

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

Appeal No. E/1644/2009, E/45/2010 - EX[DB]
E/E/3059/2009, & E/3036/2009-EX

Date 21/06/2012

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

To :
M/S MARKWELL PAPER PLAST PVT LTD
A-101, SECTOR-58, NOIDA(UP)
M/S MARKWELL PAPER PLAST PVT LTD

16. M/S. JAISWAL PRODUCTS,
442-443, FUNCTIONAL INDL. ESTATE,
PATPARGANJ, DELHI-92

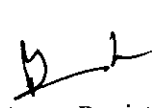
Appellant

Vs
Respondent

C.C.E. NOIDA

2012 EX[DB] dated 14-6-2012

I am directed to transmit herewith a certified copy of **Final order No. 711-714**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. NOIDA
C-56/42, SECTOR-62, NOIDA-
201307

1A. CCE, DELHI -II

2. Adv. / Consult

MR.PRABHAT KUMAR

B-51(BASEMENT)SARVODAYA ENCLAVE NEAR MOTHER INTERNATIONAL
SCHOOL 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)

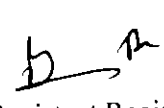
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1. 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file

14. M/S. CHAWLA PACKAGING (P) LTD.,
199-200, PATPARGANJ INDL. AREA. DELHI-92

15. M/S.SHEETAL MERCANTILE(P)LTD.,
61&64, PATPARGANJ INDL. AREA. DELHI-92


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/ decision: 14.06.2012

Hon'ble Sh. Justice Ajit Bharihoke, President
Hon'ble Sh. 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?	

Excise Appeal No. 1644 of 2009

(Arising out of order-in-original No. 19/Comm/NOIDA/2009 dated 29.4.2009 passed by the Commissioner of Customs & Central Excise, Noida).

M/s Markwell Paper Plast Pvt. Ltd.

Appellants

Vs.

CC&CE, Noida

Respondent

AND

Excise Appeal No. 45 of 2010

(Arising out of order-in-original No. 3/2009-10 dated 8.9.2009 passed by the Commissioner, Central Excise, New Delhi).

M/s Chawla Packaging (P) Ltd.,

Appellant

Vs.

CCE, New Delhi

Respondent

AND

Excise Appeal No. 3059 of 2009

(Arising out of order-in-original No. 4/2009 dated 29.9.2009 passed by the Commissioner, Central Excise, New Delhi).

M/s Sheetal Mercantile (P) Ltd. Appellant

Vs.

CCE, New Delhi Respondent

AND

Excise Appeal No. 3036 of 2009

(Arising out of order-in-original No. 5/2009 dated 29.9.2009 passed by the Commissioner, Central Excise, New Delhi).

M/s Jaiswal Products Appellant

Vs.

CCE, Delhi Respondent

Present Shri S.S. Dabas, Advocate for the appellant.

Present Shri Bharat Bhushan, AR for the respondent.

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

FINAL Order No. 711-714/2012-ET (BR)

Per. Justice Ajit Bharihoke:

1. By this order we propose to dispose above referred four appeals involving common question of law and facts.

- i) In Excise Appeal No.1644 of 2009-Ex, the appellant M/s Markwell Paper Plast Pvt. Ltd. has challenged the order-in-

original dated 29.04.2009 of Commissioner (Adjudication) whereby for the period w.e.f. April 2007 to February, 2008 the adjudicating authority disallowed the cenvat credit availed by the appellant and confirmed the demand of Rs.63,74,221/- with interest and also imposed penalty of Rs. 40 lakhs on the appellant.

- ii) In Excise Appeal No. 45 of 2010, the appellant M/s Chawla Packaging (P) Ltd. has challenged the order-in-original No. 3/2009 dated 8.9.2009 passed by the Commissioner (Adjudication) whereby he disallowed the cenvat credit availed by the appellant and confirmed duty demand of Rs.1,48,43,003/- in respect of period July, 2007 to February, 2008, with interest and also imposed penalty of Rs. 7,50,000/- on the appellant.
- iii) In Excise Appeal No. 3059 of 2009, the appellant M/s Sheetal Merantile (P) Ltd. have challenged the impugned order No.4/2009 dated 29.9.2009 whereby the Commissioner (Adjudication) disallowed the cenvat credit availed by the appellant during the period June 2007 to February, 2008 and confirmed the duty demand of Rs. 67,96,891/- with interest and also imposed penalty of Rs.3,40,000/- on the appellant.
- iv) In Excise Appeal No. 3036 of 2009, the appellant M/s Jaiswal Products has challenged the impugned order No. 5/2009 dated 29.09.2009 whereby the Commissioner (Adjudication)

disallowed the cenvat credit availed by the said appellant during July 2007 to February, 2008 and confirmed the duty demand of Rs.53,66,066/- with interest and also imposed penalty of Rs. 2,68,000/- on the appellant.

2. Briefly stated facts relevant for the disposal of these appellants are that the appellants M/s Markwell Paper Plast Pvt. Ltd., M/s Sheetal Mercantile (P) Ltd. and M/s Chawla Packaging (P) Ltd. are engaged in the manufacture of printed plastic laminated film, printed metalised film and other laminated metalised film in rolls and pouches falling within chapter 39 of the first schedule to the Central Excise Tariff Act, 1985. They are registered with the Central Excise department and are availing facility of cenvat credit under Cenvat Credit Rules, 2004.

3. The appellants were using duty paid polyester film and metalised film as input for their final product. The process carried out by the appellants for production of their final product comprised of printing on the bare polyester film by using ink and lamination of the said printed film either in two layers or in three layers with the help of adhesive and chemical.

4. After carrying out the aforesaid process of manufacture the final products were cleared by the appellants on payment of appropriate excise duty. The said practice have been followed by the appellants since inception of the aforesaid business.

5. the appellants availed of cenvat credit on the duty paid inputs used in manufacture of the final product and has always been filing returns as

prescribed under the Central Excise Rules, 2002 and Cenvat Credit Rules, 2004.

6. The department in view of the judgement of the Supreme Court in the matter of Metlex (I) Pvt. Ltd. vs. CCE, New Delhi reported in 2004 (165) ELT 129 (SC) felt that aforesaid process of printing and laminating the bare polyester / metalised film did not amount to manufacture. Consequently, show cause notices were issued to the respective appellants mentioned above proposing to disallow cenvat credit availed by them in respect of duty paid inputs on the premise that the process carried out by the appellants for bringing about the final product did not amount to manufacture.

7. The above said three appellants respectively contested the show cause notices issued to them and explained that process carried out by them to bring out the final product amounted to manufacture within the definition of Section 2(f) of the Central Excise Act, 1944. They also claimed that since they have cleared their final product on payment of requisite excise duty there was no justification for proposing to deny the cenvat credit on the inputs used for manufacture of the final product.

8. The concerned adjudicating authorities after giving opportunity of being heard to the said three appellants took the view that since the final products of respective appellants were brought out by a process not amounting to manufacture the appellants were not eligible for availing cenvat credit on the inputs used as such the cenvat credit availed by them was disallowed and the respective demands were confirmed with interest and penalties were imposed on them.

9. The appellant M/s Jaiswal Products is engaged in manufacture of chewing tobacco falling within the first schedule of Central Excise Tariff Act, 1985. This appellant took cenvat credit to the tune of Rs. 53,66,066/- during July 2007 to February 2008 in respect of duty paid on the inputs namely printed laminated polyester film, rolls/ pouches and utilised the credit for payment of duty on their final product namely chewing tobacco. The said inputs were purchased from the appellant M/s Chawla Packaging (P) Ltd., M/s Sheetal Mercantile (P) Ltd., under the cover of invoices showing the payment of duty.

10. The department was of the view that the inputs supplied to M/s Jaiswal Products by the aforesaid two appellants came into existence by the process of printing and lamination undertaken by the suppliers which did not amount to manufacture in view of the judgement of Supreme Court in the matter of Metlex (I) Pvt. Ltd. (supra). Accordingly, a show cause notice raising demand of Rs. 53,66,066/- was issued to the appellant. The appellant contested the show cause notice and took the plea that he has purchased duty paid inputs as such as per the provision of Cenvat Credit Rules he has rightly availed the cenvat credit.

11. The Commissioner (Adjudication) however after giving opportunity of being heard disallowed the cenvat credit availed by the appellant and confirmed the duty demand of Rs. 53,66,066/- with interest against the appellant M/s Jaiswal Products and also imposed penalty of Rs. 2,68,000/- upon the appellant.

12. The issue which require determination in these appeals are as under:-

- (i) Whether the process of printing and lamination on the bare polyester/ metalised films amounts to manufacture?
- (ii) If the aforesaid process does not amount to manufacture whether or not the department is justified in disallowing the cenvat credit availed by the appellants on duty paid inputs for the manufacture of their final product which was cleared on payment of excise duty?

13. Shri S.S. Dabas, Id. Advocate appearing for the appellant has contended that the impugned order is based upon the incorrect reading of the judgment of Supreme Court in the matter of M/s Metlex (I) Pvt. Ltd. (supra). In support of this contention, Id. Counsel has drawn our attention to the judgement of the Supreme Court particularly paras 16 and 17 and submitted that the Commissioner (Adjudication) has failed to appreciate that Supreme court after noting the plea of the department for remand of the matter back for decision whether there was manufacture, dismissed the plea by observing that the assessee in response to the show cause notice took up the plea that there was no manufacture and if the department still wanted to contend that manufacture have been undertaken the department was required to prove it by cogent evidence. From this, Id. Counsel contend, it is obvious that the finding of the Supreme Court in the matter of Metlex (I) Pvt. Ltd. (supra) against the department was on account of failure of the department to lead cogent evidence, as such it cannot be applied universally to all the cases dehors the facts involved.

14. Ld. Counsel further contended that the Commissioner (Appeals) has failed to take note of the various other pronouncement of the Supreme Court in the case of *Laminated Packings (P) Ltd. vs. CCE- 1990 (49) ELT 326 (SC)*, wherein Supreme court held that polyethylene laminated kraft paper produced from lamination on duty paid kraft paper amount to manufacture. The appellant have also relied upon judgement of Supreme Court in the matter of *Empire Industries Ltd. vs. Union of India – 1985 (20) ELT 179 (SC)* and *CCE, Kanpur, CCE, Kanpur vs. Krishna Carbon Paper Co. – 1988 (37) ELT 480 (SC)*. Thus, it is contended that the impugned order is liable to be set aside.

15. As regards issue No. 2, Shri S.S.Dabas, Id. Advocate has submitted that as per the scheme of Excise Act and Cenvat Credit Rules, 2004 an assessee is entitled to avail cenvat credit in respect of inputs used for manufacture of the final product which is excisable. Ld. Counsel submits that in the instant case admittedly the appellant manufacturers cleared their final product to the customers on payment of excise duty which was accepted by the department without any protest. As such now the department cannot be allowed to take the plea that the cenvat credit availed on the inputs used for manufacture of final product was wrongly availed since the final product did not emerge out of the process of manufacture. Thus, it is submitted on this count also the impugned orders are liable to be set aside.

16. On behalf of the appellant M/s Jaiswal Products, Sh. S.S. Dabas, Id. Advocate has made an additional plea that admittedly the said appellant

procured the inputs in question on payment of duty. Therefore, the department cannot deny him the cenvat credit. It is submitted that purchaser of the goods by no stretch of imagination is expected to first confirm whether or not those goods/ inputs in question have come into existence by the process of manufacture as defined under Section 2(f) of the Central Excise Act.

17. Shri Bharat Bhushan, ld. AR for the department on the contrary has argued in support of the impugned orders. He contended that the case of the appellant is squarely covered by the judgement of the Supreme Court in the matter of M/s Metlex (I) Pvt. Ltd. (supra) wherein it has been held that mere lamination of metilisation of a bare film does not bring about a new product and as such the process cannot be termed to be manufacture. Thus, it is contended that the Commissioner has rightly disallowed cenvat credit to the appellant. As regards the second issue, ld. AR has drawn our attention to Section 5(b) of the Central Excise Act, and Notification No. 22/2008-CE (NT) dated 02.05.2008 issued under the said provision and submitted that in view of the aforesaid notification non reversal of cenvat credit in these cases could have been allowed only upto 12.02.2004 and not thereafter. Thus, he contends that the plea of ld. Counsel for the appellant is without merit and there is no reason to interfere with the impugned orders.

18. We have considered the rival contentions and perused the record as well as the judgement relied upon by respective parties. On reading of the respective order-in-originals, it is evident that the Commissioner (Adjudication) has based his finding on the judgement of Supreme Court in

the matter of Metlex (I) Pvt. Ltd. (supra). Therefore, in order to appreciate the contentions raised by the parties, it would be useful to have a look on the relevant observations of the Supreme Court in the judgement which are reproduced thus:-

“15. In this case the Appellants purchase duty paid film. They merely laminate or metallise it. The product is a film to start with and remains a film after process of lamination or metallisation. Thus there is no new distinct product which has come into existence and it would have to be concluded that there is no manufacture.

16. It was however submitted that the case has proceeded on the admitted footing that there was a manufacture. It was submitted that the matter must be remitted back to decide whether there is manufacture. It was submitted that this aspect will have to be decided in terms of Note 12 to Chapter 39 and after looking at the process adopted by the Appellants. It was submitted that under the present Tariff there are separate sub-heading and thus after examining the process of the Appellants it may be possible to contend that a new and distinct product has come into existence.

17. We are unable to accept this submission. The question is whether an individual and distinct product has come into existence. It is settled law that the burden is on the department to prove that a new and distinct product has come into existence. The Appellants, in reply to the Show Cause Notice, took up the contention that there was no manufacture. If the Department still wanted to contend that manufacture had been undertaken, the Department had to prove it by cogent evidence. The Tribunal was clearly in error in seeking to cast the burden on the Appellants to show that there was no process of manufacture”.

19. In para 15 of the judgement, the Supreme Court has observed that mere lamination or metallization of a film does not bring about a new distinct product as such said process cannot be termed as manufacture. In para 16 of the judgement, the Supreme Court has referred to the plea of the department urging for remand of the case back for decision whether or not there was manufacture. In para 17, the Supreme Court rejected the said plea of the department observing that if the department wanted to contend that the assessee has undertaken manufacture, the department was required to prove it by a cogent evidence and that the Tribunal was clearly in error in

seeking to cast the burden on the assessee to show that there was no process of manufacture. From this observations, it is clear that the appeal of the assessee was allowed by the Supreme Court on facts because of the failure of the department to establish that the goods in question came into existence through a manufacturing process. That being the case in our considered view the judgement of Supreme court in Metlex (I) Pvt. Ltd. cannot be applied universally de hors the facts. Whenever the question arises whether or not the product in question came into being from a process of manufacture the adjudicating authority is require to refer to the facts of the case to come to the conclusion as to whether the process amounted to manufacture or not. In the instant case the Commissioner (Appeals) has not cared to look into the process through which the finished goods were cleared by the manufacturing assessee emerge out of the process of manufacture.

20. The manufacturing appellants have explained the process of production of their final products as follows:-

- (i) Printing of bare and metalised polyester film which is purchased from the market on payment of duty;
- (ii) Lamination of said printed film either in two layers or three layers with the help of adhesive or other chemical.

21. This fact is not refuted by the department. Thus, it is clear that the appellant after purchasing the bare polyester/ metalised film on payment of duty, first subject those film to printing as per the requirement of the customer and thereafter those films are laminated either in two layers or

three layers. In our considered view the aforesaid process changes the character of the bare polyester film (inputs) in terms of its user as also the thickness and lamination. Therefore, this process falls within the definition of manufacture as defined under Section 2(f) of the Central Excise Act, 1944. In our aforesaid view we are supported by the judgement of the Supreme Court in the matter of Laminated Packaging (P) Ltd. (supra) wherein the Supreme Court has held that polyethylene laminated kraft paper produced out of lamination on duty paid kraft paper with polyethylene amounts to manufacture. The relevant observation of Supreme Court are reproduced thus:-

“4. After this impugned Act was passed, the same was challenged before the Bombay High Court by several writ petitions. Writ Petition No. 623 of 1979 along with others were disposed of by the Bombay High Court by judgment delivered by the division bench on 16/17th June, 1983 in the case of New Shakti Dye works Pvt. Ltd. & Mahalakshmi Dyeing and Printing Works vs. Union of India & anr. [1983 ELT 1736 (Bom.)]. By the said judgement, the Bombay High Court disposed of 24 writ petitions as the question involved in all those petitions was identical. In that case the constitutional validity of the impugned Act as well as the levy of duty on certain goods identical to the present goods involved in this application under Article 32 of the Constitution was involved. The Bombay High Court dismissed the said writ petitions. We will refer to the said decision later. We may, however, state that we are in respectful agreement with the conclusions as well as the reasoning of the decision of the Bombay High Court in the said petitions. Special leave to appeal to this Court has been granted from the said decision in the case of New Shakti Dye Pvt. Ltd. [1983 ELT 1736 (Bom)].”

22. The result of above discussion is that the orders of respective Commissioners are not sustainable in law.

23. Even otherwise if for the sake of argument it is assumed that the final products cleared by the manufacturing appellants emerged from a process

not amounting to manufacture then also we find it difficult to sustain the impugned order for following reason:-

Undisputedly, the appellants used duty paid inputs for the production of their final product which was cleared to the customers on payment of excise duty. Admittedly, the department accepted the excise duty on the final product without any protest nor the appellants were informed that their final products was not subject to excise duty as it emerged from the process not amounting to manufacture as defined under Section 2(f) of the Central Excise Act. Learned Counsel for the respondent department has tried to justify the impugned order disallowing the cenvat credit availed by the appellant on the inputs on the plea that the final product has not emerged from the process which could be termed as manufactured. Such an argument, in our view cannot be sustained as it is against the tenets of equity and justice. The department having accepted the excise duty on the final product cannot be permitted to deny cenvat credit on the inputs used for the manufacture of the final product on such a technical plea. If such an argument is allowed to sustain it would negate the entire object of the cenvat credit scheme which has been put in place with a view to protect the assessee from double taxation. Thus, on this count also, the impugned orders are not sustainable.

24. In view of the above, we find ourselves unable to sustain the impugned orders which are accordingly set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant