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**(2023) 07 CESTAT CK 0040**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Customs Appeal No. 40895 Of 2014

M/S. Goyal MG Gases Pvt. Ltd

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

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**Date of Decision :** 24-07-2023

**Acts Referred:**

Central Excise Act, 1944 — Section 2(f), 4, 11A(1), 11A(4), 11AC

**Citation :** (2023) 07 CESTAT CK 0040

**Hon'ble Judges :** Sulekha Beevi C.S., Member (J); Vasa Seshagiri Rao, Member (T)

**Bench :** Division Bench

**Advocate :** Pawan K. Pahwa, R. Rajaraman

**Final Decision :** Allowed

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**Judgement**

Sulekha Beevi C.S., Member (J)

1. Brief facts are that the appellant is a registered dealer and is engaged in procuring Dissolved Acetylene, Helium, Carbon dioxide and Nitrogen gases in retail cylinders from various suppliers and sell them to their industrial customers. Intelligence was gathered by the officers of the department that apart from the above trading activity, the appellant is also engaged in the activity of refilling Oxygen and Argon gases from bulk packages into retail cylinders and selling them to industrial consumers; that they are also engaged in production of Argon-Carbon dioxide mixture gases and sell the same in retail cylinders. These gases fall under Chapter 28 of CETA, 1985. The department was of the view that these activities amounted to 'manufacture' as defined under the Central Excise Act, 1944 read with Central Excise Tariff Act, 1985. The appellant had not taken registration as a manufacturer and was not paying Central Excise duty on the goods (gases) so manufactured. The officers visited the site on 06.12.2012 and conducted verification. It was revealed that :-

(i) The appellant was procuring duty paid Liquid Oxygen and Liquid Argon in bulk

form and stored the same in bulk containers in their factory premises. The liquid oxygen and liquid argon was then converted into respective gases, and the repacked in cylinders and were cleared to their various industrial consumers.

(ii) The appellant procured Carbon dioxide in retail cylinders from suppliers and mixed the Carbon dioxide with the Argon gas in retail cylinders and thus have produced Argon-Carbon dioxide gas mixture and sold in retail cylinders to their consumers.

1.1 According to department, the above activities amounted to 'manufacture' in terms of Chapter Note 9 to Chapter 28 of CETA, 1985 which reads as under :

"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".

1.2 Show cause notice dt.03.06.2013 was issued for the period May 2008 to November 2012 proposing to demand the central excise duty along with interest on the Oxygen, Argon, and Argon-Carbon Dioxide mixture gas manufactured and cleared by the appellant. The notice also proposed for confiscating the gas (Oxygen, Argon) contained in retail cylinders and the liquid gases contained in bulk containers. Penalties were also proposed. After due process of law, the original authority, vide order impugned order herein, confirmed the demand of duty with interest and confiscated the goods with an option to redeem the same on payment of redemption fine. Equal penalty under Section 11AC of the Act was imposed. Aggrieved by such order, the appellant is now before the Tribunal.

2. The Ld. Counsel Sri Pawan K. Pahwa appeared and argued for the appellant. The submissions are summarized as under :

(a) The appellant receives duty paid Oxygen and Argon gases in cryogenic lorry tankers. The gas so received is filled in returnable gas cylinders bearing identification mark of the appellant and sold to the various industrial consumers.

(b) The appellant was initially registered with the department as a manufacturer. As the appellant entertained the view that their activity did not amount to 'manufacture' and filed refund claim for refund of the duty paid by them (Rs.3,04,261/-) for the period 21.02.2001 to 20.02.2002. The original authority then held that as per Chapter Note 10 to Chapter 28 of CETA, 1985, the activity of labelling or relabelling of containers and repacking from bulk to retail packs or the adoption of any other treatment to render the product marketable to the consumer carried out by the appellant amounts to 'manufacture' and rejected the claim of refund vide OIO No.24/2002 dt. 30.5.2002. The appellant filed appeal before the Commissioner (Appeals) and vide OIA No.348/2003 dt. 20.11.2003, the Commissioner (Appeals) held that the activity carried out by appellant does not fall under 'manufacture' as per Chapter Note 10 of Chapter 28 of CETA, 1985 and ordered for sanction of refund.

Though an appeal was filed by department against such order, the same was

disposed on monetary limits.

(c) Pursuant to the decision passed by Commissioner (Appeals) the appellant requested the department to permit the surrender of registration as a manufacturer. The department vide letter dt. 26.02.2006 accepted the surrender of registration.

(d) Similar SCN dt.7.12.2009 was issued to the appellant's Hyderabad unit for the period 11/2008 to 9/2009 alleging that as per the changed provision of law i.e. Chapter Note 9 to Chapter 28, the activities undertaken by the appellant amounts to 'manufacture'. The said Note 9 of Chapter 28 reads as under :

"in relation to products of this chapter, labelling or relabeling of the containers or repacking from bulk to retail packs or the adoption of any other process to render the product marketable to the consumer, shall amount to manufacture."

The original authority vide OIO No.2/2010 dt.18.6.2010 after considering the changed provision of law also, held that the activity does not amount to 'manufacture' and dropped the proceedings. The department filed appeal before the Commissioner (Appeals) and vide OIA No.38/2010 dt.30.11.2010 (Basheerbagh - Hyderabad) the order passed by original authority was upheld.

(e) It is submitted that after a gap of almost 8-9 years of surrender of registration by the appellant, the present SCN dt.03.06.2013 has been issued. The Central Excise officers visited the Trichy premises on 06.12.2012 and contended that the following activities amounts to "manufacture" - the activity of refilling of gases from bulk to retail undertaken by the appellant to render the product marketable. -the details of appellant and name of gases is permanently labelled with paint on each returnable cylinder.

-the appellant has undertaken process of converting the liquid Oxygen and Argon to gaseous form which amounts to 'manufacture' as under Chapter Note 9 of Chapter 28 of CETA, 1985.

-the appellant procured Carbon dioxide and mixed it with Argon in the ratio 20 : 80 and sold the same to consumers in retail cylinders containing Argon-Carbon dioxide mixture gas. This activity comes within the meaning of 'adoption of any other treatment to render the product marketable to the consumer' as provided in Chapter Note 9 of Chapter 28 of CETA, 1985.

(f) It is submitted that the adjudicating authority has proceeded to confirm the demand holding that the decisions passed in the appellant's own case applies to the period prior to amendment of the Chapter Note. That w.e.f 01.03.2008 Chapter Note 9 as amended reads as 'or' and the word 'and' which was present in earlier Chapter Note 10 has been omitted and substituted by 'or'. That for this reason, the judgments prior to 01.3.2008 is not applicable.

(g) The Ld. Counsel submitted that even as per changed chapter note scenario, the activities undertaken by the appellant does not amount to 'manufacture'.

Excise duty is a levy on the manufacture of goods. The word 'manufacture' has been interpreted in various judicial pronouncements and it has been consistently held that 'manufacture' means conversion of one commodity into another to such extent that the identity of original commodity is lost and a completely new commodity with a distinct, name character and use comes into existence. In the case of Hindustan Polymers Vs CCE - 1989 (43) ELT 165 (SC) held as under :

"11. In my opinion, however, the correct position must be found out bearing in mind the essential nature of excise duty. Excise duty, as has been reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or being sold in the market as such. See the observations of this Court in Union of India v. Delhi Cloth and General Mills Ltd. [1977 (1) E.L.T. (J 199) = 1963 Supp. 1 SCR 586], South Bihar Sugar Mills Ltd., etc. v. Union of India and Ors. [1978 (2) E.L.T. (J 336) = 1968 (3) SCR 21] and Bhore Industries Ltd., Bombay v. Collector of Central Excise, Bombay [1989 (40) E.L.T. 280 (S.C.) 1989 (1) SCC 602]. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market. If in order to be able to put it on the market, a certain amount of packing or use of containers or wrappers or putting them either in drums or containers, are required, then the value or the cost of such wrapper or container or drum must be included in the assessable value and if the price at which the goods are sold does not include that value then it must be so included by the very force of the terms of the Section. The question, therefore, that has to be examined in this case is whether these drums, containers or packing, by whatever name they are called, are necessary to make fusel oil or styrene monomer marketable as such or can these goods be sold without the containers or drums or packing? In my opinion, the facts established that these could be. The fact that 90% of the goods in C.A. No. 4339 of 1986 were delivered in tankers belonging to the assessee and only 10% of the goods were in packed condition at the time of removal clearly establish that the goods were marketable without being packed or contained in drums or containers. These were in the storage tanks of the assessee and were as such marketable. In this connection, it is necessary to refer to the observations of this Court in Collector of Central Excise v. Indian Oxygen Ltd. (supra). In that case, as mentioned hereinbefore, the respondent Indian Oxygen Ltd. was manufacturer of dissolved acetylene gas and compressed oxygen gas, called therein 'the gases'. The respondent supplied these gases in cylinders at their factory gate. For taking delivery of these gases, some consumers/customers used to bring their own cylinders and take the delivery,

while others used to have the delivery in the cylinders supplied by the respondent. For the purpose of such supply of cylinders, certain rentals were charged by the respondent and also to ensure that these cylinders were returned properly, certain amounts of deposit used to be taken from the customers. On these deposits, notional interest @ 18% p.a. was calculated. The two amounts with which this Court was concerned were rentals of the cylinders and the notional interest earned on the deposit of cylinders - whether these two amounts were includible in the value under section 4 of the Act was the question. The revenue's case was that the notional value of deposit was rental and hence should be included in computing the assessable value. The respondent, however, disputed this. Analysing the scope of section 4 of the Act, it was held by this Court that supply of gas cylinders might be ancillary activity to the supply of gases but this was not ancillary or incidental to the manufacture of gases. The goods were manufactured without these cylinders. Therefore, the rental of the same though income of ancillary activity, was not the value incidental to the manufacture and could not be included in the assessable value. Similarly, in my opinion, drums even though these were ancillary or incidental to the supply of fusel oil and styrene monomer, these were not necessary to complete the manufacture of fusel oil or styrene monomer; the cost of such drums cannot, therefore, be included in the assessable value thereof. Furthermore, no cost was, in fact, incurred by the assessee. Drums had been supplied by the buyers."

(h) The Ld. Counsel submitted that in the instant case, there is no conversion of gas received in tankers to such an extent where its identity, nature, use and character are changed into a completely new commodity. The process of compression or pumping is basically used for the purpose of increasing the pressure of the gas which does not cause any chemical reaction or affect the nature, character or identity of the goods and does not amount to per se 'manufacture'.

In fact, it is not the case of the Department also that a new commodity emerges. The pressure of gas is increased to 140 kg/cm<sup>2</sup>, as it is essential for filling gas into the cylinder for the purpose of transportation to customer's premises. The empty cylinder is returned back to the applicant. Thus, there is no manufacture in the sense the term is used in the Central Excise Act.

(i) In the SCN, the department has relied upon Note 9 of Chapter 28 of the Central Excise Tariff and alleged that the treatment adopted by the appellant, i.e. compressing the gas into cylinders, renders the product marketable to the consumer. Therefore, the same amounts to 'manufacture' and liable to central excise duty. For better appreciation, it would be important to refer Note 9 of Chapter 28 of the CETA, 1985 relied upon by the Department. Note 9 of Chapter 28 of the CETA, 1985 is reproduced below for ready reference :

Chapter 28, Note 9

"In relation to products of this Chapter, labelling or relabelling 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".

(j) On perusal of aforesaid chapter note, it can be understood that the chapter note 9 contains two parts:

a) labelling or relabelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment

b) to render the product marketable to the consumer.

(k) It is submitted that all the activities in para (a) above should result in part (b) i.e., to render the product marketable to the consumer. The activity of labelling or relabelling of containers will amount to 'manufacture' only if it renders the product marketable. It is submitted by the Ld. Counsel that in the present case, the gas cylinder provided by the appellant to its customers is for the purpose of transportation of gas and is on returnable basis. The Customer, after consuming the gas, returns the cylinder to the appellant. The purpose of embossing the name 'Goyal' on the cylinders is for identification purpose only, so that the cylinders of the appellant could be easily identifiable by the customer at the time of returning empty cylinder for refilling and the cylinder of the appellant will not get mixed up with the cylinders of any other suppliers. The embossing of name on the cylinders has no relation with the marketability of the gas. The Oxygen gas or Argon gas filled in the cylinder is already a marketable product by itself.

(l) The Ld. counsel submitted that in the case of *Taxchem Vs Commissioner of C.Ex Mumbai - 2003 (151) ELT 610 (Tri.-Mumbai)* the issue as to labelling for the purpose of marketability was considered. The Tribunal held that mere putting of the name and address on the container of the goods of the consignee and consignor does not amount to labeling. Relevant paras of the Tribunal's decision read as under :

"8. Mere putting of the name and address on the container of the goods of the consignee and consignor does not, in our opinion, amount to labelling as it is generally understood and therefore as to be denoted by the notes in question. If putting names and addresses on packages amounts to labelling, every person who writes a letter and puts upon the letter indicated the recipient of his own name and address has to be considered to have labelled that letter. This is clearly contrary to the normal use of the word. It would be appropriate to say that labelling requires furnishing information as to the nature of the product, its contents, its price etc. A garment may bear on it label of a well known manufacturer. That would be a label. Putting a sticker containing the name of the product on a box in which the garment is placed would not amount to labelling. It must be borne in mind that in accordance with well settled principles of interpretation these deeming provisions must be construed strictly, all the words contained in their given normal meaning. By doing so, we are unable to find that

the appellant had labelled the products in question.

9. We must note in passing our inability to accept labelling of the product, unless it renders it marketable would not be manufacture within the meaning of that note. There is no warrant in this proposition on a plain reading of the note. Among the activities specified in the note, labelling, relabelling, repacking from bulk pack etc. may not confer on the products under consideration any attribute of marketability that it did not possess. The position perhaps would be different in the case of goods such as cosmetics, pharmaceutical products etc. falling under Chapter 30 or 33. The intention behind the notes in these chapters appears to be to render liable to duty those processes which result in the product being sold to the consumer mentioned. Thus putting cosmetics into an attractive jar meant for retail use and placing on it a label containing a brand name enhanced the value of the cosmetics in measurement. In fact in many of these products, it is the container or label worth more than the cost of the contents. The position is however different in the case of the products falling in the chapter that we are not concerned with. In the vast majority of these products, the question of packing, labelling, repacking or relabelling or otherwise dealing with the products so as to render it marketable to "consumer" i.e. a person who buys it other than wholesale purchaser, would not generally arise with occasional exception such as boric acid. These goods are largely used by a factory or other such industry and the question of taxing value addition arising from a more attractive or appealing presentation in the form of packaging or labelling would not arise. It thus follows that the product cannot be rendered marketable to a class of customers by the act of labelling or relabelling etc. It continues to be sold in the same class of customers as it would be prior to being labelled or repacked etc. The question of the product being rendered marketable consequent on such label therefore will not arise. Hence it would not be appropriate to say that the labelling or other forms of treatment specified in the notes must be such as to render the product marketable."

(m) Further that in the present case, the gas procured by the appellant in tankers cannot be considered as bulk packs. This has been clarified by the Board vide Circular No.910/30/2009-CX dt. 16.12.2009 and Circular No.342/58/97-CX dt. 8.10.1997.

(n) In the case of Swastik Corporation Vs CCE Puducherry 2018 (359) ELT 233 (Tri.-Chennai), the Tribunal applied the circular as well as the decision in the case of CCE Vadodara Vs Vadilal Gases Ltd. - 2017 (346) ELT 161 (SC) to hold that refilling of gas from containers into retail cylinders does not amount to 'deemed manufacture'.

(o) The Tribunal in the appellant's own case, Goyal MG Gases Ltd. Vs CCE - 2015 (325) ELT 768 (Tri.-Del.) has considered Chapter Note 9 to Chapter 28 to hold that the activity does not amount to 'manufacture'. Similar view was adopted in another case of the appellant as reported in 2018 (361) ELT 921 (Tri.- Chand.)

(p) It is also alleged by department that the activity of converting liquid gas into gaseous form by atmospheric pressure before filling into cylinder renders the gas marketable and that this activity undertaken by the appellant amounts to 'manufacture'. The Ld. Counsel submitted that gas is procured in liquid form merely for ease of transportation and to reduce transit losses, as bulk quantity can be transported in liquid form only. Further, no equipment or machinery is used for conversion of liquid form to gaseous form. It gets converted to gaseous form by natural process while passing through the pipes. Thus, no process is being undertaken by the appellant. It is submitted that the gas is also marketable in its' liquid form. The marketability test is to be seen from the perspective of retail consumers and not industrial users. In this connection, it is submitted that gases as received by the appellant is marketable as such. Converting the gas from liquid form to gas does not change its chemical properties.

(q) In the appellant's own case reported in 2015 (325) ELT 768 (Tri.-Del.), the Tribunal has held that when gas is already marketable in original form, the activity of assessee cannot be said to render the product marketable again and held that the activity undertaken by the appellant does not amount to 'manufacture'.

(r) Without prejudice to the above, it is submitted that the second part of Note 9 to Chapter 28 is not applicable to the present case as the appellant sells only to industrial consumers. Second part of Note

9 inter alia provides "any treatment to render the product marketable to the consumer" as amounting to 'manufacture'. It is submitted that the treatment covered here must be a treatment which "renders" the product marketable to "consumer". The expression "consumer" here pertains to retail consumers or the ultimate consumers and not industrial buyers, who further uses the goods for commercial purpose of manufacture. The gases supplied by the appellant are to the industrial manufacturers and not to the retail consumers. The Tribunal in the appellant's own case in Goyal MG Gases Ltd. Vs CCE reported in 2015 (325) ELT 768 (Tri.-Del.) considered the very same activity in question and held that it does not amount to 'manufacture'. Relevant para reads as under :

"Since in this case gas cylinders supplied to Vanaspati manufacturers who are industrial users, impugned activity not amounting to 'manufacture' and would not be covered under Chapter Note 9 of Chapter 28"

Similar view was adopted by CESTAT in another case of the appellant reported in 2018 (361) ELT 921 (Tri.-Chennai).

(s) Another allegation is that the activity of mixing of Argon and Carbon dioxide Gases and filling the same into retail cylinders amounts to 'manufacture'. It is submitted that Carbon dioxide and Argon do not chemically react with each other on mixing and these inert gases remain separate even though kept in the same container. There is no lending or barrowing of any electron by either of the gases

and the gases retain their individual properties. The individual gases retain their properties and are separately identifiable while in use. When the mixture of argon and carbon dioxide is used in welding, the argon gas creates an inert atmosphere while the carbon dioxide gas stops oxidization of the material. Thus though called mixture these gases retain their individual properties even when filled in the same cylinder. It is submitted that with the advent of modern techniques and the facility of filling two or more gases in one cylinder, the customers found it more economical to handle these gases and it saved labour. By supplying the mixture, it was not necessary for the customer to mix these gases in the desired ratio. The mixing of gases has not resulted in a new and different product with distinct uses and marketability. The mixing of Carbon dioxide with inert gases does not bring about any chemical reaction between the gases. There is no change in the chemical composition. The Commissioner has erroneously observed that such mixture of gases is a distinct new commodity and different from the single gas.

(t) It is pertinent to mention here that the Tribunal in appellant's own case has held that the activity of mixing of gases undertaken by them does not amount to 'manufacture'. The same is reported in 2000 (115) ELT 467 (Tribunal). The said decision of Tribunal has been affirmed by the Hon'ble Supreme Court in the appellant's own case reported in 2000 (119) ELT 5 (SC). Further, on similar facts in the case of CCE Vs Vadilal Gases Ltd. [2017 (346) ELT 161 (SC)], the Hon'ble supreme Court has categorically held that mixing of gases and making them available to consumers in smaller cylinders, did not make the gases marketable as they did not chemically mix/react with each other, and retained their character, without any new commodity being created. The activity of mixing of gases does not amount to 'manufacture'.

(u) The Ld. Counsel put forward arguments on the ground of limitation also. It is submitted that the SCN in the present case has been issued on 03.06.2013 for the period May 2008 to November 2012. As per the provisions of Section 11A (1) of Section 11A (4) of the Act, the authorities can issue show cause notice within one year from the relevant date and the extended period of limitation (i.e. 5 years) can be invoked only if there is evasion of duty due to fraud; or collusion; or willful misstatement ; or suppression of facts. It is submitted in the present case there is no suppression of facts by the appellant. The department was always aware of the activity undertaken by the appellant. The department had accepted to surrender Central Excise registration.

(v) In view of above, it is evident that the details of the activity carried out by the appellant was within the knowledge of the department and the appellant has been contesting the levy for last 3 decades. The issue has been decided in favour of the appellant by various courts including the Apex Court. It is further noteworthy that same issue had been subject matter of SCN in Hyderabad unit of the appellant which was after the amendment to Chapter Note 9 to Chapter 28 which. The issue was then decided in favour of the appellant by the adjudicating

authority vide OIO No.2/2010-11 dated 18.06.2010 and also by the Commissioner (Appeals) vide OIA No.38/2010 (H-IV) (D) (CE) dated 30.11.2010.

(w) The appellant has purchased duty paid gases which were sold to industrial users only. Given this, the appellant has to pay duty only on the value addition which too could be recovered from the buyers being the industrial users eligible for cenvat credit. On this factual position no intention to evade the payment of excise duty could be attributed to the appellant in the present case. Therefore, the demand of excise duty confirmed by the adjudicating authority by invoking the extend period is not sustainable and liable to be set aside in the interest of justice. It is prayed that in case that it is held that appellant is liable to pay duty their eligibility to cenvat credit on inputs (i.e. duty paid gases procured by them) may also be considered. The Ld. counsel prayed that the appeal may be allowed.

3. The Ld. A.R Shri S. Rajaraman appeared and argued for the department.

3.1 Para 9 and para 11 of the show cause notice was adverted to by the Ld. A.R to submit that the appellant has undertaken the activity of transferring the liquid gases from the bulk containers to smaller containers and are thus doing repacking of goods into retail cylinders. In the process of repacking, the liquid Oxygen/Argon is pumped through pipeline attached to the bulk containers and through the system of vapourizer coil attached to the pipelines these liquid gases are converted into the gaseous form. The gases are then refilled / repacked into returnable cylinders. The cylinders are embossed with the name of the appellant, name of the gas, the capacity of the cylinder and other details with regard to refilling the cylinders. All such activities fall under Chapter Note 9 to Chapter 28.

3.2 On perusal of the sale invoices issued by the appellant, it was seen that they have sold the retail cylinders containing Argon and Carbon dioxide mixture to the consumers. Appellant has thus adopted a treatment so as to mix the two gases making it marketable to the consumers. In para 30 & 31 of the OIO, the adjudicating authority has correctly discussed that the activity of refilling of liquid gases from bulk containers to retail cylinders and the process of conversion of the liquid state to gaseous state through vapourizer is indeed a process undertaken to make the goods marketable to the consumers. These processes carried out by the appellant amounts to 'manufacture' in terms of Chapter Note 9 to Chapter 28 of CETA, 1985 read with Section 2(f) of Central Excise Act, 1944. The appellant has taken registration only as a 'dealer'. They are not registered as a 'manufacturer', though they have been undertaking the activity of 'deemed manufacture' of gases as envisaged in Chapter Note 9 to Chapter 28. The demand of duty invoking the extended period has therefore been correctly confirmed. Penalties imposed are also proper. The Ld. AR prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issue to be considered is whether the activity carried out by the appellant is manufacture or not.

6. "Manufacture" is defined in section 2(f) of the Central Excise Act, 1944.

"(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 CETA, 1985 (5 of 1986) as amounting to manufacture.

(iii) which, in relation to the goods specified in Third Schedule..."

From the above definition of 'manufacture' it can be seen that as per 2 (f) (ii) the definition includes certain 'deemed manufacture' as envisaged in Sections and Chapter Notes of CETA, 1985. Chapter Note 9 to Chapter 28 (which has been already reproduced) thus gives situations when certain activities in relation to goods falling under Chapter 28 are deemed to be manufacture of goods so as to attract the levy of Central Excise duty.

7. At the cost of repetition, the allegation in the SCN dt. 03.06.2013 is as under :

(i) The appellant was procuring duty paid Liquid Oxygen and Liquid Argon in bulk form and stored the same in bulk containers in their factory premises. The liquid oxygen and liquid argon was then converted into respective gases, and the repacked in cylinders and were cleared to their various industrial consumers.

(ii) The appellant procured Carbon dioxide in retail cylinders from suppliers and mixed the Carbon dioxide with the Argon gas in retail cylinders and thus have produced Argon-Carbon dioxide gas mixture and sold in retail cylinders to their consumers.

8. According to the department, the above activities fall under 'deemed manufacture' as under Chapter Note 9 to Chapter 28 of CETA 1985. We proceed to examine the same.

9. Liquid Oxygen and Liquid Argon is converted into gaseous form of Oxygen and Argon. The appellant procures liquid oxygen and liquid argon in bulk, from supplier's in cryogenic lorry tankers and these are transferred into bulk containers located in their factory premises. The liquid oxygen and argon are then refilled into retail cylinders. In this process of refilling the liquid oxygen/argon is pumped through pipeline attached to the bulk containers and through a vapourizer coil attached to the pipeline, convert them into oxygen gas and argon gas. The gases are thus refilled into returnable retail cylinders of 7 cubic meter capacity in the case of O<sub>2</sub> gas and 7.15 cubic meter capacity in the case of argon gas. The cylinders are permanently labelled with paint mentioning the name "Goyal" and denoting "Oxy" in the case of O<sub>2</sub> cylinder and "Ar" in the case of argon gas cylinder. Such labelling is as per mandatory requirement under Explosives Act. The cylinders are punched or painted with unique serial number on it. Further, after refiling and before dispatch, the retail cylinders are also labelled with paint by appellant mentioning the details of the refill, description of the content packed, capacity of the cylinder, batch number, date, percentage of

purity.

9.1 The first limb of the chapter note is whether the transfer from bulk containers to retail cylinders would satisfy the condition of repacking from bulk packs to retail packs. In the case of *Ammonia Supply Co. Vs CCE*, New Delhi 2001 (131) ELT 626 (Tri.-Delhi) it was held that filling of liquid ammonia from tankers into smaller cylinders does not amount to "manufacture" within chapter note 10 of Chapter 28 of CETA 1985 and that the activity does not satisfy any of the ingredients of the legal fiction of 'manufacture' under chapter note 10 to Chapter 28. The Tribunal in para 6 of the said decision held that the assessee was not getting ammonia in bulk packs. They were getting in tankers. The ammonia gas brought in tankers can never be termed as brought in bulk packs. So the assessee was not repacking the goods from bulk packs to retail packs. Accordingly, the activity undertaken by the assessee in filling the smaller container from bulk container viz. tankers can never fall within the fiction of 'manufacture' as envisaged in Chapter Note 10 to Chapter 28.

9.2 Pursuant to this decision of the Tribunal, the Board vide Circular No.910/30/2009-CX. dt. 16.12.2009 issued clarification that tankers cannot be termed as 'bulk packs' and therefore the activity of transferring goods from tankers into smaller drums cannot be said to be 'manufacture' under Note 10 to chapter 28.

9.3 The Board Circular No.342/58/97-CX. dt. 08.10.1997 is also noteworthy in this regard which reads as under :

"I am directed to refer to the Chapter notes introduced in this year's budget enlarging the scope of the term "manufacture" in respect of products falling under Chapters 28, 29, 34, 35 or 38 of the Central Excise Tariff.

2. In this context clarification have been sought regarding the scope of the expression

"relabelling of containers and repacking from bulk packs". Doubts have been raised as to whether receiving of liquid chemicals in bulk in containers and offloading the same at the dealers premises or godown into available empty vessel and consequent delivery of these material in the very same condition to customers against orders can be held to be an act of repacking operations as envisaged in the said chapter note or not.

3. Whether an operation amounts to repacking or not, is a question to be decided on facts. However, activity such as simply transferring the material from one container to another container may not be categorised under the scope of this description. The goods are packed either for wholesale or for retail sale. Generally the expression "Packing" is considered as package containing a prepacked commodity and the quantity of product contained therein is also pre-determined. The packaging is also generally done without the purchaser being present. The packages also contain information such as name of the

manufacturer, quantity, value and other details of the product.

4. In view of the above, the question whether or not duty is liable to be paid depends upon the facts of individual case and the decision has to be taken taking into account all relevant facts. The chapter notes inserted are on the lines of similar chapter notes used earlier in other and they have to be interpreted as usual."

9.4 The above Board circular makes it clear that by simply transferring a material from big container to a small container the activity does not amount to 'manufacture'. The word 'bulk pack' used in the chapter note has to be understood as packaging and not as a container which is inevitable to hold or contain liquid or gas.

9.5 In the appellant's own case, the issue came up for consideration and vide judgment reported in 2015 (325) ELT 768 (Tri.-Del.), the Tribunal after considering the application of Chapter Note 9 to Chapter 28 held that the activity does not amount to 'manufacture'. In the said case the facts are such that the appellant (Goyal MG Gases Pvt. Ltd.) was engaged in procuring Hydrogen gas from their suppliers in pipelines and filled the gas into retail returnable cylinders to consumers who are manufacturers of Vanaspathi Ghee. The department was of the view that the activity of filling the gas into small cylinders with the aid of filter, dehydration and compressor amounted to 'manufacture' as per Note 9 to Chapter 28. The Tribunal followed the decision in the case of Ammonia Supply Company (supra) to hold that refilling from bulk to small cylinders will not amount to 'manufacture'. It was also held that the activities undertaken by the appellant does not render the product marketable to the consumer. It was observed that the gas is already marketable in its original form and the activity undertaken by appellant does not render the gas again marketable. Another view expressed by the Tribunal was that the "adoption of any other treatment to render the product marketable to consumer" would not cover an industrial consumer and applies only to the ultimate buyer.

9.6 Identical issue came up for consideration in the appellant's own case before the Chandigarh Bench of the Tribunal. The Tribunal followed the decision in the earlier case rendered by Delhi Bench and held that the activity does not amount to 'manufacture'.

9.7 Thus the question as to whether the transfer from bulk container to small cylinders amounts to 'manufacture' has been decided in the case of Ammonia Supply Company (supra) which has been relied by the Tribunal in the appellant's own case as discussed above. This decision of the Tribunal in the case of Ammonia Supply Company has been approved by the Hon'ble Supreme Court in the case of CCE Vadodara Vs Vadilal Gases Ltd. - 2017 (346) ELT 161 (SC). In fact, the Hon'ble Apex Court in the case of Vadilal Gases Ltd. has addressed the issue under consideration before us on all points.

10. Before adverting to the said decision in the case of Vadilal Gases (supra), it

would be beneficial to address the second limb of chapter note, i.e., whether the alleged activity of labeling done by the appellant amounts to 'manufacture'. According to the department, the activity of mentioning the appellant's name, the name of gas, capacity of cylinder, etc. amounts to labeling so as to render the product marketable and therefore one limb of Note 9 to Chapter 28 is attracted which makes the activity 'manufacture'. It has to be borne in mind that mere labeling is not sufficient. The labeling should render the product marketable to the consumer. The purpose of embossing the name of the appellant is to make the cylinders easily identifiable as these are returnable cylinders. Other details such as name of the gas, capacity etc. are painted on the cylinders as per requirement under the Explosives Act. The activity of labeling to render a product marketable as per Chapter Note 9 would mean to enhance the value of the contents of the pack so as to make it attractive to the consumer. In the present case, the mention of details on a gas cylinder, in our view, cannot be considered as labeling done to render the product marketable. Our view is supported by the decision in the case of Tax Chem Vs CCE Mumbai - 2003 (11) ELT 610 (Tri.-Mumbai). The relevant para has already been reproduced.

11. The third limb of the chapter note is 'adoption of any other treatment to render the product marketable'. According to department, the activity of mixing carbon dioxide with argon gas in retail cylinders to produce Argon-Carbon dioxide mixture gas is a process by which the gas mixture is rendered marketable and therefore chapter note is attracted which makes the activity 'manufacture'. The Ld. Counsel for appellant has explained that these two gases do not chemically react with each other to form a distinct new commodity. Both the gases retain their separate properties by which the mixture is useful in welding industry. These gases are already marketable and therefore it cannot be said that the process of mixing has made it marketable.

11.1 In the appellant's own case, this point was held in favour of appellant by the Tribunal. The department filed appeal before the Hon'ble Apex Court and vide judgment reported in CCE Vs Goyal Gases (P) Ltd. and Others 2000 (119) ELT 5 (SC), the Hon'ble Apex Court affirmed the order passed by Tribunal and dismissed the appeal filed by department.

11.2 This third limb of the chapter note along with the other two limbs which have already been discussed were addressed by the Hon'ble Apex Court in the case of Vadilal Gases Ltd. The Hon'ble Apex court approved the decision of the Tribunal (2000 (115) ELT 46) rendered in the appellant's own case as discussed in para 12, 13 and 14 of the judgment. All the three limbs of the chapter note have been analysed by the Hon'ble Apex Court. Though the relevant chapter note referred in the judgment is note 10 to chapter 28, the only difference is the substitution of 'or' instead of 'and' in chapter note 9, after 2008. The discussions cover all the angles of the chapter note. The relevant paras read as under :

"4. Note 10 of Chapter 28 of the Tariff Act is in the following terms :

"In relation to products of this Chapter, labelling or relabelling 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'."

5. Reading the aforesaid Note 10 of Chapter 28 of the Tariff Act would go to show that the deeming provision contained therein with regard to what would also amount to manufacture is in two parts. The first is where labelling or relabelling of containers and repacking from bulk packs to retail packs is undertaken and secondly where the adoption of any other treatment is undertaken to render the product marketable to the consumer. Whether either of the two situations are attracted to the present case, is the moot question that would require an answer from the Court.

6. The learned Commissioner in the adjudication order dated 8-12-2006 has elaborately dealt with the process deployed in the unit of the assessee after receipt of liquified Nitrogen and Argon in bulk in cryogenic tankers. The details in this regard may be usefully extracted below :

"The cryogenic tankers are owned by M/s. VCL, a sister company of M/s. VGL. The liquefied Nitrogen and Argon are re-gassified, and packed in cylinders of 6 cubic metres or 7 cubic metres capacity for retail sale. The cylinders are owned by M/s. VCL. Before filling the gases, the cylinders are cleaned for removal of impurities like moisture, oxygen, carbon dioxide, etc., so that the gases filled in the cylinders are as much free of the impurities of oxygen, moisture, carbon dioxide, etc., as possible. The gases according to the level of purity are graded as VCL I Nitrogen, VCL I Argon, VCL II Nitrogen, VCL II Argon, UHP Argon, etc., - the UHP grade being the purest. Besides pure Argon and Nitrogen, M/s. VCL also make mixtures of gases i.e., Argon with Carbon Dioxide, Argon with Oxygen, Argon with Nitrogen, Nitrogen with Carbon Dioxide, Nitrogen with Oxygen, etc., in which gases are mixed in a fixed proportion and the same are also packed in retail cylinders of 6 or 7 cubic metres capacity. After packing of the Nitrogen, Argon, and gas mixtures in retail cylinders, the same are affixed with a label mentioning the name of the product, purity grade, the level of impurities, batch no. and cylinder no. The labels also bear the name of the marketing company - M/s. Vadilal Chemicals Ltd. (M/s. VCL), a sister company, as well as the monogram of Vadilal group. The labels being affixed on the cylinders."

7. Insofar as the first limb of Note 10 of Chapter 28 of the Tariff Act is concerned, even if we proceed on the basis that labelling or relabelling had taken place after transfer of the gases from the bulk containers/tankers to smaller cylinders, Note 10 of Chapter 28 of the Tariff Act mandates that the additional requirement that has to be satisfied so as to attract the deeming provision contained therein is that repacking from bulk packs to retail packs have also taken place.

8. The above issue need not detain the Court. We have a decision of the learned Tribunal in Ammonia Supply Company v. CCE, New Delhi - 2001 (131) E.L.T. 626

(Tri.-Del.), wherein the Tribunal has taken the view that Amonia coming in tankers cannot be treated to have come in bulk packs. In this regard, there is also a Circular dated 8-10-1997 where this question has been dealt with by the Ministry of Finance (Department of Revenue) in the following way :-

"In this context clarification have been sought regarding the scope of the expression "relabelling of containers and repacking from bulk packs". Doubts have been raised as to whether receiving of liquid chemicals in bulk in containers and offloading the same at the dealers premises or godown into available empty vessel and consequent delivery of these material in the very same condition to customers against orders can be held to be an act of repacking operations as envisaged in the said chapter note or not.

Whether an operation amounts to repacking or not, is a question to be decided on facts. However, activity such as simply transferring the material from one container to another container may not be categorised under the scope of this description. The goods are packed either for wholesale or for retail sale. Generally the expression "Packing" is considered as package containing a prepacked commodity and the quantity of product contained therein is also pre-determined. The packing is also generally done without the purchaser being present. The packages also contain information such as name of the manufacturer, quantity, value and other details of the product."

9. The decision of the learned Tribunal in Ammonia Supply Company (supra) has attained finality as the Department had not challenged the same.

10. Having read the relevant part of Note 10 of Chapter 28 of the Tariff Act, the reasoning adopted by the learned Tribunal in Ammonia Supply Company (supra) and the contents of the Circular dated 8-10-1997, we are of the view, that the conclusion of the learned Tribunal, as above, does not suffer from any infirmity which would require our interference.

11. This would bring the Court to a consideration of the second limb of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act, namely, deployment of any other treatment to render a product marketable.

12. From the manufacturing activity undertaken by the assessee, as found by the learned Commissioner himself, and as extracted above, the assessee apart from packing pure Argon and Nitrogen in smaller cylinders is also engaged in the activity of mixing of inert gases (like argon, nitrogen, helium, etc.) with other gases like oxygen, nitrogen, carbon dioxide and making available such combination to the consumers in smaller cylinders. Whether such mixing of the gases in question amount to manufacture has been gone into by the learned Tribunal in Goyal Gases (P) Ltd. v. CCE, Meerut - 2000 (115) E.L.T. 467 (Tribunal). Paragraph 11 of the report in Goyal Gases (P) Ltd. (supra) being relevant may be extracted below :-

"Appellants M/s. Goyal Gases (P) Ltd. have stated that they had been initially

supplying various gases like liquid Nitrogen, liquid Argon, Hydrogen, Helium, etc. separately but subsequently, on demand from customers they had started supply of such gases in one cylinder as this was considered more economical to the customer as also convenient and time saving. The mixing of oxygen was with inert gases viz., crypton, helium, neon, etc. which did not chemically react with each other. Since the mixture was with inert gases like argon, crypton, etc. which did not react chemically with each other, the inert gases remain separate even though kept in the same container. There was no lending or borrowing of any electron by either of the gases and the gases remained individually identified. The individual gases also retained their properties and were separately identifiable while in use. For example, when the mixture of argon and nitrogen is used in the manufacture of electric lamp, the argon gas performs the function of making the illumination. The Nitrogen gas gives long life to the filament of the bulb. Similarly, when the mixture of argon and carbondioxide is used in welding, the argon gas creates an inert atmosphere while the carbon dioxide gas stops oxidization of the material. Thus the individual gases retained their individual properties even when filled in the same cylinder. With the advent of modern techniques and the facility of filling two or more gases in one cylinder, the customers found them more economical to handle the gases and it saved labour. Further it was not necessary for the customer to mix these gases individually in a desired ratio, since such an exercise was more risky and needs expert technical handling. The question is whether in such circumstances the mixture of two or more gases in one cylinder amounted to manufacture in terms of Section 2(f) of the Central Excise Act .....

13. The decision of the Tribunal in Goyal Gases (P) Ltd. (supra) to the effect that such activity (mixing of gases) did not amount to manufacture has been affirmed by this Court by its order dated 3-4-2000 reported in Commissioner of Central Excise v. Goyal Gases (P) Ltd. - 2000 (119) E.L.T. 5 (S.C.) which is in the following terms :-

"The Tribunal has categorically held that no evidence was led by the Department to controvert the assessee's case that no new product with distinct usage and marketability had been produced. Even so, it is contended that the Tribunal failed to appreciate that by the mixing of four more gases a totally different product with distinct use and marketability was produced. We find, having heard the learned Additional Solicitor General, that there is, in fact, no evidence led by the Department to establish that case. The reliance upon the order of the Commissioner would appear to be misplaced because the Commissioner's ipse dixit carries the matter no further."

14. While it may be correct that in Goyal Gases (P) Ltd. (supra), the scope and effect of Note 10 of Chapter 28 of the Tariff Act was not specifically under consideration, nonetheless, the conclusion of the learned Tribunal, affirmed by this Court, to the effect that the mixture of an inert gas with oxygen, nitrogen, etc., does not result in creation of a new commodity, marketable as such, would

be relevant insofar as the second limb of Note 10 of Chapter 28 of the Tariff Act is concerned. The finding in *Goyal Gases (P) Ltd.* (supra) that notwithstanding the mixing, the gases retained their individual properties even after being filled up in the same cylinder would clearly demonstrate that a new marketable product does not come into existence by the process of mixing. In this regard, the fact that the two items constituting the mixture are also separately marketable would be relevant in determining the applicability of the second part of Note 10 of Chapter 28 of the Tariff Act to the present case.

15. If that be so, we do not see as to how on the findings recorded by the learned Commissioner with regard to the "manufacturing process" and the data laid before us as well as the ratio of decision in *Goyal Gases (P) Ltd.* (supra), a view can be taken that the second part of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act is attracted in the present case and any new marketable product/item comes in existence by the process of mixture of gases in question.

16. The reliance placed by the appellant-Revenue on the decision of this Court in *Air Liquide North India Private Limited v. Commissioner of Central Excise* - (2011) 15 SCC 264 = 2011 (271) E.L.T. 321 (S.C.) does not assist the Revenue in any manner. In the said case, neither the adjudicating authority nor this Court had the benefit of the details of the manufacturing process inasmuch as the same was kept away from the Court by the assessee by contending the same to be a "trade-secret". In these circumstances, this Court in coming to its conclusion that the process deployed amounted to manufacture within the meaning of Note

10 of Chapter 28 of the Tariff Act relied on certain other features of the case, details of which have been set out in Para 16 of the judgment, which may be noticed below :

"The only conclusion from the above is that the tests and the "process" conducted by the appellant would amount to "treatment" in terms of Chapter Note 10 of Chapter 28 of the Tariff Act of the Act. The fact that the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. If it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When this question was put to the officer of the appellant, he could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and the under the grade and style of the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas. Therefore, in our opinion, the Tribunal has rightly observed that if no treatment was given to the gas purchased by the appellant, the customers of the appellant would not have been purchasing helium from the appellant at a price

40% to 60% above the price at which the appellant was purchasing.”

17. In the light of the above, we do not see how the decision of this Court in *Air Liquide North India Private Limited (supra)* can assist the revenue in bringing home the point urged before us in the appeals under consideration.

18. For the reasons aforementioned, the appeals have to fail and the order of the learned Tribunal has to be affirmed, which we hereby do. Accordingly, the appeals are dismissed. The order of the Appellate Tribunal having been affirmed, we do not consider it necessary to decide any of the other issues decided by the learned adjudicating authority, as indicated by us.”

12. The above decision applies to the entire issue under consideration before us. Though squarely applicable to the facts of this case, we think that it is necessary not to leave unattended another allegation raised in the SCN. It is alleged that the conversion of liquid form to gaseous form would fall within the ambit of ‘adoption of any other treatment to render the product marketable’. The question again is whether a new marketable product has emerged? The department has no case that liquid oxygen or liquid argon is not a marketable product. Further the very same activity was done by the appellant for the earlier periods also, where the demands were dropped by the adjudicating authority, Trichy and Hyderabad Commissionerates. These decisions have attained finality.

In OIA No.38/2010 the activities undertaken by the appellant are enumerated as under :

- (i) Obtain gases bulk, in liquid state through lorry tankers
- (ii) Transfer the same from lorry tankers into storage tankers fitted to the ground inside the premises
- (iii) Convert the gases from liquid state to gaseous in an apparatus called Atmospheric Vapouriser (steel coil of pre-designed standard) and passes such gases through copper pipes to filling manifold.
- (iv) Fill the gases into cylinders of different capacity after measuring pressure gauge.
- (v) Labeling the cylinders in their name (as Goyal) and
- (vi) Marketing such labeled cylinders in retail market.

13. The activities alleged are same in the present show cause notice also. After appreciating the facts and following the decisions discussed above, we are of the considered opinion that the department has failed to establish that the activities undertaken by the appellant amount to ‘manufacture’. The appellant succeeds on merits of the case.

14. The Ld. Counsel has argued on the ground of limitation also. The SCN has been issued invoking extended period. There were decisions in favour of the appellant and their request to surrender the registration of manufacture was also

accepted by the department. Further the issue is purely interpretational in nature. No positive act of suppression has been established against the appellant. We therefore hold that there are no grounds for invoking the extended period. The issue on limitation is also answered in favour of appellant.

15. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.