CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 4118 of 2012 & 55107 of 2013

(Arising out of order-in-appeal No. 270-CE/MRT-I/2012 dated 31.08.2012 passed by the Commissioner (Appeals) Customs & Central Excise, Meerut-I)

DATE OF HEARING : 02.01.2017
DATE OF DECISION : 06.01.2017

Excise Appeal No. 4118 of 2012

M/s K.R. Packaging …. Appellant
(Rep by Sh. T. Chandran Nair, Adv.)

VERSUS

CCE & ST, Meerut-I …. Respondent
(Rep. by Sh. Yogesh Agarwal & Sh. Govind Dixit, DRs)

Excise Appeal No. 55107 of 2013

CCE & ST, Meerut-I …. Appellant
(Rep. by Sh. Yogesh Agarwal & Sh. Govind Dixit, DRs)

VERSUS

M/s K.R. Packaging …. Respondent
(Rep. by Sh. T. Chandran Nair, Adv.)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 50153-50154/2017

PER JUSTICE (Dr) SATISH CHANDRA:

Both the cross appeals, one by the assessee-Appellants and another by the Department, have been filed against the common

Order-in-Appeal No. 270-CE/MRT-I/2012 dated 31.08.2012 passed by the Commissioner (Appeals). The period in dispute in the instant appeals is from August, 2009 to March, 2010.

2. The brief facts of the case are that the assessee-Appellants are engaged in the packing and labelling business. The assessee-Appellants packed 10 Nos. of 35 ml Clinic Plus Shampoo bottles in a Pet Jar and shrink-sleeving the jar and affixing the label containing the product details on the lid of the jar. The Department considered it as a manufacturing activity in terms of Section 2(f)(iii) of the Central Excise Act, 1944 by observing that, the Shampoo bottles bear the MRP and are marketable to the consumers. However, in the impugned order the Commissioner (Appeals) has observed that the activity carried out by the assessee-Appellants is a manufacturing activity. However, he has dropped the demand by observing that the assessee-Appellants were regularly paying the Service Tax and the Department has not raised any objection to the same for a considerable period of time.

Being aggrieved, both the parties have filed cross appeals. With this background, we have heard Shri Yogesh Agarwal and Shri Govind Dixit, learned DRs for the Department and Shri T. Chandran Nair, learned counsel for the assessee-Appellants.

3. From the record, it appears that during the period in dispute the assessee-Appellants were paying regularly the Service

Tax by declaring that the activity in question was merely a service. The Department had accepted the Service Tax without raising any objection. The assessee-Appellants were having Service Tax registration and regularly submitting the half yearly returns for payment of the Service Tax. It is only on 30.03.2010 when the excise declaration was obtained by the assessee-Appellants and prior to it, was subject to Service Tax. Further, the product manufacturer was availing the area based exemption.

4. It may be mentioned that it is the claim of the learned counsel for the assessee-Appellants that once the banding activity covered within the scope of 'manufacturer' as per Section 2(f)(ii) and 2(f)(iii) of the Central Excise Act, 1944 read with Note 6 of Chapter 34 of the Central Excise Tariff, service element becomes secondary to principal manufacturing activity of banding and the Appellant can no longer claim to be mere service provider as per the ratio laid down in the case of **Vasantham Enterprises vs Commissioner of Central Excise, Chandigarh,** 2015 (37) STR 1007 (T-Del). In this case, it was also observed that an incomplete declaration does not totally debar from eligibility to exemption after curing defects in said declaration, otherwise it would defeat the object of exemption. There is nothing on record to show any suppression of facts or intention to evade the duty by the assessee-Appellants. Further, the Hon'ble Supreme Court in the case of **Sambhaji vs Gangabai,** 2009 (240) ELT 161 (SC), has observed that :

> *"9. All rules of procedures are handmaids of justice. The language employed by the draftsman of processual (sic) law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.*
>
> *12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

5. From the record, it appears that as per Section 2(f)(iii) which runs as under :

> *"which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."*

It is vital to mention that in the instant case, the assessee-Appellants were regularly paying the Service Tax and the Department had never raised any objection to the same for a considerable period, which implied that the Department was in agreement with the contention of the assessee-Appellants that their packaging activity was taxable under the services rendered taxable by the Finance Act, 1994.

6. But the fact remains that as per the definition, it appears that the packaging activity done by the assessee-Appellants did not fall within the ambit of 'packing services' and was, therefore, not liable for Service Tax by virtue of being "manufacture" as already discussed.

7. Hence, in the light of above discussion, we are of the considered view that the activity of the assessee-Appellants is of 'manufacture' and falls within the category of Section 2(f)(iii) of the Central Excise Act, 1944. In the instant case, the assessee-Appellants had already paid the Service Tax under the bonafide belief and the half yearly returns were also being accepted by the Department as the assessee-Appellants were having the registration for the Service Tax and the payment was made for this period. No double jeopardy can be applied in this case. Hence, assessee-Appellants cannot be punished twice as they have already paid the Service Tax during the relevant period. When the assessee-Appellants have filed the excise declaration on 30.03.2010 from the very day his activity is subject to excise duty being "manufacture". During the period under consideration, no duty is leviable as the Department never raised any objection which is an implied consent for having the Service Tax from the assessee-Appellants. Now refund of Service Tax is time barred. Let it be as was at the relevant

period specially when no fraud, collusion or concealment is on the part of the assessee-Appellants.

8. In view of the above, we find no reason to interfere with the impugned order passed by the Commissioner (Appeals) and dismiss both the cross Appeals.

(Pronounced in the open court on 06.01.2017)

(JUSTICE DR. SATISH CHANDRA)
PRESIDENT

(ASHOK K. ARYA)
MEMBER (TECHNICAL)

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