
(2022) 02 CESTAT CK 0013

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 50780 Of 2020

**G S Pharmabutors Pvt. Ltd. (Unit-II) Vs Additional Director General,
(Adjudication)??**

Date of Decision : 15-02-2022

Acts Referred:

Central Excise Act, 1944 — Section 2(f), 2(f)(iii), 4A, 11A(4)
Central Excise Tariff Act, 1985 — Chapter 33

Citation : (2022) 02 CESTAT CK 0013

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. G.S. Pharmabutors Pvt. Ltd. (Unit-II), Rudrapur (Uttarakhand), the appellant has filed this appeal to assail the order dated 04.03.2020 passed by the Additional Director General (Adjudication), New Delhi, the Additional Director General confirming the central excise duty of Rs.7,87,23,922/- proposed in the show cause notice with penalty and interest by invoking the extended period of limitation contemplated under section 11A(4) of the Central Excise Act 1944, the Excise Act. The benefit of the area based exemption Notification dated 10.06.2003 that exempted the goods specified in the First and the Second Schedule to the Central Excise Tariff Act 1985, the Tariff Act and cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate from the whole of the duty of excise or additional duty of excise leviable thereon subject to certain specified conditions, has been denied to the appellant. The said exemption notification was to apply to new industrial units which had commenced commercial production on or after the 7th day of January, 2003 but not later than the 31st day of March, 2010 and was to apply for a period not exceeding ten years from the date of publication of the notification in the Official Gazette or from the date of commencement of commercial production, whichever was later. The condition stipulated in paragraph 4 of the notification, which is the relevant clause, is reproduced below:

"4. The exemption contained in this notification shall not apply to such goods which have been subjected to only one or more of the following processes, namely, preservation during storage, cleaning operations, packing or repacking of such goods in a unit container or labeling or re-labelling of containers, sorting, declaration or alteration of retail sale price and have not been subjected to any other process or processes amounting to manufacture in the States of Uttarakhand or Himachal Pradesh."

(emphasis supplied)

2. The processes, namely, preservation during storage, cleaning operations, packing or repacking of such goods in a unit container or labelling or re-labelling of containers, sorting, declaration or alteration of retail sale price can be called peripheral activities.

3. "Manufacture" is defined in section 2(f) of the Excise Act to include 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 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 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."

(emphasis supplied)

4. A perusal of the aforesaid paragraph 4 of the exemption notification and the definition of "manufacture" contained in section 2(f) of the Excise Act will show that if a manufacturer is engaged in only the aforesaid peripheral activities, the exemption would not be available to it. The exemption would be available only if the goods have "been subjected to any other process or processes amounting to manufacture in the State of Uttarakhand or Himachal Pradesh".

5. The appellant manufactures excisable goods, namely, lip-care, eye care, face powder, skin care, and hair care products in the unit situated at Rudrapur (Uttarakhand) and availed the area based exemption under the notification dated 10.06.2003. The appellant added a new product called nail enamel for manufacture in its unit and submitted the option as required under the notification on 30.03.2010. According to the appellant, the sole buyer of the nail enamel manufactured by the appellant was M/s Modi Revlon Pvt. It has also been stated that prior to 30.03.2010, M/s Modi Revlon was getting nail enamel

manufactured by M/s Fiabila India Ltd., Fiabila located at Raigad.

6. For the purpose of manufacturing nail enamel, the appellant claims that it purchased two raw materials, namely, colour solution and thixo lacquer from Fiabila. The colour solution raw material is paint & varnish which is available in 20/50Kg. packages but since it is of high viscosity, it cannot be filled in small bottles in which nail enamel has to be mandatorily sold in the market under the provisions of the Drugs and Cosmetics Act, 1940, the Cosmetics Act read with the Bureau of Indian Standards Act, 2016, the BIS Act. The appellant claims that the colour solution is neither known commercially or to the consumers as nail enamel and they are not marketable as nail enamel. It is only because of the processes that are undertaken by the appellant that the manufacture of nail enamel takes place and the goods are rendered marketable to the consumer.

7. According to the appellant the following processes are undertaken on the raw material procured from Fiabila:

- (i) testing as per the requirement of the buyer;
- (ii) testing and ensuring compliance of the raw materials as well as finished goods to the mandate of the Cosmetics Act and the BIS Act with respect to colour, odour, appearance, foreign particles, heat liability, clarity and gloss, %age solid, viscosity, set to touch time, dry through time, bottle tone, heavy metals, arsenic, adhesion test, scratch test and blush test for which tests parameters, tolerance range and even apparatuses have been prescribed under law;
- (iii) homogenization of the colour solution by stirring it with the help of pneumatic stirrer;
- (iv) mixing of thixo lacquer in predetermined quantity with the colour solution in the kettle and homogenization of the mixture;
- (v) adjusting the viscosity of the resultant product so that it can be filled in the small bottle with brush attached to the cap of the bottle for application on the nails mandatorily prescribed for packing nail polish;
- (vi) filling the nail enamel in small bottles; and
- (vii) labeling the small bottles with declaration of the retail sale price.

8. The appellant further claims that all the above processes are successive processes incidental and ancillary to the completion of the manufactured product namely, nail enamel and the processes carried out by the appellant on the raw material (i.e. paint and varnish) resulted into emergence of a new product known commercially to the consumers as nail enamel which is marketable and has a name, character and use distinct from the raw material used, which has lost its identity. The appellant, therefore, believed that the processes carried out it on the raw material amounted to 'manufacture' under section 2(f) of the Excise Act.

9. However a demand cum show cause notice 2-3/05/2018 was issued to the

appellant, mentioning therein:

21. Whereas the crux of the para 4 of above-said notification is that the assessee is not entitled for benefit of exemption if they merely engage themselves in one or more of the following processes viz. preservation during storage, cleaning operations, packing or repacking of such goods in a unit Container or labeling or re-labeling of containers, sorting, declaration or alteration of retail sale price. As per chapter note 5 of chapter 33 of Central Excise Tariff, labeling or relabeling of containers intended for consumers or repacking from bulk to retail pack amounts to manufacture. The party is doing storage, packing or repacking of goods in unit container, labeling or relabeling of containers declaration of MRP on the bottles. The party is packing, re-packing, labeling /relabeling and the said activity is covered under the definition of "manufacture" as per section 2(f) of the Central Excise Act, 1944 thus, Central Excise duty is chargeable on the said activities. Further, as the party is undertaking process of storage, repacking from bulk to retail and labeling & re-labelling of retail containers and do not undertake any other process which amounts to manufacture, the benefit of central excise duty exemption under notification no. 50/2003-CE dated 10.06.2003 seems not admissible to them. Thus, from the above it appears that Central Excise duty is leviable on the manufacture and clearances of Nail Enamel by the party.

(emphasis supplied)

10. The show cause notice also invoked the extended period of limitation since the period of dispute is from 2013-14 up to June 2017 under section 11A (4) of the Excise Act. The appellant filed an interim reply as also a final reply to the aforesaid show cause notice denying the allegations mentioned therein and stated that it was entitled to benefit of the exemption notification.

11. The Additional Director General however, did not agree with the submissions made by the appellant in the reply filed to the show cause notice and denied the benefit of the exemption notification to the appellant. The relevant paragraphs of the order are reproduced below:

"38. The Noticee's contentions under paras C.1 and C.2 are as follows:-

C.1 That it has been alleged in the SCN that the test reports of samples received from CRCL revealed that finished products and Colour solution were found to have similar composition and characteristics while the r/m Thixo Lacquer was a solvent only. Further, it has been alleged that Shri Tejas S. Gupte, in his statement dated 18.04.2017, had stated that almost all the quality parameters and their range for input, namely, Colour solution were similar to the finished product parameters. Therefore, it has been concluded that the properties of the finished product (nail enamel) were similar to that of input (Colour solution) except variation of viscosity for which the Noticee added and mixed. Thixo Lacquer solution to get desired viscosity. That the only change (brought about by the noticee) was in the range of viscosity and nothing else. This view is incorrect in view of the fact that the change in the physical properties (viscosity and

Colour) of the product brought about by the Noticee had rendered the product packable in the phials in which nail polish is sold to the ultimate consumer and as a consequence, had rendered the product marketable.

C.2 That the Noticee had brought about changes in the physical properties of the inputs received from M/s Fiabila by making the Colour solution homogenous, reducing its solid contents and thereby reducing its viscosity. The department failed to obtain reports from CRCL or any other lab regarding changes in the physical properties of the inputs vis a vis the finished goods. The department failed to get tested viscosity of the products which was the most important and the only parameter to decide the marketability of the product, namely, nail polish to the consumer.

38.1. In Contention C.1 the Noticee contend that the department is not correct in holding the view that the only change between the raw material and the final product is the change in viscosity. In Contention C.2 the Notices have themselves declared that Viscosity is the only parameter to decide the marketability of the final product i.e. Nail Polish and they had brought about changes in the physical properties of inputs received from M/s Faibila by reducing the viscosity of the colour solution. Thus the contention C.2 shows that the department's allegation that the only change is viscosity and colour is correct. Therefore Contention C.1 falls flat.

38.2 in their Contention C.2 above the Noticee has admitted that viscosity of the products is the most important and the only parameter to decide the marketability of the product. In this regard, I find that in the case of Commissioner of C. Excise, Bangalore-II vs. M/s Osnar Chemical Pvt. Ltd. reported in 2012 (276 ELT 0162 (S.C.)), the Hon'ble Supreme Court has held as follows:-xxxxxxxxxx

38.2.1. On a careful reading of the relevant portion of the judgment reproduced hereinabove it becomes clear that even if the resultant product achieves superior quality after the activities and even if the resultant product has different viscosity from that of the product before the activity carried out by the manufacturer, even if the penetration becomes different after the activity carried out by the manufacturer, these activities cannot be considered to be amounting to manufacture for the purpose of levying Central Excise Duty.

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52. In light of elaborate discussion and conclusions arrived in paragraph # 34 to 51, I hold that the Show Cause Notice succeeds on merit and hence I hold that the activities carried out at the premises of the Noticee company in Uttarakhand do not amount to Manufacture and the Noticee is only carrying out peripheral activities specified in paragraph 4 of the exemption notification therefore the benefit of Area Based Exemption Number 50/2003-CE dated 10.06.2003 is not available to the Noticee. The Noticee is liable to pay Central Excise Duty on clearance of Nail polish and I hold accordingly."

(emphasis supplied)

12. The Additional Director General also observed that the extended period of limitation had been correctly invoked and, therefore, confirmed the demand of penalty and interest.

13. Shri R.M. Saxena, learned counsel appearing for the appellant made the following submissions:

(i) The processes carried out by the appellant on the raw material (i.e. paint and varnish) resulted into emergence of a new product known commercially and to the consumers as nail enamel, which product was marketable and had a name, character and use distinct from the raw material used, which had lost its identity. The processes carried out by the appellant on the raw material, therefore, amounted to manufacture under section 2(f) of the Excise Act;

(ii) The processes undertaken by the appellant on their raw materials being incidental and ancillary to the completion of the manufactured product, namely, nail enamel, amounted to manufacture in terms of s. 2(f)(i) of the Excise Act;

(iii) The processes undertaken by the appellant would also result in the goods being "subjected to any other process or processes amounting to manufacture in the State of Uttarakhand or Himachal Pradesh" and, therefore, the appellant would be entitled to the benefit of the area based exemption notification. In this connection the learned counsel submitted that the treatment adopted on the goods (colour solution) by the appellant rendered the product marketable to the consumers as nail enamel;

(iv) Nail enamel manufactured by the appellant is packed in less than 10 ml bottles and, therefore, is not subject to MRP based assessment under section 4A of the Excise Act; and

(v) The extended period of limitation, in the facts and circumstances of the case, could not have been invoked nor could penalty or interest could have been imposed on the appellant.

14. Shri Sanjay Kumar Singh learned authorised representative appearing for the Department however, supported the impugned order and submitted that:

(i) The only change brought about by the appellant is mixing the colouring matter (liquid) to a solvent of similar nature so as to reduce the viscosity;

(ii) The appellant is not justified in asserting that by mixing the colouring matter to a solvent of similar nature so as to reduce the viscosity would amount to adoption of any other treatment on the goods to render the product marketable to the consumer and, therefore, the appellant would not be entitled to the benefit of exemption notification;

(iii) Even if the resultant product achieves superior quality after the activities and even if the resultant product is in different viscosity, it would not amount to

“manufacture”.

(iv) The appellant is only conducting peripheral activities contemplated under paragraph 4 of the exemption notification and, therefore, the appellant is not entitled to the benefit of the exemption notification;

(v) Just because the raw material and the finished goods fall under different headings, it cannot be presumed that process of obtaining finished product from such raw material would automatically constitute “manufacture”;

(vi) The valuation could only have been done under section 4A of the Excise Act; and

(vii) The Additional Director General was justified in invoking the extended period of limitation in the facts and circumstances of the case.

