IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –II

Service Tax Appeal Nos. ST/52915 & 50436/2015 [DB]

[Arising out of Order-in-Appeal-134-SLM-ST-JPR-2015 dated 09/04/2015 passed by the Commissioner(Appeals), Customs, Central Excise and Service Tax-Udaipur and Order-in-Appeal-66-SLM-ST-JPR-1-2014 dated 13/10/2014 passed by the Commissioner of Central Excise-JAIPUR-I(Appeal)]

C E & ST-Udaipur &
Krishna Ice Factory **...Appellant**

Vs.

Agrasen Ice Factory &
C.C.E. & S.T.-Jaipur-I **... Respondent**

Present for the Department : Mr. V. Pandey, DR
Present for the Assesse : Mr. Himanshu Bansal, Advocate

Coram: HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/ Decision : 15.06.2018

FINAL ORDER NO. 52346-52347/2018

PER: V. PADMANABHAN

The facts involved in both the Appeals are similar and hence are being disposed of through a common order. The assesses in both cases were engaged in providing services as a chilling plant contractor in respect of milk supplied. They chilled the milk supplied by the respective dairy and maintain it at appropriate temperature so that it does not get spoilt. The milk chilled in the plants of the assesses are subsequently given back to the dairy in the insulated tankers for further processing in their plant. The Department took the view that the activity of chilling undertaken by the assesses is to be considered as a process on which service tax is leviable under the category of business auxiliary service. In the Appeal No. ST/52915/2018, the impugned order has dropped service tax levy and Revenue is in Appeal. In the case of the other Appeal No. ST/50436/2015, the lower authority has upheld the payment of servict tax under the category of BAS. Both the Appeals are being disposed of in this common order.

2. In this connection, we heard Shri Himanshu Bansal, Ld. Advocate as well as Shri Viviek Pandey, Ld. DR.

3. It is the submission of the Ld. Counsel that the activity undertaken by the assesses in these cases cannot be considered to be a process leviable to service tax under the business auxiliary services. The activity of chilling of milk is an activity which will come within the definition of 'manufacture' of milk. In Chapter 4, the Chapter note 6 reads as follows:

> "5. In relation to products of this Chapter, labelling or re-labeling of containers or re-packing from bulk packs to retail packs or the adoption of any other treatment to render the product marketable, to the consumer shall amount to manufacture."

4. It is his submission that the process of chilling has rendered the milk marketable and hence is an activity which is to be considered as 'manufacture' under Central Excise and no service tax can be levied. In this connection, he brought to our notice the following decisions of the Tribunal where similar view has been taken:-

(a) Vinayak Industries vs. Commissioner 2016 (45) STR 191 (Tri.-Del.)

(b) Sharma Ice Factory vs. Commissioner 2015 (37) STR 600 (Tri.-Del.)

5. Ld. DR justifies the impugned order.

6. After hearing both sides and perusal of record, we note that the process undertaken in the assesses's factories involves chilling the milk and maintaining it at appropriate temperature to prevent it from spoiling. The identical issue has come up before the Tribunal in the decisions relied by the Ld. Advocate. In the case of Vinayak Industries, the Tribunal has observed as follows:

> "5. We have considered the submissions from both the sides and perused the records. There is no dispute about the nature of the appellant's activity – chilling of milk to temperature below 5° Celsius for M/s SZDUSS Ltd. No other activity like pasteurization etc. is involved. We are of the view that mere chilling of milk to temperature below 5° Celsius for the purpose of its

long distance transportation, does not amount to production or processing of goods, as there is no permanent or temporary change in milk other than lowering of the temperature by the process of chilling of milk, due to which it can be transported over long distance without getting spoiled. The Apex Court in the case of Commissioner of Income Tax v. N.C. Budhraja & Co. Reported in 2004 ITR 412 (S.C.) has held that word "production", when used in juxtaposition with word "manufacture", takes in bringing into existence new goods by a process, which may not amount to manufacture. Therefore for "production", there must be some change in the raw material subjected to process, though by that change no new product with distinct characteristics, commercial identity and usages has emerged. The process of chilling milk to make it fit for long distance transportation without getting spoiled, which does not bring into existence any change whatsoever, would not amount to production of processing of the goods not amounting to the manufacture. We also find that earlier, the Commissioner (Appeals) on this very issue had taken view that chilling of milk is not Business Auxiliary Service covered by Section 65 (19) (v) of the Finance Act, 1994. In view of this we hold that impugned order is not sustainable. The same is set aside. The appeal as well as the stay application and the application for early hearing stands disposed off."

7. Since the issue stands decided in favour of the assesses, we dismiss the Appeal No. ST/52915/2015 filed by the Revenue, and allow the Appeal No. ST/50436/2015 filed by the assessee.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(V.PADMANABHAN)
MEMBER (TECHNICAL)

D.J.