. 42/98-CE(NT) dated 10.12.1998.

(h) Vide letter C.No. V(PER) JP-II/30/48/98/9413 dated 30.12.98, M/s. PGO were informed that their request could not be entertained under the scheme as enquiries had revealed that M/s. Suzuki Textile Ltd. appeared to be processors of fabrics and they had a proprietary interest in weaving of fabrics. Aggrieved with the decision conveyed in the said letter, M/s. PGO Processors (P) Ltd. Bhilwara, filed DB CWP No. 11/99 in the Rajasthan High Court, Jodhpur and obtained a Stay Order dated 5.1.999 by which M/s. PGO were allowed to take the benefit of Notifications under the scheme and clear the goods on payment of duty at the rates provided for in the Notification No. 36/98-CE dated 10.12.98 till the disposal of the petition.

(i) The Hon'ble High Court disposed of the petition by its order dated 22.4.1999 by directing the department to allow clearances of goods by PGO on provisional basis on payment of maximum duty as per Sub-clause (ii) of the Clause 1 of Notification No. 36/98-CE till the request of applicability of the notification to M/s. PGO Processors (P) Ltd., Bhilwara was determined by the Commissioner of Central Excise, Jaipur II after giving adequate and proper opportunity of hearing in accordance with law.

(j) The show cause notice C.No. V(55)15/OFF/96/98/322 dated 15.1.99 has been adjudicated vide Order in Original No. 18/2012 C-Ex/ JPR II Commissioner dated 30.3.2012 wherein it is inter alia held that M/s. Suzuki Processors, Bhilwara were manufacturer within the contemplation of Section 2(f) of Central Excise Act, 1944, and accordingly, they were liable to pay duty in respect of fabrics processed on their account in the Process-house on the basis of sale price for such fabrics in terms of Section 4(1) (a) of Central Excise Act, 1944 and that M/s. PGO Processors (P) Ltd., Bhilwara did not hold the position of a manufacturer within the meaning of Sec.2(f) of the Central Excise Act, 1944 and accordingly, Central Excise Registration Certificate S.R. No. BHL-II/Chap.51,52,54 & 55/3/97-98 dated 03.06.1997 issued to PGO was revoked under erstwhile Rule 174(11) of Central Excise Rules, 1944.

(k) Further, Order-in-Original No. 26/2012/CEx. /JPR-II/Commissioner dated 30.3.2012 was passed in respect of show case notice C.No.V(55)/15/off/96/98/Pt.I/3450 dated 31.5.1999, where it is held that provisions of Notification No. 36/98-CE and 42/98-CE(NT) both dated 10.12.98 were not applicable to M/s. PGO Processors (P) Ltd., Bhilwara and that PGO was not 'independent processor' in relation to the process-house within the meaning given in explanation to the notification No. 36/98-CE and 42/98-CE(NT) both dated 10.12.98."

4. Order in original No. 28-42/2012 dated 30.3.12 was passed confirming the demands vide 15 show cause notices issued to M/s. Suzuki Processors covering the period 16.12.98 to November, 2000 when Compounded Levy Scheme was in operation. All the demands were confirmed, but the company was granted relief for the benefit of cum duty price as well as deduction of 4% towards selling expenses from the assessable value of the goods cleared from the processing unit.

5. Order in original No.22-25/12 dated 30.3.12 was passed against M/s. PGO Processors confirming the demand for differential duty. In this order deductions were allowed on account of certain post manufacturing activities traceable to M/s. Suzuki Processors such as brokerage paid to intending agents, etc.'

6. The appeals have been filed by the assessee as well as their employees against demand of duty as well as imposition of penalties vide the above impugned orders. Revenue has filed the appeals against the admissibility of selling expenses from the assessable value

extended to M/s. Suzuki Processors as well as admissibility of brokerage and other deductions extended to PGO Processors.

7. The proceedings emanate from and hinge upon the determination of a common question of fact, being – whether the commercial arrangement, comprising of a lease agreement, rent agreement and a job work contract, entered into between M/s. Suzuki Textiles Ltd. and M/s. PGO Processors was a sham arrangement to evade payment of central excise duty. Such determination is crucial for ascertaining the correct valuation of the clearances effected by M/s. PGO Processors. It is the case of the department that as the commercial arrangement subsisting between the parties is nothing but a façade, the clearances in question have been under-valued under the ***Ujagar Prints*** Principle (until 15.12.1998) and on the annual production capacity under the compound levy scheme thereafter [Notification No. 36/98-CE dated 10.12.1998 superseded by Notification No. 19/2000-CE dated 01.03.2000]. It is alleged that such clearances ought to have been correctly valued on the sale price of M/s. Suzuki Textiles Ltd. Accordingly, the differential duty on such clearances is sought to be recovered by the department.

8. Learned senior advocate, Shri V Lakshmi Kumaran arguing the case for the appellants, submitted that the differential duty demands are not sustainable on the main ground which is common to

all the appeals. That the commercial arrangement subsisting between M/s. Suzuki Textiles and M/s. PGO Processors is not a sham and borne out of genuine commercial considerations. To support this argument, he further submitted as follows:

(i) Both M/s. Suzuki Textiles and M/s. PGO Processors are registered with the Registrar of Companies under the Companies Act with separate registration numbers. They are also separately registered with the Income tax authorities, Sales Tax authorities and also the Directorate General of Foreign Trade and have been allotted separate import - export code numbers.

(ii) Land and building, as well as plant and machinery of the two companies are separate and distinct. It is not the case of the Revenue that the amount of rent paid by M/s. PGO Processors to M/s. Suzuki is not fair.

(iii) Both companies have separate staff and are employing more than 300 employees each.

(iv) It is a settled position of law that dummy unit is one which has been created solely with the intention of evading the duty by manipulating of accounts and which does not exists in reality. This is not the case in the present matter. M/s. PGO Processors also carried out the processing of grey fabrics for parties other than M/s. Suzuki also. This was to the extent of 6% to 15% of the total sales.

9. Learned Counsel also submitted that an identical issue came before the Tribunal in the case of ***Rajasthan Spg. and Wvg. Mills Ltd. [2001 (131) ELT 594 (Tri-Del)***] where also the process house initially run by the manufacturer was later leased out. Thereafter duty was paid by the process house only on the basis of ***Ujagar Prints*** case. The Tribunal vide the above decision, held that such lease agreement for process house cannot be considered as a sham and process house owner cannot be regarded as real manufacturer. Accordingly, it was held that demand was not sustainable. The decision of the Tribunal was also upheld by the Hon'ble Supreme Court as reported in ***[2007 (218) ELT 641 (SC)].*** He submitted that since the facts of the present case are identical to the above decision of the Apex Court, the present appeals also merit a similar decision without prejudice to the above, he also submitted that if the demand is held to be maintainable both M/s. Suzuki and M/s/. PGO will be entitled to certain deductions and abatements which have not been taken into account in the impugned orders.

10. The case of the Revenue was argued by Shri T R Saini, DR. He reiterated the impugned orders and emphasized the fact that the adjudicating authority has held that processing house was part of

M/s. Suzuki Textile Ltd. and the same was artificially separated into a separate unit and lease / rent agreements were entered into between M/s. Suzuki and M/s. PGO Processors. This is nothing but a sham agreement to evade payment of Central excise duty. M/s. Suzuki who were paying duty at the rate at which the processed goods were sold, started paying duty at the end of M/s. PGO at a very much diminished value. He further submitted that M/s. IDBI, who had given loan to M/s. Suzuki did not give permission for such lease arrangements. He finally submitted that differential duty has been rightly demanded from M/s. Suzuki.

11. Heard both sides and perused the records.

12. The case of the department revolves around the question whether the commercial arrangement subsisting between the parties is to be considered as a façade engineered with the intention to evade central excise duty. After leasing out the processing unit duly stands paid on the processed fabric on the basis of cost of goods plus processing charges as has been held by the Apex Court in ***Ujagar Prints*** case. It is the claim of the appellant that leasing out of land, building, plant and machinery have been carried out between two completely separate legal entities. Further, such leasing is for commercial consideration and the department cannot stand in judgment over such commercial dealings. It has further been

contended that the processing charges charged by PGO Processors to M/s. Suzuki as well as to other independent suppliers of grey fabrics are comparable.

13. It has been submitted by the appellants that the facts and issues involved in the instant batch of cases are strikingly similar to facts and issues involved in the case of Rajasthan Spg. and Wvg Mills case (supra) and hence findings recorded therein are squarely applicable to the determination of the present matter. Since the decision of the Tribunal in that case has also been approved by the Hon'ble Supreme Court, the case will become binding precedent in the present proceedings. The operative part of the Tribunal's finding are reproduced below:

> ***"8.*** *The duty demand has been made in the impugned order upon a finding that the lease agreement is sham. That finding has been rendered on an examination of the lease agreement, the conduct of the parties, common staff of the process house before and during the lease period, financial relations between the lessee and the lessor and the control of one over the other. Lease agreements were entered into between public limited Cos. There could be no questioning of their competence to contract. The fact of their being Cos. of the same group notwithstanding, the lease agreements were valid in law. The commercial wisdom behind the agreements is not open to questioning by tax authorities. The issue as to whether a transaction is genuine or not is required to be examined from the point of view of whether the transaction really took place*

and who is the beneficiary of the transaction. In the present case, since the transacting parties were fairly big public limited companies, there could be no doubt about their existence. The books of accounts of the Cos. and their Balance Sheets show clearly that each bore the responsibility for his end of the deal. RSWML continued to be responsible for the capital invested on the process house as its owner, while BSL and PFTL bore responsibility for paying the lease amount as well as for the running of the processing house. Each Co. paid the other for the assets or services received, including interest for delayed payments. Management control by the Group Hqrs. or common workers and managerial staff for the processing house before and during lease period make no difference to the status of BSL and PFTL as lessee, manufacturers.

9. *In view of what has been stated above, the findings in the impugned order of adjudication that the lease agreement was sham, that RSWML was the real manufacturer of fabrics at Mordi and that there was short levy of duty cannot be sustained. In the facts of this case, demand could also not be raised for the extended period, invoking proviso to Section 11A(1) of the Central Excise Act as the case did not involve fraud, suppression of facts etc. mentioned in the proviso to the Section. No penalty could also be imposed in the present case since no duty evasion had taken place on account of processing of fabrics for RSWML by the BSL and PFTL. Consequently all the appeals are allowed after setting aside the impugned order."*

14. We have carefully considered the above decision cited by the appellants. Prima facie, it appears to us that there is lot of similarities in the facts and circumstances of that case with the facts of the present case. There are also certain differences. The comparison chart has been submitted by the learned Counsel between the cited decision and the present case. From this, we find that the various aspects of this case need to be re-adjudicated in the light of the cited decision. On perusal of the impugned orders, we find that the adjudicating authority did not appear to have considered the said decision. Hence, we consider it appropriate to set aside all the impugned orders and remand the entire matter for reconsideration by the jurisdictional Commissioner. He will consider the present facts of the case in the light of decisions of the Tribunal and Apex Court and pass revised orders after giving effective opportunity of hearing to all the appellants to present their case. Additional evidences may be admitted as per law.

(Pronounced in the open court on 06.06.2017)

(Justice (Dr.) Satish Chandra)	**(V. Padmanabhan)**
President	**Member (Technical)**

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