

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.459 of 2012

(Arising out of Order-in-Original No.18/Commissioner/CE/Haldia/Adjn/2012 dated 27.03.2012 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata.)

**Shri G.D. Mundhra, Proprietor
M/s. Mundhra & Co.**
(MH-6, South Chamrail, Howrah)

...Appellant

VERSUS

Commissioner of Central Excise, Haldia

.....Respondent

(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

WITH

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APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)
Shri B.K.Singh, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76794-76795/2024

DATE OF HEARING : 07.08.2024
DATE OF DECISION : 03.09.2024

Per : RAJEEV TANDON :

The appellant is a proprietorship firm that came into operation in 2005-06 with a small galvanisation unit. During the year 2009–2010 the appellant procured machineries for manufacture of hardware fittings (LT pin, 11 KV pins, 30 KV pins, stay sets etc.). Prior to this, the appellant would get the goods manufactured on job work basis as the factory was not capable of supplying different MS hardware to the state electricity boards. The appellants have filed appeal against the order-in-original No. 18/Commissioner/CE/Haldia/Adjn/2012 dated 27.03.2012, whereby the learned Commissioner has confirmed a duty amount of over Rs.1.25 crore besides holding the appellants liable to interest and penalty in terms of section 11AB and 11AC of the Central Excise Act¹ respectively. The order also imposes personal penalty on the proprietor in terms of Rule 26 of Central Excise Rules, 2002².

2. It is submitted by the appellant that they were purchasing insulators from M/s. India Pottery Ltd. and M/s. Allied Ceramics Ltd. during the year 2005 -2006 and 2006 -2007, galvanizing them and supplying back after galvanisation. The appellant firm was also supplying transmission line accessories and hardware fittings used by power supply corporations against bids and tenders floated by them. They stated that the said goods were got manufactured from different

1 The Act
2 The Rules

job workers and as they were not the manufacturers, they obtained no Central Excise registration.

3. Based on intelligence/information that the appellant was manufacturing electrical hardware and were not paying Central Excise duty, investigations were initiated by the department that culminated in the issuance of show cause notice dated 03/09/2010.

4. Disputing the allegations contained in the show cause notice and pointing out that it was barred by limitation, the appellant submitted that they cannot be treated as a manufacturer merely on the basis of the terms and conditions of the Orders of the Vidyut Nigams, particularly when they had got the goods manufactured from the job-workers by supplying raw materials or purchasing the goods directly from the suppliers and supplying them to the Vidyut Nigams. The appellant relied upon the decision in the case of **Ujagar Prints v. UOI & Ors**³, **Collector of C.Ex., Baroda v. M.M Khambatawala**⁴, to emphasise that the manufacturer was the person who actually manufactured the goods. Inspection of the goods supplied to the Nigams was also conducted at the job-worker's premises. The Director of the firm, Shri G.D. Mundra in his statements had stated that they may have received the Orders from the Vidyut Nigams as a manufacturer, but they did not actually manufacture the goods. The appellant however manufactured small quantities of goods, in their factory for some other parties namely M/s. Indian Potteries Ltd. and M/s Allied Ceramics Pvt. Ltd. Further, during the period 2005-06,

3 **1988 (38) ELT 535 (SC)**

4 **1996 (84) ELT 161 (SC)**

2006-07 and 2007-08, their clearance value did not exceed SSI exemption limit and for that reason the appellant had not taken Central Excise registration and were not required to pay the Central Excise duty. They further submitted that the job-workers were not made a party to this proceedings, nor any verification/enquiries were made in respect of the supplier of the goods from whom the goods were purchased. It is the appellant's case that embossing of the marking was for identification purpose of the goods and was indeed not a trade mark.

5. The learned AR for the department has reiterated the findings of the learned Commissioner and supports the department's stance.

6. We have heard the rival contentions of both the sides and have perused the case records.

7. We note that the basic premise of the department to arrive at its findings, is the fact that the appellant had declared themselves as manufacturers in the bid documents submitted to the Electricity Board, besides accepting mandatory requirement of providing guarantee and despatch of goods after the compulsory inspection. The fact that the said goods were embossed on site with the name of the appellant is another reason for confirmation of the demand by the department. The appellant has submitted before us that they had complied with all the conditions of the respective contracts and that the buyers were satisfied with the fulfillment thereof, and therefore the adjudicating authority assumed that the goods were manufactured by the appellant.

8. It be pointed out that the appellant has contested strongly the impugned demand on grounds of limitation wherein the show cause notice covers the period 2005–2006 to 2009 –2010 while the show cause notice has been issued on 03.09.2010. The appellants state that as the search was undertaken in the month of May and June 2007 and all sales records and other documents retrieved, the facts were well within the knowledge of the department. They further state that during the period 2005–06, 2006–07 and 2007–08 the clearances of the manufactured goods were well below the exemption threshold and therefore they were not required to take any registration for purchase and sale of the goods supplied to the electricity boards. For the reason no intimation to the department was also statutorily required to be tendered. Therefore they submit that they were not the manufacturers of the goods and were procuring the same from the job workers and supplying to different Vidyut Vitran Nigams. The appellants have also disputed the figures as shown in the balance sheet and taken as clearance value of manufactured goods. Based on assumptions and presumptions it cannot be held that the activities undertaken by them amounted to manufacture. Mainly on the basis of tender conditions that the manufacturer can alone submit the bid, the authorities have taken them to be the manufacturer of the goods supplied while attaching far too much importance to other stipulations and conditions of tender, including the inspection clause. Such enumeration is of no

relevance, particularly when the appellant did not manufacture the goods themselves, and supplied the same after getting manufactured from job workers and purchasing as such. As for the markings in certain cases like M, MC etc., the department has not been able to debunk the appellant's theory that these were mainly for ease of identification of the good supplied to the various power supply corporations and certainly were not by way of any trademark. We find support for this contention of the appellant, where under identical situation, the demands were set aside. Also in the following cases as well, a manufacturer has been clearly understood to be a person who actually undertakes manufacture of goods.

- **Comet Technocom Pvt.Ltd. v. CCE, Kolkata-II⁵**
- **S.A. Enterprise v. CCE, Kolkata-II⁶**
- **Aska Enterprise v. CCE, Nagpur⁷**
- **Basant Industries v. Collector of Central Excise, Kanpur⁸**
- **Collector of Central Excise, Baroda v. M.M. Khambhatwala⁹**
- **CCE v. Aurofood Pvt.Ltd.¹⁰**
- **Collector of C.Ex v. Arihant Udyog v. CCE, Nasik¹¹**

Thus in view of the law as flowing from the said cases we are of the view that a trader can under no circumstances be held to be a manufacturer and entrusted with attendant liabilities.

5 **Order No.F/77097-77102/2018**
6 **Final Order No.75848-75854/2023 dated 27.06.2023**
7 **2006 (202) ELT 795 affirmed by Hon'ble Supreme Court -2010 (254) ELT A-37.**
8 **1995 (75) ELT 21 (S.C.)**
9 **1996 (84) ELT 161 (S.C.)**
10 **1989 (44) ELT 261 (Tribunal) upheld by Hon'ble Apex Court – 1997 (94) ELT A 140 (S.C.)**
11 **2018 (363) ELT 924 (Tri.-Mumbai)**

9. This bench of the Tribunal in the case of **Commet Technocom Private Limited**¹² had in a like case, held that the supplier of electrical item to the Electricity Board cannot be held to be a manufacturer, merely on the strength of supplying of goods and the manufacturer was the person who has undertaken job work manufacture on a contract basis. To similar effect is also the order of this tribunal in the case of **S.A. Enterprises v. Commissioner of C.Ex, Kolkata-II** issued vide **Final Order No. 75848-75845/2023 dated 27.06.2023**. We are thus of the view that the noticee cannot be charged for payment of Central Excise duty solely on the basis of certain declarations/representations made to its customers claiming to be a manufacturer, without being actually able to show the manufacture of such goods by the noticee in terms of Section 2(f) of the Act. Also it is too well known that excise is a tax on manufacture and not on sale of goods (**UOI v. Delhi Cloth & General Mills Co.Ltd.**¹³).

10. From the records, it is evidently established that the appellant had sourced the goods supplied to the Electricity Board through various job workers. The pre-delivery inspection certificates (Form 9) clearly state to have carried out such inspections at different premises. In the proceedings and enquiries initiated by the department the proprietor has emphatically stated that they did not have the facilities for the manufacture of such electrical items as supplied to the Electricity Board and had been procuring the goods either on outright

12 Final Order No.FO/77097-77102/2018 dated 14.12.2018

13 1972 (1) ELT J-199 (SC)

purchase basis or getting the same through job work from small manufacturers and in turn supplied them to the Electricity Board as if the said goods were manufactured by the appellant. The department has arrived at the conclusion that the appellant is the manufacturer because they have claimed to be so while accepting the bid and tender supplied by the Electricity Boards. In response to a query from the Bench, the appellant submits that claim of being a manufacturer, was a mandatory requirement for participation in the tender bids. From the records, there is no other evidence culled out by the department to suggest that the appellant were in effect manufacturers of such electrical items and the same was produced by them in the factory. Admittedly, the Electricity Boards were treating the appellant as manufacturers based on the terms of the contract and tender. It is evident from records that manufacture of the goods had taken place at premises other than that of the appellant, largely at the job workers premises. Under the circumstances when manufacture takes place at a premises of a job worker, then he steps into the shoes of the manufacturer in terms of section 2 (f) of the Central Excise Act, 1944.

10.1 The very issue had come up for consideration in the case of **Comet Technocom Pvt.Ltd. & Ors. v. CCE & ST, Kolkata-II**¹⁴, wherein the Bench held as is under:

"8. That it is held in the Order dated 03.02.2020, referred supra, passed by the Hon'ble High Court, Calcutta in CEXA No.57 of 2019, that if the job workers are proved to be independent contractors with little or no supervision by the assessee then they are the manufacturers and

14 Final Order No.75260-75265/2023 dated 28.04.2023, in Appeal No.E/199-201 of 2009.

the liability of paying excise duty is with them. From the above, it would be evident that in the present case, the job workers of the assessee company were independent contractors/manufacturers and hence, the assessee company and/or its directors cannot be saddled with any liability of payment of excise duty and/or consequential penalty with respect to the goods so manufactured by the said job workers."

[Emphasis supplied]

It is therefore evident from the factual position in the present matter that the appellant noticee cannot be taken to be manufacturers, merely for so stating to their suppliers, without in effect being able to establish any manufacturing activity at their end. Certainly no claim for duty can thus be fastened onto them.

11. The facts in the present case being akin/identical and similar to the cases cited herein we find that the ratio laid down in the above referred cases as squarely applicable to the facts of the present matter. Accordingly, we find merit in the arguments of the appellant and allow the appeal. The order of the lower authority is set aside and the appeal filed is allowed both on merits and on limitation. The appellant shall be entitled to consequential relief, if any, as per law.

(Order pronounced in the open court on Sep.3, 2024.)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(RAJEEV TANDON)
MEMBER (TECHNICAL)