

(2015) 11 AHC CK 0061

In the Allahabad High Court

Case No : Central Excise Appeal No. 358 of 2010

Commissioner Customs & Central Excise

APPELLANT

Vs

Honda Siel Power Products Ltd.

RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11 A, 2(f), 35 G, 35 H, 35 L
Central Sales Tax Act, 1956 — Section 14(iv)(xi)

Citation : (2015) 11 ADJ 450 : (2015) 11 ADJ 224 : (2016) 332 ELT 222 :
(2016) 36 GSTR 160

Hon'ble Judges : Tarun Agarwala and Surya Prakash Kesarwani, JJ.

Bench : Division Bench

Advocate : R.C. Shukla, for the Appellant; Nishant Mishra, B.J. Agrawal and P. Agrawal, for the Respondent

Judgement

Surya Prakash Kesarwani, J.—Heard Sri R.C. Shukla, learned counsel for the appellant and Sri Tarun Gulati alongwith Sri Nishant Misra and Sri Anupam Misra, learned counsel for the respondent.

Preliminary objection:

2. Learned counsel for the respondent has raised the preliminary objection on maintainability of the appeal as under:

"(a) The impugned order of the Tribunal is a common order passed in two appeals and as such the present single appeal against the orders passed in two appeals, is not maintainable.

(b) The controversy involved in the present appeal is also with respect to admissibility of exemption and as such the jurisdiction lies with the Hon'ble Supreme Court to entertain such appeal under Section 35L of the Central Excise Act 1944 (hereinafter referred to as the "Act")."

Submissions of the Appellant

3. Learned counsel for the appellant submits that the appeal was filed as back as in the year 2007 and it was admitted by orders dated 18.3.2010 read with order dated 18.11.2011 and as such the objection as to filing of separate appeal cannot be raised. With regard to the second preliminary objection, he submits that the issue involved in the present appeal is as to whether the bought out Pumps and own manufactured I.C. Engine put in single carton by the assessee would amount to manufacture of Power Driven Pumps (hereinafter referred to as the "PD Pumps"). Thus, the basic question involved is as to whether the aforesaid activity amounts to manufacture under Section 2(f) of the Act. If this question is answered in affirmative only then the question of exemption on the PD Pumps removed and sold by the assessee would arise.

4. On merit, he submits that the assessee has been manufacturing general purpose I.C. Engines capable of being used to discharge various functions like vibrator, concrete mixer, pumping, power generation etc. and has been clearing I.C. Engine as such for sale in the open market on payment of duty. The assessee was also clearing I.C. Engine for captive consumption without paying duty for use in the manufacture of PD Pumps where both the PD Pumps and the prime mover have been developed and manufactured by the assessee themselves. Besides this they have also been removing I.C. Engine without payment of duty alongwith bought out PD pump by simply placing both the items in a single carton and clearing the same as PD pump set in terms that bought out PD Pumps have been developed and manufactured by M/s. Mahendra Engineering Works, Coimbatore (for short "M/s. MEW").

5. A show cause notice was issued to the assessee on the allegation that the activity of mere placing bought out PD Pumps with the own manufactured IC Engine in cardboard carton is not covered by the provisions of Interpretative Rule 2(a) of Central Excise Tariff Act, 1985 and since the bought out PD Pump is complete in all respect and does not require any further process by the unit and, therefore, the activity of placing bought out pump with their own manufactured I.C. Engine is not manufacture as defined in Section 2 (f) of the Act. He refers to various paragraphs of the order-in-original and the impugned order of the Tribunal and submits that under the facts and circumstances of the case the benefit of the Notification No. 6/2002-CE, dated 1.3.2002 was not available to the assessee in respect of I.C. Engine cleared with bought out pump and, therefore, the Adjudicating Authority rightly held that the assessee is liable to discharge duty liability on the I.C. Engine.

