# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# MUMBAI

## WEST ZONAL BENCH

## EXCISE APPEAL NO: 88640 OF 2013

[Arising out of Order-in-Appeal No: AV(135)129/2013 dated 27th May 2013 passed by the Commissioner of Central Excise & Customs (Appeals), Aurangabad.]

**Fasttrack Packers Pvt Ltd**
Survey No. 16/2B, Gut No. 62, Malibabhulgaon
Tal: Pathardi, Dist: Ahmednagar … ***Appellant***

*versus*

**Commissioner of Central Excise & Customs**
**Aurangabad**
Town Centre, N-5 CIDCO, Aurangabad - 431003 ***…Respondent***

## WITH

## EXCISE APPEAL NO: 89015 OF 2014

[Arising out of Order-in-Appeal No: AV(103)68/2014 dated 5th June 2014 passed by the Commissioner of Central Excise & Customs (Appeals), Aurangabad.]

**Fasttrack Packers Pvt Ltd**
Survey No. 16/2B, Gut No. 62, Malibabhulgaon
Tal: Pathardi, Dist: Ahmednagar … ***Appellant***

*versus*

**Commissioner of Central Excise & Customs**
**Aurangabad**
Town Centre, N-5 CIDCO, Aurangabad - 431003 ***…Respondent***

*APPEARANCE:*

Shri Prashant Patankar, Consultant for the appellant

Shri Xavier Mascarenhas, Superintendent (AR) for the respondent

**CORAM:**

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

**FINAL ORDER NO: 85557-85558/2024**

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| DATE OF HEARING: | 13/12/2023 |
| DATE OF DECISION: | 05/06/2024 |

*PER: C J MATHEW*

The contours of the dispute in these two appeals of M/s Fasttrack Packers Pvt Ltd, though stemming from relatively low stakes of duty liability, touches upon the very life blood of levy under Central Excise Act, 1944 – the taxable event – before which even the fundamental aspects of assessment, *viz*., rate of duty and value, take a backseat. Indeed, unlike sibling statutes for levy of taxes, the jurisdictional line between 'manufacture' and 'excisable' is so very conceptual that the administration of this impost has constantly been plagued by the demon of controversy which should have been about the 'manufacturing process', which is taxable, but, most often, ends up being about the 'excisable product', which offers a measure of the levy, and the factual matrix of the dispute before us is not atypical in that the submissions of both sides rely primarily on judicial precedent combined with the 'dovetailing' of the two.

2. The appellant is in the business of, inter alia, re-packing and labelling of 'unmanufactured tobacco' which, by twist of legislative deeming, is undoubtedly liable to duties of central excise and assessment thereto. Not unnaturally, the activity requires 'paper' and a aspects of the

activity – making pouches from ‘kraft’ paper, wrappers and labels- leaves the appellant with some remnants thereof, as also from waste paper used as unwrapping for paper procured by them and from damage during the process, which are unusable in the manufacturing process. It is this ‘waste paper’ which they must be rid off that was cause for cavil from the central excise authorities though it mattered not a whit to them if the appellant chose to burn these or sell them as long as duty liability was discharged on them. That it was being sold added more fuel, and ironically, to the fire for it was unambiguous demonstration of test of ‘marketability’ which, to them, is the essence of taxability. This was also intuitive proof of Lavoisier’s Law of Conservation of Mass, as effectually articulated by the lower authorities though, and not surprisingly, unannotated, thus according him high honour in the pantheon as the spiritual nemesis of evaders of excise duty in India.

3. One notice, for June 2011 to September 2011, culminated in confirmation of duty liability of ₹ 26,195 under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1944, besides imposition of penalty of ₹ 5000 under rule 25 of Central Excise Rules, 2002 while the other, for October 2011 to August 2012, culminated in confirmation of duty liability of ₹ 76,238 under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1944, besides imposition of penalty of ₹ 10,000 under rule 25 of Central Excise Rules,

2002 which was upheld in order[1] of Commissioner of Central Excise & Customs (Appeals), Aurangabad dismissing appeal of assessee leading to the first of the appeals here.

4. The notices proposed recovery on the basis of 'manufacture', as defined in section 2(f) of Central Excise Act, 1944 and coverage of description corresponding to tariff item 4707 9000 of Schedule to Central Excise Tariff Act, 1985. The original authority expounded therefrom to hold that, during the process of manufacture of both 'pouches' that were captively consumed and in their principal activity,

> *'4.2 .... a distinct commodity in trade parlance as seen from the sales invoices of the said waste and scrap…'*

emerges and

> *'…view has also been ratified by the constitutional bench of Hon'ble Supreme Court in the case of Delhi Cloth and General mills Vs UOI as reported in 1977 (1) ELT (J 199) (SC)….'*

besides drawing support from

> *'….upheld by Hon'ble Apex Court in the case of Empire Industries Ltd. Vs UOI as reported in 1985(20)ELT179(SC)…'*

and that the raw material and impugned goods are distinct products in the Central Excise Tariff which

