

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

WEST ZONAL BENCH

**EXCISE APPEAL NO: 86844 TO 86859 OF 2022
WITH
EXCISE CROSS-OBJECTION NO: 85109 & 85110 OF 2023
(on behalf of respondent)**

[Arising out of Order-in-Original No: 02/RKM/ADG/Michelin/2022-23 dated 19th May 2022 passed by the Additional Director General (Adjudication), Directorate General of GST Intelligence, Mumbai.]

Michelin India Private Limited
4th Floor, Tower-4, World Trade Centre, 1 Kharadi
Dhulepatil Road, MIDC Knowledge Park
Pune - 411014

... Appellant

versus

Additional Director General (Adjudication)
Directorate of Revenue Intelligence
Laxmi Insurance Building, Sir PM Road,
Mumbai - 400001

...Respondent

APPEARANCE:

Shri V Sridharan, Senior Advocate with Shri Rajesh Ostwal and Ms Payal Nahar,
Advocates for the appellant

Shri S D Deshpande, Special Counsel for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: 85235-85250/2024

DATE OF HEARING:	04/09/2023
DATE OF DECISION:	29/02/2024

PER: C J MATHEW

There are wheels within wheels – both literally and in a manner of speaking – in this dispute. The activity that came under scrutiny was the placement of tubes, along with flaps, in tyres and this, according to central excise authorities, is nothing but artifice to keep the taxman away by masquerading as a business model. That, they are convinced, is so patently lacking in credibility as to warrant discarding for its absurd inelegance. At stake is liability of ₹ 217,57,99,424 fastened under the intendment of section 3 of Central Excise Act, 1944 for levying duty on manufacture, *i.e.*, the subsuming of ‘inputs’ by a transforming process within the ‘output’, in order¹ of Additional Director General (Adjudication), Directorate General of GST Intelligence, Mumbai upon determination that the impugned activity has been deemed by law as manufacture. The crux of the dispute pertains to the strapping together of ‘tyres’, ‘tubes’ and ‘flaps’, referred to as ‘TTF’, at the premises of another for despatch of this particular combination of goods to dealers for catering to replacement market for bus/lorry operators.

2. M/s Michelin India Pvt Limited, aggrieved by the burden entailed on the impugned activity carried out between February 2014 and June 2017 at ‘distribution centres (DC)’, belonging to their logistics service providers, M/s DHL Ltd, M/s CFC Carriers (P) Ltd and M/s Ceva India (P) Ltd, as manufacture on their behalf, has filed these

¹ [order-in-original no. 02/RKM/ADG/Michelin/2022-23 dated 19th May 2022]

several appeals which, though impugning a single order, correspond to each of the locations and on identical cause of action prompting disposal by us in common order too. The appellant, till 2014, had been importing tyres of all types which were subjected to the impugned activity at the premises of 'logistic service providers' and, even after commencement of manufacture at its plant in Chennai, the contractual arrangement continued, though now encompassing both imported and manufactured tyres. At the 'distribution centres', the 'tyres', 'tubes' and 'flaps, received from different sources with specifications and brand detailed on them, were checked for imperfections and, in accordance with indents from dealers, segregated as separate and individual articles or as permutations and combinations of the three; it is common ground that the dispute is only about all three put together and it was alleged that the emplacement of 'tubes' and 'flaps' within the cavity of 'tyres' transformed these 'duty paid' goods into a new product on which duty liability was required to be discharged once again.

3. The impugned order has concluded that a unique product, viz., 'TTF kit' comes into existence, that this conversion has been done on behalf of the appellant herein and that assembly, strapping together, affixing of hologram and offering of warranty is tantamount to

'(iii)adoption of any other treatment on the goods to render the product marketable to the consumer...'

in section 2(f) of Central Excise Act, 1994 by relying upon

‘5. The combined reading of these two provisions resulted in conclusion that - packing or re-packing, labeling or re-labeling of containers or adoption of any other treatment on the goods to render the product marketable to the consumer in respect of the parts, components, accessories or assemblies (falling under any chapter) of vehicles falling under Chapter 87 excluding vehicles falling under heading 8712, 8713, 8715 and 8716 would amount to manufacture, MIPL were engaged in importing/ procuring tyres, tubes and flaps meant for trucks and buses (amongst other products), kitting a tyre, tube and flap, each by wrapping the three by plastic strips having 'Michelin' printed on the strip and pasting/sticking hologram of the company and ultimately bringing out a unique product known in the market and by the customers as TTF kit'.

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5.7 MIPL has entered into the agreements with DHL, M/s CFC Carriers (P) Ltd. and M/s Ceva India (P) Ltd., for providing logistics and warehouse services. The machines for strapping are provided in various premises of DHL by MIPL to make TTF kits. The straps containing Michelin Brand and logo are used to make TTF kit. Further, the software for issuance of invoice is provided by MIPL and instructions about deliveries of the TTF kits are also given by MIPL. Further, MIPL provides warranty to their customers if they purchase TTF kits and no warranty is provided if these products sold in loose form.

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5.9 The Noticees had entered into an agreement with DHL Logistics Private Limited for the purpose of logistics and warehousing [RUD 16]. The said agreement was for the

purpose of logistics and warehousing' only. The Schedule-1 to the said agreement clearly spells out the activities to be carried out by DHL. There are 16 activities to be carried out by DHL. None of the activities is related to 'kitting of TTF' sets. Mainly the activities refer to loading-unloading of tyres, etc. keeping records of goods received and dispatched, MIS reports and other confidentiality clauses. Secondly, DHL have been referred to as 'service providers' and as mentioned earlier no activity related to kitting is specifically mentioned as to be carried out by DHL in the agreement. The contention of the Noticee that kitting of tyres, tubes and flaps which allegedly amounted to manufacture was undertaken by DHL and hence, if at all any liability to pay central excise duty arose, would rest on DHL. This argument does not hold good as visibly there is no specific clause in the Schedule-1 of the Agreement that the kitting of tyres, tubes and flaps' would be carried out by DHL. In fact, MIPL has stated that the TTF kitting was done by them in their warehouses. The contents of the case law in respect of Ujjagar Prints [referred to by the Noticee at para D.4 of their reply dated 27.09.2019] have been quoted and used without proper context by the Noticees. The clearance of the TTF kits was done by the logistics partner (service provider) for and on behalf of MIPL on the documents issued in the name of MIPL only. DHL were hired for record-keeping and logistics purpose, whatever other activities carried out by DHL were in the nature of manpower hired by MIPL. Another important aspect is the goods/raw material were never 'sent' to DHL under the cover of 'challan' as envisaged and prescribed under job work procedure. No material was 'handed over' to DHL. As per the agreement MIPL had hired the premises for warehousing of their own goods. All the services provided by DHL were in the capacity as a service provider only. As mentioned above, in fact, MIPL has stated that the TTF kitting was done by them in their

warehouses. Hence DHL can never be treated as 'manufacturer'.

as set out therein. For recourse to classification as 'tyres', it has been held that

'6.3.1. The Central Excise Tariff Act, 1985 incorporates five Rules of interpretation, which together provide necessary guidelines for classification of various products under the schedule. As regards the Interpretative Rules, the classification is to be first tested in the light of Rule 1. Only when it is not possible to resolve the issue by applying this Rule, recourse is taken to Rules 2, 3 & 4 in seriatim. The provision of the individual Rule is as follows:

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6.3.5 The TTF kit comprise of Tyre (Ch.Head-4011), Tube (Ch.Head-4013) and Flap (Ch.Head-4012) put together for sale as one unit and called TTF kit. This product is very popular in the market; however, it does not contain separate classification for the same. All the three items are essential items as far as usage of tyre is concerned. The tyre alone cannot be put to use without putting tube inside it and the flap is used to provide protection to the tube while placed inside the tyre. Therefore, it may be seen that tube and flap are essential to put tyre to use. I find that the main part is tyre which can be put to use with the help of tube supported by flap. Therefore, the classification of TTF kit would be the classification of the tyre as per Rule-4 read with Section-5(2) of Central Excise Tariff (Amendment) Act, 2004. Therefore, I find that the classification of TTF kit will be Ch.Head- 4011.

and for resort to default valuation provision with the finding that

‘6.4.1 It is clear that TTF kit is covered under the Parts, components, accessories and assemblies of vehicles falling under Chapter 87 excluding vehicles falling under headings 8712, 8713, 8715 and 8716 and accordingly, its valuation to be done as per entry no. 100 of the Third Schedule to the Central Excise Tariff Act, 1985. Further, the manufacturer is legally obliged to print the MRP on the packages of the goods, under the provisions of the Legal Metrology Act, 2009. To check whether the provisions of the Legal Metrology Act, 2009 TTF kit, it is observed that as per Rule 3 (a) of Chapter — II of the Legal Metrology {Packaged Commodities} Rules, 2011, the provisions of this Act will not apply to packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg. It was ascertained and informed by MIPL that the approximate weight of a truck/bus tyre was around 62-65 Kg and of TTF set around 66-70 Kgs. Therefore, I find that as per the aforementioned condition these rules will not apply to the TTF kits for truck/ bus tyre.’

following which quantity of ‘kits’, that, admittedly and owing to lack of such description in the invoice and records, had to be estimated were valued on some basis that appeared to be sheer endorsement of proposal in the show cause notice without any semblance of finding to appraise application of mind in such decision.

4. Conceptually, ‘deemed manufacture’ is a legal fiction intended for taxing goods that have not changed form but, nonetheless, to be assessed to duty at such rate prescribed for the tariff item in the Schedule to Central Excise Tariff Act, 1985 corresponding to the

description of the goods before activity stipulated in the deeming provision was undertaken. Though duties of central excise are chargeable on ‘manufacture’, which itself is, under Central Excise Act, 1944, presumed to be so incontrovertibly known to the world – both common and otherwise – as to preclude need for definition, we are not so much concerned with that as with the effect of the inclusive portion of section 2(f) of Central Excise Act, 1944 on the charging provision as a definition does not purport to be anything but elaboration of the expression wherever found in the operational provisions. That such ‘inclusive’ element takes the expression concerned beyond the specially crafted, or generally accepted, meaning is settled law as is the implication that, but for such ‘inclusive’ incorporation, the enumerated stipulations would not lend itself to dutiability; hence, we employ ‘deeming’ for the occurrence of taxable event in which classification remains unchanged even as the stipulated activity serves to add value.

5. The adjudication order which has held the activity to be liable to duties of central excise solely on the finding of conformity with ‘manufacture’ as deemed, by

‘(iii) ..., in relation to the goods specified in the Third Schedule, involves packing and repacking of such goods in a unit container or labelling of 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...’

in section 2(f) of Central Excise Act, 1994, without transposing it to the framework which levies

‘(a) a duty of excise, to be called Central Value Added Tax (CENVAT) on all excisable goods...which are produced or manufactured in India as, and at the rate, set forth in Schedule I to the Central Excise Tariff Act, 1985; ’

in section 3(1) of Central Excise Act, 1944 has placed the propriety outcome in jeopardy. Thereafter, the adjudicating authority proceeded to determine the rate of duty to be fastened on the so-called ‘unique’ product emerging from the assembly of ‘tyres’, ‘tubes’ and ‘flaps’ which begs the question of whether duty liability was determined for ‘manufacture’ of the goods or arose from ‘deeming’ of manufacture. The distinction between the two mutually exclusive events is the nature, and extent, of transformation with only superficial impact owing to the latter in comparison with substantive alteration from the former; else, there was no need to make special provision for such activity to be brought within the tax net close to six decades after enactment of the statute and a decade and half after tariff note determined deemed manufacture. The discarding of all preceding rules for resort to

‘4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.’

in General Rules for Interpretation of the Schedule to Central Excise Tariff Act, 1985, which does not appear to advance the basis on which

the classification of ‘tyres’ was adopted across the board for the other two articles, is also inexplicable. Likewise, the impugned order has, in a most improbable trajectory, drawn upon the exclusion from declaratory requirements of

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(a) *packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags upto 50 kg; and*
.....’

in Legal Metrology (Packaged Commodities) Rules, 2011 to discard valuation in accordance with section 4A of Central Excise Act, 1944 and substitution by section 4 of Central Excise Act, 1944 with its emphasis on ‘transaction value’ despite which the computation rests upon assumptions and presumptions that do not conform thereto and should, therefore, have been determined, if at all, in accordance with the appropriate provision in Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

6. With this backdrop, we turn to the rival submissions. On behalf of the appellant, it was canvassed that such ‘manufacture’ is deemed by law upon one of three occurrences after the goods concerned had been manufactured and cleared once before: that of packing and repacking in unit containers, that of labelling and re-labelling of containers or that of such treatment on goods to render it marketable to the consumer and, with

neither of the first two crystallizing insofar as impugned assembling of ‘tyres’ and ‘tubes and flaps’ is concerned, the charge that requires defence is limited to the treatment performed on the goods as is of essence to transform the unmarketable to the marketable. From the submissions of Learned Special Counsel, it appears that the thrust of the case of Revenue is leviability of duties of central excise once again, after the uncontested duty liability, arising out of manufacture, upon clearance of the very same goods from the respective factories, merely owing to aggregation. With such duty liability having been discharged at undertakings of the appellant, the present attempt at fastening of the further impost, by invoking the deeming provision, on activity devolving contractually on the ‘logistics service provider’ by reference to another provision is a chasm that has not been adequately bridged either in the impugned order or in submissions on behalf of respondent. This is of particular relevance as section 2(f) of Central Excise Act, 1944 also construes ‘manufacturer’ for the purposes of the statute. Between these two conundrums, and from the dovetailing of the two, lies the answer to the controversy before us.

7. Learned Senior Counsel informed that the commercial model, devised even when the appellant was solely in the business of trading in imported goods, continued after commencement of their own manufacturing activity in India and, furthermore, that the affixing of ‘Michelin hologram’ on the outer wall of ‘tyres’ had been discontinued since December 2012. He dwelt, too, upon other practices that, similarly,

may have been construed against the appellant, such as the enumeration of 'TTF price' in the printed price list, that was in vogue till August 2015 and only owing to oral orders from dealers for combination to be supplied, was not on offer in the online mode of indenting and that, even so, 'TTF price' was nothing but the sum of the prices of the three. He submitted that 'strapping' at three points of the circumference, for retaining the assembly undisturbed during handling and transport, was not treatment on any of the three elements. The thrust of his submission was that no addition of any sort had been made to goods that had already discharged duty liability.

8. Contending that every 'tyre', 'tube' and 'flap', arriving at 'distribution centre' after payment of duty for further despatch without any addition or transformation, bore individual serial numbers indicating, *inter alia*, date of manufacture, it was pointed out that accounting of stock predicated on separateness of each item in the 'enterprise resource planning (ERP)' software even in instances when these were supplied together as indicated *supra*. It was further submitted that independent warranty attached to each of these separately. According to Learned Senior Counsel, the adjudicating authority has erroneously concluded that strapping at three places, affixing of hologram and offer of warranty amounted to the 'treatment' in the definition of 'manufacture' in section 2(f) of Central Excise Act, 1944.

9. According to Learned Special Counsel, the activities undertaken

at the premises of ‘logistics service provider’ – inspection and quality ascertainment, affixing of hologram and aggregating of the three products - are essential for the goods to be marketable. He pointed out that the nature of the goods do not lend themselves to protective packaging owing to which transportation from factory of manufacture to the subsequent premises is fraught with risk of customer dissatisfaction save when goods are subjected to physical check of quality. Likewise, it was contented that genuineness and authenticity of the goods is assured by the affixing of hologram but for which customer may forgo purchase. It was further posited that aggregation of ‘tyres’, ‘tubes’ and ‘flaps’ is common, and obligatory, trade practice for which reliance was placed on record of proceedings before the Designated Authority for imposition of ‘anti-dumping duty’ under section 3 of Customs Tariff Act, 1975.

10. It is of interest to note the circumstances in which ‘manufacture’ did, for the purpose of the levy, get expanded. The definition underwent change, and coinciding with the adoption of the new and comprehensive tariff, by section 4 of Central Excise Tariff Act, 1985 with effect from 28th February 1986 thus

‘ ...

(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;'*

in section 2 of Central Excise Act, 1944 to validate levy on manufacture deemed by notes in Schedule to Central Excise Tariff Act, 1985. Thereafter, to enable the Central Government to deem manufacture, section 132 of Finance Act, 2002 incorporated such empowerment thus

‘2.

- (f) *“manufacture” includes any process—*

- (i) *xxxxxxx*

- (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 is specified in relation to any goods by the Central Government, by notification in the Official Gazette, as amounting to manufacture.'*

in section 2 of Central Excise Act, 1944. By Finance Act, 2003, Third Schedule was incorporated to collate ‘goods’ to which

‘2.

- (f) *“manufacture” includes any process—*

- (i) *xxxxxxx*

- (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 “manufacture” 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;’

in section 2 of Central Excise Act, 1944 would apply for levy of duty.

11. In the light of duty having been discharged on the declared retail selling price, and at rate, for each of the three that came to be aggregated and the uncontroverted claim that price of aggregate is sum of the price of the three disaggregated products, we have cause to wonder at the statutory consequence advanced by the initiation of impugned proceedings. No less bemusing is the resistance of the appellant but, then, an assessee is not commercially created for discharge of duty liability and its business model, to the extent of not being illegal, is entirely beyond intrusion of agencies of the State and their cause for apprehension, but for the proximate detriment, does not require justification or explanation. Not so is the taxing agency and the absence of review, contemplated in section of Central Excise Act, 1944, for evaluation of the impugned order as legal and proper has not attempted to rectify this inadequacy in the adjudicated demand. There is no dispute on the classification adopted by the appellant upon clearance of

the goods from the factory of manufacture or on the value adopted for assessment. And yet there is a differential duty demand which must, necessarily, be predicated on either, or both, of rate of duty and value. That incongruence should suffice for discard of the impugned order but it behoves us, in circumstances of objection from the assessee and 'marketability' aspect set forth by the respondent, to adjudicate the validity of the contrary claims.

12. To contend that the 'tyres', 'tubes' and 'flaps' have been rendered marketable by 'inspection' at premises of 'logistics service provider' is to imply lack thereof at prior stage. That was an aspect which Learned Special Counsel, after making the proposition, chose to gloss over and his submission was restricted to 'non-marketability' occurring after clearance and restoration of 'marketability' after quality check. Surely, it cannot be the case that it was the act of inspection that did render the goods to be 'marketable' and from the description of post inspection rectification, it would appear that there were products that did not have to undergo such correctives. Therefore, at best the transition from 'marketable' to 'non-marketable' and back to 'marketable' may, at best, be attributed only to such that had suffered damage. The proceedings have not been limited to such distinguishable goods and, indeed, in the absence of such segregation as well as proposition in the show cause notice, the charge that 'inspection' fell within section 2(f)(iii) of Central Excise Act, 1944 is not tenable. That

deficit in the proceedings cannot be introduced in post-notice proceedings without compromise to integrity of section 11A of Central Excise Act, 1944.

13. The 'hologram affixing' proposition too presupposes lack of marketability in the absence of hologram. It also takes the scope of excisability beyond the stage of manufacture to brand acceptability. It is all too clear that not only is central excise law not about branding but is about manufacture. Duty liability devolves upon manufacture of the product and rate of duty is determined in generic existence and not from consumer perception of comparability of products that are all subject to the same rate of duty. The expression in section 2(f) of Central Excise Act, 1944 is 'marketable' and not 'more marketable' and, thereby, puts that proposition to rest. The submission on this aspect is not acceptable.

14. The convenience of aggregation notwithstanding, it is not the case of the respondents that 'tyres', 'tubes' and 'flaps' are never sold except after aggregation. It may be that the replacement market may have been replete with such aggregated presentation. That there is industry practice of such aggregation does not render sale as separate pieces to be against the law or contrary to conventions of sales. Reference to observations in record of proceedings before the designated authority under section 9A of Customs Tariff Act, 1975 does

not advance the case of Revenue that such aggregation offers commercial benefits owing to which the taxman should also enlarge the collection of the Government of India.

15. From our discussions *supra*, we find that, on facts alone, the proceedings do not sustain. We do not, therefore, find it necessary to delve into the interpretation canvassed on behalf of the appellants. Accordingly, the impugned order is set aside to allow the appeals.

(Order pronounced in the open court on 29/02/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)