Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11228 of 2019
Excise Misc. Application (ORS) No. 10217 of 2022

(Arising out of OIO-KCH-EXCUS-000-COM-01-2019-20 dated 05/04/2019 passed by Commissioner of Central Excise, Customs and Service Tax-KUTCH (GANDHIDHAM))

Dow Chemical International Pvt Ltd .....Appellant
Ms Rishi Kiran Logistics Pvt Ltd
Survey No 165 Behind Agarwal Pump Opp Padana Ramdew Pir Mandal Varsana Taluka Anjar Kutch, Gujarat

VERSUS

C.C.E.-Kutch (gandhidham) .....Respondent
Central Excise & Service Tax Commissionerate, Centeral Excise Bhavan Plot No. 82, Sector 8, Gandhidham(Kutch), Gujarat

With

Excise Appeal No.10770 of 2021

(Arising out of OIA-KCH-EXCUS-000-APP-223-2018-19 dated 14/12/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-KUTCH (GANDHIDHAM))

DOW CHEMICAL INTERNATIONAL PVT LTD .....Appellant
1st Floor, Block B, 02 Godrej Business District, Pirojshanagar, Lbs Marg, Vikhroli Mumbai, Maharashtra

VERSUS

C.C.E.-Kutch (gandhidham) .....Respondent
Central Excise & Service Tax Commissionerate, Centeral Excise Bhavan Plot No. 82, Sector 8, Gandhidham(Kutch), Gujarat

APPEARANCE:
Shri Saurabh Dixit, Advocate for the Appellant
Shri. Dinesh Prithiani, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 10970-10971 /2022

DATE OF HEARING: 26.07.2022
DATE OF DECISION: 12.08.2022

RAMESH NAIR

The issue involved in the present case is that whether the activity of unloading of chemicals of Chapter 29 from the tankers and re-packing and labeled in small drums by the job workers is amount to manufacture and liable to Excise duty or otherwise. If at all the activities amount to

manufacture whether the appellant being a principal supplier is liable to pay duty or the job worker is liable to pay the demand.

02. Shri. Saurabh Dixit, Learned Counsel appearing on behalf of the appellant submits that the activity carried out by the job worker is unloading of chemical of Chapter 29 from the tanker and convert into small drums, on drums label was pasted and the same was cleared by issuing the invoice of registered dealer. He submits that the said activity is trading activity and cannot tantamount to manufacture to attract any excise duty. He submits that there are judgments wherein, it was held that the transferring of chemicals from tanker to small drums cannot be said to be conversion from bulk pack to retail pack. As regard the labeling /relabeling, he submits that though the label was pasted but that does not render the product marketable, the product was already marketable. Therefore, merely by putting a label on the tanker cannot be said to have rendered the activity for marketing of the product, therefore, the activity in question does not amount to manufacture but it is only a trading activity, hence, no excise duty is payable on such activity.

2.1 On the second issue, he submits that if at all the activity is treated as manufacture even then the appellant is not liable to pay the excise duty on the ground that the entire activity was undertaken by the job worker therefore, the job worker becomes the manufacturer for which the duty demand cannot be made on the appellant. In this regard, he placed reliance on this Larger Bench judgment in the case of M/s. Thermax Babcock and Wilcox Ltd-2018 (364) ELT 945 (Tri.-LB). In support of his submissions, he placed reliance on the following judgments:-

- Rocket Engineering Corporation Ltd.- 2008 (223) ELT 347 (Bom)
- FAG Engineering (I) Ltd.- 2011 (266) ELT 193 (Tri.-Ahmd)
- Mahindra Hinoday Industries Ltd.- 2013 (292) ELT 456 (Tri-Mum)
- Voltam Transformer Ltd.- 2014 (302) ELT 586 (Tri-Ahmd)

03. Shri Dinesh Prithiani, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

04. We have carefully considered the submission made by both the sides and perused the records. We would like to deal with the second issue first

that if at all the activity carried out at the job worker's end is amount to manufacture whether the appellant is liable to pay the duty on such activity. In this regard, we find that there is no dispute that the entire activity of transfer of chemicals from tanker to small drums and labeling thereof was carried out by the job worker of the appellant. In this case, if at all the activity amounts to manufacture the job worker is a manufacturer in the eyes of Central Excise Act, 1944 to hold a person as manufacturer. The ownership of goods is not relevant, therefore, in the present case even though the goods belongs to the appellant but the entire activities were carried out by the job worker. This issue has been considered by the Larger Bench in the case of M/s. Thermax Babcock and Wilcox Ltd. (Supra) wherein, the Larger Bench has observed as under:-

> ***7.*** *The fact that M/s. Thermax Babcock was principal manufacturer who removed inputs to M/s. Thermax (job worker) for manufacturing of intermediate goods i.e. boiler parts which were to be used by the principal manufacturer in the manufacture of final product remained undisputed. M/s. Thermax as a job worker manufactured boiler parts for M/s. Thermax Babcock using the inputs supplied to it and cleared the same back to M/s. Thermax Babcock who used such intermediate goods in manufacture of final products but did not pay any duty on clearance of such final products.*
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> ***7.1*** *The term 'manufacture' is defined under Section 2(f) of the Central Excise Act which includes any process -*
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> *(i) Incidental or ancillary to the completion of a manufactured product; and*
>
> *(ii) Which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or*
>
> *(iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labelling of containers including the declaration 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]*
>
> *The definition of the manufacturer says that any person who is engaged in any of the activity specified in clauses (i) to (iii) of Section 2(f) of the Act would be called as manufacturer. It is the 'manufacturer' who under Central Excise Act and Rules is liable to pay duty unless otherwise exempted. The ownership of the goods is immaterial. Any person who undertakes the above activities being manufacturer, a job worker engaged in any of the said activity is a*

manufacturer and is thus liable to pay duty on the goods manufactured by him unless otherwise exempted.

7.2 *Exemption from payment of Excise duty has been provided by Notification issued under Section 5A of the Central Excise Act. The relevant exmption Notification No. 214/86-C.E., dated 25-3-1986 as amended was subject matter of consideration in the adjudication. That was issued by the Government in terms of Rule 8(1) of Central Excise Rules, 1944. By virtue of Section 5A(4) the legislature has provided that the exemption provided under Rule 8(1) shall continue to remain in force. The relevant Section 5A(4) as was in force during the material period reads as under :*

SECTION [5A. Power to grant exemption from duty of excise. *- (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon :*

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured -

(i) in a [free trade zone [or a special economic zone]] and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and (ii) [brought to any place in India].

Explanation. - In this proviso, ["free trade zone", ["special economic zone"]] and hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of Section 3.

[(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.]

[(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.]

[(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.]

(3) An exemption under sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation. - "Form or method", in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable : [Emphasis supplied]

(4) Every notification issued under sub-rule (1), and every order made under sub-rule (2), of Rule 8 of the Central Excise Rules, 1944, and in force immediately before the commencement of the Customs and Central Excises Laws (Amendment) Act, 1988 (29 of 1988) shall be deemed to have been issued or made under the provisions of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provisions of this section.]

(5) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.]

7.3 *Cenvat Credit Rules, 2000 and 2002 Rules were framed under Section 37 of the Central Excise Act and Finance Act, 1994. That does not vest any power to grant exemption from payment of duty. Thus the applicability of Rules 4(5) and (6) to grant exemption to the assessee i.e. job worker from payment of duty is inconceivable.*

7.4 *An exemption to job worker is provided only in terms of Notification No. 214/86, dated 25-3-1986 issued under Rule 8(1) of Central Excise Rules, 1944 in terms of Section 5A. The Notification No. 214/86-C.E., dated 25-3-1986 which provides exemption to the job worker from payment of duty on goods received from principal manufacturer reads as under :*

Specified goods manufactured in a factory as a job work and used in the manufacture of final product*s*

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods specified in column (1) of the Table hereto annexed (hereinafter referred to as the said goods) manufactured in a factory as a job work and :-

(a) used in relation to the manufacture of final products, specified in column (2) of the said Table,

(i) on which duty of excise is leviable in whole or in part; or

(ii) for removal to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or for supply to the United Nations or an international organisation for their official use or for supply to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995, or

(iii) for removal under bond for export, or

(b) cleared as such from the factory of the supplier of raw materials or semi-finished goods -

(i) on payment of duty for home consumption (on which duty of excise is leviable whether in whole or in part); or

(ii) without payment of duty under bond for export; or

(iii) without payment of duty to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or supplied to the United Nations or an international organisation for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995"], from the whole of the duty of excise leviable thereon, which is specified in the schedule to the Central Excise Tariff Act, 1985 (5 of 1986)

(2) The exemption contained in this notification shall be applicable only to the said goods in respect of which :-

(i) the supplier of the raw material or semi-finished goods gives an undertaking to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] having jurisdiction over the factory of the job worker that the said goods shall be -

(a) used in or in relation to the manufacture of the final products in his factory; or

(b) removed from his factory without payment of duty

(i) under bond for export; or -

(ii) to a unit in a free trade zone or to a hundred per cent. export-oriented undertaking or to a unit in an Electronic Hardware Technology Park or Software Technology Parks or supplied to the United Nations or an international organisation for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 108/95-Central Excises, dated the 28th August, 1995; or".

(c) removed on payment of duty for home consumption from his factory, or

(d) used in the manufacture of goods of the description specified in column (1) of the table hereto annexed by another job worker for further used in any of the manner provided in clause (a), (b) and (c) as above.

(ii) the said supplier produces evidence that the said goods have been used or removed in the manner prescribed above; and

(iii) the said supplier undertakes the responsibilities of discharging the liabilities in respect of Central Excise Duty leviable on the final products.

Explanation I. - For the purposes of this notification, the expression "job work" means processing or working upon of raw materials or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process.

Explanation II shall be omitted. (vide Notification No. 33/2000-C.E., dated 31-3-2000)

TABLE

Description of Inputs	**Description of final products**
(1)	**(2)**
All goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than high speed diesel oil and motor spirit, commonly known as petrol.	All goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely :- (i) matches; (ii) fabrics of cotton or man-made fibres falling under Chapter 52, Chapter 54 or Chapter 55 of the First Schedule to the said Act; (iii) fabrics of cotton or man-made fibres falling under Heading Nos. 58.01, 58.02, 58.06 (other than goods falling under sub-heading No. 5806.20), 60.01 or 60.02 (other than goods falling under sub-heading No. 6002.10) of the First Schedule to the said Act."

In terms of the above notification, it transpires that it is only in respect of goods covered by Para (1) and Para (2) of the Notification, manufactured by the job worker, are exempted only if the same are used by the principal manufacturer in relation to the manufacture of final products on which duty of Excise is leviable or which are cleared as such from the factory of supplier of raw material or semi finished goods either without payment of duty under bond for export or on payment of duty for home consumption. Such exemption is applicable only to those goods in respect of which the supplier gives undertaking to the Assistant Commissioner of Central Excise having jurisdiction over the factory of job worker. The facts of the case under reference

are entirely different from the situations envisaged by the Notification (supra) under which the job worker is exempted from payment of duty on goods manufactured by him on job work basis. In the case under reference, the principal manufacturer sent the inputs to the job worker under Rule 4(5)(a) of Cenvat Credit Rules, 2001 and 2002 Rules. Appellants plea was and their contention is that the job worked goods were exempted from duty on the clearance thereof at the job worker's end, by virtue of Rule 4(5)(a) of Cenvat Credit Rules, 2001 and 2002 relying upon Rule 4(6) of the said Rules, appellant claimed that the principal manufacturer can also remove the goods from the job worker premises either on payment of duty or for export, under Bond. The Rule 4(5)(a) and Rule 4(6) of Cenvat Credit Rules, 2001 and 2002 relied upon by the Appellant in support of their contention read as under :

***Rule 4(5)(a)** - The CENVAT credit on inputs shall be allowed even if any inputs as such or after being partially processed are sent to a job worker for further processing, testing, repairing, re-conditioning or any other purpose, and it is established from the records, challans or memos or any other document produced by the assessee taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days, the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer can take the CENVAT credit again when the inputs or capital goods are received back in his factory"*

***Rule 4(6)** - The Commissioner of Central Excise having jurisdiction over the factory of the manufacturer of the final products who has sent the input or partially processed inputs outside his factory to a job worker may, by an order, which shall be valid for a financial year, in respect of removal of such input or partially processed input, and subject to such conditions as he may impose in the interest of revenue including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job worker.*

Perusal of the above sub-rules reveal that Rule 4(5)(a) is concerned only with permitting removal of inputs to the job worker by the principal manufacturer who has availed Cenvat credit on such inputs. Pertinently, Rule 4 of the Cenvat Credit Rules is concerned with the conditions under which a manufacturer is allowed to avail Cenvat credit. Rule 4(5)(a), not cast any liability of duty upon the principal manufacturer who has sent the inputs for job work other than the condition that in case of non-receipt of goods within the stipulated period he shall be liable to reverse the Cenvat credit availed on such inputs. The rule is confined to the scope of Cenvat credit but has no relation with manufacture, manufacturer and payment of duty on the manufactured goods.

