IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.129 of 2012

(Arising out of Order-in-Original No.39/Commr./CE/Kol.V/Adjn./2011 dated 23.12.2011 passed by Commissioner of Central Excise, Kolkata)

M/s M.B.Control & Systems Private Limited
31/1, Ahirpukur Road, Ballygunge, Kolkata-700019

Appellant

VERSUS

Commissioner of Central Excise, Kolkata V
180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri N.K.Chowdhury, Advocate for the Appellant
Shri A.Roy, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO…75923/2023

DATE OF HEARING : 20 .06.2023

DATE OF PRONOUNCEMENT : 04.07.2023

Per Ashok Jindal :

In this appeal, the appellant has challenged the confirmation of demand of duty of Rs.3,56,49,937.78 along with interest and an equal amount of penalty was also imposed under Section 11AC of the Central Excise Act, 1944, on the activity undertaken by the appellant meant to manufacture during the period from 2005-06 to 2009-10.

2. The facts of the case are that the appellant had taken Dealers Registration on 03-12-2001 for dealing with excisable goods. The

appellant was mostly importing the electronic goods and also procuring some negligible quantity indigenously such as Power Meters, Control Pannels, Infrared Thermometers, PID Controllers, Non-contract I.R. Sensors, SMPS, Span Power Supply Controllers SC Adopter, Duplex MM/SC Digital MM and selling the same to the manufacturer of excisable goods and the manufacturers. The appellant was maintaining records in RG 23D Accounts and issuing Central Excise Invoices to enable the customers to avail CENVAT Credit. The appellant was selling the goods to their customers after calibration tests and upgradation/configuration of the appliances according to the requirements/specifications of the customers. Such process was not required in all cases. Such process is not amounting to manufacture since the same would not change the nomenclature, character and use of such appliances. This process continued during the period from 2001 to February 2009. The appellant was also submitting the returns as a Dealer. The appellant was also undertaking manufacturing of some dutiable goods but since the value of clearance was below the SSI Limit, no Central Excise Registration was taken. The appellant was experiencing difficulties in their business as a trader because they had to disclose the name of the supplier and price at which the goods were purchased in their Central Excise Invoices. Disclosure of such information, causing difficulties since the buyers sometimes were purchasing the goods directly from the manufacturers. In order to obviate such difficulties, the appellant had taken Central Excise Registration as a manufacturer on 13-03-2009 and clearing the goods against Central Excise Invoice on payment of Central Excise duty. The Officers of the Department visited their factory

on 11-12-2009, examined Books of Accounts including Balance Sheet, Tax Audit Report etc. The Officers also recorded statements of Shri Ashok Agarwal, Director, Shri S. Saha, Production In-charge, Sri S. Mukherjee, Quality Control In-charge and also from some buyers. From the statements, it appeared that the appellant was undertaking the same process after taking Central Excise Registration also as a manufacturer. The appellant was also submitting ER-1 Return.

2.1 The appellant was issued with a Show Cause Notice on 27-12-2010, proposing finalization of classification of the goods manufactured by the appellant and demanding Central Excise duty to the tune of Rs.3,56,49,937.78. Proposal was also made for charging Interest under Section 11AB and imposition of Penalty under Section 11AC of the Central Excise Act, 1944. It was alleged that since the appellant was undertaking the same process before and after taking the Central Excise Registration as a manufacturer, the appellant's activities during the period from 2005-2006 till 2009-2010 was also amounting to manufacture and the appellant was liable to pay the Central Excise duty on the clearances made as a Dealer. The demand notice has been raised invoking extended period of limitation.

2.2 The appellant submitted the reply to the Show Cause Notice denying and disputing the allegations contained therein stating inter alia that the demand is barred by limitation since there was no suppression of facts with intent to evade any Central Excise duty. The appellant was submitting the Qtrly. Returns as a Dealer and also submitting ER-1 Returns as a manufacturer w.e.f. March 2009. The activities of the appellant was known to the Department. Secondly, the process of

calibration or upgradation in some cases as per specifications of the customers are not amounting to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944 since no new product emerges and there was no change in the nomenclature, character and use such as Power Meters were purchased as Power Meters and sold also as a Power Meters. The same is also in respect of other goods. They relied on some decisions in support of their contentions. Some items were manufactured by them did not exceed 50(fifty) Lacs. They also relied upon Board Circular dated 12-04-1999 to contend that upgradation is not a process of manufacture. The appellant prayed for dropping the case. They enclosed the Quarterly Returns and ER-1 Returns.

2.3 The appellant was granted Personal Hearing on 05-08-2011 when the appellant appeared before the Commissioner of Central Excise, Kolkata – 'V' Commissionerate and made submission. The appellant was further issued with a notice for Personal Hearing on 30-08-2011 vide letter dated 24-08-2011 in view of the fact that the Ld. Commissioner has been changed and there was requirement of fresh Personal Hearing. The appellant appeared on that date before the Ld. Commissioner, Kolkata – V Commissionerate and found that the earlier Commissioner, Dr. Sanjay Agarwal, who heard the matter resume duties as Commissioner, Kolkata – V Commissionerate, due to change of posting and it was learnt from the Ld. Additional Commissioner that no further Personal Hearing is required and the appellant was advised to write a letter that no further hearing is required. Accordingly, the appellant wrote a letter dated 30-08-2011 and intimated that their case may be

decided on the basis of the Personal Hearing and submissions made on 05-08-2011.

2.4 The appellant was issued with an Order-in-Original dated 23-12-2011, passed by the another Commissioner who did not hear the matter. By the said Order, there is no whisper about the classification of the goods but confirmed the demand of Rs.3,56,49,937.78, charged Interest and imposed Penalty on equivalent amount of demand of Central Excise duty, holding that the appellant was engaged in the manufacturing activities also during the period prior to March 2009 and hence, they are liable to pay the Central Excise duty. On the point of limitation, he confirmed that extended period is invokable for non-disclosure of manufacturing activities taking the shelter as a Dealer.

2.5 The appellant filed this Appeal before the Hon'ble Tribunal, Kolkata with an application for waiver of pre-deposit, By an Order dated 02-01-2014, the appellant was directed to pre-deposit 25% of the duty confirmed, which was challenged before the Hon'ble High Court, Calcutta by filing a Writ Petition. The said Writ Petition was dismissed vide Order dated 12-06-2014 with cost of Rs.50,000/-. The appellant filed an Appeal before the Division Bench of the Hon'ble High Court, Calcutta stating that demand would be reduced to approximately Rs.57 Lacs since they are eligible for setting off of the Cenvat Credit Amount and the matter may be remanded to this Tribunal for reconsideration of pre-deposit issue. The Hon'ble Division Bench, High Court, Calcutta, remanded the matter to this Tribunal for reconsideration of the issue of pre-deposit. This Tribunal vide Order dated 17-09-2015 again directed

to deposit Rs,25,00,000/- (Rupees twenty five lakhs only). The appellant deposited the said amount.

2.6 Hence the present appeal.

3. The ld.Counsel appearing for the appellant submits that the Order passed by the Ld. Adjudicating Authority cannot be maintainable in law in view of the fact that the said Order has been passed in gross violation of the principles of natural justice since the matter was heard by one Commissioner, Dr. Sanjay Agarwal but the Order has been passed by the another Commissioner Mr. Prashant Kumar. This is bad in law and the same is well settled in this regard.

3.1 He further submits that Order is also non-speaking for non-considerations of submissions and decisions cited, which seriously affected the decision-making process, resulting violation of principles of natural justice again.

3.2 He further submits that the process of calibration and upgradation required in some cases as per specification of the customer is not amounting to manufacture since it does not emerge any new article and also did not change the nomenclature, character and use of such appliances. The manufacturing licence was taken for business convenience and the payment of duty by itself does not make the process amounting to manufacture. Further, such tests are not done in all cases. He further submitted that as per Note – 6 of Section XVI and the decision in the case of – Indo Asian Fues Gear Ltd. – 1993 (68) ELT 207 (Tri. – Del.) have no manner of application for inferring the process of calibration amounts to manufacture.

3.3 He further submitted that the demand is also barred by limitation. The finding in this regard is contrary to record and not sufficient for establishing the circumstances for invoking extended period of limitation. The appellant submitted returns when acting as a Dealer and when acting as a manufacturer. The Show Cause Notice has been issued even beyond the period of one year from the date of submission of ER-1 Return. The demand has been made from the records of the appellant, the suppression of fact cannot be alleged and extended period cannot be invoked. The question of imposition of penalty does not arise.

4. The ld.A.R. for the Revenue supported the impugned order.

5. Heard the parties and considered the submissions.

6. As per the arguments advanced by both the sides and records placed before us, the following issues emerge :

Issue

(a) Whether the impugned order is in gross violation of principle of natural justice as the matter was heard by one Commissioner and the order was passed by another Commissioner without considering the submissions made by the appellant, or not ?

7. We find that the matter was heard by the adjudicating authority on 05.08.2011 by then Commissioner, Dr.Sanjay Agarwal. Thereafter, a letter was issued to the appellant for rehearing of the matter on 24th August, 2011 for 30th August 2011 on the ground that the adjudicating authority has changed and the new Commissioner has taken charge, but on 30th August, 2011 when the appellant appeared before the

authority, it was intimated to the appellant that Dr.Sanjay Agarwal is still working as Commissioner of Central Excise, Kolkata V and no further hearing is required in the matter. Thereafter, the order was passed by Shri Prashant Kumar, Commissioner of Central Excise, Kolkata V on 23rd December, 2011.

7.1 It is fact on record that the matter was heard by Dr.Sanjay Agarwal, the erstwhile Commissioner of Central Excise, Kolkata and the order has been passed by Shri Prashant Kumar, Commissioner of Central Excise, Kolkata V, which is in gross violation of principles of natural justice. Before passing the impugned order, Shri Prasant Kumar, Commissioner of Central Excise, Kolkata V, was required to hear the appellant on merit. It is also noticed that the appellant during the course of personal hearing and in the written submissions and the reply to the show-cause notice had relied upon certain case laws relying to the issue involved in hand, but the same has not been considered by the adjudicating authority while passing impugned order.

8. In that circumstances, we hold that non-consideration of the judicial pronouncement submitted by the appellant is in gross violation of principles of natural justice. Therefore, we answered the said issue in favour of the appellant.

Issue

(b) Whether the activity undertaken by the appellant amounts to manufacture of not ?

9. We find that it is a fact on record that the appellant was engaged in the import as well as acquiring product from the independent market and after going through the necessary calibration tests used to sell

those products and passed on the cenvat credit by issuing dealer's invoices. In March, 2009, the appellant surrendered dealer's registration and got themselves registered as a manufacturer. It is also on record that the test report generated by the appellant prior to take the registration as a manufacturer and after taking registration as manufacturer, remained absolutely the same in nature and contents. The process of the imported goods is that the appellant was selling the goods to their customers after calibration tests and upgradation/configuration of the appliances according to the requirements/specifications of the customers. Therefore, it is to be seen that the calibration tests and upgradation/configuration of the appliances amounts to manufacture or not.

10. As per CBEC Circular No.454/20/99-CX dated 12.04.1999, a clarification has been issued and the same is extracted herein below :

-247-

Annexure-F

Manufacture — Upgradation of computer system and addition of hard disk not amounts to manufacture

Circular No. 454/20/99-CX., dated 12-4-1999

[From F.No. 154/4/97-CX.4]

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

1634 EXCISE & CUSTOMS CIRCULARS AND CLARIFICATIONS

I am directed to say that certain doubts have been expressed whether upgradation of computer system by increasing the storage/processing capacity of computer system etc. will amount to manufacture under the Central Excise Act, 1944.

2. The matter has been examined by the Board. It is observed that computers are covered under Heading No. 87.71 of the Schedule to the Central Excise Tariff Act, 1985 which describes computers as automatic data processing machines. An automatic data processing machine will be known by this name, irrespective of its capacity of storage and processing. The storage capacity or processing speed may be enhanced by increasing the hard disk capacity, RAM or by changing the processor chip (say from 386 to 486), or say from Pentium (I to Pentium II), but it cannot be said that new goods with a different name, character and use have come into existence, which can be subjected to duty again.

3. Upgradation of computer may involve changing the processor (e.g. from 486 chip to Pentium or Pentium II chip), the motherboard, the hard-disk etc. The new components which replace the components in existing system have already suffered duty. The remaining old parts of the old system have also suffered duty as a system initially. The upgradation is generally carried out at residential or business premises of the customer and there is no rigid requirement for the upgradation to be done at the factory of the manufacturer. The value addition in such upgradation involved, whether or not of significant magnitude, is by itself not relevant to determine whether upgradation is a process of manufacture.

4. In view of the above facts and taking note of the existing law, Board is of the view that the upgrading of old and used computer systems would not amount to manufacture, in so far as the upgradation does not bring into existence goods with a distinct new name, character and use.

5. Trade and field formations may be informed accordingly.

6. Receipt of this circular may please be acknowledged.

The above Circular clarified that the upgradation does not amounts to manufacture as it does not bring into existence new name, character and use.

11. Further, in the case of Union of India Vs. Delhi Cloth & General Mills Company Limited reported in 1977 (1) ELT J199 (SC), the Hon'ble Apex Court dealt the issue and held that "manufacture'' means bringing existences new substance known to the market and not mere on some changes in the substance. The Hon'ble Apex Court has held as under :

> ***"9.*** *We have already referred to the affidavits on this question as sworn to by Mr. Krishnan on behalf of the appellant and Dr. Nanji on behalf of the respondents-petitioners. In his affidavit Dr. Nanji has also referred to the specification of "refined oil" by the Indian Standard Institution and has given these in an annexure to his affidavit. From this annexure we find the following specification by the Indian Standard Institution:-*
>
> *"Refined groundnut oil :- Groundnut oil which has been refined by neutralisation with alkali bleached with fuller earth and/or Activated Carbon, and deodorised with steam, no other chemical agent being used.*
>
> *Refined cotton seed oil :- Cotton seed oil which has been refined by neutralisation with alkali, bleached with alkali, bleached with fullers earth and/or Activated Carbon and Deodorised."*
>
> ***10.*** *This specification by the Indian Standard Institution furnishes very strong and indeed almost incontrovertible support for Dr. Nanji's view and the respondents' contention that without deodorisation the oil is not "refined oil" as is known to the consumers and the commercial community. Further support, if any was needed is found in the several affidavits of several concerns who market refined groundnut oil under the brand names - Falika, Tripti, Kitchen, Kiran, Temple, Sovereign, Lotus, Nirmal, Dilkhus, Kamdhenu, Radio, Deer, Dog, Sepoy, Cocogem, Tushar and Binutol. They agree in asserting that the oil is always deodorised before it is marketed as refined oil under these brand names. As against this it has to be noticed that the appellant*

could not produce evidence of one single case of marketing of refined oil without deodorisation. Instead of that Mr. Pathak produced before us copies of extracts of a book by Alton Bailey of the name "Cottonseed and Cottonseed Products" and another book by the same author of the name, Industrial Oil and Fat, Products" and a third book of the name, "Vegetable Fats and Oil" by G.S. Jamiesom. Mr. Jamiesom's statement does not at all make it clear that refined oil is put on the market without deodorisation. Mr. Bailey appears to have stated in his book on "Industrial Oil and Fat Products" that the term "refining" refers to any purifying treatment designed to remove free fatty acids phosphatides or mucilaginous material or other gross impurities in the oil; it excludes "bleaching" and also "deodorisation". The extracts from this book also do not clearly show that before deodorisation, the oil which has been refined by the purifying treatment, is put on the market. The extract from Bailey's book on "Cottonseed and Cottonseed Products" contains a passage in these words :-

"In a discussion of the composition and characteristics of cotton-seed oil, three kinds of oil are to be distinguised. They are : (a) crude oil, which is the oil as it is expressed from the seed, and the commodity shipped from the oil mills; (b) refined oil, or oil which has been freed of most of its non-glyceride constituents by treatment with alkali, with or without subsequent bleaching or deodorisation; and (c) hydrogenated oil."

11. *Mr. Pathak has relied on Bailey's statement that the oil which has been freed of most of its non-glyceride constituents by treatment with alkali with or without subsequent bleaching or deodorisation is "refined oil" ; for his contention that even without deodorisation the oil is known as "refined oil".*

12. *It will be unsafe however to base any conclusion on this extract without knowing the entire context in which the statement has been made or what has been said in other parts of the same*

book. The book itself was not produced before us. It is worth noticing, that while the above statement is made by Mr. Bailey in respect of cottonseed oil the oil with which we are concerned is produced from groundnut oil and til - neither of which is cotton seed. Apart from all this we are of opinion that the view of the Indian Standard Institution as regards what is refined oil as known to the trade in India must be preferred to the opinion of this author. In this connection it has also to be mentioned that the affidavits filed on behalf of the respondents are clear and categorical, while Krishnan's affidavit on which reliance was placed on behalf of the appellant is somewhat vague, halting and not categorical.

13. *On a consideration of all these materials we have no doubt about the correctness of the respondents' case that the raw oil purchased by the respondents for the purpose of manufacture of Vanaspati does not become at any stage "refined oil" as is known to the consumers and the commercial community. The first branch of Mr. Pathak's argument must therefore be rejected.*

14. *The other branch of Mr. Pathak's argument is that even if it be held that the respondents do not manufacture "refined oil" , as is known to the market they must be held to manufacture some kind of "non-essential vegetable oil" by applying to the raw material purchased by them, the processes of neutralisation by alkali and bleaching by activated earth and/or carbon. According to the learned Counsel "manufacture" is complete as soon as by the application of one or more processes, the raw material undergoes some change. To say this is to equate "processing to manufacture" and for this we can find no warrant in law. The word "manufacture" used as a verb 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. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus :-*

"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."

15 *It is helpful to consider also in this connection the ordinary meaning of the word "goods". For, by the very words of the Central Excises and Salt Act 1944, excise duty is leviable on "goods". The Act itself does not define "goods" but define "excisable goods as meaning" "goods specified in the First Schedule as being subject to a duty of excise and includes salt". On the meaning of the word 'goods' an interesting passage is quoted in the Words and Phrases, Permanent Edition, Vol. 18 from a judgment of a New York Court thus :-*

"The first exposition I have found of the word "goods" is in Bailey's Large Dictionary of 1732, which defines it simply "merchandise" ; and by Johnson, who followed as the next lexicographer it is defined to be movable in a house; personal or immovable estates; wares; freight; merchandise."

16. *Webster defines the word "goods" thus :-*

"goods, noun, plural; (1) movables; household furniture; (2) Personal or movable estate, as horses, cattle, utensils, etc., (3) Wares; merchandise; commodities bought and sold by merchants and traders."

17. *These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold.*

18. *These considerations of the meaning of the word "goods" provides strong support for the view that "manufacture" which is liable to excise duty under the Central Excises and Salt Act, 1944 must be the "bringing into existence of a new substance known to*

the market". "But", says the learned Counsel, look at the definition of "manufacture" in the definition clause of the Act and you will find that "manufacture" is defined thus :

Manufacture includes any process incidental or ancillary to the completion of a manufactured product." S. 2 (f)

19. *We are unable to agree with the learned Counsel that by inserting this definition of the word "manufacture" in S. 2 (f) the legislature intended to equate "processing" to "manufacture" and intended to make mere "processing" as distinct from "manufacture" in the sense of bringing into existence of a new substance known to the market liable to duty. The sole purpose of inserting this definition is to make it clear that at certain places in the Act the word `manufacture' has been used to mean a process incidental to the manufacture of the article. Thus in the very Item under which the excise duty is claimed in these cases, we find the words "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". The definition of 'manufacture' as in S. 2 (f) puts is beyond any possibility of controversy that if power is used for any of the numerous processes that are required to turn the raw material into a finished article known to the market the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available. It is only with this limited purpose that the legislature, in our opinion, inserted this definition of the word 'manufacture' in the definition section and not with a view to make the mere "processing" of goods as liable to excise duty."*

12. Further, in the case of Hindustan Polymers Vs. Collector of Central Excise reported in 1989 (43) ELT 165 (S.C.), again the Hon'ble Apex Court has examined the issue.

13. In the case of South Bihar Mills Limited Vs. Union of India reported in 1978 (2) ELT J336 (SC), the Hon'ble Apex Court has an

occasion to examine the issue what is the manufacturing and the Hon'ble Apex Court has observed as under :

> "***14.*** *The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India v. Delhi Cloth and General Mills Ltd., 1963 Supp. (1) SCR 586 = 1977 E.L.T. (J 199). The contention there was that in the course of manufacture of vanaspati, a vegetable product from groundnut and till oil, the respondents brought into existence at an intermediate stage of manufacturing refined oil which fell within the description of "vegetable non-essential oil, all sorts", in Item 23 of the First Schedule. The contention would seem to assume that the goods subjected to duty must be goods known as such in the market. The contention was that the respondents after they bought raw oil with all its impurities, manufactured, by application of certain processes of refinement, refined oil which was the same as refined oil available in the market and that it was "refined oil" which became after further process the ultimate vegetable product. It was argued that the fact that the vegetable product was the ultimate product and was chargeable to duty did not alter the position that an earlier stage, the respondents manufactured "refined oil" as known to the market and that the fact that they did not put this "refined oil" the produce to it used but market the unfinished product did not affect their liability. This Court held that if a new substance was brought into existence from raw materials and that substance was the same as "refined oil" as known to the market it would be subject to duty. The question,*

therefore, was, was the substance sought to be charged "refinded oil" known to the market? The affidavits showed that deodorization was necessary before the product could be called "refined oil". It was not in dispute that that process was employed after hydrogenation and not at the stage when what was called "refined oil" came into existence at an intermediate stage. No evidence was produced by the union of refined oil being brought to the market without deodorization. It was held that raw oil purchased by the respondents for the purpose of manufacturing vanaspati did not become at any stage "refined oil" as known to the consumers and the commercial community."

14. Further, in the case of Collector of Central Excise, Chandigarh Vs. Steel Strips Limited reported in 1995 (77) ELT 248 (S.C.), the Hon'ble Apex Court has observed as under :

*"**6.** It cannot be sufficiently emphasised that when it is the case of the Excise Authorities that an article is the result of a process of manufacture and it is commercially distinct and known as such, it is for the Excise Authorities to lay evidence in this behalf before the first adjudicating authority regardless of the fact that he is an officer of the Excise Department. There should, ordinarily, be no difficulty in establishing that the article is the result of a process of manufacture; in the event of difficulty, it would be open to the Excise Authorities to seek a direction requiring the assessee to set out in writing what it does to obtain the article. Too often, as our experience in this Court and in the High Courts, before the Tribunal was established, shows, lack of evidence has led to the failure of the case of the Excise Authorities and, consequently, to the loss of revenue to the State.*

***7.** Failure to lay the requisite evidence cannot be made up by reference to authoritative publications unless the Excise Authorities inform the assessee that they propose to rely upon the same before the adjudicating authority. It is then open to the assessee to establish that it does not obtain the article by the*

means referred to in the publication or indeed, that the publication is not authoritative. In the decision of matters relating to excise, technical knowledge plays a part. It is for that reason that the Tribunal has a Technical Member. Technical evidence and authoritative publications must, therefore, be placed in the first instance before the adjudicating authority and the Tribunal. They have the requisite technical expertise to evaluate the same. Technical publications cannot usefully be cited for the first time at the Bar of this Court.

8. *Upon such material as has been referred to by learned counsel for the Excise Authorities, which we have set out above, we find it `not proved' that hot rolled strips undergo a process of manufacture before they become cold rolled strips. We are, therefore, unable to accept the contention of the Excise Authorities that the assessees' cold rolled strips are liable to excise duty at the rate of Rs. 650/- per metric tonne."*

And the Hon'ble Apex Court held that the burden on the Department to prove that the process of manufacture has resulted in emergence of a commercially distinct commodity.

15. As in this matter, the activity undertaken by the appellant as calibration tests and upgradation/configuration of the appliances according to the requirements/specifications of the customers, does not amount to manufacture as no new product came into existence and their character and use remain the same. Therefore, we hold that the activity undertaken by the appellant does not amount to manufacture. Accordingly, this issue is answered in favour of the appellant.

Issue

(c) Whether in the facts and circumstances of the case, the extended period of limitation is invokable or not ?

16. We find that the appellant has taken registration as trader from 03.12.2001 and filing their Dealer's return regularly and thereafter, on 13.03.2009, the appellant took registration as manufacture of the same activity. Therefore, the process undertaken by the appellant was well-known to the Department on 13.03.2009 and also on the visit done on 11.12.2009 for examination of Books of Account and other activities undertaken by the appellant and the appellant was also submitting ER Returns to the Department. In that circumstances, the show-cause notice issued on 27.12.2010 by invoking extended period of limitation, is not sustainable.

17. Accordingly, we hold that all the demand against the appellant is barred by limitation. Hence, this issue is also answered in favour of the appellant.

18. In view of the above observations, we do not find any merit in the impugned order and the same is set aside.

19. In the result, the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on **04.07.2023**)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/

(K.Anpazhakan)
Member (Technical)

mm