CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11154 of 2016-DB
[CROSS Application No.:-ST/CROSS/10538/2016]

[Arising out of Order-in-Original/Appeal No AND-ST-000-COM-001-002-15-16 dated 08.02.2016 passed by Commissioner of Central Excise, Customs and Service Tax-ANAND]

Commissioner of Central Excise & ST, Anand **.... Appellant**
Office of the Commissioner, Central Excise, Customs & Service Tax, Central Excise Building, Nr. Juna Dadar, Behind Old Bus Depot Anand, Gujarat, 388001

VERSUS

Standard Pesticides Pvt. Limited **.... Respondent**
Plot No. 1, Swastik Ceramic Compound, Sankarda, VADODARA, GUJARAT.

APPEARANCE :

Shri Tara Prakash, Deputy Commissioner (AR) for the Appellant-Revenue
Shri Mrugesh G. Pandya, Advocate for the Respondent- Assessee

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 18.03.2024
DATE OF DECISION: 21.03.2024

FINAL ORDER NO. 10656/2024

C.L. MAHAR :

The respondent assessee is engaged in the manufacture of pesticides on job work basis for M/s. Syngenta India Limited, Pune. The respondent-assessee is also registered with service tax department for various categories of services such as Consulting Engineering services, Maintenance or Repair services, Erection, Commissioning and Installation Service, Business Auxiliary Service, Goods Transport Agency service etc. As per the terms and conditions of the agreement entered by the respondent-assessee with M/s. Syngenta India Limited for job work they were entitled to receive a variable costs and a fixed cost from M/s. Syngenta India Limited. During the audit of the financial records of the respondent-assessee, the department noticed that from 01.07.2012 to 31.01.2013, the respondent-assessee has

collected an amount of Rs. 2,17,40,000/- as reimbursement of fixed cost from M/s. Syngenta India Limited by issuing debit notes stating therein that "*Being amount debited for reimbursement of fixed cost from July 2012 to January 2013 as per new agreement*". After scrutiny of agreement dated 07.10.2010, it was noticed by the department that above mentioned amount has been paid by M/s. Syngenta India Limited to the respondent-assessee for the fact that they have agreed to not produce any goods for any other party and not use any machinery, plant and equipment or storage to manufacture products at their plant for any other party and therefore, it was felt by the department that the respondent-assessee has 'refrained himself from an act or to tolerate an act by which they have agreed not to use their plant, machinery and equipments and storage facilities etc. for any other party' and for that they have charged M/s. Syngenta India Limited and such an act is taxable under the service category as mentioned under clause (e) of Section 66E of the Finance Act, 1994 which covers the categories of service "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" under the Declared Service category. The department, on the above premise has issued two show cause notices dated 22.05.2014 and 16.02.2015 which have been adjudicated by the common order-in-original dated 08.02.2016.

2. The learned Commissioner while adjudicating the above mentioned show cause notices, has dropped the proceedings against the respondent-assessee observing as follows:-

> "7.2 The present issue pertains to the Assessee undertaking production activity as a job worker on behalf of M/s. Syngenta. In terms of the "Toll Formulation Agreement" between M/s Syngenta and the Assessee, the charges were towards undertaking manufacturing activity on job work basis using their own facility. Certain consideration was to be paid on fixed basis, variable basis and also partly on lump-sum basis as job charges. It appears that in order to ensure propriety interests, M/s. Syngenta enjoins upon the Assessee not to undertake similar work for other entities, merely in order to

maintain strict confidentiality of the process and to protect its operations being undertaken by our client.

