CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 185 of 2008

[Arising out of Order-in-Appeal No. 106/2007-CE dated 29.11.2007 passed by the Commissioner of Central Excise & ST (Appeals), Cochin]

Poduval Industries
Industrial Development Area,
Edayar, Kerala **......Appellant**

VERSUS

Commissioner of Central Excise, Cochin
C R Building, I S Press Road,
Ernakulam, Cochin
Kerala – 682018 **......Respondent**

Appearance:

Sh. Shreehari Kutsa, Advocate for the appellant.

Sh. H. Jayathirtha, Superintendent (AR) for the respondent.

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21425 / 2023

Date of Hearing: 04.08.2023

Date of Decision: 22.12.2023

Per : Dr. D.M.Misra

This appeal is filed against Order-in-Appeal No. 106/2007-CE dated 29.11.2007 passed by the Commissioner of Central Excise & ST (Appeals), Cochin.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Diesel Generating sets (DG sets) falling under Chapter sub-heading 8502 90 of Central Excise Tariff Act, 1985. On the basis of intelligence and subsequent investigation, a show-cause notice was issued to the appellant on 29/01/2004 alleging that they have manufactured "Acoustic Enclosures" in their factory during the period from 01/04/2000 to 04/06/2002 and cleared the same without payment of duty in the guise of trading of the same, thereby evaded Central Excise duty of Rs.10,52,892/-; it is proposed to recover the said duty with interest and penalty. On adjudication, the proceedings initiated in the show-cause notice was dropped. Revenue filed an appeal before the learned Commissioner(Appeals), who after analyzing the evidences on record, set aside the order of the adjudicating authority and allowed the Revenue's appeal confirming the recovery of duty of Rs.10,52,892/- along with interest and imposed penalty of equal amount. Aggrieved by the said order, the appellant preferred an appeal before this Tribunal. The Tribunal by its order dt. 06/02/2018 dismissed the appeal filed by the appellant. Aggrieved by the said order, appellant approached the Hon'ble High Court of Kerala and by order dt. 28/06/2022, the

Hon’ble High Court remanded the matter to the Tribunal for fresh consideration. Consequently, the matter is taken up for hearing and disposal.

3. Learned advocate for the appellant assailing the impugned order submitted as follows:-

i. During the period 01/04/2000 to 24/06/2002, the appellant, to meet the requirements of the market needs for supply of acoustic enclosures, outsourced the same from manufacturers having infrastructure facilities. The said acoustic enclosures were manufactured on job work basis and later transported to the customers’ premises for fixing with DG sets attached to earth.

ii. The learned Commissioner (Appeals) is not justified confirming the demand without analyzing the cross-examination of the witnesses as none of them confirmed manufacturing of acoustic enclosures in their factory directly or indirectly.

iii. Reliance placed on the payments towards purchase of raw materials by the job workers was misplaced since it was done as a matter of commercial expediency as the suppliers were not satisfied with the credit worthiness of the job workers.

iv. The authority failed to appreciate the position that acoustic enclosures come into existence only at the customers' site. It is only the panels that are manufactured by certain job workers who were already doing job work for the appellants in connection with the manufacture of DG sets. Since they were already doing job work for the appellant, they sent raw materials to the site of the job workers as a matter of commercial expediency and hence no adverse inference can be drawn on these aspects.

v. Undue importance was placed on unloading of raw materials i.e HR sheets at the premises of the appellant as the said raw materials were to be sent for bending and corrugation to workshops. The learned Commissioner(Appeals) failed to appreciate that the ownership of the raw materials always rest with the job workers and merely because the raw materials procured and routed through the premises of the appellant, the ownership of the same remained with the job workers only.

vi. Learned Commissioner (Appeals) also wrongly concluded that movement of raw materials from the premises of the appellant to the work shop of M/s. Keshava Engineering Works were without challans, since no procedure is prescribed under the Central Excise law, where a unit whose turn over has not exceeded the limit of exemption to either to intimate the Department or to get prior permission to clear the goods.

