

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/6171/2004 - EX[DB]

Date 24/05/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E.JAIPUR-I
N.C.R.B.STATUE CIRCLE,C-SCHEME,JAIPUR
302005
C.C.E.JAIPUR-I

Appellant

Vs
Respondent

M/S AGARWAL MARBLES & INDUSTRIES LTD.

I am directed to transmit herewith a certified copy of **Final order No.A/614/ 2012 EX[DB]** dated 10/5/12
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**

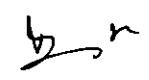

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S AGARWAL MARBLES & INDUSTRIES LTD.
B-73,ROAD NO-1-C,V.K.I.AREA
JAIPUR

2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench. COURT NO. I**

DATE OF HEARING/DECISION : 10/05/2012.

Excise Appeal No. 6171 of 2004
[Arising out of the Order-in-Appeal No. 302 (MPM) CE/JPR-I/2004 dated 20/09/2004 passed by The Commissioner (Appeals-I), Central Excise, Jaipur.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

CCE, Jaipur – I

Appellant

Versus

M/s Agarwal Marbles & Industries Ltd.

Respondent

Appearance

Ms. Sukriti Das, Advocate – for the Appellant.
Shri R.K. Verma, Authorized Representative (DR) – for the Respondent.

CORAM : Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/ 614 / 2012 - EX (BR)

Shri Justice Ajit Bharihoke :-

This is departmental appeal against the order of Commissioner (Appeals) No. 302(M.P.M.) CE/JPR-I/2004 dated 13.09.2004 whereby he accepted the appeal of the assessee and set aside the impugned order in original.

2. Briefly stated the facts relevant for the disposal of this appeal are that M/s Agarwal Marbles & Industries, Jaipur, the respondent herein are engaged in manufacture of marble slabs, marble tiles and polished marble tiles falling under heading 2504 of the schedule to the Central Excise Tariff Act, 1985.

3. In the evening of 27.08.2001, the team of excise officer paid a surprise visit to the unit of the assessee and conducted physical verification of the stock of finished goods and documents relating to production and clearance of goods. This exercise continued till the evening of 28.08.2001. On scrutiny of daily stock account and other documents, it was found that stock available at the premises was in excess to the extent of total 1152.613 sq. mtr. of marble slabs, 380.66 sq. mtr. of marble tiles and 1356.73 sq. mtr. of polished marble tiles. Aforesaid excess quantity of marble slabs, marble tiles were seized by the official of excise department. Accordingly, a show cause notice was issued to the appellant on 14.12.2001 which was contested vide order-in-original dated 31.01.2002. The adjudicating authority vide order-in-original ordered confiscation of the seized goods. He, however,

gave the respondent an option to redeem the seized goods on payment of redemption fine of Rs. 75,000/-, penalty of Rs. 40,000/- was also imposed on the respondent.

4. Being aggrieved of the order-in-original, the respondent filed appeal and the Commissioner (Appeals) relying upon the judgement of Supreme Court in the case of **M/s Aman Marble and Industries vs. CCE, Jaipur reported in 2003 (58) ELT 595 (SC)** concluded that the process of cutting marble blocks into slabs did not amount to manufacture. Accordingly, the items seized were not excisable items. Thus, he accepted the appeal and set aside the impugned order.

5. The department feeling aggrieved of the impugned order of Commissioner (Appeals) has preferred this appeal.

6. Shri R.K. Verma, ld. AR for the appellant submits that the impugned order of Commissioner (Appeals) is not sustainable for the reason that it is based upon incorrect appreciation of facts. It is submitted that Commissioner (Appeals) have failed to appreciate that confiscated marble slabs and marble tiles ("polished and unpolished") are produced after processing and cutting the uneven marble blocks to make them marketable and the aforesaid process is squarely covered within the definition of the "manufacture" as defined under Section 2(f) of the Central Excise Act, 1944. Ld. AR further submits that Commissioner (Appeals) has failed to appreciate that the judgement of Supreme Court in the matter of **Aman Marble Industries Pvt. Ltd. vs. CCE, Jaipur reported in 2003 (157) ELT 393 (SC)** is based upon its own facts and is not applicable to the facts of this

case. It is further submitted that Supreme Court in the matter of **Income Tax Officer, Udiapur vs. Arihant Tiles & Marbles (P) Ltd.** reported in **2010 (249) ELT 161 (SC)** has held that converting of marble blocks to marble tiles of specific sizes amounts to manufacture as such Commissioner (Appeals) has fallen in error in holding that the confiscated goods were not manufactured by the respondent. Ld. AR has thus urged for setting aside the impugned order and affirming the order-in-original.

7. Ms. Sukriti Das, ld. Advocate for the respondent has argued in support of the impugned order and submitted that the judgement of Supreme Court in **Aman Marble Industries (supra)** is squarely applicable to the facts of this case. She has drawn our attention to Chapter Note 6 which was added to Chapter 25 of the Central Excise Tariff Act, relating to mineral product. She submits that earlier to this explanation the process of converting stone blocks into slabs or tiles by the process of cutting or sawing or sizing or polishing or any other process did not amount to manufacture within the scope of Section 2(f) of the Central Excise Act and for this reason, the legislature deemed it appropriate incorporate explanatory note 6 to Chapter 25 of the Central Excise Tariff Act. The respondent has also relied upon the judgement of Tribunal in the matter of **Oriental Trimex Ltd. vs. CCE, Noida** reported in **2010 (249) ELT 259 (Tri. Del.)** wherein it was held that sizing of marble blocks/ slabs resulting into specific size slab tiles did not amount to manufacture prior to 01.03.2006.

8. We have considered the rival contention and perused the record. Rule 25 of the Central Excise Rules, 2001 deals with confiscation and penalty which reads thus:-

RULE 25. Confiscation and penalty. — (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -
(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.

From the above it is clear that that under Rule 25 only excisable goods are liable to confiscation in terms of the Rule.

9. It is well settled that before central excise duty can be imposed on any article, it must satisfy basic conditions:-

(i) the article should be goods; (ii) it should have come into existence as a result of "manufacture" and (iii) it must be mentioned in the Central Excise Tariff as charges to duty. In the matter of Hindustan Zinc reported in 2005 (181) ELT 170 (SC), the Supreme Court held that if either all the above conditions is not satisfied central excise duty cannot be levied. Undisputedly marble tiles and marble

slabs in question are goods. Thus, it is to be seen whether those goods came into existence as a result of manufacture.

10. The term “manufacture” is defined under Section 2(f) of the Central Excise Act which reads thus:

2(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.
- (iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling 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”.

11. On reading of above, it is evident that Section 2(f) does not define the word “manufacture” precisely but it only lays down an inclusive definition. The most generic meaning of the term “manufacture” is action or its process of producing the articles or material by application of physical labour mechanical power or some chemical process. Other limited meaning of the word implies transformation of raw material into a new commercial commodity or finished product which has a separate identity. The Supreme

court in the matter of Union of India vs. DCM reported in 1963 SC 791 while dealing with the definition of "manufacture" inter-alia observe thus:-

"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."

These observations in *Health & Milligan Manufacturing Company, the Sherwin-Williams company, etc. v. J.H. Worst, Director of the North Dakota Government Agriculture Experiment Station* which were referred to with approval by this court in the case of *Pio Food Packers'*, supra, was relied upon:

"At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured". (Emphasis Supplied).

The following observations of Bhagwati J. in *Pio Food Packers* case were cited:

"....manufacture is the end result of one or more processes through which the original commodity is made to pass... Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that in one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity. (Emphasis Supplied).

12. In the matter of Union of India vs. Parle Products Pvt. Ltd. reported in 1994 (74) ELT 492 (SC) while dealing with the question whether the process involved "aluminium foil" into paper backed aluminium foil amount to "manufacture" of Section 2(f) of the Central Excise Act.

"4. On the question whether the respondents filed a counter-affidavit or not, there is some controversy. Respondents say that a counter was in fact filed in the High Court on 13th August, 1987.

Be that as it may, the matter of this nature does not stand concluded by a mere non-traverse. The question whether the process involved in converting the "aluminium-foil" into "paper-backed aluminium-foil" amounts to manufacture within the meaning of S.2(f) of the Central Excise and Salt Act, 1944, or not, turns upon whether as a result of the application of the process a new and commercially distinct article, known to the market as such, emerges at the end. This, in turn, depends upon the evidence as to the requisite transportation of the goods into a new and different article having distinct identity and character or use. Unless this occurs, the process, however elaborate it might otherwise be, would not graduate itself into 'manufacture'. The article that results from applying the process must be commercial known as another and different article.

Such a question can be decided on evidence as to how the article is known and recognized by those in the trade, industry or commerce dealing with the article. The finding of the court must be based on such evidence and not on its own perceptions of the matter. In this case, evidence on the point is conspicuous by its absence. Indeed, in a sense, there was nothing to traverse. Appellant, so far as the proceedings in judicial review are concerned could well have remained content with a demurrer. The Court cannot reach a conclusion on its own perception and appreciation of the matter".

13. The legal position which emerges from the above referred judgements is that, whether or not a product has come into existence as a result of process covered within the definition "manufacture" would depend upon the factor whether as a result of application of the process upon the basic material a new and commercially distinct article known to the market has emerged and such a question can be decided only on the basis of evidence as

to how the finished product is known and recognized by those in the trade, industry or commerce dealing with the article and the finding on the issue must be based on such evidence known not on the present perception of the adjudicating authority.

14. In the matter of Aman Marble Industries (supra), the precise question, whether cutting of marble block into marble slabs amounts to manufacture has been answered by the Supreme Court as under:-

“2. The contention put forth on behalf of the appellant is that the activity carried on by the appellant does not amount to manufacture at all. The case put forth by the learned Counsel appearing on behalf of the appellant is that the cutting of blocks into marble slabs involves only sawing of the marble blocks and thereby does not bring into existence a distinct commodity so as to state that when such activity is completed a new substance has come into existence. The submission is that even after such activity is completed the marble will remain marble and, therefore, this activity does not attract tax.

3. Learned counsel for the department however submitted that the activity has been specifically brought into tariff item and when certain processes are applied to a commodity to make it marketable, it certainly amounts to manufacture and thereof attracts tax under the Central Excise Act.

4. in Rajasthan State Electricity Board v. Associated Stone Industries and Anr. JT 2000 (6) SC 522 such a question fell for consideration before this Court although in a different context, and this Court held as follows:

“This a part excavation of stones from a mine and thereafter cutting them and polishing them into slabs did not amount to manufacture of goods. The word “manufacture” generally and in the ordinary parlance in the absence of its definition in the Act should be understood to mean bringing to existence a new and different article having distinctive name, character or use after undergoing some transformation. When no new product as such comes into existence, there is no process of manufacture. The cutting and polishing stones into slabs is not a process of manufacture for obvious and simple reason that no new and distinct commercial product came into existence as the

end product still remained stone and thus its original identity continued.”
and this position was further reiterated as follows:-

- “... It is not possible to accept that excavation of stones and thereafter cutting and polishing them into slabs resulted in any manufacture of goods”.
15. Coming to the marble tiles polished and unpolished, in order to find out whether the process of production of marble tiles amounts to manufacture under Section 2(f)(1) of the Act, it is necessary to understand the process for bringing into being the marble tiles. The Supreme Court in the matter of Income Tax Officer, Udaipur vs. Arihant Tiles (supra) while dealing with this issue under Income Tax proceedings have concisely reproduced the stepwise activities undertaken by the procedure to bring into existence marble tiles polished and unpolished and held that process of bringing into being marble tiles amounts to manufacture. The relevant observation of Supreme Court in the aforesaid case are reproduced thus:-

“6. To answer the above issue, it is necessary to reproduce the details of stepwise activities undertaken by the assessee(s) which read as follows :-

“(i) Marble blocks excavated/extracted by the mine owners being in raw uneven shapes have to be properly sorted out and marked;

(ii) Such blocks are then processed on single blade/wire saw machines using advanced technology to square them by separating waster material;

(iii) Squared up blocks are sawed for making slabs by using the gang saw machine or single/multi block cutter machine;

(iv) The sawn slabs are further reinforced by way of filling cracks by epoxy resins and fibre netting;

(v) The slabs are polished on polishing machine; the slabs are further edge cut into required dimensions/tiles as per market

requirement in perfect angles by edge cutting machine and multi disc cutter machines;

(vi) Polished slabs and tiles are buffed by shiner."

In addition to the above activities, it may also be noted that the assessee(s) has been consistently regarded as a manufacturer/producer by various Government Departments and Agencies. The above processes undertaken by the Respondent (s) have been treated as manufacture under the Excise Act and allied tax laws.

14. In the case of *Aman Marble Industries Pvt. Ltd. v. Collector of Central Excise*, reported in 2003 (157) E.L.T. 393 (S.C.), the question that arose for consideration was whether cutting of marble blocks into marble slabs amounted to manufacture for the purposes of Central Excise Act. At the outset, we may point out that in the present case, we are not only concerned with the word "manufacture", but we are also concerned with the connotation of the word "production" in Section 80IA of the Income Tax Act, 1961, which, as stated herein-above, has a wider meaning as compared to the word "manufacture". Further, when one refers to the word "production", it means manufacture plus something in addition thereto. The word "production" was not under consideration before this Court in the case of *Aman Marble Industries Pvt. Ltd.* (supra). Be that as it may, in that case, it was held that "cutting" of marble blocks into slabs *per se* did not amount to "manufacture". This conclusion was based on the observations made by this court in the case of *Rajasthan State Electricity Board* (supra). In our view, the judgment of this Court in *Aman Marble Industries Pvt. Ltd.* (supra) also has no application to the facts of the present case. One of the most important reasons for saying so is that in all such cases, particularly under the Excise law, the Court has to go by the facts of each case. In each case one has to examine the nature of the activity undertaken by an assessee. Mere extraction of stones may not constitute manufacture. Similarly, after extraction, if marble blocks are cut into slabs *per se* will not amount to the activity of manufacture.

15. In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated herein-above is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on the facts of the cases in hand, there is certainly an activity which will come in the category of "manufacture" or "production" under Section 80IA of the Income Tax Act. As stated

herein-above, the judgment of this Court in *Aman Marble Industries Pvt. Ltd.* was not required to construe the word "production" in addition to the word "manufacture". One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production. Therefore, looking to the nature of the activity stepwise, we are of the view that the subject activity certainly constitutes "manufacture or production" in terms of Section 80IA. In this connection, our view is also fortified by the following judgments of this Court which have been fairly pointed out to us by learned counsel appearing for the Department".

16. Undisputedly, those marble tiles were seized as the same were not accounted for in the statutory record maintained by the appellant as such those were liable to be confiscated in view of Rule 25(1)(b) of the Central Excise Rule. Therefore, in our view the Commissioner (Appeals) was not right in setting aside the confiscation and redemption order passed by the adjudicating authority so far as marble tiles are concerned.

17. In view of the aforesaid finding of the Supreme Court the marble slabs which were confiscated vide order-in-original cannot be termed as excisable goods as such those were not liable to confiscation under Rule 25 of the Central Excise Rules. Accordingly, we do not find any fault in the impugned order so far as it relates to the marble slabs.

18. The result of above discussion is that the appeal is partly accepted. While maintaining the impugned order so far as it relates to the marble slabs we set aside the remaining order passed by the Commissioner (Appeals) and restore the order-in-original whereby the confiscation of the marble tiles, seized from the premises of the appellant, was ordered under Rule 25 of the Central Excise Rules. Since the appeal has been partly allowed, it is imperative to modify the amount of redemption fine and the penalty imposed

on the appellant. Accordingly, taking into account the overall facts and circumstances and the value of the confiscated marble tiles we give an option to the respondent to get released the confiscated marble tiles on payment of redemption fine of Rs. 40,000/- under Rule 34 of the Central Excise Act, 1944. The penalty is also reduced to Rs. 20,000/-.

19. Appeal is disposed of accordingly.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant