

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal Nos. E/199-201/2009

(Arising out of Order-in-Original No. 77/Commr./CE/Kol-II/Adjn.2008-09 dated 23/01/2009 passed by the Commissioner of Central Excise, Kolkata-II.

- (i) M/s. Comet Technocom Pvt. Ltd.
- (ii) M/s. Deo Krishan Mohta
- (iii) Shri Vivek Mohta

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise-Kolkata-II

Respondent (s)

**Appeal Nos. E/70151/2013, E/CO/70979/2013, E/70165-
70166/2013**

(Arising out of Order-in-Original No. 01/Denovo/Commr./CE/Kol-II/Adjn./2012-13 dated 30/11/2012 passed by the Commissioner of Central Excise, Kolkata-II.

Commissioner of Central Excise-Kolkata-II

Applicant (s)/Appellant (s)

Vs.

- (i) M/s. Comet Technocom Pvt. Ltd.
- (ii) M/s. Deo Krishan Mohta
- (iii) Shri Vivek Mohta

Respondent (s)

Appearance:

Shri B. N. Chattopadhyay, Consultant for the Appellant (s)

Shri A. Roy, Suptd. (AR) for the Revenue (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing: -05.12.2018

Date of Pronouncement:-14/12/2018

ORDER NO. FO/77097-77102/2018

PER CORAM

The appeal numbers E/199-201/2009 are directed against the
Order-in-Original No.77/Commr./CE/Kol-II/Adjn.2008-09 dated

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

23/01/2009. The Ld. Adjudicating Authority vide this order confirmed demand of Central Excise Duty amounting to Rs.50,93,726/- along with interest. He also ordered payment of penalty equal to the duty and in addition, imposed penalties of Rs.2,00,000/- each on Shri Vivek Mohta and Shri. Deo Krishan Mohta, both directors of M/s. Comet Technocom Pvt. Ltd.

2. The appeal Nos. E/70151/2013 and E/70165-70166/2013 are directed against the order in Original No. 01/Denovo/Commr./CE/Kol-II/Adjn./2012-13 dated 30/11/2012. These appeals are filed by Revenue against the findings of the Adjudicating Authority in which he dropped the demand for Central Excise Duty made against M/s. Comet Telecom and their directors. Both these sets of appeal involve common facts and hence are being disposed through this common order.

3. M/s. Comet Telecom Pvt. Ltd. (Assessee) are engaged in the manufacture and supply of Railway Wagon and Bogie components falling under Chapter 72, 73 and 86 of the Central Excise, Tariff Act, 1985. They were enlisted as a manufacturer of such items and as a vendor for supply of such items to Railway Wagon and Bogie with the various zones of the Railway.

4. The assesses were also supplying various electrical components to State Electricity Boards including Rajasthan Bidhut Bitran Nigam. They were also registered as vendors with the different Electricity Boards for such supply. As per the requirements of Railways as well as Electricity Boards, they were required to emboss marks on their goods to identify the goods as supplied by them.

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

5. For supply of goods to Railway Wagon and Bogie manufactures, the practice adopted by the assessee was that they will purchase necessary materials and supply the same to various identified job workers. In the premises of the Job workers, the necessary components were got manufactured as per the specifications of Railway Wagon manufacturers/Electricity Boards. The activity happening at the job workers were supervised by the representatives of the assessee and after the satisfactory completion of manufacture of such goods at the premises of the job workers, these goods were transferred to the assessee's factories. Subsequently, at the assessee's factory, the goods were subjected to inspection by Third Party Inspection Agency approved by Railway or respective Electricity Boards. On completion of process as above, the goods were finally supplied to Railway Wagon manufacturers/Electricity Boards under the invoices of the assessee.

6. The department investigated into the practices adopted by the assessee noticed significantly that:

(i) No Excise Duty was being paid by the assesseees on the supply of goods made to Electricity Board/Railway Wagon Manufacturers.

(ii) For the activity happening at the premises of the job workers, such job workers were being paid only labour charges in addition to supply of the necessary raw materials; but no Central Excise Duty was being paid by the respective job workers.

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

(iii) On scrutiny of the balance sheet of the assessee's accounts for certain years, it was noticed that amounts were shown as received forwards trading of goods.

7. After completion of investigations, the Department came to the conclusion as follows:-

(i) The assessee has claimed himself to be the manufacturer of goods before the Railway Authorities as well as Electricity Boards. They have supplied goods as per the contracts received by them from these Agencies, after affixing their company mark to support their claim. The goods which were manufactured by the job workers out of supplied raw materials and payment of labour charges can be considered as fully manufactured and marketable only after completing the mandatory process of inspection by the third party at the Agency at the assessee's premises.

(ii) In view of the above, the assessee was to be considered as the manufacturer of the goods supplied to Electricity Boards/Railway Wagon Manufacturers. The assessee would be liable to make payment of Central excise Duty on such goods.

8. On the above lines, separate Show Cause Notices were issued to the assessee. Covering the supplies made to Railways, the Show Cause Notice dated 22/05/2008, was issued in which, in addition to the demand for payment of Central Excise Duty amounting to Rs.2,51,54,117/-, penalties were also imposed on the assessee as well as their directors.

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

9. In respect of supplies made to the Electricity Boards, Show Cause Notice dated 04/06/2008 was issued proposing demand of Central Excise Duty amounting to Rs.50,93,726/- along with interest and penalties.

10. In respect of the Show Cause Notice dated 22/05/2008, the Adjudicating Authority passed the order-in-Original dated 22/12/2008, confirming the proposal for demand for duty and imposed penalties on the assesses as well as their directors. When the Order was challenged before the CESTAT, the same was set aside and the matter remanded for Denovo decision after granting an opportunity for cross examination of various job workers. After complying with direction of the Tribunal, the Adjudicating Authority passed the present impugned order dated 30/11/2012 in which the proceedings initiated in the Show Cause Notice were dropped. Revenue is in appeal against this order. In Appeal Number E/70151/2013, respondent have filed Cross Objection.

11. The Show Cause Notice dated 04/06/2008 issued for clearance made to Electricity Board was decided by the Adjudicating Authority by issue of impugned order dated 23/01/2009 in which he confirmed the proposal of demand for Central Excise Duty as well as penalties. This order is challenged by the assessee and their directors by way of appeals No. E/199-201/2009.

12. We heard Shri B. N. Chattopadhyay, Ld. Consultant on behalf of the assessee and their directors of Shri Vivek Mohta and D. K. Mohta. He argued the case mainly on the following points:-

(I) It is not disputed by them that the assesses have procured raw materials, sent them to various job workers and got the

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

goods manufactured as per the specification of Railway Wagon manufacturers as well as Electricity Boards. He further admitted that the job workers were paid to the job charges and further no Excise Duty was paid by the job workers. However, he strongly denied the view taken by Revenue that the assessee was liable to payment of Central Excise Duty on the goods supplied to Railways/Electricity Boards. In this connection, it was submitted that no activity of manufacture was done in the assessee's factory. Only the process of mandatory inspection by the third party was done in the assessee's premises and such inspection alone cannot be considered as a process of manufacture. As such it was submitted that there was no liability for payment of duty on the assessee. If at all, the job workers will be liable for payment of Excise Duty on the goods manufactured in their premises.

(II) Referring to the goods described as 'trading goods' in the balance sheet and accounts of the assessee, it was submitted that the assessee has, in fact, undertaken trading activities in some goods. Such goods procured from outside manufactures were separately sold and never used in the manufacture through the job workers. In this connection, he drew our attention to various invoices attached with the appeal papers indicating that such goods were only for trading as evidenced by the payment of VAT. They also referred to the record of the cross examination before the Adjudicating Authority of the job workers. They have admitted before the Adjudicating Authority that they were paid

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

only labour charges and were supplied materials, out of which they have manufactured the goods and returned to the assessee. The job workers further admitted that the activity at the job worker's premises was not controlled by the assessee who only visited the job worker's premises for supervising the manufacturing process. On the basis of such record of cross examination, it was submitted that the Adjudicating Authority has rightly concluded that no liability for Central Excise Duty would arise on the assessee. Accordingly, they prayed that the Departmental appeal merits rejection; appeals filed by them be allowed and the impugned order in respect of Electricity Board should be set aside.

13. The Revenue's case is argued by Shri A. Roy, Ld. DR. He emphasized the following points.

(i) He argued that the assessee is liable to be considered as the 'manufacturer' of the goods supplied both to Railway Wagon manufactures as well as Electricity Boards. He referred to the definition of the term 'manufacture' appearing in Section 2(f) of the Central Excise Act, 1944. This definition is: "manufacture includes any process incidental or ancillary to the completion of a manufactured product and the term 'manufacturer' should be construed accordingly. Referring to this definition, he submitted that the assessee, who has engaged job workers on payment of labour charges, and got the goods manufactured is to be reconsidered as the manufacturer.

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

(ii) Above proposition gets support from the fact that the assesses have claimed themselves to be the manufacturers before the Railways as well as Electricity Boards. They have obtained contracts from these Agencies for supply of goods and the goods supplied by them also bore their mark which establishes a connection between the goods and the assessee.

(iii) He also referred to the fact that the assesses have purchased raw materials and claimed the credit of the VAT paid on such raw materials. After the goods have been manufactured and received back from the job workers, the final products has been cleared after payment of VAT, by making use of the input tax credit of VAT. This clearly establishes the fact that the goods have been manufactured only by the assessee and sold by them to Railways/Electricity Boards.

(iv) He subsequently emphasized on the process of mandatory inspection carried out by third party agency in the assessee's premises. He brought our attention to their record of inspection which is part of the appeal papers. He also emphasized that without the completion of such inspection process, the goods cannot be considered as marketable especially for supplying to Railway/Electricity Boards, since goods, which do not pass such inspection, cannot be supplied. Accordingly, he submitted that the process of inspection is an essential process and is in the nature of a process ancillary to the completion of the manufacture of the goods supplied to Electricity Board/Railway Wagon manufacturers.

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

14. He also relied on the case of Flex Engineering Ltd. Vs. Commissioner 2012 (276) E.L.T. 153 (S.C.). In the said decision of the Supreme Court, they have taken the view that the process of manufacture is incomplete until they are subjected to testing. He relied on the said decision to argue that the appellant is liable to be considered as manufacturer. In view of the above arguments, he prayed that the appeals filed by the Revenue may be allowed and the appeals filed by the assessee rejected.

15. Heard both sides at length and perused the record.

16. The common thread of dispute in both set of appeals is whether the assessee is to be considered as the manufacturer of the goods supplied by them to Electricity Boards/Railway Wagon manufacturers. Admittedly, goods have been got manufactured by various job workers by payment of job charges and supply of raw materials. After receipt of goods from the job workers, the mandatory inspection by third party Agency has been carried out at the assessee's premises before supply of the goods to the customers. Further the assesses have represented themselves as manufacturer of the goods before their customers. In these circumstances, the question for decision is whether the assessees are liable to be considered as manufacturer and liable to payment of Excise Duty.

17. Revenue has justified the view that the assessee is the manufacturer with the argument that inspection is an important process without completion of which, the goods do not become marketable, since they cannot be supplied to the customers. The definition of the term "Manufacture" in section 2 (f) includes any

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

process which is ancillary or incidental to the completion of the manufactured product.

18. The Apex Court in the case of Union of India Vs. Delhi Cloth and General Mills Co. Ltd. 1977 (1) E.L.T. (J 199) (S.C.) has held that 'manufacture' means bringing into existence a new substance known to the market and not merely producing some change in a substance. The Apex Court has further held that "Manufacture implies a change, but every change is not manufacture and yet every change of article is to 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." It is not difficult to see that at the premises of the job worker, the raw material has been transformed into the required components. As such, it is safe to conclude that manufacture of the goods has taken place at the premises of the job worker. But the fact remains that the goods are required to undergo a further process in the form of inspection before supply to the customer. It is on record that only the process of inspection has been carried out in the premises of the assessee. In the chain of activities, from raw material to the supply of goods to customers, the process of inspection becomes one of the processes. No doubt, it is a process incidentally or ancillary to the completion of the manufactured product and such process, the marketability of the goods is not complete. But it cannot be said that the process of inspection alone, results in a new community. Hence, we are of the view that the assessee cannot be considered as a manufacturer only on account of

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

the fact that the process of inspection has been carried out in his factory.

19. Revenue has sought to sustain the view that the assessee is the manufacturer with the submission that they have engaged the job workers, supplied the raw material and supervised the activities there and hence, are to be considered as the manufacturer. Even though, the idea is attractive, it does not merit acceptance. The transformation of the raw material into the final product has been done by the job worker at his premises and hence, the job worker alone is to be considered as the manufacturer and the liability to payment of Excise Duty would be upon him.

20. The Adjudicating Authority in his Denovo Order dated 13/11/2012 has come to the same conclusion as above, particularly after cross examination of the concerned job workers. He has also recorded the finding that the job workers were not operating within the scheme of job worker Notification No.214/86. As per this scheme, the principal manufacturer undertakes the responsibility of payment of Central Excise Duty in respect of goods manufactured by job workers. He has rightly observed that the liabilities for payment of Central Excise Duty cannot be fastened on the assessees in the absence of the undertaking in terms of the said Notification. The Revenue has sought to buttress their argument by relying on the decision of the Hon'ble Supreme Court in the case of Flex Engineering Ltd. (Supra). That case dealt with an entirely different issue. The Court considered, whether the process of manufacture of the machines will extend to the process of testing of such machines. The dispute in that case was whether the

**Appeal Nos. E/199-201/2009, E/70151, E/CO/70979/2013,
E/70165-70166/2013**

inputs used for such machines will be entitled to MODVAT credit. After considering the case carefully, we are of the view that the decision is not applicable to the facts of the present case.

21. The demand has also been raised in respect of certain goods claimed by the assesseees as trade and goods. The presumption raised by Revenue is that trading is only a cover for the manufacture of goods through job workers. But such claim has been rebutted by the assesseees by submission of copies of all such trading invoices. Perusal of such invoices dispels any doubts in this regard. VAT has also been paid on such transactions and we find no reason to take a view other than to consider this as trade goods not liable for duty.

22. In view of the above discussions, we conclude that the assesseees cannot be considered as manufacturers of the goods supplied to Railway Wagon manufacturers as well as Electricity Boards. The respective job workers who have manufactured the goods will be liable to payment of Excise Duty. In this view, we find no infirmity in the order passed by the Commissioner dated 30/11/2012 and hence, it is sustained and all the revenue appeals are rejected.

23. The Order dated 23/01/2009 is not sustainable and is set aside. Consequently, the appeals filed by the assessee and the directors are allowed.

(Pronounced in the court on.....)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja