CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Excise Appeal No: 1280 of 2009

[Arising out of Order-in Original No: 08/CEX/2009-10 dated 31st August 2009 passed by the Commissioner of Central Excise, Pune – III.]

Jabil Circuit India Pvt Ltd … ***Appellant***
B-26 MIDC Industrial Area, Ranjagaon, Tal. Shirur, Dist: Pune

versus

Commissioner of Central Excise ***…Respondent***
Pune – III, ICE House, 41A Sassoon Road, Pune 411001

WITH
Excise Miscellaneous Application No: 85570 of 2018
In
Excise Appeal No: 1281 of 2009

[Arising out of Order-in Original No: 08/CEX/2009-10 dated 31st August 2009 passed by the Commissioner of Central Excise, Pune – III.]

Tecnicolor India Pvt Ltd … ***Appellant***
Level 9, Navigator, International Tech Park,
Whitefield Road, Bangalore – 560 066

versus

Commissioner of Central Excise ***…Respondent***
Pune – III, ICE House, 41A Sassoon Road, Pune 411001

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri RK Dwivedi, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 87126-87127/2019

DATE OF HEARING: 07/05/2019
DATE OF DECISION: 08/11/2019

PER: C J MATHEW

The issue in this appeal, pertaining to the demand of duties of central excise from M/s Jabil Circuit India Pvt Ltd, for the period from 1st April 2007 to 23rd January 2008, along with interest under section 11AB of Central Excise Act, 1944, and imposition of penalty under section 11AC of Central Excise Act, 1944 as well as the penalty imposed under rule 26 of Central Excise Rules, 2002 on M/s Thomson Holdings (India) Pvt Ltd (now known as Tecnicolor India Pvt Ltd), is the extent to which the definition of 'job-worker' was intended to be interpreted for application of rule 10A of Central Excise Valuation (Determination of Price of Excise Goods) Rules, 2000. While M/s Jabil Circuit India Pvt Ltd is in appeal against demand of duty, as well as imposition of penalty, M/s Tecnicolor India Pvt Ltd, [formerly known as M/s Thomson Holdings (India) Pvt Ltd and for alteration of which a miscellaneous application is also before us], are in appeal against the penalties. The miscellaneous application for change of cause title is allowed.

2. M/s Jabil Circuit India Pvt Ltd is in the business of manufacture of ‘set-top-boxes’ for M/s Tecnicolor India Pvt Ltd who, in turn, sold these exclusively to M/s Tata Sky Limited.

3. The case of the central excise authorities, as espoused by Learned Authorised Representative, is that the appellant-assessee is a job-worker who had been discharging tax liability on clearance of ‘set-top-boxes’, to M/s Tecnicolor India Pvt Ltd, by resorting to valuation under rule 6, instead of computing on the basis prescribed in rule 10A, of Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000. According to him, the agreement between appellant-assessee and M/s Tecnicolor India Pvt Ltd makes it clear that the manufacture is not merely on account of the latter and draws our attention to the impugned order-in original no. 08/CEX/2009-10 dated 31st August 2009 of Commissioner of Central Excise, Pune – III which has held that

> *‘47. The statement of the officials of the noticee as well as M/s TH1PL, the contents of MOU, the AVL, quantity supplied by M/s. THIPL along with BOM clearly indicate that the price of STBs is fixed on the basis of the PO by M/s THIPL, the prices of raw material / inputs are controlled by M/s THIPL by way of BOM and the vendors are authorized by way of AVL issued by M/s THIPL. It is also observed that M/s THIPL identified their sister concern M/s Thomson Broadband UK Limited ("TBUK") as the authorized vendor for the procurement of Key components by the noticee. Thus, M/s THIPL indirectly*

supplied the inputs to the noticee from their sister concern at the price controlled / approved by them. It is further observed that the noticee manufactured STBs exclusively for M/s THIPL. Thus, it is clear that the said STBs were manufactured by the noticee on behalf of M/s. THIPL on job work basis. It is also observed that there is no processing or any kind of activity done at M/s. THIPL as also confirmed by the officials of M/s. THIPL. The said STBs are sold by them as it is. Therefore, M/s. Thomson are the principal manufacturer of the set top boxes and the noticee is a job worker who produce or manufacture the goods i.e. STB on behalf of M/s. THIPL, as defined in Rule 10A of the Valuation Rules, 2000.

48. The noticee has argued that the raw materials for manufacture of STB's were procured by them and were not supplied by M/s THIPL, hence Rule 10A of the Valuation Rules was not applicable to them. Though, M/s THIPL did not supply the raw materials directly, it is seen that by negotiation of prices in TCP and compelling the noticee to get raw materials from AVL and supply of key components by M/s TBUK, a sister concern of M/s THIPL clearly indicates supply of goods by persons authorised by. M/s THIPL. The situation envisaged in Rule 10A of the Valuation Rules is clearly created.

49. The noticee has also cited the case of M/s Kailash Soaps Pvt Ltd to distinguish between supply of goods and sale of goods. However, the said case law is not applicable in the present situation since Rule 10A specifically defines job worker for the purpose of the said Rule. Further, the case law of M/s Kailash Soaps Pvt Ltd pertains to the period prior to insertion of the said Rule 10A.'

to substantiate the allegation that the manufacture and clearance were as 'job-worker' of M/s Tecnicolor India Pvt Ltd and that no further operation is performed on the goods which are further sold to M/s Tata Sky Limited. Pointing out that

> *'39. An examination of the arrangement between notice and the co-noticee reveals that their parent companies i.e. M/s Jabil Circuit Inc., USA, and M/s Thomson Hongkong Holdings Ltd entered into a contract under memorandum of understanding (MOU) effective as of 06/03/2006. As per this MOU Noticee were to manufacture and sell the STBs to M/s THIPL in accordance with their (M/s THIPL's) specifications and requirements.'*

it was contended that the pre-arranged scheme of disposal of the consignment clearly demonstrates that there was no free choice with the appellant. Learned Authorised Representative places further reliance on the decision of the Tribunal in *Hyva (India) Pvt Ltd v. Commissioner of Central Excise, Belapur [2013 (292) ELT 59 (Tri.-Mumbai)]* and the affirmation thereof by the Hon'ble High Court of Bombay in *Hyva (India) Pvt Ltd v. Union of India [2015 (327) ELT 41 (Bom.)]*.

4. Learned Counsel for the assessee-appellant contends that the activities, incorporated in the self-contained 'memorandum of understanding' dated 6th March 2006 between the appellant-company and M/s Thomson Holding (India) Pvt Ltd (as it then was), had contracted for procurement of set-top boxes to be supplied to M/s Tata Sky Ltd. The bill of materials, and authorized vendor list, issued to the

manufacturer by M/s Tecnicolor India Pvt Ltd also cannot be inferred as anything other than that of manufacture as a principal. It is further submitted that a particular category of inputs designated as ‘key components’ was to be supplied by M/s Thomson Broadband (UK) Ltd on order placed by the appellant. Furthermore, it is submitted that ‘Thomson control parts’ and ‘manufactured control parts’ were to be supplied by the vendors enumerated in the list approved by M/s Tecnicolor India Pvt Ltd. It is contended that the earlier proceedings relating to valuation had been settled by the Tribunal in *Jabil Circuit India Pvt Ltd v. Commissioner of Central Excise, Pune [2014 (307) ELT 891 (Tri.-Mumbai)]* with direction to resort to rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 for including remote and additional features supplied free-of-cost in the assessable value and that finality excludes scope for reopening of the issue of valuation merely because rule 10A of the said Rules adds duty burden.

5. It is contended that rule 10A is not attracted in situations such as purchase of raw materials for sale of finished goods thereafter. It is also alleged that the impugned order travelled beyond the show cause notice in holding that the appellant-assessee was a job-worker even as normal activity of manufacture was undertaken whereas rule 10A of the said Rules is applicable in a situation of goods manufactured entirely out material provided by supplier.

6. The issue of valuation of goods in the hands of ‘job-worker’ is one which is vexed the Tribunal and central excise authorities for long. It is obvious that in situations of the manufacture having been contracted out to specialists the declared value is not necessarily the base for determining the duty liability. The decisions, pertaining to job-workers and their excisability, and subsequently, the assessments, were rendered for the period before the Central Excise Tariff Act, 1985 came into force. The ‘job-worker’ modal, which was very much in vogue, did not pose a challenge to tax coverage till 1975 as excisable goods were unambiguously enumerated. In 1975, coinciding also with the new Central Excise Valuation (Determination of Price of Excisable Goods) Rules, the residuary, and generic, entry was brought into force as ‘tariff item 68’, the scope for taxation of such activity as ‘manufacture’, and thereby excisability, needed interpretation. The exhaustive tariff that has been in place since 1985 expanded the scope of ‘manufacturing’ as dutiable activity under section 3 of Central Excise Act, 1944. It was in this environment of judicial resolution of dispute pertaining to the period of tariff uncertainty that the modal, was acknowledged, shifting the dutiability from the job-worker, even though construed as manufacturer, to the principal, who did not undertake that manufacturing, was acknowledged, by conditional exemption and, in the absence of any specific rule to govern the valuation for ascertainment of liability when discharged by job-worker, the authority

of *Ujagar Prints Ltd etc. v. Union of India v. [1989 AIR 516]* was drawn upon. The blurring of distinction between 'job-worker' and 'principal manufacturer', except for determination of commercial equation, reduced the valuation issues in the hands of principal manufacturer to conformity with 'place of removal'. The belated interpolation of rule 10A in the said Rules also points out to the same want of definition.

7. In effect, a 'job-worker' works on raw materials supplied by the 'principal manufacturer' and is denied an option to sell the goods that emerge thereby and, in that context, the liability fastened on to someone, other than the manufacturer, on the basis of contract of price. It is seen from the records that on a former occasion when the taxability of 'set-top-boxes' and non-inclusion of the value of material supplied therewith, rule 6 of the said Rules was held to be appropriate in accordance with

> *'Rule 10A* -- *Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer), then,* -
>
> *(i) in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;*

(iii) in a case not covered under clause (i) or (ii), the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods :

***Provided** that the cost of transportation, if any, from the premises, wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.*
***Explanation.** - For the purposes of this rule, job-worker means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him.'*

It contains an option of delivery from the premises of 'job-worker', upon sale by the 'principal-manufacturer', and, in the event of transfer of the said goods to some other places, sale thereafter by the principal-manufacturer. The job-worker has been held to be a 'manufacturer' on behalf of 'principal-manufacturer' and the supply of inputs for goods by either the 'principal-manufacturer' or any other person authorized by him, to suffice as 'job-worker'.

8. Quality is the hallmark of modern trade and, in particular, in securing of electronic equipment. In these circumstances, it is but natural for quality control to be ensured by identifying the vendors from whom the raw materials are to be procured by the manufacturer. The question that arises is whether this may be considered as inputs supplied by the 'principal-manufacturer' or its agent. That venders vetted were

short-listed by Thomson Holdings India Pvt Ltd as exclusive suppliers is not in doubt. In our view, however, the said raw materials or inputs not being procured from M/s Tecnicolor India Pvt Ltd and from agents render such a proposition to be untenable. As pointed out by Learned Counsel, the fundamental difference lies in the payment effected by the appellants to the supplier of the approved raw materials. In *Commissioner of Central Excise, Hyderabad v. Innocorp Ltd [2012-TIOL-956-CESTAT-BANG],* it was held that

> *'7.4 It is true that stringent quality standards were prescribed by TUPPERWARE to be strictly maintained by the manufacturers at every stage of the manufacture. TUPPERWARE could inspect the process of manufacture to ensure that the specified quality standards for the products were being maintained. They also had the liberty to reject the finished goods which did not conform to the specified standards. These things are part of normal commercial practice in respect of business houses who insist on the quality of their merchandise. These cannot be considerations to hold that the manufacturing activities of the assessees were under extensive control of TUPPERWARE reducing the status of the manufacturers to job workers. That the brand name of TUPPERWARE was affixed on the finished goods by the assessees is also immaterial. In this context, in our view, the learned Commissioner is justified in having claimed support from the decisions in the cases of Poona Bottling Co. Ltd. etc.*
>
> *7.5 The third requirement [vide para (7.1) supra] for the assessees to be job workers of TUPPERWARE has also not been satisfied in this case inasmuch as the goods were not*

> *manufactured from any inputs supplied by TUPPERWARE or by any other person authorized by them. It is not in dispute that the necessary raw materials and packing materials were procured by the assessees from suppliers named by TUPPERWARE. The cost of these materials were expressly recognized as expense of the assessees. That the suppliers were chosen by the assessees from a panel furnished by TUPPERWARE does not mean that the actual suppliers were authorized by TUPPERWARE to supply the materials to the assessees. Insofar as the moulds are concerned, undisputedly, they were returned by the assessees to TUPPERWARE after use (without availing Cenvat credit) and the amortised value thereof was included in the assessable value of the finished goods. On these facts, it has to be held that the third condition also remains unfulfilled in this case. In the result, the respondents in these appeals were not manufacturing the subject goods as job workers "on behalf of" TUPPERWARE. Needless to say, therefore, that Rule 10A was not applicable to the assessment of the subject goods.'*

and, likewise, in *Coromandel Paints Ltd v. Commissioner of Central Excise, Visakhapatnam [2010 (260) ELT 440 (Tri.-Bang.)],* it was opined that

> *'11. We are of a considered view that the agreement between the assessee/appellant and SIPL is of very commercial nature and hence, any items which are procured for specific manufacturing of paints, SIPL can definitely indicate the specific use. It is to be seen that there is no clause in the agreement which would indicate that the appellant herein has to return the said raw material/packing material without any charge i.e. to say they are bound to return without any consideration. We find that clause No. 11 was relied upon by*

the ld. SDR to say that the compensation which was given was based upon the material cost + additional specific profit. In our considered view, this in itself cannot be said that the relationship between the appellant and SIPL is that of a job worker and principal manufacturer and the compensation received by a person or a company, can be decided in any manner mutually acceptable to the contracting parties. The specific clause No. 11 of the agreement in no way suggests anyone to take a view that the appellant was a job worker of SIPL. Further, we find that clause No. 15D of the said agreement which we are reproducing herein under would indicate the relationship between the appellant and SIPL.

> *"15D. This agreement is devised as "AGREMENT FOR MANUFACTURE AND SUPPLY OF PAINTS" for the limited purpose of defining the remuneration/margin of profit eligible to be retained by M/s. Coromandel Paints Ltd., Visakhapatnam, in pursuance of this agreement. The production and supply of paints by Coromandel to Sigmakalon will be on principal to principal basis and all applicable taxes on such sale shall be paid by Coromandel at the time of its supply.*
>
> *For all statutory purposes, including payments of taxes, compliance of labour and other loss, including the responsibility of manufacturing quality paints as per the prescribed specification, M/s. Coromandel Paints Ltd. shall be manufacturer and is expected to discharge the entire liability cast on them as manufacturer, under this agreement.*
>
> *Excise duty, sales tax and other levies will have to be paid by Coromandel treating the same as sales to Sigmakalon, on the full value determined and agreed between the parties from time to time."*

12. It was argued by the ld. SDR relying on the findings by the lower authorities that the said clause is only for the limited purposes of defining the remuneration/margin of profit for discharge of applicable taxes. It can be seen from the above reproduced clause, entire tenor of the agreement was for manufacture and supply of paints, is totally on principal to

> *principal basis and the indication in the said clause specifically indicates that all the taxes have to be paid on such sale prices at the time of supply of paints by the appellant. It is also seen that the agreement between both the parties is indicating that the prices which are charged by M/s. Coromandel should be treated as sale to SIPL and on the full value they have to discharge the duty liability and sales tax.'*

9. Thus, it would appear that short-listing of vendors cannot be construed as supply on behalf of 'principal-manufacturer' because payment was made directly to the supplier of the goods by the appellant. Though in the context of CENVAT credit availability, it has been held in *Miraj Drymix (P) Ltd v. Commissioner of CGST, Alwar [2018 (8) TMI 162 -CESTAT NEW DELHI]*

> *'24. Furthermore, Rule 4 of Cenvat Credit Rules, 2004 clarifies the Legislature's intent behind the definition of "job-worker". The Rule prescribes that, a manufacturer shall be entitled to take credit with respect to inputs when the goods are directly sent from the vendor to the job-worker. This can only be in a scenario wherein the principal E/51653 -51656/2017 manufacturer (viz. recipient of job-worked goods) has paid for the goods to the vendor and asked him to deliver the same to the job- worker. Thus, it becomes even more perspicuous from the said provision that the law pre-supposes free of cost supply of raw materials as a mandatory test in case of job work transactions.'*

and similar disputes having been considered in *Sujhan Instruments v. Commissioner of Central Excise, Chennai-II [2018 (7) TMI 420 – CESTAT-CHENNAI]*, it was held that

'8.5 Thus just because the goods manufactured or produced by Sujhan are purchased by Honeywell on contract that should detract from acceptance of the transaction between Sujhan and Honeywell to be one of principal to principal basis. The arrangement between Sujhan and Honeywell, in our view, is on the lines of 'contract manufacturing' as distinguished from 'job worker'. The contract manufacturers are not supplied with the raw material from principal manufacturers, like 'job workers', but they are required to purchase them from the market, very often from vendors who are approved by the principal manufacturer for quality point of view. The principal then buys finished products from the contract margin and very often sales them to his core customer, sometimes with enhanced margin. Department has also not unearthed or brought out anything on record to suspect that the contract between Sujhan and Honeywell is only a camouflage for job working. There is also no evidence put forth to indicate that apart from the value invoices by Sujhan to Honeywell there is an additional value component which is separately paid by the latter to the former or that there is any additional flow back of funds. This being the case, there is no reason on account of invoice value between Sujhan and Honeywell should not be treated as the ―transaction value‖ under Section 4 (1) (a) of the Central Excise Act, 1944.

8.6 While arriving at this conclusion, we draw sustenance from the ratio of the Tribunal's decision in Coromandal Paints- 2010 (260) ELT 440 (Tri.- Bang.). In that case, the Coromandal Paints and SIPL had entered into agreement for manufacture and supply of paints, with all taxes to be paid on sale price by the latter. The agreement indicated that prices charged by the former are treated as sale to SIPL on which value Central Excise duty and sales tax was being discharged. The Tribunal following the ratio already laid down in Gillette

> *Diversified Operations Ltd. Vs Commissioner – 2007 (217) ELT 51 (Tribunal) held that by merely indicating vendors of raw materials or by giving advance for procuring raw material or even installing equipment given by SIPL would not render Coromandal as a job worker.'*

10. In view of the above circumstances, we are of the view that the definition of 'job-worker', as incorporated in the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 would not cover the transactions, as well as the activities, that characteristic occur in the present dispute. Resort to rule 10A of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is, therefore, not legal and proper.

11. Accordingly, we set aside the impugned order and allow the appeals.

(Order pronounced in the open court on 08/11/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*