vii. However, even if it is held that process of bending / corrugation amounts to manufacture, the liability would still be on the manufacturer, not on the supplier who supplied the raw materials.

viii. Predominant activity is carried out at the premises of the job worker, ancillary activities were carried out at the premises of the appellant would not lead to the conclusion that manufacture took place at the premises of the appellant. Stray cases are considered by the learned Commissioner(Appeals) where either owing to excessive demand of acoustic enclosures or where there were repeated defects in acoustic enclosures manufactured by the job workers, certain specific jobs were carried out at the appellant's premises.

ix. Finding of aluminum scrap cannot lead to the conclusion that manufacture took place at the appellant's premises since such sheets were used in the manufacture of DG sets also.

x. Stock statements given to the banks cannot be relied upon in confirming the demand. In support he placed reliance on the following judgments:-

a. CCE Vs. Beekaylon Synthetics Ltd. [2003 taxmann.com 77 (New Delhi – CESTAT)]

b. CCE, Vapi Vs. Synfab Sales [(2015) 57 taxmann.com 338(SC)]

c. Coimbatore Spinning & Weaving Co. Ltd. Vs. CIT [95 ITR 375]

xi. There was no testing of acoustic enclosure in the factory premises as the same are assembled only at the premises of the customers.

xii. Drawing /sketches for bending and corrugation found in the appellant's premises should not lead to any adverse inference as the manufacture of the acoustic enclosure were in consultation and as per the instructions / technical specifications of the appellant.

xiii. Supply of raw materials to job workers being denied by the appellant, onus lies on the Revenue to prove the same.

xiv. Inference that skilled labourers / employees were available at the appellant's factory and also consumption of glass wool and aluminum perforated sheets used in the manufacture of acoustic enclosures recorded in the factory cannot lead to the conclusion that acoustic enclosures were manufactured in their factory.

xv. Revenue's case is based on surmises and conjectures and circumstantial evidences, which cannot form basis to reject the submissions of the appellant.

xvi. The transaction between the appellant and the job work was on the principal to principal basis and all agreements were on commercial terms.

xvii. In view of the provisions of Sections 2(d) and 2(f) of the Central Excise Act, 1944, the manufacturing activity on the goods being at the job workers' premises, hence the job workers is the manufacturer and liable to pay duty, which was earlier held by the Tribunal. The fact that the appellant has not opted under Notification No.214/86 dt. 01/03/1986 as a result of which excise duty continues to be liability on the job worker but not on the appellant.

xviii. In the event, acoustic enclosures are manufactured by the appellant, credit on the raw materials and labour used in the manufacture is available to them and liability to pay duty would be considerably low which has not been considered by the learned Commissioner(Appeals).

xix. Even though, they are entitled to avail credit on payments of raw material being made by the appellant on behalf of the job worker, proves their bona fide intention.

xx. Assembly of acoustic enclosure results into emergence of immovable property; hence not liable to excise duty, a fact not considered by the learned Commissioner(Appeals).

4.1. *Per contra*, learned AR for the Revenue submitted the following:

a. Though the raw materials are procured in the name of Jobworkers, the same are received /unloaded in appellant's factory premises – they are taken into their stock –

inventory/issues are maintained – the said raw materials are accounted and reported as their stock to statutory departments – account of stock consumption of the materials exclusively used in manufacture of Acoustic Enclosure is maintained by the appellants. (vouchers for unloading charges)

b. The raw materials received/accounted are sent to jobworkers for bending/corrugating from the factory of appellant and received back from the jobworkers into their factory. (vouchers of cash payment)

c. Drawings/sketches for bending & corrugating supplied by the appellant, that has been prepared by their Works manager.

d. Though it is contended that the goods are then sent to M/s SEW/SBN, there are no documents available/ submitted to prove that the goods have been sent to them.

e. Manufacturing processes are carried in the premises of the appellant factory only. Consumption/ stock of Glasswool and Aluminium perforated sheets, used exclusively in the manufacture of AE are maintained by the appellant. (vouchers pertaining to Meals allowance bill, food bill, night allowance, Overtime bill)

f. The job workers are not specialised in manufacture of Acoustic Enclosure as they do not manufacture the said item for anyone else; they do not have their own specific raw materials suppliers of quality; they do not have any skilled labourers for the said activity; all these proves that the job workers have not undertaken any manufacturing activity of Acoustic Enclosure in their factory and have only raised and issued invoices.

