

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 20509 of 2016

(Arising out of Order-in-Original No. COC-EXCUS-000-COM-052&
053/15-16 dated 23.12.2015 passed by the Commissioner of Central
Excise, Customs & Service Tax, Cochin Commissionerate)

M/s. Sepack India Pvt Ltd

III floor, Mathewson's Square
High School Junction, Edapally
Kochi – 682 024.

Appellant(s)

VERSUS

**The Commissioner of Central
Excise, Customs and Service
Tax, Cochin Commissionerate**

C.R. Building, I.S. Press Road
Cochin – 682 018

Respondent(s)

With

- (i). **Central Excise Appeal No. 50518 of 2016**
(Mr. Biju Philipose, Managing Director, M/s. Sepack India Pvt Ltd)
- (ii). **Central Excise Appeal No. 20519 of 2016**
(Mr. Gigi Kurian, Managing Partner, M/s. Poly Pack Industries)
- (iii). **Central Excise Appeal No. 20520 of 2016**
(Mr. Ani Paul, Proprietor, M/s. Ann Maria Industries)
- (iv). **Central Excise Appeal No. 20521 of 2016**
(Mr.K.K. Eldo, Proprietor, M/s. Ann Tech Industries)
- (v). **Central Excise Appeal No. 20522 of 2016**
(M/s. Speed Pack)
- (vi). **Central Excise Appeal No. 20523 of 2016**
(Mr. Pouplose K.U., Proprietor, M/s. Speed Pack)
- (vii). **Central Excise Appeal No. 20524 of 2016**
(Mr. K.P. Ulahannan, Proprietor, M/s. Angel Tech Industries)
- (viii). **Central Excise Appeal No. 20525 of 2016**
(Ms. Biji Philipose, Proprietor, M/s. Biowel Industries)
- (ix). **Central Excise Appeal No. 20526 of 2016**
(Mr. Shibu, Proprietor, M/s. Essem Industries)
- (x). **Central Excise Appeal No. 20527 of 2016**
(Ms. Santha Ignatius, Proprietor, M/s. Bandzeels)
- (xi). **Central Excise Appeal No. 20528 of 2016**
(Mr. Biju K.P., Proprietor, M/s. S.B.S. Industries)

- (xii). Central Excise Appeal No. 20529 of 2016
(Mr. Binoy Joseph, Proprietor, M/s. Joe Equipments)
- (xiii). Central Excise Appeal No. 20530 of 2016
(Mr. Paulson. P, Managing Partner, M/s. Global Pack Industries)
- (xiv). Central Excise Appeal No. 20531 of 2016
(Mr. Pradeep A., Proprietor, M/s. Pack Spin Industries)
- (xv). Central Excise Appeal No. 20532 of 2016
(Ms. Lilly Rajan, Proprietor, M/s. Sangama Equipments)
- (xvi). Central Excise Appeal No. 20533 of 2016
(M/s. Global Pack Industries)
- (xvii). Central Excise Appeal No. 20534 of 2016
(Mr. Geevar Paul, Proprietor, G-Tech Industries)
- (xviii). Central Excise Appeal No. 20535 of 2016
(Ms. Elizabeth, Proprietor, M/s. Isaacs Industries)
- (xix). Central Excise Appeal No. 20536 of 2016
(Mr. Eldho Varghese, Proprietor, M/s. World Pack Industries)
- (xx). Central Excise Appeal No. 20537 of 2016
(Ms. Solly, Proprietor, M/s. Crown Industries)
- (xxi). Central Excise Appeal No. 20538 of 2016
(Ms. Bini Aji, Proprietor, M/s. Pol Mart)

(Arising out of Order-in-Original No. COC-EXCUS-000-COM-052& 053/15-16 dated 23.12.2015 passed by the Commissioner of Central Excise, Customs & Service Tax, Cochin Commissionerate)

APPEARANCE:

Mr. Ravi Raghavan and Mr. Himanyush Chopra, Advocates for the Appellants

Mr. H. Jayathirtha, Superintendent (AR), for the Respondent

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

Final Order No. 20706 - 20727 /2024

DATE OF HEARING: 26.02.2024

DATE OF DECISION: 23.08.2024

PER : DR. D.M. MISRA

These appeals are filed against the impugned Order-in-Original No. COC-EXCUS-000-COM-052& 053/15-16 dated 23.12.2015 passed by the Commissioner of Central Excise,

Customs & Service Tax, Cochin Commissionerate. Since common issues are involved, these appeals are taken up together for hearing and disposal. The details of the appeals are as tabulated below:-

SL. No.	Appeal Nos.	Appellants	Period of Dispute	OIO Nos. /OIA No. & Date	Duty demanded	Penalty imposed
1	E/20509/2016	Sepack India	December 2009 to March 2014	OIO No. 052 & 053/2015-16 dated 23.12.2015	Rs. 5,21,39,369/-	Rs.5,18,69,926/- Rs.1,00,000/-
2	E/20518/2016	Mr. Biju Philipose			-	Rs. 5,00,000/-
3	E/20519/2016	Mr. Gigi Kurian			-	Rs. 50,000/-
4	E/20520/2016	Ms. Ani Paul, Proprietor			-	Rs. 50,000/-
5	E/20521/2016	Mr. K.K.Eldo, Proprietor			-	Rs. 50,000/-
6	E/20522/2016	M/s. Speedpack			-	Rs. 25,000/-
7	E/20523/2016	Poulose K.U., Proprietor			-	Rs. 50,000/-
8	E/20524/2016	K.P.Ulahannan Proprietor			-	Rs. 50,000/-
9	E/20525/2016	Ms. Biji Philipose, Proprietor			-	Rs. 50,000/-
10	E/20526/2016	Mr. Shibu, Proprietor			-	Rs. 50,000/-
11	E/20527/2016	M/s. Santha Ignatius, Proprietor			-	Rs. 50,000/-
12	E/20528/2016	Biju K.P., Proprietor			-	Rs. 50,000/-
13	E/20529/2016	Mr. Binoy Joseph, Proprietor			-	Rs. 50,000/-
14	E/20530/2016	Mr. Paulson.P, Proprietor			-	Rs. 50,000/-
15	E/20531/2016	Mr. Pradeep A, Proprietor			-	Rs. 50,000/-
16	E/20532/2016	M/s. Lilly Rajan, Proprietor			-	Rs. 50,000/-
17	E/20533/2016	M/s. Global Pack Industries			-	Rs. 25,000/-
18	E/20534/2016	Mr. Geevar Paul, Proprietor			-	Rs. 50,000/-
19	E/20535/2016	M/s. Elizabeth, Proprietor			-	Rs. 50,000/-
20	E/20536/2016	Eldho Varghese, Proprietor			-	Rs. 50,000/-
21	E/20537/2016	M/s. Solly, Proprietor			-	Rs. 50,000/-
22	E/20538/2016	M/s. Bini Aji, Proprietor			-	Rs. 50,000/-

2. Brief facts of the case are that the appellant M/s. Sepack India Pvt. Ltd. (formerly known as Sevana Trades and Services Pvt. Ltd.) (Sepack, for short) are engaged in the manufacture of various models of sealing machines falling under Chapter Sub-heading 84223000 of Central Excise Tariff Act, 1985. Appellant is a part of the Sevana Group of companies and the other companies in the group are M/s. Sevana Electrical Appliances Pvt. Ltd. and M/s. Sevana Packaging Systems Pvt. Ltd. On the basis of intelligence gathered by the officers of DGCEI, investigation was initiated against the appellant by visiting the premises of the appellant as well as other units; statements of various persons were recorded from time to time; 3093 numbers of sealing machines valued at Rs.51,15,840/- seized from the premises of the appellant against mahazar dated 07.01.2013, 1372 numbers of sealing machines valued at Rs.10,42,390/- were seized from the premises of M/s. Speed Pack against mahazar dated 28.01.2013 and 1477 numbers of sealing machines valued at Rs.11,37,569/- were seized from the premises of M/s. Global Pack Industries. A show-cause notice was issued on 14.06.2013 proposing confiscation of the goods seized under Rule 25 of the Central Excise Rules, 2002; proposed imposition of penalty on the appellant and other notices under Rule 26 of the Central Excise Rules, 2002. On completion of the investigation, show-cause notice was issued to Sepack on 06.01.2015 alleging that they had adopted the modus operandi of manufacturing the goods through dummy units called mother units in or around Kizhakkambalam by splitting the turn-over among the said so called mother units and consequently proposed for recovery of the duty amounting to Rs.5,77,88,539/- for clubbing the clearance of excisable goods manufactured by all mother units during the period December 2009 to March 2014 along with interest and proposal for penalty. Also, notices were issued to the Managing Director of Sepack and the Proprietor/partner of various dummy units proposing

