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

Appeal No.ST/200/2011

[Arising out of Order-in-Appeal No.10/2011 dt. 05.01.2011 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore]

Commissioner of Central Excise & ST
Coimbatore Appellant

Versus

Udhya Semiconductors Ltd. Respondent

Appearance :

Shri A. Cletus, ADC (AR)
For the Appellant

Shri S. Durairaj, Advocate
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 09.05.2018

FINAL ORDER No. 41477 / 2018

Per Bench

M/s.Udhya Semiconductors Ltd., the respondents herein, are undertaking the process of lamination of solar cells. supplied by M/s.Udhaya Solar Photovoltaics Private Ltd. (hereinafter referred to as USL). It appeared to the department that the processes undertaken by the respondents do not amount to 'manufacture', in terms of Section 2 (f) of the Central Excise Act, 1944 and the activity is squarely covered under 'Business Auxiliary Service' as defined in Section 65 (19) of the Finance Act, 1994. It further appeared that respondents were not eligible for exemption from payment of service tax under BAS as provided in Notification No.8/2005 dt. 1.3.2005 since the goods cleared by the 100% EOU were exempted under Notification No.24/2003-CE dt. 31.3.2003, 6/2002-CE and 6/2006-CE. Accordingly, show cause notice dt. 6.7.2009 was issued to the respondents, inter alia proposing demand of service tax of Rs.48,95,506/- along with interest thereon for the period 10.09.2004 to 31.12.2008 and imposition of penalties under various provisions of law. In adjudication, original authority vide an order dt. 14.12.2009 confirmed the proposed tax demand with interest and also imposed penalties under Section 77 & 78 of the Finance Act, 1994. In appeal, the Commissioner (Appeals) vide impugned order dt. 05.01.2011 held that the activity of “lamination” by the assessee on job work basis to their client USL amounts to ‘manufacture’ and as consequence, the said activity would not attract levy of service tax under BAS. On these grounds, the lower appellate authority allowed the appeal and set aside the order of original authority. Department is aggrieved with this impugned order and have filed this appeal.

2. Today when the matter came up for hearing, on behalf of the appellant, ld. A.R Shri A. Cletus reiterated the grounds of appeal. He further submits that the character of Solar PV cells brought for job work by the respondent remains solar cells even after the job work activity. Hence there is no manufacture involved. Ld. AR took us to the Notification No.8/2005-ST to point out that the exemption provided to service of production of goods on behalf of the client falling under BAS shall apply only when the job worked products after being returned back to the client are used in relation to ‘manufacture’ of any other goods on which appropriate duty of excise is payable. The *Explanation* (ii) to the Notification clarifies that appropriate ‘rate of duty of excise’ shall not include ‘Nil’

rate of duty or duty of excise wholly exempt. However as the goods produced by the EOU are exempt from duty in view of Notification No.6/2002-CE as amended, the benefit of exemption under BAS will not be available to the respondents.

3. For the respondents, Ld. Advocate Shri S. Durairaj supports the impugned order. He also made oral and written submissions which can be broadly summarized as under :

(i) Conversion of solar cells into solar panels by the process of lamination is amounting to manufacture since a new product emerges. Therefore, such process is not covered by the BAS. Ld. Advocate displayed a sample of the solar cell received from the principal (EOU) and also the solar panel array that emerges after job work activity. Although the SCN has alleged that only "lamination process" is done by respondents, in fact a number of processes are undertaken in the job work and lamination is only one of such processes. Only after all these processes are completed solar cell becomes a solar cell array or solar laminate which is thereafter sent back to the principals. The job work was performed by the respondents only based on the permission granted by the jurisdictional AC to the principals (EOU) as per the conditions of Notification No.214/86-CE.

ii) Hence the above job work is manufacturing activity which is exempt from payment of service tax and hence they cannot be taxed under the category of "Business Auxiliary Service". Only for these reasons, respondents had not registered with service tax hence question of filing of returns does not arise.

iii) Even if the processes carried out by the respondents amounting to manufacturing activities the respondents would be outside the fold of liability to service tax under Business Auxiliary Service for the following reasons :

(a) Job work is done for the EOU and not on behalf of the EOU. For the period upto 15.6.2005, BAS covers only those service provided on behalf of the client. It does not cover those services provided for the client. Therefore, upto 15.6.2005 it is not a taxable service. Reliance is placed on the decision rendered in the case of *Ferro Scrap Nigam Ltd. Vs CCE Raipur* – 2014 (36) STR 955 (Tri.-Del.).