g. The above proves that the manufacturing facility/ capability is available in the factory premises. It is also fact that the appellant has skilled labourers/employees who are well versed in the process of manufacture of Acoustic Enclosure.

h. Book No. 11 contain all details of the all the goods worked upon and supplied by the job worker to the appellant – but there is not even a single entry in the said book evidencing the fact that Acoustic Enclosure were fabricated and applied to appellant nor is it available even in other documents recovered from the job worker. Even, Book No. 8, containing bill wise details of actual work carried out with the amount in respect of their customers, does not reflect any Acoustic Enclosure processing work.

i. If the appellant were receiving fully manufactured Acoustic Enclosure ready to despatch in unassembled condition from jobworker and were clearing as such on trading, procurement of Nylon wheels and Pin sets (used exclusively in Acoustic Enclosure) separately on regular basis was not required.

j. The payment – job charges of 3% of Basic value + Sales Tax amount is paid by the appellant to the said jobworker for the purported processing of the AE. It appears to be very meagre and not even one fourth of actual labour and the same is impossible to fabricate for the said amount. It amounts to the fact that the manufacturing was done in the premises of appellant with the help of its own skilled employees and only in order to evade payment of duty, entire financial accounts & raising of invoices in these cases have been created / fabricated. It is clear that the 3% amount paid is nothing but the commission/ a sort of charges paid for raising the invoices in appellant's name and paying the Sales Tax in their own account.

k. It is also stated by their staff that the Acoustic Enclosure are assembled in the factory and tested before they are finally dispatched. This is further the fact that the appellant have the manufacturing facility and skilled labour with them for manufacturing AE in their factory premises.

l. Furthermore, immediately after the evasion was unearthed, the appellants stopped the said procedure and started a new unit. They also sent their skilled employees who were till then working in their factory to the new factory. This shows that the said employees were actually carrying out the said manufacturing activity in the appellant's unit.

4.2. Replying to their grounds, the learned Authorised Representative (AR) for the Revenue submitted as follows:-

I. In the grounds of appeal, among others, the appellants have claimed that they have procured the raw materials in the name of jobworkers and had sent them for manufacture of Acoustic Enclosures and that they received the Acoustic Enclosure under invoice on payment of Sales Tax. They have claimed that they have not manufactured acoustic Enclosure and if at all the activity amounts to manufacture, it should be the jobworker who is liable to pay duty as manufacturer.

II. In the grounds of appeal, they have stated that 'The said raw materials were never taken into the appellant's stock at any stage'. The said statement is very much far from truth, as during the investigation, the department has found a document declaring the material stock position by the appellants to M/s Dhanalakshmi Bank during the month of March 2002, April 2002 and May 2002. The appellant had shown stock of items/ raw materials that were procured in the name of jobworker and exclusively used in the manufacture of Acoustic Enclosure. The same has been clearly brought out in para 19 of the show cause notice. They have also put forth that the procurement in the names of SEW and SBN by the appellant was necessitated solely because the suppliers of raw materials were not convinced of the creditworthiness of SEW and SBN and hence, invariably insisted on the payments being made by the appellant, as a condition for the sale of goods. Though the appellant has been stating the above, they have not produced any evidences/ documents to that effect and the same appears to be a bald statement without any support and an afterthought to cover the evasion of duty.

III. Further, they contend that mere supply of raw materials & mere routing of raw materials to a job worker will not leave supplier of raw materials, for whom the work is done by the job worker, the manufacturer of the product, manufactured using the said raw materials. In this regard, it has been very evidently brought out at para 20 to 25 of the SCN that the appellant had actively engaged their employees for enquiring about the bending facility and were sending the raw materials for the said job work and receiving back in their factory for further process. There are documents to show that they had incurred expenditure in the processes connected to the manufacture of Acoustic Enclosure. It has also been brought out that the said bending/cutting of the sheets had been undertaken as per the drawing/sketches given by appellants. Evidences have also been discussed which support the fact that such activities of cutting/corrugating has been got done even without raising bills between them. As such, it is not mere routing of raw materials, but the appellants had undertaken various processes of work right from the stage of procuring the raw materials to the testing of the Acoustic Enclosure in their factory premises.

IV. The show cause notice has in detail given entire account of the transactions pertaining to manufacture of Acoustic Enclosure involving procuring of raw materials, raising of jobwork bills, sales invoices, carrying out testing, etc., and from the same, it is clear that the matter does not involve mere supply of raw materials, but much more than that to hold the appellants, being principal manufacturer as the actual manufacturer of the Acoustic Enclosure. Also, at para 26-38 of the show cause notice, the investigation has discussed all the pieces of evidences to prove that the manufacturing activities of Acoustic Enclosure have been carried out at factory premises of the appellant and hence the contention of the appellant that job workers are the manufacturers is not acceptable.

V. The appellants have argued that the agreement entered into between the appellant and the job workers was one, which was on principal to principal basis and that the job worker was not a hired labourer. It is seen from the documents on record that the appellant has not produced any documentary evidences/ copy of the agreement to prove /support their claim of manufacture was on principal to principal basis.

VI. It has been stated by Shri Jolly Francis, employee/labourer, who was working in the appellant unit that the acoustic enclosure used to be tested within the factory. Even when the said employee was cross examined ruing the adjudication proceedings, while answering the Question No. 6 during the cross examination, he has confirmed that the 'Acoustic Enclosures {assembled form} which are to be sent to distant places are tested before dismantling and sending to the buyer. It is clear that the appellant used to carry out the testing in their factory premises to ensure that the specifications as desired by their customers are met and the same is deliverable/marketable.

VII. At the stage of adjudication process, the appellant in their reply to SCN had contended that the only panels are manufactured at manufacturer's premises and the AE comes into existence only at the customers site and on assembly it becomes a structure that is fixed to the earth and immovable in nature thereby losing its character as goods for levy of duty. In this regard, the AE, that is fixed to the earth is capable of being unbolted and shifted from a place and is capable of being sold and hence it is not an immovable property. Therefore the same is liable to Central Excise duty.

VIII. Also, the adjudicating authority had held that it is not conclusively established that the appellant had the facility to manufacture AE in their factory. However, on proper analysis of the evidences, that have not been assailed/ contested with evidences by the appellant, proves that they had the capability of manufacturing AE in their factory.

IX. It can be seen that the appellant has denied all charges/points/evidences without any corroborative evidences. They have also failed to produce a copy of agreement of job work and also documents to explain the reasons for procuring raw materials in the name of job workers. On perusal of the evidences discussed in the show cause notice, it becomes abundantly evident that two parties have connived to avoid payment of duty on the manufacture of Acoustic Enclosure. It is obvious that there is pieces of evidence of creating an elaborate system of fraudulent documentation with intent to evade payment of Central Excise duty, as has been held by the

Commissioner (Appeals) in his order dated 29.11.2007.

X. The findings of OIA and CESTAT Final Order dated 06.02.2018 are reiterated and considering the above submission, the appeals are liable to be dismissed.

5. Heard both sides and perused records.

6. The short issue involved in the present appeal for consideration is whether appellant during the relevant period i.e. 01/04/2000 to 04/06/2002, manufactured and cleared 'Acoustic Enclosures' without payment of duty or the said goods were manufactured on job-work basis by other manufacturers and cleared to the customers directly.

7.1. The allegation of the Revenue is that the appellant in the guise of getting the said acoustic enclosure manufactured on job work basis, but in fact the appellant manufactured the same in their factory premises and later supplied it to their customers to be fitted with the manufactured DG sets.

