2024 INSC 354

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1121 OF 2016

COMMISSIONER OF CENTRAL EXCISE
BELAPUR APPELLANT(S)

VERSUS

JINDAL DRUGS LTD. RESPONDENT(S)

WITH

CIVIL APPEAL NOS. 788-790 OF 2022

J U D G M E N T

UJJAL BHUYAN, J.

Heard learned counsel for the parties.

2. Issue raised in the present batch of appeals is identical. Therefore, the civil appeals were heard together and are being disposed by this common judgment and order.

3. However, Civil Appeal No. 1121 of 2016 was argued as the lead appeal. Therefore, for the sake of convenience, we would refer to the facts of this appeal.

4. This is an appeal by the revenue under Section 35L (1)(b) of the Central Excise Act, 1944 (referred to hereinafter as 'the Central Excise Act') against the order dated 16.04.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (briefly 'CESTAT' hereinafter) in Appeal No. E/86389/13-Mum. (Jindal Drugs Limited Vs. Commissioner of Central Excise, Belapur).

4.1. By the impugned order dated 16.04.2015, CESTAT has allowed the appeal filed by the respondent holding that as per Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985 (referred to hereinafter as 'the Central Excise Tariff Act'), the activity of labelling amounted to manufacture and hence the activity of the respondent fell within the ambit of the definition of manufacture as per the said Note. Therefore, the respondent was eligible for availing the cenvat credit of the duty paid by its Jammu unit and was also eligible for rebate on the duty paid by it while exporting its goods. CESTAT further held that there was no suppression by

the respondent and, therefore, the extended period of limitation was not available to the department (revenue).

5. Though facts lie within a narrow compass, nonetheless it is necessary to make a brief reference to the relevant facts for a proper perspective.

5.1. Respondent is engaged in the business of exporting cocoa butter and cocoa powder. Its factory at Jammu manufactures cocoa butter and cocoa powder. Respondent has another unit located at Taloja in the State of Maharashtra. Cocoa butter and cocoa powder manufactured at Jammu are received by the respondent's unit at Taloja. In the Taloja unit, respondent affixed two labels on two sides of the packages of the said goods received from its Jammu factory and cleared the same for export on payment of duty and claimed rebate of the duty paid on the exported goods. Further, respondent availed cenvat credit of the duty paid on those two goods at the time of clearance from Jammu. Respondent also imported cocoa butter and cocoa powder from China and Malaysia, receiving the same in its factory at Taloja.

5.2. The factory of the respondent at Taloja was visited by officials of the appellant and it was found that the respondent was

only putting labels on the goods brought from Jammu as well as on the imported goods. As the labels were already fixed on the boxes containing the two goods, additional labels affixed by the respondent did not amount to manufacture since affixing of additional label did not enhance the marketability of the goods which were already marketable.

5.3. In such circumstances, appellant issued show cause cum demand notice dated 09.10.2012 to the respondent to show cause as to why the activity of labelling undertaken by the respondent on the product cocoa butter received from the Jammu unit and also on the imported goods should not be held as activities not amounting to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. It was alleged that respondent had wrongly availed cenvat credit amounting to Rs. 23,02,53,752.00 for the period from June, 2008 to July, 2012 which should not be demanded and recovered under Rule 14 of the Cenvat Credit Rules read with Section 11A(1) of the Central Excise Act (since renumbered as Section 11A (4) of the Central Excise Act with effect from 08.04.2011). It was further alleged that rebate claims amounting to Rs. 13,22,30,368.00 for the period from June, 2008 to July, 2011, were erroneously sanctioned and

utilised by the respondent which should not be demanded and recovered under Section 11A(1) of the Central Excise Act (since renumbered as Section 11A(4) of the Central Excise Act with effect from 08.04.2011). Respondent was also called upon to show cause as to why interest at the appropriate rate on the cenvat credit wrongly availed of and utilised as determined and demanded should not be recovered from it under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act (now Section 11AA of the said Act with effect from 08.04.2011).

5.4. Respondent submitted written reply dated 08.02.2013 denying all the allegations made in the show cause notice.

5.5. Following adjudication, the appellant *vide* the order in original dated 25.02.2013 held that cocoa butter received by the respondent at its Taloja unit from its unit at Jammu as well as the imported cocoa butter were already packed in corrugated boxes of 25Kg each. The exported cocoa butter was also in corrugated boxes of 25Kg each. Hence no repackaging activity was undertaken either on the goods received from the Jammu unit or on the imported cocoa butter. Appellant further held that the goods received from the Jammu unit already contained a label.

On receipt of the goods at Taloja, two more labels on two sides of the carton were affixed. Appellant concluded that it was a case of additional labelling and not relabelling. Therefore, such labelling at Taloja did not amount to manufacture. After holding that Rule 3 of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'the Cenvat Credit Rules') allows cenvat credit only in a case where the process undertaken amounts to manufacture, respondent held that the process of labelling undertaken by the respondent in its unit at Taloja did not amount to manufacture. Therefore, the cenvat credit availed of by the respondent was contrary to Rule 3 of the Cenvat Credit Rules. Hence, the credit of Rs. 23,02,53,752.00 availed of by it was irregular which was liable to be recovered under Rule 14 of the Cenvat Credit Rules read with Section 11A(1) of the Central Excise Act. Further, appellant held that the respondent had already utilised part of the irregular credit availed of and claimed rebate of Rs. 13,22,30,368.00 during the period from June, 2008 to July, 2012. As the credit availed of was irregular, the rebate sanctioned was erroneous since the respondent was not entitled to take the credit and to utilize the same. Therefore, it was held that the erroneous refund of Rs. 13,22,60,368.00 was liable to be recovered on which the

respondent was also liable to pay interest under Section 11AB/Section 11AA of the Central Excise Act. Proceeding further, appellant held that respondent had suppressed the information from the department that it was only undertaking labelling activity at its Taloja unit which did not amount to manufacture. Thus, with the intention to avail irregular credit, respondent had suppressed the information and claimed that the process undertaken by its unit at Taloja amounted to manufacture. Therefore, there was suppression of material fact with the intent to avail irregular credit. Hence, the respondent was held liable to pay penalty equivalent to the irregular credit availed of under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act. Thereafter, appellant passed the following order:

1. credit of Rs. 23,02,53,752.00 (Rupees twenty three crores two lakhs fifty three thousand seven hundred fifty two only) was wrongly availed and therefore demanded under provisions of Rule 14 of Cenvat Credit Rules read with Section 11A(4) (erstwhile Section 11A(1) of the Central Excise Act.
2. rebate of Rs. 13,22,30,368.00 (Rupees thirteen crores twenty two lakhs thirty thousand three

hundred sixty eight only) sanctioned during the period from June 2008 to July 2012 was erroneous as the duty on the exported goods were paid by utilizing the regularly availed credit which was not eligible to the assessee. Hence, the same was demanded under Section 11A(1)/Section 11A(4) of Central Excise Act.

3. interest at the appropriate rate under Rule 14 of the Cenvat Credit Rules read with Section 11AA (erstwhile Section 11AB) of the Central Excise Act, was demanded on the irregular credit availed/erroneous rebate sanctioned.
4. penalty of Rs. 23,02,53,752.00 (Rupees twenty three crores two lakhs fifty three thousand seven hundred fifty two only) under the provisions of Rule 15(2) of Cenvat Credit Rules read with Section 11AC(1)(a) of the Central Excise Act was imposed. However, the penalty would be reduced to 25% of the above amount if the assessee paid the duty determined along with interest within 30 days of receipt of the order. The reduced penalty of 25% of the amount of duty so determined would be available to the assessee only if the 25% of the penalty was also paid within the period of thirty days of receipt of the order. Otherwise, the penalty imposed under Section 11AC(1)(a) equal to the duty amount would remain.

5.6. Aggrieved by the aforesaid order in original passed by the appellant, respondent preferred appeal before the CESTAT. After hearing the matter, both Judicial Member and Technical Member passed separate orders on 05.01.2015.

5.7. In his order, the Judicial Member recorded that the respondent after clearing the goods in its Jammu unit, received the same in its factory at Taloja and claimed the benefit of notification No. 56/2002-CE(NT) dated 14.11.2002. As per the said notification, the Jammu unit was entitled to refund of the duty paid whereas the Taloja unit was also entitled to avail cenvat credit of the duty paid by the Jammu unit. Judicial Member noted that after receiving the goods at Taloja, respondent affixed two labels on the packages on two different sides and thereafter exported the goods. After referring to the show cause cum demand notice, the Judicial Member opined that the only issue for consideration was whether the labelling/re-labelling or putting additional labels on the containers in the Taloja unit amounted to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. As per Note 3, in relation to products of Chapter 18, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to

