IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Excise Appeal No.377 of 2012

(Arising out of Order-in-Original No. 02/2012 (Commr.) dated 30.3.2012 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore)

M/s. Mak Controls and Systems (P) Ltd. Unit – I **Appellant**
Adjacent to PSG Arts College
Avinashi Road, Civil Aerodrome Post
Coimbatore – 641 014.

Vs.

Commissioner of GST & Central Excise **Respondent**
6/7, A.T.D. Street, Race Course
Coimbatore 641 018.

APPEARANCE:

Shri S. Durairaj, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40300/2023

Date of Hearing: 30.03.2023
Date of Decision:25.04.2023

Per M. Ajit Kumar,

This is an appeal filed by M/s. Mak Controls and Systems (P) Ltd. Unit I, against the Order in Original Sl. No. 02/2012-Commr. dated 30.3.2012 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore.

2. M/s. Mak Controls and Systems (P) Ltd. are engaged in the manufacture of 'alternators' which are further used in the production of (a) Ground Power Unit (GPU), for servicing of aircrafts falling under Chapter 8303, (b) Auxiliary Power Unit (APU), for battle tanks and (c) Dual Frequency Genset (DFG), for missile launching vehicles falling

under Chapter Heading 8502. After the first round of adjudication by the learned Commissioner, the adjudication order Sl. No. 09/2009 (Commr.) dated 31/07/2009 was challenged before the Hon'ble CESTAT, Chennai who vide order No 215/10 dated 22/02/2010 have remanded the matter to the lower authority for a fresh decision after taking into account the written submission field by the appellant on 20/03/2009. Accordingly, the learned Commissioner in de-novo proceedings vide the impugned order has held that the 'alternators' manufactured and cleared from Unit – I are dutiable articles falling under Central Excise Tariff Heading (CETH) 8501.00 upto 27.2.2005 and under CETH 85016100 / 85016200 with effect from 28.2.2005. He has gone on to confirm the duty demanded and also imposed penalty. Aggrieved by the impugned order, the appellant is now before us.

3. The background of the issue is that the appellant has two units. The principal unit is Unit – II from where final products are manufactured and cleared. Unit – I is an additional premises of the appellant. The appellants case is that raw materials for manufacture of specific 'alternators' are first sent by Unit – II to Unit – I and exclusively designed semi-finished 'alternators' meant for use as integral part of GPUs / APUs / DFCs are sent back to Unit – II by Unit – I, for completion into 'alternators'. Final 'alternators' emerge at Unit – II after finishing and testing processes and are cleared from Unit – II after further assembly in GPUs / APUs / DFCs in Unit – II. Department's contention is that manufacture of excisable goods i.e. complete 'alternators' was being done at Unit – I which was being cleared to Unit – II without payment of duty during the period May 2003 to February 2008 and July 2008 to March 2009. This resulted in the issue of two show cause

notices dated 04.06.2008 and 03.08.2009 to the tune of Rs 1,03,51,757/- + 11,82,227/- for the respective periods. The notices alleged that the clearances were made without observing any central excise procedure, thereby involving suppression of fact, and evoked the extended period of time, which culminated in the impugned order being passed after following all formalities.

4. We have heard Shri S Durairaj learned Counsel for the appellant. He stated that semi-finished alternators, which are intermediary products in the integrated manufacturing process are not shown by the department to be either marketed or marketable. Therefore, demand for duty on the alternators is not sustainable. Further in the impugned order it is stated that classification of a product depends on the nature and functions and tariff entry and it does not depend on the end use. The order is not proper as the classification of GPU was decided as 8803 by the Tribunal in the appellant's own case – 2001 (138) ELT 1152 by relying on Note 3. The Revenue's appeal was also dismissed by the Hon'ble Supreme Court. Further in the decision of Intel Design Systems (India) Pvt Ltd – 2008 (223) ELT 135 (SC) [Division Bench – 11.2.2008], relied upon in the impugned order, Note 3 of Section XVII was not considered but only Note 2. This decision is not applicable for the present issue due to the subsequent decisions of Hon'ble Supreme Court. On 8.3.2021, the Full Bench of the Hon'ble Supreme Court, in its judgement in Westinghouse Saxby Farmer Ltd Vs Commissioner of C. Ex. Calcutta [2021 (376) ELT 14 SC] after considering both Notes 2(f) and 3 of Section XVII has held that invocation of Note 2(f) in Section XVII, overlooking the 'sole or principal user test" indicated in Note 3, is not justified. The review application filed by the Revenue

was also dismissed by the Hon'ble Supreme Court – 2022 (382) ELT 292 (SC) on 10.8.2022. In view of the above reasons, the learned counsel submitted that Alternators of GPU would fall under CETH 8803 and Alternators of APU would fall under CETH 8710. The learned counsel stated that the Tariff rate is NIL for CETH 8803 upto 11.5.2007. Therefore, the demand on the Alternators of GPU from May, 2003 to 10.5.2007 is not sustainable. The learned counsel stated that irrespective of CETH [whether it is 8803 or 8501], the parts of aeroplanes or helicopters of any chapter for servicing of aeroplanes or helicopters are exempted vide Sl.No:240 of notification 6/2002-CE dated 1.3.2022 as extended/ amended. Further, bulk quantity of GPUs was also exported under notification 42/2001-CE (NT). It is an admitted fact that Unit-II has availed these exemptions for GPUs and such exemption was not denied by the Revenue. Under such circumstances, alternators, which are integral part of GPU [parts of parts] are also entitled for such exemption. Doctrine of substantial compliance and intended use is satisfied. On the same logic as above, alternators of APUs and DFGs were cleared based on the excise duty exemption certificates issued under notifications Sl.No:84 of 6/2002-CE; Sl.No:88 of 4/2006-CE; and 64/1995-CE. Since, the main part is cleared under excise duty exemption certificate the same exemption is also available for parts of the main item. He finally stated that the extended period of limitation cannot be invoked for the appellant was under the bona fide belief that alternators were 'parts of aircrafts' and subject to NIL rate of duty. This was also supported by decisions taken by the Hon'ble Supreme Court and the CESTAT in their own case. It is a well settled principle that where an assessee has entertained bona fide doubt regarding classification/non-taxability, proviso to Section 11A (1) cannot be invoked. Therefore, there is no suppression on the part of the appellant. He prayed that the appeal filed by the appellant be allowed and the impugned order be set aside.

5. Learned AR Shri M. Ambe appeared on behalf of Revenue. He stated that it was only after a verification and study of Unit I conducted by the department that it was discovered that manufacture of alternator was being done at Unit – I and was being cleared to Unit – II without payment of duty and without observing any central excise procedure. The assessee's contention that the alternators manufactured at Unit – I was not complete and that the final product came up only at Unit – II after affixing the 'Rotating Rectifier Assembly' and conducting final in-house testing was not correct as the verification of records revealed that rotating rectifier assembly was cleared from Unit – II to Unit – I on several occasions and later were sent from Unit – II to Unit – I for testing purpose and alternator with complete assembly have also been cleared from Unit – I to Unit – II with serial numbers, model, capacity etc. Hence, it appeared that the assessee manufactured fully finished alternators at Unit – I. Further, in terms of Rule 2A of General Rules for the Interpretation of the Schedule to the Central Excise Tariff Act, 1985 (CETA), any reference in a heading to an article incomplete or unfinished but having the essential character of the complete or finished article shall be classified as complete or finished article. Hence the alternator assembled at Unit – I was classifiable under Chapter Heading 8501.00 upto 27.2.2005 and 85016100 / 85016200 with effect from 28.2.2005. Unit – I was claiming exemption under Notification No. 67/95-CE dated 16.3.1995

but since the alternators received from Unit I are used only for the manufacture of exempted final products and not dutiable final product by Unit II, therefore duty exemption appeared to be not available to them under the said Notification for the alternator. The original authority has hence correctly classified the goods and demanded duty etc, so the impugned order may be upheld. He reiterated the other points made in the impugned order.

6. We have heard both sides and carefully gone through the appeal papers and the submissions made. We find that the points for determination are:

(a) Whether the product 'alternators' manufactured at Unit – I is a distinct excisable product,

(b) Whether the alternator in question is classifiable under CETH No. 8501 or 8803 / 8710 of the Schedule to CETA.

(c) Whether Unit – I is eligible for the exemptions claimed by the appellant.

(d) Whether the method adopted for determining the assessable value is correct and

(e) Whether extended period for issue of show cause notice is invokable in this case.

7. We find that the whole issue revolves around the question whether alternators are finally manufactured excisable goods when cleared from Unit I to Unit II.

8. The appellants contentions are;

(i) the alternator can be said to be a complete unit only after fixing the 'rotating rectifier assembly' which converts AC data to DC data, at Unit II.

(ii) the rectifier is one of the six major components used in the alternator which gives it its essential character, as stated in the write up furnished along with reply to the show cause notice on 24/12/2011.

(iii) final in-house testing for various stringent parameters specified by the Directorate General of Aeronautical Quality Assurance is also to be completed before the goods are marketable.

(iv) they have not cleared these semi-finished alternators as such from Unit I to any of their customers.

(v) the impugned order has not refuted these contentions of the appellant.

The impugned order on the other hand holds:

(i) serial number were being affixed on the alternators cleared from Unit I, based on an illustrative list of 20 odd cases, which shows that the goods had the essential character of an alternator

(ii) Rule 2(a) of the General Rules for interpretation of the schedule to the CETA, 1985, holds that the classification of a product which has the essential characteristics of an article whether incomplete or unfinished is to be classified under the appropriate chapter under the CETA as if it is fully finished.

9. We find that by invoking Rule 2(a) of the General Rules for Interpretation of the Schedule to the CETA, 1985 [hereinafter referred to as 'General Rules'], to determine the exigiblity of incomplete or unfinished goods even before deciding whether they are marketable, the learned Commissioner has put the cart before the horse. To determine whether the goods are exigible to Central Excise duties, it is first necessary to determine whether manufacture of 'excisable goods' as defined under Section 2(d) of Central Excise Act, 1944, has taken

place. Thereafter assessment for duty purposes is to be done and not the other way round. The 'General Rules' come into play only if classification and assessment of 'excisable goods' are involved. 'General Rules' cannot cloth an activity as manufacture of goods on the lines contemplated by Section 2(f) of Central Excise Act, 1944. The said Rule would be of use in determining the classification of incomplete/ unfinished goods, for assessment purposes, when they satisfy the criteria for 'excisable goods' including the fact that they are also marketable in that condition.

10. Classification of goods are intrinsically linked to the assessment of goods for the purposes of determining the duty that is payable. The assessment process involves classifying the goods, checking the quantity of goods cleared, ascertaining its value in the case ad valorem duty is to be levied, eligibility of the goods to the benefits of duty exemption if any etc. Hence assessment, which means determination of the tax liability, comes into play only when 'excisable goods' are manufactured. When no excisable product has been demonstrated to have been manufactured 'General Rules' would not be very relevant. The issue of marketability being an essential ingredient of determining whether goods have reached the stage of manufacture where duties of Central Excise could be said to have been attached to it, is no longer res integra. In Moti Laminates Pvt. Ltd. vs. CCE – 1995 (76) ELT 241 (SC), this aspect was again reiterated by the Supreme Court in the following words:

> "6. The duty of excise is leviable under Entry 84 of List I of the VII Schedule on goods manufactured, or produced. That is why the charge under Section 3 of the Act is on all, `Excisable goods', `produced or manufactured'. The expression `excisable goods' has been defined by clause (d) of Section 2 to mean, `goods' specified in the Schedule. The scheme in the Schedule is to divide the goods in two broad categories - one, for which rates are mentioned under

different entry and other the residuary. By this method all goods are excisable either under the specific or the residuary entry. The word `goods' has not been defined in the Act. But it has to be understood in the sense it has been used in Entry 84 of the Schedule. That is why Section 3 levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. Therefore, where the goods are specified in the Schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression `produced or manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently, it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured, they were not marketed or capable of being marketed.

7. The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be useable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling. . . . . ."

In, Cipla Limited Vs Commissioner of C. Ex. Bangalore [2008 (225) ELT 403 (SC)] cited by the appellant, the Hon'ble Apex Court, held at para 11, that since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to prove that the product was marketable or was capable of being marketed.

11. Although the SCN dated 04/06/2008 at para 13 alleged that transactions between Unit I and Unit II (and vice versa) show the facility for fixing of rotating rectifier assembly on the alternators and testing was available in their Unit I itself; that in in a dozen odd cases, serial number were affixed to the alternators cleared from Unit I, pointing to the completion of the manufacturing process, the issue has not been elaborately discussed in the findings portion of the impugned order. Para 13.6 merely states that the recorded instances of the

movement of alternators proves that the appellants manufacture fully finished alternators. The crux of his findings in this matter appears at para 13.6. At para 13.6 of the impugned order the learned Commissioner holds that even if the semi-finished alternators manufactured at Unit I was cleared to Unit II, by virtue of rule 2(a) of the General Rules for interpretation of the schedule to the CETA, 1985 the same is liable for payment of duty. This reasoning is not legally sound as discussed above. Merely finding the availability of the testing facility in Unit I is not the same as finding that the impugned goods were actually manufactured, tested and had reached the marketable stage at Unit I itself. Further no clandestine clearance of the 'alternator', to third parties, has been alleged in the notice, whereby marketability could enter the picture. In the circumstances the appellants contention that the essential character of the alternator is attained only after fixing the 'rotating rectifier assembly' and that the article can be said to be a complete unit known in the market as an 'alternator' only after testing for quality assurance at Unit II cannot be ignored. The appellant has also relied upon the decision of the Apex Court in the case of M/s Flex Engineering Lt Vs CCE UP [2012 (276) ELT 153(SC)]. Para 21 is reproduced below;

> *"21. Thus, in our opinion the process of testing the customised F&S machines is inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the afore-extracted covenant in the purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence not marketable at the factory gate. We are, therefore, of the opinion that the manufacturing process in the present case gets completed on testing of the said machines."*

Based on the discussions above we are of the opinion that the lower authority has failed to demonstrate that a distinct marketable commodity known as 'alternator' has been manufactured and come into being at Unit I, to be exigible to Central Excise duties. The appeal hence succeeds on this issue.

12. Although the main dispute on merits having been decided, it is felt proper to proceed to examine and consider the facts and merits of the case in entirety, so as to settle the basic disputed issue's related to assessment. We hence examine the other points listed at para 6 above. With respect to the issue at para 6 (b), the appellant's have in their appeal stated that initially they had only one unit but due to shortage of space to cater to the needs of the defence establishment, they have moved men and material to Unit I from Unit II. The units are a single entity and the semi-finished alternators of Unit I go through the finishing processes at Unit II. It is a continuous process of manufacture. As regards the classification and rate of duty applicable on 'alternators' if they had been found manufactured at Unit I, it should not make any difference. The appellant states that they have established the sole and principal use of GPU is for servicing of aircrafts. The classification of GPU was decided under CETH 8803 by the Tribunal in the appellant's own case – 2001 (138) ELT 1152 by relying on Note 3. The Revenue's appeal in the case was also dismissed by the Hon'ble Supreme Court. Similarly, the sole and principal use of APU is in armored vehicles and the classification is CETH 8710. Therefore, alternators of APU are also classified under CETH 8710. The learned Lower Authority on the other hand has held that both Unit I and Unit II are separate premises with separate Central Excise registration certificates. The usage of products manufactured in Unit I after its transportation to Unit II for further production cannot be termed as usage of goods within the factory of production. In other

word the processing of goods sent by Unit I to Unit II cannot be considered to be done during a continuous process of manufacture within a single unit.

13. Section 2 of the CETA provides that the rates at which duties of excise shall be levied are specified in its First and Second Schedule. Classification of excisable goods under CETA is to be determined according to the terms of the headings and any relative Section or Chapter Notes. The First Schedule contains the "General Rules'. These Rules begin with a mandate that the "classification of goods in this Schedule shall be governed by the principles laid thereunder." The steps for classification, under the schedule, will be firstly to determine whether an excisable product by itself finds a suitable mention in terms of the CETH. A specific entry should be preferred to a residuary entry. Secondly one has to check for any exclusion of the said goods from the identified specific heading, in line with the Section/ Chapter Notes etc, if applicable, so as to classify it elsewhere. Section/ Chapter notes given in the schedule to the CETA have a limited purpose of excluding the coverage of an item from a heading where it finds mention or of extending coverage of a particular item to a tariff entry in the schedule to the CETA. Hence classification of goods has to be first determined according to the terms of specific headings ie the statutory fiscal entry, of the schedule and then applying the relevant Section or Chapter Notes to it, if any, to finalise the classification and not vice versa. This is line with the judgment of the Hon'ble Supreme Court in C.C. (General), New Delhi Vs. Gujarat Perstorp Electronics Ltd., [2005 (186) E.L.T. 532], wherein Revenue held that Drawings, Designs and Plans imported by the Company could not be said to be "Books" within the

meaning of Chapter Heading 49.01 but would be covered under sub-heading 4911.99 and hence were liable to custom duty. The Hon'ble Supreme Court held that a residuary heading can be applied only when goods are shown to be not falling under any other specific heading. If a specific item covers them, residuary item has no application.

> *"57. . . . .Priority, therefore, has to be given to the main entry and not the residual entry. According to the Company, the case is covered by the main entry under 49.01, and in that view of the matter, one cannot consider the residual entry 49.11.*
>
> *58. In Indian Metals & Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneshwar, 1991 Supp (1) SCC 125, this Court held that residuary item can be referred to and such item can be applied only when goods are shown to be not falling under any other specific item. If they are covered by a specific item, residuary item has no application.*
>
> *59. The Court stated;*
> *"One more aspect of the issue should be adverted to before we conclude. The assessee is relying upon a specific entry in the tariff schedule while the department seeks to bring the goods to charge under the residuary Item 68. It is a settled principle that unless the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the specific items mentioned in the tariff, resort cannot be had to the residuary item" [See also Bharat Forge & Press Industries v. Commissioner of Central Excise, (1990) 1 SCC 532 : (1990) 45 ELT 525 (sc)] . . . . ."*

And again in Speedway Rubber Co. Vs. Commissioner of Central Excise, Chandigarh, [2002 (143) E.L.T. 8] it was held as under;

> *"24. We may notice that as per Rule 3(a) of the Interpretation Rules to the Central Excise Tariff Act, 1985: "3. (a) The heading which provides the most specific description shall be preferred to headings providing a more general description."*
>
> *25. Accordingly, Heading 40.08 provides more specific description to the impugned goods than Heading 40.16 and hence, the specific entry should overrule the general entry. . . . "*

14. We find that the classification to be decided in this case is that of 'alternators'. The said item finds specific mention under Chapter Heading 8501.00 (up to 27.2.2005 and 85016100 / 85016200 with effect from 28.2.2005). The said CETH as it stands now is given under:-

Tariff Item	Description of goods	Unit	Rate of duty

(1)	(2)	(3)	(4)
	- AC generators (alternators):		
8501 61 00	-- Of an output not exceeding 75k VA	“	12.5%
8501 62 00	-- Of an output exceeding 75kVA but not exceeding 375k VA	“	12.5%
8501 63 00	-- Of an output exceeding 375k VA but not exceeding 750 k VA	“	12.5%
8501 64	-- Of an output exceeding 750 k VA	“	12.5%
8501 64 01	--- Of an output exceeding 750 k VA but not exceeding 2,000 k VA	“	12.5%
8501 64 20	--- Of an output exceeding 2,000 k VA but not exceeding 5,000 k VA	“	12.5%
8501 64 30	--- Of an output exceeding 5,000 k VA but not exceeding 15,000 k VA	“	12.5%
8501 64 40	--- Of an output exceeding 15,000 k VA but not exceeding 37,500 k VA	“	12.5%
8501 64 50	--- Of an output exceeding 37,500 k VA but not exceeding 75,000 k VA	“	12.5%
8501 64 60	--- Of an output exceeding 75,000 k VA but not exceeding 1,37,500 k VA	“	12.5%
8501 64 70	--- Of an output exceeding 1,37,500 K VA but not exceeding 3,12,500 k VA	“	12.5%
8501 64 80	--- Of an output exceeding 3,12,500 k VA	“	12.5.%

It has to be seen next whether there are any Section/ Chapter Notes that would take it out of the said classification heading. Note 2 of Section XVI, states as under:

> *“2. Subject to note 1 to this section, note 1 to Chapter 84 and note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:*
>
> *“(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are <u>in all cases</u> to be classified in their respective headings.* (emphasis added)
>
> *(b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517, and parts which are suitable for use solely or principally with the goods of heading 8524 are to be classified in heading 8529;*
>
> *(c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.”*

It is seen that Note 2 of Section XVI contains three rules, dealing with three different categories of parts. (a) <u>Parts which are goods</u> included in any of the headings of Chapter 84 or 85 (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading and (c) All other parts. From the scheme of the said rules each of these rules has to be applied sequentially as it moves from a specific product to a general product. 'Alternator' gets covered by the first rule as 'parts which are goods included in any of the headings of Chapter 84 or 85 and hence falls in the category of goods which 'in all cases' are to be classified in their respective headings. Having found a suitable classification, the other two rules of Note 2 of Section XVI, are not relevant in this case. Once the classification of 'alternators' has been discovered within a Chapter and it satisfies the Section/ Chapter Notes, it is not required to further look into Section/ Chapter notes of other Sections to find a probable classification elsewhere. This view is supported by the Apex Courts judgment in Indian Metals & Ferro Alloys Ltd., Cuttack (supra).

14. The Apex Court in its judgment in M/s. Intel Design Systems (India) P. Ltd. Vs. Commissioner of Customs & C. Ex. [2008 (223) ELT 135 (SC)], cited in favour of Revenue in the impugned order, examined a similar matter where the appellant, was engaged in the manufacture of excisable goods, inter alia, filed classification list of their products mentioned as parts of tanks and other armoured and motorized fighting vehicles claiming classification under Chapter Heading 8710 of the Schedule to the CETA. The said goods were manufactured for Government of India, Ministry of Defence and are used in the tanks and armoured fighting vehicles as per drawing and design supplied by the Ministry of Defence. Since the goods are manufactured for use solely and principally for fitting into the tanks in armoured fighting

vehicles of the Defence Department, they sought classification of the goods under Chapter sub-heading 8710.00. On the other hand, the adjudicating authority relied upon Note 2(f) to Section XVII which excludes the goods i.e. electrical machinery and equipment falling under Chapter 85 and since the appellants' manufacture goods such as contractors, switches, control box etc. and are used for switching/protecting electrical circuits or for making connections to or in electric circuits, these are parts of electrical equipment's falling under chapter sub-heading 8536.90 and CBEC circular was, therefore, not felt relevant. Moreover, reliance was placed on the interpretative Rule 3(a) of the 'General Rules', which provides that specific entry shall be preferred to the heading providing more general description. The Apex Court at para 5 held as under:

> *"5. As per the Explanatory Notes to HSN the parts falling under Chapter Heading 8710 would be covered under the said chapter, provided they fulfill both the conditions i.e. they must be identifiable as being suitable for use solely or principally for such vehicles and that they must not be excluded by the provisions of Notes to Section XVII. The identifiable parts under the said heading bodies of armoured vehicles and parts thereof, cover special road wheels for armoured cars, propulsion wheels for tanks, tracts etc. As per this requirement, the goods should not only be identifiable to be armoured vehicles, but it should so not have been excluded by Notes to Section XVII. The Chapter note 2(f) excludes electrical machinery and equipment falling under Chapter 85. Explanatory Notes to HSN relating to the parts and accessories excluded by Note 2 specify items with reference to specific Chapter Heading as per (7) (a), (k) which excludes photographs and other current collectors for electric traction vehicles, fuses, switches and other electric apparatus of Heading No. 85.35 or 85.36. The items, therefore, manufactured by the appellants are identifiable or are in the nature of goods falling under Chapter Heading 85.36. Since these fall under the category of excluded goods under Chapter Notes, even though they are used specifically solely or principally with the armoured vehicles of Chapter Heading 8710, they are classifiable under Chapter Heading 8536.90 only as held by the adjudicating authority."*

15. The appellant has stated that the Apex Court's judgment in Intel Design Systems (supra) decided on 11/02/2008, did not consider Note 3 of Chapter XVII while deciding the classification of 'parts of tanks and

other armored and motorized fighting vehicles'. They further stated that classifying 'alternators' under CETH 8501 by giving precedence to Note 2(f) of Section XVII [Exclusion of electrical machinery from Section XVII] over Note 3 of Section XVII [sole and principal use test] did not find favour with the Apex Court in its judgement in Westinghouse Saxby Farmer Ltd Vs Commissioner of C. Ex. Calcutta [2021 (376) ELT 14 SC] delivered on 08/03/2021, wherein it examined the classification of 'relays' in a similar dispute involving Section Notes 2 and 3 of Section XVII, and held as under;

> "14. The questions that arise for our consideration in this appeal are:
>
> (i) Whether the "Relays" manufactured by the appellant used only as Railway signalling equipment would fall under Chapter 86, Tariff Item 8608 as claimed by the appellant or under Chapter 85 Tariff Item No. 8536.90 as claimed by the Department?
>
> (ii) ......
>
> . . . . .
>
> 31. But in invoking General Rule 3(a), the Authorities have omitted to take note of 2 things. They are : (i) that as laid down by this Court in Commissioner of Central Excise v. Simplex Mills Co. Ltd. [(2005) 3 SCC 51 = 2005 (181) E.L.T. 345 (S.C.)] the General Rules of Interpretation will come into play, as mandated in Rule 1 itself, only when no clear picture emerges from the terms of the Headings and the relevant section or chapter notes; and (ii) that in any case, Rule 3 of the General Rules can be invoked only when a particular goods is classifiable under two or more Headings, either by application of Rule 2(b) or for any other reason. Once the authorities have concluded that by virtue of Note 2(f) of Section XVII, 'relays' manufactured by the appellant are not even classifiable under Chapter Heading 8608, we do not know how the Authorities could fall back upon Rule 3(a) of the General Rules. There is a fundamental fallacy in the reasoning of the Authorities, that Rule 3(a) of the General Rules will apply, especially after they had found that 'relays' are not classifiable under Chapter Heading 8608, on account of Note 2(f) of Section XVII.
>
> 32. Coming to Section XVII, which precedes Chapter 86, the same contains a few notes, one of which is Note 2, which lists out certain articles to which the expressions "parts" and "parts and accessories" mentioned in Chapter 86 do not apply. Note 2(f) reads as follows :-
>
> "(1) xxxx
>
> (2) xxx

(a) xxxx

(b) xxxx

(c) xxxx

(d) xxxx

(e) xxxx

(f) electrical machinery or equipment (Chapter 85)".

33. Note 2(f) is relied upon by the Revenue, in view of the fact that Chapter Heading 8608 uses the words "parts of the foregoing" after the words "Railway or tramway track fixtures and fittings" etc. Chapter Heading 8608 does not specifically mention "electrical relays". The assessee's contention is that "it is part of the railway signalling safety or traffic control equipment" and that, therefore, Relays manufactured by them would fall under Chapter Heading 8608 due to the usage of the word "parts". It is this contention that is sought to be repelled by the Authorities by relying upon Note 2(f) of Section XVII.

34. Though at first blush, Note 2(f) seems to apply to the case on hand, it may not, upon a deeper scrutiny.

35. Note 3 of Section XVII reads as follows:

"References in Chapters 86 to 88 to "parts" or "accessories" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those Chapters. A part or accessory which answers to a description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part or accessory."

36. What is recognized in Note 3 can be called the "suitability for use test" or 'the user test'. While the exclusion under Note 2(f) may be of goods which are capable of being marketed independently as electrical machinery or equipment, for use otherwise than in or as Railway signalling equipment, those parts which are suitable for use solely or principally

37. It is conceded by the Revenue that the relays manufactured by the appellant are used solely as part of the railway signalling/traffic control equipment. Therefore, the invocation of Note 2(f) in Section XVII, overlooking the "sole or principal user test" indicated in Note 3, is not justified.

38. On the question as to what test would be appropriate in a given case, this court pointed out in A. Nagaraju Bros. v. State of A.P. [1994 Supp (3) SCC 122 = 1994 (72) E.L.T. 801 (S.C.)], as follows :
".....there is no one single universal test in these matters. The several decided cases drive home this truth quite eloquently. It is for this reason probably that the common parlance test or commercial usage test, as it is called, is treated as the more appropriate test, though not the only one. There may be cases, particularly in the case of new products, where this test may not be appropriate. In such cases, other tests like the test of predominance, either by weight of value or

> on some other basis may have to be applied. It is indeed not possible, nor desirable, to lay down any hard and fast rules of universal application."
>
> Therefore, the respondents ought not to have overlooked the 'predominant use' or 'sole/principal use' test acknowledged by the General Rules for the Interpretation of the Schedule.
>
> 39. As pointed out by the Commissioner (Appeals), the goods were previously classified (before 1993) under sub-heading 8536.90, but a revised classification list, classifying them under sub-heading 8608, submitted by the appellant, was approved by the competent Authority on 27-8-1993. After such specific approval of the classification list, it is not proper on the part of the Authorities to invoke Note 2(f) of Section XVII. Hence question No. 1 is answered in favour of the appellant and against the Revenue."

16. It is seen from the above judgment that it does not deal with a case of classifying goods that has a specific description under a tariff heading and by applying Note 2 of Section XVI. In fact, Section XVI does not have a Note similar to Note 3 of Section XVII. The Westinghouse Saxby Farmer Ltd judgment (supra) looks into the applicability of General Rule 3(a) apart from Note 2 and 3 of Section XVII for classifying 'relays'. The 'sole/principal use' test was a requirement of Note 3 of Section XVII. However, in the impugned order while the classification of the 'alternators' was settled under Chapter 85 falling under Section XVI, Section Notes of Chapter XVII have been examined in the context of the claim of the appellant for classification of the goods under headings 8710 or 8803. Moreover, the said judgment at para 38, citing the Apex Court's decision in A Nagarajan Bro's, states that there is no one single universal test in these matters and that it is indeed not possible, nor desirable to lay down any hard and fast rule of universal application. In the Westinghouse Saxby Farmer judgment (supra), the Hon'ble Supreme Court used to 'sole or principal user test' as required by Note 3 to Section XVII. There is no such requirement in Section XVI. Hence the judgment is distinguished.

It has been held by the Apex Court in its judgment in the case of Collector of Central Excise, Calcutta v. M/s. Alnoori Tobacco Products and Anr. [2004 (170) E.L.T. 135 (S.C.)]: .

> *"10.Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*
>
> *11.The following words of Lord Denning in the matter of applying precedents have become locus classicus :*
>
> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*
>
> * * * * * * * *
>
> *"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

The said judgment has been approved and followed by the Apex Court in a number of cases [see Escorts Ltd Vs CCE, Delhi–II, 2004 (173) ELT 113 (SC); Union of India & Anr. Vs Major Bahadur Singh, (2006) 1 SCC 368].

17. In the case of Commissioner of Central Excise, Delhi Vs Carrier Aircon Ltd. [2006 (199) E.L.T. 577 (S.C.)] decided by the Hon'ble Supreme Court the issue to be determined was;

> *2. . . . . "Whether the chillers manufactured by M/s. Carrier Aircon Limited (respondent herein) are classifiable under Chapter Heading 84.18 of the Schedule to the Central Tariff Act (for short "the Act") as claimed by them or under Chapter Heading 84.15 as contended by the Revenue?"*

It is seen that both the sub-headings under dispute were falling under Chapter 84 coming under Section XVI of the Schedule and did not have the legal requirement of being subjected to the 'sole/principal use test' as required by Note 3 of Section XVII. The Hon'ble Court held:

> "15. End use to which the product is put to by itself cannot be determinative of the classification of the product. See Indian Aluminium Cables Ltd. vs. Union of India and Others, 1985 (3) SCC 284 / 1985 AIR 1201. There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification the relevant factors inter alia are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product."

18. In the light of the above discussion the classification of 'alternators' if it had been found to be manufactured by Unit I would fall under CETH 8501.00 up to 27.2.2005 and under CETH 85016100 / 85016200 with effect from 28.2.2005, as decided in the impugned order and not under CETH 8803/ 8710 as claimed by the appellants.

19. Coming to the issue of whether the 'alternators' of Unit I were eligible for the exemption claimed by the appellant, as at para 6 (c) above. The appellant has stated that for 'alternators' falling under CETH 8803 the Tariff rate is NIL upto 11.5.2007. Therefore, the demand on the Alternators of GPU from May, 2003 to 10.5.2007 is not sustainable. The learned counsel stated that irrespective of CETH [whether it is 8803 or 8501], the parts of aeroplanes or helicopters of any chapter for servicing of aeroplanes or helicopters are exempted vide Sl.No:240 of Notification 6/2002-CE dated 1.3.2002, which was rescinded with effect from 1.3.2006. The above exemption was further extended by Notification 6/2006-CE dated 1.3.2006 [Sl.No:88] upto 28.2.2007. From 1.3.2007, notification was further amended by Notification 6/2007-CE dated 1.3.2007, wherein Sl.No:88 was omitted and exemption for parts of aircrafts - 8803 was introduced from 1.3.2007 [Sl.No:54B]. It is a conditional exemption. Further,

Sl.No:54B was further amended by notification 19/2007-CE dated 7.3.2007, wherein "any chapter" was substituted for "8803". Further, bulk quantity of GPUs was also exported under notification 42/2001-CE (NT). It is an admitted fact that Unit-II has availed these exemptions for GPUs and such exemption was not denied by the Revenue.

19. The impugned order has discussed the ineligibility of 'alternators' for exemption under notification 67/95 CE dated16/03/1995 which provides for duty exemption on inputs used within the factory of production in or in relation to the manufacture of the final products. The impugned order reject the claim for exemption on two grounds (a) the goods are not manufactured in the same unit. Unit I and Unit II have different premises and different Central Excise Registration Certificates and hence the 'alternators' are not consumed within the factory. (b) the second condition of the notification is that the final products should suffer duty, which is not so in this case. We hence agree with the impugned order that the appellant was not eligible for the said exemption on 'alternators' during the period covered by the SCN.

20. The learned Commissioner has also examined the appellants claim for exemption under notification 214/86 dated 25/03/1986. He found that the appellant had not followed the job-work procedure as laid out in the notification. However, the appellant was of the view that the transactions were covered by delivery challans of Unit I and Unit II and hence substantial compliance and intended use is satisfied. We find that this is a procedural issue and in the light of our finding that

no manufacture was involved a sympathetic view can be taken and the matter be laid to rest without having to go into the issue in-depth.

21. With respect to the other exemption notifications claimed by the appellant, we find that the same has not been discussed in the impugned order. Hence had the 'alternators' been found to be excisable goods manufactured by Unit I, the claims of the appellants would require to be revisited by the proper officer in the light of the classification of the goods discussed above.

22. As regards para 6 (d) regarding, the value of 'alternators', it is seen that the appellant are amenable to the valuation of alternators, when captively consumed in Unit II, if arrived at as per Rule 8 of the Central Excise Valuation Rules 2000. Their only contention was that if goods from Unit I are to be valued for the purpose of Central Excise duty assessment, then the value based on costing principles should be determined based on the data pertaining to Unit I and not that of Unit II. We agree with the same.

23. Coming to the fifth and final issue, at para 6 (e) as to whether extended period can be invoked for issue of show cause notice in this case. We find that this question would have been relevant only if a demand for duty was involved. Further the question is not pertaining to the core issue of whether the impugned goods are exigible to duty and is also not related to their assessment. Hence the question loses relevance at this stage.

24. Based on the discussions we find that the appeal succeeds with respect to point (a) of para 6 above, regarding the issue of 'alternators' not being exigible to duty in their semi-finished state in Unit I and accordingly the monetary demands made and penalty imposed in the

impugned order under various provisions of law, are set aside. It is clarified that our decisions with respect to the findings of the Lower Authority listed at points (b) to (e) of para 6, have been discussed individually above, only for purposes of disposing off all issues raised in the appeal. The decisions in this regard would have been operational if the appellant had failed in his appeal on merits on exigiblity of 'alternators', as per the question listed at para 6 (a) above.

25. In the light of the discussions, the impugned order is modified as above with consequential relief, if any, as per law. The appeal is disposed off accordingly.

(Pronounced in open court on 25.4.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

Rex