

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

REGIONAL BENCH - COURT NO. 1

Excise Appeal No. 20847 of 2016

(Arising out of Order-in-Original No. BLR-EXCUS-003-COM-31-15-16 dated 19.01.2016 passed by the Commissioner of Central Excise, Bangalore III Commissionerate, P.B No. 5400, C.R Building, Queens Road, Bengaluru-560001)

M/s 3M India Ltd.

Plot No. 48-51, Electronic City,
Hosur Road, Bangalore-560100

...Appellant

VERSUS

**Commissioner of Central Excise,
Bangalore-III**

Commissionerate, PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20841 of 2016

**Shri Sameer Agarwal,
CFO of M/s. 3M India Ltd.**

Concorde Block, U.B. City,
24, Vittal Mallya Road,
Bangalore-560001

...Appellant

VERSUS

**Commissioner of Central Excise,
Bangalore-I**

Commissionerate, PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20842 of 2016

**Shri Sunil Banthiya,
Vice President/Executive Director- Supply Chain
M/s. 3m India Ltd.**

Concorde Block, U.B City,
24, Vittal Mallya Road, Bangalore-560001

...Appellant

VERSUS

**Commissioner of Central Excise,
Bangalore-I Commissionerate,**

PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20843 of 2016

Shri D.K. Suresh, Manager (Taxation)
M/s 3m India Ltd,
Concorde Block, U.B City,
24, Vittal Mallya Road, Bangalore-560001

...Appellant

VERSUS

Commissioner of Central Excise,
Bangalore-I
PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20844 of 2016

Shri Amit Laroy, Managing Director
M/s. 3m India Ltd.
Concorde Block, U.B City,
24, Vittal Mallya Road, Bangalore-560001

...Appellant

VERSUS

Commissioner of Central Excise,
Bangalore-I, Commissionerate,
PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20845 of 2016

Shri B. Srikanth,
General Manager (Sourcing),
M/s. 3m India Ltd.
Concorde Block, U.B City,
24, Vittal Mallya Road, Bangalore-560001

...Appellant

VERSUS

Commissioner of Central Excise,
Bangalore-I Commissionerate,
PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

...Respondent

WITH

Excise Appeal No. 20846 of 2016

Shri Milind Joglekar, Senior General Manager,
M/s. 3m India Ltd.
Concorde Block, U.B City,
24, Vittal Mallya Road, Bangalore-560001

...Appellant

VERSUS

Commissioner of Central Excise, Customs
Bangalore-I Commissionerate,

...Respondent

PB No. 5400, C.R. Building,
Queens Road, Bengaluru-560001

WITH

Excise Appeal No. 20825 of 2016

M/s Indi Cans

...Appellant

Plot No. 14-12, KIADB Indl. Area,
II Phase, Kumbalgodu,
Bangalore-560074

VERSUS

**Commissioner of Central Excise,
Bengaluru III Commissionerate,**

...Respondent

C.R. Building, Queens Road,
Bengaluru-560001

AND

Excise Appeal No. 20826 of 2016

**Shri J. Chandrakanth,
CEO of M/s. Indi Cans**

...Appellant

Plot No. 14-12, KIADB Indl. Area,
II Phase, Kumbalgodu,
Bangalore-560074

VERSUS

**Commissioner of Central Excise and
Bengaluru III Commissionerate,**

...Respondent

C.R. Building, Queens Road,
Bengaluru-560001

APPEARANCE:

Present for the Appellant: Shri Lakshmikumaran, Advocate and
Shri M.S. Nagaraja, Advocate

Present for the Respondent: Smt. D.S. Sangeetha, Additional Commissioner (AR)

**CORAM: HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)**

Date of Hearing: 10.01.2023

Date of Decision: 13.02.2023

FINAL ORDER NO's 20028-20036/2023

JUSTICE DILIP GUPTA:

Excise Appeal No. 20847 of 2016 has been filed by M/s 3M India Limited¹ to assail the order dated January 19, 2016 passed by the Commissioner of Central Excise, Bangalore III, Commissionerate

1. the appellant

Bengaluru², to the extent it has imposed penalty of Rs. 1,51,00,000/- upon the appellant under rule 26 of the Central Excise Rules, 2002³.

2. **Excise Appeal Nos. 20841 to 20846 of 2016** have been filed by Chief Finance Officer, Vice-President, Manager, Managing Director, General Manager and Senior General Manager of the appellant to assail the order dated January 19, 2016 to the extent it seeks to impose a penalty of Rs. 30 lacs on each them under rule 26 of the Rules.

3. **Excise Appeal No. 20825 of 2016** has been filed by M/s Indi Cans⁴ to assail the order dated January 19, 2016 insofar as it confirms the demand of central excise duty amounting to Rs. 3,02,87,970/- on the goods said to have been manufactured by it as a job worker, with interest and penalty.

4. **Excise Appeal No. 20826 of 2016** has been filed by the Chief Executive Officer of M/s Indi Cans to assail the order dated January 19, 2016 insofar as it imposes a penalty of Rs. 25,00,000/- on him under rule 26 of the Rules.

5. The appellant is engaged in the manufacture and trading of various products in diverse sectors, such as transportation, health care, electrical and communications. The appellant *inter alia* engages various job workers for performing product services by supplying raw materials and packing materials. The appellant contends that where the activity undertaken by the job worker amounts to manufacture, it discharges the applicable excise duty on the said goods in the capacity of the principal manufacturer, but in cases where the

2. the Commissioner
3. the Rules
4. the job worker

process undertaken by the job worker does not amount to manufacture, excise duty is not paid and in such cases the appellant instructs the job worker to discharge service tax. The goods so received by the appellant from the job worker without payment of excise duty are traded by the appellant.

6. According to the appellant, the premises of the appellant houses two warehouses, namely, BB and BG. BB warehouse is the demarcated area registered with Central Excise Department as a manufacturer. The remaining part of the warehouse is known as BG warehouse and is utilized by the appellant for trading transactions.

7. In BB warehouse, the appellant receives raw materials, avails CENVAT credit on the eligible raw materials and dispatches the same to the job worker for the manufacture of excisable products. Upon receipt of the manufactured goods from the job workers, the appellant clears the same from the BB warehouse upon payment of excise duty. All the goods manufactured and cleared from the BB warehouse bear the item code starting with 'IA'.

8. The appellant carries trading activities from its BG warehouse. The appellant sends the materials to the job worker and the processed goods received back from the job worker are sold by the appellant without payment of excise duty, as according to the appellant the activities undertaken by the job worker do not amount to manufacture. Such products received in the BG warehouse bear item code starting with 'IE'. For this purpose, the appellant enters into a Product Purchase Agreement⁵ with the job worker. In terms of the said Agreement, the job worker performs product services in respect of three IE coded products, namely, (i) Diesel Engine

5. the Agreement

Conditioner; (ii) Fuel System Cleaner; and (iii) Intake System Cleaner. The product services required to be undertaken by the job worker involve repacking from bulk containers to retail pack. In consideration for the above, the appellant pays job charges to the job worker and the purchase orders on the job worker indicate the excise duty as Nil and service tax at @12.36%. The raw material in liquid form is supplied to the job worker in bulk containers consisting of 200 litre barrels. The job worker fills the liquid in small aerosol containers and returns the IE coded goods to the appellant.

9. However, a show cause notice 22.05.2015 was issued by the Additional Director General to the job worker, the appellant, and some of the employees of the appellant and the job worker proposing:

- (i) demand of central excise duty amounting to Rs. 3,02,87,970/- on the goods manufactured by the job worker [Excise Appeal No. 20825 of 2016] during the period 01.05.2010 to 31.12.2014 by classifying the impugned goods under Central Excise Tariff Heading⁶ 3403 and adopting M.R.P. based assessment; and
- (ii) penalty under rule 26 of the Rules on the appellant [Excise Appeal No. 20847 of 2016] as well as on the employees of the appellant [Excise Appeal Nos. 20841 to 20846] and the employee of the job worker [Excise Appeal No. 20826 of 2016].

10. Replies were filed, denying the charges alleged in the show cause notice dated May 22, 2015. An order dated January 19, 2016 was thereafter passed by the Commissioner holding that:

- (i) The activity undertaken by the job worker would amount to 'manufacture' under section 2(f)(ii) of the

Central Excise Act, 1944⁷ read with Chapter note 6 to Chapter 34 of the Central Excise Tariff contained in the First Schedule to the Central Excise Tariff Act, 1985⁸;

- (ii) such manufactured goods are classifiable under CTH 3403 as 'lubricating preparations' and are liable for MRP based assessment in terms of section 4A of the Excise Act;
- (iii) the extended period of limitation is invokable; and
- (iv) penalties on the employee of the job worker, the appellant and the employees of the appellant under rule 26 of the Rules are imposable.

11. Shri V. Lakshmikumaran, learned counsel appearing for the appellant and its employees and Shri M.S. Nagaraja, learned counsel appearing for the job worker and its employee made the following submissions:

- (i) The activities undertaken by the job worker do not amount to 'manufacture' under section 2(f)(ii) of the Excise Act;
- (ii) The impugned goods are not lubricating preparations classifiable under CTH 3403. The impugned goods are additives classifiable under CTH 3811 or alternatively under CTH 3402 as cleaning preparations; and
- (iii) Penalty could not have been imposed under rule 26 of the Rules as the demand itself is not sustainable, apart from the fact that the employees acted in a bonafide manner. In fact, Amit Laroya, Sunil Bhantiya, Sameer Agarwal and Milind Joglekar were not even employees of the appellant at the time when the contract with the job worker was entered.

12. Ms. D.S. Sangeetha, learned authorized representative

7. the Excise Act
8. the Central Excise Tariff

appearing for the department has, however, supported the impugned order and made the following submissions:

- (i) The activities undertaken by the job worker would amount to 'manufacture' under section 2(f)(ii) of the Excise Act. In support of this contention, reliance has been placed upon the decision of the Tribunal in **Nestle India Ltd. vs Commissioner of Central Excise, Chandigarh**⁹;
- (ii) The impugned goods are lubricating preparations classifiable under CTH 3403 and not additives classifiable under CTH 3811. They are also not cleaning and washing preparations classifiable under CTH 3402; and
- (iii) Penalty has been correctly imposed under rule 26 of the Rules.

13. The submissions advanced by the learned counsel for the appellant and its employees, the learned counsel appearing for the job worker and its employee and the learned authorized representative appearing for the department have been considered.

14. Before dealing with the submissions, it would be useful to examine the relevant provisions of the Excise Act and the Central Excise Tariff.

15. Section 2(f) of the Excise Act defines 'manufacture'. It is, as it stood at the relevant time, reproduced:

"2(f) "manufacture" includes any process, —

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of The 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

9. **2011 (270) ELT 575 (Tri.-Del)**

such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer, and the word “manufacture” shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;”

(emphasis supplied)

16. The definition of manufacture in section 2(f) of the Excise Act includes any process which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Tariff Act as amounting to manufacture.

17. Chapter note 6 of Chapter 34 of the Central Excise Tariff is as follows:

“CHAPTER 34

Soap, Organic Surface-Active Agents, Washing Preparations, Lubricating Preparations, Artificial Waxes, Prepared Waxes, Polishing Or Scouring Preparations, Candles and Similar Articles, Modelling Pastes, “Dental Waxes” and Dental Preparations with a basis of plaster

Notes:

1. to 5 xxxx xxxxxx xxxx
6. In relation to products of this Chapter, labelling or relabelling 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’.”

18. Chapter note 10 of Chapter 38 of the Central Excise Tariff is as follows:

“CHAPTER 38

Miscellaneous chemical products

Notes:

1. to 9 xxxx xxxxxx xxxx
10. In relation to products of this Chapter (other than products of heading 3808), labelling or relabelling 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’.”

19. The relevant portions of CTH 3402, CTH 3403 and CTH 3811 are as follows:

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
xxxx	xxxxxx	xxxx	
3402	Organic surface active agents (other than soap), surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401		
3402 20 20	Cleaning or degreasing preparations not having a basis of soap or other organic surface active agents	Kg	10%
xxxx	xxxxxx	xxxx	
3403	Lubricating preparations (including cutting oil preparations, bolt or nut release preparations, anti-rust or anti-corrosion preparations and mould release preparations, based on lubricants) and preparations of a kind used for the oil or grease treatment of textile materials, leather, furskins or other materials , but excluding preparations containing, as basic constituents, 70% or more by weight of petroleum oils or of oils obtained from bituminous minerals		
xxxx	xxxxxx	xxxx	
3811	Anti-knock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils		

20. Rule 26 of the Rules is as follows :

“Rule 26. Penalty for certain offences -

(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation

under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.”

21. The issues that arise for consideration in these appeals are whether the activity undertaken by the job worker would amount to manufacture under section 2(f)(ii) of the Excise Act read with Chapter note 6 of Chapter note 34 or Chapter note 10 of Chapter 38 of the Central Excise Tariff; and whether the products, namely, (i) Diesel Engine Conditioner, (ii) Fuel System Cleaner, and (iii) Intake System Cleaner are classifiable under CTH 3403 as lubricating preparations as contended by the department or under CTH 3811 or alternatively under CTH 3402 as contended by the appellant and the job worker.

22. To appreciate these issues, it would be relevant to first examine what was alleged in the show cause notice dated May 22, 2015 that was issued by the Additional Director General, Directorate General of Central Excise Intelligence, Bengaluru. After noticing that the job worker was mainly engaged in undertaking the activity of aerosol packing of products on job work basis and that the job worker was evading payment of central excise duty on the goods manufactured and cleared on job work basis for the appellant, the show cause notice alleges that the work undertaken by the job worker would amount to ‘manufacture’ in terms of section 2(f)(ii) of the Excise Act and the relevant portions are reproduced below:

“4.1 During mahazar proceedings at the factory premises of M/s Indicans, it was noticed that M/s Indicans were registered with Central Excise department and were paying central excise duty on the goods manufactured and sold by them. **It was also noticed that they were carrying out**

aerosol packing of certain products, on job-work basis, for 3M India Limited, Bangalore.

.....The raw materials in liquid form were received in bulk containers consisting of 200 litre barrels and by using the machineries installed in their factory, M/s Indicans undertook the activity of repacking from bulk to retail packs. The individual containers after completion of all the activities were placed in the carton boxes and cleared to M/s 3M India Ltd.....

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4.3 It appeared during mahazar, proceedings that M/s. Indicans were not paying Central Excise duty on the finished goods cleared by them from their factory to M/s. 3M after carrying out the aforesaid processes on job work. It also appeared during investigation that the Central Excise duty was not paid either by M/s. Indicans or by M/s. 3M in respect of products having product codes starting with alphabets 'IE' manufactured and cleared on job work basis by M/s. Indicans. Regarding the manufacture and clearance of goods by M/s. Indicans, on job work basis to M/s. 3M, statements of the connected persons were recorded under Section 14 of the Central Excise Act, 1944, as follows:-

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11.1 It appears that M/s. Indicans have carried out mixing/packing of 'IE' coded automobile (car/motor cycle) care products in their factory on job work basis for M/s. 3M. It appears that the products are basically Engine Conditioners, Fuel System Cleaners and Intake System cleaners. All the said products are the products of M/s. 3M for use in the automobiles like car and motorcycles.

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11.6.2 In respect of the products falling under chapter 34 (and even Chapter 38) of the Central Excise Tariff Act, 1985, as per the respective chapter notes, any labelling 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'. **From the records and evidences discussed above, it appears that M/s Indicans have carried out the mixing/packing/repacking of the products received by them from M/s. 3M into retail packs and also affix labels printed with all the details including MRPs.** The labels affixed on such retail packs were also containing the details like brand name of 3M, Net wt. batch no., date of packing, date of expiry, their concern name and address etc. **Further, it appears from the invoices raised by M/s Indicans, that the subject goods manufactured and sold by them were packed in measured doses or packing for retail sale.** It also appears that the subject goods cleared from the factory of M/s Indicans were ready for retail sale and were sold by M/s 3M to their customers. **All the mixing/ packing/ repacking/ labelling carried out in the factory of M/s Indicans are basically to render the product marketable to the consumer by M/s 3M. As such, it appears that the activities carried out by M/s. Indicans amount to manufacture by virtue of the chapter notes in the Central Excise Tariff Act, 1985** read with Section 2f(ii) of the Central Excise Act, 1944."

(emphasis supplied)

23. The show cause notice also seeks to classify the goods said to have been manufactured by the job worker under CTH 3403. The show cause notice also alleges that penalty should be imposed under rule 26 of the Rules.

24. Replies were filed both by the appellant and the job worker denying the allegations made in the show cause notice. The Commissioner, however, passed an order confirming the demand and penalty under rule 26 of the Rules was also imposed.

25. The first issue taken up by the Commissioner was whether the activity carried out by the job worker would amount to manufacture

under section 2(f) (ii) of the Excise Act and the findings are :

"30.3 From the documents/evidences available on record, it is seen that M/s Indi Cans have carried out aerosol filling/packing of the raw materials received by them from M/s 3M, into retail packs and also have affixed applicable labels containing the details such as brand name of 3M, Net weight, batch No., date of packing, date of expiry, name and address of the packer, MRP, etc. M/s Indi Cans have carried out all the above said activities, in their factory premises, by using their own workers and infrastructure. From the documents raised by M/s Indi Cans, it is seen that the subject goods manufactured by them are packed in fixed measured doses or packing meant for retail sale. Hence, I hold that all the aerosol filling/packing/labelling carried by M/s Indi Cans in their factory are basically to render the product marketable to the consumer by M/s 3M. Therefore, I hold that the activities carried out by M/s Indi Cans amount to manufacture by virtue of the chapter notes of both chapter Nos. 34 and 38) of the Central Excise Tariff Act, 1985 read with Section 2f(ii) of the Central Excise Act, 1944."

(emphasis supplied)

26. The Commissioner, thereafter, classified Diesel Engine Conditioner under Customs Tariff Item 3403 19 00; Fuel System Cleaner under Customs Tariff Item 3403 99 00; and intake System Cleaner under Customs Tariff Items 3403 99 00.

27. The first issue that arises for consideration in these appeals is as to whether the activity undertaken by the job worker would amount to 'manufacture' under section 2(f)(ii) of the Excise Act.

28. The impugned order has confirmed the duty demand against the job worker holding that the activity of aerosol filling/packing/labeling would amount to manufacture in terms of

section 2(f)(ii) of the Excise Act read with Chapter note 6 of Chapter 34 or Chapter note 10 of Chapter 38.

29. As noticed above, the show cause notice alleges that the job worker carries out packing/re-packing of the products received from the appellant into retail packs and also affixes labels printed with details, including MRPs. The contention of learned counsel for the appellant and learned counsel appearing for the job worker is that the activity undertaken by the job worker would not amount to manufacture for the reason that the job worker undertakes aerosol filling/packing of the raw-materials delivered by the appellant in 200 litre container barrels into retail packs and thereafter affixes labels on such retail packs. Thus, according to the learned counsel, the activity of the job worker would not amount to repacking from **bulk packs** to **retail packs** for what is actually undertaken is the activity of packing the raw material from 200 litre **containers** to **retail packs** and in this connection, learned counsel stressed upon the use of the two expressions 'containers' and 'bulk packs' in Chapter note 6 of Chapter 34 of the Central Excise Tariff.

30. Learned authorised representative appearing for the department, however submitted that the activities undertaken by the job worker would amount to manufacture for the reason that the activity of aerosol filling/ packing/labeling of IE coded products on job work basis would amount to manufacture under section 2 (f)(ii) of the Excise Act read with note 6 of Chapter 34 of Central Excise Tariff. According to the learned authorised representative, the conversion of the goods from bulk containers to retail containers, labelling them and sending them market ready is an activity of rendering the product marketable which should be construed as amounting to

manufacture. In this connection learned authorised representative placed emphasis on Chapter note 6 of Chapter 34, which is similar to the Chapter note 10 of Chapter 38 of the Central Excise Tariff Act and contended that the Chapter note seeks to widen the scope of manufacture by including the activities which would otherwise fall outside the scope of the definition of the said term under section 2(f) of the said Excise Act. Learned authorised representative also submitted that even the third limb of the note relating to adoption of any other treatment to render the product marketable to the consumer would also be applicable.

31. The present appeal concerns only the activity undertaken by the job worker involving repacking from bulk containers received from the appellant into retail packs in respect of three IE coded products, namely (i) Diesel Engine Conditioner; (ii) Fuel System Cleaner; and (iii) Intake System Cleaner, for which the appellant pays job charges to the job worker and the purchase orders placed on the job worker indicate that NIL excise duty would be payable and service tax @ 12.36% would be payable.

32. Section 2(f) of the Excise Act defines 'manufacture'. In terms of section 2(f)(ii) 'manufacture' would include any process which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff as amounting to manufacture. Chapter note 6 of Chapter 34 and Chapter note 10 of Chapter 38 provide that in relation to products of the concerned 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.

33. The Chapter notes seeks to extend the definition of 'manufacture' and should be strictly interpreted in view of the decisions of the Supreme Court in **Union of India & ors. vs. Bombay Tyre International Ltd.**¹⁰ and **Commissioner of Customs (Import), Mumbai vs. Dilip Kumar**¹¹.

34. For the activities undertaken by the job worker to amount to 'manufacture' under note 6 of Chapter 34, it should include any of the following activities :

- (i) labelling or relabelling of containers; or
- (ii) repacking from bulk packs to retail packs; or
- (iii) adoption of any other treatment to render the product marketable

35. It is not in dispute that the job worker carries out aerosol filling/packing/labelling of the raw materials received in bulk containers consisting of 200 litre barrels from the appellant into the retail packs and thereafter affixes labels on such retail packs. It is not the case of the department that the job worker undertakes labeling/relabelling of the containers in which raw materials are received. Thus, the first condition is not satisfied.

36. The job worker also does not repack from bulk pack to retail packs. The raw materials in liquid form are transported in bulk containers of 200 litres and the job worker, upon receiving the raw materials, undertakes the activity of retail packing the raw materials from 200 litres containers into aerosol pressurized can. The job worker, therefore, does not repack from bulk packs to retail packs.

37. It needs to be noted that the note 6 of Chapter 34 has consciously used distinct expressions 'containers' and 'bulk packs'.

10. 1983 (14) ELT 1896 (SC)

11. 2015 (325) ELT 815 (SC)

Thus, when the Legislature has consciously used two different words, they would have different implications and in this connection reliance can be placed on the decision of the Supreme Court in **Union of India vs. Kumho Petrochemicals Company Limited**¹², wherein it was held that as the Legislature has used different expressions at different places, it must be presumed that such different expressions have different implications.

38. 'Containers' are distinct from 'bulk packs' and, therefore, the activity of repacking from 'containers' to 'retail packs' would not amount to manufacture.

39. In this connection, reference can be made to the decision of the Supreme Court in **Commissioner of Central Excise, Vadodara vs Vadilal Gases Ltd.**¹³, wherein it was held that the gases supplied in tankers are not in bulk packs and, therefore, the activity of repacking from tankers to retail packs would not amount to manufacture. Reference can also be made to the decision of the Tribunal in **Swastik Corporation vs. Commissioner of Central Excise, Puducherry**¹⁴, wherein after placing reliance on the decision of the Supreme Court in **Vadilal Gases Ltd.**, it was held:

4.....For convenience of reference the entry under Note 11 of Chapter 29, as it stood at the relevant time, is reproduced below (effective from 22-9-1997):

"In relation to products of this Chapter, labelling or relabelling of containers or re-packing from bulk packs to retail packs or adoption of any other treatment to render products marketable to the consumer shall amount to manufacture."

12. 2017 (351) ELT 65 (SC)

13. 2017 (346) ELT 161 (SC)

14. 2018 (359) ELT 233 (Tri.-Chennai)

5. In respect of the very same issue, the Board has clarified vide Circular No. 910/30/2009-CX., dated 16-12-2009 that the activity does not amount to manufacture and is reproduced below:

“Therefore, the tankers cannot be termed as bulk packs and therefore the activity of transferring the goods from tankers into smaller drums cannot be said to be covered by the said Chapter Note 10”.

6. The Board has issued the above clarification pursuant to the judgment of the Hon’ble Tribunal in the case of Ammonia Supply Co. reported in 2001 (131) E.L.T. 626 as noted in para 3 of the Circular.

7. Further, by a very recent judgment the Hon’ble Supreme Court in the case of C.C.E. Vadodara v. Vadilal Gases Ltd. Reported in 2017 (346) E.L.T. 161 (S.C.) on identical facts and circumstances has categorically held as under :

“Gases coming in tankers were not bulk packs and their repacking/relabelling did not amount to manufacture”

8. The Hon’ble Apex Court in the said judgment has approved the judgment of the Hon’ble Tribunal in the case of Ammonia Supply Co. v. Commissioner (supra) after noting that the order of the Hon’ble Tribunal has attained finality having not been challenged by the Department.

9. In view of the above, when the activity itself does not amount to deemed manufacture, the question of demand of duty does not arise and hence the other issue raised by the Department regarding availability of exemption does not survive for determination.”

(emphasis supplied)

40. The impugned order holds that the activity undertaken by the job worker of repacking raw material received from the appellant into retail packs would amount to manufacture. There is no finding that the job worker undertakes the activity of repacking from bulk packs

to retail packs nor does the appellant undertake such an activity.

41. With regard to the activity of adopting any treatment to render the product marketable to the consumer, it is the case of the appellant and the job worker that such a treatment has not been undertaken on the raw materials supplied by the appellant in bulk containers to the job worker, as the raw materials are injected into aerosol cans and thereafter plastic caps are fitted and labels are affixed on the cans. This activity of injecting the raw materials into aerosol cans would not amount to adopting any treatment on the raw materials to render the product marketable. This is what was held by the Supreme Court in **Vadilal Gases Ltd.**

42. Learned authorized representative appearing for the Department has placed reliance upon the decision of the Tribunal in **Nestle India Ltd.** The said decision would not help the Department as in that case there was mixing of vitamins in required proportions which, the Tribunal held, would amount to adopting a treatment to render the goods marketable.

43. In this view of the matter, the activity undertaken by the job worker would not amount to manufacture even under the third limb of the Chapter note.

44. The inevitable conclusion, therefore, is that the process undertaken by the job worker would not amount to manufacture in terms of section 2(f)(ii) of the Excise Act read with note 6 of Chapter 34 or note 10 of Chapter 38 of the Central Excise Tariff.

45. The second issue that requires to be examined is about the classification of the products said to have been manufactured by the job worker. As the first issue has been decided in favour of the job worker, namely that the process undertaken by the job worker would

not amount to 'manufacture', it would not be necessary to decide this issue.

46. Once it is held that the activity undertaken by the job worker would not amount to manufacture under section 2(f)(ii) of the Excise Act, penalties could not have been imposed either upon the employees of the appellant or the employee of the job worker.

47. Such being the position, the order dated 19.01.2016 passed by the Commissioner cannot be sustained and is set aside. In the result, the Excise Appeals are allowed.

(Order pronounced on **13.02.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C. J. MATHEW)
TECHNICAL MEMBER