15. The submissions advanced by the learned counsel for the appellant and the learned authorized representatives appearing for the Department have been considered.

16. The main issue that arises for consideration is whether the appellant had undertaken any other process or processes amounting to ‘manufacture’ in the State of Uttarakhand or Himachal Pradesh, which is a condition contemplated in paragraph 4 of the exemption notification.

17. There is no dispute that the appellant had undertaken the peripheral processes mentioned in paragraph 4 of the notification. Whether any other process or processes, apart from peripheral processes, had been undertaken by the appellant so as to amount to ‘manufacture’ contemplated in section 2(f) of the Excise Act would have to be examined. The adoption of any other treatment on the goods to render the product marketable to the consumer is one of the requirement set out under section 2(f) of the Excise Act for the process to result in ‘manufacture’. Thus, what has to be seen is whether in the present case, adoption of any other treatment on the goods had rendered the product marketable to the consumers.

18. The appellant has stated that it had purchased two raw materials namely, colour solution and thixo lacquer from Fiabila for the manufacture of nail enamel. The colour solution, being paint and varnish was obtained by the appellant in packages of 20/50 Kg. The several process undertaken by the appellant after receipt of the raw material have been enumerated above. They include not only testing as per the requirement of the Cosmetics Act and the 2016 Act but also homogenization of the colour solution by stirring it with the help of pneumatic stirrer and mixing of thixo lacquer in predetermined quantity with the colour solution in the kettle so as to adjust the viscosity of the resultant product so that it can be filled in small bottles as mandatorily prescribed for packing nail polish, with brush attached to the cap of the bottle for application on the nails. Thereafter, the nail enamel is filled in small bottles and labelled with the declaration of the retail sale price. This treatment adopted on the goods,

according to the appellant renders the product marketable to the consumers.

19. At this stage it would be useful to refer to Chapters 32 and 33 contained in the Schedule to the Tariff Act. Chapter 32 deals with tanning or dyeing extracts, tannins and their derivatives, dyes, pigments and other colouring matter, paints and varishes, putty and other mastics, inks, whereas Chapter 33 deals with essential oils and resinoids, perfumery, cosmetic or toilet preparations.

20. The appellant had purchased thixo lacquer solution from Fiabila and the invoices mention the Harmonized System of Nomenclature, HSN classification as 3208 90 19. Excise Tariff Heading, CTH 3208 deals with paints and varnishes (including enamels and lacquers). ETH 3304 deals with Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or suntan preparations; manicure or pedicure preparations and Nail Polish or lacquers is mentioned against the relevant Excise Tariff Item 3304 99 20.

21. It would also be pertinent to refer to Chapter 33 of HSN and the relevant portion is reproduced below:

"Chapter 33

Essential Oils and Resinoids, Perfumery, Cosmetic or Toilet Preparatons

Chapter Notes:

1. xxxxxxxx

2. Heading Nos. 33.03 to 33.07 apply, inter alia, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use.

3. xxxxxxxx

GENERAL

Headings 33.03 to 33.07 include products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use (see Note 2 to this Chapter).

The products of headings 33.03 to 33.07 remain in these headings whether or not they contain subsidiary pharmaceutical or disinfectant constituents, or are held out as having subsidiary therapeutic or prophylactic value (see Note 1 (d) to Chapter 30). However, prepared room deodorizers remain classified in heading 33.07 even if they have disinfectant properties of more than a subsidiary nature.

Preparations (e.g. varnish) and unmixed products (e.g., unperfumed powdered talc, fuller's earth, acetone, alum) which are suitable for other uses in addition to those described above are classified in these heading only when they are:

(a) In packings of a kind sold to the consumer and put up with labels, literature or other indications that they are for use as perfumery, cosmetic or toilet preparations, or as room deodorizers; or

(b) Put up in a form clearly specialised to such use (e.g., nail varnish put up in small bottles furnished with the brush required for applying the varnish)."

22. It needs to be noted that Chapter Note 2 of HSN is the same as Chapter Note 3 of Chapter 33 to the Excise Tariff Act.