> *'…also indicates that these two commodities…. are distinct*

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[1] [order-in-appeal no. AV(135)129/2013 dated 27th May 2013]

> *commodities in commercial parlance. In view of the above, I find that that the process vide which 'Waste and Scrap of paper' is generated by the assessee does amount to manufacture.'*

Further, by reference to specific tariff item conforming to the goods and it being capable of sale and purchase for consideration, marketability was also deduced. While conceding that the impugned goods were 'subsidiary', its taxability was, nonetheless, unquestionable, according to the original authority, owing to decisions of the Hon'ble Supreme Court in

> *'.....CST, Bombay Vs BPCL[1995(77)ELT790(SC)] and M/s Grasim Industries Ltd. Vs. UOI[2011(273)ELT10(SC)] ...and I find that the same are squarely applicable interest the present case.'*

besides expounding on the manner in which a fiscal statute should be interpreted which, regrettably, has been misplaced for construing a definition in, and not the substantive portion of, Central Excise Act, 1944. That disputes of this nature continue to dot the terrain of indirect tax administration, either by obduracy on the part of 'manufacturers' or obstinacy in central excise authorities, despite the resolution of controversies by the Hon'ble Supreme Court in favour of the tax administration is surely painful to institutions such as the Tribunal.

5. Learned Consultant for appellant is also not too far behind in placing reliance on definitions as he pleaded that conditions contemplated for conformity with 'manufacture' and with 'excisable goods' in section 2(f) and section 2(d) of Central Excise Act, 1944 have

to be satisfied in tandem for tax to have sanction of law and that the lack of *Explanation*, similar to that incorporated in section 2(d) of Central Excise Act, 1944 with effect from 10th May 2008 precluded its relevance beyond insertion for the purpose of determining rate of duty and for resort to which 'manufacture' would have to determined first on its own terms.

6. According to Learned Consultant, the impugned order stood unattended among peers as other first appellate authorities, deciding challenge to similar findings in sister units under other jurisdictions, had set aside the demands which were accepted in review. In particular, he referred to three demands in order[2] for June 2011 to March 2012, order[3] for April 2012 to December 2012 and order[4] for January 2013 to December 2013 of Commissioner of Central Excise & Customs (Appeals), Nashik that were not only repudiated but such repudiation was also not challenged. He also submitted that several binding decisions cited before the first appellate authority, viz., *Commissioner of Central Excise, Lucknow v. Wimco Ltd [2008 (230) ELT 106 (Tri-Del)]*, in *International Tobacco Co Ltd v. Commissioner of Central Excise, Ghaziabad [2004 (165) ELT 314 (Tri-Del]*, in *TTK Textiles Ltd v. Commissioner of Central Excise, Madurai [2006 (194) ELT 332 (Tri-*

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[2] [order-in-appeal no. RPS/177/NSK/2013 dated 7th June 2013]
[3] [order-in-appeal no. NSK-EXCUS-000-APP-324-13-14 dated 22nd November 2013]
[4] [order-in-appeal no. NSK-EXCUS-000-APP-426-15-16 dated 27th November 2015]

*Chennai)]*, in *Dolsun Containers Pvt Ltd v. Commissioner of Central Excise, Jaipur [2003 (151) ELT 624 (Tri-Delhi)]* and in *VVF Ltd v. Commissioner of Central Excise, Daman [2009 (248) ELT 593 (Tri-Ahmd)]*.

7. There is no doubt that similar demands, for at and around the same period, relating to other jurisdictions stood resolved in the case of the appellant herein at the level of the first appellate authority. Those have attained finality since then. The first appellate authority may have been unaware of those developments. Further, on the submissions of Learned Consultant, it is apparent that the first appellate authority did not consider the several decisions cited during the course of proceedings and appeared to have given overwhelming weight to the decision in *re Grasim Industries Ltd* without attending to the context of the dispute. A key element in fastening recovery of duty is determination of the appropriate tariff item in the Schedule to Central Excise Tariff Act, 1985; from the contents of the impugned order, we are unable to ascertain the reason for inferring that the impugned goods are covered by tariff item 4707 9000 of Schedule to Central Excise Tariff Act, 1985 in accord with the General Rules for Interpretation of the Tariff. There is also no finding as to the impact of the definition of 'manufacture' on section 3 of Central Excise Act, 1944 and its applicability to the process undertaken by the appellant de hors the amendment to 'excisable goods' which has no bearing on taxability but

only on the rate of duty. In the absence of these critical evaluations, we are unable to adjudge the impugned order as being legal and proper.

8. That must be rectified and to enable that, it is necessary to set aside the impugned orders. We do so to restore the appeals of the assessee before Commissioner of Central Excise & Customs (Appeals), Aurangabad for a fresh hearing and decision covering all the issues that we have set out *supra*. All issues are kept open and, needless to say, the first appellate authority shall ensure compliance with principles of natural justice.

9. Appeals are allowed by way of remand.

*(Order pronounced in the open court on 05/06/2024)*

**(AJAY SHARMA)**
***Member (Judicial)***

**(C J MATHEW)**
***Member (Technical)***

**/as*