

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Service Tax Appeal No. 327 of 2011

[Arising out of OIO-15-23/COMMR/2011 passed by Commissioner of Central Excise-AHMEDABAD-III]

Messers Sureel Enterprise Pvt. Ltd.

....Appellant

Block No. 513/B, Ahmedabad-Mehsana
Highway, Chhatral Taluka : Kalol,
Mehsana-Gujarat.

VERSUS

C.C.E. & S.T- Ahmedabad-iii

....Respondent

Custom House 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat-380009

WITH

Service Tax Appeal No. 768 of 2011

[Arising out of OIA-194/2011/AHD-III/KANPAZHAKAN/COMMR-A/AHD passed by Commissioner of Central Excise-AHMEDABAD]

M/s. Sureel Enterprise P. Ltd.

....Appellant

Plot No. 513-b, N.h. Road, Chhatral,
Tal: Kalol, Gandhinagar-Gujarat.

VERSUS

C.C.E.- Ahmedabad-iii

....Respondent

Custom House 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat-380009

AND

Service Tax Appeal No. 10391 of 2013

[Arising out of OIA-26TO27-2012-AHD-III-SKS-COMMR-A-AHD passed by Commissioner of Central Excise-AHMEDABAD-III]

M/s Sureel Enterprise P. Ltd.

....Appellant

Block No. 513/B, Ahmedabad-Mehsana
Highway, Chhatral Taluka : Kalol,
Mehsana-Gujarat.

VERSUS

C.C.E. & S.T- Ahmedabad-iii

....Respondent

Custom House 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat-380009

APPEARANCE:

Sh. Shailesh Trivedi (Advocate) with Sh. P.Dave (Advocate) for the Appellant
Sh. L. Patra Authorized Representative for the Respondent

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

FINAL ORDER NO. A/ 11947-11949 /2019

DATE OF HEARING: 03.07.2019
DATE OF DECISION: 18.10.2019

PER: RAMESH NAIR

The brief facts of the case are that the appellant entered into agreement dated 20/11/1999 with M/s Nirma Limited, Bhavnagar accordingly to which the appellant was supposed to manufacture detergent on job work basis. However, subsequently they made another agreement dated 28/05/2005 accordingly to which the appellant were required to carry out the process of converting the raw material into detergent /cake in the factory premises of M/s Nirma at Bhavnagar with the machinery, material, land and building provided by M/s Nirma. The case of the department is that the appellant provided manpower for manufacturing of detergent powder/cake to M/s Nirma in its factory at Bhavnagar. Accordingly, the consideration received against the supply of manpower is leviable to service tax under the head of "Manpower Recruitment and Supply Agency Services". The revenue has issued a show cause notice periodically for payment of service tax. The adjudicating authority holding that the activity of the appellant is providing the services of "Manpower Recruitment and Supply Agency Services" confirmed demand of service tax amounting to Rs. 1,40,22,985 by adjudicating nine show cause notices. The demand of interest under section 75 of the Finance Act 1994, was made and penalty under section 76 and 78 was also imposed. Being aggrieved by the order in original dated 8/3/2011 the appellant filed the present appeal.

2. Shri. P.M. Dave, Ld. Counsel with Shri. Shailesh Trivedi, Advocate appearing on behalf of the appellant submits that the appellant have carried out activity of manufacturing of detergent cake/powder. The consideration towards the manufacturing received on the basis of the quantity i.e. per kg basis. Therefore, the appellant have not provided any service but they have carried out manufacturing of excisable goods on which no service tax is chargeable. He submits that the payment of the manufacturing work is not based on number of workers deputed for such manufacturing but irrespective of any number of workers the charges is on the basis of quantity of goods manufactured. Shri. Dave further submits that the entire proceeding of issuance of show case notices and adjudication thereof is beyond the jurisdiction for the reason that as per the location of the appellant, the jurisdictional commissionerate is Ahmedabad – I whereas the proceedings have been carried out by the commissionerate of Central Excise Ahmedabad-III, therefore, it is beyond

the jurisdiction of the proper authority. He further submits that the goods manufactured by the appellant in the factory of Nirma were cleared by M/s Nirma on payment of excise duty. Once the goods is manufactured and cleared on payment of duty on such activity no service tax can be demanded. He also submits without admitting that even if the service tax is payable by the appellant the same is available for CENVAT credit to their principal M/s Nirma Ltd. He invited our attention to two detailed charts of duty payment by Nirma Ltd. Bhavnagar which is placed on page 173 of appeal papers wherein he pointed out that in the year from 2005-2006 to 2008-2009 every year major amount of the duty payment was made from PLA. Therefore, the entire exercise is amount to revenue neutral. For this reason also the demand for service tax is not sustainable. In respect of the above submissions he placed reliance on the following judgements.

- Alidhara Texspin Engineers- 2010(30) STR 315 (Tri. – Ahmd.)
- Allengers Medical Systems Ltd.- 2009(14) STR 235 (Tri.-Del.)
- Neo Structo Construction Ltd.-2010(19) STR 361 (Tri.-Ahmd.)
- Pawan Biscuits Co. P. Ltd.-2000(120) ELT 24 (S.C)
- Rameshchandra C. Patel -2012(25) STR 471 (Tri.-Ahmd)
- Jubilant Industries Ltd.- 2013(31) STR 181 (Tri. – Del.)
- Shiv Narayan Bansal- 2013(31) STR 747 (Tri.-Del.)
- Integral Construction Company -2010(17) STR 380 (Tri. –Bang.)
- Reliance Industries Ltd.-2009(244) ELT 254 (Tri.-Ahmd)
- Great Galleon Ltd.- 2009(16) STR 169 (Tri.- Del.)
- Copy of Hon'ble CESTAT, Ahmedabad order No. A/10297/2015

dated 20.03.2015 in Case of M/s. Motif India Infotech P. Ltd.

- K. Damodarareddy V/s. Commr. Of C.Ex. Tirupathi-2010(19) STR 593 (Tri. – Bang.)
- Hemant V. Deshmukh V/s. Commr. Of Ex., Goa- 2014(35) STR 602 (Tri. – Mumbai)
- Ritesh Enterprise V/s. Commr. C.Ex. Bangalore-2010(18) STR 17 (Tri.- Bang.)
- Divya Enterprises V/s. Commr C.Ex., Mangalore-2010 (19) STR 370 (Tri.- Bang.)

3. He also submits that in the appellant's own case on the same issue, the Additional Commissioner of the Central Excise and Service Tax,

Bhavnagar dropped the proceedings vide order in original number BHV-EXCUS-000-ADC-036 to 038-14-15 dated 23/1/2015 the said order of the additional commissioner (AR) accepted by the department.

4. On the other hand Shri. L. Patra, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He also handed over a written submission which was taken on record. He submits that though there is an agreement for manufacture of synthetic detergent out of raw-material and packing material but the fact remains that the appellant have supplied only man power/labour to M/s Nirma Ltd and this activity had no co-relation with the activity mentioned in agreement dated 20.11.1999, therefore, the service is of supply of man power and the appellant is liable to pay the service Tax.

5. We have carefully considered the submissions made by both the sides and perused the records. We find that the appellant entered into agreement dated 20.11.1999 with M/s Nirma Ltd, Bhavnagar, according to which the appellant was supposed to manufacture of detergent on job work basis. However, subsequently, they made another agreement dated 28.05.2005 according to which the appellant were required to carry out the process of converting the raw-material into detergent/cake in the factory premises of M/s Nirma Ltd, Bhavnagar, with the plant or machinery, material land, and building provided by M/s. Nirma Ltd, Bhavnagar. We observed from both the agreement that the ultimate activity which is to be performed by the appellant is to convert raw-material and packing material into packed detergent/cake irrespective of the fact whether the same is carried out in the appellant's premises or at the premises of the service recipient i.e. M/s. Nirma Ltd. Even as per the agreement the clear understanding between the appellant and M/s Nirma Limited is not for supply of man power but to carry out manufacturing activity of detergent/cake, therefore, in our view it is clear contract of manufacturing of excisable goods.

6. There is no dispute that the appellant after carrying out the manufacturing handed over the excisable goods to M/s. Nirma Ltd who ultimately cleared the said goods on payment of excise duty. It is also observed that the appellant were paid the service charges, as per the quantity of excisable goods i.e. detergent/cake manufactured by the appellant and the consideration is not with reference to the number of

man power/man hour deputed for the manufacturing of excisable goods. This also shows that there is no contract between the appellant and M/s. Nirma Ltd for supply of man power. The activity carried out by the appellant is at the most considered as "production or processing of goods on behalf of the client" which is covered under the service head of "Business Auxiliary Service". If this be so, then the service is exempted under Notification No. 8/2005-ST. Since, the demand was raised under wrong head i.e. Man Power Recruitment and Supply Agency Service, for this reason also the demand is not sustainable. This tribunal time and again held that if contract is for particular job and not for man power supply the demand of service tax under Man Power Recruitment And Supply Service cannot be raised, the relevant judgments are referred below:-

- **Rameshchandra C. Patel-2012 (25) STR 471(Tri.-Ahmd.)**

"4. From the above it can be seen that there are two requirements for determining whether a service is taxable service under the category of manpower recruitment or supply agency. First of all, it should be provided by a manpower recruitment or supply agency and secondly it should be in relation to manpower supply or recruitment. In this case, whether it is in the agreement entered into between the two parties or in the activity undertaken by the appellant which is contract manufacturing, looked into, it is seen that nowhere the question of supply of manpower or recruitment arises. In fact the agreement is totally silent as regards the manpower. It does not have any provision relating to the number of men or labour to be used or the manner in which they have to be used or the quantum of payment to be made to them etc. The department has totally failed to show in which manner the service provided by the appellant can be categorized under manpower recruitment or supply. In the Order-in-Original, the adjudicating authority proceeded on the ground that there was no challenge to the liability of tax at all since the appellant had deposited the amount during investigation. Commissioner (Appeals) in her order simply stated that she agreed with the view of the adjudicating authority and went on to say that appellants had wilfully suppressed the fact of service and appellants failed to pay service tax. Both the authorities have not at all discussed how the service provided by the appellant amounts to service of manpower recruitment or

supply. After considering the records, submissions and the orders passed by the lower authorities, I am unable to find any ground on which the appellant can be held liable to service tax on the activity undertaken by them. In the result appellant succeeds and the appeal is allowed with consequential relief to the appellant.

• ***Jubilant Industries Ltd-2013 (31) STR 747 (Tri.-Del)***

"13. *We are in agreement with the contention that the same activity cannot be considered as manufacturing and subjected to excise levy and at the same time considered to be a service and subjected to service tax. This principle does not need much discussion and is also recognized under Section 65(19) of Finance Act, 1994 levying service tax on processing of goods not amounting to manufacture. Process amounting to manufacture is kept specifically out of the scope of the entry. That being the case such an activity cannot be brought under service tax levy under "Business Support Service" because the underlying principle will apply to this entry also. The specific exclusion is not seen under 64(104c) for the reason that the legislature intended to deal with the issue under Section 65(19). We find that Revenue is also not disputing the position that manufacturing activity cannot be subjected to service tax. Revenues contention is that what JLSL was doing was manufacturing and what appellant (earlier known as PMSL) was doing was support services.*

14. *So the essential question to be determined is whether the impugned activity can be split into two - one as manufacturing by JLSL and the other as service by appellant (earlier known as PMSL) to JLSL. While considering this issue another issue that arises is whether there can be two manufacturers for the same goods. In the instant case JLSL claimed to be the manufacturer and the claim was accepted by Central Excise Department and JLSL was paying excise duty. In such circumstances is there any scope for PMSL to claim that their activity should also be considered as manufacturing activity in respect of the same goods?*

15. *We have perused the contract dated 1-4-2007 between the two parties. It is seen that as per the contract JLSL was supplying all the raw materials required for manufacturing final products. JLSL was also supervising the manufacturing process and was*

taking steps to ensure the quality of the products. All activities like handling the raw materials, its accounting and processing was done by appellant (earlier known as PMSL). This means that both the parties were involved in the manufacturing activity. It is also to be noted that such manufacturing arrangements are very common in the country. In such situation legal provisions exist in Central Excise laws for considering either of the two parties as manufacturer. In most cases the persons doing the job-work claims to be the manufacturer and pays excise duty as applicable in his hands. There are situations where the person supplying raw materials undertakes to pay excise duty and for that reason excise duty is not charged in the hands of the person doing the manufacturing activity. Notification 214/86-C.E. is applicable in such cases.

16. *Section 2(f) of Central Excise Act defines manufacture and manufacturer as under :*

"manufacture" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

17. *Therefore if either party was to apply for registration as a manufacturer the department would have accepted the application. Excise registration is only to the effect that one of the parties undertakes to discharge the excise duty liability on the goods manufactured. This cannot be interpreted to mean that the*

activity done by the other party is not manufacturing activity. Notification 214/86-C.E. only provides a mechanism by which the duty liability is fixed on the person supplying raw material and enables the clearance of the goods from the factory of actual manufacture subject to undertaking for payment of duty by the other party or its further use in the manufacture of excisable goods. In a situation where the other party (JLSL in this case) was willing to pay excise duty at the time of clearance of the goods from the factory of manufacture there was no need to adopt the procedure laid down in Notification 214/86-C.E.

18. *We find that the predominant activities for manufacture were done by appellant (earlier known as PMSL). Their plant and machinery was used and their employees were doing the processes. In the matter of deciding who is the manufacturer of excisable products, ownership of raw materials is not a critical criterion. We do not see any merit in the argument of Revenue that the activities of making available the factory and infrastructure and doing activities of raw material handling, accounting etc. are to be considered as activities distinct from manufacturing activity. All the activities done by the appellants have to be seen together and when it is so seen it is clear that they were doing manufacturing activity. For reasons already explained, the fact that PLSL was paying excise duty does not lead to a legal position that the appellant (earlier known as PMSL) was not doing manufacturing activity. The fact that appellant (earlier known as PMSL) was charging two components towards job-charges separated as fixed cost and variable cost cannot alter this situation so long as goods were manufactured. In a situation where goods were not manufactured but charges were collected under the fixed component it could have been considered as a service. While working out cost of any manufactured product costing is done by splitting cost elements into fixed cost and variable cost and that cannot change the nature of the activity. What could have changed the nature of the activity is a situation where no manufacturing activity took place and still the appellant collected their charges.*

19. *We also do not find merit in Revenue's argument regarding suppression of facts. The contract was placed before the department from the very beginning when JLSL took Central Excise registration. The Department did not raise any issue at that time. The contention of Revenue is that the fact that they*

were charging separately for fixed costs and variable costs was not disclosed to the department. As already stated we are of the view that this aspect could not actually change the nature of the activity.

20. In view of the analysis as above we hold that the activities under taken by the appellant during the period April 07 to Sept. 09 being a manufacturing activity carried out cannot be classified as business support service and subjected to service tax and hence the demand fails. This demand fails on account of time-bar also because we are of the view that all relevant facts have been disclosed to the department in time. So this part of the appeal is allowed.

21. For the period 1-10-2009 to 14-11-2010 the appeal is dismissed as withdrawn."

• **Shiv Narayan Bansal-2013 (31) STR 747 (Tri.-Del.)**

"3. Heard both sides and perused the records. We have gone through the finding of adjudicating authority and also the observations of the authorities at page 63 of the appeal folder, wherein the authorities had noted that :-

"In the instant case all the three persons mentioned in last para of the above letter are not covered under the above referred service as they did the job work themselves. The service receiver has not paid amount individual person who have performed the job work. Moreover, labour employed for the job work remained under the control of job worker and not in the control of the service receiver. Thus, party's contention appears to be correct."

4. On totality of the construction of the agreement at page 48 of the appeal folder without being read in piece-meal does not throw light to hold that the objective of the parties was to provide manpower only without carrying out manufacture. Had that been the objective, the appellant would have ceased to operate after supply of manpower. But that was not so. While object is clear from Clause 3 of agreement, that appears to be determining factor to decide incidence of tax under law.

5. When we are able to appreciate above fundamental concept, waiving requirement of pre-deposit, we do not propose to keep the appeal pending. We hold that the appellant had not provided service of manpower but had acted as job worker in absence of finding that no manufacture activity was carried out.

6. Appeals are thus allowed. Consequently, both stay applications and appeals get disposed of in the above manner.”

7. From the above judgments the issue in hand is settled that when the contract between the service provider and service recipient is admittedly of contract manufacturing in such case demand under man power supply cannot be made. The appellant have vehemently argued on Revenue neutral situation on the ground that if at all the appellant is liable to pay service tax the same is available as cenvat credit to the service recipient i.e. M/s. Nirma Ltd. In this regard, he also submitted the details of payment of excise duty of M/s. Nirma Ltd from PLA/cash. This prima facie show that it is a case of Revenue neutral and by not paying the service tax by the appellant the Government Exchequer is not at any loss, however, since, we have already decided the issue on merit, we are not giving our concluding opinion on Revenue Neutral position. The issue of jurisdiction raised by the appellant is also kept open.

8. As per our above discussion the impugned order is not sustainable. Hence, the same is set aside. The appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 18.10.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)