7.3 Under the circumstances, I find that the issue is no longer res-integra. In the case of Jubilant Industries Ltd. v. CCE (2013) 31 STR 181 (Tri.-Del.) relied upon by the noticee, wherein it is held as under:-

> ***"13.*** *We are in agreement with the contention that the same activity cannot be considered as manufacturing and subjected to excise levy and at the same time considered to be a service and subjected to service tax. This principle does not need much discussion and is also recognized under Section 65(19) of Finance Act, 1994 levying service tax on processing of goods not amounting to manufacture. Process amounting to manufacture is kept specifically out of the scope of the entry. That being the case such an activity cannot be brought under service tax levy under "Business Support Service" because the underlying principle will apply to this entry also. The specific exclusion is not seen under 64(104c) for the reason that the legislature intended to deal with the issue under Section 65(19). We find that Revenue is also not disputing the position that manufacturing activity cannot be subjected to service tax. Revenues contention is that what JLSL was doing was manufacturing and what appellant (earlier known as PMSL) was doing was support services.*
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> ***18.*** *We find that the predominant activities for manufacture were done by appellant (earlier known as PMSL). Their plant and machinery was used and their employees were doing the processes. In the matter of deciding who is the manufacturer of excisable products, ownership of raw materials is not a critical criterion. We do not see any merit in the argument of Revenue that the activities of making available the factory and infrastructure and doing activities of raw material handling, accounting etc. are to be considered as activities distinct from manufacturing activity. All the activities done by the appellants have to be seen together and when it is so seen it is clear that they were doing manufacturing activity. For reasons already explained, the fact that PLSL was paying excise duty does not lead to a legal position that the appellant (earlier known as PMSL) was not doing manufacturing activity. The fact that appellant (earlier known as PMSL) was charging two components towards job-charges separated as fixed cost and variable cost cannot alter this situation so long as goods were manufactured. In a situation where goods were not manufactured but charges were collected under the fixed component it could have been considered as a service. While working out cost of any manufactured product costing is done by splitting cost elements into fixed cost and variable cost and that cannot change the nature of the activity. What could have changed the nature of the activity is a situation where no manufacturing activity took place and still the appellant collected their charges.*
>
> ***20.*** *In view of the analysis as above we hold that the activities under taken by the appellant during the period April 07 to Sept. 09 being a manufacturing activity carried out cannot be classifies as business support service and subjected to service tax and hence the demand fails. This demand fails on account of time-bar also because we are of the view that all relevant facts have been disclosed to the department in time. So this part of the appeal is allowed."*

7.4 Para 5 of the Show Cause Notice dated 22.05.2014 states that, "On examining the records submitted by the Assessee to department it was found that the assessee was charging joh charges (to which they called as variable cost) depending upon the quantity manufactured & cleared by them by issuing separate invoice at the end of the ever month (RUD3) giving the invoice wise details of quantity of goods cleared by them on payment of Central Excise Duty as per Central Excise Low Here the recovery of the

joh charges on goods manufactured on behalf of M/s Syngenta seems to be over. The amount of Job charges may increase or decrease in a month depending upon the order received and quantity produced/cleared. From the perusal of the production figures of the unit it is observed that there is major short fall during the period to April / May when as explained by the assessee, it is the off season of the year. Now since they are bound by the agreement to not to produce for other parties & not to use any machinery equipment or storage vessels to manufacture products at plant for any other party except M/s Syngenta India Limited they cannot make full utilization of production capacity".

The notice does not allege at any point that the fixed cost was recovered without any manufacture. If it can be shown that the fixed cost is s recovered without any manufacture then the variable and fixed costs can be segregated into manufacturing cost and other service. Therefore, in view of the ruling in the case of Jubilant Industries Ltd. (supra), 1 am constrained to consider the variable and fixed costs as manufacturing cost.

7.5 Even though section 66 E (e) of the Act has come into effect from 01.07.2012, unless it is shown that the fixed cost was recovered independent of any manufacture, the variable and fixed costs will have to be considered as manufacturing cost and Section 66 D (f) of the Act regarding negative list of the services whereby any process amounting to manufacture or production of goods, will come into effect.**"**

On the basis of above argument, proceedings against respondent-assessee were dropped. The impugned order-in-original has been reviewed by the department and they are before us against the above referred order-in-original on the following grounds:-

"6.1.4 The Commissioner in the Impugned order has held that the notice does not allege at any point that the fixed cost was recovered without any manufacture. However, at para 5 of the show cause notice F. No. V.ST. (Adj.)10/Standard/ ADC/2014 dated 22.05.2014 issued to the assessee in the present case it is specifically alleged that the assessee was charging job charges (to which they called as variable cost) depending upon the quantity manufactured & cleared by them by issuing separate invoice at the end of the every month giving the invoice wise detail of quantity of goods cleared by them on payment of Central Excise Duty; that here the recovery of the job charges on goods manufactured on behalf of M/s. Syngenta seems to be over; that the amount of Job charges may increase or decrease in a month depending upon the order received and quantity produced/cleared; that since they are bound by the agreement to not to produce for other parties & not to use any machinery/equipment or storage vessels to manufacture products at plant for any other party except M/s. Syngenta they cannot make full utilization of production capacity; that therefore it appears that the contention of the assessee that the Fixed Cost reimbursed by M/s. Syngenta is towards Job charges only does not seem to be correct as the actual job charges are on the goods manufactured & cleared for which assessee Issues separate commercial Invoice; that if

at all the fixed cost is towards the job work, then it should have been included in the commercial invoice, and not by issuing separate Debit Note for the same: that the debit notes seems exclusively issued for not producing for other parties and not to use any machinery/equipment or storage vessels to manufacture products at plant for any other party other than M/s. Syngenta as mentioned in Toll Formulation Agreement executed between Assessee and M/s. Syngenta.

Thus, when there is a specific allegation in the show cause notice dated 22.05.2014 that the assessee has recovered separate amount by way of issuing the debit note and also that if at all the fixed cost was towards the job work, then it should have been included in the commercial Invoice, the Commissioner's findings that the notice does not allege at any point that the fixed cost was recovered without any manufacture, is contrary to the facts available on the records. Further, since it was binding on the assessee as per the Toll Formulation Agreement dated 07.10.2010 between the assessee and M/s Syngenta that they shall not carry out formulation and packing of products for other parties other than Syngenta and also not use any machinery, equipments or storage vessels to manufacture products at the Plant for any other party other than Syngenta, the fixed amount being agreed to be paid, over and above towards manufacturing and clearance of goods in quantitative terms, which was not included in their commercial invoice for the purpose of payment of Central Excise duty, in no way can be considered as recovered towards the manufacturing of goods. Thus, such an act of refraining to do i.e. in the present case manufacture for others, is covered under the declared services defined under Clause (e) of the Section 66 E of Finance Act, 1994, is liable to Service Tax under the Finance Act, 1994.

6.1.5 The terms 'manufacture' is defined under Section 2(f) of the Central Excise Act, 1994, which is also made applicable for the purpose of levy of Service Tax under the Finance Act, 1994 and reads as:

> (f) "manufacture" includes any process,
>
> (i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or
>
> (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re- labeling 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:

6.1.6 Further, the Commissioner has failed to note that when statute has defined a particular activity viz. 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' under the declared service made liable to Service Tax w.e.f 01.07.2012, he ought to have decided the impugned case covering the period from 01.07.2012 onwards, in light of provisions of the Finance Act, 1994, as amended and rules made there under, relevant at the material time and by way of confirming the demand and recovery of the Service Tax on the fixed amount charged/received by the assessee towards said service.

6.1.7 The Commissioner, while dropping the proceedings against the assessee in the Impugned case, has also relied upon the decision in case of Jubilant Industries Ltd. Vs CCE [reported at (2013) 31 STR 181 (Tri.-Del.)], in which the period is from April, 2007 to March, 2010 and from April, 2010 to 14.11.2011 i.e. prior to 01.07.2012. When the provisions of Finance Act, 1994 is amended w.e.f. 01.07.2012 by way of introduction of negative list based regime and also the activity of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' has been brought under the purview of levy of Service Tax by way covering the same under declared services, under Clause (e) of the Section 66 E of Finance Act, 1994, the Commissioner's reliance on the said case law of M/s Jubilant Industries Ltd. (supra) is incorrect and therefore, he has erred in dropping the demands of Service Tax along with consequential interest and penalties thereon

7. The Committee, therefore, under the provisions of Section 86(2) of the Finance Act, 1994, directs the Commissioner, Central Excise, Anand to apply to the Customs, Central Excise & Service Tax Appellate Tribunal for the correct determination of the following points arising out of the said order.

3. We have heard both the sides and perused the agreement which the respondent-assessee has entered with M/s. Syngenta India Limited. On perusal of record as well as the agreement for job work, we find that the

agreement is primarily for undertaking job work for manufacturing various pesticides and the payment schedule for both, fixed as well as variable payment for manufacture of pesticides. It will be relevant to have a glance at the Schedule-II which covers the payment to be made by M/s. Syngenta India Limited to the respondent-assessee;

SCHEDULE II – TOTAL REMUNERATION

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Fixed charges on per month basis: Rs. 16 lacs
Fixed charges upto 1500 MT on per kg basis: Rs. 5.7/kg of formulation.
Variable Rate per kg for each product is as given below:

PRODUCT – PACK	PACK SIZE	2010 RATE PER KG
ACTARA 100 GRAM	100	4.98
ACTARA 250 GMS	250	3.46
ACTARA 500 GMS	500	2.55
ACTARA 1000 GMS	1000	1.91
PROCLAIM 05 SG 10 GRAM	10	90.69
PROCLAIM 05 SG 50 GRAM	50	9.02
PROCLAIM 05 SG 100 G	100	4.98
PROCLAIM 05 SG 250 GM	250	3
PROCLAIM 05 SG 500 GRAM	500	2.21
PEGASUSU 25 GRAM	25	18.99
PEGASUS 250 GRAM	250	9.97
PEGASUS 500 GRAM	500	9.41
POLO 250 GRAM	250	9.56
POLO 500 GRAM	500	8.7
POLO 1000 GRAM	1000	7.87
RIDOMIL MZ 25 GM	25	34.85
RIDOMIL MZ 72WP 100G	100	7.09
RIDOMIL MZ 72WP 250G	250	4.94
RIDOMIL MZ 72WP 500G	500	3.89
RIDOMIL MZ 1 KG	1000	3.44
KAVACH 100 GM	100	11.57
KAVACH 250 GM	250	9.61
KAVACH 1000 GM	1000	8.05
THIOVIT 500 GM	500	1.9

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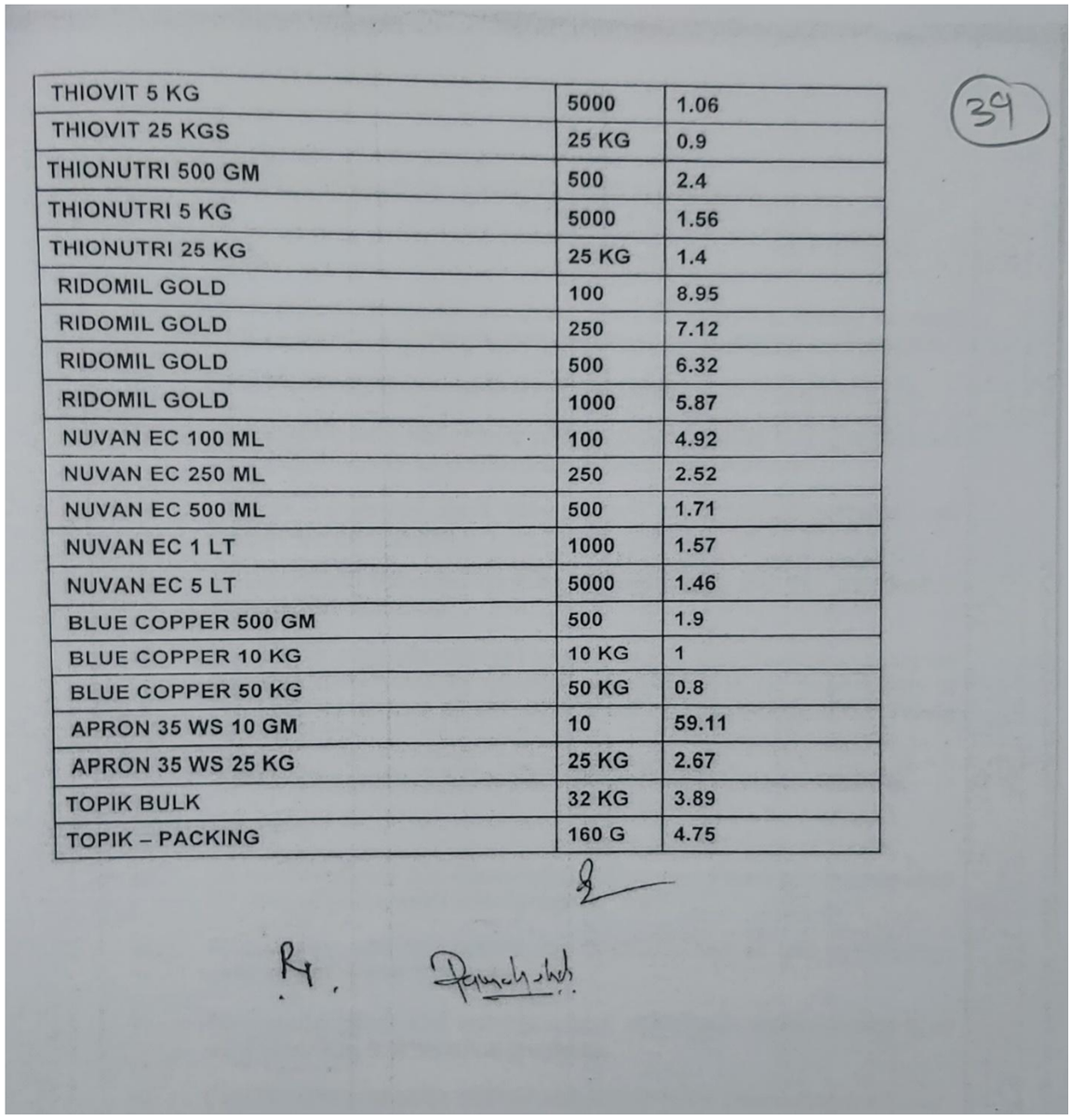

THIOVIT 5 KG	5000	1.06
THIOVIT 25 KGS	25 KG	0.9
THIONUTRI 500 GM	500	2.4
THIONUTRI 5 KG	5000	1.56
THIONUTRI 25 KG	25 KG	1.4
RIDOMIL GOLD	100	8.95
RIDOMIL GOLD	250	7.12
RIDOMIL GOLD	500	6.32
RIDOMIL GOLD	1000	5.87
NUVAN EC 100 ML	100	4.92
NUVAN EC 250 ML	250	2.52
NUVAN EC 500 ML	500	1.71
NUVAN EC 1 LT	1000	1.57
NUVAN EC 5 LT	5000	1.46
BLUE COPPER 500 GM	500	1.9
BLUE COPPER 10 KG	10 KG	1
BLUE COPPER 50 KG	50 KG	0.8
APRON 35 WS 10 GM	10	59.11
APRON 35 WS 25 KG	25 KG	2.67
TOPIK BULK	32 KG	3.89
TOPIK – PACKING	160 G	4.75

It can be seen from the above schedule that payment for the job work for manufacturing of various kinds of pesticides has two components, firstly fixed charges per month of Rs. 16 Lacs and fixed charges up to 1500MT of per kg. basis at the rate of Rs. 5.7 per kg. for formulation and secondly for manufacturing of pesticides of above 1500MT variable rates has been given as provided in the table above.

4. We have also perused the manufacturing agreement entered into by the respondent-assessee with M/s. Syngenta India Limited. A few relevant clauses of the agreement which are reproduced below:-

"3. CONFIDENTIAL INFORMATION, LICENCE

3.1 Syngenta hereby grants Toller for the term of this agreement a royalty-free, non-exclusive and non-transferable license to use the Confidential Information solely for the formulation and/or packing of the products in accordance with the terms of this agreement and the respective schedule(s). Toller shall keep the Confidential Information confidential and shall not have the right to assign, sub- license or otherwise make available confidential information, in whole or in part, to third parties. In particular, toller agrees not to use any part of the confidential information for the formulation of crop protection products for any third parties.

4 FORMULATION AND PACKING

4.1 Toller shall Formulate and/or pack the Products at the plant for Syngenta in accordance with the specifications on a non-exclusive basis and on the terms and conditions of this agreement. The term "non-exclusive" in this clause means:

(a) Syngenta may engage other Tollers to carry out formulation and packing of the products; and

(b) Toller shall not carry out formulation and packing of products for other parties other than Syngenta at the plant.

(c) Toller shall not use any machinery, equipments or storage vessels to manufacture products at the plant for any other party other than Syngenta.

4.2 The Toller shall provide all facilities and staff required for such formulation and/or packing, and shall not outsource the formulation and/or packing to third parties.

6 SYNGENTA MATERIALS

6.1 Syngenta will supply Toller with the Syngenta materials free of charge, for use only in formulating and/or packing the products. Toller shall not use any materials in substitution for the Syngenta materials to formulate the products.**"**

It can be seen that the agreement is primarily for manufacturing of pesticides by respondent-assessee on job work basis. The first category of the fixed charges which is at the rate of Rs. 16 Lacs per month is an integral part of the job work manufacturing charges i.e. primarily for the purpose of keeping the confidentiality of the formulation of the M/s. Syngenta India Limited and same cannot be considered separately from the job work agreement. We also find that the department has not been able to establish that fixed charges have been paid to the respondent-assessee as an independent of all the manufacturing activity. We also think that amount of fixed cost of Rs. 16 Lacs was paid not only for maintaining strict

confidentiality of propriety of the formulation of M/s. Syngenta India Limited but also for the plant and machinery which may remain unutilized during the process of undertaking job work pertaining only for M/s. Syngenta India Limited. In view of all these facts, we hold that the fixed cost which are being paid to the respondent-assessee do not fall under Declared Service category as mentioned under Section 66E(e) and the amount which is paid to the respondent-assessee is primarily for manufacturing cost undertaken by them on job work basis.

5. It is an accepted legal position that the agreement has to be considered in its entirety for the purpose of levy of service tax since the agreement is primarily for undertaking job work for manufacturing various kinds of pesticides and therefore, even if the payment for the job work is made in two types namely one as fixed and another is at variable cost, this fact will not change the nature of the agreement and same is to be considered as job work manufacturing agreement. We are therefore of the view that the department's stand that fixed component of the payment for the job work category under the declared service under Section 66E is not sustainable.

6. We take support of the following decisions, wherein the same view has been taken:-

(a) Brindavan Bottlers Pvt. Limited vs. CCE&ST, Lucknow – 2022 (58) GSTL 330 (Tri. Alla.)

> **"12.** Having considered the rival contentions, we find that the appellant have actually entered into an agreement for manufacture on job work basis. Evidently, as per the agreement the job charges have been spread over in two tier billing *i.e.* fixed charges and variable charges. The reason being that in summer season there is more demand of packed water and beverages, whereas in other months, the demand is lower. Keeping in view the constant availability of funds to meet the fixed charges and finance charges and for variable cost towards job charges, two tier billing has been provided, to the appellant job worker to meet the financial obligation round the year. Admittedly,

appellant has paid the excise duty on the goods manufactured and cleared for the principal manufacturer, as is evident from the copy of excise returns filed before the Tribunal. In this view of the matter, we conclude that the job charges received by the appellant have formed part of the cost of manufacture, which have suffered excise duty. Accordingly, we hold that service tax cannot be levied on the fixed components of job charges. We also find that under similar facts and circumstances in the case of *BOC India Limited* v. *Commissioner of Central Excise, Jaipur* - 2018 (10) G.S.T.L. 309 (Tri. - Del.) it was observed that BOC was engaged in the manufacture and supply of gases and are liable to pay Central Excise duty. BOC put up the storage facility inside the client premises to store such gases for subsequent consumption. For such activity, they are collecting fixed facility charges apart from the sale consideration for the gas. Such fixed facility charges were proposed to be taxed under Section 65(105)(zzzzj) of the Finance Act, 1994, under the head SOTG. The Board *vide* letter dated 10-11-2014 have clarified that such facility charges form part of transaction value for the purpose of Central Excise duty. Accordingly, this Tribunal set aside the order and allowed the appeal of BOC India Limited.

(b) Jubilant Industries Limited vs. CCE, Ghaziabad – 2013 (31) STR 181 (Tri. Del.)

13. We are in agreement with the contention that the same activity cannot be considered as manufacturing and subjected to excise levy and at the same time considered to be a service and subjected to service tax. This principle does not need much discussion and is also recognized under Section 65(19) of Finance Act, 1994 levying service tax on processing of goods not amounting to manufacture. Process amounting to manufacture is kept specifically out of the scope of the entry. That being the case such an activity cannot be brought under service tax levy under "Business Support Service" because the underlying principle will apply to this entry also. The specific exclusion is not seen under 64(104c) for the reason that the legislature intended to deal with the issue under Section 65(19). We find that Revenue is also not disputing the position that manufacturing activity cannot be subjected to service tax. Revenues contention is that what JLSL was doing was manufacturing and what appellant (earlier known as PMSL) was doing was support services.

14. So the essential question to be determined is whether the impugned activity can be split into two - one as manufacturing by JLSL and the other as service by appellant (earlier known as PMSL) to JLSL. While considering this issue another issue that arises is whether there can be two manufacturers for the same goods. In the instant case JLSL claimed to be the manufacturer and the claim was accepted by Central Excise Department and JLSL was paying excise duty. In such circumstances is there any scope for PMSL to claim that their activity should also be considered as manufacturing activity in respect of the same goods?

15. We have perused the contract dated 1-4-2007 between the two parties. It is seen that as per the contract JLSL was supplying all the raw materials required for manufacturing final products. JLSL was also supervising the manufacturing process and was taking steps to ensure the quality of the products. All activities like handling the raw materials, its accounting and processing was done by appellant (earlier known as PMSL). This means that both the parties were involved in the manufacturing activity. It is also to be noted that such manufacturing arrangements are very common in the country. In such situation legal provisions exist in Central Excise laws for considering either of the two parties as manufacturer. In most cases the persons doing the job-work claims to be the manufacturer and pays excise duty as applicable in his hands. There are situations where the person supplying raw materials undertakes to pay excise duty and for that

reason excise duty is not charged in the hands of the person doing the manufacturing activity. Notification 214/86-C.E. is applicable in such cases.

16. Section 2(f) of Central Excise Act defines manufacture and manufacturer as under :

> "manufacture" includes any process, -
>
> (i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or
>
> (iii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or 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;

17. Therefore if either party was to apply for registration as a manufacturer the department would have accepted the application. Excise registration is only to the effect that one of the parties undertakes to discharge the excise duty liability on the goods manufactured. This cannot be interpreted to mean that the activity done by the other party is not manufacturing activity. Notification 214/86-C.E. only provides a mechanism by which the duty liability is fixed on the person supplying raw material and enables the clearance of the goods from the factory of actual manufacture subject to undertaking for payment of duty by the other party or its further use in the manufacture of excisable goods. In a situation where the other party (JLSL in this case) was willing to pay excise duty at the time of clearance of the goods from the factory of manufacture there was no need to adopt the procedure laid down in Notification 214/86-C.E.

18. We find that the predominant activities for manufacture were done by appellant (earlier known as PMSL). Their plant and machinery was used and their employees were doing the processes. In the matter of deciding who is the manufacturer of excisable products, ownership of raw materials is not a critical criterion. We do not see any merit in the argument of Revenue that the activities of making available the factory and infrastructure and doing activities of raw material handling, accounting etc. are to be considered as activities distinct from manufacturing activity. All the activities done by the appellants have to be seen together and when it is so seen it is clear that they were doing manufacturing activity. For reasons already explained, the fact that PLSL was paying excise duty does not lead to a legal position that the appellant (earlier known as PMSL) was not doing manufacturing activity. The fact that appellant (earlier known as PMSL) was charging two components towards job-charges separated as fixed cost and variable cost cannot alter this situation so long as goods were manufactured. In a

> situation where goods were not manufactured but charges were collected under the fixed component it could have been considered as a service. While working out cost of any manufactured product costing is done by splitting cost elements into fixed cost and variable cost and that cannot change the nature of the activity. What could have changed the nature of the activity is a situation where no manufacturing activity took place and still the appellant collected their charges.**"**

7. In view of the above discussion, we hold that impugned order-in-original is legally sustainable and therefore, the appeal is dismissed. Cross objection also get disposed of.

(Pronounced in the open court on 21.03.2024)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL