

**CUSTOMS EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,**

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 19.04.2017

Date of Pronouncement: 07.07.2017

Appeal No. E/1577/2007-EX[DB]

[Arising out of the Order-in-Appeal No. 23/2006-07 dated 09.03.2007, passed by the Commissioner of Central Excise, New Delhi]

M/s. Ess Ess Metals & Electricals ... Appellant

Vs.

CCE Delhi-II ... Respondent

Appearance:

Present Shri Bipin Garg, Advocate the appellant

Present Shri M.R. Sharma, DR for the respondent

**Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
 Hon'ble Mr. V. Padmanabhan, Technical Member**

FINAL ORDER No. 53700/2017

Per V. Padmanabhan:

This appeal is against the order in original dated 09.03.2007.

The appellant is engaged in the manufacture of brass, zinc, nickel, tin and lead alloys falling under Tariff Subheading 74.03 of the 1st schedule to the Central Excise Tariff Act, 1985.

2. The dispute pertains to the period 01.04.1987 to 31.3.1990. Show cause notice dated 07.07.1992 was issued for demand of Central Excise Duty amounting to Rs. 49,83,736/- along with a proposal for imposition of penalties under various rules as well as a proposal for confiscation of land, building, plant and machinery used in the

manufacture of excisable goods. The appellant was not discharging the Central excise duty payable on the goods viz. alloys of various nonferrous metals, by taking the view that these metals as well as metal alloys remained classified in the same tariff heading up to 13.5.1988 and hence there can be no manufacture in the conversion of metal into metal alloys. Revenue was of the view that conversion of nonferrous metals into metal alloys would amount to manufacture in terms of the section 2(f) of the Central Excise Act 1944 both prior to 13/05/1988 as well as for the period subsequent thereto. The case was initially adjudicated by the Commissioner vide his order dated 16.7.1998 in which the Central excise duty demands stand confirmed. When this order of the Commissioner was challenged before the Tribunal, the order was set aside since it was passed ex parte without considering the submissions of the appellant, and vide the Tribunal's order dated 04.05.2001, the case was remanded back to the adjudicating authority for passing de novo orders after extending an opportunity to the appellant. The impugned order dated 09.03.2007 stands passed by the Commissioner in the de novo proceedings in which the duty demand as proposed in the show cause notice stands confirmed along with penalty of Rs. 50 lakh under rule 173Q. Aggrieved by this order the present appeal has been filed mainly agitating the following grounds:

- i) The process undertaken by the appellant by including other materials to the material purchased by them, does not amount to manufacture and hence there can be no demand for Central excise duty.
- ii) None of the other units engaged in the manufacture of similar goods were paying Central excise duty on their product. Hence there is a general trade practice for non-payment of duty.

iii) In spite of repeated attempts made by the appellant, all the documents based on which the show cause notice has been issued, has not been supplied to them. Consequently the demand raised, on the basis of such documents, cannot be sustained.

iv) The appellant had sought cross-examination of the investigating officers which has not been permitted by the adjudicating authority.

v) If the process undertaken by the appellant amounts to manufacture, they will be entitled to the benefit of small-scale industry exemption notification number 175/86 dated 01.03.1986 since they were registered with the Director of Industries.

vi) They will also be entitled to the benefit of Modvat credit on inputs and capital goods used in the manufacture of final products, if they are liable to pay Central excise duty on their final products.

3. With the above background heard Shri. Bipin Garg, the Ld. Counsel for the appellants and Sh. M.R. Sharma, DR appearing for the revenue.

4. The 1st issue is whether the goods viz. Nickel, lead and tin alloys made by the appellant were liable to Central excise duty during the disputed period. The defense raised by the appellant is that till 12.5.1998, both metals and its alloys were classifiable under the same subheading and after 13.5.1998, the Central Excise Tariff stands fully aligned with HSN. Consequently, metal alloys cannot be considered as a manufactured product since they remain classified in the same heading as the metals.

5. A similar question came up before the Hon'ble Supreme Court in the case of ***Commissioner Central Excise Jaipur vs Mahavir Aluminum Ltd reported as 2007(212) ELT 3 (SC)*** in which the Apex Court considered a question whether aluminum in ingots when converted into billets would amount to manufacture. Both ingots and billets were classified in the same subheading of the tariff during the period of dispute. The apex court held as follows:

"9. The assessee being aggrieved by the order-in-original passed by the Commissioner, preferred an appeal to CEGAT. CEGAT observed that there was substance in the contention raised by the assessee that the process carried out by the assessee of Melting Ingots into Round Ingots for the purpose of extrusion did not amount to 'manufacture' and the taxable commodity remained the same although in different form. CEGAT stated that "mere change in physical form of shape or substance does not amount to manufacture". It, therefore, allowed the appeal and set aside the order passed by the Commissioner. The said order is challenged by the Revenue in this Court.

10. We have heard the learned counsel for the parties.

11. It was submitted by the learned counsel for the Revenue that CEGAT has committed an error of law in holding that the commodity remained one and the same and merely the form was changed and as such there was no 'manufacture' and Excise Duty could not be imposed by the Department.

12. The learned counsel for the assessee, on the other hand, submitted that CEGAT was right in holding that there was no change of commodity and hence there was no 'manufacture'. Extrusion Ingots which are also known as Round Ingots or Billets are only a different form of the same taxable commodity, namely, Wrought Aluminium under Chapter 7601. The process or conversion of Melting Ingots into Extrusion Ingots was not a 'process of manufacture' and there is a change in shape or form of the product. The order of CEGAT, hence, calls for no interference.

13. Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. The expression

'manufacture' is defined in Clause (f) of Section 2 of the Act which reads thus :

(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 Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture, (5 of 1986), 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.

14. It is thus clear that 'manufacture' includes any process under Section 2(f). As observed by this Court before more than four decades in Union of India & Another v. Delhi Cloth & General Mills Co. Ltd. & Ors., (1963) Supp (1) SCR 586 : AIR 1963 SC 791, the word 'manufacture' is a verb which 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".

15. In Empire Industries Ltd. v. Union of India, (1985) 3 SCC 314, it was held that taxable event under Excise Law is 'manufacture'. The moment there is transformation into a new commodity commercially distinct and separate commodity having its own character and name whether be it the result of one process or several processes, 'manufacture' takes place and liability to excise duty under Section 4 is attracted.

16. In Union Carbide India Ltd. v. Union of India & Ors., (1986) 2 SCC 547, this Court held that in order to attract Excise Duty, the article manufactured must be capable of sale to a consumer. To become goods, an article must be something which can ordinarily come to the market to be bought and be sold.

17. In Union of India & Ors. v. J.G. Glass Industries Ltd. & Ors., (1998) 2 SCC 32, leading decisions came to be considered by this court and it was held that a two fold test emerged for deciding whether the process is that of 'manufacture'.

18. The Court after considering earlier decisions, stated :

"On an analysis of the aforesaid rulings, a two-old test emerges for deciding whether the process is that of "manufacture". First,

whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words whether the commodity is already in existence will be of no commercial use but for the said process”.

19. In the present case, the assessee is not only captively consuming Aluminium Billets for the production of Irrigation Pipes but is also selling such commodity in open market. It is, therefore, clear that the process of ‘manufacture’ results in emergence of new commercial commodity, namely, ‘Billets’. The said commodity has an independent marketability and the assessee itself has sold Billets in open market by paying Excise Duty.

20. The entry also makes it clear which is under Chapter 76. The relevant part reads thus :

Chapter 76

<i>Heading No.</i>	<i>Sub-Heading No.</i>	<i>Description of Goods</i>	<i>Rate of Duty</i>
76.01	7601.10	ingots, billets	16%

21. Ingots and Billets are thus two different commercial commodities. They have separate, distinct and identifiable marketability and saleability. The assessee, no doubt, used Aluminium Billets captively but is also selling in open market. We are, therefore, of the view that the Commissioner was right in holding that the assessee was liable to pay Excise Duty and CEGAT was wrong in interfering with the order-in-original. The order of the CEGAT, therefore, is liable to be set aside.

22. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The order passed by CEGAT is set aside and the order-in-original passed by the Commissioner is restored.

23. The learned counsel for the assessee, however, submitted that in that case the assessee would be entitled to MODVAT benefits. If it is so, the assessee can claim the said benefit. We may make it clear that our setting aside the order passed by

CEGAT in this appeal would not come in the way of the assessee in claiming and getting such benefit, if it is otherwise entitled.

24. The appeal is allowed accordingly with no order as to costs."

6. In the light of the above decision of the Apex Court, there is no scope for the argument that conversion of metal into alloys does not amount to manufacture. Ipso facto Central Excise duty is liable to be paid on the finished product cleared from the appellant's factory.

7. Now we turn to the various pleas raised by the appellant during the course of argument of the present appeal. It has been argued that all the relied upon documents based on which the show cause notice has been issued, has not been supplied to the appellant. It has also been submitted that if duty is held to be payable by the appellant, Modvat credit of inputs and capital goods may be allowed to be taken. Further, the appellant has also claimed that they should be entitled to the benefit of SSI Exemption No. 175/86.

It is a settled position of law that the demand cannot be sustained unless all the relied upon documents have been furnished to the appellant to enable them to defend themselves fairly. Consequently, wherever the relied upon documents have not been supplied to the appellant, the demand of excise duty is liable to be set-aside. For this purpose we remand matter to the original adjudicating authority who will recompute the demand after excluding the demands attributable to the documents whose copies have not been made available to the appellant. On the question of eligibility of Modvat credit, the Apex Court's decision cited above clearly lays down that assessee will be entitled to Modvat benefits if otherwise eligible. In the de novo proceedings, the adjudicating authority will extend the benefit of modvat credits subject to satisfaction of conditions to be fulfilled by the appellant in this regard. The appellant should be given an

opportunity for putting forth their claim for Modvat credit supported by necessary documents. Similarly, the benefit of SSI notification will also be allowed subject to fulfilling the conditions specified therein.

8. In view of the above discussions we uphold the charge of manufacture and remand the matter to the adjudicating authority for re-quantification of the demand in the light of the above observations.

[Order Pronounced in the open court on _____]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

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