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

Ex.Appeal No.442/12

(Arising out of Order-in-Original No.33/Commissioner/CE/Haldia/Adjn./2012 dated 30.03.2012 passed by the Commissioner of Central Excise, Haldia)

M/s The Water Treatment Company

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Haldia

Respondent (s)

Appearance:

Shri Muthu Venkataraman & Shri M.N.Bharathi, both Advocates for the Appellants(s)
Shri S. S. Chattopadhyay, Supdt. (AR) for the Revenue

CORAM:

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

Date of Hearing : 27.02.2019
Date of Decision : 27.02.2019

ORDER NO.FO/75271/2019

Per Bench :

The present appeal is directed against the Order-in-Original No. No.33/Commissioner/CE/Haldia/Adjn./2012 dated 30.03.2012.

2. The appellants, who have their office at Salem in Tamil Nadu, received an order from Executive Engineer, Zilla Parishad, Andaman & Nicobar Islands, for setting up a Water Treatment Plant for providing potable drinking water for the community. As per agreement entered into by the appellant with the Executive Engineer, Zilla Parishad, the appellant undertook for setting up a Reverse Osmosis (RO) Water Treatment Plant in different places. The Department noticed that for such Water Treatment Plants, the appellant did not discharge Central

Excise duty. Investigation was undertaken by the Anti-Evasion Unit of Haldia Commissionerate into the allegation of evasion of Central Excise duty by the appellants in respect of supply and setting up of such RO Water Treatment Plant. After conclusion of investigation, show-cause notice dated 12.08.2010, was issued proposing to demand of Central Excise duty totally amounting to Rs.68,67,384/-. After consideration of reply filed by the appellants to the show-cause notice and extending a personal hearing, the adjudicating authority passed the impugned order in which he upheld the demand of Central Excise duty as made in the show-cause notice along with interest. In addition, the adjudicating authority also imposed penalty for an amount equal to the Central Excise duty demanded. Aggrieved by the impugned order, the present appeal has been filed.

3. The appellant is represented by Shri Muthu Venkataraman, ld.Advocate along with Shri M.N.Bharathi, ld. Advocate and Revenue is represented by Shri S.S.Chattopadhyay, ld.D.R..

4. The ld.Advocate submitted that the appellant is not liable for payment of Central Excise duty as demanded in the impugned order. His main arguments are summarized below :

(i) He submitted that the activities of assembly and erection of the bought out items to form RO Water Treatment Plant, cannot be construed as manufacture under Section 2 (f) of the Central Excise Act, 1944. He submitted that the entire Plant after its erection, cannot be described as "goods" since the Plant is erected in the form of civil structure and cannot be dismantled without damage.

(ii) He submitted that the RO Water Treatment Plant for a particular location, needs to be specifically designed taking into account the requirement of the particular site including quality of water. Before undertaking the design, the team of officials visited the site and collected sample of water for the purposes of analyzing the various parameters. Depending upon the test result, the Plant is designed and various requirements of components, such as, filter, membrane and other equipments/instruments are ordered. After getting the necessary items procured from various sources, the appellant assembles and installs them as per design and drawing. The various sub-systems are interconnected and welded permanently. The entire Plant is installed on civil structure. After commissioning of the appellant, the same is handed over to the client.

(iii) Keeping in view the process of setting up of RO Water Treatment Plant, the ld.Advocate submitted that the Water Treatment Plant after its erection, becomes immovable properly and the same cannot be easily removed without considerable damage. He further submitted that approximately 60% of the Plant components will be damaged if the Plant is dismantled from the place of installation. He also added that if dismantled, it may not be possible to install it in another location since the requirement will be different.

(iv) Since the RO Water Treatment Plant becomes immovable property, the same cannot be described as “goods” and consequently, cannot be charged to Central Excise duty.

(v) He submitted that the issue of chargeability of Central Excise duty on such RO Water Treatment Plant, stands settled in various decisions. In particular, he refers to the Three Member Bench decision of the Chennai Bench of the Tribunal in the case of ION Exchange (India) Ltd. Vs. CCEx., Coimbatore reported in 2003 (159) ELT 499 (Tri.-Chennai). Three Member Bench of the Tribunal held that RO Water Treatment Plant, which is immovable property, does not attract duty in the hands of the assessee. The decision has also been followed in the subsequent decision of the Tribunal in the case of ION Exchange (India) Ltd. Vs. CCEx., Chennai reported in 2002 (150) ELT 1235 (Tri.-Chennai).

(vi) Lastly, the ld.Advocate submitted that the demand raised is also liable to be held as time barred inasmuch as the same assessee was already visited with another show-cause notice dated 20.03.2008/05.03.2008 proposing the demand of Central Excise duty on identical goods.

(vii) Finally, he submitted that the impugned order may be set aside and appeal may be allowed.

5. The ld.D.R., on the other hand, justified the impugned order. He submitted that the RO Water Treatment Plant is specifically classifiable under Chapter Sub-heading No.842102190 of Central Excise Tariff Act, 1985. He refers to the Certificate issued by the Executive Engineer, Zilla Parishad dated 13.01.2010, in which it is stated that the RO Water Treatment Plant so installed is shiftable except its foundation structure, without causing any damage to plant/accessories and stationary in nature. He submitted that in view of the above, the Adjudicating Authority was right in holding that RO Water Treatment Plant will be liable for payment of Excise duty. He also submitted that

the demand is not barred by limitation as the installation of RO Water Treatment Plant was, in the earlier show-cause notice, under a different Commissionerate, whereas in the present case, this is the first show-cause notice issued.

6. We have heard both sides at length and perused the record.

7. The dispute in the present case is regarding liability to Central Excise duty of the RO Water Treatment Plant, which is designed, erected and commissioned by the appellants in various places in Andaman Nicobar Islands. Such RO Water Treatment Plants are meant for providing potable water supply for public utility to the area concerned. It is required to examine whether the activity of assembly and erection of the bought out items to form RO Water Treatment Plant, can be construed as manufacture under Section 2 (f) of the Act. The contention of the appellant is that the RO Water Treatment Plant is immovable properly, since the same is erected on the civil structure and cannot be dismantled without considerable damage.

8. As explained by the ld.Advocate, RO Water Treatment Plant is designed for getting quality water in a particular site. Various components/equipments required for such RO Water Treatment Plant, are procured from different sources. They are installed/erected at the site and erected on civil foundation. As per the write up of setting up of a Water Treatment Plant, such Water Purification Systems are brought into existence only at the site of the customer in a progressive manner on civil construction/platform. Before erection of various component parts, the civil structure in the form of foundation is constructed on which whole system is assembled and erected.

System further requires inter-connection of various parts through piping.

9. While there is no dispute that Water Treatment Plant comes into existence only at the site of the customer, the Adjudicating Authority has taken the view that such Water Treatment Plant can be easily dismantled after its installation and shifted elsewhere. To this effect, he cited a Certificate of the Zilla Parishad dated 13.01.2010. At this stage, the ld.Advocate draws our attention to another Certificate procured by the appellant from the Executive Engineer (N & M), Zilla Parishad, Mayabunder. In this Certificate dated 14.01.2008, the Jurisdictional Executive Engineer has certified that Water Treatment Plants were erected out of materials brought to the site and assembled at site and it is an immovable property.

10. After considering both the Certificates issued by the Executive Engineers, Zilla Parishad as well as processes of setting up of Water Treatment Plant, we are of the view that Water Treatment Plant erected at the site, cannot be considered as “goods”. The Plant has come into existence only at the site in a progressive manner on a civil construction plat form. After conclusion of such erection, it is clearly in the form of immovable structure. The fact that about 60% of the Plant can be dismantled without damage thereof, cannot be a reason to reject the conclusion as above.

11. We also find that the excisability of such Water Treatment Plants, has come up before the Tribunal in several cases. The appellant places reliance on the Three Member Bench decision of the Chennai Bench of the Tribunal in the case of ION Exchange (India) Ltd. (supra). The

Tribunal has taken the view that the process of erection at site, does not bring into existence "goods" and hence not liable to duty.

12. The decision of the Three Member Bench decision of the Chennai Bench of the Tribunal has been followed in the subsequent decision of the Chennai Bench of the Tribunal in the case of ION Exchange (India) Ltd. as reported in 2002 (150) ELT 1235 (Tri.-Chennai). For better appreciation, Paras 5 and 6 of the said decision, are reproduced below:

> "***5.*** *On a careful consideration, we notice that the issue is no longer res integra. This Bench had considered the appellant's own case with regard to same issue on the same facts and by majority Final Order No. 790/2002, dated 16-7-2002 upheld the assessees contention and set aside the demands and penalty against the appellants and other parties. The findings recorded by the Third Member in paragraphs 25 to 32 is reproduced herein below :*
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> *"25. I have perused the records and orders proposed by my ld. Brothers. I have also heard both sides.*
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> *26. The dispute is whether the appellant is manufacturing industrial water treatment plants. The appellants, submission is that the industrial water treatment plants come into existence only upon erection at site. The appellants have developed designs for such plants of varied capacity. They also get the various parts and equipment required for the assembly of such water treatment plants manufactured to specifications by job works. Upon receipt of orders from industrial plants, they pack various parts required for the assembly and erection and send them to the buyers who gets the water treatment plant assembled and erected at site. At times, some parts are also directly despatched from the place of manufacture to the place of assembly without being received in the appellant's premises. The*

appellants' submission is that mere packing of the parts is not a process of manufacture attracting the levy of CE duty.

27. As against this, the Revenue's contention is that the appellant has designed the plant, has got all the parts standardised and produced and is selling the goods against specific orders for plants. Further, the unit is easily assembled and does not require any foundation. Revenue therefore, holds that the product which is packed and sold by the appellant is a water treatment plant and the appellant can rightly be held as a manufacturer of such plants.

28. The appellant placed much reliance on the decision of the Supreme Court in the case of Hawkins Cookers v. Collector - 1997 (96) E.L.T. 507 (S.C.), specific reference has been made to the following observations of the court :

"When the matter came to the Tribunal, the Tribunal proceeded on the assumption that the PCA only packed the different equipments/pieces and items that they bought from different people at their depot at Nangal Shama and that they do not manufacture the components. Dealing with PCA's submission is that they do nothing more than packing the equipments/items bought from different people in cartons and boxes was taken to be true. Yet it was held that this process amounted to manufacturing. The Tribunal observed that "even the Collector's findings that they had manufactured the twink simmermatic by affixing the heat control panel is unimportant and need not lead us away from the path". In fact, the Tribunal did not examine the correctness of the facts found and the conclusion reached by the Collector. The Tribunal held that the path taken by the Collector was not the path that should have been taken. The Tribunal disposed of the case proceeding on the assumption that nothing was done by the PCA except to gather the various tax paid articles and put them in a box themselves and in the facts and circumstances of the case that would constitute manufacture.

The Tribunal's order is clearly erroneous. The Tribunal has not found whether a new product came into existence because of some activity undertaken by the appellant. Without this finding, it could not be held that a manufacturing process had been undertaken by the appellant and unless there is a finding of manufacture, excise duty is not attracted. Unfortunately, the Tribunal has not examined the correctness of the Collector's order at all. We are of the view that the order of the Tribunal is erroneous and must be set aside".

[paras 2 and 3]

29. The appellant's contention is that unless some manufacturing process brings into existence a new product, the dutiable event does not takes place. As against this, the Revenue has contended that if some process is carried out which brings into existence a new product, duty is attracted. According to them it is not relevant whether the process is a manufacturing process or not.

30. It is well settled that Excise being a duty on manufacture or production, the levy is dependent on the manufacture of new goods. In the present case, the evidence in the SCN only reveals that the appellant gets the parts manufactured, they pack and send those parts either fully from their factory or send some of the parts directly from the manufacturer's premises to the buyers' premises and other parts from the factory. However, other than designing and packing, appellant is not carrying out any manufacturing activity. These activities are not in the nature of manufacturing process, which brings into existence the industrial plant in the appellant's factory.

31. I am in agreement with the view of the ld. Member (J) that the appellant was not manufacturing Industrial water treatment plants and that the demand are not sustainable. I am also in agreement with the view of the ld. Member (J) that the demand *is time-barred inasmuch as the facts about the manufacture of the industrial water treatment plants was fully in the knowledge of the C.E authorities. The assessee had written to the C.E authorities on 27-10-86 about the dutiability of industrial water treatment plants. This letter explained the full facts about the appellant's activity. The Asstt. Collector of C.E. had also clarified to the appellant vide his letter dt. 3-3-87, that industrial water treatment plants need not suffer excise duty. Thus, when the facts of the case were known to both sides, there is no substance in the allegation that relevant facts were wilfully suppressed by the appellant with the intention to evade payment of duty.*

32. In view of what has been stated above, I am of the view that the appeal is required to be allowed."

6. *In view of this Bench having decided in the appellant's own case by majority order holding that the process of assembly at site does not bring into existence excisable goods and are not liable to duty, therefore, the impugned orders in orders-in-original in these 27 appeals are required to be set aside by allowing the appeals. The COD application in Appeal No. E/177/02 is taken up and allowed in view of the main appeal already pending before the Tribunal and which is already listed for today for consideration. The stay applications are also allowed in the same term, with consequential relief, if any."*

13. In the finding of the Three Member Bench, it is held that the process of assembly does not bring into existence any excisable goods. We find that the Hon'ble Bombay High Court in the case of Larsen & Toubro Ltd. Vs. Union of India reported in 2009 (243) ELT 662 (Bom.), has also taken a similar view.

14. In view of the above discussions, we find no justification to charge excise duty on the Water Treatment Plant.

15. In the result, the impugned order is set aside and the appeal is allowed with consequential relief.

(Dictated and pronounced in the open court)

Sd/	Sd/
(P.K.Choudhary)	**(V.Padmanabhan)**
Member (Judicial)	**Member (Technical)**

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