Submission of the Respondent Assessee

6. Refuting to the submissions of counsel for the appellant, Sri Tarun Gulati, learned counsel, submits that Section 35 G of the Act clearly provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July 2003 (not being an order relating, among other thing to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of

assessment), if the High Court is satisfied that the case involve a substantial question of law. An order in original No. 01 dated 19.2.2004 was passed by the Commissioner of Central Excise Meerut - II for the period April 02 to February 03 creating a demand of Rs. 3,28,507/- with respect to I.C. Engine cleared with bought out Pumps as pump sets and another order in original No. 9-11 dated 31.1.2006 for subsequent period creating the duty demand of 1,78,08,035/- under Section 11 A of the Act adjudicating the show cause notices dated 9.6.2004 and 29.6.2005 were passed. Against these two orders-in- original separate appeals being appeal No. E/2619 of 2004 and E/1786 of 2006 were filed by the assessee before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi, under Section 35-B of the Act and the appeals were allowed by Final Order No. 831 and 832/06-EX dated 20.10.2006 which is a common order. Therefore, two separate appeals should have been preferred by the appellants before this Court.

7. On merit he submits that the assessee has manufactured I.C. Engine and purchased Pumps from M/s. MEW and placed the same inside single carton and marketed it as pump sets in unassembled condition. Thus, I.C. Engines were used in factory of production of the assessee and were consigned as a single commodity which amounts to manufacture under Section 2(f) of the Act. The assembly of the said article is required at the customer's end. In terms of Rule 2(a) of the Interpretative Rules to the Central Excise Tariff Act, the clearance is of fully made Pump in unassembled condition and the consignment as a whole is to be treated as a single commodity for the purposes of excise liability classifiable under Chapter heading 84.13 and, therefore, Engine would be exempt under the relevant notification. He, submits that definition of the word "manufacture" under Section 2(f) of the Act is very widely worded which clearly covers the activity in question. He also refers to the provisions of Rule 2(a) of the interpretative Rules as well Chapter Note No. 3 and 6 of Section XVI of the Central Excise Tariff Act, the Circular No. 2 to 4/58/96-CX dated 26.6.1996 issued by the Central Board of Excise and Customs New Delhi and the law laid down in the cases of Royal Bank of Scotland N.V. Vs. Commissioner of Cus. and C. Ex., , Commissioner of Service Tax Vs. Scott Wilson Kirkpatrick (India) Pvt. Limited, , Commissioner of Service Tax Vs. Ernst and Young Pvt. Ltd., , Laxmi Udyog Vs. Commissioner of Central Excise, , Western India Paints & Colour Co. Ltd. v. CCE Madras , 2000(117) ELT 555 , Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, , Metro Readywear Company v. Collector of Customs, 1975 (2) ELT 3520 (Kerala) , Fedders Lloyd Corportion Ltd. Vs. Commissioner of Central Excise, Mumbai, , Siddhartha Tubes Ltd. Vs. Commissioner of Customs and Central Excise, Indore (MP), and Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, .

Discussion and Findings

8. We have, carefully, considered the submissions of learned counsel for the

parties and perused the record.

9. With the consent of learned counsel for the parties the following questions of law have been formulated and they have been heard on it:--

"i. Whether under the facts and circumstances of the case, the High Court has jurisdiction to entertain the present appeal under Section 35 G of the Act?

ii. Whether under Section 35 G of the Central Excise Act, 1944 separate appeal shall lie to the High Court against every order passed in appeal by the Tribunal including a common order passed by the Tribunal in two or more appeals?

iii. Whether placing of own manufactured I.C. Engine with bought out pump in a single carton would amount to manufacture under Section 2(f) of the Central Excise Act 1944?"

Question No. (i)

10. Section 35 G of the Act provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law. Section 35 L provides that an appeal shall lie to the Supreme Court from any judgment of the High Court delivered in an appeal under Section 35 G or on a reference made under Section 35 G by the Appellate Tribunal before 1st day of July, 2003 or on a reference made under Section 35 H . Clause (b) of Section 35 L provides that an appeal shall lie to the Supreme court from any order passed by the Tribunal relating among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment. Thus, the exclusion of power of the High Court to entertain an appeal under Section 35 G of the Act is limited to an order of the Tribunal relating, among other things to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment. Thus Section 35 G of the Act does not exclude the power of the High Court to entertain an appeal against an order passed by the Appellate Tribunal on the question of manufacture. The basic question involved in the present appeal as also contested by the parties from the initial stage is whether the activity of the assessee with respect to the goods in question cleared by them is manufacture? Thus, we do not find any substance in the first preliminary objection raised by the respondent assessee as the maintainability of the appeal before the High Court under Section 35 G of the Act and accordingly, the said preliminary objection is rejected. We hold that the appeal is maintainable under Section 35 G of the Act.

Question No. (ii)

11. It is undisputed that two orders in original were passed by the Commissioner

of Central Excise against which the respondent assessee filed separate appeals before the Tribunal being appeal No. E/2619/04 and Appeal No. E/1786/06.

12. Thus two appeals were decided by the Tribunal by final order No. 831/06 and 832/06 - EX dated 20.10.2006 which is a common order deciding both the appeals. Section 35 G provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal. The impugned common order of the Tribunal clearly discloses that a final order No. 831/06/EX was passed in appeal No. E/2619/04 and Final Order No. 832/06 EX was passed in Appeal No. E/1786/06. Under the circumstances the appellants should have filed two separate appeals challenging the final order No. 831/06 arising from appeal No. E/2619/04 and Final Order No. 832/06 arising from appeal No. E/1786/06, but, instead, a single appeal has been filed by the appellants. Thus the present appeal shall be treated as an appeal only against one final order of the Tribunal. Considering the facts and circumstances of the case the present appeal is treated to be an appeal filed against one Final Order. Consequently, the present appeal is entertained against the impugned final order of the Tribunal arising from order in Original No. 9-11 dated 31.1.2006.

Question No. (iii)

13. Before we proceed to examine the legal issue, it would be expedient to notice undisputed facts which emerge from the order in original and the impugned final order of the Tribunal.

14. The assessee is engaged in the manufacture of portable gen set I.C. Engine and parts thereof and P.D. pump sets falling under chapter headings No. 84.07, 84.09, 85.02, 85.03 and 84.13 of the Schedule to the Central Excise Tariff Act, 1985. The assessee has been manufacturing general purposes I.C. Engines capable of being used to discharge various functions like vibrator, concrete mixer, pumping power generation etc. They have been clearing I.C. Engine, as such, for sale in the open market on payment of duty. They have also been clearing I.C. Engine for captive consumption without payment of duty for use in the manufacture of PD Pumps where both the Pumps and the I.C. Engine have been developed and manufactured by the assessee. Apart from this the assessee has also been removing I.C. Engine without payment of duty alongwith bought out P.D. Pump by placing both the items in a single carton and clearing the same as P.D. Pump set [model No. WSK 2020, WMK 3025(3), WMK 3025, WMK 2520, WMK 2020, WMK 3025 (3) (L)]. The aforesaid bought out Pumps have been developed and manufactured by M/s. MEW.

15. Show cause notices were issued by the appellants to the respondent assessee alleging that the activity of mere placing bought out Pump with own manufactured I.C. Engine in a cardboard carton is not covered by the provision of Interpretative Rule 2(a) of the Tariff Act, 1985, inasmuch as, the bought out Pump is complete in all respect at consignee's end and does not require any further process by the unit. It was also alleged in the show cause notice that the

activity of placing bought out Pump by the assessee with their own manufactured I.C. Engine is not "manufacture" as defined under Section 2(f) of the Act. The assessee submitted the reply. The Adjudicating Authority framed the following question for determination:

"Whether the mere placing of a bought out Pump with their own manufactured I.C. Engine in a single carton would amount to manufacture and entitle them (assessee) for the benefit of Notification No. 6/2002, dated 1.3.2002".

16. The Adjudicating Authority recorded findings of fact with regard to removal of two types of pump set as under:

"M/s. HSPPL claimed to have manufactured and cleared the following to types of pump sets:--

(a) Honda make mono block pump sets model WBK30, WBK 7515, WBK20, WBK30 etc. where Honda I.C. Engine as well as the pump is developed, designed and manufactured by them. This Honda pump is a compact unit.

(b) The other pump set is a combination of bought out Mahendra pump with Honda I.C. Engine packed in a single carton. The printed sheet to be affixed on such carton carried the description of Honda I.C. Engine as well as Mahindra bought out pump"

17. After considering the evidences on record the Adjudicating Authority recorded the following findings of fact in the order in original dated 31.1.2006:--

"The office orders of the Marketing Accounts Cell of M/s. HSPPL show that for pumps of model WMK 3025(3) and WMK 3025, they were providing GK-300 and GK-200 Honda I.C. Engines respectively with bought out Mahendra Pumps and whereas, in case of their own manufactured Honda make water Pump Sets, where pump as well as I.C. Engine is developed & manufactured by them, they are maintaining the Honda Pump Set only. The perusal of the invoices used by M/s. MEW also reveal that the models of WSK and WMK series pertained to their "Mahendra" pumps. These are supplied with the Honda Engine Models GK-100, GK-200 & GK-300 in a single carton by M/s. HSPPL for use in the manufacture of Pump Sets at dealer/customer's end.

The agreement between M/s. MEW and M/s. HSPPL clearly mentions that Mahendra" shall be embossed on the casing of Pump set and a name plate showing "Mahendra" shall also be affixed on the Pump itself. M/s. HSPPL were also supplying two buyers manual with such combination of Pump and I.C. Engine, one pertained to their own I.C. Engine and the other pertaining to "Mahendra" pumps supplied by M/s. MEW. These manuals separately provided the description and the functioning of I.C. Engine and the "Mahendra" pump.

The packing of such bought out Mahendra Pump with own Honda I.C. Engine clearly makes the distinction between the Honda Mono Block pump set and the other Pump sets using bought out pumps in respect of which no manufacturing

activity was taken place at M/s. HSPPL. Hence it can be said that no manufacturing was taking place in respect of Mahendra pump. And since there is no manufacturing involved, the benefit of condition No. 58(ii)(b) of the Notfn. No. 6/2002-CE dated 1.3.2002 is not available to M/s. HSPPL for these products.

Regarding the Board's circular dated 26.6.96, I find the same not being applicable as there is no dispute in classification of P.D. Pump sets. The present issue revolves around whether the activity undertaken by M/s. HSPPL in relation to bought out pumps tantamounts to manufacture or not and whether they are eligible for the benefit of Notf. No. 6/2002-CE dated 01.03.2002.

M/s. HSPPL in support of their contention have also cited certain case laws. The ratio of the judgment in the case of M/s. Vishwa Industrial Co. (P) Ltd. v. CCE, does not appear to be applicable in the instant case because the issue taken up therein pertained to supply and erection of the Conveyer at site against the specific contract placed upon the party. Further the ratio of the judgment of Fedders Lloyd Corp. Ltd. v. CCE, Mumbai-II is not applicable because the appellant were affixing their own brand before clearing the split Air Conditioner to the site of the customer. In the instant case the identity & the brand of Mahendra Pumps manufactured by M/s. MEW is retained. Even on the packing of the combination of bought out Pumps and I.C. Engine to be cleared, the description of both Honda Engine as well as Mahendra pump is given. The printed sheet to be pasted on the packing box of Model WMK 2520 bear the description "GK-200 with Mahendra WMK 2520 Water Pump". It meant that the identity of both I.C. Engine and Mahendra Pump is retained separately. While in case of their own manufactured Honda make P.D. Pump Sets Model like WBK 15 M/s. HSPPL pasted the label reading as "Honda Portable Water Pumping Set". The ratio of this judgment in the case of M/s. Punjab Recorders v. CCE, Chandigarh, has also not relevance in the instant case because the subject issue relates to inclusion of value of Lead Acid Batteries (assembled out of cells by the appellant in his factory itself) in the value of UPS.

