

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

REGIONAL BENCH - COURT NO. I

EXCISE APPEAL No. 89858 of 2013

(Arising out of Order-in-Appeal No. SDK/215/Bel/2013-14 dated 28.10.2013 passed by Commissioner of Central Excise (Appeals), Mumbai-III, Navi Mumbai.)

Super Fire Engineering Pvt. Limited

Plot No. C/222, TTC MIDC
Turbhe, Navi Mumbai – 400705.

.....Appellants

VERSUS

Commissioner of Central Excise

Raigad Commissionerate
Plot No.1, Sector-17
Khandeshwar
Navi Mumbai - 400 614.

.....Respondent

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the Appellants
Shri P.K. Acharya, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86228/2024

Date of Hearing: 21.06.2024
Date of Decision: 21.10.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Super Fire Engineering Private Limited, Navi Mumbai (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. SDK/215/Bel/2013-14 dated 28.10.2013 (herein after, referred to as 'the impugned order') passed by Commissioner of Central Excise (Appeals), Mumbai-III, Navi Mumbai.

2.1 The facts of the case, leading to this appeal, are summarised herein below:

2.2 The appellants herein, *interalia*, are engaged in the activity of filling of empty fire extinguisher cylinders with imported Hepta Propane (FM200) Liquid from bulk imported mother containers. The department had claimed

that the cylinders are super pressurized by Nitrogen Gas to make the cylinders marketable, since FM 200 Liquid is required to be released with high pressure to effectively put out fire. Therefore, the department had interpreted that such activity of filling of empty fire extinguisher cylinders with FM 200 Liquid amounts to 'manufacture', in terms of Chapter Note 9 to Chapter 38 of Central Excise Tariff Act, 1985 (CETA). However, since no Central Excise duty was paid by the appellants on such activity during the disputed period from 30.12.2006 to 30.12.2009, the department had initiated investigation into the alleged duty evasion by the appellants and upon completion of the investigation had issued Show Cause Notice (SCN) dated 07.12.2011, proposing for treating the process of refilling undertaken by the appellants as 'manufacture', in terms of Note 9 to Chapter 38 of CETA and for classifying such goods under Central Excise tariff item 3813 0000 and demanding central excise duty short levied for an amount of Rs.21,28,891/- under Section 11A(1) [now 11A(4)] of the Central Excise Act, 1944 along with interest; and proposing for confiscation of impugned goods, imposition of penalty under Section 11AC *ibid*. In adjudication of the SCN, the original authority vide Order-in-Original dated 31.03.2013 had confirmed all the demands as proposed in the SCN. Being aggrieved with the said order of the original authority, the appellants had filed an appeal before the Commissioner (Appeals), who had issued the impugned order in confirmation of the adjudged demands as decided by the original authority and for rejection of the appeal filed by the appellants. Feeling aggrieved with the impugned order, the appellants have filed this appeal before the Tribunal.

2.3 Learned Advocate submitted that the appellants are, *inter alia*, engaged in the activity of supply, installation, testing and commissioning (integration) of fire detection system, fire suppression system, security system and intelligent building management system. In explaining about the Fire Suppression System, he stated that it consists of various components such as pipeline, cylinder filled with FM-200 and Nitrogen gas, valve actuator, flexible discharge hoses, switch pressure, nozzle, etc. The Fire Suppression System is fixed inside the walls/ceilings/cabinets. The said system is workable only after completion of the entire site related activities. The Fire Suppression System is installed as per their client's requirement. This system is located in the single place of the client's premises. This single point is used to create the multiple hose inside the ceilings/walls/cabinets. So, whenever a fire occurs, these multiple hose

gets activated and supply FM-200 gas with high pressure to put off the fire, simultaneously. The customer base of the appellants primarily comprises of Computer Data Centers.

2.4 He further stated that the appellants import various materials such as nozzle, valve, discharge hose, discharge pressure/switch, FM-200 gas, etc. They import FM-200 gas under Tariff Item 3824 90 90 of the First Schedule to the Central Excise Tariff Act, 1985 in bulk mother containers on payment of appropriate customs duties. The appellants procure / purchase empty seamless cylinders of various capacities (80,65,45,34 liters, etc.) from the domestic market as per the client specification. These seamless cylinders fall under Tariff Item No. 73110030 of the First Schedule to the Central Excise Tariff Act, 1985. The appellants also procure nitrogen gas from the domestic market. In few cases, their customer comes up with the empty cylinder and the appellants undertake the activity of refilling the same with FM 200 gas.

2.5 He further stated that the entire activity carried on by the appellants is that the imported FM-200 gas is filled in the empty seamless cylinders with the help of a refilling machine; thereafter, these seamless cylinders are super pressurized by nitrogen gas; the said activity helps the FM-200 gas to come out with high pressure to put off the fire. After the above activity, the valve is locked in the cylinder to protect the gas from leakage. The appellants had not availed Cenvat credit on aforesaid imported goods as well as on locally purchased goods, as they were under the *bona fide* belief that the filling up of FM-200 gas and Nitrogen gas does not amount to manufacturing of new product.

2.6 In support of their stand, the appellants had relied upon the following judicial pronouncements:

(i) *3M India Ltd., Vs. Commissioner of Central Excise, Bangalore-III – 2023 (384) E.L.T. 424 (Tri. – Bang.)*

(ii) *Commissioner of Central Excise, Vadodara Vs. Vadilal Gases Ltd., - 2017 (346) E.L.T. 161 (S.C.)*

(iii) *Ammonia Supply Company Vs. Commissioner of C, Ex., New Delhi 2001 (131) E.L.T. 626 (Tri. – Del.)*

3.1 On the other hand, learned Authorised Representative for Revenue reiterated the findings of the Commissioner (Appeals) in the impugned order, and submitted that the appellants are charging the cylinders with a

mixture of FM-200 gas with Nitrogen gas under pressure and therefore such activity is not simply refilling the gas, but preparing a mixture of gases to act as fire extinguishing agent. The resultant product is a distinct product known as 'preparations and charges for fire-extinguishers' classifiable under sub-heading 3813. Further, he stated that in terms of chapter note 9 of Chapter 38 of CETA, repacking or relabelling of containers from bulk pack to retail pack or adoption of any other treatment to render produce marketable amounts to manufacture. Thus, he claimed that the activity undertaken by the appellants is liable to pay Central Excise duty and the appellants are liable to penalty. Therefore, he prayed that the appeal preferred by the appellants is liable to be set aside.

3.2 In support of the Revenue's stand, learned AR had relied upon the following case laws:

(i) Xron Gases P. Ltd., Vs. Commissioner of Customs, Nhava Sheva – 2017 (356) E.L.T. 121 (Tri. – Mumbai)

(ii) Abdos Trading Co. Pvt. Ltd. Vs. Commissioner of Central Excise, Kolkata-II - 2013 (290) E.L.T. 467 (Tri. - Kolkata)

4. Heard both sides and perused the records of the case.

5. The short issue for consideration before the Tribunal in this case is,-

(i) whether the activity undertaken by the appellants in filling of imported Hepta Propane / FM-200 gas from bulk mother container to empty cylinders of different sizes is a process of manufacture in terms of note 9 to chapter 38 of the Central Excise Tariff Act, 1985, or not?

(ii) whether the clearance of impugned goods are liable to pay Central Excise duty or not; and whether the appellants are liable for consequential penal action under the Central Excise Act, 1944.

6. In order to address the above issues, we would like to refer the relevant legal provisions contained in Central Excise Act, 1944; Central Excise Tariff Act, 1985 and the instructions, if any, issued thereunder for determination of proper Central Excise duty applicable on the subject goods under dispute.

Central Excise Act, 1944

"Section 2. Definitions. –

In this Act, unless there is anything repugnant in the subject or context,—

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(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 the¹[First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)]Fourth Schedule 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;"

Central Excise Tariff Act, 1985

"CHAPTER 38
MISCELLANEOUS CHEMICAL PRODUCTS

Notes:

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9. In relation to products of this Chapter (other than products of heading 3808), labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to "manufacture".

7. In the impugned order, the learned Commissioner (Appeals) have dealt with the above issues, and has given his findings for confirmation of the adjudged demands in the following manner:

"6.It is observed that the appellants are importing Agent FM 200 under Csh 38249090 of Customs Tariff which is not disputed. Chapter Note 9 to chapter 38 reads as under :-

"In relation to products of this Chapter (other than products of heading 3808), labelling or re-labelling of containers and re-packing from bulk packs to retail packs or adoption of any other treatment to render the product "marketable to the consumer, shall amount to manufacture."

The above referred goods fall under Chapter 38 (other than 3808) which is not disputed. The activity undertaken by the appellant is covered by the Chapter note as Agent FM 200 has been re packed from mother containers to cylinders of various capacities i.e., from bulk to retail packs. Also Agent FM 200 has been subjected to Nitrogen gas treatment making it marketable to consumer for putting off the fire. The said activity falls under the category of "any other treatment to render the product "marketable to the consumer" and is rightly covered by the above referred chapter Note. It is to be noted here that as per the above chapter Note goods (inputs) falling under chapter 38 (other than 3808) when subjected to activities referred to in the chapter note will be

¹Substituted for "the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)" with "Fourth Schedule" by the Taxation Laws (Amendment) Act, 2017, w.e.f. 01.07.2017.

considered as an activity of manufacture irrespective of under what chapter head of the Tariff, the resultant product falls. Hence the appellants contention that the resultant product falls under chapter head 84 of CETA 1985 even if assumed but not admitted to be so, will not make any difference as the activity will still amount to manufacture as per the above chapter note. It will be absurd if we accept the appellants contention that the final product is to be subjected to the Chapter note of the respective chapter to determine its applicability.

7. *The appellants have also contended that their final product is fire extinguisher falling under Chapter subhead 84241000 of CETA 1985. The broad head of the said chapter 8421 refers to basically Mechanical appliances. The appellants can by no stretch of imagination be considered as manufacturer of Mechanical appliances especially when their activity is restricted to refilling of cylinders provided by their clients with Agent FM 200 under pressure of Nitrogen gas. The description of Chapter subhead 84241000 i.e., "Fire extinguishers, whether or not charged" itself indicates that to fall under the said category basically the fire extinguishing cylinder / equipment has to be manufactured which is not the case in the present context.*

8. *In view of the above discussion I am of the view that the activities undertaken by the appellants amount to manufacture. Accordingly duty ought to have been paid upon clearance of the said goods from the factory. Since there is a nonpayment of duty, interest on delay automatically accrues."*

From the above it could be seen that learned Commissioner (Appeals) have mainly relied upon the fact that the activity undertaken by the appellants is covered by the Chapter note 9, as FM 200 gas has been re-packed from mother containers to cylinders of various capacities i.e., from bulk to retail packs. Further, he also observed that imported FM 200 gas has been subjected to Nitrogen gas treatment, for making it marketable to consumer for putting off the fire. Hence, in the impugned order he had decided that the said activity falls under the category of "any other treatment to render the product "marketable to the consumer" and has held that it is rightly covered by the above referred chapter Note, to construe the same as amounting to 'manufacture'.

8. On careful perusal of the chapter note 9 to Chapter 38, read with the definition of 'manufacture' under Section 2(f) *ibid*, it transpires that there are three elements/activities, which are considered as deeming such activities as manufacture. These are (i) labelling or re-labelling of containers; (ii) re-packing from bulk packs to retail packs and (iii) adoption of any other treatment, to render the product marketable to the consumer. From the facts of the case, it is not brought out clearly that the imported Hepta Propane / FM-200 gas is being labelled for marketing the same to

the consumer. Further, the records of the case indicate that such imported gas from bulk mother container is transferred by filling into empty seamless cylinders of different capacities such as 80,65,45,34 liters, etc. as per the specification sizes/ requirement of their customers. The purport of the activity of filling of the imported gas into an empty container, undertaken by the appellants is a simple filling up of the imported material into the containers of various sizes. Such activity cannot be equated to the repacking of imported goods contained in a bulk pack(s) into retail packs, which is entirely different as it is a process undertaken to enable packing of the goods in a standard retail packs for distribution and sale to ultimate consumer. We also find that it is nowhere established by the authorities below that the imported Hepta Propane / FM-200 have been subjected to certain treatment of Nitrogen gas, which alone had enabled it to be marketed it to the ultimate consumer. The records of the case indicate that the imported gas is refilled into seamless cylinders with super pressure in order to obtain the required 25 bar or 360 per square inch parameter, by use of nitrogen gas. Such filling up of container under heavy pressure cannot be equated to a process of treatment to render the product marketable, since there is no perceptible change brought out in the imported product. The facts of the case indicate that the imported FM 200 gas and nitrogen gas remained as it is, after they were refilled into the seamless cylinders. Therefore, we are of the opinion that the assertion made by the learned Commissioner (Appeals) for treating the process of refilling as amounting to manufacture is not duly supported by factual evidences or any supporting technical documents.

9. We also find that the appellants have contended that issue of repacking of imported goods would amount to manufacture or not, have been addressed by the Central Board of Excise & Customs (CBEC) earlier by issue of clarification vide Circular No. 342/58/97-CX dated 08.10.1997. In this regard, the copy of the said CBEC circular issued on 08.10.1997 is extracted and given below:

"Circular No. 342/58/97-CX

*F. No. 341/14/97-TRU
Government of India
Ministry of Finance
(Department of Revenue)
Tax Research Unit*

New Delhi, dated 08.10.2017

Subject : Clarification regarding labelling and repacking etc. amounting to manufacture.

I am directed to refer to the Chapter notes introduced in this year's budget enlarging the scope of the term "manufacture" in respect of products falling under Chapters 28, 29, 34, 35 or 38 of the Central Excise Tariff.

2. In this context clarification have been sought regarding the scope of the expression "relabelling of containers and repacking from bulk packs". Doubts have been raised as to whether receiving of liquid chemicals in bulk in containers and offloading the same at the dealers premises or godown into available empty vessel and consequent delivery of these material in the very same condition to customers against orders can be held to be an act of repacking operations as envisaged in the said chapter note or not.

3. Whether an operation amounts to repacking or not, is a question to be decided on facts. However, activity such as simply transferring the material from one container to another container may not be categorised under the scope of this description. The goods are packed either for wholesale or for retail sale. Generally the expression "Packing" is considered as package containing a prepacked commodity and the quantity of product contained therein is also pre-determined. The packaging is also generally done without the purchaser being present. The packages also contain information such as name of the manufacturer, quantity, value and other details of the product.

4. In view of the above, the question whether or not duty is liable to be paid depends upon the facts of individual case and the decision has to be taken taking into account all relevant facts. The chapter notes inserted are on the lines of similar chapter notes used earlier in other and they have to be interpreted as usual."

The above circular was issued by CBEC in the specific context of doubts raised in respect of receiving of liquid chemicals in bulk in containers and offloading the same into available empty vessel and consequent delivery of these materials in the very same condition to customers against orders. It had been specifically clarified that the question of whether an operation amounts to repacking or not, has to be decided on facts; and activities such as simply transferring the material from one container to another container may not be categorised under the scope of this description 'packing' for deeming it as manufacture. Thus, it follows that the field formations implementing the classification of goods, assessment to duty including interpretation of the chapter note as per Tariff, have to follow the instructions issued under Section 37B of the Central Excise Act, 1944, for the purpose of uniformity in implementation of the law. Therefore, we are of the opinion, that a different view cannot be taken from the legal position of the clarification, mentioned in the circular issued by the CBEC.

Accordingly, we find that the impugned order, insofar as it had categorised the activity undertaken by the appellants as amounting to manufacture, in the present case is not legally sustainable.

10.1 In this regard, we find that on a similar set of facts, in the case of 3M India Limited (supra), the Co-ordinate Bench of the Tribunal has dealt with the similar issue of deemed manufacture as per chapter note 38 and have held that injecting raw material into cans would not amount to adopting any treatment on the raw materials to render the product marketable. The relevant paragraphs of the said order is extracted and given below:

"37. *It needs to be noted that the note 6 of Chapter 34 has consciously used distinct expressions 'containers' and 'bulk packs'. Thus, when the Legislature has consciously used two different words, they would have different implications and in this connection reliance can be placed on the decision of the Supreme Court in Union of India v. Kumho Petrochemicals Company Limited [2017 \(351\) E.L.T. 65 \(SC\)/\[2017\] 83 taxmann.com 149 \(SC\)/63 GST 311 \(SC\)](#), wherein it was held that as the Legislature has used different expressions at different places, it must be presumed that such different expressions have different implications.*

38. *'Containers' are distinct from 'bulk packs' and, therefore, the activity of repacking from 'containers' to 'retail packs' would not amount to manufacture.*

39. *In this connection, reference can be made to the decision of the Supreme Court in Commissioner of Central Excise, Vadodara v. Vadilal Gases Ltd. [2017 \(346\) E.L.T. 161 \(SC\)/\[2017\] 79 taxmann.com 121 \(SC\)/\[2017\] 60 GST 250 \(SC\)](#), wherein it was held that the gases supplied in tankers are not in bulk packs and, therefore, the activity of repacking from tankers to retail packs would not amount to manufacture. Reference can also be made to the decision of the Tribunal in Swastik Corporation v. Commissioner of Central Excise, Puducherry [2018 \(359\) E.L.T. 233 \(Tri. - Chennai\)](#), wherein after placing reliance on the decision of the Supreme Court in Vadilal Gases Ltd., it was held:*

4.....For convenience of reference the entry under Note 11 of Chapter 29, as it stood at the relevant time, is reproduced below (effective from 22-9-1997):

"In relation to products of this Chapter, labelling or relabelling of containers or re-packing from bulk packs to retail packs or adoption of any other treatment to render products marketable to the consumer shall amount to manufacture."

5. In respect of the very same issue, the Board has clarified vide Circular No. 910/30/2009-CX., dated 16- 12-2009 that the activity does not amount to manufacture and is reproduced below:

"Therefore, the tankers cannot be termed as bulk packs and therefore the activity of transferring the goods from tankers into smaller drums cannot be said to be covered by the said Chapter Note 10".

6. The Board has issued the above clarification pursuant to the judgment of the Hon'ble Tribunal in the case of Ammonia Supply Co. reported in [2001 \(131\) E.L.T. 626](#) as noted in para 3 of the Circular.

7. Further, by a very recent judgment the Hon'ble Supreme Court in the case of *C.C.E. Vadodara v. Vadilal Gases Ltd.* Reported in 2017 (346) E.L.T. 161 (S.C.) on identical facts and circumstances has categorically held as under :

"Gases coming in tankers were not bulk packs and their repacking/relabelling did not amount to manufacture"

8. The Hon'ble Apex Court in the said judgment has approved the judgment of the Hon'ble Tribunal in the case of *Ammonia Supply Co. v. Commissioner (supra)* after noting that the order of the Hon'ble Tribunal has attained finality having not been challenged by the Department.

9. In view of the above, when the activity itself does not amount to deemed manufacture, the question of demand of duty does not arise and hence the other issue raised by the Department regarding availability of exemption does not survive for determination."

(emphasis supplied)

40. The impugned order holds that the activity undertaken by the job worker of repacking raw material received from the appellant into retail packs would amount to manufacture. There is no finding that the job worker undertakes the activity of repacking from bulk packs to retail packs nor does the appellant undertake such an activity.

41. With regard to the activity of adopting any treatment to render the product marketable to the consumer, it is the case of the appellant and the job worker that such a treatment has not been undertaken on the raw materials supplied by the appellant in bulk containers to the job worker, as the raw materials are injected into aerosol cans and thereafter plastic caps are fitted and labels are affixed on the cans. This activity of injecting the raw materials into aerosol cans would not amount to adopting any treatment on the raw materials to render the product marketable. This is what was held by the Supreme Court in *Vadilal Gases Ltd.*

42. Learned authorized representative appearing for the Department has placed reliance upon the decision of the Tribunal in *Nestle India Ltd.* The said decision would not help the Department as in that case there was mixing of vitamins in required proportions which, the Tribunal held, would amount to adopting a treatment to render the goods marketable.

43. In this view of the matter, the activity undertaken by the job worker would not amount to manufacture even under the third limb of the Chapter note.

44. The inevitable conclusion, therefore, is that the process undertaken by the job worker would not amount to manufacture in terms of section 2(f)(ii) of the Excise Act read with note 6 of Chapter 34 or note 10 of Chapter 38 of the Central Excise Tariff.

45. The second issue that requires to be examined is about the classification of the products said to have been manufactured by the job worker. As the first issue has been decided in favour of the job worker, namely that the process undertaken by the job worker would not amount to 'manufacture', it would not be necessary to decide this issue.

46. *Once it is held that the activity undertaken by the job worker would not amount to manufacture under section 2(f)(ii) of the Excise Act, penalties could not have been imposed either upon the employees of the appellant or the employee of the job worker."*

10.2 In respect of the case laws referred to by the learned AR, as the Xron Gases P Ltd. (supra) refer to the examination of chapter note in the context of fulfillment of actual user condition for the purpose of complying with import restrictions; and in the other case of *Abdos Trading Co. Pvt. Ltd. (supra)*, the Tribunal has held that in each case, it has to be determined as to what constitute a 'bulk pack' and a 'retail pack', we are of the view that these case laws do not have direct relevance for the purpose of deciding the issues involved in the present case.

11. We further find that the Hon'ble Supreme Court in the case of *Vadilal Gases Ltd. (supra)* have held that mixing of gases and making them available to consumers in smaller cylinders, did not make gases marketable as they did not chemically mix/react with each other and retained their character, without any new commodity being created and hence this would not amount to manufacture in terms of the chapter note. The relevant paragraphs of the said judgement is extracted and given below:

"4. *Note 10 of Chapter 28 of the Tariff Act is in the following terms :*

"In relation to products of this Chapter, labelling or relabelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'."

5. *Reading the aforesaid Note 10 of Chapter 28 of the Tariff Act would go to show that the deeming provision contained therein with regard to what would also amount to manufacture is in two parts. The first is where labelling or relabelling of containers and repacking from bulk packs to retail packs is undertaken and secondly where the adoption of any other treatment is undertaken to render the product marketable to the consumer. Whether either of the two situations are attracted to the present case, is the moot question that would require an answer from the Court.*

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7. *Insofar as the first limb of Note 10 of Chapter 28 of the Tariff Act is concerned, even if we proceed on the basis that labelling or relabelling had taken place after transfer of the gases from the bulk containers/tankers to smaller cylinders, Note 10 of Chapter 28 of the Tariff Act mandates that the additional requirement that has to be satisfied so as to attract the deeming provision contained therein is that repacking from bulk packs to retail packs have also taken place.*

8. *The above issue need not detain the Court. We have a decision of the learned Tribunal in *Ammonia Supply Company v. CCE, New Delhi - 2001**

[\(131\) E.L.T. 626](#) (Tri.-Del.), wherein the Tribunal has taken the view that Amonia coming in tankers cannot be treated to have come in bulk packs. In this regard, there is also a Circular dated 8-10-1997 where this question has been dealt with by the Ministry of Finance (Department of Revenue) in the following way :-

"In this context clarification have been sought regarding the scope of the expression "relabelling of containers and repacking from bulk packs". Doubts have been raised as to whether receiving of liquid chemicals in bulk in containers and offloading the same at the dealers premises or godown into available empty vessel and consequent delivery of these material in the very same condition to customers against orders can be held to be an act of repacking operations as envisaged in the said chapter note or not. Whether an operation amounts to repacking or not, is a question to be decided on facts. However, activity such as simply transferring the material from one container to another container may not be categorised under the scope of this description. The goods are packed either for wholesale or for retail sale. Generally the expression "Packing" is considered as package containing a prepacked commodity and the quantity of product contained therein is also pre-determined. The packing is also generally done without the purchaser being present. The packages also contain information such as name of the manufacturer, quantity, value and other details of the product."

9. The decision of the learned Tribunal in Ammonia Supply Company (supra) has attained finality as the Department had not challenged the same.

10. Having read the relevant part of Note 10 of Chapter 28 of the Tariff Act, the reasoning adopted by the learned Tribunal in Ammonia Supply Company (supra) and the contents of the Circular dated 8-10-1997, we are of the view, that the conclusion of the learned Tribunal, as above, does not suffer from any infirmity which would require our interference.

11. This would bring the Court to a consideration of the second limb of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act, namely, deployment of any other treatment to render a product marketable.

12. From the manufacturing activity undertaken by the assessee, as found by the learned Commissioner himself, and as extracted above, the assessee apart from packing pure Argon and Nitrogen in smaller cylinders is also engaged in the activity of mixing of inert gases (like argon, nitrogen, helium, etc.) with other gases like oxygen, nitrogen, carbon dioxide and making available such combination to the consumers in smaller cylinders. Whether such mixing of the gases in question amount to manufacture has been gone into by the learned Tribunal in Goyal Gases (P) Ltd. v. CCE, Meerut - [2000 \(115\) E.L.T. 467](#) (Tribunal). Paragraph 11 of the report in Goyal Gases (P) Ltd. (supra) being relevant may be extracted below :-

"Appellants M/s. Goyal Gases (P) Ltd. have stated that they had been initially supplying various gases like liquid Nitrogen, liquid Argon, Hydrogen, Helium, etc. separately but subsequently, on demand from customers they had started supply of such gases in one cylinder as this was considered more economical to the customer as also convenient and time saving. The mixing of oxygen was with inert gases viz., crypton, helium, neon, etc. which did not chemically react with each other. Since the mixture was with inert gases like argon, crypton, etc. which did not

react chemically with each other, the inert gases remain separate even though kept in the same container. There was no lending or borrowing of any electron by either of the gases and the gases remained individually identified. The individual gases also retained their properties and were separately identifiable while in use. For example, when the mixture of argon and nitrogen is used in the manufacture of electric lamp, the argon gas performs the function of making the illumination. The Nitrogen gas gives long life to the filament of the bulb. Similarly, when the mixture of argon and carbondioxide is used in welding, the argon gas creates an inert atmosphere while the carbon dioxide gas stops oxidization of the material. Thus the individual gases retained their individual properties even when filled in the same cylinder. With the advent of modern techniques and the facility of filling two or more gases in one cylinder, the customers found them more economical to handle the gases and it saved labour. Further it was not necessary for the customer to mix these gases individually in a desired ratio, since such an exercise was more risky and needs expert technical handling. The question is whether in such circumstances the mixture of two or more gases in one cylinder amounted to manufacture in terms of Section 2(f) of the Central Excise Act"

13. *The decision of the Tribunal in Goyal Gases (P) Ltd. (supra) to the effect that such activity (mixing of gases) did not amount to manufacture has been affirmed by this Court by its order dated 3-4-2000 reported in Commissioner of Central Excise v. Goyal Gases (P) Ltd. - [2000 \(119\) E.L.T. 5 \(S.C.\)](#) which is in the following terms :-*

"The Tribunal has categorically held that no evidence was led by the Department to controvert the assessee's case that no new product with distinct usage and marketability had been produced. Even so, it is contended that the Tribunal failed to appreciate that by the mixing of four more gases a totally different product with distinct use and marketability was produced. We find, having heard the learned Additional Solicitor General, that there is, in fact, no evidence led by the Department to establish that case. The reliance upon the order of the Commissioner would appear to be misplaced because the Commissioner's ipse dixit carries the matter no further."

14. *While it may be correct that in Goyal Gases (P) Ltd. (supra), the scope and effect of Note 10 of Chapter 28 of the Tariff Act was not specifically under consideration, nonetheless, the conclusion of the learned Tribunal, affirmed by this Court, to the effect that the mixture of an inert gas with oxygen, nitrogen, etc., does not result in creation of a new commodity, marketable as such, would be relevant insofar as the second limb of Note 10 of Chapter 28 of the Tariff Act is concerned. The finding in Goyal Gases (P) Ltd. (supra) that notwithstanding the mixing, the gases retained their individual properties even after being filled up in the same cylinder would clearly demonstrate that a new marketable product does not come into existence by the process of mixing. In this regard, the fact that the two items constituting the mixture are also separately marketable would be relevant in determining the applicability of the second part of Note 10 of Chapter 28 of the Tariff Act to the present case.*

15. *If that be so, we do not see as to how on the findings recorded by the learned Commissioner with regard to the "manufacturing process" and the data laid before us as well as the ratio of decision in Goyal Gases (P) Ltd. (supra), a view can be taken that the second part of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act is*

attracted in the present case and any new marketable product/item comes in existence by the process of mixture of gases in question.

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18. *For the reasons aforementioned, the appeals have to fail and the order of the learned Tribunal has to be affirmed, which we hereby do..."*

12. In view of the foregoing discussions and analysis, and on the basis of the judgements of judicial forum referred above, we are of the opinion, that activity undertaken by the appellants in filling of imported Hepta Propane / FM-200 gas from bulk mother container to empty cylinders of different sizes is not a process of manufacture in terms of note 9 to chapter 38 of the Central Excise Tariff Act, 1985. Therefore, we are of the considered view, that the impugned order passed by the learned Commissioner (Appeals) cannot be sustained on merits. Accordingly, the impugned order is set aside and the appeal is allowed in favour of the appellants.

13. In the result, the impugned order dated 28.10.2013 is set aside and the appeal is allowed in favour of the appellants.

(Order pronounced in the Open Court on 21.10.2024)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)