CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Excise Appeal No. 292 of 2011

(Arising out of Order-in-Original No. 266/11/V/2010/COMMR/KS dated 15.11.2010 passed by Commissioner of Central Excise & Customs (Appeals), Mumbai-V)

M/s. Babubhai Narottamdas & Co. **Appellant**
Banaco House,
P-1, Cama Industrial Estate,
Walbhat Road, Goregaon (E),
Mumbai 400 063.

Vs.

Commissioner of Central Excise **Respondent**
Mumbai-V
5th floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E',
Bandra-Kurla Complex,
Bandra (East),
Mumbai 400 051.

WITH

Excise Appeal No. 293 of 2011

(Arising out of Order-in-Original No. 266/11/V/2010/COMMR/KS dated 15.11.2010 passed by Commissioner of Central Excise & Customs (Appeals), Mumbai-V)

Shri Dipen Ramesh Kocha **Appellant**
603, Bharat Apartments,
Gandhigram Road, Juhu,
Mumbai 400 049.

Vs.

Commissioner of Central Excise **Respondent**
Mumbai-V
5th floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E',
Bandra-Kurla Complex,
Bandra (East),
Mumbai 400 051.

WITH

Excise Appeal No. 294 of 2011

(Arising out of Order-in-Original No. 266/11/V/2010/COMMR/KS dated 15.11.2010 passed by Commissioner of Central Excise & Customs (Appeals), Mumbai-V)

Shri Ramesh Babubhai Kocha **Appellant**

603, Bharat Apartments,
Gandhigram Road, Juhu,
Mumbai 400 049.

Vs.

Commissioner of Central Excise Mumbai-V **Respondent**
5th floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E',
Bandra-Kurla Complex,
Bandra (East),
Mumbai 400 051.

AND

Excise Appeal No. 308 of 2011

(Arising out of Order-in-Original No. 266/11/V/2010/COMMR/KS dated 15.11.2010 passed by Commissioner of Central Excise & Customs (Appeals), Mumbai-V)

Shri Prashant Ramesh Kocha **Appellant**
603, Bharat Apartments,
Gandhigram Road, Juhu,
Mumbai 400 049.

Vs.

Commissioner of Central Excise Mumbai-V **Respondent**
5th floor, Utpad Shulk Bhavan,
Plot No.C-24, Block 'E',
Bandra-Kurla Complex,
Bandra (East),
Mumbai 400 051.

Appearance:

Shri Prashant Paranjape, Advocate for the Appellant
Shri Sanjay Hasija, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. P. Anjani Kumar, Member (Technical)

FINAL ORDER NO. A/**86337-86340/2019**

Date of Hearing: 07.02.2019
Date of Decision: 02.08.2019

PER: DR. D.M. MISRA

These four appeals are filed against order-in-original No. 266/11/V/2010/Commr/KS dated

15.11.2010 passed by the Commissioner of Central Excise, Mumbai.

2. Learned Advocate submitted that appeal No. E/308/2011 is filed by Shri Prashant Ramesh Kocha. He expired on 15.06.2014. In support, he has placed the death certificate of the said appellant. He has further submitted that in view of Rule 22 of the CESTAT (Procedure) Rules, the appeal abates. The Ld. A.R for the Revenue has no objection. Hence, the said Appeal is abated. The other Appeals are taken up for disposal

3. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of chlorination equipment, evaporators, chlorinator system and parts thereof. They avail the benefit of small scale exemption under relevant notification. The appellants are also engaged in manufacture of turnkey projects at the site of the customer by using their own goods and also bought-out items which are normally reflected as treating turnover in their books of accounts. During the relevant period, the appellants had executed projects for Nuclear Power Corporation of India Ltd., National Thermal Power Corporation Ltd., Bhabha Atomic Research Centre, Bharat Heavy Electricals Ltd. etc. On the basis of search and seizure in the factory premises and investigation carried out thereafter, show cause notice was issued to the appellants alleging that even though they have manufactured various parts of chlorinators in their factory and transferred to their customer’s site but failed to discharge service tax on the entire goods used in the turnkey projects resulting into short payment of duty of Rs.88,15,196/-. Consequently,

show cause notice was issued to them on 16.4.2008 demanding duty for clearances effected during the period 2002-03 to 2006-07 amounting to Rs.88,15,196/- with interest and proposal for penalty. On adjudication, the demand was confirmed with interest and penalty of equal amount imposed on the appellant, personal penalty imposed on other co-noticees under Rule 26 of the Central Excise Rules, 2002.

4. At the outset, learned Advocate, Shri Prasad Paranjape for the appellant, has submitted that this is the second round of litigation before this Tribunal. In the first round of litigation, this Tribunal vide order dated 08.09.2009 observed that the circular issued by the Board, No.58/1/2002-CX dated 15.1.2002 provides certain guidelines as to how to ascertain whether a given commodity was excisable goods or immovable property, hence not chargeable to duty of excise. It is further observed that the adjudicating authority has held that the commodity in question is excisable goods without examination the manner in which it had taken shape and came into existence, regardless of the guidelines laid down and illustrations mentioned in the Board circular dated 15.01.2002. Consequently, the Tribunal remanded the matter to the adjudicating authority to decide the issue afresh to examine whether the commodity in question would fit into the parameter of immovable property. Further, the Tribunal had observed that this exercise may call for physical inspection also. The learned Advocate has submitted that even though in the order, the Tribunal directed the adjudicating authority for physical inspection of the chlorination plant installed at various sites, however, the *de novo* order was issued by the

Commissioner without undertaking the exercise of physical inspection of the chlorination plant, hence, the order issued by the adjudicating authority is bad in law. Reiterating their submission before the authorities below, the appellant narrating the process undertaken by the appellant at site for erection and commissioning of chlorination plant, submitted as follows:

i) Various items of equipment both manufactured and bought out from sub-vendors which have been taken to site are placed on their foundations and grouted with the help of special cement compounds.

ii) After grouting, micro alignment of the goods is carried out particularly the rotating equipment's.

iii) The equipment's are thereafter connected together with pipes of various sizes made out of various base material such as carbon steel, mild steel, mild steel/carbon steel that are rubber lined, fiberglass reinforced plastic, PVC, copper etc that are purchased by the Appellant as per the piping material specifications which vary from client to client. The piping is done as per the piping layout approved by the client.

iv) The pipes are not connected by connectors/screwed type sockets but are welded to each other so that there is no leakage.

v) The pipes are adequately supported by the supports fabricated out of steel structures at the site and as per the approved drawings of the support. The supports are also grouted to the earth with cement. The entire work is carried out according to the process & instrumentation diagrams, equipment layout and piping layout.

vi) Individual piping circuit/network piping is jointly inspected/tested by the clients at the site as per the testing procedures such as hydraulic tests, pneumatic tests, nitrogen based pneumatic tests and the approved field quality plan. These tests are carried out to ensure leak tightness and the integrity of the system as a whole.

vii) Other items, namely, pressure gauges, temperature gauges, flow indicators, temperature gauges, flow indicators, temperature switches, pressure switches, level gauges, level switches, leak detectors, analysers etc then suitably installed on the plant at various places. The switches in respect of the above are then electrically connected and wired to the control panel. The electrical circuit is further tested for circuit completion, i.e., continuity test and performance test.

viii) The entire chlorination plant/system erected at site of the customers is then inspected/tested to ensure readiness of the system before commissioning.

ix) The entire system is then taken up for start-up and commissioning activity .

x) Thereafter completion certificate is received from the client/customer. Performance guarantee test is then carried out as per the approved procedure for testing the system at the operating parameters specified by the customers in their technical procurement specification.

xi) A complete chlorination plant is approximately 50 meter in length, 15 meter in width and 6 meter in height (erected at the site of NPCIL Mecon Ltd. At Tarapur). The biggest size of the chlorinator manufactured by the Appellants is 800 milimeter x 800 milimeter x 1750 milimeter in size. The evaporators are also similar in size.

xii) The manufacture of the chlorinator, evaporator and trunnion rollers takes approximately 3 to 4 months whereas the erection of a plant/system as a whole takes approximately 9 to 12 months. The Appellant during the course of hearing invited attention of the Hon'ble Tribunal to the drawings of chlorination plant system, namely, P & ID; Plan of Equipment and Piping Layout and Sectional Views of Equipment and Piping Layout.

5. Referring to the Board's circular dated 15.01.2002, the learned Advocate has submitted that in the aforesaid circular, it has been clarified that the turnkey projects are immovable in nature and hence

not excisable. The appellant has undertaken various turnkey projects of installing entirely a chlorination plant and hence, the chlorination plant cannot be called as excisable goods.

6. Further, the learned Advocate has submitted that a chlorination plant is completely different from a hot mix plant. A chlorination plant is housed inside an earthquake proof building/specially constructed building and the plant is joined to the building by way of pipes and supports and also to the earth by being grouted to large foundation. The pipe supports are not only grouted but are also anchor-fastened at certain places and the same have also been welded to the plates embedded in earth/walls/civil structures provided for welding the supports at various places. In contrast, a hot mix plant was a mobile plant per se and was placed on a foundation only for the purpose of providing some stability. Therefore, such hot mix plant cannot be considered as a completely immobile or immovable property. Both hot mix plant and chlorination plant are completely different in its use, as a hot mix plant is intended to be mobile and transported from one project to another, whereas a chlorination plant is designed and intended to be completely immovable as its purpose is to serve project to which it is attached. Its intention was to make it a permanent adjunct to another facility like water supply facility or power generation facility which are permanent in nature. Referring to the judgment of the Hon'ble Supreme Court in *Solid & Correct Engineering Works – (2020) 5 SCC 122*, the learned Advocate submitted that the intention in the present case is to permanently fasten the chlorination plant to structures permanently embedded to earth.

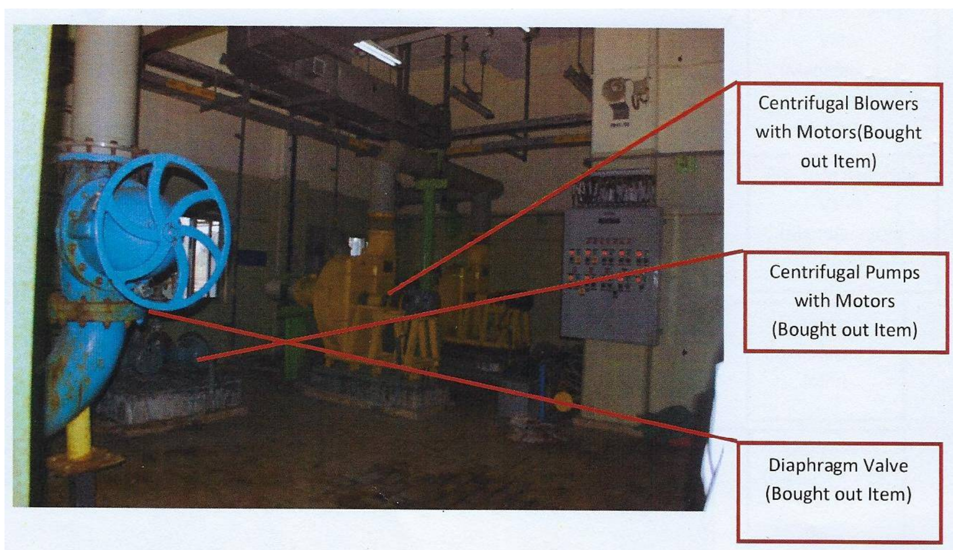
Therefore, the finding of the Hon'ble Supreme Court that once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The learned Advocate also referred to the judgment of the Hon'ble Supreme Court in *Triveni Engineering – 2009 (120) ELT 273 (SC)*. Besides, he has also referred to the judgments in the case of *Larsen & Toubro vs. UOI – 2009 (243) ELT 662 (Bom)*, *Ion Exchange Ltd. – 2003 (159) ELT 499 (Tri.-Chennai)*, *Ion Exchange Ltd. – 2002 (150) ELT 499 (Tri.-Chennai)* and *CCE, Madras vs. Chemtec Water Conditioners – 2000 (115) ELT 135*.

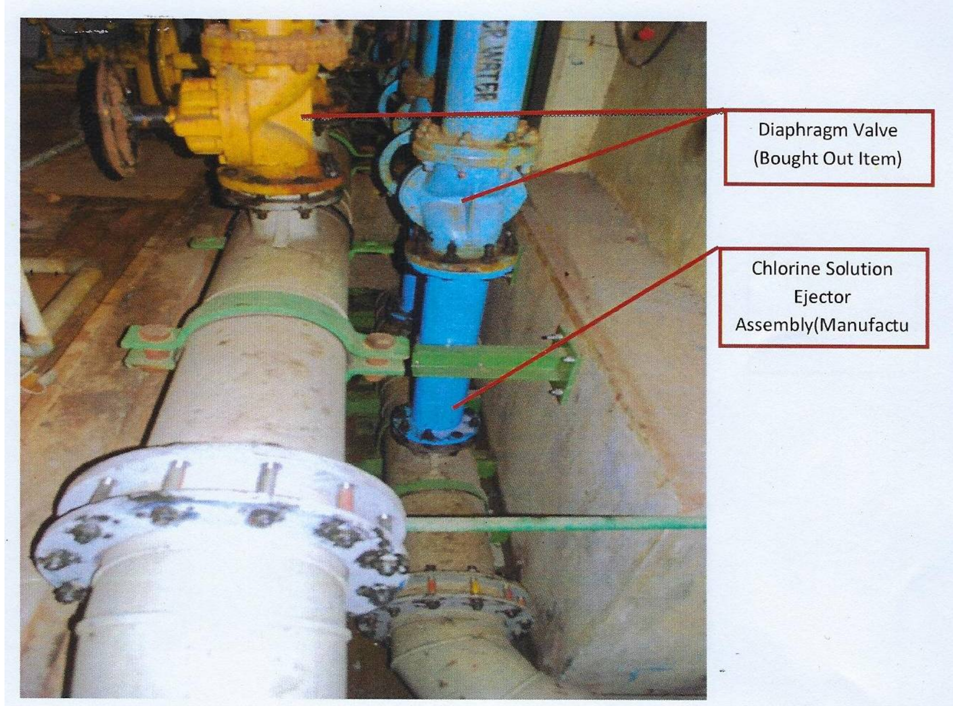
7. Learned AR for the Revenue reiterates the findings of the learned Commissioner.

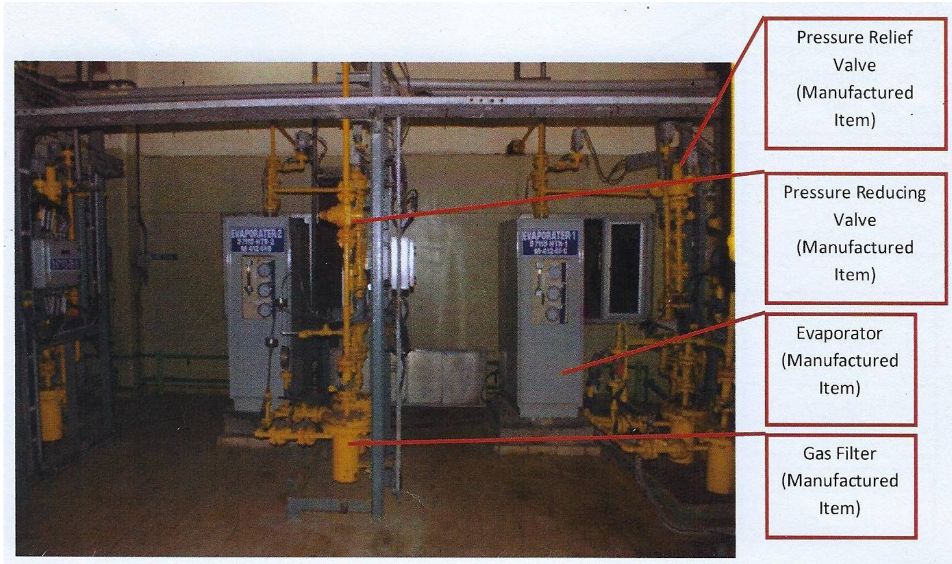
8. Heard both sides and perused the records.

9. This is the second round of litigation before this Tribunal. In the earlier round, this Tribunal by its order dated 8th September 2009 remanded the matter to the adjudicating authority to examine the issue in the light of the guidelines laid down and illustrations given in the Circular dated 15.01.2002 issued by Board. Also, it was directed that if necessary, physical inspection could be undertaken by the adjudicating authority in deciding the issue. Pursuant to the said direction, the adjudicating authority considered the whole issue again, but without undertaking any physical inspection of various turnkey projects. The adj. authority has observed that the plant erected by the appellant at various sites are excisable goods, hence, leviable to duty.

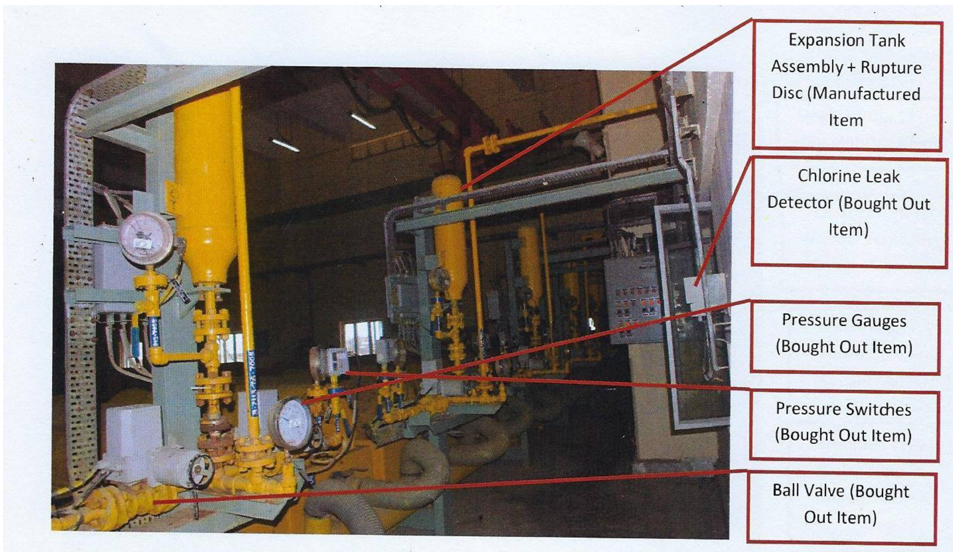
10. We have carefully examined the contention of the appellant and find that the appellant is engaged in assembly of chlorination plant at various sites on turnkey basis. The following photographs produced during the course of hearing reveal that the plant has come into existence only after assembly of various individual components which were grouted to the earth and civil foundations on permanent basis and not for the purpose of making it wobble or vibration free. Thus the purpose was to permanently attach the individual components for smooth function of the plant as a whole.

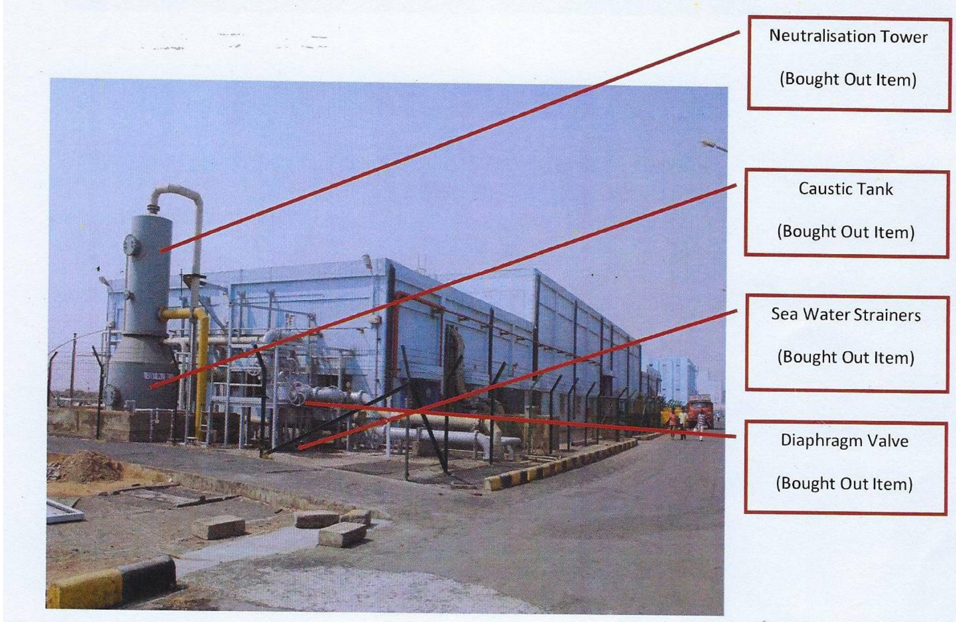




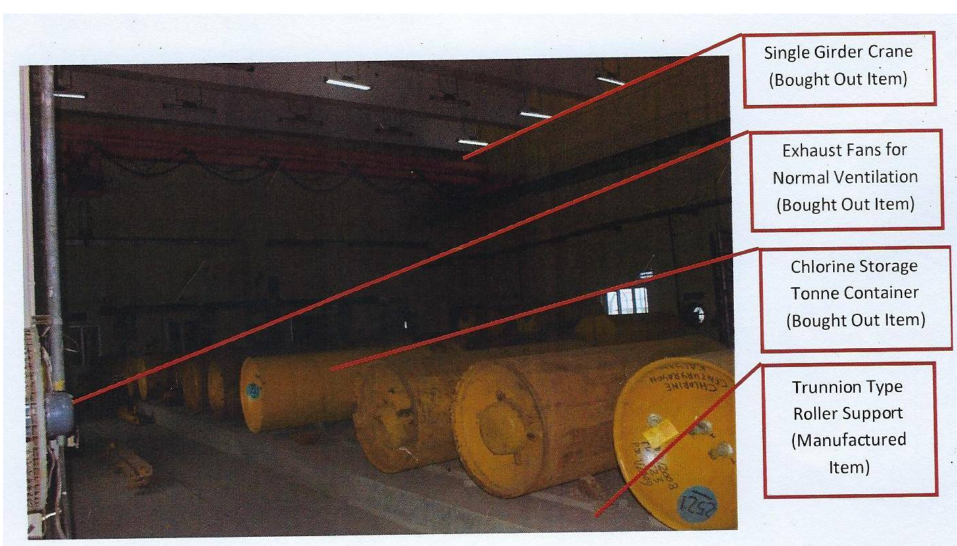

Pressure Relief Valve (Manufactured Item)
Pressure Reducing Valve (Manufactured Item)
Evaporator (Manufactured Item)
Gas Filter (Manufactured Item)


CHLORINATOR-3
Chlorinator (Manufactured Item)





Motive Sea Water Piping, Chlorinated Air Ducting, Neutralized Air Ducting, Chlorine Solution Piping, Liquid Chlorine Piping, Chlorine Gas Piping, Service Air Piping, Masked Air Piping, Chlorine Solution Piping, Domestic Water Piping fabricated at Site



Needless to emphasize, each of the items has been connected through pipelines and dismantling the plant and shifting from the initial site where it is installed would be carried out only by damaging the plant as a whole.

10. The Hon'ble High Court in the case of *Larsen & Toubro* (supra) was confronted with the question whether fabrication, assembly and erection of waste water treatment plant at the site of the assessee resulted into manufacture of excisable goods, accordingly chargeable to duty. Analyzing the evidence on record, the Hon'ble Court observed as follows:-

*"**5.** It need not be stated that the excise duty is not payable in respect of an immovable property. The plant when erected by embedding in the civil work becomes an immovable property and would not therefore attract any excise duty. The contention of the respondents, however, is that the plant came into existence in an unassembled form at site and became operational after it was embedded in the civil work. Though the civil work did not attract excise duty, excise duty was payable on the plant in an unassembled form. The relevant wording in the show cause notice in that regard is quoted below :-*

> *"The plant already came into existence <u>in an unerected</u> form as per drawing and designs approved by M/s. B.P.C.L. before the same was installed erected and affixed to the ground with civil work. The civil work did not attract duty being immovable property." (Underlining supplied)*

In our view, mere bringing of the duty paid parts in an unassembled form at one place, i.e. at the site does not amount to manufacture of a plant. Section 2(f) of the Central Excises and Salt Act, 1944 (for short "the Act") defines the word "manufacture" to include any process incidental or ancillary to the completion of a manufactured product. Any process by which an object becomes a new commercial goods would be included in the definition of "manufacture". However, simply collecting together at site the various parts would not amount to manufacture unless an excisable movable product (say a plant) comes into existence by assembly of such parts. In the present case, as the petitioner has stated that the *waste water treatment plant does not come into existence unless all the parts are put together and embedded in the civil work. Waste water treatment plant does not become a plant until the process which includes the civil work, is completed. In our view, therefore, no commercial movable property came into existence until the assembling was completed by embedding different parts in the civil works."*

11. Similarly, in *Ion Exchange Ltd.*'s case (supra), by a majority, it has been held that manufacture of water treatment plant at the site by assembly and installation of various individual components would result into emergence of an immovable property, hence, not leviable to duty. The said judgment was later followed for the subsequent period. In *Chemtec Water Conditioners*' case (supra) also, the question was whether water treatment plant, which is firmly and permanently attached by way of civil construction to earth, is liable to excise duty or otherwise. Following the judgment of the Hon'ble Supreme Court, this Tribunal observed that after being permanently grouted/embedded to earth, it loses the character of movability and thus becomes immovable, accordingly, non-excisable.

12. In the present case also, no evidence has been placed by the Revenue that the chlorination plant erected and commissioned at site could easily be unassembled and shifted to other place without causing damage to the components and plant as a whole, hence, be considered as movable one.

13. The Ld. Commissioner has heavily relied upon the judgment of Hon'ble Supreme Court in *Solid & Correct Engineering Works* (supra). The facts of the said case is not relevant to the facts of the present case, in as much as in the said case, the very purpose

of hot mixing plant was to was mix the coal tar at the construction of the Roads. After completion of the work, the hot mix plant is shifted to another site. Thus, the very purpose of the said plant was to make it movable. Hence it is held to be considered as movable and accordingly excisable. In the present case, BARC and other customers of the appellant have certified that the chlorination plant installed in their premises are fixed permanently to earth and not meant to be shifted/transferred. No contrary evidence is placed by the Revenue.

14. In these circumstances, therefore, we are of view that the chlorination plant installed at various sites out of the goods manufactured and cleared by the appellant from their factory on payment of excise duty and assembling with other bought out items at the site of the customer, resulted into an immovable property and hence not leviable to excise duty. Consequently, the impugned order is set aside and the appeals are allowed with consequential relief, if any, as per law.

15. The appeals are disposed of as above.

(Pronounced in the open court on 02.08.2019)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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