penalty under Rule 26 of the Central Excise Rules, 2002. On adjudication, the seized goods released provisionally has been confiscated with an option to pay redemption fine of Rs.20.00 lakhs by Sepack, Rs.3.50 lakhs by M/s. Global Pack Industries and Rs.4.00 lakhs by M/s. Speed Pack. Also, duty amounting to Rs.2,69,443/- was directed to be paid by Sepack on the goods seized from the premises of M/s. Global Pack Industries and M/s. Speed Pack along with interest. Penalty of Rs.1.00 lakh was imposed on the appellant and penalty of Rs.25,000/- was imposed on each of M/s. Global Pack Industries and M/s. Speed Pack under Rule 25 of Central Excise Rules, 2002. Similarly on adjudication of the show-cause notice dated 06.01.2015, the demand of rs.5,18,69,926/- confirmed with interest with penalty of equal amount; penalty of Rs.5.00 lakhs was imposed on the Managing Director of the appellant; penalty of Rs.50,000/- was imposed on Proprietors / Managing Partners of other appellants under Rule 26 of Central Excise Rules, 2002. Hence, the present appeals.

3. At the outset, the learned advocate for the appellants assailing the impugned Order that the DMUs are merely dummy units of Sepack and have no independent existence that Sepack exercises effective control over the DMUs and all products manufactured by them are sold to Sepack, submitted as below:

- The DMUs have been deciding their own product line and acquired the technology on their own accord;
- there is no arrangement that the DMUs should sell their products only to the Appellant or manufacture only sealing machines; in fact, almost all DMUs were selling their products to other parties and were manufacturing other products as well. For example, in the year 2010-11, M/s. Ann Mariya's sales to Sepack were only 54% of their total sales. Similarly, M/s. Sangama Equipments' sales in 2009-10 and 2010-11 was only 37% and 40%

respectively. Further, it is also evident that M/s. Essem Industries was also involved in sale of other products like plastic tubes and was also selling to other customers apart from Sepack;

- The DMUs arranged capital on their own accord and have their own infrastructure obtained by pledging their own properties and providing their own personal guarantees;
- The DMUs have recruited their own employees, trained them on their own and are paying remuneration to them on their own;
- All DMUs are separately registered with the tax and other statutory authorities for purposes such as Sanitation Certificates, Income Tax etc.
- It is further pertinent to note that eight DMUs have already stopped supplies to Sepack and closed down their business at different points of time. M/s. Angel Tech has, in fact, diversified into a different business altogether.
- The discussion in the monthly meetings is mainly to keep up with the constant change in the cost of raw materials and is essential to ensure the smooth and efficient conduct of business.
- From the statements of various persons recorded by the department it is clear that Sepack has a negligible role to play in the day-to-day functioning and operations of the DMUs. Therefore, it is clear that the DMUs operate independently without any effective control from Sepack.
- The Appellant submits that the courts have consistently in similar circumstances laid the tests/principles for ascertaining the independent existence of DMUs/other units. Reliance is placed on (i) **CCE v. Ravi Batteries** [2009 (244) ELT 167 (ii) **CCE v. Meco Tronics**, [2003 (159) ELT 628 (Tri. Chennai)(iii) **Motor Industries v. CCE, Bangalore** [1999 (111) ELT 163 (Tri. – Chennai)].

- As regards financial flow back, it is submitted that the department had summoned all the key personnel and proprietors of the DMUs to furnish their respective bank details. Therefore, all transactions of the personnel of the DMUs for the past years were within the knowledge of the department. Despite this, the impugned order has failed to adduce or demonstrate any concrete evidence of any financial flow back.
- With regards to the allegation regarding financial flow back by providing assistance for die casting moulds, it is submitted that the department has incorrectly appreciated the factual position. The true facts are that 50% of the cost of the die casting moulds was borne by Sepack while the rest were adjusted against the bills of the DMUs. The DMUs were required to pay a certain amount as advance to Sepack which was in turn settled against future bills. This was purely a business arrangement arrived at with the consent of all parties involved.
- As regards mutuality of interest, it is relevant to state that Sepack is a corporate entity with 29 shareholders with the Managing Director possessing less than 25% of the equity. On the other hand, all the other DMUs are individual proprietorship or partnership concerns. In such a case, it is absurd to state that a corporate entity has mutuality of interest or financial flow back from individuals.
- It is further submitted that all the DMUs are located in rural areas and it has been the policy of the government to promote employment and industry in rural areas by allowing the SSI exemption. The main objective of this policy was to eliminate labour problems which were a major issue in Kerala. It is submitted that Sepack has merely taken part in the above policy of the government and there was no intention to evade payment of duty.

- It has been alleged in the impugned order that the DMUs are dummy units functioning under the effective control of Sepack. In addition to the submissions made above with regards to raw materials and further functioning of the DMUs, the following contentions are pertinent.
- It is submitted that M/s. Polypack Industries and M/s. G Tech industries were already in existence and were manufacturing and marketing sealing machines even before Sepack was incorporated and started doing business. Therefore, the case of the department that the DMUs were set up merely as dummy units falls flat. Reliance in this regard is placed on the decision in **Jagatjit Agro Industries v. CCE Ludhiana** [2014 (309) ELT 301 (Tri. – Del.)] which categorically held that when the units that are alleged to be dummy units were in existence much prior, clubbing of clearances cannot be effected.
- As far as the allegation regarding manufacturing taking place at the hands of Sepack due to quality control and affixing of label by Sepack, it is submitted that Sepack deploys freelance quality engineers for pre-delivery inspection. The same is similar to the pre-delivery inspection done by a car dealer before delivering the car to the customer. It is submitted that merely by performing the above activity of pre-delivery inspection, Sepack cannot be considered to be the manufacturer. Reliance is placed on the decision in (i) **CCE v. Cosme Farma Laboratories** [2015 (318) ELT 545 (SC)], (ii) **CCE v. Innocorp** [2013 (289) ELT 173 (Tri. – Bang.)]
- With regards to the reliance on Note 6 to Section XVI of the Central Excise Tariff Act, 1985, it is submitted that the said reliance in the impugned order is completely misplaced inasmuch as the sealing machines manufactured by the DMUs are already complete manufactured products and not

incomplete products. The machines received from the DMUs are capable of being used and sold directly to another customer. To this extent, Section Note 6 will have no application in the present matter.

- Further, it would be absurd to state that merely because packaging and branding of the sealing machines have not been done, and activities such as insertion of warranty card have not been performed, the sealing machines procured by Sepack are not marketable. It is submitted that the sealing machines are procured by Sepack, are capable of performing the functions for which they are designed even without undertaking the further processes of packaging and branding. Further, the process of quality check undertaken is to merely ensure that the quality of the sealing machines conforms to the standards maintained by Sepack. However, the same would not mean that without the quality check, the procured sealing machines are not marketable. Reliance is placed on the decision of the Allahabad Bench of this Hon'ble Tribunal in the case of ***Xerox India vs. CCE, 2018 (359) ELT 49 (Tri. All.)***.
- In the present case, the Respondent has failed to show as to how the sealing machines procured by Sepack were an incomplete/unfinished article, having the essential character of a complete/finished good. Further, the activities of merely packaging, branding and quality control cannot be said to make the sealing machines into complete articles and therefore, the said processes does not amount to manufacture. Reliance is placed on the decision of this Hon'ble Tribunal in ***CCE vs. Innocorp, 2013 (289) ELT 172 (Tri. – Bang.)***, ***ITC Ltd. vs. CCE, 2003 (151) ELT 246 (SC)***,
- The Appellant places heavy reliance on the decision of this Hon'ble Tribunal in the case of (i) ***Miraj Drymix vs.***

Commissioner of CGST, 2020 (371) ELT 868 (Tri. Delhi)
(ii) **CCE vs. Cosme Farma Laboratories, 2015 (318) ELT 545 (SC)**, (iii) With respect to the aspect of branding, reliance is placed on the decision of Hon'ble High Court of Bombay in the case of **CCE vs. Rafique Malik, 2018 (360) ELT 454 (Bom.)**, (iv) **CCE vs. Johnson & Johnson, 2005 (188) ELT 467 (SC)**, (v) **Chromaprint (India) Pvt. Ltd. vs. Commissioner of GST, 2024-VIL-245-CESTAT-CHE-CE**, this Hon'ble Tribunal reiterated that activity of printing labels and affixing it on the carton boxes would not amount to manufacture.

- It has been submitted by the Respondent that Sepack procures the sealing machines from the DMUs and sells them after adding a significant amount of margin. Therefore, there is price or value addition by Sepack and this price fixation results in manufacture. The said contention is incorrect as evident from the judgment of the Hon'ble Supreme Court in **CCE vs. SR Tissues**, [(2005) 186 ELT 385] and **Maruti Suzuki India vs. CCE, AIRONLINE** [2015 SC 477].
- Further It is submitted that the decision of the Hon'ble Supreme Court in **CCE v. MM Khambatwala** [1996 (84) ELT 161 (SC)] squarely covers the issue at hand. The department has itself, in the instant case, recognized the independent existence of each of the DMUs and has attributed separate and distinct recognition to the DMUs. The goods seized from the premises of Sepack vide Mahazar dated 07.01.2013 and 28.01.2013 were subsequently released provisionally to the respective parties. Thus, by releasing the seized goods to the respective parties, the department has impliedly admitted that the DMUs are manufacturers and have separate and independent existence. Moreover, the impugned order has imposed penalty under Rule 25 of CER, 2002 to all the DMUs, even though Rule 25 is applicable only to manufacturers.

Therefore, the department has admitted that the DMUs are manufacturers of the goods. Imposition of fine of Rs. 3,50,000/- on Global Pack and fine of Rs. 4,00,000/- on Speed Pack, where as duty on such goods has been demanded only from Sepack also shows that the said units are not dummy units. Reliance is placed on the decision in ***Gajanan Fabrics Distributors v. CCE, Pune*** [1997 (92) ELT 451 (SC)].

- It is submitted that the officials of the department visited Sepack's corporate office as well as godown premises on 18.12.2012 and seized various documents. Several subsequent searches were also conducted. Further, Sepack was also issued Show Cause Notice dated 14.06.2013 for confiscation of goods on the same set of facts. Therefore, the activities of the Appellants have been in the knowledge of the department for a sizeable period of time, hence the entire demand is barred by limitation. Reliance is placed on the decision in ***Nizam Sugar Factory v. CCE*** [2008 (9) STR 213 (SC)]. Further reliance is placed on ***Studioline Interior Systems v. CCE*** [2006 (201) ELT 250 (Tri. – Bang.)].
- The impugned order has imposed penalty on Sepack, Global Pack and Speed Pack under Rule 25 of the Central Excise Rules, 2002. It is submitted that no specific relevant clause of Rule 25 has been cited in the impugned order to impose penalty. As held in ***CCE v. Al-Amin Exports***, [2007 (211) ELT 305 (Tri. – Ahmd.)], the same is sufficient ground for setting aside penalty under Rule 25.
- It is submitted that no interest is payable as duty itself is not payable in light of the elaborate submissions made supra. It is submitted that when the demand itself fails, no interest is payable, as interest is only an accessory to the principal demand. (***Pratibha Processors v. Union of India***, [1996 (88) ELT 12 (SC)]).

- The impugned order imposes penalty of Rs. 5,00,000/- on Mr. Biju Philipose, Managing Director of Sepack and of Rs. 50,000/- on the various proprietors of the DMUs. In this regard, it is submitted that three ingredients must be satisfied for imposition of penalty under Rule 26: a) there must be removal of goods, b) the goods should be excisable and c) there should have been knowledge or reason to believe that the goods are liable to confiscation. Reliance is placed on ***Kamdeep Marketing Pvt. Ltd. v. CCE***, [2004 (165) ELT 26 (Tri.- Del.)] wherein it was reiterated that the condition for imposition of penalty under Rule 26 is physically handling the excisable goods. Reliance is placed on the decision in ***Anil Kumar Saxena v. CCE***, [2001 (129) ELT 351], wherein penalty was set aside on the same grounds mentioned above

4. *Per contra*, the learned AR for the Revenue reiterated the findings of the learned Commissioner and has submitted the following:-

- The Department would like to place the factual matrix/details with reference to the situations under which Sepack and DMUs are related in a way that Sepack controls the DMUs right from the procurement of raw materials to the clearance of finished goods. The same is based on the documents available on record and statements drawn during the investigation.
- There is no written agreement between Sepack and the DMUs. As per the facts of the case and the documents on record, it is observed that though Sepack contends that the agreement between them and DMUs is on principal-to-principal basis, there is no such evidences have been furnished by them. It is clear that the appellants have

not made/entered into any written agreements to show that the contract between them & DMUs was principal-to-principal. It has to be kept in mind that Sepack have entered into written agreement with die casting units viz., M/s Vabs Tools & Dies Pvt. Ltd., M/s Alcom Auto Industries Pvt. Ltd. and M/s Lighting Resource India, to whom they supplied moulds, for producing base and rocker arm to be supplied to DMUs. It is not clear as to when Sepack had entered into written agreement with inputs/component/die cast manufacturers, why they had not entered into a written agreement with any of the DMUs. The reason for this would be that they had entered into agreement with die casting units as they were independent and functioned independently, and whereas, the entire business/operation with regard to manufacture of sealing machines of DMUs was monitored and were under the complete control of themselves, they never considered making any agreement and they had not beheld any necessity for making an agreement. The absence of written agreement for manufacture of PB sealing machines has been accepted & confirmed from all the relevant stake holders in their statements drawn during the investigation. This itself is sufficient to prove that the DMUs were not independent.

- Though DMUs are registered separately with statutory departments, they are not independent– they are mutually dependent: It is observed that though the DMUs are separately registered with statutory departments like VAT, etc., the control exercised by Sepack on these units would be sufficient to hold that the said units are not independent when it comes to taking decisions with regard to the manufacture of sealing machines. Further, Sepack and the DMUs are mutually dependent in as much as Sepack is dependent on DMUs for procuring the sealing machines at the cost they fix & at maximum profit and the

DMUs are dependent on Sepack for getting orders for job to enhance their business and job-work income.

- Procurement of raw materials and raw material price negotiation: Sepack have admitted the fact of identifying the suitable suppliers of raw materials, negotiating the rate and instructing the DMUs to purchase such goods from those identified units. They also stated that DMUs which used die cast components had clearly stated that they purchased those components from the specified industries only to maintain the standard of required quality. The advantage of making bulk purchase from the raw material supplier should be one of the reasons for Sepack to negotiate the rate directly with such suppliers. Sri Biju Philipose, Managing Director, in his statement has deposed that they identified suppliers of raw materials required to manufacture sealing machines, negotiate price with them and instruct DMUs to purchase raw materials from such suppliers for the purpose of minimising the cost of raw materials of the BMUs, itself proves that fact. By effecting purchases of raw materials/ inputs from units identified by Sepack, the DMUs get inputs satisfying requirement and specification of buyer at the least possible price and they will not have to bear blame of using inferior quality raw materials as the same is purchased from suppliers recommended by the buyer. It is clear that the negotiations of raw material price is done by Sepack and not by the individual DMUs and also that the DMUs are bound to procure the raw materials from the suppliers recommended by Sepack.
- Transfer price fixed by Sepack-reduction in cost of raw material is immediately passed on to Sepack – not principal to principal transaction: there is no written agreement for fixing of the price at which the DMUs would

clear the goods to Sepack. The fixation of the said price was revealed on enquiry with representatives of DMUs & Sepack during the recording of the Statement under Section 14 of Central Excise Act. The amount payable by Sepack for transfer of various models of sealing machines supplied by DMUs [transfer price or transfer rate] has been determined by adding the agreed profit margin to the sum of all components of manufacturing costs, including material cost, assembling charges, royalty and even interest.

- Further, in the statements recorded, all the representatives of the DMUs as well as Sepack have deposed that the DMUs will submit the raw material cost,, assembling charges, interest charges of cost of materials, wastage, royalty and the billing price is fixed/decided after discussion with Sepack during the meetings. Many of the DMUs have also deposed that Sepack never accepted the price proposed by them.
- The practice adopted shows that the final say in the fixation of the price – transfer price is of Sepack and the prices proposed by the DMUs are verified/enquired by M/s Sepack. It has also been deposed that Sepack will never accept the price quoted by DMUs. This mechanism reveals that the DMUs cannot even fix their profit margin. The prices are immediately amended based on the revision of prices of the raw materials. This system of fixing of price by the principal manufacturer that too based on the cost of raw materials cannot be considered to be on principal-to-principal basis and to be independent. In normal principal-to-principal transactions, the price is not fixed by the buyer and that too based on the cost of raw materials used and it would be fixed by the processor considering his cost & profit and on his terms. In such transactions, the

processors are not required to reveal the costing of their products and percentage of profit to the buyers. There may be price negotiations, but not fixation of price by the buyer. Even when there are variations in the cost of raw materials, the same is passed on to the buyer and are not absorbed by the processors as it normally happens in a principal-to-principal agreements. In view of the above facts, it is clear that the transactions are not principal-to-principal terms and are controlled by the buyer viz., Sepack by fixing the price for transfer of manufactured goods from DMUs to Sepack. The said transaction cannot be considered to be a sale in terms of Section 4(1) and the value cannot be accepted to be a transaction value.

- Sepack is the sole buyer of the sealing machines manufactured by majority of the DMUs. It is a fact that entire goods processed by majority of the DMUs are given to Sepack against recovery of agreed transfer price. This fact has been accepted by the DMUs as well as Sepack. Majority of the DMUs have confirmed that they manufacture and sell goods only to Sepack vide their statements recorded under Section 14 of CEA. From the statements it revealed that Sepack, procures the sealing machines from their DMUs and after carrying out quality inspection & branding, clears them to the market for final sales. Accordingly, it becomes very clear that Sepack depends on the DMUs for manufacture and clearance of sealing machines and without the DMUs manufacture, the sales business of Sepack would be hard to imagine and may actually be reduced to null. On the other hand, it is also an undoubted & undeniable fact that majority of the goods manufactured by DMUs are cleared to Sepack only. This gives rise to a situation where DMUs depend on Sepack for continuous orders for production of goods, in the absence of which the very existence of the majority of

the DMUs would be in jeopardy. Consequently, both Sepack and DMUs are mutually interested and are supporting each other for their existence and progress in their business.

- It is also found that when the die casting units identified by Sepack refused to invest in mould required for making base and rocker arm of machines as per the requirement of Sepack, they themselves made the required mould and supplied to the die casting units free of cost to manufacture and supply parts exclusively to DMUs. By adding interest element involved in investment made by DMUs, Sepack indirectly met the cost of financing the activities undertaken by the DMUs. It is evident that there is financial flow/financial support from Sepack to DMUs. Hence, the contention of the Sepack as well as the DMUs that the Sepack has not funded any of the activities connected with processing of goods by DMUs or management of DMUs and has got no role in establishing and running the DMUs cannot be accepted.
- It is stated that as and when there is reduction in the cost of the raw materials, the transfer price is immediately reduced to that extent and the profit accruing out of the said reduction in the cost of raw materials is passed on the appellants by the DMUs. By ensuring minimum processing cost to DMUs and by determining the processing charges on the basis of such processing cost, the benefit of the reduction of the value of raw materials is passed on to Sepack and they are able to derive maximum financial benefits. Hence there is a kind of financial flow back of the reduction in price from the DMUs to Sepack.
- Further, it is also a fact that they themselves consider the clearance of the goods from DMUs to Sepack as transfer

and the price to be transfer price. It is very clear that the value adopted is not transaction value and the sale is not there in these cases since the transaction is not at arm's length. The buyer and seller in this case are undoubtedly related and the value adopted is not the sole consideration for the said clearance. Accordingly, there is no sale involved in the clearance of goods from DMUs to Sepack.

- The representatives of DMUs in their respective statements admitted that after assembling of the machines, the machine are subjected to thorough quality checking in the premises of DMUs by quality checking inspectors engaged by Sepack. Only after clearance from the said Inspectors, the goods are transferred to Sepack. It has been stated that the DMUs used to keep the machines manufactured by DMUs without the bottom cover and the quality inspectors of Sepack will inspect the quality and working condition of the machines and put the sticker on which QC passed, part number, etc. by ink print or paper sticker are there. After that the bottom cover is fixed and then the printed sticker on the machine are put on which QC passed, VC[Vencor Code], IVC(Inspector Vendor Code], Sign are printed. After completing details against VC and IVC, the machines whose quality inspection is completed are ready for billing and dispatch to Sepack. It is seen that the DMUs were not affixing the brand name.
- The goods being electrical goods, they are marketable only after branding, without which the said goods are not bought & sold in the market. This is because safety checks & testing and the branding carries important aspect in marketability of electrical goods. Here, the goods at the premises of DMUs are unbranded, without any kind of brands and also another round of checks & warranty are also not available. Hence they are not marketable

- It is also a fact that the said goods have been assembled/processed by the DMUs for and on behalf of the principal manufacturer viz., Sepack. Accordingly, all the said goods are transferred to Sepack by the DMUs for a consideration termed as transfer price approved & fixed by the said Sepack. Only after ensuring that each individual machine is capable of performing the intended purpose with required precision, it become a marketable commodity. It is evident that what emerges out of the processing undertaken by the DMUs is not a fully manufactured marketable commodity and it becomes marketable only after requisite further checking has been undertaken by Sepack in their premises also.
- It is a settled law that the testing/quality checking is a mandatory and an essential part of the manufacturing process and until the said process is completed, the goods manufactured cannot be considered as marketable. The above matter has been held as such by various Tribunals and Courts and have nullified the view that the goods before testing is marketable.
- It was also alleged in the SCN dated 14.06.2016 that though the product processing gets finished at the premises of DMU, it acquires its marketable stage at the premises of Sepack. This is because of the mandatory processes undertaken by Sepack at their premises. This aspect is completely covered under Note 6 to Chapter XVI of the CETA.
- Thus the product is bought or sold in the market as sealing machine with warranty against all manufacturing defects and hence the subsequent checking/testing and packing the machine in printed cartons with other particulars is a

process incidental to completion of the manufacture of sealing machines in a marketable form and the said conversion/processes amount to 'manufacture' in terms of above cited Chapter Note 6.

- The decision of the Hon'ble Supreme Court in the case of M/s Khambatwala, is in different circumstances hence not applicable. The following decisions on the matter of clubbing of clearances for SSI exemption are being relied upon:

- i. 2011 (263) E.L.T. 15 (S.C.) - **PARLE BISLERI PVT. LTD.**
- ii. 2012 (278) E.L.T. 223 (Tri. - Del.) - **HIMANSHU TRADERS**
- iii. 2014 (313) E.L.T. 87 [Tri.-Del.] - **BRITISH SCAFFOLDING INDIA PVT LTD**
- iv. 2015 (323) E.L.T. A124[S.C.] - **EURO SCOFF (INDIA) LTD.**

- On the issue of limitation, the judgment in ***Sparr Engineering vs CCE Bangalore II*** reported at 2007(207) ELT 545 [Tri.Bang.] and the Apex Court in the case of **Kalvert Foods India Pvt. Ltd.** [2011 (270) ELT 643 (S.C.)] is applicable to the present case.

- With regard to the proceedings under SCN dated 14.06.2013, the adjudicating authority has rightly found that by floating manufacturing units, by holding non-marketable goods assembled by the DMUs as finished goods and by undertaking processes indispensable for completion of manufacturing by deputing their own staff to premises of DMUs and by fixing the transfer price, they have deliberately attempted to camouflage the DMUs as real manufacturer. It is also found that M/s Sepack have wilfully misstated the facts and intentionally suppressed the value of goods produced by colluding with the DMUs, so as to evade payment of Central Excise duty.

- It is a settled law that when the suppression of facts/mis-declaration/intention to evade payment of duty has been noticed, the necessary notice under provisions of Section 11A by invoking extended period of limitation of 5 years can be issued. Hence their contention in this regard is not acceptable as held in the following decisions –
 - i. 2015(326) ELT 650[Bom.] – ***Tigrania Metal & Steel Industries P. Ltd.***
 - ii. 2008(221) ELT 481[S.C.] – ***Mathania Fabrics***
 - iii. 2010(251) ELT 264[Tri.Chen.] – ***Chemfab Alkalies Ltd.***
 - iv. 2017 (345) E.L.T. 256 [Tri.-Mumbai] – ***Komatsu India Ltd.***
 - v. 2017(4) GSTL 264[Tri.Del.] – ***Star Estate Management Ltd.***
- Further, being the Managing Director and over all in-charge of the company, and mastermind of the evasion, hence penalty under Rule 26 of Central Excise Rules 2002 is imposable. Similarly, the authorized representatives/proprietors of various DMUs being in-charge of the said respective units and had played a vital and important role in evasion of Central Excise duty on sealing machines by being hand-in-glove with M/s Sepack, they are liable for penalty.
- The goods seized from the premises of M/s Sepack are procured by them from the DMUs without observing/following Central Excise formalities. Also, the goods seized from the premises of M/s Global Pack Industries and M/s Speed Pack were manufactured without Central Excise Registration as specified under Rule 9 and also in violation of provisions of Rule 10. Accordingly, the said seized goods were held liable for confiscation in terms of Rule 25 of CER. Further, it was held that since the goods have been released on execution of B-11 Bond, fine in lieu of confiscation was imposed.

5. Heard both sides and perused the records.
6. The issues involved for determination are whether:-
 - i. the clearance value of sealing machines manufactured by each of the Units(called as mother units) be denied SSI exemption under Notification No.08/2003CE dt.01.3.2003 being dummy Units created and controlled by Sepack and duty with interest is payable by Sepack as the 'manufacturer' of the sealing machines during the period 2009-2014; penalty is imposable on Sepack.
 - ii. goods seized at M/s. Sepack India Pvt. Ltd., M/s. Global Pack Industries and M/s. Speed Pack are liable to be confiscated and penalty imposable on them; duty is payable on the seized goods by M/s. Sepack India Pvt. Ltd.
 - iii. imposition of penalty under Rule 26 of CER 2002 on other appellants are justified.
7. The undisputed facts are that the appellant(M/s. Sepack) during the relevant period engaged in trading, inter alia, of sealing machines. These sealing machines were manufactured by various independent units (DMUs) and supplied to Sepack at the price mutually agreed. The appellant after affixing their brand name and packing the sealing machines cleared to the end consumer at a price higher than the price at which the same were purchased from different units. Each of the DMUs engaged in the manufacture of sealing machines was registered with the respective village panchayats, but not registered with the Central Excise Department claiming SSI exemption under Notification No.08/2003-CE dated 01.3.2003 up to the aggregate value of

clearances in the respective financial years being less than Rs.150 lakhs. The relevant portion of the said Notification reads as:

SSI Exemption to manufacturers not availing Cenvat — Notification No. 8/2002-C.E. superseded

*In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (herein after referred to as the Central Excise Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 8/2002-Central Excise, dated the 1st March, 2002, published in the Gazette of India vide number G.S.R. 129(E), dated the 1st March, 2002, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts clearances, specified in column (2) of the Table below (hereinafter referred to as the said Table) for home consumption of excisable goods of the description specified in the Annexure appended to this notification (hereinafter referred to as the specified goods), from so much of the **aggregate of**, -*

- (i) the **duty of excise** specified thereon in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the First Schedule); and*
 - (ii) the **special duty of excise** specified thereon in the Second Schedule to the said Central Excise Tariff Act, 1985 (hereinafter referred to as the Second Schedule),*
- as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said Table :*

Provided that nothing contained in this notification shall apply to a manufacturer who has availed the exemption under notification No. 39/2001-Central Excise, dated the 31st July, 2001, published in the Gazette of India vide number G.S.R. 565 (E), dated the 31st July, 2001, in the same financial year.

Table

S. No	Value of clearances	Rate of duty
(1)	(2)	(3)
1.	First clearances up to an aggregate value not exceeding one hundred lakh rupees made on or after the 1st day of April in any financial year.	Nil
2.	All clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods.	Nil

2. The exemption contained in this notification shall apply subject to the following conditions, namely : -

- (i)
- (ii)
- (iii)
- (iv)

- (v)
- (vi)
- (vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed rupees three hundred lakhs in the preceding financial year.**
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[Notification No. 8/2003-C.E., dated 1-3-2003]

8. The allegation of the Revenue is that the individual units which are described as Decentralized Mother Units (DMUs) are dummy units being created and controlled by Sepack only for the purpose of claiming SSI exemption benefit under Notification No.8/2003-CE dated 01.03.2003 on the turnover of each of the said Units. Secondly, it is also alleged by the Revenue that the product sealing machines at the premises of the DMUs were not fully finished and attained the character of a marketable commodity; the sealing machines became complete and emerge only after the quality checking, and other processes in the premises of Sepack including the processes of branding, labelling, warranty agreement which enriches its value as well as make the sealing machines marketable. Thus, manufacturing of sealing machines becomes complete only after these incidental and ancillary processes undertaken by the appellant at their premises. Hence, Sepack is the manufacturer of the sealing machines. On the other hand, the contention of the appellant is that each of the said units are independent, assessed separately under the Income Tax Act; invested their own capital/finance in building manufacturing infrastructure and working capital;

managed and controlled the day to day affairs by the respective Proprietors and partners; therefore, clubbing the value of the clearances of all these units and treating the said units as the dummy units of Sepack and denying the benefit of SSI exemption is incorrect. Besides it is argued that the sealing machines were complete and marketable at the premises of DMUs and the process of branding, further quality checks and packing of sealing machines and providing warranty to customers by Sepack do not result into 'manufacture' and Note 6 of Section XVI of CETA is not applicable to the present case.

9. In the impugned order, the learned Commissioner analysing the statements and other evidences held that since the Sepack identifies and recommends suitable supplier of raw materials from whom the DMUs were required to purchase the raw materials; fixing the price of the goods on negotiation with DMUs, suggests methods for cost reduction in the monthly meeting with DMUs, subjecting the goods to quality check before being accepted by Sepack, indicate that there is a direct control by Sepack exercised on various DMUs, from the first stage of procurement of raw materials till the finished goods received by them; even though these DMUs are declared independent on paper but in fact all these units are dummy units being controlled by the appellant. Also, he has held that the goods manufactured at the premises of the DMUs were incomplete and attains the condition of marketability only at the premises of

Sepack, hence Sepack is the manufacturer and the liability to pay duty is on Sepack.

10. The learned advocate for the appellant on the other hand has argued that all negotiations, understandings and business supports provided by the appellant to various DMUs are in the nature of commercial supports/relations and there is no shareholding in the form of investment by Sepack in DMUs, nor financial flow-back or any soft interest free financial loan extended by the appellant to various DMUs; therefore, the DMUs are independent units and had manufactured the sealing machines by employing their own machinery, labour and finance having separate PAN, file income tax returns and complied with all the statutory requirements in running business of their manufacturing unit. Therefore, calling them dummy units of Sepack without any shareholding, financial flow-back or sharing of profits, supply of infrastructure is contrary to the principles of settled law in this regard; hence, could not be accepted.

11. We find that the approach of the Department is ambivalent. At the first instance, it is alleged that the DMUs are dummy units i.e. effective control of the DMUs are in the hands of the Sepack; therefore the sealing machines manufactured and cleared by each of the DMUs to Sepack be considered as if the said sealing machines are manufactured by Sepack and the turnover of each of the DMUs be considered to be the turnover of the appellant for the purpose of calculating the aggregate

value of clearance of good under SSI Notification No. 08/2003CE dated 01.3.2003. The second line of argument of the Department is that the sealing machines manufactured by each of the dummy units were not fully manufactured and only after carrying out the processes of packing, sealing and affixing the brand name of the Sepack, it results into a complete machine and the 'manufacture' is completed; hence the appellant being the manufacturer of sealing machines that were cleared by the DMUs, the sale price at which the sealing machines were sold by Sepack during the relevant period be chargeable to duty.

12. Now, let us analyse each of the said issues raised by the Revenue in denying the benefit of SSI exemption to each of the DMUs on the basis of evidence on record.

13. The principles of law settled on the issue of clubbing of clearance needs to be stated. The Hon'ble Supreme Court in **CCE, New Delhi Vs. Modi Alkalis & Chemicals Ltd.** [2004 (171) ELT 155(SC)] has observed that a general rule on clubbing of clearance having universal application cannot be stated, each case has to be decided on the facts of the case. It is held:

8. Whether there is inter-dependence and whether another unit is, in fact, a dummy has to be adjudicated on the facts of each case. There cannot be any generalization or rule of universal application. Two basic features which *prima facie* show interdependence are pervasive financial control and management control."

14. Hon'ble High Court of Bombay in the case of **CCE, Pune-II Vs. Ravi Batteries** [2009(244) ELT 167 (Bom.)] observed as:

5. We have carefully perused the orders passed by the Commissioner of Central Excise as well as all the three Members

of the Tribunal. The record reveals that the respondent No. 1 M/s. Ravi Batteries is a partnership firm established in 1978 having four partners. This firm is a manufacturer of Lead Battery Plates. The firm is carrying on its business at Plot No. B-15, MIDC, Shirol, Kolhapur. The respondent No. 2-M/s. Ganesh Industries is also a registered partnership firm. It was established in the year 1991 with three partners. Out of them, Prabhakar Joshi was partner in both the firms. The remaining partners in the said firm are different, though they may be related. Since establishment, respondent No. 2 firm and its unit were situated at Kagal at a distance of about 50 K.M. From Kolhapur. M/s. Ganesh Industries shifted the manufacturing operations from Kagal to MIDC, Shirol, Kolhapur sometime in 1992-93. Both the respondents had independently taken loans from the Banks. They had also submitted their separate declarations about the production. It appears that the respondent No. 2 had submitted returns about production for the year 1990-91 at Kagal. During the year 1992-93, because it was in the process of shifting from Kagal to Shirol, the production was much less, as production was undertaken only for three months. Independent account books were maintained by them even after shifting of respondent no. 1 from Kagal to Shirol. Both the units were not situated on the same property. The respondent No. 1 was situated at Plot No. B-15, while respondent no. 2 was situated on Plot No. B-16 of MIDC, Shirol. Merely because both the firms were dealing in the same type of production and because one of the partners in both the firms was same, it could not be concluded that respondent no. 2 was a dummy unit of respondent No. 1. In view of these reasons, the Tribunal rejected the contention of the Revenue and allowed the appeals by majority of two against one. The findings of the Tribunal are clearly based on facts, In view of some of the salient facts noted above, it is impossible to hold that the findings of fact given by two of the Members are perverse.

15. Further, this Tribunal in the case of **CCE, Chennai Vs. Meco Tronics (P) Ltd.** [2003(159) ELT 628 (Tri. Chennai)] confronted with the issue whether clearance of 9 units be clubbed with that of MTPL in confirming the demand against MTPL. Referring to the earlier judgments, it is observed as follows:-

15. Further, we notice that the issue of common premises, common Directors, supply of raw materials have all been the subject matter of several Tribunal orders as in the case of Cheryl Laboratories v. CCE, 1993 (65) E.L.T. 596, Alpha Toyo Ltd v. CCE, 1994 (71) E.L.T. 689; Mico Ltd.; 1999 (111) E.L.T. 163. It will not be out of place to extract the findings of the Tribunal rendered in MICO Ltd. (supra) which would apply to revenue's contentions raised in the grounds of appeal. Paras 19 to 22 are extracted herein below :-

“19. The Commissioner has rejected the independency of the ancillary units on the ground that they have not demonstrated their sovereignty in determining their own price and that they are merely as ancillary units prepare a cost estimate and the purchaser (or buyer) MICO fixes the price. And this runs counter to the concept of principal to principal dealing also. He has further held that the concept of determination of price by MICO is not an attribute of principal to principal relationship and the arrangement of this type cannot be regarded as sale of goods at which they are ordinarily sold in the wholesale trade. This is the concept which has kept on analysing the statements and agreements to draw the conclusion that the monetary consideration for the transaction were determined by MICO. In para 37 of the impugned order, the Commissioner goes on to state that by extension of even the profit level of the ancillary company is determined by MICO; actually that ought to have been the exclusive preserve of the management incharge of ancillary companies. All these ancillary units have ceded one vital managerial function to MICO, i.e. determining the level of profit they should make. Therefore, the Commissioner wonders that in such circumstances, who is really running these enterprises. He holds that the managerial control is not demonstrated by having separate sales-tax, income-tax, excise, ESI, P.F. and other registrations, but in his view, it is demonstrated by the right to determine its price and profit level. Those who are managing these enterprises can be said to be in control if they had demonstrated their sovereignty in deciding the price they want to charge for selling of the goods they manufacture and the quantum of profit they want to make while selling such goods. He has held that they, like a paid employee, manufacture, then compute the cost data, supply it to MICO and leave the decision to MICO. He has held that although the ancillaries state that they are happy with the profit they are making (or getting) but the sharing of cost data with the buyer militates against the doctrine of “Indoor Management”. He has held that determination of price or the profit level (or loss) should be the policy decision of the Management in-charge of the company. In such a policy matter, if determined by somebody else, it demonstrate that such somebody is incharge of the management. He states that this is precisely what the show cause notice alleges, i.e. the goods are manufactured under the management, direction and control of MICO. Thus the show cause notice is substantially correct when it alleged that the goods are manufactured under the management, direction or control of MICO.

20. With due respect, we are unable to agree with this conclusion of Id. Commissioner. This is not a new concept which the Commissioner or the department has tried to bring out in the order. But this has been gone into again and again by several courts and they laid down what managerial control means and in these cases it has been well laid down that managerial control should be such as to lead to the flow back of the profits to Principal manufacturer. In this particular case, admittedly the ancillaries prepare the cost estimate and that is being negotiated and where there is an escalation of price, the same is also negotiated and re-fixation of price is arrived at. In any contract of this type there is always a price and that price is a negotiated price with offer and acceptance and that there is free will in determining the price. In this case the Commissioner has not demonstrated and shown that there is no free determination of price by negotiation. The

data relied by Commissioner itself disclose that there is negotiation and the price is arrived at thereafter. The ancillary units are making profit and it is not as though no profit is made by them. The MICO is determining the market and it is they who are marketing the goods and as the market player, it has to keep its price in terms of the market fluctuations. Therefore, being aware of the market situations, it negotiates the price to maintain the business. Such fixation of price by MICO with its ancillary units cannot be said to be a control as to make the ancillary units a hired labour, which is different concept; wherein a hired labour has no role to play except to receive his wages and the contract is that of employer and employee and the hired labour services can be terminated and that he can seek reinstatement or sue for compensation or for enforcement of the contract obligation. While in the present case, the relationship is not of a hired labour as admitted facts are that the ancillaries have come up on their own, with their own finances, functioning independently with their own constitution and incorporations. The loss or the profit is not taken over by MICO and MICO cannot be held responsible for all the actions of the ancillary units. The determination of price, so long as it is independent and not influenced by any factors of under valuation as laid down under Section 4 of the Central Excise Act, then such negotiated price is required to be accepted. Section 4 of the Central Excise Act, deals with the aspect pertaining to the related persons, and even in such cases, the price of a related person cannot be rejected so long as the price is a mutually arrived at one and not fixed by any consideration and that there is no flow back in any form. When the price of related persons is the same as that of other dealers and in such circumstances also the price is required to be accepted. In the present case, the department is not proceeding on the basis of ancillary units being related persons but as Commissioner has analysed, they have proceeded on the basis that the goods are manufactured under the management, direction and control of MICO. All units being ancillaries manufacture goods according to design and specifications, therefore, MICO getting such goods manufactured as per their specification does not make MICO as the manufacturers in terms of Section 2(f) of Central Excises and Salt Act. This has been further analysed by the Hon'ble Supreme Court in the case of C.C.E. v. M.M. Khambhatwala as reported in 1996 (84) E.L.T. 161 (S.C.) where goods produced by household ladies in their own premises out of the raw material supplied by the respondents who paid wages on the basis of number of pieces manufactured and there was no supervision over the manufacturing of the goods by the respondents, and the goods sold from the premises of such household ladies, but sale proceeds sent to the respondents. Such household ladies, the Hon'ble Supreme Court held, are to be treated as "manufacturers" of the goods and not as "hired labourers". In this regard Hon'ble Supreme Court relied on its earlier judgment in the case of Ujagar Prints v. Union of India as reported in 1988 (38) E.L.T. 535 (S.C.) and that of Empire Industries v. Union of India as reported in 1985 (20) E.L.T. 179 (S.C.). In the case of Santha Industrials v. C.C.E. as reported in 1995 (78) E.L.T. 556 (Tribunal), the Tribunal held that owner of the brand name getting the goods manufactured, the ancillary is certainly concerned about its make, quality, standard and market reputation. The Tribunal held that there is no bar in the notification that the brand name holder to get his products manufactured through other

independent units on principal to principal basis, on supply of raw materials and by quality control. The Tribunal held that this will not make the other units dummy.

21. This citation refers to large number of judgments of the Tribunal. In the case of *Cheryl Laboratories v. C.C.E.* as reported in 1993 (65) E.L.T. 596 (Tribunal) in a similar circumstances the 3-Member Bench held that a buyer cannot be considered as a manufacturer and two persons cannot be held to be manufacturers of the same product. The Bench cited the Supreme Court judgment in the case of *Union of India v. Cibatul Ltd.* as reported in 1985 (22) E.L.T. 302 (S.C.). Hon'ble Supreme Court in para 6 and 7 answered the question whether the goods are manufactured by the seller or are manufactured by the seller on behalf of the buyer. The Hon'ble Supreme Court noted the relevant provisions of the agreement and other materials on record which showed that the manufacturing programme is drawn up jointly by the buyer and seller and not merely by the buyer, and that the buyer is obliged to purchase the manufactured product from the seller only if it conforms to the buyer's standard. For this purpose, the buyer is entitled to test a sample of each batch of the manufactured product and it is only on approval by him that the product is released for sale by the seller to the buyer. On other words, the buyer has the right to reject the goods if he does not approve of them. If the manufactured goods are not in accordance with the buyer's standard, they are either reprocessed to bring them up to the requisite quality, or if that is not possible, the goods are sold to the buyer for a different purpose if they are compatible with the specifications of some other product and provided that the buyer has a need for that product, or the goods are sold to others in the market as sub-standard goods at a lower price or the goods are destroyed. It is significant to note that the buyer is not obliged to purchase the goods manufactured by the seller regardless of their quality and that in the event of rejection by the buyer the alternatives present before the seller extend to the sale of the manufactured goods to others or even to the very destruction of the goods. It is apparent that the seller cannot be said to manufacture the goods on behalf of the buyer. Further the Supreme Court observed in para 7 that the appellant relies on the circumstances that under the agreements the seller is required to affix the trade-marks of the buyer on the manufactured goods and, it is said, that indicates that the goods belong to the buyer. The Supreme Court observed that it seems to them clear from the record that the trade-marks of the buyer are to be affixed on those goods only which are found to conform to the specifications or standard stipulated by the buyers. All goods not approved by the buyer cannot bear those trade-marks and are disposed of by the sellers without the advantage of those trade-marks. The trade-marks are affixed only after the goods have been approved by the buyer for sale by the seller to the buyer. The seller owns the plant and machinery, the raw material and the labour and manufactures the goods and under the agreements, affixes the trade marks on the goods. The goods are manufactured by the seller on its own account and the seller sells the goods with the trade marks affixed on them to the buyer. This ruling of the Hon'ble Supreme Court is clearly applicable to the facts of this case and answers the points raised by the ld. Commissioner in his order.

22. In view of the findings given by us, the appeals succeed and the impugned order is set aside and appeals allowed."

16. *We notice that this Bench in the case of R. Venkatachalam v. CCE - 2000 (115) E.L.T. 192 likewise held that 9 units cannot be clubbed with the main unit merely because there is common telephones, common business, common employees, and like allegations made in the present case. The Tribunal upheld the assessee's contention that 9 units therein were not dummy units nor they were in the nature of hired labour of the main noticee. Even grounds of limitation has been answered in assessee's favour. This judgment of the Tribunal has since been affirmed by the Apex Court as noticed in extracted from 2000 (118) E.L.T. A242. The Commissioner's (Appeal) before the Apex Court has since been rejected. In view of the findings and the judgments cited above, we uphold the contention raised by the Ld. Sr. Counsel and do not find any merit in this appeal and hence this appeal is rejected.*

16. We find that the learned Commissioner has observed that there is a financial flow-back from the appellant to DMUs inasmuch as the Sepack identify the supplier of raw materials who would supply the inputs at the least possible price to the DMUs; the reduction in the production cost by various methods including procurement of raw materials at a cheaper price and through other mutual efforts benefitting both Sepack and the DMUs; the benefit that accrues to Sepack by such means would definitely be considered as a financial flow-back to Sepack. Further, he has observed that when the die-casting units suggested by the appellant refused to invest in mould and supply to DMUs, the appellant had supplied the moulds free of cost to die-casting units of which 50% of the cost of dies invested by Sepack and balance contributed by the DMUs. The said reasoning of the learned Commissioner has been rebutted by Sepack in their Director's statement and also by adducing

evidence of reduction in the cost price of the sealing machine by procuring raw material at a cheaper price benefits both DMUs as well as Sepack, all negotiations on price reduction on the basis of the cost of production of each of the DMUs since benefits both the parties and the benefits derived are more or less equally shared by both cannot be construed as financial flow-back and be construed the benefit is derived only by Sepack. We find merit in the argument of the learned advocate for the appellant that the mutual benefit derived from various efforts leading to cost reduction in the manufacture of sealing machines by DMUs, cannot be said a financial flow-back by way of sharing the benefits of cost reduction resulted from meticulous planning and execution of the lower cost of production through monthly meetings and sharing of the cost data. Also, it is pertinent to note that the price at which sealing machines are purchased from the respective DMUs by Seapack were not uniform but rests on the methodology of the cost reduction followed by the individual DMUs. In these circumstances, it is difficult to accept the fact that cost reduction be interpreted as a financial flow-back from the DMUs to Sepack, in absence of any shareholding, investment in capital and advancing of loans to the DMUs; cannot stand to the scrutiny of settled law that there is a pervasive financial control exercised by Sepack. Regarding the investment by Sepack on the moulds to the extent of 50% of the cost of such moulds and balance 50% by the DMUs, it has been clarified by Shri Biju Philipose, Managing Director in his

statement dated 04.06.2013 that they had entered into agreement with diecasting units viz. M/s. Vabs Tools & Dies Pvt. Ltd., M/s. Lighting Resource India Pvt. Ltd. for production of base and rocker arms and supply of the same to the parties approved by Sepack. The mother units started placing purchase orders of base and rocker arms with the diecasting units and could able to achieve better efficiency, uniformity and cost reduction and they could able recoup the investment on moulds within one year and returned the advances made by the mother units. Later the diecasting units were investing in the moulds themselves and recovering the cost through amortisation. The said statement of Shri Biju Philipose has been verified by the Department from the ledger account submitted and no discrepancy was noticed as recorded in the show-cause notice. Thus, the finding of the Commissioner that there is a financial flow back by way of investment in moulds cannot be sustained as it is within the normal practice of the trade.

17. Further, the Commissioner has concluded that it is difficult to accept the fact that Sepack has exercised effective control since all key activities of DMUs including important decisions as to what production to be made; from where to purchase raw materials, what should be the transfer price etc.. Besides, he has observed that there is a huge difference in the price of sealing machines of the appellant and the transfer price of the machines by DMUs to the appellant. The reasoning of the

learned Commissioner that selecting the raw material suppliers, advising the DMUs to purchase the raw material and periodical interaction with the personnel of DMUs in ascertaining the cost of production and determining the price of the machines which resulted cost benefit to the Sepack as well as to the DMUs be considered as financial flow-back from the DMUs to the appellant, are issues/factors considered by the Tribunal in its various judgments as insignificant factors in deciding whether Units are dummy or otherwise. Also, it is not brought on record that there is common workforce or supervising staff shared between Sepack and the DMUs in carrying out the day-to-day operation of the manufacturing unit.

