

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 194 OF 2012

[Arising out of Order-in-Original No: Belapur/38/Taloja/R-IV/SLM/Commr/11-12 dated 31st October 2011 passed by the Commissioner of Central Excise, Belapur.]

Mody Chemi Pharma Pvt Ltd

J-39 MIDC, Taloja, Dist: Raigad, Maharashtra

... Appellant

versus

Commissioner of Central Excise

Belapur

CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

WITH

EXCISE APPEAL NO: 195 OF 2012

[Arising out of Order-in-Original No: Belapur/38/Taloja/R-IV/SLM/Commr/11-12 dated 31st October 2011 passed by the Commissioner of Central Excise, Belapur.]

Bhavesh N Modi

Mody Chemi Pharma Pvt Ltd

J-39 MIDC, Taloja, Dist: Raigad, Maharashtra

... Appellant

versus

Commissioner of Central Excise

Belapur

CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

WITH

EXCISE APPEAL NO: 196 OF 2012

[Arising out of Order-in-Original No: Belapur/38/Taloja/R-IV/SLM/Commr/11-12 dated 31st October 2011 passed by the Commissioner of Central Excise, Belapur.]

Mody Chemical Industries

Gala No. 209, 2nd Floor, Malva, Patanwala Compound
LBS Marg, Ghatkopar (W), Mumbai 400086

... Appellant

versus

Commissioner of Central Excise

Belapur
CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

WITH

EXCISE APPEAL NO: 1220 OF 2012

[Arising out of Order-in-Appeal No: BC/37-39/MUM-III/2012-13 dated 30th April 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai – III, Belapur.]

Bhavesh N Modi

Mody Chemi Pharma Pvt Ltd
J-39 MIDC, Taloja, Dist: Raigad, Maharashtra

... Appellant

versus

Commissioner of Central Excise

Belapur
CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

WITH

EXCISE APPEAL NO: 1221 OF 2012

[Arising out of Order-in-Appeal No: BC/37-39/MUM-III/2012-13 dated 30th April 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai – III, Belapur.]

Mody Chemi Pharma Pvt Ltd

J-39 MIDC, Taloja, Dist: Raigad, Maharashtra

... Appellant

versus

Commissioner of Central Excise

Belapur
CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

WITH

EXCISE APPEAL NO: 1222 OF 2012

[Arising out of Order-in-Appeal No: BC/37-39/MUM-III/2012-13 dated 30th April 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai – III, Belapur.]

Mody Chemical Industries

Gala No. 209, 2nd Floor, Malva, Patanwala Compound
LBS Marg, Ghatkopar (W), Mumbai 400086

... Appellant

versus

Commissioner of Central Excise

Belapur
CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

APPEARANCE:

Ms C Pooja Reddy, Advocate for the appellants

Ms Anuradha Parab, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86199-86204/2022

DATE OF HEARING:	07/06/2022
DATE OF DECISION:	07/12/2022

PER: C J MATHEW

Two sets of appeals comprising of three against order of adjudication and the other of the same three against order of first appellate authority, arising from common cause of action, are

disposed off by this common order. The common issue in both sets is the leviability of duties of central excise on product deemed by law to have been manufactured and the other issue, in the adjudication order impugned here, is short-payment of duty on another product by misdeclaration of quality.

2. At the root of the common issue is ‘manufacture’ defined as

‘ includes any process –

(i) ...

(ii) which is specified in relation to any goods in the section or chapter notes of Schedule to the Central Excise Tariff Act, 1985 as amount into manufacture.’

in section 2(f)(ii) of Central Excise Act, 1944 which, along with

‘In relation to products of this Chapter, labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consume, shall amount to manufacture’

in note 9 to chapter 28 of Schedule to Central Excise Tariff Act 1985, was invoked to allege non-compliance with the liabilities attracted by, and obligations appendant to, section 3 of Central Excise Act, 1944. The two entities involved in the impugned transactions are M/s Mody Chemi Pharma Pvt Ltd, registered manufacturer under Central Excise Act, 1944, and M/s Mody Chemical Industries, a proprietorship concern registered as dealer under Central Excise Act,

1944 with the individual-appellant, Mr Bhavesh Mody as Hindu Undivided Family (HUF), owning the latter and designated director in the former.

3. Levy of duties from deeming as manufacture, through insertion of note in chapter 28, 29, 34, 35 and 38 of the Schedule to Central Excise Tariff Act, 1985, by Finance Act, 1997 ushered in the impugned legal fiction that is the cause of the present controversy for the period from August 2007 to October 2008. In the factual matrix, M/s Mody Chemical Industries imported 'liquid bromine' in ISO tanks of 15000 kg capacity from Louisiana, USA which M/s Mody Chem Pharma Pvt Ltd, authorized to handle such hazardous substance and with capacity for bottling, supplies back in 'crates of six 3 kg bottles'; an intermediate collection in flask of 50 kg capacity before the final stage is the crux of the dispute. The case of central excise authorities is that note 9 in chapter 28 of Schedule to Central Excise Tariff Act, 1985 suffices for such re-bottling to be manufacture within the ambit of excisability. The appellant-company manufactures several chemicals for use in downstream industry and about 2 to 3 metric tons of 'liquid bromine' procured domestically is consumed every month by them for producing '1,3 dibromo 5,5 dimethyl hydantoin (DDH)' and the excess from the 'normal supply quantity' of 5000 kgs was being sold under their label to several domestic users, with far lesser usage coupled with inability to invest in purchase of

higher quantity, in standard retail packs described before and on payment of duties of central excise. With commencement of imports by the trading concern, M/s Mody Chemical Industries, the facility of M/s Mody Chemi Pharma Pvt Ltd was utilized on their behalf and who, while availing CENVAT credit on additional duties of customs incurred at the time of import, discharged duty liability in the retail sale. It was the clearance of 284397 kgs of 'liquid bromine' effected during the period in dispute by M/s Mody Chemi Pharma Pvt Ltd after re-bottling into standard retail packs that was held to be clandestinely removed with consequences in the order of adjudication impugned before us.

4. It would also appear that some of the '2.2 azobisisobutyronitrile (AIBN)' manufactured by M/s Mody Chemi Pharma Pvt Ltd were being sold to plastic manufacturers and waste dealers at much lower prices than that obtainable for prime material sold for use in the pharmaceutical and paint industry and sought to be attributed to deterioration. Show cause notice dated 29th December 2009 for recovery of duties of central excise of ₹ 53,45,417 on 284397 kgs of 'liquid bromine' so cleared during the period of dispute and of ₹ 3,96,818 on 4903 kgs of '2.2 azobisisobutyronitrile (AIBN)' culminated in order-in-original no. Belapur/38/Taloja/R-IV/SLM/ Commr/11-12 dated 31st October 2011 of Commissioner of Central Excise, Belapur confirming the said liability under section 11A of Central Excise Act, 1944, along with interest

thereon under section 11AB of Central Excise Act, 1944, besides imposing penalty of ₹ 53,45,417 under section 11AC of Central Excise Act, 1944 and determination of fine of ₹ 15,00,000 under section 34 of Central Excise Act, 1944 on the goods that, but for lack of availability, would have been confiscated.

5. During investigations into alleged clandestine removal by the manufacturer, repacked 'liquid bromine' valued at ₹ 19,98,200 were seized on 31st October 2008 for not having been accounted and show cause notice dated 28th April 2009 issued by the jurisdictional Deputy Commissioner of Central Excise proposing confiscation under rule 25 of Central Excise Rules, 2002 with attendant penalties under rule 26 and rule 27 of Central Excise Rules, 2002 was adjudicated. The upholding of confiscation with option to redeem on payment of fine of ₹ 3,00,000 and imposition of penalty of ₹ 2,88,140 in order-in-appeal no. BC/37-39/MUM-III/2012-13 dated 30th April 2012 is the second set of appeals impugned before us.

6. Learned Counsel for the appellant submits that the scope of the then newly inserted notes in the respective chapters was clarified by Central Board of Excise & Customs (CBEC) in circular no. 342/58/97-CX dated 8th October 1997 as requiring interpretation on the facts of each activity as had been done, all along, in like inclusions elsewhere in the Schedule to the Central Excise Tariff Act, 1985.

Attention was also drawn by her to circular no. 910/30/2009-CX dated 16th December 2009 of Central Board of Excise & Customs (CBEC), consequent upon the amendment to the newly inserted notes by substituting 'and' by 'or' to align with the intendment of distinction among the sets of activities and, notwithstanding which, it was reiterated that the activity of re-packing would need to be ascertained for conformity with retail packing.

7. Learned Counsel placed reliance on the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Vadodara v. Vadilal Gases Ltd* [2017 (346) ELT 161 (SC)] and of the Tribunal in *Swastik Corporation v. Commissioner of Central Excise, Puducherry* [2018 (359) ELT 233 (Tri-Chennai)], in *Ammonia Supply Company v. Commissioner of Central Excise, New Delhi* [2001 (131) ELT 626 (Tri-Del)], in *Commissioner of Central Excise, Chennai v. Indian Additives Ltd* [2007 (213) ELT 44 (Tri-Chennai)] and in *Ghodawat Foods International Pvt Ltd v. Commissioner of Central Excise, Pune-II* [2017 (352) ELT 213 (Tri-Mumbai)].

8. Insofar as the unaccounted goods and goods cleared at lower value are concerned, it was submitted that the reasons put forth during the course of investigation, as well as in response to the show cause notice, had been discarded without consideration. Reliance was placed on the decision of the Tribunal in *Kakkar Complex Steels Pvt Ltd v.*

Commissioner of Central Excise, Chandigarh [2006 (206) ELT 869 (Tri-Delhi)], in *Commissioner of Central Excise, Lucknow v. BMW Steels Ltd [2011 (272) ELT 315 (Tri-Del)]*, in *Sumeet Industries Ltd v. Commissioner of Central Excise, Surat [2004 (164) ELT 335 (Tri-Mumbai)]*, in *Commissioner of Central Excise, Rajkot v. Foton Ceramics [2011 (272) ELT 388 (Tri-Ahmd)]* and of the Hon'ble High Court of Gujarat in *Commissioner of Central Excise v. Pharma Indiana Laboratory [2009 (238) ELT 743 (Guj)]*.

9. Learned Authorised Representative submits that the re-packing of imported 'liquid bromine' as 'six pack' of bottles of 3kg capacity and labelled for sale to ultimate users passes through a stage that was not contemplated in the circulars of Central Board of Excise & Customs (CBEC) cited on behalf of appellant. He further submits that it has not been controverted that the manufacturing entity carried out bottling which, in the past, had been undertaken on payment of applicable duties. It was also pointed out that individual-appellant herein had, in a statement, admitted to the non-accountal of stock found in the premises at the time of search.

10. Learned Authorised Representative relied upon the decision of the Hon'ble Supreme Court in *Commissioner Central Excise, Meerut – II v. Sundstrand Forms P Ltd [2011 (271) ELT 326 (SC)]*, in *Air Liquide North India Pvt Ltd v. Commissioner of Central Excise,*

Jaipur – I [2011 (271) ELT 321 (SC)] and of the Tribunal in *Mittal Pigments Pvt Ltd v. Commissioner of Central Excise, Jaipur-I [2013 (30) STR 193 (Tri.-Del.)]* as well as in *Nestle India Ltd v. Commissioner of Central Excise, Chandigarh – II [2011 (270 ELT 575 (Tri.Del.)]*. Further reliance was placed in the decision of the Tribunal in *Collector of Central Excise, Jaipur v. Mittal Laminates (P) Ltd [1999 (105) ELT 408 (Tribunal)]* and it was also contended that the decision of the Hon’ble Supreme Court in *Shri Vivekanand Mills Ltd v. Union of India [1999 (109) ELT 32 (SC)]* had placed onus on the assessee for ensuring compliance with the tax law.

11. The decision of the Hon’ble Supreme Court in *re Sundstrand Forms P Ltd* placed emphasis on ‘marketability’ owing to its relevance in invoking rule 2A of the General rules for the interpretation of Schedule to Central Excise Tariff Act, 1985 which does not really pertain to the present dispute on interpretation of specified activities that are deemed to amount to manufacture for application of section 3 of Central Excise Act, 1994. The decision of the Hon’ble Supreme Court in *re Air Lidquide North India Pvt Ltd*, though pertinent to same note of chapter invoked in the dispute before us, examined a dispute in which helium gas was made available through a process that the disputant chose not to reveal but significance to the consumer from its unique utility to each such was found to be in conformity with the chapter note. Likewise, the

decision in *re Nestle India Ltd* was also on the scope of the notes to the chapter referred to in the present instance. Each these decisions, it would appear, rests upon the facts material to the dispute and, that too, in relation to activity that is obviously not restricted to labelling/re-labelling or re-packing *simpliciter*. All that can be deduced is that there is no universal template for determination of ‘marketability’ which does not appear to have been the factual matrix in which this dispute came up for determination.

12. It is seen from the impugned order that the adjudicating Commissioner has, instead of subjecting the impugned activity to the test of conformity to note 9 of chapter 28 of Schedule to Central Excise Tariff Act, 1985 and noticeably so in the sparse findings therein, merely taken up the reliance placed upon the decision in *re Ammonia Supply Company* and other decisions following therefrom for disputation, by contriving a test derived by him from the findings therein which the impugned activity has been held to have not passed muster, and found sufficing to confirm liability to duties of central excise. The arguments and submissions of Learned Authorized Representative on marketability and value addition as determinants of manufacture mirrored that ‘zig zag’ approach to applicability of the wherewithal for deeming an activity as dutiable.

13. It has been alleged by the jurisdictional tax authorities that the

containment of 'liquid bromine' for convenient transportation and storage from the bulk supply in ISO containers lined with glass by the manufacturing entity for the trading concern is deemed manufacture in terms of note 9 to chapter 28 of Schedule to Central Excise Tariff Act, 1985. The goods received in quantities that is far in excess of reasonable requirement for industrial deployment passes through a process for driving it out of the ISO containers and into 3 kg bottles forced through a 50 kg flask. It is akin to a step-down transformer that brings high tension electrical energy to the homes of consumers. Being a hazardous substance, there is legal requirement of affixing labels detailing source and handling instruction. There is, thus, packing and labelling and it was to be determined if these conform to the prescriptive threshold envisaged by the impugned note that is composed of four process with each of them standing on their own for manufacture to be deemed. We fail to see any finding that, with reference to the facts, narrows the impugned activity to one of the four alternatives. It is regrettable that adjudication is, at times, perceived as response to resistance put up by noticee instead of as a responsible exercise of determining, from established fact, either breach of statutory boundaries or inapplicability of context for escapement. That deficit must be made good before appellate determination can commence.

14. The determination of breach as far as the 'liquid bromine'

seized from the manufacturing entity is concerned has been influenced by the finding of the adjudicating Commissioner and the taint therein infects the outcome before the first appellate authority in the second set of appeals requiring fresh determination.

15. The findings in the order of the adjudicating Commissioner on the selective clearance of the second product at non-comparable rates without documenting distinguishment has not considered the submissions of the manufacturing entity. Consequently, tax liability has been fastened by resort to assumptions driven by absence of satisfactory explanation. Clandestine clearance, being provable only by circumstantial evidence, should be determined by reference to circumstances including complexion of the transactional engagement in which the submissions made in defence are required to be dealt with. The lack thereof in the adjudication order impugned here must be made good.

16. To enable proper determination, we set aside the impugned orders and remand the matters back to the respective adjudicating authorities for proper discharge of statutory obligation. All six appeals are, thus, disposed off.

(Order pronounced in the open court on 07/12/2022)

(AJAY SHARMA)
Member (Judicial)

**/as*

(C J MATHEW)
Member (Technical)