

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

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 50872-50873 of 2017

(Arising out of Order-in-Appeal No. ALW-EXCUS-O-I-O-COM-88/16-17 dated 02.02.2017 passed by the Commissioner of Central Excise), Alwar)

DATE OF HEARING : 09.08.2018

DATE OF DECISION : 09.08.2018

Shri Munnawar Ali
M/s Perfect Engineering Works

Appellants

(Rep. by Sh. Jatin Mahajan, Adv.)

VERSUS

CCE, Alwar

Respondent

(Rep by Sh. R.K. Mishra, DR)

CORAM : HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. 52759-52760/2018

PER ANIL CHOUDHARY :

Both the present appeals are filed by the Appellants against the Order-in-Appeal No. ALW-EXCUS-O-I-O-COM-88/16-17 dated 02.02.2017 passed by the Commissioner of Central Excise), Alwar. The period in dispute is 2009 to 2015.

2. The brief facts of the case are that the assessee-appellant are engaged in supply of various bought-out electrical items and accessories to various nodal agencies to provide electricity connection to below poverty line (BPL) households. They procured these items from various parties and supplied them to these nodal agencies in various combinations (BPL Kit). The combination of BPL Kits contained all or some of the items like Wooden or Polycarbonate board, DP switches, Kit- Kat Fuse, Piano switch, Bulb holders, CFL bulbs, MCB, Nuts , Bolts, Screws & GI wire, PVC/GI pipes, etc. Taking into account the different type of combinations and the nature of items cleared during the relevant period, the following categorization of these supplies have been made for convenience and reference. These categorizations were taken note of in the impugned order and various invoices and documents evidencing such categorization have also been considered. These categories are:

Category-I: Each item is sold in original bulk packing, as purchased by the appellant. None of the items are fixed or mounted on the Board. In this category, all the items are individually shown and billed.

Category-II: Each item is sold in original bulk packing, as purchased by the appellant. The items are not fixed or mounted on the Board. A lump-sum price is charged in this case.

Category-III: Under the category, the board, earthing bolts/nuts, piano switch and batten holders are repacked in a box to make a set while items like conduit pipe, aluminum wire, PVC saddle and other hardware items are supplied in original bulk packing. In this category

of goods also, no items are fixed or mounted on the board and the items are priced individually.

Category-IV: This category is the same as Category-III goods except for the fact that billing is made on single-rate basis instead of item-wise billing.

Category-V(a): Only one item is fixed or mounted on the board in this type of goods. For example, piano switch on one board, lamp holder on another board and MCB on yet another board and single rate is charged.

Category-V(b): In this category, two or more items like DP switch and kit-kat fuse or MCB and kit-kat are mounted on the board and single rate is charged.

3. The Revenue entertained a view that the assessee-appellant is liable to Central Excise Duty on such BPL kits cleared by them to their clients. Proceedings were initiated against the appellant-assessee for classifying the BPL kit under CETH 85371000 and to demand a Central Excise Duty of Rs. 2,28,15,486/-. The appellant-assessee contested the demand and submitted various documents and defence opposing the said demand. He confirmed duty demand of Rs.2,28,15,486/-. He affirmed the demand for an extended period and imposed a penalty of equal amount on assessee-Appellants and Rs. 1,00,00,000/- on the Proprietor. Both the assessee-Appellants have filed appeals against the said order.

4. The Id Counsel appearing for the appellant-assessee mainly submitted on the following lines:

- i) The original authority failed in examining the issue of "manufacture" before proceeding with the classification. There is no new manufactured item arising out of the process undertaken by the appellant which will amount to manufacture in terms of Section 2(f) of the Central Excise Act, 1944. Mere mention of certain products in the tariff classification will not make them liable to Central Excise Duty. The assessee should be involved in producing said goods by a process which will amount to manufacture.
- ii) There is no change in the name, character and use of the goods now subjected to excise levy when compared to items used in making such goods. In other words, there is no item as "BPL Kit" known or available in the market for sale and purchase. The product is not commercially known.
- iii) Without prejudice to the above submissions, it is stated that the product, even after mounting of two items, is not classifiable under CETH 85371000. The item mentioned in the said tariff heading is for electric control or the distribution of electricity. The present Kit supplied by the appellant neither controls nor distributes electricity. Reliance was placed on the clarification issued by M/s Rural Electrification Corporation Ltd.

- iv) The re-categorization of items cleared, quantification of duty demand is also contested. The benefit of cum-duty-valuation and Cenvat credit duty on duty paid inputs are also available to the appellant-assessee.
- v) There is no case for invoking the extended period and imposition of penalty on such issue involved is one of interpretation of the statutory provisions including tariff entries.

5. To levy central excise duty on any goods, the same should have been produced or manufactured in India. Here, we are concerned with the scope of term 'manufacture'. Section 2(f) of the Central Excise Act, 1944 defines the said term as below:

"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 16 [the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to 17 (manufacture; or]
- (iii) 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,]

and the word "manufacture" 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;]"

6. As noted above, the term is not explained by exhaustive definition. However, the scope of the term has been a subject matter of various decisions by the Apex Court. In Delhi Cloth & General Mills Company Ltd, 1977(1) ELT (J199) (SC), the Apex Court examined the scope of the term "manufacture". It was held that the term 'process' cannot be equipped to "manufacture". The word 'manufacture' used as a verb is generally understood to mean as "bring into existence a new substance" and does not mean merely "to produce some change in a substance". Relying on an American judgment, it was observed :

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

7. In M/s J.G. Glass Industries Ltd, 1988 (97) ELT 5 (SC), the Apex Court held that a two-fold test emerges for deciding whether the process is "manufacture". First, whether by the said process, a different commercial commodity comes into existence or whether 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 already in existence will be of no commercial use but for the said process. Referring to their decision in M/s Empire Industries Limited

1985 (20) ELT 179 (SC), the Apex Court emphasized that in case of transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes, "manufacture" takes place and liability to duty is attracted.

8. The Hon'ble Supreme Court in M/s Servomed Industries (P) Ltd , 2015 (319) ELT 578 (SC) referring to their decision in Rajasthan State Chemical Works, 1991 (55) ELT 444 (SC) held where the goods remained exactly the same even after a particular process, there is obviously no "manufacture" involved. Even where the goods remained essentially the same after the particular process, there again, "manufacture" is not involved. When the goods were transformed into something different and new, after a particular process but the same are not marketable, there is no case of manufacture. Where the goods are transformed into a new and different goods after a particular process and such goods are marketable, as such, the process of manufacture and duty liability will arise.

9. The Revenue contends that the appellant-assessee assembled various electrical components and manufactured BPL Kit which should be liable to duty under heading 85371000. The said tariff entry is as below:

"8537- Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of a heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, and numerical control apparatus other than switching apparatus of heading 8517
85371000- For a voltage not exceeding 1,000 V"

10. We note that except in two categories of clearances, there is no evidence to show that the appellant-assessee is even putting together an assembly of various electrical components and accessories in order to make any new identifiable product. Here, it is necessary to find that even if the goods were cleared and identified as BPL Kit, whether such goods can at all be considered as a new excisable item. Here, the main thrust of the Revenue is that there is an assembly process undertaken by the appellant-assessee. We note that mere putting together of two or more items by itself will not make an assembly of a new item. In *M/s Narang Latex and Dispersions (P) Ltd*, 2001 (134) ELT 482 (Tri-Mby.), the Tribunal held that when the appellant cleared the nipples manufactured by them by attaching them with bought-out bottles, the process of attaching the rubber nipples with the bottles and packing together for clearance will not amount to manufacture. The said order of the Tribunal was affirmed by the Apex Court, 2000 (139) ELT A-392 (SC). In *M/s Shivam Enterprises*, 2017 (345) ELT 550 (Tri.-Del.), assembling audio cassettes without magnetic tap was found to be not a process of manufacture. In *M/s Medtronic (P) Ltd*, 2006 (199) ELT 347 (Tri.-Bby.), the Tribunal held that "Custom pack" made by the appellant by adding parts like plastic tubes, connectors, blood filters, caps, oxygen, etc. cannot be held to be a process of manufacture. No new product emerges when these parts are put together in a pack for a ready-to-use condition. The said decision of the Tribunal was affirmed by Hon'ble Gujarat High Court in 2015 (323) ELT 738 Gujarat and further affirmed by the Apex Court reported in 2015, ELT A48 (SC).

11. In the present case, the Revenue seeks to classify the product cleared by the appellant-assessee under tariff heading

85371000. We have perused the various types of items in different combinations cleared by the appellant-assessee. Samples were shown at the time of hearing. We note that the appellant-assessee did not undertake any process in the form of assembling the electrical components and accessories which will result in a new identifiable product having a different character or use. The electrical components or switches are mounted on the board before clearance. The goods cleared by the appellant were generically called as 'BPL Kit.' It is apparent that the method of clearance is mandated by the terms of agreement with their clients. There is no standard commercially identifiable item which is available for sale or purchase in the market. In other words, there is no 'BPL Kit' commercially known and marketed. The clearances made by the appellant-assessee to the various clients as per their requirement are not any new manufactured product, commercially identifiable as 'BPL Kit.'

12. The original authority upheld the duty demand partly, on the ground that the process of mounting two components/items on the wooden or plastic board would amount to manufacture. We are not in agreement with such finding. The electrical components, MCB and kit-kat fuse mounted on the board do not lose their identity and assume a different character and use after such process. The MCB and kit-kat fuse are mounted on the board for their function as electrical components. The addition of these two on the board does not create a new commercially identifiable product in the present case. The Revenue did not produce any evidence or did not even assert that these are commercially known and marketed product. The electrical components retained their name, character and use and there is no

new commercially identifiable product emerging in the present case. Further, we find force in the appellant's contention against the classification adopted by the original authority in respect of part of the clearances made by them. The mounted electrical components on the board does not make the board as an item for electric control or the distribution of electricity.

13. In view of the above detailed analysis, we find that the appellants have not manufactured any dutiable item attracting central excise levy during the material time. We find the impugned order is not sustainable in so far as it confirms certain duty liability on part of the clearances, on the appellant-assessee. We upheld the original authority order with reference to the finding for dropping the demand raised against the appellant-assessee.

14. In view of the above and following the ratio laid down by this Tribunal in the case of **M/s TGL Enterprises Pvt. Ltd.**, Final Order No. 58605-58606/2017 dated 28.12.2017, we allow both the appeals filed by the assessee-Appellants.

15. A copy of this order be given DASTI.

(Dictated & pronounced in the open court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)