

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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 105 of 2011

(Arising out of Order-in-Original No. 18/COMMR./CE/KOL-II/Adjn/2010-11 dated 29.10.2010 passed by the Commissioner of Central Excise, Kolkata-II, 2nd Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Annapurna Engineering Works

: Appellant

59/18, 23, 24 Natabar Paul Road,
Howrah – 711 101

VERSUS

Commissioner of Central Excise

: Respondent

Kolkata-II Commissionerate
2nd Floor, M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

AND

Excise Appeal No. 106 of 2011

(Arising out of Order-in-Original No. 18/COMMR./CE/KOL-II/Adjn/2010-11 dated 29.10.2010 passed by the Commissioner of Central Excise, Kolkata-II, 2nd Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sudipta Dey, Partner

: Appellant

M/s. Annapurna Engineering Works

59/18, 23, 24 Natabar Paul Road,
Howrah – 711 101

VERSUS

Commissioner of Central Excise

: Respondent

Kolkata-II Commissionerate
2nd Floor, M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri J.P. Khaitan, Senior Advocate

Assisted by Shri Agnibesh Sengupta and Shri Indranil Banerjee, both Advocates
for the Appellant(s)

Shri B.K. Singh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 77711-77712 / 2024

DATE OF HEARING: 27.11.2024

DATE OF DECISION: 03.12.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Annapurna Engineering Works, 59/18, 23, 24 Natabar Paul Road, Howrah – 711 101 and its Partner, Shri Sudipta Dey (hereinafter referred to as Appellants) have filed the present appeals against the impugned Order-in-Original No. 18/COMMR./CE/KOL-II/Adjn/2010-11 dated 29.10.2010 passed by the Commissioner of Central Excise, Kolkata-II Commissionerate.

2. The Appellant-company is a manufacturer as well as dealer of various types of railway wagons, parts and railway components falling under Chapters 72 and 73 of the First Schedule of the Central Excise Tariff Act, 1985. The Appellant-company is a registered supplier to the Railways and is also registered with NSIC as a manufacturer. The Appellant submits tenders for supply of railway parts such as striker casting wear plate, lock lift lever hook, universal lock lift connector, etc. Since the manufacturing process in the Appellant's factory became unworkable because of labour unrest, since 2000/2001, the Appellant claimed that they started outsourcing all orders of railway components received from the Railways to various job workers. From the railways, the Appellant used to get the designs and forward it to the job workers and the goods were required to be manufactured by the job workers as per the designs furnished.

2.1. The appellant claimed that after getting the orders from railways, they outsourced the work to various job workers, namely, M/s. S.S. Enterprises, Saraswati Industries, M/s. Navin Enterprises, M/s. Unique Tube Industry, M/s. Gobinda Industries, etc. These job workers worked independently. The

appellant supplied to them raw materials, such as M.S. Rounds, M.S. Plates, etc., and the job workers, got the goods manufactured by themselves or through further outsourcing and delivered the same to the Appellant-company. The goods were brought to the Appellant's premises and after quality check delivered to railways.

3. On 19.06.2008, the Officers of the Anti-Evasion Unit of the Central Excise, Kolkata-II Commissionerate conducted a search at the premises of the Appellant-company. During the course of search, several documents and records were seized. Upon completion of the investigation, a Show Cause Noticed 09.07.2009 was issued to the Appellant *inter alia* alleging that they had indulged in manufacturing of railway components and avoided payment of Central Excise Duty amounting to Rs.5,19,24,945/- (including cess), by stating that the job workers were the actual manufacturers, who are responsible for discharging central excise duty on the goods manufactured by them.

4. The said Notice was adjudicated by the Ld. Commissioner vide the impugned Order-in-Original No. 18/COMMR./CE/KOL-II/Adjn/2010-11 dated 29.10.2010 wherein the Ld. Commissioner has confirmed the demand of Central Excise Duty of Rs.5,19,24,945/-, along with interest and imposed equal amount of tax as penalty under Section 11AC of the Central Excise Act, 1944 along with a penalty of Rs.10,00,000/- under Rule 25(1)(c) of the Central Excise Rules, 2002, for non-registration. A penalty of Rs.10,00,000/- was imposed on Shri Sudipta Dey, Partner of the Appellant-company, under Rule 26(1) of the Central Excise Rules, 2002.

5. Aggrieved by the confirmation of the demands and imposition of penalties, the Appellant-company as well as its Partner viz. Shri Sudipta Dey, have filed the present appeals.

6. The submission of the Appellants is that on 19.06.2008 when the Officers conducted the search, there were no plant and machinery or working staff available in the factory premises. In the course of search, no raw material or manufactured goods were found in the process of manufacturing; no manufacturing process was going on and there was no labour was found to be employed by the Appellant. The appellant further stated that the monthly electricity charges of the factory was within Rs.4,000/- to Rs.5,000/- which evidences that no manufacturing activity was undertaken in the factory.

6.1. The Appellant submitted that the entire case has been built upon by the department on the basis of the statements recorded from the job workers. Some of the job workers allegedly stated that they have worked under the supervision of the Appellant. It was also alleged that some of the summons sent to the job workers were returned undelivered accordingly, it was concluded that the job workers were not in existence. The allegation of the department is that even when the appellant supplied raw materials to the job workers, they have not undertaken the complete manufacturing process and the appellant has undertaken some processes on the semi-finished goods to complete the process of manufacturing. Accordingly, the contention of the department is that appellant is the actual manufacturer of the goods and they are liable to pay central excise duty on the finished goods supplied to railways. In this regard, the

appellant submitted that none of the job workers who have undertaken the job work have given the statement that they have not undertaken the job work. According to the appellant, the job workers have undertaken the complete manufacture of the goods as per the designs furnished by the railways. In many cases, the goods were directly dispatched from the job workers premises. In some cases, they received the finished goods into their factory premises for quality check and the goods were subsequently supplied to railways. They have not undertaken any process amounting to 'manufacture' in their premises. Accordingly, the appellant submits that they are not liable to pay central excise duty on the goods manufactured by the job workers. Central Excise duty, if any payable, is the responsibility of the job workers who were the actual manufactures of the goods.

6.2. The Appellants have contended that the levy of Central Excise Duty is on the activity of "manufacture", but in the Show Cause Notice it is nowhere mentioned as to what item had been manufactured and as to what quantity of the goods had been manufactured by them; without identification and quantification of the goods, the Show Cause Notice issued is ex-facie bad in law.

6.3. The Appellants further submitted that in the Show Cause Notice, it has been alleged that as per the terms and conditions of the Railway tenders, inspection of the goods has been done by RITES / RDSO at the factory premises of the supplier; accordingly, it was alleged in the Notice that testing and branding activities are therefore undertaken at the Appellant's premises; these premises, which were used for completion of the manufacture of the goods,

belonged to the Appellant and hence the Appellant would be liable to pay Central Excise Duty on the goods manufactured by them. In this regard, the Appellant submits that in most of the cases, there was no requirement of testing and there was no requirement of branding of the goods; testing, if any, as and when required, was done at the office of RITES / RDSO, where samples were drawn and only after approval from RITES / RDSO, the goods were accepted. They also submit that it is not the requirement by the Railways that before supply, the goods are to be tested as a necessary condition; however, whenever necessity of testing was considered by the inspecting authority of Railways, the goods were tested at the place of RITES / RDSO where samples used to be sent. It is also stated that on several occasions examination of the goods were carried at job workers' premises.

6.4. It is also contended by the Appellant that they had sought cross-examination of various persons whose statements were relied upon in the adjudication proceedings; however, the adjudicating authority has not allowed cross-examination of the persons who have given the statements. Thus, the appellant submits that the statements cannot be relied upon against the appellant in this case.

6.5. The Appellants relied up various decisions in support of their contention that the job workers are the actual manufacturers. Some of the decisions relied upon by the appellant are furnished below: -

(i) Aska Equipment Pvt. Ltd. v. Commissioner of Central Excise, Nagpur [2006 (202) E.L.T. 795 (Tri. – Mumbai)]

(ii) Commissioner of Central Excise, Jaipur v. Sabhyata Plastics Ltd. [2002 (145) E.L.T. 166 (Tri. – Del.)]

6.6. The Appellants submit that they have only involved in trading of the goods and not any manufacturing activity, as has been alleged in the impugned order. Accordingly, the Appellant contends that the demand confirmed in the impugned order is not sustainable.

6.7. The Appellant further submits that a similar issue was raised earlier for the period 1995 to 1999 and a Show Cause Notice bearing DGAE F.No. 243/Cal/CE/99 was issued alleging that the Appellant was the manufacturer; however, during the adjudication process, the adjudicating authority dropped the charges holding that the Appellant was not the manufacturer of the goods. Accordingly, they contend that the entire activities undertaken by the Appellants were known to the Department and thus the present demand issued by invoking the extended period of limitation is not sustainable. In this regard, the Appellants have placed reliance on the decision of the Hon'ble Supreme Court in the *Nizam Sugar Factory v. Collector of Central Excise, A.P.* [2006 (197) E.L.T. 465 (S.C.)] wherein it has been categorically held that once a demand has been raised for any issue by invoking the extended period of limitation, then another demand cannot be raised again by invoking the extended period on the same issue for a subsequent period. Thus, the appellants submit that the demands confirmed in the impugned order by invoking the extended period of limitation is not sustainable. Accordingly, the appellants prayed for setting aside the demands confirmed in the impugned order.

7. The Ld. Authorized Representative for the Revenue submitted that the statements given by various job workers clearly indicate that the Appellant had monitored the manufacturing activity as well as offered financial assistance to the job workers; further, many of the job workers said to have undertaken the job work were not even found to be physically existing in the places where their addresses had been mentioned. Thus, the Ld. Authorized Representative for the Revenue contended that the Appellant had actually undertaken the manufacturing activity by themselves and created a network of job workers to create an impression that the goods were manufactured by job workers. Accordingly, he supported the impugned order confirming the demands against the Appellants.

8. Heard both sides and perused the appeal records.

9. We observe that the Appellant has received orders from the Railways for supply of railway parts and components. They are registered with the Railways as manufacturers. Accordingly, the impugned order considered the Appellant-company as the manufacturer and demanded Central Excise Duty from them in respect of the goods supplied by them to railways. However, the submission of the Appellant is that they did not have any manufacturing facility in their premises; there was no machinery found during the course of search; there was no manpower employed by them for undertaking the manufacturing process; the monthly electricity charges of the factory was within Rs.4,000/- to Rs.5,000/- which evidences that no manufacturing activity was undertaken in the factory; they have out sourced the entire activity

through job workers; the job workers have undertaken the complete manufacture of the goods as per the designs furnished by the railways. In many cases, the goods were directly dispatched from the job workers premises. In some cases, they received the finished goods into their factory premises for quality check and the goods were subsequently supplied to railways. The quality check undertaken by them does not amount to 'manufacture' as defined in Section 2(f) of the Central Excise Act, 1944. They have not undertaken any other process amounting to 'manufacture' in their premises; the impugned order also has failed to bring any evidence on the record to show that any manufacturing activity was going on at the time when the search was conducted, or thereafter. Thus, the Appellants contended that the evidence available on record does not indicate that they have undertaken any manufacturing activity in their premises. Accordingly, the appellant submits that they are not liable to pay central excise duty on the goods manufactured by the job workers. Central Excise duty, if any payable, is the responsibility of the job workers who were the actual manufactures of the goods.

9.1. A perusal of the information available on record reveals that the appellants have received the designs for the goods to be manufactured from the railways and accordingly, they procured raw materials and supplied the same to the various job workers; these job workers were working independently. The Appellant have supplied raw material such as M.S. Rods, M.S. Plates, etc. and the job workers manufactured the goods as per the design supplied by the railways. Thus, we observe that the appellants have outsourced the manufacturing process and got

the goods manufactured through job workers. In this regard, the appellants submission is that they got the entire activity undertaken by the job workers, but the department's contention is that they have undertaken activities such as testing, branding done at their premises, which amounts to 'manufacture' as per section 2(f) of the Central Excise Act, 1944. Thus, we observe that the main ground under which the adjudicating authority considered the appellant-company as the manufacturer is that the appellant-company has undertaken some processes in their premises which amounts to 'manufacture' as defined under section 2(f) of the Central Excise Act and hence appellant-company is the actual manufacturer.

10. In view of the above position, it is to be decided, under the facts and circumstances of this case, whether the appellant-company is the manufacturer or the job worker, who has undertaken the activities as per the designs supplied by the Railways, on the raw materials supplied by the appellant, is the actual manufacturer?

10.1. Section 2(f) of the Central Excise Act, 1944 deals with "manufacture". For the sake of ready reference, the said Section is reproduced below: -

"Section 2. Definitions. — In this Act, unless there is anything repugnant in the subject or context, -

...

(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 [the Fourth Schedule] as amounting to [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 "manufacturer" 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;"

10.2. Thus, if the appellant-company undertakes any process which are incidental or ancillary to the completion of a product, then the appellant can be considered as 'manufacture' as defined under section 2(f) of the Central Excise Act, 1944. Thus, even in respect of the goods manufactured by the job workers, if the appellant-company undertakes any process to complete the manufacturing, then the Appellant can be considered as the actual manufacturer of the goods. In this regard, the findings of the adjudicating authority is that as per the agreement, RITES / RDSO has to inspect the goods before delivery. Accordingly, the adjudicating authority presumed that the goods were inspected by RITES/RDSO at the premises of the Appellant-company and hence the appellant company are the manufacturer. We have perused the documents available on record. There is no evidence available on record to substantiate the allegation that RITES/RDSO have actually inspected the goods at the appellants premises. The appellant submitted that even if RITES/RDSO conducted some inspection, it was only visual inspection to check the goods, which does not amount to manufacture as defined under Section 2(f) of the Central Excise Act, 1944. In their submissions, the appellant stated that in most of the cases, there

was no requirement of testing and there was no requirement of branding of the goods; testing, if any, as and when required, was done at the office of RITES / RDSO, where samples were drawn and only after approval from RITES / RDSO, the goods were accepted. They also submit that it is not the requirement by the Railways that the before supply, the goods are to be tested as a necessary condition; however, whenever necessity of testing was considered by the inspecting authority of Railways, the goods were tested at the place of RITES / RDSO where samples used to be sent. It is also stated that on several occasions examination of the goods were carried at job workers' premises. We observe that there is no evidence available on record to substantiate the allegation that the appellants have carried out some processes amounting to manufacture in their factory premises. We observe that the adjudicating authority has relied upon the statements reworded from various job workers to substantiate this allegation.

10.3. We have perused some of the statements relied upon by the adjudicating authority in the impugned order to conclude that the appellant-company are the actual manufacturers.

Statement dated April 23, 2009 of Sri Biswajit Paul, proprietor of M/s Paul Welding Works

10.3.1. From the statement dated April 23, 2009 of Sri Biswajit Paul, proprietor of M/s Paul Welding Works, we observe that they manufactured equalising stay and bracket (according to drawings supplied by the appellant) which were thereafter electroplated (galvanized) and sent to the appellant. Shri Paul stated that he received raw materials from the

appellant under cover of challan and sent the goods to the appellant under challan. When asked whether the goods were ready to use, Shri Paul stated that the items were not finished product. However, we observe that Shri. Paul's statement has not mentioned what were the further processing required to complete the process of manufacture of the goods. The statement also does not indicate whether such process, if any required, were carried out by the appellant in their premises. Since, no opportunity was granted to the appellant to cross-examine Shri Paul, these facts could not be confirmed from him. We observe that without any evidence on record, the adjudicating authority concluded that they have received semi-manufactured goods from Shri. Paul and under taken further processing to complete the process of manufacturing at their premises. Accordingly, we observe that on the basis of the statement of Shri. Paul, it cannot be concluded that the appellants have undertaken some activities amounting to 'manufacture' in their factory premises.

Statement of Sri Alok Adak having overall supervision of M/s. S. S. Industries

10.3.2. From the impugned order, we observe that the statement of Sri Alok Adak has been relied upon to conclude that the appellants have provided financial assistance and were having overall supervision of M/s. S. S. Industries, one of the job workers. From the statement given by Shri. Adak, we observe that M/s. S. S. Industries purchased the raw materials which were sent to job workers who manufactured the goods which were sold to the appellants. As regards the nature of the goods manufactured by them, question

No. 17 and the answer thereto are relevant and hence the same are reproduced below:-

"Q. No.17. The product so manufactured by you, is finished products?

Ans.- Yes, but it is a part."

10.3.3. We observe that the above answer given by Shri. Adak has been relied upon to conclude that the product manufactured was not a finished product. We observe that this statement does not indicate that the appellant-company has supplied that part 'as it is' to railways or undertaken any process at the premises of the appellant-company. We observe that on the basis of this statement, the adjudicating authority has arrived at a conclusion that the job worker has manufactured only a part of the finished product. We observe that there is no basis for arriving at this conclusion.

10.3.4. It has also been alleged that the appellant-company has given financial assistance the S.S. Industries and supervised the manufacturing activities at the premises of the job worker. The Ledger account of the job worker S.S. Industries has been relied upon for this purpose. From the ledger account of the appellant in the books of M/s. S. S. Industries for the Financial Year 2007-08, we observe that the said concern sold goods worth Rs.9,64,616 to the appellant against which the appellant paid Rs.9,01,723, leaving outstanding an amount of Rs.62,893 which was paid on April 8, 2008 in the next financial year 2008-09. The said ledger account for the financial year 2007-08 does not show any advance payment by the appellant to M/s S.S. Industries. The ledger account for the period April 1, 2008 to July 31,

2008 falling within the financial year 2008-09 shows that during the period April 1, 2008 to July 31, 2008, M/s. S. S. Industries sold goods worth Rs.6,06,038 to the appellant which were duly paid for by the appellant soon after the bills were raised. We find that the appellant gave an advance of Rs.50,000/- on June 16, 2008 and another advance of Rs.1,00,000/- on July 19, 2008 which was to be adjusted against the supplies to be made by M/s. S. S. Industries.

10.3.5. We observe that this is a normal practice between companies to give some advance at the time of placing the orders or before the actual delivery of the goods. Such payment of a small advance of Rs.1,50,000/-cannot lead to a conclusion that the appellant-company has provided "financial back up" to M/s. S. S. Industries for running its business. Thus, we observe that the surmise in the impugned order that M/s. S. S. Industries procured raw materials "on the strength of the finance made by" the appellant is not supported by the ledger accounts of both parties during the relevant periods.

10.3.6. Based on the statement of Shri. Adak, in the impugned order, the Ld. adjudicating authority has arrived at the conclusion that the job worker M/s. S. S. Industries manufactured the goods as per the direction and supervision of the appellant-company. It was further concluded in the impugned order that the appellant provided finance or financial back up to M/s. S. S. Industries or that M/s. S. S. Industries was the appellant's dummy and that the appellant used the documents of M/s. S. S. Industries to create an impression as if the goods were manufactured by M/s. S. S. Industries.

10.3.7. We observe that the financial documents of M/s. S. S. Industries relied upon in the Show Cause Notice show that M/s. S. S. Industries was an independent concern carrying on its own business and was entitled to the profit there from and further that there was no financial assistance or back-up to M/s. S. S. Industries by the appellant. In other words, we observe that the appellant and M/s. S. S. Industries dealt with each other on principal to principal basis. Thus, we observe that on the basis of the statement of Shri. Adak it cannot be concluded that the appellant are the manufacturer of the goods and S.S Industries was a dummy unit..

Statement dated September 18, 2008 of Ramesh Jaiswal, proprietor of M/s. Nabin Enterprise

10.3.8. The appellant sent materials to M/s. Nabin Enterprise for cutting purposes as per the drawings and designs provided by railways. Apart from the cutting work, M/s. Nabin Enterprise also sold to the appellant goods which they got manufactured outside with raw material purchased by them. We observe that his statement has been interpreted to arrive at the conclusion that the goods sent by him to the appellant required further processing. We observe that Shri. Jaiswal said that he did not know what the appellant did with the goods supplied by him. We observe that the adjudicating authority interpreted this statement wrongly and concluded that the goods sent by M/s. Nabin Enterprise to the appellant were not finished products or that the same were parts of some product which was allegedly assembled in the appellant's premises. Thus, we observe that this statement is not sufficient to arrive at the conclusion

that the appellant has undertaken further processing at their premises, which amounts to manufacture.

Statement dated October 20, 2008 of Sri Dipak Kumar Roy, partner of M/s. Unique Tube Industries

10.3.9. According to the replies given by Shri Roy, the goods were manufactured by him according to the designs/drawings provided by the appellant. We observe that the goods supplied conforming to the designs/drawings provided by the appellant should be in finished form only. In his statement Shri. Roy has not mentioned what further processing were required to complete the process of manufacturing. Thus, we observe that this statement cannot be relied upon to conclude that the appellant has undertaken some process amounting to 'manufacture' in their factory premises.

10.3.10. We have also perused the following statements relied upon in the impugned order.

Statement dated April 21, 2009 of Sri Govinda Datta, proprietor of M/s. Govinda Industries

Statement dated April 23, 2009 of Sri Raghunath Sett, Proprietor of M/s. S. R. Enterprise

Statement dated May 15, 2009 of Sri Tanmoy Ghosh, proprietor of M/s. Tanmoy Engineering Works

10.3.11. A perusal of these statements revealed that all of them accepted that they have received raw materials from the appellant company and manufactured the goods as per the designs supplied by the appellant. Some of them in their statements mentioned that the goods supplied them are not

finished goods which require further processing. Some of them stated that the goods supplied were finished goods, but need to be tested further for quality control which was done by the appellant in their premises. We observe that the adjudicating authority has interpreted these statements to arrive at the conclusion that the appellant, after receipt of the goods, has undertaken some process amounting to manufacture in their premises; but, we observe that none of the statements indicated that what were the further processing required to complete the process of manufacturing. Even if some processing required, there is no evidence available on record to conclude that the said processes were undertaken by the appellant in their factory premises.

10.4. We observe that in the impugned order, the Ld. adjudicating authority has concluded that the appellant has undertaken activities such as quality control testing, affixing their label etc. in the goods received from the job workers. The adjudicating authority has relied on various case laws in support of his findings that the activity of quality control, testing and labelling amounts to manufacture. Some of the decisions relied upon by the adjudicating authority in the impugned order are reproduced below:

1) Tribunal in *Mehrotra Engg works Pvt. Ltd [2004 (169) E.L.T. 187]*, testing of goods being one of the essential requirement for completion of the goods, it cannot be said that the goods were in fully manufactured condition before testing.

2) In *Rolls Prints (Packaging) Ltd [1998 (104), E.L.T. 712]* case, the assessee were carrying out inspection, counting & packing. Before the

removal of final product, inspection is one of the processes that are carried out by the manufacturer. The Tribunal observed that the definition of manufacture in section 2(f) of CEA 44 includes any process incidental or ancillary to the completion of a manufactured product.

3) In *Prasad films Vs CCE [2001 (130) E.L.T. 491(CEGAT)]* goods were brought in factory after processing by Job workers. These were tested randomly & labeling was done. It was held that quality control is an important facet of manufacturing activity where goods manufactured are of sensitive nature.

4) In *CCE Vs General Cement products (P) Ltd. [1989 (39) E.L.T. 689(CEGAT)]*, it has been held that where quality, tests are mandatory requirements as per agreement with customer, goods cannot be said to be fully manufactured till such quality control, tests are carried out.

10.4.1. We find that the appellant also relied upon various decisions in support of their contention that the activities of quality control, testing and labelling does not amounts to manufacture. The appellant cited the decision of the Tribunal, Delhi in the case of *Commissioner of C.Ex., Jaipur v. Sabhyata Plastics Ltd. [2002 (145) E.L.T. 166 (Tri. – Del.)]* wherein the Tribunal has observed as under: -

"6. The other operation was subjecting the goods to quality control. Quality control in the instant case was to indicate that the goods were of ISI standard. Since this quality control did not change the name, character or use of the material, the test of quality control did not amount to manufacture. Fixing of brand/trade name also did not bring into existence any new item and therefore, this also did not amount to manufacture. We further note that the Id. Commissioner (Appeals) relied on the decision of

this Tribunal in the case of Hindustan Zinc Ltd. v. CCE reported in [2000 \(115\) E.L.T. 823](#). He also relied on the decision of the Hon'ble Supreme Court in the case of Indian Metals & Ferro Alloys Ltd. reported in [1991 \(51\) E.L.T. 165](#). We note that the ratio of these two decisions fully covers the facts in the present case. We further note that nothing has been brought on record by Revenue to show that the ratio of these decisions was not applicable to the facts of the present case."

10.4.2. From the decisions cited by the adjudicating authority as well as the appellant, we observe that the activities such as quality testing, labelling/branding etc may or may not amounts to 'manufacture'. It depends upon the facts and circumstances of each case. However, before going into the question whether quality testing, labelling/branding etc amounts to manufacture or not it must be established that the appellant has actually undertaken such activities in their factory premises.

10.4.3. In the present case, we observe that the appellant did not have any manufacturing facility in their premises; there was no machinery found during the course of search; no raw material or manufactured goods were found in the process of manufacturing at the time of search; there was no manpower employed by them for undertaking the manufacturing process; the monthly electricity charges of the factory was within Rs.4,000/- to Rs.5,000/- which evidences that no manufacturing activity was undertaken in the factory. Thus, we observe that the evidences available on record does not support the conclusion arrived at by the adjudicating authority that the appellant has undertaken some activity amounting to 'manufacture' in their premises.

10.4.4. Regarding testing of the goods, the Appellant submits that in most of the cases, there was no requirement of testing and there was no requirement of branding of the goods; testing, if any, as and when required, was done at the office of RITES / RDSO, where samples were drawn and only after approval from RITES / RDSO, the goods were accepted. They also submit that it is not the requirement by the Railways that before supply, the goods are to be tested as a necessary condition; however, whenever necessity of testing was considered by the inspecting authority of Railways, the goods were tested at the place of RITES / RDSO where samples used to be sent. It is also stated that on several occasions examination of the goods were carried at job workers' premises. The appellant also submitted that for railway supplies the marking is done only for identification purposes. They affix the letters 'AE' to identify the product later for repair or replacement purposes. It helps railways also to identify which firm has supplied the goods. We observe that affixing of the letters 'AE' for identification purposes cannot be construed as 'branding' as the letters 'AE' is not a brand. We observe that the adjudicating authority has not produced any other evidence to substantiate the allegation that the appellant has actually carried out testing, branding etc in their premises. In the absence of any such evidence, it cannot be presumed that the appellant has undertaken these activities after receiving the goods from the job workers.

10.4.5. Further, we observe that the levy of Central Excise Duty is on the activity of "manufacture", but in the Show Cause Notice it is nowhere mentioned as to what item had been manufactured and as to what quantity of the goods had been manufactured by

them. We observe that without identification and quantification of the goods, the Show Cause Notice issued is ex-facie bad in law.

10.4.6. We observe that another ground based on which the adjudicating authority has concluded that the appellant is the manufacturer is that the appellant has registered themselves as a 'manufacturer' with Railways. Accordingly, it was presumed that the appellant is the actual manufacturer of the goods supplied to railways. In this regard, we observe that mere registration with railways department themselves as a manufacturer would not automatically make the appellant as a manufacturer. It must be established that the appellant has actually undertaken the manufacturing activity so as to demand central excise duty from them. In this regard, we take note of the decision rendered by the Tribunal, Mumbai in the case of *Aska Equipment Pvt. Ltd. v. Commissioner of C.Ex., Nagpur [2006 (202) E.L.T. 795 (Tri. – Mum.)]* wherein it was held that: -

"7. The fact that the appellant had claimed before the Government companies, who are the buyers of the Towers that they manufacture the same or that they give warranty, cannot be a reason to conclude that they would be covered by the definition of manufacturer under the Central Excise Act, 1944, in view of their job workers being held to be an independent manufacturer of the very same goods as also the law as laid down by the Apex Court that it is the job workers who is processing the raw material, who is a manufacturer under the Central Excise Law. The placing of a sticker on the Towers showing the brand name of the appellants will not render the appellants as a manufacturer of the Towers. Such branding affixations may only deprive the job worker-manufacturer of the Small Scale Exemptions. Duty demands pursuant to denial/ineligibility of the benefit of notification cannot be made on the appellants."

10.4.7. We observe that the same view has been taken by this Tribunal in the case of *SA Enterprise v. Commissioner of C.Ex., Kolkata-II vide Final Order Nos. 74848-74853 of 2023 dated 27.06.2023 in Excise Appeal No. 392 of 2012 & ors. [CESTAT-Kolkata]*. The relevant portion of the said order is reproduced below:

"13. ...

C. Job work : We find that the appellant firm had also traded in items obtained through job work. However, as compared to the total turnover of the appellant firm, the quantum of sale of job worked goods was quite low in value. To support such conclusions, we have perused the details and documents submitted by the appellant firm in relation to job worked goods for the period 2011-12 and 2012-13. We find that during the said period the appellant firm had maintained separate set of sale bills for sale of goods manufactured by job workers which the appellant firm referred to as 'manufacturing sales' and in respect of the others sale of goods purchased and sold as such, the appellant firm had maintained during the said two years a separate set of sale bills referred to as 'trading sales'. Notwithstanding that the appellant firm may have flouted the procedures under central excise law relating to job work, no duty liability could have been fastened on the appellant firm as regards job work activities undertaken by the job workers on principal-to-principal basis.

D. Testing at third party premises : The adjudicating authorities should have observed that only visual/ physical inspection of the goods had taken place at the appellant firm's premises and that tests like galvanization test, mechanical test, slip load test etc. had been conducted in outside laboratories. Such position is evident from the documents relied upon while issuing the show cause notice dated 21.02.2014 such as Annexures 'X' and 'B1' as also the test reports filed by the appellant firm in their defense, such as the documents at page nos. 5149 to 5400 (Part 8), page nos. 7897 to 7944 (Part 14), page nos. 8761 to 8786 (Part 17) of the combined Paper Book filed before this Tribunal."

10.4.8. Thus, by relying upon the decisions cited supra, we hold that the evidence available on record does not indicate that the appellant has undertaken any of the activities amounting to 'manufacture' in their factory premises. Accordingly, we set aside the demand of central excise duty confirmed in the impugned order. Since, the demand of duty is not sustainable, the question of demanding interest or imposing penalty on the appellant-company does not arise.

11. Regarding invocation of extended period of limitation to demand central excise duty, the Appellant has submitted before us that a similar issue was raised earlier for the period 1995 to 1999 and a Show Cause Notice bearing DGAE F.No. 243/Cal/CE/99 was issued alleging that the Appellant was the manufacturer. The adjudicating authority has

dropped the charges holding that the Appellant was not the manufacturer of the goods. Accordingly, they contend that the entire activities undertaken by the Appellants were known to the Department and thus the present demand issued by invocation of the extended period of limitation is not sustainable. We observe that the same issue has already been raised and the issue has been settled in favour of the appellant. In that case, the Ld. adjudicating authority has categorically held that the appellant was not the manufacturer as defined under Section 2(f) of the Central Excise Act. Since, there is no suppression of facts with intention to evade the tax established in this case, raising the demand by invoking extended period of limitation again is legally not sustainable. We find that this view has been held by the Hon'ble Supreme Court in the *Nizam Sugar Factory v. Collector of Central Excise, A.P.* [2006 (197) E.L.T. 465 (S.C.)] wherein it has been categorically held that once a demand has been raised for any issue by invoking the extended period of limitation, then another demand cannot be raised again by invoking the extended period on the same issue for a subsequent period. The relevant part of the said order is reproduced below:

"9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

11.1. We find that the demand has been raised against the Appellant for the period from 2004-05 to 2008-09 vide the Show Cause Notice issued on 09.07.2009. The said Notice was adjudicated wherein the adjudicating authority dropped the charges and demand of Central Excise Duty amounting to Rs.1,33,48,977/-. It is observed that no appeal has been filed by the Department against the above order and hence, the same has attained finality. In these circumstances, we observe that majority of the demand raised against the Appellant is hit by time-bar. Thus, by relying on the decision of the Hon'ble Apex Court cited supra, we observe that part of the demands confirmed in the impugned order by invoking the extended period of limitation is not sustainable. Accordingly, we hold that part of the demand is liable to be set aside on the ground of limitation also.

12. Since there is no corroborative evidence brought on record by the respondent to substantiate the allegation that the Appellant are the actual manufacturers of the goods in question, we hold that the job workers are the actual manufacturers of the goods in this case, as has been claimed by the Appellant. The issue framed at paragraph 10 of this Order stands answered thus.

13. Thus, we hold that the demand of Central Excise duty from the Appellant-company is not sustainable in law. Since the demand itself is not sustainable, the question of demanding interest or imposing penalty on the Appellant-company under Section 11AC of the Central Excise Act, 1944 or under Rule 25(1)(c) of the Central Excise Rules, 2002 does not arise.

Accordingly, the demand of interest and penalties imposed on the Appellant-company are set aside.

14. Regarding the penalty imposed on the Partner of the Appellant-company, namely, Shri Sudipta Dey (Appellant in Excise Appeal No. 106 of 2011), we find that the same has been imposed on the ground that the Partner played a role in the commission of the alleged offence. Since we have already held that the demand of duty on the activity undertaken by the Appellant is not sustainable, we hold that the role of the appellant in commission of the alleged offence is not established. Accordingly, the penalty imposed on the Partner viz. Shri Sudipta Dey under Rule 26(1) of the Central Excise Rules, 2002 is also set aside.

15. In the result, the demands confirmed in the impugned order are set aside and the appeals filed by both the Appellants are allowed, with consequential relief, if any, as per law.

(Order pronounced in the open court on **03.12.2024**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd