

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH

COURT NO.1

Appeal No.E/55352/2013-EX(DB)

Appeal No.E/51943/2014-EX(DB)

[Arising out of the OIO No.90-92/SA/CCE/12 dt,28.9.12 and OIO NO.02/SA/CCE/14 dt.16.1.14 passed by the CCE, Delhi-III]

Date of Hearing: 21.02.2019

Date of Decision:22.02.2019

M/s. Domino Printech India Pvt.Ltd.	Appellant
Vs.	
CCE, Delhi-III	Respondent

Appearance

Shri B.L.Narasimhan & Sh.Amarender Singh,Advocates- for the appellants

Shri G.M.Sharma, AR- for the respondent

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

FINAL ORDER NO.60155-60156/2019

Per: **ASHOK JINDAL**

The appellant has filed these two appeals against the impugned order demanding duty alongwith interest and imposing penalty against the appellant.

2. The facts of the case in brief are that the appellant is engaged in the activity of manufacturing, trading of coding and marking equipment involving different types of technologies, inks and consumables, trading in spares and providing after sale service. The appellant have also undertaken the activity of ink refilling, relabeling

and manufacturing facility in Manesar, Gurgaon where inks related to the coding and marking equipment manufactured and traded by it are sold. The appellant is also carrying out the following activity:-

(a) Relabeling of import printing ink reservoir and printing ink cartridge before sale without involving any process of refilling. The original packing is only relabelled.

(b) Refilling from bulk drums of 200 lts/50 lts to small packs consisting of printing ink reservoir and printing ink cartridges and labelling the small packs so refilled.

(c) Blending and mixing of chemicals for the manufacture of printing ink make up solution and packing and labelling.

(d) Relabeling of imported printing make up solution without involving any process of refilling. The original packing is only relabelled.

(e) Refilling from bulk to small packs of wash solution and labelling.

(f) Relabeling of imported wash solution without involving any process of refilling. The original packing is only relabelled.

3. The appellant imported ink in bulk and procured the container from third parties in open market. The ink was procured and refilled in these containers and labelled and cleared as such. Various show cause notices were issued to the appellant by invoking the extended period of limitation on the grounds:

(a) Refilling of ink/labelling of the containers from bulk drums/cans amounts to manufacture and liable for excise duty.

(b) The cenvat credit sought to be denied of CVD on the imported printing ink make up cartridges and wash solution which relabelled and cleared on payment of duty holding that the activity of labelling does not amount to manufacture.

4. The show cause notices were adjudicated and it was held that refilling of ink and labelling of containers from bulk drums to small pack amounts to manufacture and the same is classifiable under sub heading 8443 99 60 and 8443 39 10 as parts and accessories of goods of heading 8443 39. The credit of CVD was denied on the printing ink make up cartridge and the activity undertaken by the appellant for labelling the same does not amount to manufacture, therefore, they are entitled to avail credit of CVD. Aggrieved with the said order, the appellant is before us.

5. Learned Counsel for the appellant submits that the activity of refilling ink and labelling of containers from bulk drums/cans does not amount to manufacture as there is no change in nature or character of the product as the ink remains the ink. Even after the refilling or labelling process was done as such, no distinct commodity comes into existence. It is further submits that method or manner of packing of the ink or using of ink would not in any case determine dutiability or otherwise of the ink. The sole contention of the department is that the containers are of specific size and shapes, therefore, by simply refilled/relabeling ink into

these containers, it became the part of the machinery. If the said finding of the Commissioner however is taken as correct then empty containers were procured by the appellant is already of a particular shape and size and the appellant does not have changed the shape and size of the containers but simply refilled or relabelled the containers and such activity have no impact on size and shapes of the containers, therefore, it cannot be said that the appellant has undertaken a manufacturing process. It is also submitted that relabeling does not bring into existence a new commodity and does not result in any change in nature or use or the character which remains the same irrespective of relabeling. It is his submission that the Commissioner has dropped the demand of duty on imported printer ink reservoir and printing ink cartridges wherein relabeling was done and no appeal has been filed against the said order. He further submits that the imported ink is classifiable under Chapter 32 and there is no Chapter note to Chapter 32 for heading 3215 deeming a process amounts to manufacture. Since imported ink in bulk after being refilled/relabelled in the containers remained ink only in which no manufacture is involved.

6. He further submits that classification proposed by the department and the impugned order have several anomalies as there is no classification of the impugned goods was sought in the show cause notice and during the personal hearing, the Commissioner has made altogether new case by proposing classification of the impugned product. The Commissioner deviated from the earlier stand and classified the goods under heading 8443

99 60 of the Tariff. The Commissioner committed an error by holding that classification of the goods under sub heading 8443 30 10 as parts accessories of the goods of heading 8443 39. The adjudicating authority was uncertain of the classification of the goods under which the duty demand has been raised and to change classification, burden of proof lies on the department which the department has failed to discharge. He further submits that the classification proposed under tariff item 8443 9951 is ruled out as the impugned cartridges have no print head assembly. Further the entry against tariff entry 8443 99 52 i.e. ink cartridges, without printing assembly has been inserted only with effect from 20.5.2010. Prior to 20.5.2010, the entry against tariff entry 8443 99 52 read as ink spray nozzle, which is not the case here. Further the entry against 8443 99 52 is a sub-classification of the entry tariff parts and accessories of goods of sub headings 844331, 844332. Therefore, in order to fit classification of the impugned products under tariff entry 8443 99 52, first it has to be satisfied that the impugned goods are parts and accessories of goods of sub headings 8443 31 or 8443 32. The entry against 8443 31 reads as Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data processing machine or to a network which is not the case here in as much as the use of the impugned products is never in those machines which have two or more functions such as printing, copying of facsimile transmission. Further the machines in

which the products are used, are not connected to an automatic data processing machine.

7. Learned Counsel further submits that in the impugned order the Commissioner held that main printing machine is classifiable under sub heading 8443 39 10 which refers to ink jet printing machine. Thus, the impugned order has classified the impugned order as parts and accessories of goods of sub heading 8443 39 i.e. under sub heading 8443 90 60. He submits that the goods are not per se to be known as parts and accessories of printers. These are containers containing ink to be used in printing machines. Although some of the impugned products described as cartridges have been designed to be inserted into printing machines, mere design for insertion into printing machines would not make these parts or accessories of printing machines. Further the essential character to the printing process is given by the ink and not the container thereof. Learned Counsel without prejudice submits that the Customs have allowed clearance of identical imported goods by accepting the classification of the items in question under Tariff Item 3215 without challenging the same. It is settled law that Bills of Entry filed for import of identical ink/ ink cartridges/reservoirs is an appealable order and in the absence of any challenge of the department, the same has been finalized.

8. With regard to the denial of credit on the ground that mere change of labels of printing ink make up cartridges and printing ink wash solution does not amount to manufacture. The submission of the appellant is that by virtue of Chapter Note 10 to Chapter 29, the

activity of relabeling undertaken by the appellant in respect of wash solution amounts to manufacture.

9. He further submits that the department has taken the contradictory stands, on the one hand the impugned order dated 28.9.2012 has confirmed the demand that labelling of ink reservoirs, cartridges, etc. amounts to manufacture. On the other hand, it has denied the credit on imported printing ink make up cartridges and wash solution on the ground that such labelling does not amount to manufacture. He has relied on the Chapter Note 7 to Chapter 32 to hold that changing of labels or relabeling does not amount to manufacture.

10. The contention of the learned Counsel is that once the duty has been collected by the department, it is not open to the department to contend that credit is not admissible as the process does not amount to manufacture. Admitted in this case, the appellant has cleared after relabeling of the goods on payment of duty. If the activity of the appellant does not amount to manufacture in such case the duty paid amounts to reversal of credit as per decision of Hon'ble High Court of Bombay in the case of Ajinkya Enterprises-2013 (294) ELT 203 (Bom).

11. He further submits that the appellant is regularly filing their excise returns and wherein it has been specifically mentioned according to them, that the activity of labelling or packing does not amount to manufacture and the said declaration has been made in all ER-1 returns which clearly shows that the department was well

aware of the activities of the appellant. In that circumstance, the extended period of limitation is not applicable.

12. Learned Counsel also relied on the decision namely Serv-Med Industries Pvt.Ltd. Vs.CCE-2015 (319) ELT 578 (SC), A.D.Steel Syndicate vs. CCE-1998 (103) 180 (Tri.-Del.),Safex Fire Services vs. CCE-2001 (127) ELT 182 (Tri.-Mum), CCE vs. Mahavir Spinning Mills Ltd.-2001 (130) ELT 65 (Tri.-Del.) and Union of India vs. Delhi Cloth and General Mills Co.Ltd.-1977 (1) ELT J 199 (SC).

13. Learned Counsel submits that there are certain calculations errors while computing the demand against the appellant, therefore, the impugned orders are liable to be set aside.

14. On the other hand, learned AR appearing on behalf of the respondent opposed the contention of the learned Counsel and submits that the Commissioner has examined the issue in detail thereafter he observed that the activity of refilling undertaken by the appellant amounts to manufacture. Therefore, he submits that ink cartridges manufactured by the appellant is a new product distinct from the ink and empty container which are bought out products of the appellants. The cartridges having specific size and shape are classifiable under parts of printing machines under chapter heading 8443. This chapter heading is having specific entry for the type of cartridges manufactured by the appellants. The ink cartridges recognised in trade as a new distinct commercial commodity from the ink and/or ink in bulk containers. To support this contention, he relied on the decision of Apex Court in the case

of Aspinwall & Co. Ltd. vs. CIT-2001 (133) ELT 18 (SC) and Air Liquide North India Pvt.Ltd. vs. CCE-2011 (271) ELT 321 (SC). He submits that the appellant in their ER-1 returns filed in November, 2010 have themselves described the goods as "Printing Ink Cartridges" and have classified the same under chapter heading 32159090. The appellant has wrongly classified the goods under this chapter. This chapter sub heading covers others of chapter heading 3215 'Printing Ink, writing or drawing ink and other inks, whether or not concentrated or solid. The cartridges being manufactured and sold by the appellant cannot fall under this chapter heading in as much as they are suitably classifiable under chapter heading 8443. He therefore submits that the impugned order is to be upheld.

15. Heard the parties and considered the submissions.

16. On careful consideration of the submissions made by both sides, following issues emerge:

- (a) Whether the activity undertaken by the appellant refilling ink from bulk containers to different types of reservoir and printing ink cartridges shall amount to manufacture
- (b) Whether if the activity undertaken is a manufacture whether the classification of the goods can be changed by the adjudicating authority without alleging in the show cause notice or not.
- (c) Whether the credit can be denied to the appellant if the activity of relabeling/refilling of imported goods does not

amount to manufacture wherein such goods has been cleared on payment of duty or not.

- (d) Whether the extended period of limitation is invokable to the facts of the case or not
- (e) whether the penalty can be imposed on the appellant or not

17. We find that the appellant has carried out the following activities:-

- (a) Relabeling of import printing ink reservoir and printing ink cartridge before sale without involving any process of refilling. The original packing is only relabelled.
- (b) Refilling from bulk drums of 200 lts/50 lts to small packs consisting of printing ink reservoir and printing ink cartridges and labelling the small packs so refilled.
- (c) Blending and mixing of chemicals for the manufacture of printing ink make up solution and packing and labelling.
- (d) Relabeling of imported printing make up solution without involving any process of refilling. The original packing is only relabelled.
- (e) Refilling from bulk to small packs of wash solution and labelling.
- (f) Relabeling of imported wash solution without involving any process of refilling. The original packing is only relabelled.

18. The appellant imported ink in bulk and also procured/purchased the containers locally from the third party. The ink is refilled/relabelled in these containers so purchased/procured. After this the ink is cleared as such. Whether this activity is amounts to manufacture? While going through the impugned order, we find that the Commissioner has observed that the containers are special type of containers and they are made such that they can be used machinery parts. In these circumstances, we have to see what types of the containers in dispute and what is use thereof.

(i) Printing Ink Reservoir: Plastic moulded containers which have a quality code printed on it i.e. mathematical algorithm based number containing information on ink type, batch number and expiry date. The manifold assembly of the printer is simply fixed on the top of the reservoir after unscrewing the cap. The pump in the manifold assembly draws ink from the reservoir and supplies it to the printer head assembly for use in printing.

(ii) Printing Ink Reservoir (with Sump Chip): Similar to the printing Ink reservoir described above. Instead of a quality code printed on the label there is a sump chip below the container which allows the printer to identify the printing ink. The said reservoir has since been discontinued and is forming a miniscule portion of the entire demand.

(iii) Ink Cartridge: Plastic container with a cap which is used to replenish the ink in the printing ink reservoir. The cartridge does not have any quality code printed on it. The cartridge is simply mounted on top of the assembly to replenish the ink reservoir. There is a spring loaded mechanism to prevent the flow back of the ink.

(iv) Bag-in-Box: Plastic bag having a capacity to hold 5 litres of ink placed outside the printer. The demand pertaining to bag in box has been dropped by the Commissioner however the same was not deducted due to a quantification error.

(v) Jerry Can: Simple plastic cans which can hold printing ink up to 25 ltrs. Like the bag in box the demand on account of jerry cans was also dropped but was not deducted due to quantification error by the Commissioner.

(vi) Printing Ink Bottle and OCC Cartridge: These are simple bottles which hold printing ink in various capacities of 200 ml, 1 litre

and 2 litres. These bottles are placed outside the printer and are connected via tubes and pipes.

19. We have seen these containers are various different sizes shapes which are procured from third party. Ink is transferred to these containers from the control machine by using the same control machine after which the containers are sold. We have also seen that printing ink bulk drums is classified under heading 3215. We also find that the appellant is importing ink filled above said containers and affixing the label on such containers. Those containers are also classified under heading 3215. The classification of such containers was never disputed at the time of import of the containers already filled reservoirs/cartridges or bottles. Even if when these containers are cleared by the appellant after affixing the label on the containers the same were classified under heading 3215. Only reason for holding that the activity amounts to manufacture by the Commissioner is that these containers are specific shapes and sizes of impugned items making them compatible with printers manufactured/traded by them. The impugned items are made as per fitment, which make them unique for their compatible printers only and hence the amounts to manufacture. But the Commissioner has dropped the demand pertaining to refilling of ink to Jerry Can and Bag-In-Box as these products does not have any specific shape and size and are not fitted inside the printers and are only connected with the printers with tubes. Therefore, the Commissioner has classified the impugned items as parts and accessories of the goods of sub

heading 84439 under sub heading 8443 99 60 but no such proposal was made in the show cause notice. Now have to see whether the activity undertaken by the appellant amounts to manufacture or not. The section 2 (f) of the Central Excise Act, 1944 defines 'manufacture' as under:-

"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 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 "manufacturer" 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.

20. From the above provisions of section 2(f) defines the term 'manufacture' in an inclusive manner which covers both the processes which are commonly understood as manufacture as well as the processes covered in the inclusive clause which are deemed to be manufacture. Hon'ble Apex Court has determined the tests for manufacture is whether the process in question brings into existence a new commercial commodity which is distinct from the starting material, having different name, character or use in the case of Delhi Cloth and General Mills Ltd. (supra) wherein the Apex Court observed as under:-

14. The other branch of Mr. Pathak's argument is that even if it be held that the respondents do not manufacture "refined oil", as is known to the market they must be held to manufacture some kind of "non-essential vegetable oil" by applying to the raw material purchased by them, the processes of neutralisation by alkali and bleaching by activated earth and/or carbon. According to the learned Counsel "manufacture" is complete as soon as by the application of one or more processes, the raw material undergoes some change. To say this is to equate "processing to manufacture" and for this we can find no warrant in law. The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance," however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus :-

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

21. We have seen that the appellant has procured the empty containers and does not manufacture such containers. The appellant is only and simply filled the empty containers with ink and no other activity undertaken as a result of process of refilling no new article comes into existence. Prior to undertaking such activity the product remained ink and even after undergoing the refilling activity remains ink. We find that admitted position is that the items in question do not form part of Third Schedule of the Central Excise Act in section 2(f) (iii). We observed that the Commissioner have given finding that the containers are specialized containers which are specially designed for the purpose of a printer and hence the process of filling and labelling amounts to manufacture. We find that neither these containers nor the ink manufactured by the appellant, therefore, by merely undertaking the process of filling of

ink/labelling of the containers which would enable the container to be used for printing.

22. We have seen that the Hon'ble Apex Court has examined the concept of manufacture in the case of Servo-Medi Industries Pvt.Ltd. (supra) wherein the Apex Court observed as under:-

10. *When a finished product cannot conveniently be used in the form in which it happens to be, and it is required to be changed into various shapes and sizes so that it can conveniently be used, no transformation takes place if the character and the end use of the first product continue to be the same. An illustration of this principle is brought out by the judgment in CCE, New Delhi v. S.R. Tissues, 2005 (186) E.L.T. 385 (S.C.). On facts, in the said case, jumbo rolls of tissue paper were cut into various shapes and sizes so that they could be used as table napkins, facial tissues and toilet rolls. This Court held that there was no manufacture as the character and the end use of the tissue paper in the jumbo roll and the tissue paper in the table napkin, facial tissue and toilet roll remains the same.*

23. We find that in the present case also filling in to containers enables the impugned items to be used as printing ink. However there is no change in the essential character or end use of printing ink. Thus, no transformation takes place which would result to be referred as manufacturing activity.

24. Further in the case of S.R. Tissues Pvt.Ltd. (supra) again the issue of manufacture came before the Hon'ble Apex Court. In the said case, the Apex Court has observed as under:

12. *At the outset, we may point out that the assessee is one of the downstream producers. The assessee buys duty-paid jumbo rolls from M/s. Ellora Paper Mills and M/s. Padamjee Paper Mills. There are different types of papers namely, tissue paper, craft paper, thermal paper, writing paper, newsprints, filter paper etc. The tissue paper is the base paper which is not subjected to any treatment. The jumbo rolls of such tissue papers are bought by the assessee, which undergoes the process of unwinding, cutting/slitting and packing. It is*

important to note that the characteristics of the tissue paper are its texture, moisture absorption, feel etc. In other words, the characteristics of table napkins, facial tissues and toilet rolls in terms of texture, moisture absorption capacity, feel etc. are the same as the tissue paper in the jumbo rolls. The said jumbo rolls cannot be conveniently used for household or for sanitary purposes. Therefore, for the sake of convenience, the said jumbo rolls are required to be cut into various shapes and sizes so that it can be conveniently used as table napkins, facial tissues, toilet rolls etc. However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues.

13.*In the case of Brakes India Ltd. v. Supdt. of Central Excise & Others reported in [(1997) 10 SCC 717], this Court has very aptly brought out the test of character or end-use by observing as follows :*

"If by a process, a change is effected in a product, which was not there previously, and which change facilitates the utility of the product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product. It will not be safe solely to go by a test as to whether the commodity after the change takes in a new name, though in stated circumstances, it may be useful to resort to it. This may prove to be deceptive sometimes, for it will suit the manufacturer to retain the same name to the end product also. The 'character or use' test has been given due importance by pronouncements of the Supreme Court. When adopting a particular process, if a transformation takes place, which makes the product have a character and use of its own, which it did not bear earlier, then the process would amount to manufacture under Section 2(f) irrespective of the fact whether there has been a single process or have been several processes."

