CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 07.09. 2017
Date of decision: 09.11.2017

Excise Appeal Nos. 809, 935 to 940 of 2009

(Arising out of order-in-original No. 25/2008 dated 22.12.2008 passed by the Commissioner of Central Excise, Delhi-I).

M/s Hindustan Sanitary & Industries Limited Appellant
Ajay Kumar Jindal, Prop.-M/s Sunshine Ind.
Anil Kumar Goyal, Prop. – M/s Century Polytech
Vipan Singh Wazir, Partner – M/s Super Plast (India)
Smt Sarla Devi, Prop. – M/s Vishal Plastics
Satish Bansal, Prop.- M/s R.S. Sanitaryware
M/s Jindal Sanitary Works

Vs.

CCE, Delhi Respondent

Appearance:

Sh. B. K. Singh, Sh. R. Krishnan & Sh. Prem Ranjan Singh, Advocates for the appellant

Sh. R. K. Mishra, AR for the respondent

Coram:

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

Final Order Nos. 57728 – 57734/2017

Per: **V. Padmanabhan**:

M/s Jindal Sanitary Works (JSW) is engaged in the manufacture of PVC sanitary ware i.e. cistern, seat covers, bath tubs and parts. The DGCEI investigated the case and found that JSW had five other units wherein similar goods were being manufactured. All six units were availing SSI exemption. Search operations were carried out on 04.12.2006 covering all the six premises alongwith the combined office of JSW and other group companies. Other connected premises including the residential premises of the Partners / Prop. of group units were also searched. The records seized were scrutinised and statements were recorded of various persons. After completion of investigation show cause notice dated 01.06.2007 was issued proposing to club the value of other five group companies into the turnover of JSW which came to be decided vide the impugned order.

2. With the above background, we heard Sh. R. Krishnan, ld. Advocate representing the buyer M/s Hindustan Sanitaryware (HSW) and other appellants represented by Sh. B. K. Singh, ld. Advocate. Revenue was represented by Sh. R. K. Mishra, ld. AR.

3. For a proper appreciation of the case, the brief details of investigation conducted and the conclusions of the department are given below:

3.1 a. Sh. R. N. Jindal, prop. of M/s JSW is managing/ regulating the purchases of the raw material for all the group units including the diversion of the same within the group units without any formal documentation. Department found that the supply of twelve MT Resins on the invoice of M/s Haldia meant for delivery to M/s Vishal Plastics which was unloaded at M/s Ganesh Udyog and M/s JSW which was seized on 04.12.2006. Similar diversions were made in respect of goods received from M/s Bombay Fancy.

b. Sales invoices of certain goods were issued by those units which did not actually manufacture the goods. Department relied on the statement of Sh. Vipan Singh Wazir, Partner of M/s Super Plast. Similar instances were quoted in respect of raw material supplied by M/s Super Plast to M.s Century Polytech. Similar allegations were made against M/s Ganesh Udyog also.

c. Based on a register 'Image' reflecting clandestine clearance amounting to Rs. 1,01,49,780/- under the brand name "Jindal" owned by JSW, allegations of clandestine manufacture and removal were also made against JSW. Sh. Anil Goyal of M/s Century Polytech also admitted that the bath tubs available in his unit was manufactured by M/s Sunshine.

d. M/s Ganesh was clandestinely clearing the goods to the assembling godown of JSW and M/s Sunshine. The proprietor of M/s Ganesh stated that all the goods manufactured in his unit were packed with "Jindal" brand and transferred to godown of JSW/ M/s Sunshine.

e. The packing material (card board boxes) were with the brand names "Jindal" and 'Malpline' as well as 'Sun Plast' which was registered brand of JSW and Sunshine.

f. All the purchase orders were addressed to Sh. R. N. Jindal. Sh. Gautam Ghosal of Hindustan Sanitaryware confirmed common procurement from the group. Sh. Anil Saxena of M.s Shine Polymers informed that raw material for all the units was ordered by Ajay Jindal.

g. It is also also alleged that the complete records were not submitted by M/s Century Polytech and M/s Vishal Plastic.

3.2 Relying on the aforesaid evidences, it was concluded by Revenue in the show cause notice that Sh. R. N. Jindal of JSW is managing/ controlling and governing all the decision making affairs in respect of all the units of the group.

3.3 In para 8 of the show cause notice it has been stated that all the units had been filing declaration to the departments and each of the units was declaring its annual turnover below Rs. 1 crore. The Revenue concluded that although *de-jure* all the units are separate legal entities but are *de-facto* multiple units floated by Sh. R. N. Jindal so as to fraudulently avail the SSI exemption.

3.4 It has also been concluded that all the units were manufacturing the goods of 'Hind Ware' and 'Rassi' brand owned by HSW. The invoices hear the brand name as 'Tiffany', 'Java', 'IRIS', 'Prestige etc. which are models of HSW. The bath tubs also bear similar brand names, the sale invoices also mention name of the model. The department also did not accept the statement of Sh. Ghosal that the units were putting only the model name.

3.5 In the show cause notice it has also been alleged that during 2005-06 goods worth Rs. 3,74,755/- and during 2006-07, goods worth Rs. 2,97,978/- were clandestinely removed by M/s Sunshine and JSW.

3.6 In respect of M/s Ganesh Udyog, in para 14.3 of the show cause notice a total value of clandestine clearance to unit of JSW/Sunshine was Rs.1,01,49,780/- The department has alleged clandestine clearance of excisable goods from various premises of M/s JSW to the tune of Rs. 1,75,24,763/- during the year 2006-07. They also came to the conclusion that at the various units a stock of Rs. 41,93,900/- was lying unaccounted and stock of Rs. 50,52,251/- was seized at various other premises.

3.7 At internal page 75 of the show cause notice, a flow chart has been shown to indicate the manner in which the raw material was diverted to various units. Similarly at page 76 of the show cause notice, a flow chart has given for sale of baths tub by different units.

3.8 The department prepared a chart in respect of clearance of goods from various units and has come to conclusion that the branded goods worth Rs.9,77,89,637/- was cleared from all the units of the group during last five years i.e. from 2002-03 to 2006-07 to M/s HSW after availing the benefit of SSI exemption. The department has also concluded that from years 2004-05 to 2006-07 the SSI benefit was not available to JSW.

3.9 The Revenue finally concluded that other than JSW all units were dummy and hence, the clearances by all units are to be considered as clearance from M/s JSW.

3.10 Accordingly, duty of Rs. 3,13,16,833/- and Education Cess Rs. 4,33,534/- was demanded from JSW. This included the liability against all the units. Penalty was also proposed against the JSW under Section 11AC read with Rule 25 of the Central Excise Rules, 2002 and penalty was also proposed on other individuals of various units under Rule 26.

3.11 Vide order-in-original dated 22.12.2008 the adjudicating authority confirmed the demand on JSW as proposed in the show cause notice, imposed equal amount of penalty under Section 11AC of the Act and also imposed penalty of Rs. 50 lakhs on Sh. R. N. Jindal under Rule 26. He also imposed penalty of Rs.10 lakhs each on Sh. Ajay Kumar Jindal, Raj Kumar Jindal, Vipan Wazir, Anil Kumar Goyal and Smt. Sarla Devi. He also imposed a penalty of Rs. 5 lakhs on Sh. Satish Bansal of M/s R. S. Industries and Rs. 10 lakhs on M/s HSW.

4. Sh. B. K. Singh, ld. Advocate submitted the main grounds of assessee's appeal as follows:

(a) It is submitted that the adjudicating authority has not considered any of the submissions made by the appellant in their reply. He has narrated the submission in para 89 of the order-in-original. However, without discussing the same, the adjudicating authority has concluded in para 90 of the impugned order that Sh. R. N. Jindal had been controlling and governing all the decisions as well as funding of all the units. He relied on the decision of Hon'ble Supreme Court in case of D. Bhoormall to conclude that the department is not required to prove its case with mathematical precision.

(b) Reading of some of the findings of the adjudicating authority gives the impression that he has just copied the allegations made in the show cause notice and extracted it as his findings.

(c) It is submitted that for clubbing of clearances of all units or to hold that several units are manufacturing on behalf of one unit, it has to be shown that those units were dummy units. It is submitted that for this purpose, at least two basic facts have to be proved. These are that:

(i) None of the units has capacity to manufacture goods.

(ii) There is financial flow back from the parent unit to the dummy unit.

(d) There are several case laws on this issue. A few of such cases are as below:

(a) Renu Tandon vs. UoI – 1993 (66) ELT 375 (Raj.) - Appellant would rely on para 36 of the said judgment of the Hon'ble High Court.

(b) Jagijiwandas & Co. vs. CCE, Thane- 1985 (19) ELT 441- Appellant would rely on observation of the Tribunal in para 6 of the judgment.

(c) Techno Device vs. CCE, Chennai – 2009 (243) ELT 79. The appellant would rely on para 11 of the judgment.

(d) DPK Engineers vs. CCE, Bangalore – 2003 (157) ELT 691 (Tri. Bang.) - The appellant would rely on para 3(c), (d) & (e) of the judgment.

(e) Poly Printers vs. CCE Delhi reported in 2002 (139) ELT 295 (Tri. Del.) and approved by the Hon'ble Apex Court.- the appellant would rely on para 10 & 11 of the judgement.

(e) The only evidence cited for clubbing of clearances is that Sh. R. N. Jindal was placing orders for each of the units, ensure supply of goods from each unit, help those units in getting raw material at reasonable rate and represent this unit to the outsides.

(f) In the present case, all units are separate and are either proprietorship or partnership. They have separate establishment and separate registration with the authorities concerned; they have also been filing regular declaration to the department. All of them had the infrastructure including machines to manufacture goods. They had separate power supply, separate manpower and purchased raw material according to their need.

(g) The claim of the department that the raw material was procured only by Sh. R. N. Jindal and payment was made by him is not substantiated by the evidence available on record. The appellant would refer to bank statements of all the units to show that each unit has paid for the raw material which they have received. It may be true that Sh. R. N. Jindal negotiated with the supplier to purchase the raw material for all units but in all cases the cost of the raw material was paid by individuals units which is reflected in the bank statement of the relevant period.

(h) It has been alleged that Sh. Ajay Kumar Jindal was not paying rent for the godown in which he used to assembly the excisable goods after clearance from his factory along with Sh. R. N. Jindal. It is submitted that the said premises of assembling belonged to the mother of Sh. Ajay Jindal and R. N. Jindal and therefore, there was no financial accommodation by any of them. The officer conducting search had clearly mentioned that the two units functioning the same building had different floors assigned to them and had different works even. Even if some of the workers were common, it would not lead to the conclusion that one unit was dummy of the other unit.

(i) The show cause notice has been issued in 2007 and covers the period from 2004-05 to 2006-07, larger part of the demand is barred by time. The allegation that the appellant had suppressed the facts in this case is only assumption. It may be seen that the unit of JSW and other manufacturer was searched by DGCEI itself in the year 2002. The mode of operation of JSW was known to the department from the very beginning in fact show cause notice for the year 2002-03 is pending for final decision for this Hon'ble Tribunal. Therefore, no allegation for suppression of fact against the appellant cannot be made if show cause notice was issued on the same issue prior to the impugned show cause notice. The appellant relies on the following decisions-

(a) Nizam Sugar Factory vs. CCE – 2006 (197) ELT 465 (SC)

(b) CCE vs. Chemphar Drugs – 1989 (40) ELT 276 (SC)

(j) The allegation that the appellant was manufacturing the branded goods of HSW is also not substantiated even by the statement of Sh. Ghosal an official of HSW. Sh. Ghosal has confirmed the statement of the appellant that they were not marking the finished goods supplied to HSW with the brand name 'Hindware' or 'Rassi'. They were only mentioning model name of the products manufactured for supply to Hindware. Such supplies are not considered as manufacture of the branded goods. Appellant would like to rely on the following decision-

> CCE, Mumbai-IV vs. Sam Techno Mech – 2016 (343) ELT 393 (Tri Mum)

5. Sh. R. Krishnan, ld. Advocate submitted on behalf of M/s HSW as follows:

The allegation is that M/s HSW procured goods bearing their brand name from various group companies of JSW. He submitted that the goods procured did not bear the brand names such as "Hindware" and "Rassi" which belong to HSW. The goods were bearing short abbreviations such as "BTT" BTJ, BTI etc. which was nothing but accronym indicating different models. It is also his submission that HSW were in no way connected with the availing of SSI exemption by JSW and their group companies. As a buyer it is not their obligation to question the seller about SSI exemption. As such, he submitted that the penalty imposed under Rule 26 HSW is not justified.

6. We heard both sides and perused record.

7. A table showing the various units covered in the present case is given below for ready reference:

Sl.No.	Name & Address of the Group Units	Name of the Prop. / Partner	Relation ship with Sh. R. N. Jindal	Products
1	M/s Jindal Sanitary Works (JSW), T-5/241, Mangolpuri Indl. Area, Phase-I, Delhi	Sh. Ram Niwas Jindal, Proprietor	Self	Cisterns and parts thereof, seat covers

2	M/s Sun Shine Industries (SS) T-5/241, Mangolpuri Indl. Area, Phase-I, Delhi	Sh. Ajay Kumar Jindal, Propiretor	Younger Brother	Bath Tubs, Cistern Seat covers etc.
3	Combined office	Ajay Jindal & R.N. Jindal	Brothers	All kinds of plastic products
4	Ganesh Udyog (GU) T-2/201, Mangolpuri Indl. Area, Phase-I, Delhi	Sh Raj Kumar Jindal, Proprietor	Elder Brother	Cistern and other plastic accessories, Corner Mirror frames, Seat covers
5	M/s Century Poly Tech (CPT) 262, Swarn Park, Udyog Nagar, Mundaka, Delhi	Sh. Anil Kumar Goyal, Proprietor	Brother-in-law	Acrylic Bath Tubs Kitchen Sinks
6	M/s Super Plast (India) 265, Swarn Park, Udyog Nagar, Mundaka, Delhi	Smt. Pushpa Rani, Partner (60%) Sh. Vipan S. Wazir, Partner (10%)	Wife	Water tanks
7	M/s Vishal Plastic (VP) 129, Sector-5, Bawana Indl. Area, Delhi-39.	Smt. Sarla Devi, Proprietor	Sister	Seat covers for toilet etc.

8. At the outset, we record the fact that Sh. Raj Kumar Jindal, Prop. of GU has expired as pointed out by the ld. Counsel for the appellant. As per Rule 22 of the CESTAT Procedure Rules, the appeal filed by GU abates alongwith the penalty imposed on Sh., Raj Kumar Jindal. This view is also supported by Apex Court decision in the case of *Shabina A**braham vs. CCE - 2015 (322) ELT 372 (SC).***

9. Case of the department is that JSW has evaded duty by exceeding the exemption limit under Notification No. 8/2000 (SSI exemption) by showing the clearances of goods under the group companies i.e.-

Sl.No.	Name & Address of the Group Units	Name of the Prop. / Partner	Relation ship with Sh. R. N. Jindal	Products
1	M/s Sun Shine Industries (SS) T-5/241, Mangolpuri Indl. Area, Phase-I, Delhi	Sh. Ajay Kumar Jindal, Propiretor	Younger Brother	Bath Tubs, Cistern Seat covers etc.
2	Ganesh Udyog (GU) T-2/201, Mangolpuri Indl. Area, Phase-I, Delhi	Sh Raj Kumar Jindal, Proprietor	Elder Brother	Cistern and other platic accessories, Corner Mirror frames, Seat covers
3	M/s Century Poly Tech (CPT) 262, Swarn Park, Udyog Nagar, Mundaka, Delhi	Sh. Anil Kumar Goyal, Proprietor	Brother-in-law	Acrylic Bath Tubs Kitchen Sinks
4	M/s Super Plast (India) 265, Swarn Park, Udyog Nagar, Mundaka, Delhi	Smt. Pushpa Rani, Partner (60%) Sh. Vipan S. Wazir, Partner (10%)	Wife	Water tanks
5	M/s Vishal Plastic (VP) 129, Sector-5, Bawana Indl. Area, Delhi-39.	Smt. Sarla Devi, Proprietor	Sister	Seat covers for toilet etc.

On the basis of certain kachha parchis recovered during search, it has also been alleged that clandestine clearances were made in respect of goods covered under the kachha parchies, without payment of duty. The other allegation is that JSW cleared goods bearing the brand name of HSW who are not entitled to SSI exemption. Hence, clearance of such branded goods are to be charged to duty without SSI benefit.

10. It was noticed by the department during search that out of the various units comprising JSW group, each had certain machineries for example JSW has drilling machines, injection moulding machines; SS had machines for making of bath tubs, in the combined office and assembling unit of different goods were found to be done. GU had injection moulding machines, CPT had power press, stamping machine etc. SP had three ARMS rotational moulding machine, VP had two injection moulding one extruder. However, it is important to note that no unit had the infrastructure to make any of the goods claimed to be manufactured by that unit.

11. It is the allegation of the Revenue that Sh. Ram Niwas Jindal, Prop. JSW was the patriarch who was managing, controlling and governing the decision making in respect of all the units. He seemed to have placed orders for purchase of raw material of all the group units and diversion of the same to different group. He is instrumental in the issue of sale invoices from various units within the group in respect of even goods not actually manufactured by that unit, but manufactured and cleared from another unit. It was also noticed that inter unit transfer of finished goods within the group units was common as also common assembly of goods without any accountal. Sh. Ram Niwas Jindal also handled procurement of orders centrally and showing the same in the books of different units. But fact remains that Department has not put any corroborated evidence to this effect specially when each unit is maintaining separate stock register.

The appellants have contested that purchase of raw materials centrally by stating that such raw materials have been reflected in the books of accounts separately in each company.

12. The investigation undertaken has clearly brought out that finished goods i.e. bath tub, PVC cistern and seat covers were being manufactured in SS and JSW whereas the invoices were being issued from GP and payment was received as reflected in the books of accounts.

13. After appreciation of overall evidences – both documentary as well as oral - picture that emerges is that none of the companies had the full infrastructure to manufacture the goods they were shown to make. The final assembly of goods said to be manufactured in different units. For moving the goods from one unit to another unit, some times, kachhi parchies were used. There is no clear evidence of flow back of funds among the units. All these evidences lead to an escapable conclusion that all the units were having separate existence in record by taking separate registrations under sales tax/ income tax etc. They were also filing separate declarations every year to Central Excise authorities claiming that their turnover was below the SSI limit. However, the investigation has established that all units though were shown to have separate *de jure* existence but the de fecto contract was with Sh. Ram Niwas Jindal. But in the eye of law, it alone cannot be ground to deny the benefit of SSI exemption.

15. In these circumstances, we are of the view that the finding of the adjudicating authority that the turnover of all the units was required to be clubbed for the purposes of SSI exemption cannot be justified.

16. Now we turn to the allegation of clearance of goods by JSW bearing the brand name belonging to HSW. The submission on behalf of the appellant HSW is that goods were got manufactured from JSW as per their specifications. Such goods were cleared bearing only certain marks representing the different models and not with the brand names. These items were received by HSW in their trading godown where the recipient affixed their own brand names such as "Hindware" and "Rassi" and then cleared in their packing material. The supply was exclusively to HSW. No item was sold in the open market. The appellants were doing job work.

17. Further, the allegation that the goods cleared to HSW were bearing the brand names of the later is not substantiated by corroborated evidence. In his statement, Sh. Ghosal, official of HSW, has confirmed the statement of the appellant that they were not marking the finished goods supplied to HSW with the brand names, "Hindware" or Rassi". They were initially mentioning the model number of the products manufactured for supply of HSW. Such marks such as "BTT", "BTJ", etc. cannot be considered as brand names in the absence of any investigation to prove the name mentioned on such labels was brand name or name of another person as has been held by the Tribunal in the case of ***CCE vs. Sams Techno Mech reported in 2016 (343) ELT 393 (Tri. Mum)***. In view of the above discussions, we conclude that there is no justification for denying the SSI benefit to appellant companies. Also all the penalties imposed are not justified and set aside. The original adjudicating authority is directed to re-calculate (re-quantify) the demand after allowing the SSI benefit for clearances to HSW. To this extent the impugned order is modified.

18. In the result, all the appeals are allowed as stated above.

(Pronounced on 09.11.2017).

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

Pant