23. It clearly transpire from the aforesaid General Explanatory Notes that the preparations (e.g. varnish), which are suitable for other uses in addition to use as varnish (that is applied on wood) are classified as cosmetics under Chapter 33 only when they are - (a) in packings of a kind sold to the consumer and put up with labels, literature or other indications that they are for use as cosmetics; or put up in a form clearly specialized to such use (e.g. nail varnish put up in small bottles furnished with the brush required for applying the varnish). Thus, it is more than apparent that the colour solution supplied in 20/50 Kg drums from Fiabila cannot be regarded as nail enamel. The packing of nail enamel as contemplated in HSN General Explanatory Notes and the Cosmetics Act has special significance, as without the goods being packed in the specified packing they will not be classifiable or commercially known as nail enamel. The nail enamel takes its name, character and use as such only after being packed in the manner provided.

24. A conjoint reading of the definition of manufacture in section 2(f) (iii) of the Excise Act and Chapter Note 5 of Chapter 33 of the First Schedule to the Excise Act and the aforesaid treatment adopted on the goods (colour solution) by the appellant would render the product marketable to the consumer as nail enamel and, therefore, the appellant would be covered by the exemption notification dated 10.06.2003 since the appellant has adopted such a treatment to the goods that rendered them marketable to the consumer.

25. In this connection reference can be made to the decision of the Tribunal in *Lakme Lever Limited vs. Commissioner of Central Excise, Mumbai-III*, 2001 (127) E.L.T. 790 (Tri.-Mim.) and the relevant portion of the decision is reproduced below:

" 3. The goods manufactured by the appellant or obtained by it, all fall under chapter 33 of the tariff. Note 4 to this chapter at the relevant time (1996-97) reads as follows:

"In relation to products of heading nos. 33.03, 33.04 and 33.05, conversion of powder into tablets, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the products marketable to the consumer, shall be construed as ?manufacture?.

The notice issued to the appellant alleged, and the Commissioner agrees that the

repacking done in the depot of the appellant falls within the scope of "adoption of any other treatment to render the product marketable to the consumers". Therefore the goods have been manufactured.

4. One of the meaning of the word 'rendering' the one that would obviously apply, to the phrase of the note under consideration is "cause to be or become; make of a certain nature, quality, condition etc." (New Shorter Oxford English Dictionary). From this meaning and indeed by common usage of this word, it is only the treatment which makes a product marketable to the consumer which was so rendered. That is to say, the process to fall within the scope of the "any other treatment" it must be one which confers upon a product the attributes of marketability which it did not possess earlier. We must note here the significance of the word 'consumer' in the note. Thus the product must be referred to must be rendered marketable to the consumer. Although this word is not defined it evidently refers to one who purchase the product for consumption by him, as distinct from a purchaser who trades in it. Therefore for any treatment to fall within the scope of the note to the chapter it must be one that confers upon a product a quality as a result of which the product, which was otherwise not marketable is now rendered marketable. If the product were already marketable any amount of treatment to enhance its marketability would not amount to manufacture within the meaning of this note. That treatment does not render it marketable when it earlier was not. That is the object of the note is also clear from the fact that the processes which is specified in it as manufacture conversion of powder into tablets, labelling or re-labelling of containers intended for consumers, re-packing bulk drugs to retail packs are all activities which result in the products being made marketable to the individual consumers."

26. It is, therefore, not possible to accept the contention advanced by learned authorised representative appearing for the Department that the only change brought about by the appellant when the colouring matter is mixed to a solvent is to reduce the viscosity and this would not amount to manufacture. It cannot also be accepted that when the resultant product achieves superior quality, a new product marketable to the consumers as nail enamel does not come into existence as in the present case it has been found as a fact that a new marketable product comes into existence.

27. The decision of the Tribunal in *British Cosmetics vs. Collector of Central Excise, New Delhi*, 1999 (105) E.L.T. 667 (Tribunal), on which reliance has been placed by learned authorised representative appearing for the Department, does not help the Department. The issue that arose was regarding classification of 'thinner' under sub-Heading 3814 00. The contention of the appellant therein that thinner was different from nail polish remover could not be substantiated nor could it be established that thinner manufactured by them was capable of being used elsewhere than as nail polish remover/diluter.

28. The appellant would, therefore, clearly be entitled to the benefit of the area based exemption notification dated 10.06.2003.

29. The order dated 04.03.2020, passed by the Additional Director General cannot, therefore, be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on 15.02.2022)