CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 21883 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000-COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

M/s. BEML Ltd.
Mysore Complex
Belavadi Post,
Mysore – 570 018.

Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,
Siddhartha Nagar,
Mysore – 570 011.

Respondent(s)

WITH

Central Excise Appeal No. 21880 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000-COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri M. Pradeep Swaminathan
Executive Director-Finance
M/s. BEML Ltd.
BEML Soudha, 23/1, 4th Main Road
S.R. Nagar,
Bangalore – 560 027.

Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,
Siddhartha Nagar,
Mysore – 570 011.

Respondent(s)

WITH

Central Excise Appeal No. 21881 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000-COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri A. K. Halder
Executive Director-Marketing
M/s. BEML Ltd.

Appellant(s)

III/V Floor, Unity Buildings,
JC Road,
Bangalore – 560 002.

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,
Siddhartha Nagar,
Mysore – 570 011.

Respondent(s)

AND

Central Excise Appeal No. 21882 of 2014

(Arising out of Order-in-Original No.MYS-EXCUS-000-COM-013-13-14 dated 26.02.2014 passed by the Commissioner of Central Excise, Customs and Service Tax, Mysore.)

Sri M. Pitchiah
Director (Finance)
M/s. BEML Ltd.
BEML Soudha, 23/1, 4th Main Road
S.R. Nagar,
Bangalore – 560 027.

Appellant(s)

Versus

The Commissioner of Central Excise
S1 & S2, Vinaya Marga,
Siddhartha Nagar,
Mysore – 570 011.

Respondent(s)

Appearance:

Ms. Neetu James & Mr. Rohan Karia, Advocates	For the Appellant
Mr. H. Jayathirtha, Suptd. (AR)	For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20996 - 20999 /2023

Date of Hearing: 21/06/2023
Date of Decision: 13/10/2023

Per : DR. D.M. MISRA

Briefly stated facts of the case are that the appellant, a Public Sector Undertaking are engaged in the manufacture of Dump Trucks, Water sprinkler, Motor grader falling under

Chapters 84 & 87 of the Central Excise Tariff Act, 1985 and on the basis of intelligence and consequent investigation initiated by DGCEI, Bangalore against the appellant, it has been alleged that though, besides manufacturing they were also engaged in the activity of repacking and relabelling of imported and indigenously procured spare parts of Dumpers (Mechanical Drive and Electrical Drive), Water Sprinklers and Motor Graders at their marketing division. The said activity in terms of Section 2(f) of the Central Excise Act, 1944, read with Sl. No 100 of Third Schedule of the Central Excise Tariff Act, 1985 result into "manufacture" and its value for the purpose of excise duty to be determined as per Section 4A after allowing an abatement of 33.5% on the maximum retail price as per Notification No.11/2006 CE (NT) dated 29.5.2006, but it was cleared/sold to various customers without payment of duty. Further, alleging that the appellant had failed to discharge total duty of Rs.62,10,81,326/- between January 2008 to March 2011, a show cause notice was issued to them on 05.4.2013 demanding the said duty with interest and proposal for penalty on the company and personal penalty on co-noticees. Later, by a corrigendum issued on 27.1.2014 the demand amount was revised to Rs.72,34,13,726/-. On adjudication, the total amount was reduced to Rs.50,23,90,685/- and confirmed with interest and equal penalty and personal penalty of Rs.5,00,000/- on each of the other co-noticees. Hence, the present appeals.

2. The learned advocate for the appellant has submitted that the Marketing Division of the appellant caters to the needs of the

customers, who have already procured the dumpers and other equipment from Mysore (Manufacturing) unit. The Marketing Division comprises of receiving section, holding section and packing and despatch section. The activities undertaken by the appellant at the Marketing Division comprises of unloading and unpacking; receiving, inspection; labelling; holding/binning (material handling); packing and tagging; repacking and despatching; material handling and loading in truck. The spare parts are cleared either directly to the customers or stock transferred to the Regional Offices or supplied to the customers based on their requirements. The value adopted for sale of spare parts from the Marketing Division of the appellant is based on the pricelist available/generated in the ERP system. From May 2012 onwards, the system generated STD prices which are considered in case of stock transfer to Regional / District Offices from where the goods are sold to the customers.

2.1 The Ld. Advocate further submitted that the appellant had considered the said activity of re-packing and relabelling undertaken by them do not result into manufacture; accordingly, no duty was paid on sale of the spare parts. He has submitted that all spare parts are cleared to the industrial and institutional consumers only.

2.2 The learned advocate has submitted that the Third Schedule to the Central Excise Act, 1944 was amended in 2006 so as to bring within the scope of Section 2(f)(iii) of the Central Excise Act, 1944, the activities of repacking and relabelling of parts of Automobiles, as amounting to manufacture. Provision under Section 66(b) of the Finance Act, 2006 was brought into with effect from 01.6.2006. In the said amendment the term 'automobile' was not defined. The CBEC vide Circular No.167/38/2008-CX.4 dated 16.12.2008 clarified that since the term 'automobile' is not defined in the Notification, the general meaning has to be adopted.

2.3 The learned advocate referring to the Ministry's Circular No.262/15/86-CX.8 dated 14.7.1987 submitted that Automobile Cess in the said Circular was clarified to be not leviable on the earthmoving machinery including Dumpers. Therefore, the spare parts of the Dumpers etc. cleared by the appellant fall outside the scope of the term 'automobile' and therefore, the demand for the period 01.3.2008 to 26.02.2010 cannot be sustained and liable to be set aside. In support of his contention, that 'dumpers' are not automobiles the learned advocate referred to the decisions of the Larger Bench of the Tribunal in the case of **M/s. Action Construction Equipment Ltd. vs. CCE, Delhi-IV, Order dated 6.6.2023**. It is his submission that the decision of the Larger Bench is squarely applicable to the present case in all force inasmuch as the spare parts of the Dumpers, Tatra Trucks, Tatra Engines cleared by the appellant are earthmoving machines which fall outside the meaning and scope of the term 'automobile' mentioned in Sl. No.100 of the Third Schedule of the Central Excise Act, 1944 as it existed prior to 27.02.2010.

2.4 Further, the learned advocate has submitted that the demand issued invoking extended period of limitation is unsustainable in terms of decision of the Tribunal in their own case reported as **M/s. BEML & Ors. vs. CCE. C & ST, Bangalore: 2014-TIOL-2215-CESTAT-BANG**., wherein in an identical facts and circumstances, demand pertaining to the Marketing Division, Mysore for the period from 29.4.2010 to 31.3.2013, the Tribunal referring to the decision of **J.K. Spinning and Weaving Mills Ltd. & Anr. Vs. Union of India & Ors.: 1987 (32) E.L.T. 234 (SC)** held that extended period of limitation under Section 11A of Central Excise Act, 1944 could not be invoked. The said decision of the Tribunal was upheld by the Hon'ble High Court of Karnataka reported as **Commissioner of Central Excise, Bangalore vs. M/s. BEML Ltd. & Ors.: 2015-TIOL-1189-HC-KAR-CX**.

2.5 Further, referring to the definition of Section 2(f)(iii) of Central Excise Act, 1944 and the judgment of the Hon'ble Supreme Court in the case of **Union of India vs. J.G. Glass Limited: 1998 (97) E.L.T. 5 (SC)**, it is argued that any activity which brings in any change in the character of the article thereby making the product marketable would have to be construed as amounting to 'manufacture'. In the appellant's case since the spare parts were finished, functional and marketable condition and does not add any additional value to the product and make it marketable to the consumer; hence, the activity undertaken by the appellant cannot be treated as 'manufacture' under the main definition of Section 2(f) of Central Excise Act, 1944.

Further, he has submitted that imposition of penalty on the appellant is not sustainable.

3. Learned Authorised Representative for the Revenue reiterated the findings of the learned Commissioner. Rebutting the arguments of the appellant referring to the Larger Bench Decision in Action Construction Equipment Ltd 's case (supra) that Entry at Sl. No.100 in the Third Schedule prior to its amendment was only applicable to "parts, components and assemblies of automobiles" and not to the spare parts of Dumpers as it fall outside the scope of 'automobiles', the learned Authorised Representative submitted that the products in the present appeal were not considered by the Larger Bench of the Tribunal in that case, hence, the said ratio is not applicable to the facts of the present case. The Larger Bench considered the products/goods/vehicles viz., Cranes, Forklifts, Compactors, Wheeled Tractor Loader Backhoe and Hydra Cranes, Hydraulic Excavator Loader (Backhoe Loaders), Hydraulic Loader (Wheel Loading Shovel/Shovel Loaders, Road Rollers (Compactors) as it has been specifically held at Para 89 of the said Order that the earth moving machines are not 'automobile'. Comparing to the products in question, the learned Authorised Representative has contended that Dumpers, Motor Graders have not been discussed therein in deciding whether the goods referred are 'automobiles' or otherwise.

3.1 Further advancing his arguments, he has referred to the judgment of the Tribunal in the case of **M/s. Komatsu India**

Pvt. Ltd. vs. CCE, Nagpur: 2017 (345) E.L.T. 256 (Tri.-Mumbai) wherein the Tribunal considered whether the parts of dumpers and other machineries imported, packed/repacked in unit containers affixed with MRP could be subjected to Section 2(f)(iii) of Central Excise Act, 1944. It is his contention that the facts of the said case are squarely applicable to the facts of the present case. Therefore, the demand requires to be confirmed even for extended period of limitation following the said judgment of this Tribunal.

3.2 Distinguishing the judgment of this Tribunal in their own case, learned Authorised Representative has submitted that in the said decision while examining the issue as to whether the demand could be raised in respect of retrospective amendment by invoking extension of period of limitation, it opined in favour of the Appellant. Further he has submitted that the said decision pertaining to the KGF Unit where the activity was started during April 2010 only; whereas in the present case, the demand relates to the period from 2006 onwards. Further, he has submitted that in the said case, after the retrospective amendment, show-cause notice was issued on 22.04.2013 whereas in the present case the DGCEI has initiated investigation on 24.10.2011 and on completion of the investigation, the show-cause notice was issued to the appellant. The DGCEI investigation forced the appellant to obtain Central Excise registration on 10.10.2012 which they have failed to take cognizance more than six years. He has further submitted that the appellants had been carrying out the activity of manufacture even after it was brought under the scope of levy of excise duty, without taking registration and cleared goods without payment of duty; thus, the confirmation of the demand invoking extended period by the learned Commissioner is justified and sustainable.

4. Heard both sides and perused the records.

5. The short question involved in the present appeal for determination is: whether the activity of packing, repacking, relabelling of spare parts of automobiles, mechanical drive and electrical drive fall within the scope of definition of 'manufacture' prescribed under Section 2(f)(iii) of the Central Excise Act, 1944 during the period January 2008 to March 2011.

5.1 The period of dispute can conveniently be divided according to the amendment carried out to the relevant entry at Sl. No. 100 of Third Schedule; (i) from January 2008 to February 2010, and (ii) March 2010 to March 2011.

5.2 Before analysing the above issue, it is necessary to reproduce the relevant provisions of the Central Excise Act,1944.

Section 2(f) of the Central Excise Act, 1944

[(f) "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 Fourth Schedule] as amounting to [manufacture; or]

[(iii) 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;]

Serial No.100 of Third Schedule of the Central Excise Tariff Act, 1985 read as under during the relevant period.

From 01.06.2006 to 26.02.2010

Sl. No.	Heading, Sub-Heading or Tariff Item	Description of goods
1	2	3
100	Any Chapter	Parts, Components and assemblies of automobiles

From 27.02.2010 to 31.03.2013

Sl. No.	Heading, Sub-Heading or Tariff Item	Description of goods
1	2	3
100	Any Chapter	Parts, Components and assemblies of vehicles (including chassis fitted with engines) falling under Chapter 87 excluding vehicles falling under headings 8712, 8713, 8715 and 8716

Sl. No.100A has been inserted into the Third Schedule of the Central Excise Tariff Act, 1985 with effect from 29.04.2010 reads as under:

Sl. No.	Heading, Sub-Heading or Tariff Item	Description of goods
1	2	3
100	Any Chapter	Parts, Components and assemblies of goods falling under Tariff item 8426 41 00, Headings 8427, 8429 and sub-heading 8430 10

5.3 For the first period i.e., from January 2008 to February 2010, the appellant has argued that the spare parts involved in the present appeal pertains to Dumpers (Mechanical Drive and Electrical Drive), Water Sprinklers, Motor Graders, Tatra Trucks, Tatra Engines etc., being not as part of 'automobiles', hence fall outside the scope of Sl. No.100. In other words, repacking and relabelling of spare parts, components and assemblies of automobiles fall outside the scope of Sl. No.100 of Third Schedule to the Central Excise Act, 1944. In support, they referred to the judgment of the Larger Bench of this Tribunal in the case of **M/s. Action Construction Equipment Ltd.** case.

5.4 The Larger Bench was constituted pursuant to a direction of the Hon'ble Supreme Court, as there were conflicting views expressed by the Mumbai Bench of the Tribunal in the case of **CCE, Pune-I vs. JCB India Ltd.: 2014 (312) ELT 593 (Tri.-Mum.)** and Chandigarh Bench of the Tribunal in the case of **M/s. Action Construction Equipment Ltd. & Ors. Vs. CCE, Delhi-IV: 2016 (10) TMI 473- CESTAT CHANDIGARH** in Excise Appeal No.791 of 2012. After analysing the scope of Sl. No.100 of the Third Schedule to the Central Excise Act, 1944, relevant material it has been observed by the Larger Bench as follows:

> "89. What follows from the aforesaid discussion is that the earth moving machines involved in the present appeals are not 'automobiles'. It would not be appropriate to borrow the meaning of the word 'automobile' or 'motor vehicle' under the Motor Vehicle Act, 1988 or the Air (Prevention and Control of Pollution) Act, 1981 merely because the word 'automobile' has not been defined in the Central Excise Act, Central Excise Tariff Act or the Notifications issued by the Central Government. In such a situation, it would be appropriate to refer to the dictionaries to find out a general sense in which the word 'automobile' is understood in common parlance. Automobiles, therefore, are conveyance for transportation of passengers and goods on road as also been understood by the department in the various Circulars issued from time to time. Serial No.100A inserted in the Third Schedule w.e.f 29.04.2010 is prospective and likewise Serial No.109 inserted in Notification No.49/2008 by Notification No.19/2010 dated 29.04.2010 issued under Section 4A of the Central Excise Act, is prospective in nature.
>
> 90. The reference made to the Larger Bench is, accordingly, answered in the following manner:

(i) As the word 'automobile' has not been defined in the Central Excise Act, the Central Excise Tariff Act or the Notifications issued by the Central Government, it would be permissible to refer to the dictionaries to find out the general senses in which the word is understood in common parlance and it will not be appropriate to refer to the definition of the word 'automobile' occurring in the Air (Prevention and Control of Pollution) Act, 1981 or the Motor Vehicles Act, 1988; and

(ii) The amendment made in the Third Schedule to the Central Excise Act by Finance Act, 2011 w.e.f 29.04.2010 by adding serial No.100A to the Third Schedule is prospective in nature."

5.5 Distinguishing the said ratio, the Revenue has argued that the equipment considered in the said judgment are different and hence, the principle laid down in the said judgment cannot be made applicable to the facts of the present case. It was argued that the Mumbai Bench of the Tribunal specifically considered parts of the dumpers in **M/s. Komatsu India Pvt. Ltd.** (supra), therefore, the said judgment be followed and applied to the present case.

5.6 We find the said approach of the Revenue is incorrect in as much as the judgment of **M/s. Komatsu India Pvt. Ltd.** case rests on the principle settled by the Tribunal in the case of **M/s. J.C.B India Ltd.** case (supra) which was referred to Larger Bench when the Chandigarh Bench of the Tribunal expressed doubt about the correctness of the said judgement in **M/s. Action Construction Equipment Ltd.'s** case. Secondly, the Larger Bench also in laying down the principles has held that the meaning of the word 'automobile' occurring in Air (Prevention and Control of Pollution) Act, 1981 or the Motor Vehicles Act, 1988 cannot be adopted but the meaning has to be understood is in general sense and as used in common parlance. Further, emphasizing the said meaning as in common parlance, the Larger Bench opined that the scope and meaning of 'automobiles' be understood as the conveyances for transportation of passengers and goods on road; also in the same manner, it has been understood by the department in various Circulars issued from time to time. Further, it is also held that the amendment brought into effect from 29.04.2010 is prospective. Hence, following the principles laid down by the Larger Bench in the aforesaid case, we do not see merit in the contention of the department that the ratio of the said judgment is not applicable to the facts of the present case. Consequently, Sl. No. 100 of the Third Schedule shall not be applicable to parts and spares of Dumpers repacked and relabelled by the Appellant for the period from January 2008 to February 2010. Also, the said activities do not fall within the scope of 'manufacture' under either clause (i) or (ii) of Section 2(f) of CEA,1944, hence, not leviable to excise duty. However, for the period from March 2010 to March 2011, the said activities be considered to be 'deemed manufacture' being covered under the amended entry at Sl. No.100 of the Third Schedule.

5.7 The next issue to be considered is invoking of extended period of limitation. The learned advocate for the appellant submits that in their own case, this Tribunal for their Mysore Division reported as **M/s. BEML & Ors. vs. CCE: 2014 (8) TMI 135 (CESTAT-BANG.)** held that extended period of limitation cannot be made applicable for recovery of duty on the basis of retrospective legislation. Distinguishing the said judgment, on the other hand, learned Authorised Representative for the Revenue has submitted that the activity of relabelling and repacking in the said Mysore Division commenced from April 2010, whereas in the present case, the said activity was started in the year 2006, therefore, the appellant was aware of the fact that such activity attracts excise duty. In confirming the demand for the period, the learned Commissioner has observed that since the appellant have been operating for more than six years, under the present era of self-assessment procedure, the department expects the assessee to comply with the requirement of law voluntarily. It is his finding that non-compliance with the provisions of various Rules of Central Excise Rules, 2002 resulted in contravention of the same with intention to evade payment of duty. Following the Larger Bench judgement, We have observed that for the period upto Feb 2010, sr. no. 100 of the Third Schedule was applicable only to Automobiles, and not to Dumpers being not an automobile, the said sr. no 100 was amended by the Finance Act in 2011 giving retrospective effect from March 2010. This issue need not detain us much as this Tribunal examined all aspects on the applicability of extended period for the said activities relating to Mysore Division and following the principle laid down by the Hon'ble Supreme Court in **J.K. Spinning and Weaving Mills and Others vs. UOI: 1987 (32) ELT 234 (SC)** held that invoking extended period of limitation for demanding duty in implementing a retrospective operation of the law for the period from April 2010 cannot be sustained. We do not find reason in not following the judgment of the Tribunal in appellant's own case more or less for a similar period and show-cause notice issued in the same month i.e., April 2013. In the result, invoking of extended period of limitation is bad in law. Accordingly, the demand be confined to the normal period of limitation. Consequently, the penalties imposed on the appellants, in the facts and circumstance of the case, in our opinion, is unwarranted. Consequently, penalty imposed on all the appellants are set aside. In the result Appeal No.21883 of 2014 is partly allowed to the extent discussed as above. All other Appeals imposing personal penalty are hereby allowed.

6. All the appeals are disposed of as above.

*(Order pronounced in Open Court on **13.10.2023**.)*

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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