14.*Applying the above tests, we hold that no new product had emerged on winding, cutting/slitting and packing. The character and the end-use did not undergo any change on account of the above-mentioned activities and, therefore, there was no manufacture on first principles.*

25. Further in the case of A.D.Steel Syndicate (supra) wherein this Tribunal has held as under:-

"Wherever legislature wanted to declare the process of repacking into small containers as amounting to manufacture it has so provided in the tariff by inclusion of a specific note to that effect. This is evident from Chapter Note 2 of Chapter 9,

Chapter Note 2 of Chapter 24, Chapter Note 5 of Chapter 30 and Chapter Note 4 of Chapter 33. There is, however, no such inclusion corresponding to these Chapter notes in Chapter 34 under which the Organic Surface Active Agents fall. Therefore, the process of repacking undertaken by the appellants is not a process of manufacture.”

26. Further, we find in the case of Safex Fire Systems (*supra*), wherein the issue before this Tribunal was as under:

2.The appellant had paid duty on the small quantity of chemicals manufactured by it. It also procured quantities required of the chemicals for filling into the fire extinguisher when they were first sold or for refilling in the extinguishers already sold by it, the maintenance of which it undertook a contract, quantities which had been depleted due to natural causes or had become unsuitable. It undertook the same activity with carbon dioxide. The question for consideration in these appeals is whether such filling of the chemicals and the carbon dioxide into the extinguisher, either in the appellant’s own hands or the premises of the customer, amounts to manufacture.

In those set of facts, this Tribunal has observed as under:

4.It is not necessary for us to recount the judgment of the Supreme Court and other courts that manufacture necessarily requires the coming into existence of product that is distinctly different, with a different nomenclature, character and end use. None of these requirements in our view is satisfied by the activity carried out by the appellant. The appellant does not even undertake that the mixture of the chemical, it not being disputed that the sodium bicarbonate purchased by the appellant from elsewhere already contained in it the required quantity of China clay and other chemicals which are required to ensure its free flow and give it its characteristics of fire extinction. We are not required to answer the question whether such mixing amounts to manufacture. The simple process of packing this chemical mixture into the fire extinguisher cannot by any stretch of imagination lead to manufacture. Its identity, use and nomenclature remains the same. The same reasoning holds true for carbon dioxide. Packing larger container into a smaller container of a gas cannot amount to manufacture.

5.Merely because the Indian Standard specification uses the words “dry powder charge” it does not become a specific commodity different, liable to duty. One of the meanings of

the word "charge" in The New Shorter Oxford Dictionary is "the quantity of something which a receptacle, mechanism, etc., is designed to bear or receive at one time; especially the appropriate quantity of explosive for a gun". That appears to be the meaning where the term is used in the specific manner as signifying a quantity of powder required for the application. It is interesting and significant to note that the tariff heading has been taken from the Harmonised System of Nomenclature Explanatory Notes, which contain the same heading 38.13 of the Custom Corporation Council. The Explanatory Notes to this Nomenclature in fact explain that charges for fire extinguisher classifiable under heading 38.13 are light weight containers of glass thin sheet metal etc. designed themselves into a fire extinguisher contain various preparation of fire extinguisher with the nature of which is amplified further. By such definition it is only a person who makes such containers who manufactures a charge. Unless otherwise provided by a deeming provision to show that packing or refilling the chemical or the gas amounts to manufacture, the activity cannot be manufacture. Such deeming provision has been introduced into the chapter from 1st March, 1997 onwards. We are concerned with the period prior to this and therefore do not consider it necessary to examine whether the activity of the appellant would be manufacture within the meaning of the amended provision.

27. Further in the case of Mahavir Spinning Mills Ltd. (supra) wherein the issue before this Tribunal was whether the duty paid on paraffin wax in lump from the market, and after melting, transfer it in the moulds to get the shape of washers for using in the binding machine for waxing the sewing thread and as such the activity amount to manufacture or not. In the said case, this Tribunal has observed as under:-

10.*In the instant case not the character, but only shape of the wax is being changed by the respondents in order to use it more conveniently and properly in their winding machines for waxing the sewing thread. They procure duty paid wax in lump form from the market, and after melting, transfer it in the moulds to get the shape of washers. The basic character of the wax remains the same and only new shape is given by them in order to use the same in the winding machine for waxing the sewing thread. No new or*

different article or commodity is thus manufactured by them. The process adopted by them for changing the form of the wax from lump to washers cannot be equated to the process of manufacture keeping in view the test of manufacture laid down by the Apex Court in the above referred cases. Therefore, the impugned order of the Commissioner (Appeals) holding the product in question (wax washers) to be not dutiable being not a manufactured product is perfectly valid and deserves to be affirmed.

28. On the analysis of the above cited judgements, we find that the character, name and use of the printing ink does not change. Therefore, the process of refilling and relabeling which enables the products to be used with printing ink does not amount to manufacture

29. We find that the Commissioner has classified of the goods of sub heading 8443 30 10 as parts accessories of the goods of heading 8443 39 as machines classifying under heading 8443 39. The Commissioner has held as new product classified under the aforesaid heading has come into existence amounts to manufacture. This approach is totally erroneous as the printing ink has been imported in bulk drums which are never questioned by the department but the Commissioner has classified the impugned items under sub heading 8443 30 10 by classifying the item as parts of printing ink would not render the activity refilling/relabeling amount to manufacture. Therefore, the activity undertaken by the appellant does not amount to manufacture. We also note that the fact the empty containers are procured from the third party and ink is imported which are not manufactured by the appellant. The containers so-called parts of printer are procured and ink is filled

into the same and cleared as such. There is no change in the name, character and use of the so called parts. Therefore, even if the classification is taken to be correct, the test of manufacture is not satisfied.

30. Section 3 of Central Excise Act, 1944 levied excise duty and which is reproduced below:

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods [(excluding goods produced or manufactured in special economic zones)] which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)

31. Further section 2 (d) Central Excise Act, 1944 defined the excisable goods.

(d) "excisable goods" means goods specified in [[the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986)] as being subject to a duty of excise and includes salt.

32. From the perusal of the above provisions, we find that the duty of excise levied on the excisable goods which are manufactured in India. Only if the activity amounts to manufacture will be the question of the rate at which the excise duty is to be levied is relevant. Merely because an item is classifiable under a sub heading it would not have a bearing on whether the activity amounts to manufacture or not. In the impugned order, the Commissioner has not analysed the activity of refilling/relabeling whether it amounts to manufacture or not. The Commissioner has proceeded to simply classify the impugned items and hold that as the items are

classifiable under a particular sub heading the activity amounts to manufacture which is not in consonance with the levy provision. In the absence of any finding made by the Commissioner as regards how the activity of refilling/relabeling satisfies the test of manufacture no excise duty can be imposed. We also take note of the fact that there is no deeming provision of refilling amounting to manufacture as per chapter notes of Central Excise Tariff relating to impugned goods. Section 2(f) (ii) provides certain specified activities are deemed to be amounting to manufacture as set out in Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985. The appellant has imported ink which was refilling in various containers as also the impugned items were imported and assessed under chapter heading 3215 of the Customs Tariff, which is *pari material* to the Central Excise Tariff and character, nature and use of the ink have admittedly not undergone any change and these remained classified under heading 3215 90 90. After refilling/relabeling the same shall remain be classified under heading 3215 90 90, therefore, does not amount to manufacture. Further, we take note 7 to chapter 32 deems certain activities in respect of certain goods of the chapter as manufacture. The said provisions are extracted herein below:

7. In relation to products of tariff items 3204 19 81, 3204 19 82, 3204 19 83, 3204 19 84, 3204 19 85, 3204 19 86, 3204 19 87, 3204 19 88, 3204 19 89, 3204 19 90 and products of heading 3206, 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.

The Chapter note 7 to chapter 32 does not refer to heading 3215 or any Tariff item. Therefore, as per Chapter Note 7 to chapter 32, the activity shall not deem as manufacture. Therefore, we hold that the activity undertaken by the appellant does not amount to manufacture. . Accordingly the issue No.1 is answered in favour of the appellant.

The issue No.2

33. We have gone through the show cause notice issued to the appellant and no classification was proposed in the show cause notice. However, during the course of adjudication, the Commissioner have travelled beyond the allegation in the show cause notice and classified the impugned products under sub heading 8443 99 51/52 of Central Excise Tariff without assigning any reason/evidence. It is settled law, that the show cause notice is the foundation of the case on which the Revenue has to form its case and in the absence of any allegation with regard to the classification, in the circumstances, the adjudicating authority cannot change the classification of the products. Therefore, the impugned order classifying the goods under 8443 99 60 is beyond the scope of show cause notice. We further find that the Commissioner has held that the item in question are parts or accessories of printer but we have seen there is no relationship with the printers but merely the container in which ink is contained carrying out printing functions. The printer does not have any

interface with the impugned items as the container is unscrewed and the manifold assembly is placed on top of the container from where the pump draws ink to be supplied to the print head assembly.

34. We have also seen that at the time of import of already filled containers. The classification declared by the appellant was accepted by the department, therefore at this stage the same cannot be allowed to be classified the product under different sub heading.

35. We have also seen that the Commissioner has given finding qua sump chips has been applied across all the impugned items. The sump chip is to read only memory containing ink identity information and was affixed to old technology printers. The sump chip has no bearing on the ink filled into the reservoir as it merely is a repository of information regarding the ink filled into the container. Therefore, we hold that classification changed by the Commissioner is not sustainable.

Accordingly, the issue No.2 is also answered in favour of the appellant.

The issue No.3

36. We find that the imported ink container, the appellant has availed credit of CVD paid by them on the premise that the activity

of refilling/relabeling. As discussed above, as per Chapter Note 7 to Chapter 32, the activity undertaken by the appellant does not amount to manufacture. Therefore, the appellant is not entitled to avail credit of CVD paid by them at time of import. But as per the decision of the Hon'ble High Court of Bombay in the case of Ajinkya Enterprises (supra), by upholding the finding of this Tribunal that if the activity does not amount to manufacture and the goods have been cleared on payment of duty, in such case, the duty paid by the assessee which has been accepted by the department and more than the credit availed. In that circumstance, the duty paid by the assessee shall amount to reversal of credit and the assessee is not required to reverse the credit. Admittedly in this case, the appellant cleared the said imported goods after refilling on payment of duty. Therefore, if the activity does not amount to manufacture, in that case, the duty paid by the appellant shall amount to reversal of credit. Therefore, the appellant is not required to reverse the credit of CVD availed by the appellant at the time of import.

The issue No.4

37. We find that the appellant is regularly filing their excise returns and specifically mentioned the activity of relabeling or packing does not amount to manufacture. In that circumstance, we hold that the activity undertaken by the appellant was in the knowledge of the department. Therefore, the extended period of limitation is not invokable.

The issue No.5

38. In view of above, as duty confirmed against the appellant is not sustainable, therefore, the question of imposing penalty does not arise. As the issue has been answered in favour of the appellant, therefore, we do not find any merit in the impugned order. Accordingly, the same are set aside. The appeals are allowed with consequential relief, if any.

(pronounced in the open court on 22.02.2019)

(Bijay Kumar)
Member (Technical)

(Ashok Jindal)
Member (Judicial)

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