(b) Notifications 6/2002-CE and 6/2006-CE are issued under Section 5A of the Central Excise Act, 1944. Proviso to sub section (1) of Section 5A states that unless specifically provided in such notification, no exemption therein shall apply to excisable goods manufactured by EOU. No specific provision is mentioned in the above notifications for EOU. Therefore, the exemption in these notifications is not applicable for EOU. Further, export of goods by an EOU under bond cannot be treated as exempted clearances or Nil duty clearances. Therefore, exemption under notification 8/2005-ST dt. 1.3.2005 is available for the period from 1.3.2005. Reliance is placed on the decisions rendered in the case of *Interplex Electronic India P. Ltd. Vs CST Bangalore* – 2014 (33) STR 56 (Tri.-Bang.) and *Super Springs Pvt. Ltd. Vs CCE &ST Coimbatore* – 2018 (4) TMI 1104 - CESTAT Chennai.

4. Heard both sides and have gone through the facts.

5. From the facts on record as narrated in the SCN, the impugned order and even in the grounds of appeal, it cannot be disputed that respondents receive Photovoltaic Cells from their principal on which they carry out job work, resulting in Photovoltaic Solar Laminate. As per the narration in para 4.3 of the impugned order, it is brought out that the following activities are carried out in job work :

1) Tabbing,
2) Stringing
3) Matrixing with Bus bars and Lap up
4) Electrical & Physical check
5) Lamination
6) Curing
7) Edge Trimming
8) Sun Simulator

After this stage, the product Solar Laminate that emerges after all of these activities is sent to the principal for further processing and completion of Solar Photovoltaic Module. The lower appellate authority has noted that the SCN is limited to the activity of 'lamination', however it is silent on how the lamination does not amount to 'manufacture'. It is also seen that the lower appellate authority has taken note of the original case file where the claim of the respondent that they carry out many operations on job work basis though raised by the jurisdictional Deputy Commissioner, has however failed to discuss on the write up of stage by stage activities submitted by the respondent. He has also noted that the original authority is also silent on the narration/submission on the activities of 'lamination' presented by the respondent has not reasoned as to how this activity does not amount to 'manufacture' and that the original authority confirmed the demand on the basis of report of the jurisdictional Deputy Commissioner which was received only after the personal hearing granted to the respondent. We find that the lower appellate authority has correctly found fault in the original authority not having given an opportunity to the respondent to offer their comments or defend against the said report of the jurisdictional Deputy Commissioner. The lower appellate authority has then gone to thoroughly analyse the definition of ‘manufacture’ in Section 2(f) of the Central Excise Act, the nature of Photosensitive Conductor Devices, the relevant Harmonized System of Nomenclature (HSN notes) and has found that item “Solar PV Laminate” resulting out of the job work would merit classification under CTH 8541 40 11 of the Central Excise Tariff Schedule. Only after such exhaustive analysis and findings, has the lower appellate authority arrived at a conclusion that activity “lamination” for which the job order was given to the respondent by the 100% EOU is in fact, a series of activities to manufacture “Solar PV Laminate” and that the process amounts to ‘manufacture’ within the meaning of Section 2(f) of the Central Excise Act, 1944, hence the job work activity will not attract levy of service tax under “Business Auxiliary Service” as defined in Section 65 (19) of the Finance Act, 1994. We are not able to find any infirmity in these findings of the lower appellate authority. Even in the grounds of appeal, in para-13, it is conceded that the solar cells were processed by the respondent to interconnect them as modules; however Revenue has taken up the stand that no new product comes into existence. The solar cell received by the respondent from the EOU unit principal and the solar cell array manufactured by the former in job work, was displayed by the Ld. Advocate during the course of hearing and we find that the lower authority was indeed correct in holding that the job work process amounts to manufacture.

6. We therefore do not find any merit in the grounds of appeal preferred by the Revenue. Instead, we fully endorse the well reasoned findings of the lower appellate authority. This being so, the job work activity carried out by the respondents will only have to be considered as amounting to ‘manufacture”, hence same cannot be again considered as ‘Business Auxiliary Service’ and service tax demanded on the activity under BAS.

7. Having arrived at these conclusions, we do not find it necessary to address the submissions made by the Ld. A.R / Revenue concerning liability of respondent to discharge service tax under BAS and their ineligibility to exemption from service tax liability vide Notification No.8/2005-ST when read with Notification 6/2006-CE.

8. The impugned order is therefore upheld and the Revenue appeal is dismissed.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar) **Member (Technical)**	**(Sulekha Beevi C.S)** **Member (Judicial)**

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