18. Further, we find that some of the DMUs were in existence much before the incorporation of Sepack (i.e. Sevana Traders and Services Pvt. Ltd.) and hence it is difficult to accept the reasoning of the Commissioner that all the DMUs are created by Sepack to evade excise duty. In his statement dated 24.12.2012, the Managing Director of the appellant Mr. Biju Philipose explained the scheme of manufacture involving the DMUs disclosed that he had undergone a training in Germany on Negotiations in the year 2011 and implementing the idea of 'Co-operative Negotiations' and promoting entrepreneurship and industrial activities in or around Kizhakkambalam. The DMUs were set up with the said objective and he has been organising joint actions with the DMUs in identifying suppliers of raw

materials for cost reduction which has resulted a definite advantage over competitive negotiations in which each negotiator tries to protect his interest and maximise his gains. This objective as stated by Mr. Biju Philipose in his statements has never been challenged by the Revenue. It is to be borne in mind that the entire allegation of the Revenue rests on the premises that all these individual DMUs were dummy units of Sepack, impliedly, these units do not have separate physical existence in practice and their existence was on paper only. On the contrary, from the various statements, it could easily be discerned that there has been commercial and healthy negotiations between Sepack and all DMUs by exchanging ideas and sharing of cost data and suggesting to arrive at the optimum cost of production so as to maximise the profit in the interest of both parties. Thus, it cannot be interpreted that the individual DMUs have no existence and all the units belong to Sepack and fully controlled by Sepack. In the event, the DMUs were in existence only on paper, then there was no need to conduct periodical monthly meetings and deliberate on the issues of reduction in cost and contributing to the efficiency in production. Sepack would have unilaterally circulated implementing a price list arrived at by itself without involvement of DMUs. Besides, no evidence has been brought on record by the Revenue that the payments towards procurement of raw materials, payment to labours and other day-to-day working expenses have been liberally advanced by Sepack to DMUs and there is accounted /

unaccounted transfer of funds / profits from the business either from Sepack to DMUs and vice-versa. All the negotiations, meetings and reductions in cost resulted into such meetings that were carried out in a transparent manner and based on pure commercial terms. Therefore, it is difficult to accept that there are extra commercial dealings between Sepack and DMUs leading to a conclusion that the DMUs are not in existence and operational.

19. The learned advocate for the Sepack also vehemently argued that in the event the Department considers the DMUs are dummy units; then the adjudicating authority after directing confiscation of the goods seized from the premises of the said DMUs, and demanding duty from the appellant should not have allowed it to be redeemed by the respective DMUs, thereby acknowledged that DMUs are in existence as a separate entity and not a dummy unit of the Sepack. In support, the learned advocate referred to the judgment of the Hon'ble Supreme Court in the case of ***Gajanan Fabrics Distributors Vs. CCE, Pune*** [1997(92) ELT 451 (SC)]. We find merit in the contention of the learned advocate as dummy units were considered to be in existence and allowed to redeem the goods on payment of redemption fine whereas as per the allegation, the goods ought to have been released to the Sepack who has been saddled with the duty involved in the seized goods. In view of the above, we do not find merit in the findings of the Commissioner that all the

DMUs are dummy units of the Sepack and hence each of the said DMUs is not eligible to avail SSI exemption under relevant notification.

20. The Ld. AR for the Revenue placed reliance in the case of **Parle Bisleri Pvt. Ltd.** (supra), where the appellants were manufacturers of soft drinks, availed the benefit of SSI exemption notification No.175/86 and No.1/93 which is the holding company of M/s. Parle Exports Ltd. The said company sells its products to the holding company M/s. Parle International Ltd. and franchise bottlers of M/s. Parle Exports Ltd. Analysing the inter-se relations, financial interdependence, control of management etc., the clearance of the companies under same group proposed to be clubbed by the Department. The Hon'ble Supreme Court answered the issues in favour of the Revenue holding that clearances value of all the units to be clubbed in considering the benefit of SSI exemption. In the present case, the relation between Sepack and other DMUs are not that of holding company and subsidiary companies nor belong to the same group. Therefore, the said judgment is not applicable to the case in hand. Similarly, the judgment in **Himanshu Traders** (supra) case relates to consideration of a miscellaneous application seeking rectification of mistake ; hence not applicable. In **British Scaffolding India Pvt. Ltd.**'s case (supra), the issue before the Tribunal was clubbing the clearances of the appellant with clearances of other companies

closely controlled by the directors of the appellant company. In the said scenario, the Tribunal after lifting the corporate veil held that the benefit of SSI exemption notification cannot be extended to the appellant. In the present case, none of the family members of Sepack are holding any shares or partners in the DMUs; therefore the said judgment is also not applicable to the present case. Similarly, the other judgments cited by the learned AR are in a different set of facts and circumstances; hence cannot be made applicable to the facts of the present case.

21. The second alternate allegation of the Revenue is that the sealing machines cleared by the DMUs to the Sepack were incomplete, since the processes of branding, packing and placing warranty cards have been undertaken by the Sepack in their premises. It is the Revenue's contention that these processes are ancillary and incidental; therefore, resulted into manufacture of sealing machines. The learned advocate for the appellant referring to the judgment of Hon'ble High Court of Bombay in the case of **CCE Vs. Rafique Malik** (supra) submitted that mere packing, affixing their brand name and providing warranty to the customers would not result into manufacture as the sealing machines which were received by Sepack were in fully finished condition and capable of being bought and sold in the market as the goods were already in marketable condition. Therefore, the reasoning of the Commissioner that the sealing machines

become complete and marketable after carrying out the processes of packing and affixing the brand name of the appellant would result into manufacture cannot be sustained. The Hon'ble Bombay High Court in Rafique Malik's case observed as follows:-

10. Thus, it is not in dispute that the respondent-assessee received footwear in its finished form in the labelled boxes bearing M.R.P. The work carried out for the respondent is of affixing its brand name on the manufactured footwear. As admittedly, the footwear in finished form was received by the respondent, it is impossible to say that in the form in which the footwear was received, it could not be marketed or sold in open market by the respondent-assessee. Even without carrying out the activity of putting its brand name, the final product namely the footwear could have been marketed and sold to the consumers. Even assuming that one or two brand names affixed by the respondent are very popular, by affixing the brand name, at highest the value of the footwear will increase. However, it is impossible to accept that by giving a treatment to the footwear which is in finished form by affixing brand names renders the product marketable to the consumer. Therefore, on plain reading of sub-clause (iii) of clause (f) of Section 2, the activity does not amount to manufacture within the meaning of clause (f) of Section 2.

22. Also, it has been argued on behalf of the Revenue that the inspection of the sealing machines were carried out by Sepack through third party at DMUs' premises before its dispatch and accepting the same; also they carry out inspection in their premises after receiving the sealing machine from the DMUs before clearing it to customers. The contention of the Revenue that in view of the Note 6 to Section XVI, the sealing machine since subjected to inspection at the premises of the Sepack, being received incomplete / unfinished condition and the activity of inspection makes the product complete and marketable. The

learned advocate for the appellant referring to the judgment of ***Xerox India*** (supra), submitted that to attract the provision of Note 6 of Section XVI, it is necessary to establish that the sealing machines procured by Sepack were an incomplete / unfinished article, having the essential character of a complete / finished goods. We find from the record that the Sepack initially carry out the process of inspection before delivery of sealing machines at their premises and accepts the same when it is found complete and also carry out a second time inspection before selling the goods to the consumers, which itself indicate that when they receive the sealing machines, the same was complete and ready to be used condition. Thereafter, Sepack as discussed above, affixes its brand name, placing the warranty card and packing the sealing machine, clears the same to their customers. Hence, it is incorrect to say that incomplete / unfinished sealing machines were received by Sepack from the DMUs.

23. In view of above, on both counts, it could not be established by the Revenue that Sepack are required to pay duty by clubbing the turnover of the individual DMUs, denying each of the units the benefit of Notification No.8/2003-CE dated 01.03.2003 and also considering Sepack as manufacturer of sealing machine during the period 2009 to 2014, on the price of sealing machines cleared by them. In the result, on merit, the impugned order cannot be sustained. Since, the order is not

sustainable on merit, the other issues raised in the appeals viz. confiscation of seized goods, imposition of penalty on Sepack, penalty on other appellants under Rule 26 of Central Excise Rules, 2002 become academic and hence not deliberated. Consequently, the impugned order is set aside and the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in Open Court on 23.08.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja....