CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

DIVISION BENCH
COURT NO. I

APPEAL NOs. E/60081/2016, E/60083-60086/2016-EX[DB]

[Arising out of Order-in-Original No. 34/GDL/Commr/FBD-II/2015-16 dated 31.03.2016 passed by the Commissioner of Central Excise, Faridabad-II]

Hytech Earthmoving Engineers, **Hydra Power Engineers,** **Shakuntala Soni,** **Umesh Soni,** **Kailash Soni**	**:**	**Appellant(s)**
VS		
C.C.E., Delhi-IV	**:**	**Respondent(s)**

Appearance:
Present for the Appellant(s): Mr. R.K. Hasija, Advocate
Present for the Respondent(s): Mr. G.M. Sharma, AR

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of hearing/decision: 21.02.2019

FINAL ORDER NO. 60247-60251/2019

Per Ashok Jindal :

The appellants are in appeal against the impugned order wherein the demand of duty of Rs. 4,61,83,132/- has been confirmed against them on account of the activity undertaken by the appellants to manufacture for the period 2010-11 to 2011-12 by way of issuing the show cause notice dt. 08.12.2014.

2. The facts of the case are that the appellants are engaged in trading of parts of earthmoving equipment/excavators and receive parts in bulk and sell them after consolidation by putting in polythene bags/wooden boxes/gunny bags as the case may be without any

labeling etc. The officers of Central Excise visited the premises of the appellants on 06.09.2011. As the earthmoving equipments/ excavators fall under Tariff 84264100, 8427, 8429 and 843010 of the First Schedule to the Central Excise Tariff Act, 1985, therefore, in terms of Section 2(f)(iii) of the Central Excise Act, 1944, the activity of re-packing for parts amounts to manufacture. On the allegation that the activity undertaken by the appellants amounts to manufacture and they are not registered with the Central Excise department, therefore for the period 2010-11 and 2011-12, a show cause notice was issued on 08.04.2012 to demand duty on their activity. The matter was adjudicated. Demand of duty was confirmed and also ordered confiscation of seized goods to be released on payment of redemption fine and penalty was also imposed. Against the said order, the appellants are before us.

3. The Ld. Counsel for the appellants submits that the case of the department is that the activity of putting multiple pieces in polythene bags and then putting them in carton boxes amounts to manufacture in terms of Section 2(f)(iii) of the Central Excise Act, 1944. It is his contention that the appellants have adopted a modus operandi of dispatching the excisable goods in packed condition bearing the logo of "HP"/"Hytec Parts" and "Authenticate Replacement Parts" was mentioned. It is his further contention that the appellants import or procure different parts from the local market, put multiple different parts in a polythene bag and then put a number of polythene bags of different types of parts in a cardboard carton/ box and sell the same to the dealers/users. Ultimate sale of individual parts to the consumers/end-users by the dealers is only in the original packing supplied by the vendors. The goods sold by dealers after purchase

from the appellants is never in the packing of 'HP/Hytech' except a few items which are purchased by the appellants from the vendors with original packing of 'HP/Hytech' such as seals and tooth point which are either imported or procured from manufacturers such as M/s Elofic Filters with pre-printed "Hytech" brand. There is no evidence of any branding being done by the appellants. No equipment/machinery has been found by the officers which establish printing of logo of any brand of 'HP/Hytech' on the goods. No goods have been found at any premises of the dealers/buyers with brand of 'HP/Hytech' despite the fact that the department approached a number of dealers. Further, he submits that the goods worth Rs. 1,06,26,669/- were also seized by the visiting officers, out of which only goods worth Rs. 29,032/- were having 'HP/Hytech' brand name i.e. 0.27% of the value of seized goods. Except for the above items, no other item anywhere with the brand of 'HP/Hytech' was found by the officers. He further submits that the activity undertaken by them does not fulfill the condition of Section 2(f)(iii) of the Act. There is no packing or re-packing of such goods in the unit container in the instant case. Putting of multiple different parts in a carton boxes/gunny bags/wooden packing cannot be called 'packing or re-packing' inasmuch as the goods are not sold to the ultimate consumers in a packed condition but are sold only in loose or naked condition by numbers without any packing. The process of 'packing or re-packing' must be one for the purpose of selling the goods to the ultimate consumers in the 'packing' as it is, without there being any intervention by the dealers or shopkeepers. Mere putting of multiple different parts in carton boxes/gunny bags/wooden packing for ease of transportation cannot be said to be 'packing or re-packing' as the same is not meant for the ultimate consumers but only as a convenience of transportation for the dealers and shopkeepers for further selling them to the ultimate consumers in loose condition without any packing. Therefore, no process of packing/re-packing of goods in a unit container has taken place. He submits that as the goods are not in the unit container, therefore, the condition of Section 2(f)(iii) of the Act is not fulfilled and they are not liable to pay the duty. To support of his contention, he relied on the decisions in the cases of ***Sree Leathers vs. CCE, Kolkata-V – 2012 (275) ELT 225 (Tri. Kolkata), Dodsal Corporation Pvt Ltd vs. CCE, Bangalore – 2011 (263) ELT 719 (Tri. Bang.), CCE, Mumbai vs. Shalimar Super Foods – 2007 (210) ELT 695 (Tri. Mumbai)*** and ***CCE, Chennai vs. Rajam Condiments – 2009 (245) ELT 706 (Tri. Chennai)***.

4. He further submits that on the date of seizure of the goods, the provisions of Section 2(f)(iii) were not applicable to the facts of this case as the said provisions came in the Finance Act, 2011, therefore the seizure is illegal.

5. He further submits that the adjudicating authority has relied on the decision of this Tribunal in the case of ***M/s Larsen & Toubro Ltd vs CCE, Nagpur – 2015-TIOL-2561-CESTAT-MUM*** holding that the labeling of parts amounts to manufacture even if such parts are not packed in the unit container. In fact, the Ld. Commissioner has ignored the decision of this Tribunal in the case of ***M Pitchiah, Director (Finance), BEML Ltd. vs CCE, Bangalore-I – 2014-TIOL-2215-CESTAT-BANG***, which has been affirmed by the Hon'ble High Court of Karnataka as reported in ***2015-TIOL-1189-HC-KAR-CX***; therefore, the decision of ***M/s Larsen & Toubro Ltd (supra)*** is not applicable to the facts of this case. He further submits that MRP

valuation is incorrectly applied. He also submits that demand is barred by limitation as in this case, the show cause notice has been issued on 08.12.2014 for the period from 29.04.2010 to 05.09.2011 by invoking extended period of limitation. He also submits that in the case of ***M Pitchiah, Director (Finance), BEML Ltd. (supra)***, this Tribunal in the identical facts and circumstances followed the judgment of Hon'ble Supreme Court in the case of ***J.K. Spinning & Weaving Mills Ltd vs Union of India – 1987 (32) ELT 234 (SC)*** and held that demand has to be within normal period as prescribed under Section 11A of the Central Excise Act, 1944. In that circumstance, demand is barred by limitation. He further submits that quantification has also not correctly done. In view of this, the impugned order is to be set aside.

6. On the other hand, the Ld. A.R. for the Revenue relies on the decision of ***M/s Larsen & Toubro Ltd (supra).***

7. Heard the parties and considered the submissions.

8. In this case, the facts of the case are not in dispute that the appellant is a trader and receiving the parts in bulk and sell them after consolidation by putting in polythene bags/wooden boxes/gunny bags as per the requirement of the buyers. The case of Revenue is that the activity of packing/re-packing by the appellant amounts to manufacture in terms of Section 2(f)(iii) of the Act, therefore, they are liable to pay duty on their activity. For better appropriation, the provisions of Section 2(f)(iii) of the Central Excise Act, 1944 are incorporated as under:

> *"2(f) "manufacture" includes any process –*

> *(iii) which, in relation to the goods specified in the Third Schedule, involves packing or re-packing of 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."*

On going through the said provisions, we find that the activity of packing/re-packing of the goods in a unit container amounts to manufacture. On going through the process undertaken by the appellant, we find that the appellant is not putting this packing/packed goods in a unit container. In fact, the appellant is packing the goods a bigger carton/gunny bags for ease of transportation to the place of the buyers and the buyers are selling these parts separately without any packing done by the appellant to the ultimate customers. We also take note of the facts that the appellant is engaged in the activity of packing/re-packing of the parts/components of earthmoving equipments falling under Tariff 84264100, 8427, 8429 and 843010 of the First Schedule to the Central Excise Tariff Act, 1985, which has been put at Sl. No. 108 amending the Notification No. 49/2008-CE(NT) dt. 24.12.2008 under Section 4A as notified the items for the purpose of MRP valuation. However, these items were not brought under the ambit of Section 2(f)(iii) of the Act fiction of manufacture, it was only brought in the Finance Act, 2011 with retrospective effect under Section 73 of the said Act w.e.f. 29.04.2010 i.e. at par with amendment to Notification issued under Section 4A of the Act. However, again an error was committed by the Legislature by specifying the goods in the non-existent third schedule to the Central Excise Tariff Act, 1985 and the third schedule was amended by the Finance Act, 2012 w.e.f. 28.05.2012 and whole of the period for which demand has been raised against the appellant is prior to the said amendment dt. 28.05.2012. In this situation prior to 28.05.2012, there was no deeming provision to demand duty under Section 2(f)(iii) of the Central Excise Act, 1944 and the introduction of such amendment which was made effective retrospective, the extended period of limitation is not invokable for issuance of the show cause notice as there is no allegation to invoke extended period of limitation such as fraud, collusion, willful mis-statement, suppression of facts or intent to evade duty under Central Excise Act/Rules. Admittedly, whole of the demand in this case has been confirmed by invoking extended period of limitation, therefore, we find that the extended period of limitation is not invokable in the facts and circumstances of the case. The said view was taken by this Tribunal in the case of ***M Pitchiah, Director (Finance), BEML Ltd. (supra),*** wherein the demand on account of extended period of limitation was confirmed. The said view was also affirmed by Hon'ble High Court of Karnataka (reported supra).

9. In view of the above, we hold that the demand against the appellant is not sustainable; accordingly, the impugned order is set aside and the appeals are allowed with consequential relief, if any.

(Operative part of the order pronounced in the court)

(Bijay Kumar)	**(Ashok Jindal)**
Member (Technical)	**Member (Judicial)**

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