...
GOODS AND SERVICE TAX APPELLATE TRIBUNAL
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केस विवरण फाइल पर प्रमाण :

क	[illegible]	[illegible]	[illegible]
	V2(22)-(2)/2018-?	ST-DC-Kanjur Jhanda/226 to 8	30.10.18

ख अपील आदेश संख्या(Order-in-Appeal No.)

MUM-EXCUS-000-APP-223-2018-19

आदेश की तारीख Date of Order:	11.12.2018	जारी करने की तारीख Date of Issue	14.12.2018

कमल सांघी, आयुक्त (अपील) द्वारा पारित।
Passed by Shri Kamal Sanghi, Commissioner (Appeals)

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[illegible]

घ अपीलकर्ता & प्रतिवादी का नाम और पता/Name & Address of the Appellant & Respondent :

Dow Chemical International P. Ltd. [illegible] Plot Block-B, IT Centre Business District, Prabhanagar, LBS Marg, Ghatkopar(W), Mumbai-400086

[illegible]

ङ [illegible]
Appeal / Stay Appl. is hereby disposed of in terms of above.

च [illegible]

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: ORDER IN APPEAL :

M/s. Dow Chemical International Pvt Ltd., C/o Rishi Kiran Logistics Pvt Ltd., Survey No. 165, B/H Agarwal Pump, Opp Padana Ramdev Pir Mandal Versana Taluka - Anjar District - Kutch (hereinafter referred to as 'appellant') has filed present appeal against Order-in-Original No. 08/DC/Anjar Bhachau/2017-18 dated 30.10.2017 (hereinafter referred to as "impugned order") passed by the Deputy Commissioner, Central GST Division, Anjar Bhachau (hereinafter referred to as 'the adjudicating authority')-

2. The facts of the case are that the Officers of Kutch Commissionerate carried out simultaneous search on 3.2.2016 at godown situated at Survey No. 165, B/H Agarwal Pump, Opp Padana Ramdev Pir Mandal, Versana, Taluka - Anjar and at Office situated at Plot No. 8, Sector - 5 Opp. Post Office, Ganchichara and incriminating documents were recovered. It was found that the appellant had entered into 'Tolling Agreement' dated 14.9.2015 with M/s Rishi Kiran Logistics Pvt. Ltd. (hereinafter referred to as 'M/s Rishi'), as per which, M/s Rishi had to arrange transportation of various chemicals of the appellant in bulk from tank terminal to godown of M/s Rishi situated at Versana and to pack the same in 200/180 liters drums and then to label them so as to mention details such as Name of Manufacturer, Description of goods, Trade Mark, Grade, Lot No., Caution for use & Disposal, Quantity, precaution to be taken with regard to those goods, danger while using those goods, etc. and then to dispatch them from the said premises; that the said activities carried out by the appellant alleged to fall within the meaning of 'Manufacture' under Section 2(f) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') read with Note 10 of Chapter 29 of the Central Excise Tariff Act, 1985 (hereinafter referred to as 'CETA, 1985'). During search, 1,88,610 Kgs. of Chemicals packed in 935 drums duly labelled having total value of Rs. 1.41 Crore (Approx.) involving Central Excise duty of Rs. 17,62,500/- were placed under seizure under Panchnama dated 3.2.2016 and statement of Shri Shivkumar Agarwal, Godown in-charge and Shri Asst. Anil Mahadik, Lead

Supply Chain Expert of the appellant were recorded. Show Cause Notice No. V.29/AE/JC/17/2016-17 dated 28.7.2016 was issued to the appellant proposing confiscation of the seized goods valued at Rs. 1.41 Crore under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules"); demanding Central Excise duty of Rs. 17,62,500/- under Section 11A(4) of the Act and imposition of penalty under Section 11AC of the Act and under Rule 25 of the Rules. The lower adjudicating authority vide impugned order confirmed Central Excise duty of Rs. 17,62,500/- along with interest, ordered confiscation of the seized goods valued at Rs. 1.41 Crore under Rule 25 of the Rules and imposed redemption fine of Rs. 40 lakhs in lieu of confiscation of the goods and imposed penalty of Rs. 17,62,500/- under Rule 25 of the Rules subject to the provisions of Section 11AC of the Act and

2 Being aggrieved with the impugned orders, appellant preferred the present appeal, *inter-alia*, on the following grounds: -

(i) The impugned order did not discuss grounds taken by the appellant in reply to SCN, thus the impugned order is not a speaking order and liable to be set aside on this ground alone. The appellant relied on decisions in the case of Jay Pee Bela Cement reported as 2000 (118) ELT 133 (Tribunal); S.G. Engineers reported as 2015 (322) ELT 204 (Del.) in support of their contentions

(ii) The product imported by the appellant was already in a marketable condition before repacking. The said fact will be evident that the description of goods in the Bill of Entry as well as on the stickers is the same and that no process was carried out on the goods imported by the appellant. Further affixing stickers on the drum is for the purpose to identify the product, load no., quantity, its usage and precautions and was only for the identification and information purpose. The said activity does not render such products marketable. Therefore, affixing of sticker on containers cannot be held to be manufacture under Chapter Note 10 of Chapter 29 of CETA, 1985.

(iii) The appellant affixes stickers on the containers and the activity of affixing the stickers on the drums cannot be considered labelling of

containers; that the term 'label' has not been defined under the Act or CETA, 1985 and as per the decision in the case of Johnson & Johnson reported as 2003 (158) ELT 134 upheld by the Hon'ble Supreme Court, the definition of label has to be adopted from Standard of Weight and Measurement (Package of Commodities) Rules, 1977. It is evident that the sticker affixed by the appellant on the drum did not contain the details provided under Rule 6 of the said Rules as the sticker did not indicate Retail Sale Price, Month and year in which the commodity was manufactured or re-packed or imported. therefore, it was submitted that the sticker affixed by the appellant was not label. The appellant also relied on decision in the case of Pachsheel Soap Factory reported as 2002 (145) ELT 527 (Tri. – Del.) affirmed by the Hon'ble Supreme Court to say that putting a sticker will neither amount to labeling or re-labelling, the processes which have been deemed to be a process of manufacture.

(iv) Regarding repacking from bulk pack to retail pack, it was submitted that CESTAT in the case of Ammonia Supply Co. reported as 2001 (131) E.L.T. 626 (Tri.) has held that transferring goods from tankers into small drums cannot be construed as 'bulk pack' to 'retail pack' since tankers cannot be construed as 'bulk pack'. In the present case, the goods falling under Chapter 29 of CETA, 1985 received by the appellant in tankers which are then transferred into drums. The appellant also relied on CBEC Circular No. 910/30/2009-CX dated 16.12.2009 to support their contention.

(v) The goods seized under Panchnama dated 5.2.2016 were combination of goods falling under Chapter 29, Chapter 38 & Chapter 39 of CETA, 1985. Since the dispute is only in respect of goods cleared under Chapter 29, the value of goods falling under Chapter 29 is only to be considered and confiscation of 61,530 Kgs. of goods falling under Chapter 39 and 29,240 Kgs. of goods falling under Chapter 38 was not required to be considered as the allegation in SCN is only in respect to goods falling under Chapter 29 of CETA, 1985.

(vi) The appellant vide letter dated 12.8.2016 at the time of obtaining registration at the impugned location had informed the process to be

carried out along with Chapter heading as per CETA, 1985 to the Deputy Commissioner, Central Excise Division, Gandhidham. Therefore, the allegation that the appellant had any malafide intention to evade payment of central excise duty is not correct.

(vii) Without prejudice to the above submission, even if it is accepted that activities of repacking from bulk to retail pack and affixing the sticker amounts to manufacture, appellant will be eligible to claim cenvat credit of duty paid on purchase of raw material and input services used for such manufactured goods. Hence the entire exercise would be revenue neutral. The appellant has properly recorded the receipt of the goods in RG 23-D register and availed cenvat credit of the eligible duties and has also recorded the clearances of such goods and charged and paid central excise duty on their removal. Para 29 of the impugned order that the appellant has not taken the Central Excise registration and accordingly, they have forfeited the facility of taking and availing of cenvat credit as manufacturer, thus the benefit of cenvat credit cannot be extended is not correct as the appellant was registered as central excise dealer. They are eligible to claim credit of the duty paid even if not registered with the department as manufacturer as they had made complete disclosure regarding the activities to be carried out vide letter dated 12.5.2010 and relied on decision in the case of Indo Chem Corporation reported as 2009 (236) ELT 102 (Tri. – Kolkata) in support of their contention.

(viii) The impugned order confirmed demand of central excise duty of Rs. 17,92,500/- whereas cenvat credit available on the goods seized is Rs. 39,76,582/-, which is more than the duty demanded. The appellant also relied on decision in the case of M Portal India Wireless Solutions Pvt. Ltd. reported as 2011-TIOL-926-HC-KAR-ST wherein it has been held that for claiming refund of service tax under Rule 5 of Cenvat Credit Rules, 2014, the requirement of registration with the department is not a condition precedent for claiming cenvat credit, there is no provision in Cenvat Credit Rules, 2004 which imposes such restriction. The said decision was relied upon in the case of Bolco Industries Pvt. Ltd. reported as 2014-TIOL-2617-CESTAT-AHM.

(ix) The Courts/CESTAT have consistently held that where the demand leads to revenue neutral situation, the demand shall be set aside. The Hon'ble Supreme Court in the case of Coca Cola reported as 2007 (213) ELT 490 (SC) has held that demand of excise duty shall not be raised when it results to revenue neutral situation. The appellant also relied on decisions in the case of Indeos Abs Limited reported as 2010 (254) ELT 628 (Gujarat HC); SRF Limited reported as 2007 (220) ELT 201 (T); United Phosphorus Ltd. reported as 2007 (210) ELT 45 (Tri. – Ahmd.); and Indian Oil Corporation Ltd. reported as 2013 (282) ELT 751 (SC).

(x) The appellant vide letter dated 10.2.2016 applied for provisional release of the seized goods which was allowed by the department. Out of 1,88,610 Kgs. of goods confiscated, the appellant removed 1,26,005 Kgs. of goods on which duty of Rs. 15,75,233/- was paid which is required to be appropriated against the demand. The appellant relied on decision in the case of Bayer Extracts Pvt. Ltd. reported as 2012 (285) ELT 57 (Tri. – Bang.) in support of their contentions.

(xi) It is submitted that penalty under Section 11AC of the Act can be levied if there is an intent to evade payment of central excise duty since, there was no malafide intent to evade payment of central excise duty, the penalty should not be imposed. The appellant had disclosed their activities of drumming, packing, re-packing, etc. vide letter dated 12.3.2010 duly acknowledged by the department on 15.6.2010. Thus, there was no suppression of facts with intent to evade payment of central excise duty. The appellant was under bonafide belief that their activities were not covered under the definition of 'manufacture' under Section 2(f) of the Act and hence, they were not required registration under Rule 9 of the Rules and not required to pay Central Excise duty on the said goods in view of CBEC Circular No. 910/30/2009 dated 18.12.2009. The appellant also relied upon decision in the case of Al-Falah (Exports) reported as 2006 (198) ELT 343 (Tri. LB) wherein it has been held that when the demand is with in normal period, penalty under Section 11AC of the Act cannot be levied.

(xii) None of the provisions of Rule 25 of the Rules applies to the present

case as the appellant has not removed any excisable goods in contravention of the provisions of the Rules since the appellant was not engaged in the manufacturing activity of any goods. There is no allegation that the appellant has not accounted for any excisable goods stored in the godown as the appellant had maintained proper records of the goods lying in godown in RG23D register. The appellant was already registered as dealer under Rule 9 of the Rules since they were involved in trading activity of imported chemicals after packing the same into smaller drums. There was no intention to evade payment of central excise as they had informed the department about the nature of operation carried out by them long back in 2010. Hence, the goods lying in godown cannot be confiscated under Rule 25 of the Rules and Bond and Bank Guarantee executed cannot be encashed in terms of Rule 29 of the Rules. Further, penalty imposed under Rule 25 of the Rules is also required to be set aside.

(xii) The impugned order did not specify the clause of Rule 25 of the Rules under which penalty was imposed. The appellant relied on decisions in the case of Amrit Foods reported as 2005 (190) ELT 433 (SC) and United Telecom Ltd. reported as 2011 (21) STR 234 (T) to submit that it is necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable for penalty under any provision.

2. Personal hearing in the matter was attended by Shri Manoj Chauhan, C.A., on behalf of the appellant who reiterated the grounds of appeal and submitted written submission to say that as per Chapter Note 10 of Chapter 28 of CETA, 1985, they do not do labeling as per Legal Metrology Act, 2009; that they also do not do repacking from bulk pack to retail pack as they pack directly from tanker, which can't be said to be bulk pack as clarified by CBEC Circular No. 910/30/2009-CX dated 16.12.2009 and CESTAT's Order in the case of Ammonia Supply Co. reported as 2001 (131) ELT 626 (T); that they are also not doing any other treatment to the product, that they were already registered with the department as dealer for cenvat credit and paid duty to that extent, then even if they are held manufacturer, demand should adjust that much duty; that everything was

declared by them to the department in 2010 and hence, demand is time barred and also no penalty under Section 11AC of the Act or Rule 25 of the Rules is impossible and thus, their appeal should be allowed and the impugned order should be set aside.

FINDINGS:

5. I have carefully gone through the facts of the case, impugned order, grounds of appeal and submissions made during personal hearing. The issues to be decided in the present case are: -

(i) Whether the process of packing of imported chemicals in smaller containers and affixing stickers on the containers of chemicals amounts to manufacture in view of Chapter Note 10 of Chapter 29 of CETA or otherwise,

(ii) Whether demand of Central Excise duty on chemicals lying in godown is correct or otherwise.

(iii) Whether chemicals packed in small containers is liable to be confiscated under Rule 25 of the Rules or otherwise

(iv) Whether penalty is imposable under Rule 25 of the Rules read with Section 11AC of the Act.

6. The facts of the case reveal that the appellant was registered with the department as central excise dealer, had imported chemicals in bulk on payment of customs duties and transferred the said goods in their godown where the appellant packed the chemicals in drums of 180/200 lbs and affixed stickers on these drums as per legal requirement. The lower adjudicating authority vide impugned order has held that the processes carried out by the appellant amount to manufacture in terms of Chapter Note 10 to Chapter 29 of CETA, 1985 and confirmed demand of central excise duty of Rs. 17,62,500/- along with interest for goods found lying in their godown premises and seized during search and also ordered to confiscate the said goods and imposed redemption fine of Rs. 40 lakhs in lieu of confiscation and imposed penalty of Rs. 17,62,500/- on the appellant under Rule 25 of the Rules subject to Section 11AC of the Act.

6.1 Note 10 to Chapter 25 of CETA, 1985 prior to 1.3.2008 read as under:

> "10. In relation to products of this Chapter, labelling or relabeling 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'."

6.2 The said Chapter Note 10 was amended vide Notification No 1/2008 CE(NT) dated 1.3.2008 and after amendment the said Chapter Note reads as under: -

> "10. In relation to products of this Chapter, labelling or relabeling 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'."

6.3 Thus, it can be seen that the phrase 'labelling or relabeling of containers and repacking from bulk packs to retail packs' has been replaced by the phrase 'labelling or relabeling of containers or repacking from bulk packs to retail packs' vide aforesaid Notification dated 1.3.2008 meaning thereby that Chapter Note 10 to Chapter 29 of CETA, 1985, effective from 1.3.2008 specifies that labeling or relabeling of containers or repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer is to be treated as manufacture. In the present case the appellant imported chemicals in bulk and packed it into small containers of 180/200 ltrs. and affixed stickers containing details of the products and information such as Name of Manufacturer Description of goods, Trade Mark, Grade Lot No., Caution for use & Disposal Quantity precaution to be taken with regard to these goods, danger while using those goods etc. Hence, I find that the processes have been correctly held as manufacture by the lower adjudicating authority within the meaning of Chapter Note 10 to Chapter 29 of CETA, 1985. The decisions in the case of Johnson & Johnson reported as 2003 (155) ELT 134 and Pachshool Soap Factory reported as 2002 (146) ELT 527 (Tri. – Del.) were pronounced by taking into consideration the Chapter Note 10 prior to issuance of Notification No. 1/2008 CE(NT) dated 1.3.2008 and therefore, these decisions cannot be made applicable

in the present case. The ratio of the decision in the case of Ammonia Supply Co. reported as 2007 (131) ELT 626 (Tri.) that transferring of goods from tankers to small drums cannot be construed as 'bulk pack' to 'retail pack' since tankers cannot be construed as 'bulk pack' is not applicable in the present case as the appellant themselves imported chemicals in bulk and transferred the same to their godown premises for labelling and packing of the goods from bulk pack to retail pack. I also find that the appellant has contended that goods packed in containers were sold to industrial consumers and not to be considered as retail pack. I find that the plea of the appellant cannot be accepted in view of decision of CESTAT New Delhi in the case of Nestle India Ltd. reported as 2011 (270) E.L.T. 575 (Tri. - Del.). The CESTAT vide Para 70 & Para 71 of the said order held as under: -

> 70. *While applying the law laid down by the Apex Court in relation to legal fiction created by the statutory provision under Note 12 of Chapter 29 quoted above, we will have to primarily ascertain the purpose behind introducing the said Note 12. The Note certainly relates to connotation of the term 'manufacture' and it seeks to widen the scope thereof by including the activities which would otherwise fall outside the scope of the definition of the said term under Section 2(f) of the said Act. Therefore, the purpose for which the said Chapter Note has been introduced in Chapter 29 is to widen the scope and the meaning of the term 'manufacture' in relation to the products covered by the said Chapter 29 of the Tariff Act. Mere process of labelling or relabelling of the containers and even repacking from bulk to retail pack are described as amounting to manufacture and, therefore, the resultant product would attract the duty under the said Act. Likewise, any process adopted for rendering the product marketable would also amount to manufacture even though such activity may not come within the purview of the definition of the term under Section 2(f). In other words, the Chapter Note attempts to remove any doubt about the activity described therein as being manufacture and subject to duty under the said Act.*
>
> 71. *The point to be considered with reference to the said Note is whether the process of mixing of the vitamins, collecting the resultant product in the containers, labelling them and storing them to be consumed for manufacture of final product as and when required would amount to treatment rendering the product marketable to a consumer. The Note uses four expressions namely, 'any other treatment' 'rendering' 'marketable', and 'consumer'. The term 'treatment' signifies a process by which someone would deal with something. The term 'rendering' implies giving or providing or performing something. The word 'marketable' signifies suitability of the product being bought and sold. The term 'consumer' means a person or thing that eats or uses something. There are the dictionary as well commonly understood meaning of the concerned terms used in the said Note.*
>
> (emphasis supplied)

6.4 The appellant has further contended that the goods seized under Panchnama dated 3.2.2016 were combination of goods falling under

Chapter 29, Chapter 38 & Chapter 39 of CETA, 1985, however, I find that nothing in this regard is forthcoming from the impugned order or the SCN.

6.5 The appellant has also contended that they were entitled for cenvat credit and therefore the matter is revenue neutral. I find that the plea of the appellant is incorrect as the appellant was registered as central excise dealer and they had already availed cenvat credit of CVD and SAD paid on import of chemicals and passed on the said cenvat credit to their customers. Hence, I find that confirmation of Central Excise duty of Rs. 17,62,500/- involved on goods lying in stock is not correct, however, the appellant is required to pay differential central excise duty on account of value addition of the products falling under Chapter 29 of CETA, 1985 which is required to be recovered from the appellant.

7. As regard to confiscation of goods and imposition of redemption fine in lieu of confiscation, I find that the appellant had properly accounted for the goods lying in stock, which cannot be disputed and the goods were not removed without payment of Central Excise duty in contravention of the Rules and thus, the goods cannot be confiscated. I therefore, have no option but to set aside imposition of redemption fine of Rs. 40 lakhs. The lower adjudicating authority has imposed penalty of Rs. 17,62,500/- under Rule 25 of the Rules subject to Section 11AC of the Act. I find that the goods cannot be confiscated under Rule 25 of the Rules as the appellant had properly accounted for the goods lying in stock and the goods were not removed without payment of Central Excise duty in contravention of the Rules, hence, penalty cannot be imposed upon the appellant under Rule 25 of the Rules also because the appellant vide their letter dated 12.8.2010 had informed the department about the processes to be carried out by them along with Chapter heading as per CETA, 1985.

8. In view of above factual and legal position, I hold that the appellant is liable to pay central excise duty on goods falling under Chapter 29 of CETA, 1985. In view of Chapter Note 10 to CETA, 1985. However, I find that the appellant has paid central excise duty of Rs. 15,75,239/- equivalent to cenvat credit availed by them, the appellant is required to pay only the differential central excise duty along with applicable interest. The

redemption fine of Rs. 40 lacs and penalty imposed under Rule 25 of the Rules are set aside.

९. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है

9. The appeal filed by the appellant is disposed off in above terms

(कुमार संतोष)
आयुक्त (अपील)

By Speed Post

To,

M/s. Dow Chemical International Pvt. Ltd.,
C/o Rishi Kiran Logistics Pvt. Ltd., Survey
No. 165, B/h Agarwal Pump, Opp.
Padana Ramdev Pir Mandir, Versana,
Taluka – Anjar, District - Kutch

मेसर्स डो केमिकल इंटरनेशनल प्रा लिमिटेड,
सी/ओ रिशि किरण लॉजिस्टिक्स प्रा लिमिटेड,
सर्वे नं. 165, अग्रवाल पंप के पीछे,
पदाना रामदेव पीर मंडिर के सामने
वर्सना, तालुका – अंजार, जिला – कच्छ

Copy to:

1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information please.

2) The Commissioner, CGST & Central Excise, Gandhidham Commissionerate, Gandhidham for necessary action

3) The Deputy Commissioner, CGST & Central Excise, Anjar-Bhachau Division, Gandhidham (Kutch).

4) Guard File.