render a product marketable to the consumer shall amount to manufacture. Judicial Member opined that all the three activities are independent and separate. Note 3 to Chapter 18 is a deeming provision whereby the processes mentioned therein, if carried out, would amount to manufacture though there may not be any actual manufacture. In the above context, the Judicial Member held that activities of labelling or re-labelling of containers without enhancing marketability amounted to manufacture. A reading of Note 3 would clearly indicate that the activity of labelling or re-labelling of the containers amounted to manufacture. Thereafter, it was held that both the Jammu unit and the Taloja unit of the respondent are separate units. Therefore, it could not be said that respondent was availing double benefit. The Taloja unit had rightly availed the cenvat credit of the duty paid at Jammu as well as the countervailing duty paid for the imported goods. Consequently, the rebate claim was correctly sanctioned to the respondent. Therefore, the respondent had rightly availed of the cenvat credit. Since the issue, whether the activity of labelling or re-labelling amounted to manufacture as per Note 3 to Chapter 18 of the Central Excise Tariff Act was related to interpretation of a statutory provision, question of any suppression or

misrepresentation of fact by the respondent did not arise. Hence, question of getting the benefit of any extended period of limitation by the appellant for issuing show cause cum demand notice and thereafter passing adjudication order did not arise. In the above background, the Judicial Member set aside the order in original dated 25.02.2013.

5.8. However, the Technical Member did not agree with the view taken by the Judicial Member. He held that no manufacture had taken place in the Taloja unit of the respondent both in respect of the goods manufactured at Jammu as well as the imported goods. He further held that the activity of the respondent in bringing the goods from Jammu to Taloja and thereafter to affix labels so as to avail the benefit of Note 3 to Chapter 18 was not known to the department. Therefore, it was a case of misrepresentation of facts with the intent to avail rebate fraudulently. Consequently, the extended period of limitation was available to the department. That being the position, the Technical Member was of the view that the order in original was justified on all counts and dismissed the appeal.

5.9. In view of the difference of opinion between the Judicial Member and the Technical Member, the matter was placed before

the President of CESTAT to nominate a third member to resolve the same.

5.10. Thereafter, pursuant to the order passed by the President, the matter was placed before the third member to resolve the difference of opinion between the Judicial Member and the Technical Member.

5.11. After hearing the matter, the third member passed the order dated 16.04.2015. Referring to Note 3 to Chapter 18, both prior to 01.03.2008 and post 01.03.2008, the third member noted that Parliament has consciously substituted the word 'or' in place of 'and' appearing between the words 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs' to widen the scope of Note 3. According to the third member, any one of the three activities referred to in Note 3 i.e. (i) labelling or re-labelling, (ii) packing or repacking from bulk and retail packing and (iii) adoption of any other treatment to render a product marketable would be deemed to be manufacture. He held that the activity undertaken by the respondent at its Taloja unit i.e. labelling amounted to manufacture. He negated the stand of the revenue that labelling or re-labelling should enhance marketability of the goods as contrary to the plain reading of Note

3. He, therefore, agreed with the Judicial Member that the activity of labelling undertaken by the respondent is covered by Note 3 to Chapter 18 of the Central Excise Tariff Act which amounts to manufacture. Further, he also recorded a finding of fact based on the evidence on record that respondent had repacked the imported cocoa butter in new cartons and exported them after labelling. He thus fully concurred with the view expressed by the Judicial Member that the activity of labelling undertaken by the respondent amounted to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. He also concurred with the view expressed by the Judicial Member that there was no suppression or misrepresentation of material fact by the respondent. Therefore, the extended period was not available to the revenue. He further held that the respondent is entitled to the credit of the duty paid on the goods received from the Jammu unit as well as credit of the countervailing duty paid on the imported goods. That being the position, he held that the credit and the rebate were rightly availed of by the respondent. Question of refund of the same did not arise. Further, no penalty can be imposed on the respondent.

5.12. Following the opinion rendered by the third member, the matter was placed before the two-member Bench of CESTAT. In view of the majority decision, the appeal filed by the respondent was allowed *vide* the order dated 16.04.2015.

6. This Court by the order dated 08.02.2016 had issued notice. Thereafter, the appeal was admitted on 18.11.2019.

7. Respondent has filed counter affidavit supporting the order of CESTAT and has sought for dismissal of the appeal. In response thereto, appellant has filed rejoinder affidavit reiterating the grounds urged in the appeal.

8. Learned counsel for the appellant has laid great emphasis on the fact that the activity undertaken by the respondent at its Taloja unit i.e. putting labels on the two sides of the cartons which were already labelled at Jammu, cannot be said to be a manufacturing activity. Note 3 to Chapter 18 of the Central Excise and Tariff Act cannot be read in a manner to hold that the activity of labelling amounted to manufacture. Learned counsel, therefore, contended that appellant was fully justified in passing the order in original. CESTAT was divided in its opinion as to whether such an activity could be termed as manufacture. The Technical Member had given good reasons as to why such an

activity cannot be called manufacture while differing from the view taken by the Judicial Member. The third member has erred in concurring with the view taken by the Judicial Member. He, therefore, submits that the order passed by the CESTAT by way of majority should be interfered with and order in original should be restored.

9. Mr. V. Sridharan, learned senior counsel in his brief submission referred to Note 3 to Chapter 18 of the Central Excise Tariff Act, both prior to its amendment with effect from 01.03.2008 and post amendment. According to him, Parliament has consciously replaced the word 'and' by the word 'or' and post amendment, it is clear that the activity of labelling or re-labelling amounted to manufacture. He, therefore, supports the decision of the CESTAT and seeks dismissal of the appeal.

10. Submissions made by learned counsel for the parties have received the due consideration of the Court.

11. The core issue to be considered is whether the activity of labelling carried out by the respondent amounts to manufacture? While contention of the appellant is that the same does not amount to manufacture, on the other hand according to

the respondent, as per Note 3 to Chapter 18 of the Central Excise Tariff Act, the above activity amounts to manufacture.

12. The Central Excise Act which has since got subsumed in the Central Goods and Services Tax Act, 2017 was enacted to provide for levy of central duties of excise on goods manufactured or produced in India and for matters connected therewith or incidental thereto.

12.1. Section 2 is the definition clause. 'Manufacture' is defined in Section 2(f) which reads as follows:

> "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 (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;

12.2. Therefore, the word 'manufacture' includes any process which is incidental or ancillary to the completion of a manufacture product; any process which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act as amounting to manufacture; or any process 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.

13. Chapter 18 of the Central Excise Tariff Act deals with cocoa and cocoa preparations. Note 3 to Chapter 18 has undergone amendment with effect from 01.03.2008. Prior to the amendment, Note 3 to Chapter 18 read as under:

> 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 consumer, shall amount to 'manufacture'.

13.1. Post 01.03.2008, Note 3 now reads as follows:

In relation to products of this Chapter, labelling or re-labelling 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'.

13.2. Thus by way of the amendment, the word 'and' has been replaced by the word 'or' between the expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs'. Prior to 01.03.2008, the legislative intent was quite clear. The process to constitute manufacture should either be labelling or re-labelling of containers and repacking from bulk packs to retail packs. This process was construed to be one whole. In other words, the activity should not only include labelling or re-labelling of containers but the same should relate to repacking from bulk packs to retail packs. This was one activity. The other activity was adoption of any other treatment to render the product marketable to the consumer. Therefore, the legislature was quite

clear that if either of the two processes were followed, the same would amount to manufacture.

13.3. However, after the amendment i.e. post 01.03.2008, Note 3 has undergone a change as indicated above. Now because of substitution of the word 'or' in place of the word 'and' between the two expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs', the earlier composite process of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two independent processes. Labelling or re-labelling of containers is one process and repacking from bulk packs to retail packs has now become another process. Therefore, instead of two activities, Note 3 now contemplates three activities. As pointed out above, the composite activity of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two activities i.e. labelling or re-labelling of containers is one and the other is repacking from bulk packs to retail packs. The other activity of adopting any other treatment to render the product marketable to the consumers remains the same. Therefore, Note 3, post amendment, as it exists today contemplates three different

processes; if either of the three processes are satisfied, the same would amount to manufacture. The three processes are:

(i) labelling or re-labelling of containers; or
(ii) repacking from bulk packs to retail packs; or
(iii) the adoption of any other treatment to render the product marketable to the consumer.

13.4. As already observed above, if any one of the above three processes is satisfied then the same would amount to manufacture.

14. We have already noticed the definition of 'manufacture' in the Central Excise Act. Any one of the processes indicated in Note 3 to Chapter 18 of the Central Excise Tariff Act would come within the ambit of the definition of 'manufacture' under Section 2(f)(ii) of the Central Excise Act.

15. There is no factual dispute as to the activity carried out by the respondent at its Taloja unit. Whether the goods are brought from the Jammu unit or are imported, those are relabelled on both sides of the packs containing the goods at the Taloja unit of the respondent and thereafter, introduced in the market or sent for export. In terms of Note 3 to Chapter 18, this process of re-labelling amounts to 'manufacture'.

16. That being the position, we are of the considered opinion that the view taken by CESTAT is the correct one and no case for interference is made out. This is because all the other aspects are related and hinges upon the core issue. Resultantly, the impugned order of CESTAT dated 16.04.2015 is affirmed and the appeal by the revenue is dismissed.

17. In view of the above decision, Civil Appeal Nos. 788-790 of 2022 would also stand dismissed.

18. However, there shall be no order as to costs.

.....J
[ABHAY S. OKA]

.....J.
[UJJAL BHUYAN]

NEW DELHI;
APRIL 30, 2024.