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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-13-2002

Reported in : (2003)(86)ECC394

Judge : K Kumar, S T C.

Appellant : interchrome Pvt. Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. These four appeals have been filed against a common Order-in-Original No. 32 to 36/1997 passed by the Commissioner (Adjudication) Central Excise, Mumbai. The impugned order relates to the five Show Cause Notices dtd. 4.1.1993, 1.2.1993, 2.3.1993, 29.6.1993 and 2.3.1994. The first four have been issued by the Superintendent and the last one by the Commissioner. The impugned order drops the demand under Show Cause Notice dtd. 4.1.1993 as the same is included in the notice dtd. 2.3.1994. As regards the other four Show Cause Notices, the demands have been confirmed totalling Rs. 2,64,07,189 and in addition a penalty of Rs. 20 Lakhs have been imposed. The stay application was earlier decided by this Tribunal on 26.3.1998 staying the recovery of the duty amount that there is no specific order regarding stay of the penalty.

2. Shri V. Sridharan, learned Advocate for the appellant argued the case at length and made detailed submissions to the following effect: "A.1 The activity undertaken is of mere slitting of the flat rolled products, namely, HR coils, CR coils

and SS coils of width more than 600 mm. the slit products were either of more than 600 mm width or of less than 600 mm width.

A.2 Vide circular dated 7.9.2001, the revenue has not disputed the position that when the slit products are of more than 600 mm, the process of slitting the coils would not amount to manufacture since the starting materials is coils of width more than 600 mm and the slit product is also of width 600 mm. In other words, even according to the revenue itself the process of slitting had not resulted in emergence of new product with distinct name character or use when the slit coil is of more than 600 mm width. If that is the case when the slit coil is of width more than 600 mm, the position cannot be different if the slit coil is of width less than 600 mm.

A.3 The activity undertaken is slitting alone. The flat rolled products namely, HR coils, CD coils and SS coils of more than 600 mm width remained as flat rolled product even after slitting. Only the width was reduced. Slit product also remained as flat rolled products namely HR coils or CR coil or SS coils as the case may be.

The name, characteristics and use had not changed. The purpose for which the flat rolled products of more than 600 mm width was purchased/received by the manufacturers remained the same even after the slitting process undertaken.

A.4 Thus, the flat rolled product even after slitting remained the same and no new product has emerged. Therefore, the process of slitting undertaken on the flat rolled product does not amount to manufacture of a new product attracting levy of Central Excise duty.

B.1 The term "manufacture" has been defined in Section 2(f) of the Central Excise Act and has been interpreted by the Supreme Court in Union of India v. Delhi Cloth and General Mills Co. Ltd., 1977 ELT (J 199). B.2 The relevant portion of the aforesaid decision is as under: "14 According to the learned Counsel 'manufacture' is complete as soon as by the application of one or more processes, the raw material undergoes some change. To say this is to equate 'processing' to 'manufacture' and for this we can find no warrant in law. The word 'manufacture' used as a 'verb' is generally understood to mean as 'bringing two existence a new

substance' and does not mean merely to produce some change in substance, however minor in consequence that change may be. This distinction is well brought out in a passage thus quoted in permanent Edition of Words and Phrases, Vol. 26 from an American judgment. The passage runs thus: 'Manufacture implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use'.

19. We are unable to agree with the learned Counsel that by inserting this definition of the word "manufacture" in Section 2(f) the Legislature intended to equate "processing" to "manufacture" and intended to make mere "processing" as distinct from "manufacture" in the sense of bringing into existence of a new substance known to the market, liable to duty..." B.3 Thus, in order to treat a process amounting to manufacture, new and different article must emerge having distinct name, character and use. As submitted above, the slit HR coils, CR coils and SS coils did not have distinct name, character or use. They are also called HR coils, CR coils and SS coils. By mere slitting and cutting of these coils, no character of the same would change. The use of the product also remains the same. Hence, the process of slitting does not amount to manufacture.

B.4 When the tariff classifies flat rolled products of iron or non-alloy steel of a width 600 mm or more under heading 72.08 and the flat rolled products of iron or non-alloy steel of width less than 600 mm under Heading 72.11, it would only mean that if a manufacturer manufactures flat rolled products of width more than 600 mm and after slitting the same into flat rolled products of width less than 600 mm such manufacturer has to pay duty at the rate applicable to the flat rolled products of width less than 600 mm. It does not mean that if a person buys duty paid flat rolled products of width more than 600 mm and slits the same into flat rolled products of width less than 600 mm the process undertaken by him would amount to manufacture. Had the Legislature intended that the mere process of slitting and cutting would amount to manufacture it would have enacted appropriate Section Note or Chapter Note in the tariff to that effect. However, no such Note treating the cutting and slitting of the flat rolled products as amounting to manufacture is

enacted in the tariff. Hence, the process of slitting undertaken on the CR or HR coil would not amount to manufacture.

B.5 The above submission is fully supported by the decision of Hon'ble Supreme Court in the case of Prabhat Sound Studios v. Additional Collector of Central Excise, 1996 (88) ELT 635. The relevant portion of this decision is as under: "2. It is not in dispute that the appellant, on job-work basis, recorded sound on 'magnetic cassette tapes or spool magnetic tapes, these tapes being supplied by the customer. The majority view of the Tribunal was that the appellant was engaged in the manufacture of goods which were excisable under Item 59 of the Central Excise Tariff. The dissenting Member took the view that no manufacture was involved.

"59, ARTICLES OF A KIND USED FOR SOUND OR SOUND AND IMAGE RECORDING, WHETHER RECORDED OR NOT, NAMELY: 7. The manufacturer of tapes may manufacture and sell blank tapes upon which the purchaser would be free to record such sound as he chose. The manufacturer may go one step forward and record sound itself and sell such tapes. It is to cover both eventualities that Tariff Item 59 is categorised as it is. But it is altogether different to say that by reason thereof the recording of sound on blank tapes, as done by the appellant on job-work basis, is a manufacturing process. As the Tribunal in M. Basheer Ahammed's case has rightly pointed out, even such a pre-recorded tape can have the sound erased from it and it can be used again for recording other sound.

8. We are in agreement with the view taken by the dissenting Member, and in M. Basheer Ahammed's case, that no process of manufacture is involved as aforesaid.(Tri), Garware Polyester Ltd. v. CCE (c) 1991 (52) ELT 392 (Tri) flexor India Ltd. v. CCE Affirmed by Supreme Court on 17.8.95 B.7 The aforesaid submission is also supported by the following decisions wherein it has been held as under: "9. The main question for consideration is, whether the petitioner carries on any manufacturing process? It has already been seen that what the petitioner does is to import jumbo rolls of graphic art films and it cuts these films into sheets of various sizes, which are thereafter packed and sold in the market. The alleged manufacture is the cutting of jumbo rolls into shorter lengths called flats. 12. The

contention of the respondents that merely because there is a separate Tariff Entry for flats as distinct from jumbo rolls, the flats cut from jumbo rolls can be classified as a manufactured product, cannot be sustained. Tariff Entry 37.01 and Tariff Entry 37.02 deal with two different resultant products of manufacture. If a person manufactures photographic flats and films, then that manufacturing process would attract the levy of duty under entry 37.02. If another person manufactures photographic flats and films, then that manufacturing process would attract Tariff Entry 37.01. But, if photographic flats or films are not 'manufactured at all, but only made out of jumbo rolls by cutting into smaller pieces, then there being no manufacturing process involved, Tariff Entry 37.01 cannot be made use of to hold that the petitioner should take out a licence. S.R. Tissues Pvt. Ltd. v. CCE, New Delhi, "8.1 We have carefully considered the rival submissions. The fundamental question to be settled whether M/s. S.R. Tissues activity of converting jumbo rolls of tissue paper to facial tissues, napkins and tissues in roll form by cutting and slitting amounted to 'manufacture' as defined under Section 2(f) of the Central Excise Act. They purchased the jumbo rolls from the market and mechanically cut and slit the same to smaller sizes of required dimensions (suitable for use as facial tissues, napkins etc.) and packed the products separately and sold such packs under certain brand names in the market. It is not in dispute that the jumbo rolls of tissues used for the purpose were classifiable under Tariff Heading 48.03 and were already duty paid. It is, again, not disputed that the facial tissues, napkins etc. obtained by the cutting and slitting of the jumbo rolls fell under TH 48.18. The dispute is whether the conversion of the former to the latter involved "manufacture" as defined under Section 2(f) of the Act.... 8.2...

Had M/s. S.R. Tissues manufactured tissue paper out of the necessary raw materials by using the required technology and cleared the paper in jumbo rolls of width exceeding 36 cm., for home consumption, the product would have been chargeable to duty under TH. 48.03, subject to applicable Exemption Notification, if any. Similarly, if they had carried out the same process and cleared the resultant tissue paper in rolls not exceeding 36 cm. In width, duty would have been leviable on the product in terms of TH 48.18, subject to applicable Exemption Notification, if any. This is all what was meant by the Legislature when it classified the jumbo rolls under TH 48.03 and the rolls of width not exceeding 36 cm. Under TH 48.18.

Had the Legislature intended that the mere activity of slitting and cutting jumbo rolls of duty-paid tissue paper into smaller sizes and packing the products for sale in the market should also be excisable, it would have enacted such intent into law through appropriate Section Note or Chapter Note in the Central Excise Tariff. Such Section/Chapter Note is conspicuously absent in the Tariff.

Therefore, it has to be held that the existence of a separate Tariff Entry (TH 48.18) for the facial tissues, napkins etc. would not, by self make these products excisable. The Apex Court's decision in Prabhat Sound Studios (supra) is supportive of this view. 8.3 Their Lordships of the Apex Court, in the above case, were considering the question whether the activity of recording of sound on blank cassette tapes could be called 'manufacture' for the purpose of levy of Central Excise duty. The blank tapes were covered by entry

(3) under Tariff Item 59 of the erstwhile Central Excise Tariff, while the sound-recorded tapes stood classified under entry

(4) of the said T.I.

59. Their Lordships observed that a manufacturer of cassette tapes might manufacture the tapes and, at his option, sell the blank tapes or record sound on them and thereafter sell the sound-recorded tapes. It was to cover both these eventualities that the above two entries were provided under T.I.

59. A separate entry for recorded tapes did not suggest that the process of recording sound on blank tapes amounted to manufacture. Shri Lakshmi Kumaran has heavily relied on this view of the Apex Court after drawing an analogy between the recording of sound on blank cassette tapes [in which process the cassette tapes falling under entry

(3) get converted to sound-recorded cassette tapes falling under entry

(4) under T.I. 59 *ibid*] and the activity of slitting and cutting of jumbo rolls of tissue paper [in which the jumbo rolls falling under Chapter Heading 48.03 get converted to smaller sizes falling under Chapter Heading 48.18 of the new Central Excise Tariff]. We note that the analogy is befitting the context and it could very well be

held that the provision of a separate Chapter Heading (48.18) for tissue papers of smaller sizes than those in jumbo rolls being slit and/or cut to the smaller sizes amounted to 'manufacture'. CCE v. Reelco Paper Products (P) Ltd., "..... After slitting and perforation Monotype paper continues to be Monotype paper. There is no change in the name, character and use of the paper, and no transformation into a distinct and separate commodity takes place. The process of slitting, re-winding and perforation is not, therefore, a process of manufacture under Section 2(f) of the Central Excises & Salt Act requiring payment of duty for the second time....". (d) CCE, Bombay v. True Graph Charts Pvt. Ltd., "6. We have carefully considered the submissions made by both the sides. We find that in the case of Relco Paper Products cited supra, the Tribunal no doubt had before it, the case pertaining to the period when old tariff was existing but what the Tribunal decided was about manufacture. We also note that in the case of Systems Packaging, identical facts were before the Tribunal when the Tribunal held that slitting of jumbo rolls into smaller rolls does not amount to manufacture. Following the decision in these two cases, we hold that slitting of jumbo rolls of thermal paper into smaller rolls does not amount to manufacture." C. The decision of the Supreme Court in the case of Lal Woollen and Silk Mills (P) Ltd. 1999

(108) ELT 7 proceeds on the basis that the grey yarn and dyed yarn are specified under two different tariff item and this itself recognises that they are two different goods.

However this decision did not consider the earlier decision of three members bench decision in the case of Moti Laminates Pvt. Ltd. v. CCE, 1995 (76) ELT 241 (SC) wherein at para 6 it was held that where the goods are specified in the Schedule of the Central Excise Tariff they are excisable but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied the relevant portion of the above decision of the Supreme Court in Moti Laminate's case is under; "6. The duty of excise is leviable under Entry 84 of List I of the VIIIth Schedule on goods manufactured, or produced. That is why the charge under Section 3 of the Act is on all, 'Excisable goods', 'produced or manufactured'. The expression 'excisable goods' has been defined by clause (d) of Section 2 to mean,

'goods' specified in the Schedule. The scheme in the Schedule is to divide the goods in two brand categories--one, for which rates are mentioned under different entry and other the residuary. By this method all goods are excisable either under the specific or the residuary entry. The word 'goods' has not been defined in the Act. But it has to be understood in the sense it has been used in Entry 84 of the Schedule. That is why Section 3 levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. Therefore, where the goods are specified in the Schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied.

The expression 'produced or manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured but it or if they had been produced or manufactured they were not marketed or capable of being marketed.

D.1 CBEC in its Circular dated 7.9.2001, relying on the Supreme Court's decision in Lal Woollens, 1999 (108) ELT 7 (SC) held that slitting of HR/CR coil amounts to manufacture.

D.2 This view of the CBEC is entirely incorrect. It is settled law that just because the goods are enumerated in the tariff, excise duty cannot be levied. The question really depends upon whether a new commercial commodity has come into existence and if so, whether the goods are marketable. Only when these two tests are cumulatively and simultaneously satisfied, excise duty can be levied.(SC)--Moti Laminates Pvt. Ltd. v. CCE, paras 6, 7 and 11 (b) 7999 (108) ELT 321 (SC)--Constitution Bench Hyderabad Industries Ltd. v. UOI -- paras 5 and 8 (c) 2007 (130) ELT 401 (SC)--Constitution Bench CCE v. Man Structural Ltd. DA The decision of the Supreme Court in the case of Lal Woollen, 1998 (108) ELT 7(SC) did not refer to the above decisions mentioned in (a) and (b). Hence, the decision in Lal

Woollen is no a good law.

D.5 The decision of the Supreme Court in Moti Laminates is binding since it of a Larger Bench when compared to the bench which decided the Lal Woollen Silk Mills case. This submission is fully supported by the decision of the Supreme Court in the case of UOI v. Reghubir Singh, 1989 (2) SCC 754 : AIR 1989 SC 1933 and another decision of the Supreme Court in the case of Mahanagar Railway Vahdora's Union, 1994 Supp. (1) SCC 609.

E. The test of "manufacture" is emergence of new and distinct commercial product. Where there is no essential difference in identity between the original commodity and the processed article, it cannot be said that new and distinct product has emerged. The fact that the processed article is known by different name will not determine the question as to whether manufacture has taken place.

This submission is supported by the decision of Gauhati High Court in Sundari Rubber Works v. State of Tripura, 1991 (81) STC 200 (Gau). The relevant portion of the decision is extracted below: "It is, however, clear that though with every process a commodity experiences a change, it is only when the change, or a series of changes, takes the commodity to a point where it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. In that case, the manufactured article may be said to be a product of the original. Where there is no essential difference in identity between the original commodity and the processed article, the processed article cannot be treated as different and distinct.

It must be regarded as still retaining its original identity, The fact that it is known by a different name after processing is not relevant for that determination." Y. Moideen Kunhi v. CCE, 1986 (23) ELT 293 (Kar) has held that conversion and sawing of timber logs into different sizes, planks, beams, etc. is not manufacture as envisaged by Section 2(f).

G. The Supreme Court in CCE v. Kutty Flush Doors & Furniture, 1988 (35) ELT 6 (SC) has held that no new commodity emerges by sawing of timber into several sizes." 4. He also referred to the unreported decision of CEGAT bearing No.C-

1/3004-07/WZB/2Q02 dtd. 1.10.2002 in the case of M/s. Bemcee Ltd. In this case, the Tribunal has held as follows: "12. We have seen the tariff item. The description of the product as flat rolled products continuous throughout the tariff even when the tariff sub-heading changes following the width of the product. Since the identity of the product remains unchanged even where the classification changes, it could not be said that the activity causing such a change amounted to manufacture. Collector of Central Excise v. Kapri International (P) Ltd., 2000 (142) ELT 10 (SC) is also cited before us where the Hon'ble Court held that where the activity amounted to manufacture it was not material whether the resultant parts continued to fall under the same tariff entry as the parent product.

14. Thus, the combined reading of the judgments would indicate that what is required to be shown is the fact of "Manufacture" having taken place resulting in the creation of a new product distinctly known commercially in the market, to attract fresh levy. The question whether the first product and resultant products fell under the same tariff entry or different is not germane to the issue of leviability of the resultant product to duty.

15. Since the goods after slitting continued to be known by the same nomenclature in the market, the test of "manufacture" as envisaged by the Supreme Court is not fulfilled. As a result the appeal of the assessee succeeds and is allowed." 5. Shri M.H. Shaikh, learned JDR appearing for the Revenue stated that after slitting, the tariff items changed and therefore duty is payable again. He also drew attention to Para 3 of the impugned adjudication order which reads as follows: "The assessee had filed classification list Nos. 194/88-89 w.e.f.

1.3.89, N. 11/90-91 w.e.f. 3.4.90, N. 102/90-91 w.e.f. 20.2.91, N. 29/91-92 w.e.f. 28.7.91, 265/91-92 w.e.f. 1.3.92 wherein they had declared that processes like cutting/shearing and slitting is amounting to manufacture in such cases where modvat credit is taken." 6. Further, he drew attention to Para 49 of the impugned order wherein it has been stated that: "Moreover, the conversion of flat rolled products into each other in Iron & Steel Industry, requires the deployment of big machines with sophisticated features and even a single operation would require the setting up of a big plant. Therefore, technologically as well, the said conversion

can be described as a manufacturing process." 7. The main points urged by the learned Advocate for the appellants are as follows: (1) The Show Cause Notices are vague and they do not disclose precisely what are the materials, what are the finished products and how the conversion into the finished goods amounts to manufacture.

(2) To attract excise duty it is not enough that the goods are classifiable under a different tariff heading, in addition they must meet the test of manufacture resulting in new marketable commodity.

(3) Listing of a product under a tariff heading would require payment of duty on the same at the rate prescribed therein when cleared from an integrated factory. However, if the same is cleared from another unit, where the processing does not amount to manufacture, no duty would be chargeable beyond what has been paid on the input material at the earlier stage.

(5) No penalty is leviable when the dispute merely relates to classification issue, 8. The points urged by the learned Advocate raise important question of law and have serious implications on the scheme of excise taxation and tax administration. If classification under a different item as a result of further processing is not considered by itself enough to attract excise duty at the rate prescribed under the same, the excise officials from the level of Inspectors to the level of Commissioner have to in each case determine whether the processes that resulted in the change of classification also meets the test of manufacture and marketability. This would be no easy task and there will be no end to litigation apart from the fact that the tariff would cease to be a guide to determining dutiability of a product. If the learned Advocate's further contention that strips produced out of sheets in an integrated factory would pay duty as strips but strips produced by independent converters out of duty paid sheets would pay no further duty at the strip stage is considered, this would introduce inequity in the matter of excise taxation. Strips produced by two different producers would be charged to different amounts of duty causing unintended market distortion.

9. Our attention has been drawn by the learned advocate to the recent decision of CEGAT dated 1.10.2002 in the case of M/s. BEMCEE. While proceeding on the

premises that the product is described as flat rolled product, even when the tariff sub-heading changes (Para 12), the decision notes later on that since the goods after slitting continued to be known by the same nomenclature in the market, the test of manufacture is not fulfilled (Para 15). To us, the conclusion appears to be based on erroneous reasoning as a group of products falling under different tariff heading and sub-headings broadly described as "flat rolled products" do not automatically get known by the same nomenclature in the market since the tariff nomenclature and the market nomenclature are not one and the same. There is also no finding in the said decision as to how the products in question are known in the market. (Flat rolled products infact are listed under separate Tariff Headings 72.08 to 72.12, 72.19 to 72.20 and 72.25 to 72.26 depending on the kind of steel used, hot rolled or cold rolled, coated, plated or clad and also based on width and thickness).

10. We however, feel that that larger questions of law raised by the learned Advocate have to be answered in a more appropriate case. The impugned Show Cause Notices including the one issued by the Commissioner himself are sketchy and do not contain information as to from which raw material which finished goods have been produced and how are such finished goods known in the market. For example, in the Show Cause Notice dtd. 2.3.1994, the Commissioner merely states that: "They have manufactured and cleared the excisable goods i.e.

cutting/shearing and slitting of H.R. Coils falling under Ch. S.H. 7208.39 of Central Excise Tariff Act, 1985 during the period April 89 to June 92." He does not indicate the specifications such as width etc. of the H.R.coils or of the finished goods. He does not indicate what quantity of the raw material was used nor he states what was the end product which arose as a result of cutting/shearing and slitting and how he proposes to classify them under which tariff sub-heading and for what reasons the processes involved would amount to manufacture and how the end product is known in the market. In the absence of such relevant information, it is not possible to determine whether a new and separate marketable product has been produced and whether it should be charged to duty under a different tariff classification.

11. In view of the fact that the Show Cause Notices issued are absolutely vague, we have no hesitation in setting aside the duty demands made under these notices. We also set aside the impugned order including the order of penalty. Appeal is allowed.

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