7.2. In support of the allegation that goods were manufactured in the factory premises of the appellant, the Revenue on the basis of statements recorded and evidences collected, it is claimed that the raw materials necessary for the fabrication of acoustic enclosures are procured by them in the name of M/s. SBN Engineering Works and M/s. Steel Engineering Works, but in fact the same were unloaded in the premises of the appellant and it is purchased by the appellant as payments were made by them and the raw materials were received by them. In support of the allegation that the raw materials were unloaded and accounted as stock in the premises of the appellant, the Revenue relied upon the procedure for the purchase of raw materials adopted by the appellant and maintained in their office. Also, vouchers indicating payment of unloading charges against the corresponding invoices of the suppliers viz. M/s. Premier Steels have been enclosed. The stock of raw materials maintained thereunder perfectly tallied with the stock declared to the banks viz. Dhanalakshmi Bank Ltd. during the period March, 2002, April 2002 and May 2002.

7.3. Further it has been placed on record that glass wool and perforated sheets are purchased in the name of the appellant; however it was declared to have been procured in the name of M/s. Steel Engineering Works. Further they have placed on record sending all the raw materials viz. HR sheets for cutting and bending/corrugating, which is the first process of manufacture of acoustic enclosure as they were not having such facilities being stated by Shri Sebastian, Works Manager of the appellant. The statements recorded from persons who carried out the bending works viz. Shri V.P. Suresh Babu, Partner of M/s. Kesava Engineering Works in his statement dt. 27/05/2003 categorically stated that they had undertaken bending of HR sheets for making acoustic enclosure as per the drawings and sketches given by Shri

Sebastian. The HR sheets that were required for bending had been brought in to their factory and on completion of bending, it was sent back to the factory of the appellant for making acoustic enclosure. Similar information were also furnished by Shri Vasanth Kumar, representative of M/s. Unifab, in his statement dt. 09.06.2003. All these evidences have been challenged by the appellant arguing that there are stray cases and trivial issues.

8. Besides, evidence in support of manufacturing of acoustic enclosures in their factory viz. payments for overtime to employees, where the vouchers indicate acoustic enclosure were also placed on record. Also, all other allowances, expenses incurred in connection with manufacture of acoustic enclosure were placed on record, which indicate that the acoustic enclosures were manufactured in the factory premises of the appellant. The said evidences have not been rebutted with material particulars by the appellant.

9. The Revenue also relied on evidences indicating that the purchase bills of acoustic enclosures from M/s. SBN Engineering Works against few invoices for the period December 2000 to January 2001 were fabricated by the appellant as such manufacturing activities were carried out in the job worker's premises. The relevant annexures to the show-cause notice contain the documentary evidences in this regard. Further analyzing the payments made to the job workers brought on record that the amount paid ranging from Rs.660/- to Rs.1340/-

being 3% of the total sales value cannot meet even 1/4 of the actual labour expenses involved in the fabrication of the acoustic enclosures. Thus, the claim of the appellant that the goods were manufactured on job work basis negated by the Revenue. No contrary evidence is placed by the appellant showing the amount collected is sufficient to meet the job-work charges and any costing of the manufacture of the same placed on record by the appellant.

10. Thus, the Revenue could be able to establish that even though the appellant claimed to have manufactured the acoustic enclosures on job work basis from M/s. SBN Engineering Works and M/s. Steel Engineering works, in fact the same were manufactured in their premises during the relevant period and cleared without payment of duty. The claim of the evidence from the stage of procurement of raw-materials, receipt in the factory, manufacture using their labour force adduced by the Department in the demand notice and confirmed in the impugned order by learned Commissioner (Appeals), the owner shifts to the appellant to establish that the goods acoustic enclosures manufactured on job-work basis. We find that the submissions advanced by the appellant are of general in nature and devoid of rebuttal of evidences brought on record indicating procurement of raw materials, processing of the same in the factory premises, stock of the glass wool etc. used in the manufacture of acoustic enclosures found in their factory, low conversion charges reflected

in the invoice of job-worker etc. overwhelmingly indicate that the acoustic enclosures were manufactured and cleared without payment of duty from their factory. In the result, the appeal of the appellant is rejected and order of the Commissioner(Appeals) is upheld.

(Pronounced in open court on 22.12.2023)

(Dr. D.M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

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