IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.525 of 2012

[Arising out of Order-in-Original No.24/2012 (C) dated 08.08.2012 passed by the Commissioner of Central Excise, Puducherry Commissionerate, Puducherry]

The Commissioner of GST & Central Excise, **: Appellant**
Puducherry Commissionerate,
No.1, Goubert Avenue,
Puducherry 605 001.

VERSUS

M/s.AGS Transact Technologies Limited **: Respondent**
C-85A, PIPDIC Industrial Estate,
Mettupalayam,
Puducherry 605 009.

APPEARANCE:

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Appellant

Shri S. Murugappan, Advocate
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40206 / 2023

DATE OF HEARING : 28.02.2023
DATE OF PRONOUNCEMENT : 28.03.2023

Per: Ms. SULEKHA BEEVI C.S

The above appeal is filed by the department against the order passed by Commissioner who dropped the proceedings and demands initiated under show cause notice dated 10.08.2011.

2. The Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the Department. The facts were explained by the Ld. A.R by submitting that the respondent, namely, M/s.AGS Transact Technologies Limited, Puducherry which was formerly known as M/s.AGS Infotech Pvt. Ltd. is a company which was started during the year 1993. The respondent started an unit at Puducherry during the year 2005 and it was registered with Central Excise Department as Dealer during June 2007. The respondent is engaged in import and sale of different types of Automated Teller Machines (ATMs) which they imported from M/s.WINCOR NIXDORF in China/Singapore/Germany and sold to the nationalised as well as private banks spread all over India. The process of loading of software, fixing of accessories such as camera, printer etc. on the imported ATMs and re-painting/logo-painting were carried out on the imported ATMs at the Puducherry unit. The software which is meant for basic operation of ATM is loaded into the imported ATM at the said unit. Besides this, a specialized/customized software with suitable modifications for the use by the different banks, as per the requirement of the individual buyer-bank, which is developed by the software team of the company at Mumbai was also loaded on the ATMs at the said unit. Thus, it appeared that the ATMs imported by the respondent are not sold as such to the banks and the imported ATMs are unfinished and incomplete products. After the loading of software both basic and customized software, the imported ATMs become fully functional and finished product. The loading of the software on the ATMs amounts to 'manufacture'. As per the provisions of Section

notes to Section XVI of the Schedule to Central Excise Tariff Act, 1985, conversion of a machine which is incomplete or unfinished having the essential character of the complete or finished machines into a complete or finished machine shall amount to 'manufacture'. In the instant case, the loading of software is a process of conversion of an incomplete or unfinished ATM, which is having the shape of ATM, into a complete and finished operational ATM. Therefore, the process of loading of software which is taken place at the Puducherry unit amounts to 'manufacture' and attracts levy of Central Excise duty on the complete or finished ATMs when cleared to the buyer-banks. The respondent did not pay Central Excise duty though the process of loading of the software amounted to 'manufacture'. Show cause notice was issued proposing to demand Central Excise duty on the ATMs manufactured and cleared for the period 31.08.2010 to 17.03.2011. After due process of law, the adjudicating authority vide order impugned herein dropped the proceedings. Hence this appeal.

3. Ld. A.R submitted that as per Section 2(f) of the Central Excise Act, 1944, any incidental or ancillary process amounts to 'manufacture'. The process done for the completion of the product amounts to 'manufacture'. The definition as given in Section 2(f) of Central Excise Act reads as under :

> **“SECTION 2. Definitions.** — In this Act, unless there is anything repugnant in the subject or context, -
> … … …
>
> *(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*
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> *(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,*
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> *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”.*

4. The Commissioner has wrongly concluded that after loading of software in ATM, no distinct product with new name, character and use emerges and hence loading of software in the ATM did not amount to ‘manufacture’. As per Section Note 6 to Section XVI of Central Excise Act, 1944, conversion of an article which is incomplete or unfinished into a complete or finished article shall amount to ‘manufacture’. Ld. A.R adverted to the said section notes which reads as under :

> “In respect of goods covered by this Section, conversion of an article which is incomplete or unfinished but having the essential character of the complete or finished articles (including ‘blank’, that is an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only

> be used, other than in exceptional cases, for completion into a finished article or a part), into complete or finished article shall amount to 'manufacture'.

5. From the above section note, it is clear that the conversion of an article which is incomplete or unfinished into a complete or finished article shall amount to 'manufacture'. The Commissioner, however, has wrongly observed that after loading the software no new product has emerged. However, there is observation made by the Commissioner that before loading of software, the commodity will not serve the intended purpose fully. The impugned software is an essential part of the ATM without which the machine could function as an ATM. The loading of software converts hardware into a functioning ATM and therefore this process amounts to 'manufacture'. This software called by the respondent as "Proinstal" forms an integral part of the ATM. The said software provides the most essential and basic characteristic of the ATMs. The process of loading of software such as 'Application Software' or 'Operating Software' whether packaged or customised on the imported ATMs amounts to 'manufacture' within the meaning of sub-section (i) of Section 2(f) of the Central Excise Act, 1944. The Commissioner has relied on various case laws to conclude that there is no emergence of a new product with a distinct name and use after the loading of software which is incorrect and erroneous. She prayed that the appeal may be allowed.

6. Learned Counsel Shri S. Murugappan appeared and argued for the respondent. Ld. Counsel adverted to the discussions made by the Commissioner in the impugned order from para 13 onwards. It is explained by him that the department dos not dispute that the respondent has declared the goods as 'ATM' while importing the goods. The Commissioner has correctly analysed the issue and held that even after loading the software, the product is sold as ATM and no different, distinct or a new product emerges by the process of loading of the software.

7. The Counsel submitted that the Hon'ble Apex Court decision in the case of *Union of India Vs J.G. Glass Industries Ltd.* - 1998 (97) ELT 5 (SC) was relied by the learned Commissioner. In the said case, the Hon'ble Apex Court has put forward two tests to understand whether the process amounts to 'manufacture'. Firstly, by the said process whether a different commercial commodity comes into existence and the identity of the original commodity does not cease to exist. Secondly, though the commodity which was already in existence would not serve the intended purpose fully but for the said process. Ld. Counsel explained that the user can always buy the ATM and the software separately and upload the software onto the ATM in his premises. It is the same as in the case of a computer. The respondent has imported ATM software together and not a software-loaded ATM. The machine and the software were assessed as ATM and cleared by the Customs department.

8. It is argued by the Ld. Counsel that a process of manufacture implies a change, but every change is not manufacture. In the present case, the adjudicating authority has taken note of the definition of 'manufacture' in Section 2(f) and also considered the application of Section Note 6 of Section XVI of the Schedule to the CETA 1985. The said section note refers to conversion of an article which is incomplete or unfinished but having the essential character of the compete or finished article into a complete or finished article. Therefore, the essential requirement for applicability of Section Note 6 is that an article which is sought to be complete should be incomplete or unfinished. In the present case, the respondent imported ATMs which already existed as a complete or finished goods. The said section note therefore does not have any bearing to the facts of the case.

9. Ld. Counsel submitted that the view taken by the Commissioner is supported by the Board's circular as well as the decisions of the Hon'ble Apex Court. He prayed that the appeal may be dismissed.

10. Heard both sides.

11. The issue is whether the process of loading of the software into the ATMs imported by the respondent amounts to 'manufacture' so as to attract Central Excise duty. In the grounds of appeal, the department has mainly relied on Section Note 6 of Section XVI of the Schedule to the

CETA, 1985. It is argued by the Ld. A.R that the ATMs imported by the respondent are not complete and finished ATMs and these become complete and functional only after loading of the software. It has to be noted that the goods declared in the Bill of Entry are 'ATM'. Even after loading of the software, they are sold as 'ATM' and does not transform into a new distinct product. The Section note applies only in cases of incomplete and unfinished products to which some process is done to make them complete and finished. The ATM along with the software has been imported and assessed to Customs Duty as ATM.

12. The Board by Circular No.454/20/99-CX date 12.04.1999 clarified that process of upgradation of computer system and addition of hard disk does not amount to 'manufacture' in so far as the upgradation does not bring into existence goods with the distinct new name character and use. Circular No.497/63/99-CX dated 30.11.1999 clarified that the activity of creating a computer network from duty paid computers does not amount to 'manufacture' in so far as the upgradation does not bring into existence goods with the distinct new name character and use.

13. Though the department contends that the goods imported are unfinished and incomplete ATM, there is no evidence placed before us to support such contention. While clearing for home consumption, the goods have been assessed to customs duty as complete ATM. In the case of

Hindustan Poles Corporation Vs CCE Calcutta – 2006 (196) ELT 400 (SC), the Hon'ble Apex Court observed as under :

> ***"25.*** *A Constitution Bench of this Court in* Union of India *v.* Delhi Cloth and General Mill Co. Ltd. - *AIR 1963 SC 791 had attempted to decide the meaning of expression 'manufacture'. The Court held that 'manufacture' which is liable to excise duty under the Central Excise and Salt Act, 1944, must therefore be the "bringing into existence of a new substance known to the market".*
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> ***26.*** *In another Constitution Bench of this Court in* Devi Dass Gopal Krishnan & Ors. *v.* The State of Punjab & Ors. *reported in Sales Tax Cases XX (1967) page 430, the Court relied on the dictionary meaning of 'manufacture' and according to Court 'manufacture' means 'transform or fashion raw materials into a changed form for use'. The Court observed that if by a process a different identity comes into existence then it can be said to be 'manufacture'.*
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> ***27.*** *In* Empire Industries Ltd. *v.* Union of India - *AIR 1986 SC 662, it was observed that manufacture is complete as soon as by the application of one or more processes, the raw material undergoes some change. If a new substance is brought into existence or if a new or different article having a distinct name, character or use result from particular process, such process or processes would amount to manufacture. Whether in a particular case manufacture has resulted by process or not would depend on the facts and circumstances of the particular case."*

14. The Apex Court in the case of *Grasim Industries Ltd. Vs UOI* - 2011 (273) ELT 10 (SC) held as under:

> **"8.** The goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subjected to payment of excise duty. Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty. [See *Hyderabad Industries Ltd.* v. *Union of India*, (1995) 5 SC 338 = 1995 (78) E.L.T. 641 (S.C.), *Moti Laminates (P) Ltd* v. *CCE*, (1995) 3 SCC 23 = 1995 (76) E.L.T. 241 (S.C.), *CCE* v. *Wimco Ltd*, (2007) 8 SCC 412 =

2007 (217) E.L.T. 3 (S.C.)]. Therefore, both on authority and on principle, for being excisable to excise duty, goods must satisfy the test of being produced or manufactured in India. In our opinion, the charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in the terms of Section 2(f) of the Act. Therefore, the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act. The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient. This Court has in several decisions starting from *Tungabhadra Industries* v. *CTO,* AIR 1961 SC 412, *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.*, AIR 1963 SC 791 = 1977 (1) E.L.T. J199 (S.C.), *South Bihar Sugar Mills Ltd.* v. *Union of India*, AIR 1968 SC 922 = 1978 (2) E.L.T. J336 (S.C.) *and in line of other decisions* has explained the meaning of the word 'manufacture' thus :

> "14. The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use."

15. These decisions have been relied by the Commissioner to conclude that no new commodity comes into existence after the process of loading of the software. In commercial parlance, ATMs whether loaded with and without software are known and understood as an ATM. After going through the discussions made by the Commissioner in the impugned order, we do not find any grounds to interfere with the view taken by him that from the facts of the case loading of the software does not amount to "manufacture". The order passed by the Commissioner is sustained. The appeal of the department is dismissed.

(pronounced in open court on 28.03.2023)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

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