In view of aforesaid it is apparent that no manufacturing process took place in respect of the PD Pumps sets with Mahendra Pumps in the factory of M/s. HSPPL. As such the I.C. Engines were not used within the factory of production for the manufacture of these models of the PD Pumps sets. Therefore, I hold that clearing of own manufactured I.C. Engine by placing them in a carton containing bought out pump does not amount to manufacture of PD Pump Sets. Accordingly, the benefit of the Notfn. No. 6/2002-CE dated 1.3.2002 is not available to M/s. HSPPL in respect of I.C. Engines cleared with bought out Pumps as PD Pump Sets, I hold that M/s. HSPPL should have discharged the duty liability on the I.C. Engines."

18. In the impugned order the tribunal has not considered the findings of fact based on crucial evidences recorded by the Adjudicating Authority. It merely referred to the circular of the CBEC and observed in paragraphs 5,6,7 and 8 as under:

"5. We have perused the record and heard both sides at length. Much case law has also been cited by both sides on the issue of manufacture.

6. As already noticed, the appellant was discharging duty at the time of clearance of the PD pump packages after classifying them under 8413. The appellant described the item under sale as "Water Pump-WSK2020" etc. The dealer invoice produced, forming part of the record, describes the item as "Portable water Pumpset Honda-WSK 2020". Thus, the appellant as well as trade were recognizing the item cleared as pump set. The tariff heading already extracted specifically recognized power driven pump as an item. The board's clarification also notes that power driven pump is a separately recognized item. We may read that circular:--

Subject:-- CE-Classification and excisability of Power Driven Pump Sets for handling water- Regarding.

I am directed to say that the Confederation of Indian Industry has pointed out about divergence in practice of classification of Power Driven Pump Sets for handling water. A P.D. Pump Set may be a pump having an inbuilt prime move designed and built as a complete unit, called a monoblock pump-set, or a pump and a prime mover being two separable units whether coupled or not put/intended to be put on a common platform. It has been represented that it is classified in some Commissionerates under Chapter Heading 84.13 extending the benefit of Notification No. 56/95, dated 16.3.1995 (previous Notification No. 46/94 dated 1.3.94) either fully or partially whereas, other Commisisonerates are classifying this product under Chapter Heading 84.79 hereby denying the benefit of exemption.

2. The matter has been examined in depth. Board in its F. No. 151/13/92CMS (Pt.) (Circular No. 11/11/94, dated 2.2.94) has held that elector motors or rotors or stators are components parts P.D. Pumps. Following the same analogy, the prime mover, i.e., I.C. Engine may be treated as an integral part of P.D. Pumps. The board takes note of Note 3 of Section XVI of Central Excise Tariff which states that compromise machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as, if consisting only of that component or as being that machine, which performs the principal function. As the principal function of a pump set is that of the pump, the pump set is rightly classifiable under Chapter sub-heading 84.13.

3. Hence the Board is of the view that Power Driven Pump Sets are classifiable under Chapter Heading 84.13 and if such Power Driven Pump sets are primarily meant for handling water, the benefit of Notification No. 56/95, dated 16.3.95 will be admissible to the whole pump set.

7. The first para of the above circular notes industries stand on the item. It is clear therefrom that the industry recognized PD pump sets as two varieties, one

monoblock and the other "having two separable units whether coupled or not put/intended to be put on a common platform". Thus, the industry recognition of power driven pump is as a pump put together or intended to be put together on a common platform. In the appellant's case also, the carton contained a pump and an engine along with the platform on which the engine and pump are to be mounted. The packing contained all the items required from putting together at site, a power driven pump. Thus, the packing was a power driven pump. Central Excise law makes no distinction between a manufactured item cleared as an assembled integral unit or cleared as parts, because whether an item is fully put together or cleared as parts is merely a matter of convenience of packing and transport. In fact, even incomplete products, having the essential characteristics of a manufactured item get treated as the fully manufactured item for the purpose of levy.

8. From the above noted factual situation, we are clear that the packets removed by the appellants were, in fact, power driven pump sets and that by putting together an appropriate pump, an engine and platform the appellant has produced a new item viz. power driven pump and the finding to the contrary is not sustainable. It is well settled that manufacture involves the bringing into existence of a new item with a distinct name, identity, character and use. That a power driven pump has a different and new commercial identity, character and use than the components going into its production is clear from the fact that the pump or engine in itself cannot perform as a power driven pump. We have already noted that PD pumps are recognized as a separate product by the industry manufacturing it and Central Excise tariff. We do not consider it necessary to go into the case law relied upon by both sides, since we have taken a view that in the facts of the case and the industry trade and taxation practice, there could be no dispute that power driven pump is a manufactured item. The Commissioner was, therefore, in error in holding that the clarification of the board was not relevant on the issue of manufacture. This is to presume that classification circulars are an academic exercise in a theoretical framework and has no application in the real world of tax administration."

19. The tribunal has also observed in the next paragraph of impugned order that in case the Commissioner was of the view that there was no manufacture, the proper and just course would be to adjust the duty erroneously paid on the pump sets towards the duty payable on the Engine.

20. The aforementioned findings recorded by the Tribunal in paragraph 5,6,7 and 8 of the impugned order clearly goes to show that Tribunal has completely ignored the findings of fact based on relevant material recorded by the Adjudicating Authority as reproduced in paragraph 18 as above.

21. In paragraph 8 of the impugned order the Tribunal also completely ignored the fact that the respondent assessee is manufacturing and clearing I.C. Engine being used for vibrator, concrete mixer, pumping, power generation etc. and have been clearing I.C. Engines, as such, for sale in the open market on payment of

duty and also clearing for the captive consumption without payment of duty for use in the manufacture of Honda make P.D. pump of certain variants where both the pump and prime mover i.e. I.C. Engine have been developed and manufactured by assessee themselves. The dispute was with regard to payment of duty on such I.C. Engines which were merely put in a carton along with bought out Pump manufactured by M/s. MEW. The packing of bought out Mahindra pump with the I.C. Engine manufactured by the respondent assessee contained two buyers' manual, one pertain to their own I.C. Engine and other pertain to Mahindra Pumps purchased from M/s. MEW. These manuals separately provided the description and the functioning of I.C. Engine. The Mahindra Pump manufactured by M/s. MEW has been retained separately even on the printed sheet to be pasted on the packing box which bear the description "G.K. 200" with Mahindra WMK 2520 water pump". These facts clearly indicate that the I.C. Engines were not used by assessee within the factory of production for the manufacture of the P.D. Pump sets in question.

22. In view of the above discussion, we are of the view that the finding recorded by the Tribunal in the impugned order that by putting together a Pump and Engine and a platform the assessee had produced a new item viz. "P.D. Pump" is wholly baseless and also without consideration to the findings of fact based on relevant material and evidences recorded by the Adjudicating Authority. Merely putting together one bought out item with own manufactured item in a carton does not involve any process amounting to manufacture under Section 2(f) of the Act.

23. In the case of Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, , Hon"ble Supreme Court laid down the law as under:

"We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

24. In the case of Udhavdas Kewalram Vs. Commissioner of Income Tax, Bombay City I, Hon"ble Supreme Court held that the Tribunal should consider with due

care all the material facts and record its finding on all the contentions raised by the appellant, in the light of the evidence and relevant law. In the case of Metal Extruders (India) Pvt. Ltd. Vs. Customs, Excise and Gold (Control) and Another, , Hon"ble Court held that the order of the Tribunal must show that it really went into the question placed before it by recording its finding of fact.

25. In the case of Commnr. of Central Excise, Bangalore Vs. Srikumar Agencies etc. etc., , Hon"ble Supreme Court held that order of the Tribunal placing reliance on a judgment without analysing facts is not proper and consequently the matter was remanded.

26. In the case of Commissioner of Central Excise Commissioner Batore v. Matri Plex Pump Private Ltd. 2015(322) ELT 6 SC (para 3 and 4), Hon"ble Supreme Court held as under:

"In that view of the matter, we are of the considered opinion that being the Tribunal, a Statutory Authority and being vested with the responsibility of appreciating and recording findings of facts, it was expected that it would analyse and discuss the reasons for arriving at the said conclusion by the Commissioner before taking a contrary view.

Considering the facts and circumstances of the case, we set aside the order of the Tribunal and remit back the matter to CESTAT for de novo consideration of the facts of the case after which a considered and reasoned decision shall be rendered by the Tribunal."

27. In view of the above discussion, we are of the view that the impugned order of the Tribunal can not be sustained and, consequently, deserve to be set aside and the case deserve to be remitted back to the Tribunal for de novo consideration of the facts of the case, the findings recorded by the Adjudicating Authority in the order in original and the evidences referred therein after which a reasoned decision shall be rendered by the Tribunal.

28. Before parting, it would be appropriate to consider the definition of the word "manufacture" under Section 2(f) of the Act which reads as under:

"(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 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;"

29. A perusal of the above noted definition of the word "manufacture" clearly shows that the activity of manufacture must involve any process incidental or ancillary to the completion of a manufactured product, or 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, 1985 (5 of 1986) as amounting to manufacture, or any process which, in relation to the goods satisfied in the third schedule involves packing or repacking of such goods in a unit container or labelling or relabelling 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.

30. Mere addition in the value of a product would not amount to manufacture. To bring the process within the definition of manufacture, it must be shown that due to the process original identity of the product undergoes transformation and it becomes a distinct and new product.

31. In the case of Satnam Overseas Ltd. Vs. Commr. of Central Excise Hon^{ble} Supreme Court held as under:

"It follows from the above that mere addition in the value, after the original product has undergone certain process, would not bring it within the definition of "manufacture" unless its original identity also under goes transformation and it becomes a distinctive and new product."

32. In the case of XL Telecom Ltd., Hyderabad Vs. Superintendent of Central Excise, Hyderabad and Others, , the Andhra Pradesh High Court considered the law settled by Hon^{ble} Supreme Court on the question of "manufacture" in the cases of Union of India (UOI) Vs. Delhi Cloth and General Mills, , South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, , Ujagar Prints Vs. Union of India (UOI) and Others etc. etc., and Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, and held as under:

"11. The Supreme Court in DCM's case (supra) construing the definition of "manufacture" observed the word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be. While making the above observation relied on a passage quoted in Permanent Edition of Words and Phrases, Vol.26 from an American Judge which reads as follows :

"manufacture" implies a change, but every change is not manufacture and yet every," change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use.""

In South Bihar Sugar Mills Ltd. v. Union of India, (supra) the Supreme Court

followed the decision in DCM Ltd. and observed that :

"The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use."

In *Ujagar Prints v. Union of India*, (supra) the Supreme Court reiterated the view expressed in DCM's case and observed that :

"The prevalent and generally accepted test to ascertain that there is "manufacture" is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. There might be borderline cases where either conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between "processing" and "manufacture", results in an oversimplification of both and tends to blur their interdependence in cases such as the present one."

In *Moti Laminates Private Ltd. v. Collector of Central Excise, Ahmedabad*, (supra) while reiterating the judgment in DCM's case the Supreme Court observed :

"Therefore, where the goods are specified in the schedule they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression "produced or manufactured" has further been explained. By this Court to mean that the goods so produced must satisfy the test of marketability. Consequently, it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured they were not marketed or capable of being marketed."

The next decision to be considered is *Porriils & Spencer (Asia) Ltd. v. CCE, New Delhi*, (supra) while reiterating the test laid down in DCM's case it was held :

"Every change does not necessarily fall within the expression "manufacture" unless it is shown that the process has brought into existence any new product having a distinct identity in the commercial world. In the absence of any evidence in that behalf which the Revenue ought to have laid, it is difficult to come to the conclusion that excisable goods came into existence by the treatment of cotton and nylon yarn into a multifold yarn."

12. What emerges from the above is excise duty is leviable on goods manufactured. The expression manufacture means bringing into existence a new substance and does not mean merely to produce some change in a substance, however minor in consequence the change may be and as a result of treatment,

labour and manipulation there should be transformation in the raw material and as a result of treatment, labour and manipulation a new and different article must emerge having a distinct name, character or use. It is not enough if there is change, the change should result in bringing into existence a new and definite article having a distinctive name, character or use and the said article must be marketable and it should be known to the market as such. In the absence of any one of the ingredients referred to above, the provisions of the Act are not attracted and no excise duty is leviable. Even if the goods so produced were excisable goods mentioned in the schedule, they cannot be subjected to duty unless they are marketed or capable of being marketed. The marketability is one of the principle test in determining the liability to excise duty. In addition the product which is brought into existence must have a distinct identity in the commercial world.

13. Let us apply the above tests to the facts of the present case. As pointed out in the earlier paragraph, the identity of the items placed in the kit is not changed. They are known in the market as such. There is no transformation in the articles which are placed in the kit. They are marketable as such. Further, no process is also involved except that all the articles are put together in one box. It is true that by placing all these articles in one kit the kit has a distinct name known as "cable jointing kit". However, there is no change in character and use of the articles placed in the kit. In other words, except the test that the articles which are placed in the kit has a distinct name, the other tests have not been satisfied. Therefore, placing different articles in the kit does not amount to manufacture. If once the activity of placing the articles in the kit does not amount to manufacture, the provisions of the Act are not applicable as the levy of excise duty is on the production and manufacture of goods."

33. In the case of Faridabad Iron and Steel traders Association v. Union of India 2004(178) ELT 1099 (Delhi), Delhi High Court considered the question as to whether process of cutting or silting of steel sheet in coil form to specific size amounts to manufacture? After referring to large number of decisions of Hon"ble Supreme Court held that mere cutting or silting of steel sheet does not amount to manufacture because identity of the product remains unchanged and the steel remains steel even after cutting no new different and distinct article emerges having distinct name, character and use. The Special leave to appeal filed by the Union of India against the aforesaid judgment of Delhi High Court was dismissed by Hon"ble Supreme Court, reported in 2005 (181) ELT A 68 (SC).

34. The judgment relied by learned counsel for the respondent assessee in the case of Western India Paints and Colour Co. Ltd. (supra) is clearly distinguishable on facts inasmuch as the aluminium paint was cleared by supplying aluminium paste in a specified quantity along with aluminium medium in a specified quantity in a single carton to facilitate their use as aluminium paint by the consumer as the aluminium paste, if, kept in a mixed form has no shelf life. Therefore, it was necessary to pack both the aluminium paste and aluminium medium in specified

quantity for ready use as aluminium paint.

35. The case of Rajasthan State Chemical Works (supra) is also of no help to the respondent assessee as evident from paragraph 11, 12 and 16 of the judgment as under:

"11. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end-result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.

12. Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to, manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture of processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

16. A process is a manufacturing process when it brings out a complete transformation for the whole components so as to produce a commercially different article or a commodity. But, that process itself may consist of several processes which may or may not bring about any change at every intermediate stage. But the activities or the operations may be so integrally connected that the final result is the production of a commercially different article. Therefore, any activity or operation which is the essential requirement and is so related to the further operations for the end-result would also be a process in or in relation to manufacture to attract the relevant clause in the exemption notification. In our view, the word "process" in the context in which it appears in the aforesaid notification includes an operation or activity in relation to manufacture."

36. The judgment in the case of Siddharth Tubes Ltd. (supra) is also no help to the respondent assessee inasmuch as it to Section 14(iv)(xi) of the Central Sales Tax Act. The case of Mangalore Chemicals Fertilizers Ltd. (supra) is not on the question of manufacture.

37. In view of the above discussion, we set aside the impugned final order of the Tribunal arising from the order in original No. 9-11 dated 31.1.2006 and remand the matter to the Tribunal to pass an order afresh in light of the directions and observations made above, after affording opportunity of hearing to the parties.

38. In result, the appeal succeeds and is hereby allowed to the extent indicated above. However, there shall be no order as to costs.