CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>BANGALORE</u>

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.493 of 2009
(Arising out of Order-in-Appeal No.24/2009-ST dt. 04/03/2009 passed by the CCE,C&ST(Appeals), Cochin)

M/s. The Canning Industries Cochin Ltd. **....Appellant**
Valarkuvu, Trichur – 680 006.

VERSUS

Commissioner of Central Excise & Customs, **....Respondent**
CR Building, Manachira, Calicut

WITH

(i)Service Tax Appeal No. 20383/2016(Canning Industries Cochin Ltd.); (ii) Service Tax Appeal No. 21684/2018(Canning Industries Cochin Ltd.) (iii) Service Tax Appeal No. 21686/2018(Canning Industries Cochin Ltd.)

(Arising out of Order-in-Appeal No. CAL-EXCUS-000-APP-444-15-16 dt. 13/01/2016 passed by the CCE,C&ST(Appeals), Cochin)
(Arising out of Order-in-Appeal No. COC-EXCUS-000-APP-680&681-2018 dt. 24/07/2018 passed by the CCE,Central Tax & Customs), Cochin)

<u>APPEARANCE:</u>

Shri K.K.G. Nair, Advocate — For the Appellant

Shri Rama Holla, Superintendent(AR) — For the Respondent

CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 20099-20102/2020

DATE OF HEARING:08/01/2020
DATE OF DECISION:11/02/2020

Per : S.S GARG

Appellants have filed these 4 appeals against different impugned orders passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeals of the appellant. The details of all the 4 appeals are given herein below:-

Appeal No.	Period of dispute	Demand confirmed/Dropped in OIO	OIA No. and date
ST/493/2009	16.06.2005 to 31.12.2005	Rs.3,54,604/- confirmed along with interest and penalties u/s 76 & 78.	OIA No.24/2009-ST dt. 04/03/2009. Upheld the confirmation of the demand.
ST/20383/2016	01.01.2006 to 31.03.2008	Demand Rs.18,92,638/- dropped.	No. CAL-EXCUS-000-APP-444-15-16 dt. 13/01/2016. Set aside the OIO and confirmed the demand.
ST/21684/2018 ST/21686/2018	01.04.2014 to 31.03.2015	Demand confirmed Rs.14,55,018/- with interest and penalties. Demand confirmed Rs.3,59,574/-	OIA No. COC-EXCUS-000-APP-680&681-2018 dt. 24/07/2018. Upheld the OIO.

Since the issue involved in all the 4 appeals is identical, all the 4 appeals are taken up together for discussion and disposal. For the sake of convenience, the facts of appeal No.ST/493/2009 are taken.

2. Briefly the facts of the present case are that the appellant is a public limited company having its registered office at Trissur and they are engaged in processing and packing of marine products for merchant exporters. They entered into a contract with M/s. SLS Exports Pvt. Ltd., Cochin, on 01/07/2005. On 21/12/2005, the Central Excise officers from Calicut Commissionerate issued a summons for

certain documents and for explanation of the activities undertaken by the appellant. on 06/01/2006, all required documents and copy of agreement and ledgers showing receipts payments etc. were furnished and the entire manufacturing process were also explained. Thereafter on 23/01/2006, the statement of the General manager was recorded in which it was further explained that appellant did not provide any service. It was also explained that all the raw materials were supplied by the Merchant Exporters and the activities are not liable to service tax. Thereafter a show-cause notice dt. 12/03/2007 was issued. The appellant filed detailed reply to the show-cause notice and explained in their reply that the activity carried out by the appellant is not only processing and freezing but it also add preservatives to ensure preservation of the same for longer period. After following the due process, the original authority confirmed the demand along with interest and also imposed penalty. Aggrieved by the said order appellant filed appeal before the Commissioner(Appeals) who rejected the appeal. Hence the present appeal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable as the same has been passed without properly considering the facts and law. He further submitted that in the impugned order, Commissioner(Appeals) has not considered the submissions made by the appellant and has simply confirmed the Order-in-Original without giving any reasons. He further submitted that the Commissioner(Appeals) has only observed in the impugned order that the appellant has not followed the Central Excise procedure and therefore the appellant cannot be allowed to take the plea that they are covered under the Central Excise just because service tax has been imposed on them. He further submitted that in the subsequent show-cause notice dt. 20/04/2009 which is subject matter of appeal No.ST/20383/2016. The original authority

after considering the detailed submissions and the processes carried out by the appellant dropped the demand. Aggrieved by the said order, the Department filed appeal before the Commissioner(Appeals) and the Commissioner(Appeals) set aside the order of Additional Commissioner and confirmed the demand. Learned counsel further submitted that the Department issued periodical show-cause notices and 7 show-cause notices were issued and the Jt. Commissioner, Calicut vide Order-in-Original dt. 31.08.2016 confirmed the demand of Rs.71,50,287/- along with interest. Aggrieved by the said order of Joint Commissioner, appellant filed appeal before the Commissioner(Appeals) who vide his order No.CAL-EXCUS-000-APP-550-2018 dt. 13/06/2018 allowed the appeal and set aside the Order-in-Original. He further submitted that this order of the Commissioner(Appeals) dt. 13/06/2018 has not been appealed against by the Department. He further submitted that for subsequent period, two show-cause notices were issued and in one of the show-cause notices, even service tax on renting of immovable property was also demanded along with service tax on Business Auxiliary Service and both the authorities confirmed the demand under BAS amounting to Rs.14,55,018/- and under 'renting of immovable property' amounting to Rs.3,59,574/-. He further submitted that the appellant in reply to the show-cause notice has given the detailed description of the entire processes carried out by them which is nothing but a manufacturing process and therefore according to the appellant, they are not liable to service tax. Learned counsel further submitted that their activity falls under the manufacture as their goods falls under Chapter 16 of the CETA 1985 by virtue of Chapter Note 3 of the said Chapter 16. In support of his submissions, the appellant relied upon the following decisions:-

i. Abraham J. Tharakan Vs. CCE, Cochin [2007(210) ELT 112 (Tri. Bang.)]
ii. J.K. Synthetics Ltd. Vs. CCE, Jaipur [1998(97) ELT 310 (Tri.)]
iii. Ponds (India) Ltd. Vs. CCE [1993(63) ELT 3 (Mad.)]

iv. CCE, Vadodara Vs. Pioneer Scientific Glass Works [2006(197) ELT 308 (SC)]

5. On the other hand, the learned AR defended the impugned order.

6.1. After considering the submissions of both the sides and perusal of the material on record, we find that the only issue to be decided in the present set of appeals is whether the activity of the appellant can be termed as taxable service under the provisions of Finance Act, 1994 as Business Auxiliary Service or the activity can be called as a manufacture as defined under the provisions of Central Excise Act, 1944. Further we find that it is not in dispute that the appellant is processing marine products on behalf of their clients and all the processes carried out by the appellant have been informed to the Department by the appellant vide its letter dt. 06/01/2006 in reply to the summons issued by the Department. The details of the processes explained by the appellant are reproduced herein below:-

> *"Raw materials procured by our clients are freshly caught raw materials like shrimps, cuttlefish, squids and octopus. The raw material on arrival at our unit is thoroughly washed with chlorinated water, graded and stored in insulated containers well iced to prevent dehydration, discolouration and deterioration. The ice used is a preservative and will act as a protective measure to avoid spoilage.*
>
> *These stored materials will be de-skinned and the viscera and other intestinal matters which are not edible are removed using scissors, knives and other hand tools which is the next stage of processing operation. The peeled deveined or de-skinned materials are then subjected to further processing by removal of the eyes, beaks, alimentary canals etc and are treated with permitted additives and anti-oxidant like sodium poly phosphate, sodium chloride, hydrogen peroxide etc as preservatives. To improve*

the colour, yield, texture and better product appearance additives like ML TR-79, Caffdos, Altesa etc are used, which is next stage of processing. This semi processed material is then weighed, chlorinated glaze water is added to each block to act as protective covering to the product.

This processing material is then located in contact plate freezer and frozen for 90 minutes. This is the end product. This product is packed in corrugated cartons, strapped and stored in the frozen storage maintaining at minus 18 degree Celsius. When sufficient cargo is ready, this will be shipped to the overseas buyers by M/s. SLS Exports.

So, after the various stages of processing of the raw materials received a commercially distinct product is obtained with a brand image and acceptable to any overseas buyers. Thus, the raw materials received are converted to a value added product, and manufacturing activities are taken place in the course of its exports. We would also point out that Ministry of Good Processing Industries, Govt. of India, has included sea food processing unit as manufacturing units under Meat Product (Amendment) Order, 2005.

As such, we would like to submit that ours is a production unit and we carry out production or processing with inputs shown above for and on behalf of our client. So we earnestly would like to bring your kind notice that as per the latest amendments of the notification of Service Tax we do not come under the purview of Service Tax and it may not be made applicable in us."

Besides this, it is relevant to examine the definition of manufacture as provided in Section 2(f) which is reproduced herein below:-

Section 2(f): Manufacture includes any process

i. Incidental or ancillary to the completion of manufactured product.

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

iii. *Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.*

From the perusal of the definition of manufacture, it is clear that the term manufacture within its ambit also includes any processes which are specified in relation to any goods in the Section or Chapter Notes of the First Schedule of the CETA, 1985. Further we find that the activity of the appellant falls under Chapter 16 of the CETA, 1985 by virtue of Chapter Note 3 of the said Chapter 16 which is extracted below:-

> *In relation to the products of this Chapter, labeling or relabeling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'*.

6.2. It is not in dispute that the processes undertaken by the appellant on the marine products are intended to render such products marketable to consumers. Therefore the appellant's activity falls under the definition of manufacture and not as taxable service falling under BAS. Both the authorities have not properly appreciated the processes explained by the appellant vis-à-vis the Chapter Note 3 of Chapter 16 CETA, 1985. Further we find that the decision of the Supreme Court in the case of Sterling Foods Vs. State of Karnataka and another [1986(26) ELT 3 (SC)] relied upon by the Department is not applicable in the facts and circumstances of the case because the said decision was in relation to Sales Tax and not relating to Central Excise or the Service Tax. We have also examined the definition of BAS and we find that the activities carried out by the appellant do not fall under the BAS as defined under Section 65(19) of the Finance Act. Further as far as demand of service tax on renting of immovable property is concerned, we find that if the other activity carried on by the appellant amounts to manufacture, the demand of service tax on renting of immovable property amounting to Rs.3,59,574/- will fall in the threshold limit and is exempt and the appellant is not liable to pay service tax on that.

7. In view of our discussion above, we are of the considered view that the impugned orders are not sustainable in law and therefore we set aside the same by allowing the appeals of the appellant.

(Order pronounced in the open court on11/02/2020)

(S.S. GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja….