

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 737 of 2011- SM

(Arising out of OIA-14-17/2011-AHD-I-CE/MM/COMMR-A-/AHD dated 15/03/2011 passed by Commissioner of Central Excise-AHMEDABAD-I)

Orkay Gears

42, Laxmi Industrial Estate, Amraiwadi,
Ahmedabad, Gujarat.

.....Appellant

VERSUS

C.C.E.-Ahmedabad-i

C. Ex Bhavan,
Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad, Gujarat - 380015

.....Respondent

WITH

- **Excise Appeal No. 738 of 2011 (Dhirubhai C Patel)**
- **Excise Appeal No. 739 of 2011 (Dhanikbhai J Patel)**
- **Excise Appeal No. 740 of 2011 (Jivrajbhai C Patel)**

APPEARANCE:

Shri, Devan Parikh (Sr. Adv) & Shri, Nirav Shah, Advocates for the Appellant
Shri, G. Kirupanandan Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/11171 - 11174 /2023

DATE OF HEARING: 06.02.2023
DATE OF DECISION: 02.06.2023

RAMESH NAIR

The present four appeals have been filed by M/s Orkay Gears (Appellant No.1), Shri Jivrajbhai Chhaganbhai Patel, Proprietor of M/s Orkay Transmission (Appellant No.2), Shri Dhirubhai Chhaganbhai Patel, Proprietor of M/s Hitesh Engineers (Appellant No.3) and Shri Dhanikbhai J. Patel, Proprietor of M/s Omkar Technologies (Appellant No.4) against the impugned Order -In-Appeal No. 14 to 17/2011(Ahd-I)CE/MM/Commr(A)/Ahd dated 15.03.2011. Since all the appeals are against the common order, therefore, the appeals are taken up together for consideration.

2. Brief facts of the case are that intelligence was gathered that the Appellant No.1 is indulging in evasion of duty and accordingly a search was carried out in the factory premises of M/s Orkay Gears, M/s Orkay Transmission, M/s Hitesh Engineering and M/s Omkar Technologies. Investigation conducted by the department has brought on records that out of four units, none of them are having full-fledged machinery to carry out the complete manufacturing process of Gears, Gear Boxes and Parts thereof, at their own. It also came on record that though clearance of manufactured goods for substantial amount has been shown from M/s. Omkar Technologies, the said unit did not have any machinery installed in its shed. It also has come on record that the cycle of manufacturing process is completed when the goods travel through all the three units. Therefore, it is felt that all the three unit cannot be considered independent units manufacturing Gears, Gear Boxes and parts thereof and so as to avoid duty liability, four units have been created on paper without having proper manufacturing facilities. It therefore felt that above four units are not separately eligible for the SSI Exemption contained in the Notification No. 8/2003 –CE dated 01.03.2003, the clearances shown to have been made in the name of other three units have to be clubbed with the value of clearances of the Appellant No.1 so as to determine their eligibility for exemption contained in the Notification No. 8/2003-CE dated 01.03.2003. Accordingly, on completion of the investigation, a show cause notice was issued proposing demand of central excise duty and imposing penalty on the Appellants. In adjudication, demand was confirmed vide Order –In-Original dated 16.09.2010. Being aggrieved, all the appellants filed appeals before the Commissioner (Appeals), who vide impugned common Order-In-Appeals rejected the appeals and upheld the order of adjudicating authority. Aggrieved by the same, the appellants are before us.

3. Ld. Counsel Shri, Nirav Shah appearing for the appellants submits that finding in the impugned order in this case cannot be sustained. The department has failed to discharge its burden to demonstrate that there is evasion of duty. Even at the time of visit it was clarified beyond doubt that some of the activities are carried out in all units and all units send goods out for Jobwork. It was department to substantiate for making out the case that it was whether the nature of Jobwork and activities on the machinery of the unit is sufficient to make final products. However no such investigation is carried out despite knowing that jobwork is being done.

3.1 He also submits that there is no justification in orders as to why Orkay Gears is main firm and others are abettors when even Orkay Gear

does not have all machines. In the aforesaid context the OIO specifically found that there is no dispute about existence and their independence. If this be the case, there is no justification, either in SCN or in orders as to why only one unit is considered as main unit so that entire responsibility comes on one proprietor i.e Shri Dineshbhai Kaneriya. Even at the time of Panchnama, he was not present and only Sureshbhai of Orkay Transmission was present. Even the finding in the context of imposition of penalty does not justify why all three units shall be considered as abettor and Orkay Gears as main evader. As a matter of facts Hitesh Engineers was the first unit established in 1989 and had started manufacturing of Gear Box since 1995. Orkay Transmission also started manufacturing of these products from 1995. Now Orkay Gears come into existence in 2002 and Orkay Technologies in November, 2006. It is not understood in such facts why Orkay Gears should be considered main and others as abettors.

3.2 He further submits that in this SCN itself, statement of different proprietors are recorded. In para 5,6,7 & 8 all of them have clarified that they are doing certain activities on their own machinery and remaining on Jobwork. All purchase raw materials directly and pay for the same from their accounts. All sell their goods to customers separately by taking orders on phone or orally. All of them receive payment in their bank accounts. Omkar Technologies have no machines but they get their goods manufactured on Jobwork basis. All of them have the Jobwork invoices and have paid through their bank accounts. All have labour and their own premises. They are registered under innumerable acts and laws. All of them have into existence independently at different time belonging to same proprietor. So it is not the case as if there was a partnership firm who subsequently show paper divisions for availing exemption. Each of the proprietors started his business independently at different point of time. There are concrete walls between the units and Orkay Transmission of Plot No. 36 is on other side of the road. Furthermore all these units functions exactly in the same manner all the way till 2020 except for Hitesh Engineers which shifted its activity in 2008 to another premises. Despite this fact no case is made out by the department from April 2007 onwards.

3.3 He also submits that various case laws have settled the issue that commonality of administrative facilities, relation of parties, even some common use of machine, etc. cannot lead to clubbing. In the present case even electric connection are different. Most importantly there is no averment

or finding on any financial flow back or managerial control as required by settled case law. Hence as per the settled legal position the units cannot be clubbed. He placed reliance on the following judgments.

- (i) CCE Vs. Electro Mechanical Engg. Corp. -2008(229) ELT 321(SC)
- (ii) Jain Poles Ind. Vs. CCE – 2018(364)ELT 189 (Tri. Del.)
- (iii) Shree Nirmal Spinners Vs, CCE – 2014(300)ELT 469 (Tri. Chennai)
- (iv) Techno Device Vs. CCE – 2009(243)ELT 79 (Tri.- Chennai)
- (v) CCE Vs. Sushil Chemicals – 2008(230)ELT 117 (Tri. –Bang.)
- (vi) CCE Vs. Superior Products – 2008(230)ELT 3(SC)
- (v) RenuTandon Vs. UOI – 1993(66)ELT 375 (Raj.)
- (vi) CCE Vs. Madhusudan Chemical Ind- 2004(174)ELT 335 (Tri.-Mumbai)
- (vii) CCE Vs. S C Patel – 2011 (264) ELT 414 (Tri.-Ahmd.)

3.4 He further submits that in the present matter proceedings suffer from fundamental flaws. If the turnover of unit is required to be clubbed to other or units be considered as one then all units must be required to show cause on this aspect. The SCN issued only against Orkay Gears on this point. The other units are required to show cause notice for imposition of penalty as abettors. He placed reliance on the following decisions.

- (i) CCE Vs. Urbane Ind. -2015(325)ELT 726 (Mad.)
- (ii) CCE Vs. N Manikandan- 2009(246)ELT 349 (Tri.-Chennai)
- (iii) CCE Vs. Copier Force I Ltd. -2009(245)ELT 478 (Tri. Chennai)
- (iv) Poly Resins Vs. CCE – 2003(161)ELT 1136 (Tri.- Chennai)
- (v) Ramsay Pharma P Ltd. Vs. CCE – 2001(127)ELT 789 (Tri. Del)

4. Countering the arguments, on the other hand Shri G. Kirupanandan Assistance Commissioner (AR) appearing for the revenue reiterated the finding of orders. He submits that evidence on records and investigation has brought on records that out of four units, none of them is having full-fledge machineries to carry out the complete manufacturing process of gears, gear boxes and parts thereof of their own. The above said four units were created on paper to wrongly avail SSI exemption provided under Notification No. 8/2003-CE. Therefore the above said four units are not separately eligible for SSI exemption and the clearance shown to have been made in the name of other three units have to be clubbed with the value of clearances of M/s

Orkay Gears so as to determine their eligibility for exemption contained in Notification No. 8/2003-CE.

4.1. He placed reliance on the following judgments.

- Supreme Washers (P)Ltd Vs. Commissioner of Central Excise Pune. - 2003(151)ELT 14 (SC)
- L.R. Industries Vs. Collector of Central Excise, Pune – 1999(114)ELT 550 (Tribunal)
- Heemanshu Traders Vs. Commissioner of C.Ex., Surat- 2003(153)ELT 119(Tri.Del.)
- Amar Enterprises Vs. Commissioner of Central Excise, Delhi – 2017(347)ELT 548 (Tri. Del.)
- S.N. Industries Vs. Union of India – 2015(324)ELT 138 (Raj.)

5. We heard the parties at length and gone through submissions, case laws cited carefully.

6. In the present matter we have gone through the records, statement recorded by the department and find that the proprietor of the above said four units are related to each by blood i.e they are blood relatives as admitted by them in their respective statements recorded by the department. Further it is also admitted facts on records that out of four units, three units did not have all the machines required to manufacture of Gears, Gear Boxes and Parts thereof. Whereas, the fourth unit i.e M/s Omkar Technolgies did not have any machinery installed in his shed. These facts have also been admitted by the proprietor of the above said four units as well as Shri Suresh J. Patel, Authorized person of M/s Orkey Gears in their statements. He also admitted the facts that seven workers on the pay – roll of M/s Omkar Technolgies as Shed No. 43 were being utilized commonly by the above four units. Further during the investigation the department also found that one room situated at shed No. 42 and 43 which is common premises where the spares of all the above four units were stored. Further we also find that Shri Dhanik G. Patel, Proprietor of M/s Omkar Technologies in his statement dated 15.02.2007 and 18.09.2009, admitted that no rent agreement was made and no payment was made as rent to his uncle, Shri Dhribuai C. Patel, who is the owner of the said Shed No. 43; that no machines are installed in his units; that the relevant documents, records etc. pertaining to his firm were kept in the office of M/s Orkay Gears , situated at Shed No.42; that they use the office equipments of the said assessee for their business for which no rent was paid to them; Shri Hasmukhbhai Patel, Smt. Hetalben Nanavati and Shri Sawan H. Patel were preparing sales

invoices on computer in respect of M/s Omkar Technologies; no salary was paid by him for doing such office works to said persons.

6.1 We further find that Shri Suresh J. Patel, authorized person of M/s Orkay Gear had admitted in the present matter that in shed No. 36 (of M/s Orkay Transmission) the machining works of C.I. Casting is carried out, in shed No. 44 (of M/s. Hitesh Engineers) the process of round cutting by hack saw machine for making shaft and teeth cutting process on worn-wheels is carried out , that the partially processed goods from shed No. 36 and 44 were received in shed No. 42 (Of M/s Orkay Gear) where activities of boring, drilling, tapping, finishing, fitting/ assembly, testing, coloring, packing etc are being carried out, in shed No, 43 (Of M/s. Omkar Technologies) from where the goods are shown to be manufactured is owned by Shri Dhanik Girdhar Patel and the same is used for final dispatches of finished goods and storing raw materials only and there is no facility to carry out any manufacturing activity. We also notice that the proprietor of the above said four units, in their respective statements have admitted the above facts and also admitted that in case of necessity in business they lend money to each other without any condition as they are all members of the one family, they also agreed with the contents of the Panchnama dated 07.02.2007 as well as with the statement dated 07.02.2007 of Shri Suresh Patel. We find that the above facts are not disputed by the Appellants during the entire proceedings.

7. After having gone through the above undisputed facts on record, we are of the considered view that manufacture and clearances made by the said four units availing the benefit of Notification No. 8/2003-CE have to be clubbed together as we hold that these units are one and the same, when their operations are under common management/family members and financial control and have mutuality of financial interest with each other. When it is so, then we agree with the findings of the impugned orders. We also find that the Hon'ble Supreme Court's decision in the case of *Calcutta Chromotype Ltd. v. C.C.E., Calcutta* - [1998 \(99\) E.L.T. 202](#) (S.C.) had observed that depending upon the facts and circumstances of the case, veil of the company has to be lifted to find the real facts. In the present case also, all the four units, whatever is their constitution, (these are proprietary concerns), are under common management and closely controlled by relative persons. The facts and circumstances have warranted to examine the reality of these units; and after going behind the mask of these entities, it has been revealed that activities of these units i.e. manufacture,

clearance, etc. has to be clubbed together. In this regard, we take support from the Hon'ble Supreme Court's observations in the above case of Calcutta Chromotype Ltd.(supra) which are given below :

"14. In M/s.Mcdowel and Company Ltd. v. Commercial Tax Officer [(1985) 3 SCC 230 = (1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of IRC v. Duke of Westminster[(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties....."

(emphasis supplied)

8. In the present matter we also find that appellants have not been able to show that all the four units were functioning independently and were capable of functioning independently. Considering the above facts we do not find any reason to interfere with the impugned orders.

8.1 We also noticed that in the present case learned Counsel has quoted certain judgments. We have gone through the said judgments and we do not find it necessary to discuss the same in this order as the facts in those cases are different from the present case and, therefore, the said judgments are distinguishable.

9. In view of the above, all the appeals are dismissed.

(Pronounced in the open court on 02.06.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)