CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/115/2009-DB

[Arising out of Order-in-Original No. 20/2008 dated 31/10/2008 passed by the Commissioner of Central Excise, Bangalore-I Commissionerate, Bangalore.]

M/s. ITI LTD.
BANGALORE PLANT
DOORVANINAGAR
BANGALORE.

Appellant(s)

Versus

Commissioner of Central Excise
BANGALORE-I
POST BOX NO 5400,
CR BUILDINGS,
BANGALORE - 560001
KARNATAKA

Respondent(s)

Appearance:

Mr. B.V KUMAR, Advocate
LAW ASSOCIATES
#103,17TH "C" MAINROAD,
5TH BLOCK, KORAMANGALA ,
BANGALORE – 560 095.
KARNATAKA

For the Appellant

Mrs. Kavitha Podwal,
Superintendent (AR)

For the Respondent

Date of Hearing: 24.07.2018
Date of Decision: 25.09.2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21385 /2018

PER: P. ANJANI KUMAR

Indian Telephone Industries Ltd. (ITI), the appellants are manufacturers of excisable goods i.e. Telephone instruments, Satellite Communication Equipment, C. Exchanges, CDMA/WLL Equipment. The appellants entered into an agreement for the supply of 3,46,000 of WLL CDMA 2000 IX integrated fixed Wireless Terminals, with BSNL. The appellants in turn placed an order on ZTE, Corporation, China. The appellants also imported 49,940 "Power Supply Units" and have taken Cenvat credit of Rs.41,21,917/-. They have been clearing a final product to M/s. BSNL as per the agreement.

2. The Department had issued a show-cause notice dated 05.10.2007 to the appellants contending that the activity of inspection and sample testing undertaken by the appellants does not amount to manufacture as no new commodity having distinct name, character or use emerges as a result of such processes; in terms of Rule 16 of Central Excise Rules 2002, the appellants ought to have paid an amount equal to the credit availed at the time of removal of such inputs on which credit was availed; they

have short-paid credit of Rs. 1,46,85,041/- and that they have not maintained proper records of receipt, disposal, consumption of power supply unit as required under sub-rule 5 of Rule 9 of Cenvat Credit Rules, 2004. The Department has also alleged willful misstatement of facts. Commissioner of Central Excise, Bangalore vide Order-in-Original No. 20/2008 dated 31.10.2008 confirmed the demands and imposed equal penalty. Hence, this appeal.

3. The learned counsel for the appellant submitted that the goods imported from ZTE Corporation were cleared after subjecting to them to certain processes such as inspection, testing and loading of software after payment of duty from the Cenvat credit availed by them. The instruments were required to be tested for quality control as well as for their functioning within a particular cellular telephone infrastructure by loading particular software before the same are cleared from their factory. He has submitted a small hand note on the manufacturing activity carried out by the appellant, the gist of which is as follows:

Receipt of SKD consignment from M/s. ZTE; Assembling of sub-modules like Antenna, Battery, Battery Charger and Handset;

Programming/software loading of IFWTs to suit the BSNL Technical requirement; Testing the IFWTs with the Mobile Phone Testers for confirming the quality requirement; Preparing the list of ESN numbers to be offered to customer; ITI and Customer's Monogram (BSNL) is printed on each IFWT; Offering the IFWTs to the customer for their evaluation as per Customer's circle wise requirement; The selected samples put for vigorous quality check like temperature cycling at 50 degree centigrade from 72 hours in a special burn in chamber. Customer will monitor the condition of the IFWTs at the elevated temperature; customer will test the IFWT samples from their quality check in the CDMA Mobile phone tester; customer will check for these IFWTs in their live network for voice, SMS, Data and PC Fax communication. He also submitted that some of the instruments are rejected and ZTE Corporation was informed to take them back and as and when the supplier takes back the same, Cenvat will be reversed. This process amounts to manufacture. The clearance of IFWT was on provisional basis. It is now settled law that testing of goods is integral part of manufacture in terms of Section 2(f) of the Central Excise Act 1944. He relied upon the following cases:

- ***Collector of Central Excise V. Rajasthan State Chemical Works – 1991 (55) ELT 444 (SC)***

- ***Biddle Sawyer Ltd. V. CCE, Mumbai – 2004 (168) ELT 119 (T)***
- ***Flex Engineering Ltd. V. CCE – 2012 (276) ELT 153 (SC)***

3.1. The Counsel submitted that though the Ld. Commissioner has relied upon the following cases, facts are distinguishable as shown below.

(i). M/s. Breaks India Ltd. 2008 (87) RLT 162: The case relates to Cenvat credit availed on inputs procured only for export under bond.

(iii). Metlex India Pvt. Ltd. 2004 (165) E.L.T. 129 (SC): In this case, the appellant pleaded that there was no process of manufacture.

3.2. Regarding the credit availed on power supply unit, the receipt of the said power unit has been clearly recorded in their Cenvat credit register for the purpose of taking credit of CVD etc. Further the said PSUs have been cleared under proper central excise invoices, packing note cum delivery challans. Annexure B to the show-cause notice was prepared on the basis of Cenvat register itself. Therefore, Rule 9 of Cenvat Credit Rules is not violated. It was not correct for the Ld. Commissioner to observe that in the absence of any documents, to show the receipt of goods and the use of the same in the final products, the goods are to be held to be cleared without bringing into the factory.

4. The learned Departmental Representative has reiterated the findings in the Order-in-Original and relied upon the following cases to say that the activities performed by the appellants did not amount to manufacture under Section 2(f) of Central Excise 1944.

(i) Empire Industries Ltd.: 1985 (20) ELT 179 SC

(ii) Sterlite Optical Technologies Ltd.: 2012 (282) E.L.T. 392 (Tri.-Ahmd.)

He submitted that the testing etc. claimed by the appellants is done by the personnel of the purchaser i.e. BSNL in the premises of the appellant. Therefore, it cannot be held that the appellants are doing such processes although they do not amount to manufacture.

5. Heard both sides and perused the records of the case. The issues that require deliberation in the case are as follows:

(i). Whether inspection, testing and loading of software on the imported IFWT-Telephone Instruments, before the clearance by the assessee, amounts to manufacture? and (ii). Whether the credit availed on the Power Supply Units, in respect of which it has been alleged that proper accounts have not been maintained, is factually correct, if not whether Cenvat credit is allowable?

5.1. Coming to the question at No. 1 above, the appellant claims that the imported instruments are cleared after subjecting to inspection, testing of samples and loading of software as per the requirement of purchaser. We find that the cases relied upon by the learned Commissioner has been distinguished satisfactorily by the counsel for the appellants. The authorized representative relied upon the case of Empire Industries (supra) the judgment was delivered in 1985, whereas the counsel has relied upon subsequent judgments. We find that Hon'ble Supreme Court in the case of Flex Industries (Supra) held that ***it needs little emphasis that the process of manufacture is complete only when the product is rendered marketable. Thus, the manufacture is intrinsically integrated with marketability***. They have concluded that ***in our opinion the process of testing in customized F&S machines is inextricably connected with the manufacturing process, inasmuch as until this process is carried out in terms of the alore-***

extracted covenant in the purchase order, the manufacturing process is not complete, the machines are not fit for sale and hence not marketable at the factory gate. (paras 17 & 21) (Emphasis supplied).

5.2. Moreover, we find that the Central Excise Department is not very clear on the issue whether the processes undertaken by the appellants amounted to manufacture or otherwise. We find that the Department has not raised any issue with reference to manufacture by the appellants in a different case involving of a refund claim of Rs.7,33,29,913/- for the period 2003-04 and 2004-05 (Appeal No. E/845/2008). In that case also the appellants were involved in similar activity. The only difference being that the foreign supplier was M/s LG Electronics in that case where as in the instant case, it is ZTE Corporation. The processes involved in obtaining an order from BSNL, placing an order on foreign supplier, assembly/testing/loading of software in the factory and clearance to BSNL are identical in both cases. In case, the Revenue takes a stand that the activity undertaken by appellant does not amount to manufacture, the assessee succeeds in the earlier appeal as where the process do not amount to manufacture, the duty paid by the appellant needs to be treated as a deposit and requires to be refunded as the appellants have shown that the same is not passed on. We find that Revenue cannot change the goal posts and have two different approaches to the same issue for different periods more so when the facts are identical. Therefore, we find that in the interest of Justice and equity, the issue requires to go back to the original adjudicating authority who on examination of the issue involved in both the cases, shall take a view as a whole of the issues taking into consideration the submissions made by the appellants, records of the case and the evaluation of Law on the concept of the manufacture.

5.3. Coming to the issue of denial of Cenvat credit on power supply unit, we find that prima facie the appellants have made out a case that they have maintained record pertaining to the receipt, storage, usage and clearance of the power supply unit. It is seen that assessee's own records were taken as an evidence for arriving at the demands raised in the show-cause notice. Therefore, on this issue also the matter required to go back to the original adjudicating authority for a proper appreciation of records maintained by the appellants.

6. In view of the above, we allow the appeal by way of remand.

(Order was pronounced in Open Court on **25.09.2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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