

Commissioner of Central Excise Vs. Indian Additives Limited

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Court : Chennai

Decided On : Jan-03-2014

Judge : The Hon'ble Mrs.Justice CHITRA VENKATARAMAN

Appellant : Commissioner of Central Excise

Respondent : Indian Additives Limited

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated :

03. 01.2014 Coram The Honourable Mrs.Justice CHITRA VENKATARAMAN and The Honourable Mr.Justice T.S.SIVAGNANAM Civil Miscellaneous Appeal Nos.2784 of 2007 and 1354 of 2008 --- The Commissioner of Central Excise Chennai I Commissionerate 121, Uthamar Gandhi Salai Nungambakkam Chennai 600 034 ... Appellant in both CMAs. -vs- 1. M/s.Indian Additives Limited Manali Express Highway Manali, Chennai 600 068. 2.Customs Excise and Service Tax Appellate Tribunal South Zonal Bench Shastri Bhavan Annexe I Floor, 26, Haddows Road Chennai-600 006. ..Respondents in both CMAs. Civil Miscellaneous Appeal No.2784 of 2007 filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.397 of 2007 dated 21.03.2007 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai. Civil Miscellaneous Appeal No.1354 of 2008 filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.1168 of 2007 dated 14.09.2007 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai. For

appellant : Mr.Rajnish Pathiyil in both CMAs. Central Government Standing Counsel For respondent 1 : Mr.V.S.Manoj for in both CMAs. Mr.K.Vaitheeswaran for R1 R2- Tribunal COMMON

JUDGMENT

(The Judgment of the Court was made by T.S.SIVAGNANAM, J.) These appeals by the Revenue are directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal [The Tribunal]. dated 21.03.2007 in Final Order No.397 of 2007 and dated 14.09.2007 in Final Order No.1168 of 2007.

2. The first respondent/assessee is M/s.Indian Additives Limited in both the appeals. Since the issue involved in both the appeals are identical, they were heard together and are disposed of by this common order.

3. The appeals have been admitted on the following questions of law: CMA No.2784 of 2007: Whether the Tribunal is right in holding that the labelling and re-labelling activity performed by the respondent is not amounting to ".manufacture". as per Note 5 of the Chapter 38 of the Central Excise Tariff Act, 1985?. CMA No.1354 of 2008:

1. Whether the Tribunal is right in holding that the labelling and re-labelling activity performed by the respondent is not amounting to ".manufacture". as per Note 5 of the Chapter 38 of the Central Excise Tariff Act, 1985?.

2. Whether the Tribunal is right in holding that the first respondent had labelled their name, address and brand name on the barrels to meet the requirements of (Packaged Commodities) Rules, 1977 especially when the first respondent is not obliged to follow the provision of Standards of Weights and Measures Act, 1976 and the Rules made there under and had erased the markings on the imported barrels and inscribed the first respondent's name (IAL) and address, taken samples, tested them and enclosed the test report to make the product marketable?.

4. The Tribunal while dismissing the appeal filed by the Revenue in the Final Order No.1168 of 2007 dated 14.09.2007 relied upon the final order dated 21.03.2007,

which is the subject matter of CMA No.2784 of 2007. Therefore, it would suffice to refer to the facts in CMA No.2784 of 2007, which is identical to that of the other case.

5. The first respondent/assessee is engaged in the manufacture of Lubricating Oil Additives and also importing additives and trading the same locally. The imported barrels are affixed with certain markings containing name and address and other details of the first respondent and samples are tested and a test report is also enclosed with each consignment, which is sent to the customers. The first respondent/assessee treated their activity as a trading activity and did not pay any duty of Excise for the clearances effected. The Department pursuant to certain investigation, issued three show cause notices for the period from March 1997 to January 1999, February 1999 to August 1999 and September 1999 to January 2000, alleging that the activity done by the first respondent/assessee amounted to ".manufacture". in terms of Note 5 to Chapter 38 of the Central Excise Tariff Act Schedule (CETA Schedule], and therefore excise duty should have been paid on the goods sold by them in India. The Department invoked the extended period of limitation for issuance of the show cause notice alleging that the first respondent/assessee had suppressed facts. The show cause notices also proposed to impose penalty. The first respondent/assessee submitted their reply and the Commissioner who adjudicated the three show cause notices rejected the case of the Department and dropped the proposals made therein by order dated 30.12.2000. As against this, the Revenue preferred appeal to the Tribunal which was rejected by order dated 21.03.2007, against which the Revenue preferred CMA No.2784 of 2007.

6. Insofar as the show cause notice dated 05.11.2001, the Original Authority namely, the Assistant Commissioner of Central Excise, Chennai-I Division confirmed the demand of Rs.19,33,323/-; but did not impose any penalty. Aggrieved by the same, the first respondent/assessee preferred appeal to the Commissioner (Appeals). The First Appellate Authority by order dated 30.10.2002, modified the order passed by the Original Authority and confirmed the demand of duty to the extent of Rs.7,27,611/-. Aggrieved by the same, the first respondent/assessee preferred appeal to the Tribunal. The Tribunal by following

its order dated 21.03.2007 allowed the appeal filed by the first respondent/assessee vide order dated 14.09.2007 and as against which, the Revenue has preferred CMA No.1354 of 2008.

7. The short question, which falls for our consideration in both these appeals is as to whether the operations carried on by the first respondent/assessee amounted to manufacture in terms of Note 5 to Chapter 38 of the CETA Schedule?.

8. For better appreciation, the said provision is quoted herein below: ".Chapter 38 - Miscellaneous Chemical Products Note:5. In relation to products of this Chapter [other than products of heading No.38.08]. labelling or re-labelling of containers and re-packing from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture. ". Now we are required to examine the nature of activity done by the first respondent/assessee and whether it would fall within the mischief of ".manufacture". as mentioned in Note 5 of Chapter 38 quoted above.

9. The first respondent/assessee imported certain additives in barrels, which contain the name of the foreign supplier and their identity. These were removed by the first respondent/assessee and the name, address and brand name of the first respondent/assessee were added to the barrels. Samples were drawn from the imported additives, tested and test reports were prepared. The imported additives were sold under dealers' invoices accompanied by Test Certificate. According to the first respondent, the activities done by them like sample testing, re-branding, changing the name and address, name of the product etc., to make them accepted by customers would not amount to manufacture and would not fall within Note 5 of Chapter 38 of CETA Schedule.

10. The Revenue contended that the activities done by the first respondent/assessee would amount to manufacture since the imported additives after undergoing the said activity have transformed into a new excisable product distinct in name, character and use and hence liable for levy of excise duty at the time of their clearance.

11. The Tribunal pointed out that as per the Board's instructions, reported in 1996 [87]. ELT T18/19, the Board clarified that doubts have been raised regarding the excisability of imported finished medicines including life saving drugs exempted vide Customs Notification No.13/95-Customs, which are marketed by the assessee therein in the country and the Board after examining the matter clarified that the assessee therein while pasting stickers on the cartons of the imported medicines are in fact trying to comply with the requirements of the Drugs and Cosmetics Act, 1940 and are not altering any information originally contained in the package. In this regard, the Board also took note of the opinion of the Drug Controller of India that relabelling as done by the assessee therein is necessary to meet their requirements of Rule 96 of the Drugs and Cosmetics Rules, 1945. Therefore, it was clarified that the process of pasting of stickers on imported finished medicines including life saving drugs cannot be covered by Note 5 of Chapter 30 of CETA 1985. The above referred instructions of the Board was withdrawn on 16.05.2001. The Tribunal placed reliance on the decision of the Hon'ble Supreme Court in the case of Paper Products Ltd., vs. Commissioner reported in 1999 (112) ELT 765(SC) and observed that the earlier instructions of the Board having been in force at the relevant point of time, the subsequent withdrawal of the instructions cannot alter the circumstances, which were prevalent at that relevant point of time. After examining the nature of activity done by the first respondent/assessee, the Tribunal recorded a finding of fact that the first respondent has re-labelled their name address and brand name on the barrels containing goods imported by them and this was to meet the requirements under Rule 33 of the Standards of Weights and Measures [Packaged Commodities] Rules, 1977 framed under the Standards of Weights and Measures Act and not to render the goods marketable so as to attract Note 5 of Chapter 38 of CETA Schedule, which was in pari materia to Note 5 of Chapter 30 of CETA Schedule, 1985. Further, it is to be noted that there is no dispute that the goods imported in barrels were sold as such in India after re-labelling activity done by the first respondent/assessee and such re-labelling activity did not involve any re-packing from bulk to retail pack.

12. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise vs. Johnson & Johnson Ltd., reported in 2005

(188) ELT467(SC) wherein the Hon'ble Supreme Court held that Note 5 of Chapter 30 was held to be inapplicable as there was want of re-packing from bulk pack to retail pack.

13. Learned counsel appearing for the appellant/Revenue submitted that in terms of Rule 33 of Standards of Weights and Measures [Packaged Commodities] Rules, 1977 apart from the name and address of the importer, they shall declare on the package the name and address of the manufacturer also. Whereas in the instant case, the first respondent/assessee has deleted the details of the manufacturer of imported goods and declared on the package the name and address of the importer, code number of the product, product name, gross weight and net weight only and therefore, the said declaration is not covered by the said Rule 33 Standards of Weights and Measures [Packaged Commodities] Rules, 1977 and the declaration was not to comply with the provisions of the said Rules and the Board's circular relied on by the Tribunal is not applicable to the facts of this case.

14. We have heard the learned counsel appearing for the first respondent/assessee on the above submission.

15. The Original Authority, who adjudicated the show cause notices found that the first respondent/assessee had sold the goods under dealer invoices and in the dealer invoices the particulars of the original supplier has been mentioned and such documents were pre-authenticated by the Central Excise Inspector before each and every clearance and the first respondent/assessee never intended to suppress the import identity of the goods and the buyers of the first respondent/assessee were very well aware that they are getting under the said dealers invoices goods, which were imported and not manufactured by the first respondent/assessee. Further more, the inscription of the name of the first respondent/assessee along with other details was with a view to comply with the statutory requirements as required under Rule 33 of the Standards of Weights and Measures [Packaged Commodities] Rules, 1977.

16. Therefore, it is evidently clear that the inscription of the name and other details by the first respondent/assessee was a statutory requirement and cannot be said

to be covered under Note 5 of Chapter 38 of CETA Schedule.

17. As regards taking of samples and the issuance of test services, we find from the facts that all the barrels have not been tested and samples are drawn from one barrel in each consignment with a view to ensure with the quality of the product, which has been imported. Since the cap, which was used to seal the barrel had been removed while taking the samples, such barrels have to be re-capped. That apart, the Original Authority noticed that the entire activities done by the first respondent/assessee is with the knowledge of the customers and not at the back of them and the activity was not for the purpose of rendering the product marketable since the product was assured by a buyer and there was no uncertainty about its sale. Therefore, what has been done by the first respondent/assessee was totally unrelated to the sale of the product and such activity would fall outside the scope and purview of Note 5 of Chapter 38 of the CETA Schedule.

18. Then coming to the aspect as to whether the activity done by the first respondent/assessee would amount to adoption of any other terms to render the product marketable, we find from the facts that the activities done by the first respondent/assessee is not in any way transform the imported product into different product, which was distinct in name, character and use and were not incidental or ancillary to the completion of the finished product and thus not covered by the definition of ".manufacture". under Section 2(f) of the Central Excise Act, 1944 read with Note 5 of Chapter 38 of the CETA Schedule. The Tribunal, rightly placed reliance on the decision of the Hon'ble Supreme Court in the case of Johnson and Johnson Ltd., (cited supra) wherein the Hon'ble Supreme Court was considering the case relating to re-labelling of certain retail packs of assorted medicines. While considering the facts of the said case, the Hon'ble Supreme Court pointed out that the Commissioner of Central Excise has found that the product is ready for sale to consumers in retail packs and these retail packs were then taken to the importers ware houses where stickers were affixed containing information such as name and address of the importers, maximum retail price, net weight, etc., and as they merely imported ready to market retail packs and in the absence of any evidence to show that they indulged in further

activity, which required packing or re-packing of bulk packing into retail price within the extended meaning of ".manufacture"., the Hon'ble Supreme Court dismissed the appeals.

19. The provisions what we are concerned under Note 5 to Chapter 38 is not different from what we find under Note 3 to Chapter 18 and Note 3 to Chapter 19 of the Central Excise Tariff Act, 1985 on the meaning assigned to the expression ".manufacture".. On the facts found, except for re-labelling, the assessee had not broken the bulk packs into smaller packs. Hence, we do not find any justifiable ground to accept the plea of the Revenue. Consequently, the CMA No.2784 of 2007 fails and the same is dismissed.

20. Insofar as CMA No.1354 of 2008 is concerned, the nature of activity was also similar to that of the activity, which is the subject matter of CMA No.2784 of 2007 and the Tribunal by following its earlier order allowed the appeal of the assessee. For the reasons assigned above as the Revenue has not made out any ground to interfere with the order passed by the Tribunal. Accordingly, both the appeals are dismissed and the questions are answered in favour of the assessee. No costs. (C.V.,J) (T.S.S.,J) 03.01.2014 Index:Yes Internet:Yes vj2 To 1.The Commissioner of Central Excise Chennai-I Commissionerte 121, Mahatma Gandhi Road, Chennai-600 034 2. The Commissioner of Central Excise(Appeals) Chennai 3.The Customs, Excise and Service Tax Appellate Tribunal South Zonal Bench, I Floor, Shastri Bhavan Annexe Haddows Road, Chennai-600 006 CHITRA VENKATARAMAN, J.

and T.S.SIVAGNANAM, J.

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