

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 1606 of 2012

(Arising out of Order-in-Appeal No. YDB(202) ThI/2011 dated 24.08.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone I)

M/s. Lanxess India Pvt. Ltd.

Appellant

Lanxess House,
Plot No. 162A, 163A, 164A, MIDC,
Road No.27, Wagle Estate,
Thane (W) 400 604.

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

Appearance:

Ms. Payal Nahar, Advocate, for the Appellant

Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 09.12.2022

Date of Decision: 09.12.2022

FINAL ORDER NO. A/86163/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. YDB(202) ThI/2011 dated 24.08.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone I. By the impugned order, the Commissioner (Appeals) has upheld the Order-in-Original No. 01/HHK-01/TH-I/2011 dated 27.01.2011 passed by the Additional Commissioner of Central Excise, Thane-I holding as follows:-

"33. In the light of the above findings, I pass the order as follows:

(i) I confirm the demand of the wrongly availed and utilized Cenvat Credit of Rs. 14,86,433/-(Rupees fourteen lakhs eighty six thousands four hundred and thirty three only) during the

period from August 2005 to September 2008 and order its recovery from M/s. Lenxess India Pvt. Ltd., Block No.K, Gala No. 4 &5 Rajlaxmi commercial Complex Thane, Bhiwandi Road, Bhiwandi 421 3021; under Section 11A of the Central Excise Act, 1944 read with rule 14 of the Cenvat Credit Rules, 2004;

(ii) I order recovery of interest at appropriate rate on the above amount from them under the provisions of Section 11AB of the Central Excise Act, 1944.

(iii) I impose penalty of Rs.14,86,433/-(Rupees fourteen lakhs eighty six thousands four hundred and thirty three only) M/s. M/s. Lenxess India Pvt. Ltd., Block No. K, Gala No. 4 &5 Rajlaxmi commercial Complex Thane, Bhiwandi Road, Bhiwandi 421 3021; under Section 11AC of the Central Excise Act, 1944 read with rule 15(2) of the Cenvat Credit Rules, 2004.”

2.1 Appellant is holding central excise registration for manufacture of excisable goods falling under Chapter 28 & 29 of the Central Excise Tariff Act, 1985. They are also taking Cenvat credit in respect of the inputs received by them for manufacture of finished goods treating repacking and relabeling activity undertaken by them as manufacture under Section 2(f) of the Central Excise Act, 1944.

2.2 On scrutiny of records and enquiry, it was found that the appellant was not having any plant, machinery or industrial power connection. As no manufacturing activity was undertaken by them, their premises was simply a godown used for dispatch of the finished goods. The only activity that was being undertaken in the said godown is repacking and relabeling of excisable goods and dispatch thereof. These activities undertaken in respect of the goods of Chapter 39 & 40 did not amount to manufacture. Accordingly the appellant was neither required to pay any central excise duty nor entitled to any Cenvat credit in respect of these goods.

2.3 For denial of Cenvat credit, a show cause notice dated 13.05.2010 was issued to the appellant asking them to show cause as to why:-

a) the wrongly availed and utilized Cenvat credit amounting to Rs. 14,86,433/- (Rupees Fourteen Lakhs Eighty Six Thousand Four Hundred Thirty Three only) should not be demanded and recovered from them under Section 11 A of the Central Excise Act 1944, read with Rule 14 of Credit Rules 2004

b) interest at the appropriate rate should not be recovered from them under the provisions of Section 11 AB of the Central Excise Act 1944

c) penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules 2004 for the contravention as aforesaid."

2.4 The show cause notice was adjudicated by the Additional Commissioner vide the order referred in para 1 above. Appeal against the said order has been dismissed by the Commissioner (Appeals) by the impugned order. Hence this appeal.

3.1 We have heard Ms. Payal Nahar, Advocate, for the appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits:-

- The department has incorrectly considered the amount of excise duty discharged by the appellant as Cenvat credit availed. The demand made was the actual duty paid by them on the dispatches made by them of the finished products and the total credit taken by them on the inputs received was Rs.12,64,661/-.
- The duty paid should be treated as reversal of credit and the demand raised is not maintainable in view of the decisions as follows:-

- Ajinkya Enterprises [2013 (288) ELT 247 (T)] affirmed by Hon'ble Bombay High Court reported at 2013 (294) ELT 203 (Bom.)]
- Creative Enterprises [2009 (235) ELT 785 (Guj.)] affirmed by Hon'ble Supreme Court reported at 2009 (243) ELT A120 (SC)]
- Vishal Precision Steel Tubes and Strips Pvt. Ltd. [2017 (3) TMI 1287-Karnataka High Court]
- Tristar Enterprises [2019 (11) TMI 481-CESTAT Mumbai]
- Argus Coatings & Polymers Pvt. Ltd. [2018 (9) TMI 122-CESTAT Mumbai]
- The Standard Chemical Co. Pvt. Ltd. [2019 (11) TMI 1262-CESTAT Mumbai]
- Gee Ltd. [2022 (10) TMI 957-CESTAT Mumbai]
- The entire exercise is revenue neutral and the entire demand is time barred. No penalty and interest can be imposed on them.

3.3 Learned Authorised Representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For upholding the order-in-original, Commissioner (Appeals) has in the impugned order held as follows:-

"The issues in the appeal is, as to whether the appellant are eligible to avail Cenvat credit on the inputs falling under chapter 39 & 40 of the Central Excise Tariff Act. 1985, when the said raw materials are not subjected to any manufacturing process.

It is the contention of the appellant that their process of repacking and relabeling are incidental and ancillary to the completion of a manufactured product and same is covered by the definition of manufacture.

Section 2(f) of Central Excise Act, 1944 states

2(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 First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) 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;]

Taking in to consideration the ingredients of the Section 2(f) supra, it is seen that, no new and different commercial product comes into existence during the course of their activity of repacking & for the goods of the Chapter 39 & 40. Therefore, the said process/activity does not fall under the definition of the "manufacture", in terms of the Section 2(f) of the Central Excise Act, 1944.

In the case of CCE. Mumbai v/s. Johnson & Johnson Ltd.,- 2005(188) ELT.464(SC), it was held that-

8.The respondents import items classifiable under Chapter 18 and Chapter 19 of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Act"). The issue is whether Note 3 to Chapter 18 and Note 3 to Chapter 19 which extend the meaning of manufacture by legal fiction to the labelling or relabeling of containers and repacking from bulk to retail packs

would apply For the reasons stated by us in the order passed in CA. Nos 8277-8280/2003 these appeals are also dismissed.

9.In these appeals there is an additional fact that the Commissioner of Central Excise had found as a fact that the products are imported as ready for sale to consumers in retail packs. These retail packs were then taken to the appellant's warehouses where stickers were affixed to them containing information like names and addresses of the importers, maximum retail price. net weight etc. In these cases the appellants therefore, admittedly merely imported ready to market retail packs. There is no evidence of the appellants" themselves indulging in any further activity which required the packing or repacking of bulk packing into retail packs within the extended meaning of manufacture" as contained in Chapter Note 3 in Chapters 18 and 19 of the Act.

In the case of Chemerown Export Ltd., v/s. CCE, Mumbai-III-2010(256) ELT.108(Tri.-Mum.), it was also held that-

6.We find that the appellant's case is squarely covered by the substantial decisions referred by the learned Advocate and the Apex Court on the Identical issue has taken view that the activity taken over by the appellants does not amount to manufacture. We are also in agreement with arguments advanced by the Id Counsel. Following the same ratio, we also hold that the activity in the facts and circumstances of the case does not amount to manufacture in both the periods (ie prior to 1997 and after 1997). With these observations, we set aside the impugned order and allow the appeals with consequential relief.

From the above decision of the Hon'ble Apex Court, it is clear that the process carried out by the appellants did not fall under the definition of the "manufacture", in terms of the Section 2(f) of Central Excise Act, 1944, therefore the appellant was not entitled for availing the Cenvat credit as per rule 3 of the Cenvat Credit Rules, 2004.

It has been contested by the appellant that there is revenue neutrality in their case as they availed Cenvat credit and reversed the same at the time of clearance of the said products. In this regard, the Central Excise duty paid by the appellant is nothing but passing the said duty element through Central Excise Invoices to their customers who subsequently availed credit, who used it unduly, thus there is a clear loss to revenue, and the revenue neutrality cannot be a ground for availing wrong Cenvat credit. Therefore, the contention of the appellant about the revenue neutrality does not hold good, hence, not acceptable."

4.3 We find that the contention as raised by the Revenue that the activities undertaken by the appellant do not amount to manufacture, but still undisputedly the appellant has paid the duty in respect of the finished goods. Having accepted the payment of duty, Revenue could not have denied the Cenvat credit availed by the appellant. Hon'ble Bombay High Court has in the case of Ajinkya Enterprises [2013 (294) ELT 203 (Bom.)] held as follows:-

"10. *Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - [2008 \(221\) E.L.T. 586](#) (T), Super Forgings - [2007 \(217\) E.L.T. 559](#) (T), S.A.I.L. - [2007 \(220\) E.L.T. 520](#) (T) = [2009 \(15\) S.T.R. 640](#) (Tribunal), M.P. Telelinks Limited - [2004 \(178\) E.L.T. 167](#) (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in [2009 \(235\) E.L.T. 785](#) (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see [2009 \(243\) E.L.T. A121](#)] by dismissing the SLP filed by the Revenue."*

5.1 Following the said decision of Hon'ble Bombay High Court, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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