***7.5** Similarly Rule 4(6) is concerned with the condition under which the finished goods, manufactured from the inputs on which Cenvat credit has been availed, can be cleared by the principal manufacturer from the premises of job worker on payment of duty or for export under Bond subject to approval of the jurisdictional Commissioner of the principal manufacturer. This rule is applicable only when principal*

manufacturer discharges the Excise duty on finished goods which is manufactured by the job worker. This Rule does not allow the job worker to remove finished goods without payment of duty. Such a situation arises in case where the Cenvated inputs are sent for job work and finished goods manufactured therefrom is cleared from the job work premises. It is a facility to avoid the return of the finished goods to the factory of principal manufacturer and also to save the logistic cost. Thus Rule 4(5) and Rule 4(6) have been issued under Cenvat Credit Rules, 2001 and 2002 Rules as the conditions under which Cenvat credit can be allowed to a principal manufacturer and it is not a statutory provision to grant exemption from payment of duty to the manufacturer and in the present case, the job worker.

7.6 *The job worker being the manufacturer of goods is liable to pay duty on goods manufactured by him albeit on job work. The ownership of the goods is immaterial for the purpose of levy of duty and thus any person who has undertaken the activity of manufacture is liable to pay duty. In order to save the job worker from payment of duty the principal manufacturer has to own the liability to pay such duty. It is only by virtue of the Notification No. 214/86-C.E., dated 25-3-1986 that the liability of the job worker to pay duty is transferred to the principal manufacturer who undertakes to pay duty.*

7.7 *The intention of enactment of Notification (supra) was to shift the liability of payment of duty from job worker to the principal manufacturer under certain conditions as provided in the said notification. There is no blanket machinery provisions in the Central Excise law under which the liability to pay duty is transferred from the job work manufacturer to another person i.e. principal manufacturer. However when the principal manufacturer does not own up the liability to pay duty on finished goods, the provision of Notification No. 214/86-C.E., dated 25-3-1986 does not apply. In that case, it is the ultimate manufacturer i.e. the job worker who has to pay the duty. Following the procedure and conditions of the Notification (supra) only by the principal manufacturer, the job worker would be saved from payment of duty on goods manufactured by him.*

7.8 *In the case under reference, the facts of non-payment of duty on final products by the principal manufacturer is not disputed. The goods received from the job worker were not used in the manufacture of dutiable final products but in goods on which no duty was paid. In such case when the principal manufacturer did not intend to pay duty on the final products, the job worker who is manufacturer of intermediate goods is liable to pay duty. Non-compliance of Notification No. 214/86-C.E., dated 25-3-1986 by the principal manufacturer has resulted into duty liability upon the job worker. Moreover, it is admitted by the appellant (job worker) that the inputs were not sent by the principal manufacturer under Notification No. 214/86-C.E. If the contention of the appellant is accepted it would lead to the situation where neither the principal manufacturer nor the job worker would pay duty, which has not been legislated.*

7.9 *The appellant has relied upon the Tribunal's order in case of M/s. M. Tex & D.K. Processors P. Ltd. v. CCE, Jaipur - 2001 (136) E.L.T. 73 (Tri.-Del.) to support their views. However the facts are entirely*

different as the principal manufacturer was sending goods to the job worker in that case under Rule 57F(4) which reads as under :

"57F(4) - The inputs can also be removed as such or after they have been partially processed by the manufacturer of the final products to a place outside his factory under the cover of a challan specified in this behalf by the Central Board of Excise and Customs, for the purposes of test, repair, refining, re-conditioning or carrying out any other operation necessary for the manufacture of final products or for manufacture of intermediate products necessary for the manufacture of final products and return the same to his factory within a period of sixty days or such extended period as the Assistant Commissioner of Central Excise may allow in this behalf, for -

(i) further use in the manufacture of the final product; or

(ii) removing after payment of duty for home consumption; or

(iii) removing the same without payment of duty under bond for export."

Since the rule provided for exemption where the principal manufacturer pays duty on finished goods and therefore it was held that no duty is liable to be paid by the job worker. The job worker was exempted from payment of duty in case where the goods arising out of job work were to be used by the principal manufacturer either in the manufacture of goods on which duty was paid by him or were to be cleared as such on payment of duty. The said situation given in Rule (supra) cannot be equated with the present situation as Rule 4(5)(a) not being concerned with payment of duty but only limited to sending of cenvated inputs to the job worker.

7.10 *In the present case the fact remains is that neither the goods after job work were cleared as such on payment of duty nor were used in manufacture of dutiable final products by the principal manufacturer. Hence the duty liability would be on the real manufacturer of goods i.e. the job worker. Since the principal manufacturer pays the duty on the product arising out of manufacture even at the job worker's end, he is eligible to avail credit. The Rule 4(5)(a) thus is a facility to the principal manufacturer to send goods for job work on which Cenvat has been availed. It is nothing to do with the duty payment of goods.*

7.11 *Rule 4(6) is a facility to the principal manufacturer to clear the goods directly from the premises of job worker after payment of duty. Notably it is not the case of the appellant that the principal manufacturer paid duty at anytime as the goods manufactured by him were exempted from duty. Thus the liability for payment of duty on such intermediate goods manufactured by the job worker is on job worker only.*

7.12 *The Tribunal order in case of Vandana Dyeing Pvt. Ltd. v. CCE, Mumbai - 2014 (307) E.L.T. 528 (Tri.) and Mukesh industries Ltd. v. CCE, Ahmedabad - 2009 (248) E.L.T. 203 (Tri.) were rendered considering Rule 4(5)(a) of Cenvat Credit Rules, 2001 and 2002 Rules as pari materia to 57F(4) of erstwhile Central Excise Rules, 1944. However in our considered view Rule 57F(4) provided for payment of*

duty by the principal manufacturer whereas Rule 4(5)(a) only provides sending of Cenvat availed inputs for job work and return of same to the principal manufacturer implying that the principal manufacturer shall pay duty on the same. Accordingly those judgments are of no help to the appellant.

7.13 *Even the Tribunal's order in case of Dhana Singh Synthetics Pvt. Ltd. v. Commissioner, Vapi - 2015 (326) E.L.T. 609 (Tri. - Ahmd.), is to the effect that the goods were received under Rule 57F(4) which itself stipulates the payment of duty by the principal manufacturer and therefore no duty payment was required to be made. Since the principal manufacturer was paying duty, the job work was exempted from duty. Even the Tribunal's order relied upon by the appellant in case of Essar Steel Ltd. v. CCE, Raipur - 2016 (341) E.L.T. 145 (Tri.) also says that the job worker is not liable to pay duty if the principal manufacturer is paying duty on the job work on returned goods at the time of clearance as such from the factory of the principal manufacturer or at the time of removal of final products in which such job work returned goods are used. The Para 6 of the decision dealing with the findings of the Tribunal is as under :*

"6. It is thus, obvious that as far as the duty liability of a job worker in terms of Rule 57F(4) of Central Excise Rules, 1944 is concerned, it is settled upto the level of Supreme Court that the job worker was not required to pay duty. We have reproduced above the provisions of Rule 57F(4) of Central Excise Rules, 1944 and the provisions of Rule 4(5)(a) of the Cenvat Credit Rules, 2004 and have carefully perused the same. The language in both these Rules gives no scope to infer that if the job worker was not required to pay duty in terms of Rule 57F(4) it could be required to pay duty in terms of Rule 4(5)(a) because the conditions of Rule 57F(4) of Central Excise Rules, 1944 were stringent compared to the conditions of Rule 4(5)(a) of the Cenvat Credit Rules inasmuch as Rule 57F(4) categorically required the principal manufacturer to use the goods received from the job worker for further use in the manufacture of the final product or removing after payment of duty for home consumption or removing the same without payment of duty for export while Rule 4(5)(a) does not say so expressly though it is implicit therein. Thus, we are of the view that for the purpose of dutibility at the hands of the job worker, the provisions of Rule 57F(4) of Central Excise Rules, 1944 are essentially pari materia the provisions of Rule 4(5)(a) of the Cenvat Credit Rules. Indeed vide judgments in the case Mukesh Industries Ltd. v. CCE (supra) CESTAT essentially held as under :

"Duty liability - Job worker - Respondents receiving grey MMF and knitted or crocheted fabrics from principal manufacturer under the cover of challans issued under Rule 4(5)(a) of Cenvat Credit Rules, 2001 and after completion of job work the goods stand returned to the principal manufacturer - Rule 57F(3) of erstwhile Central Excise Rules, 1944 and Rule 4(5)(a) ibid being independent provisions, fact that goods were not specified in the Notification No. 214/86-C.E. will not make a difference - No duty liability can be fastened upon the job worker - Section 3 of Central Excise Act, 1944. [para 4]."

Similarly in the case of Dhana Singh Synthetics Pvt. Ltd. v. CCE, (supra) it was held as under :

"Demand - Job worker - Fabric received by job worker accompanied with Challans issued under Rule 57F(5) of erstwhile Central Excise Rules, 1944 corresponding to Rule 4(5)(a) of Cenvat Credit Rules, 2002/2004, which returned after processing to principal manufacturer under said Challans without payment of excise duty - Demand raised as processed fabric not exempt under Notification No. 214/86-C.E. - HELD : Inputs received under Central Excise Challans and not under Notification No. 214/86-C.E. - As per C.B.E. & C. Circular No. 306/22/97-CX, dated 30-3-1997 for job work undertaken in terms of Rule 57F(4) ibid, duty liability to be discharged by principal manufacturer and not by job worker - No dispute that principal manufacturer cleared finished goods on payment of duty - Case of revenue neutral as any payment of duty by job worker will enable principal manufacturer to avail Cenvat credit - Order passed by adjudicating authority dropping proceedings against job worker upheld - Impugned order set aside - Section 11A of Central Excise Act, 1944. [paras 2, 3]".

The order of Tribunal in case of Mukesh Industries v. Commissioner - 2009 (248) E.L.T. 203 (Tri.), Vandana Dyeing Pvt. Ltd. v. CCE, Mumbai-III - 2014 (307) E.L.T. 528 (Tri.), are also on the same views and thus not applicable in the present set of facts.

7.14 *The appellant also relied upon the judgment of Hon'ble Apex Court in case of M/s. International Auto Ltd. v. CCE, Bihar - 2005 (183) E.L.T. 293 (S.C.). In the said case the dispute related to valuation of goods for the purpose of levy of duty at the job worker's end. The controversy was not related to liability of duty of job worker. It is undisputed in the present case that the principal manufacturer was not paying duty on removal of final products and had also not opted to avail the benefit of Notification No. 214/86-C.E. Hence the liability is on the manufacturer of intermediate product, i.e. job worker in the present case.*

7.15 *The reliance placed upon the Circular No. 306/22/97/-CX, dated 20-3-1997 is also misplaced since the circular was with reference to the situation upon eligibility of the job worker to claim credit where no duty was paid by them. However the facts of the present case are different as it deals with the situation as to who should be liable to pay duty when the principal manufacturer is not discharging duty either on job work goods or on final products in which such job work goods are consumed. In such case the responsibility lies to the job worker who is the ultimate manufacturer of the goods to discharge the excise duty.*

7.16 *Revenue has placed reliance upon the Tribunal judgment in case of M/s. Facit Asia Ltd. v. CCE - 1991 (54) E.L.T. 347 (Tri.). Tribunal was seized of the question as to whether the duty paid by the job worker is available to the principal manufacturer when the job worker could have availed exemption under Notification No. 214/86-C.E. The Tribunal rightly held that if the job worker has paid duty even though he was eligible to avail exemption under the Notification, the principal manufacturer was eligible for the credit thereof as he was liable to pay duty on clearance of the final goods. Tribunal held that had the Notification No. 214/86 not issued, even under Rule 57F(2) the job worker had to pay duty. Thus it follows that it is only*

by virtue of notification (supra) the goods manufactured at job workers end are exempted only if the same or the final product in which such intermediate goods are used are liable for duty at the end of the principal manufacturer which is absent in the present reference.

7.17 *In case of Collector v. Bright Steel Mac Fabrics - 1994 (69) E.L.T. 276 (Tribunal) as upheld by the Hon'ble Apex Court in case of CCE v. Bright Steel Mac Fabrics - 1997 (94) E.L.T. A145 (S.C.), the Tribunal has rightly held that Rule 57F(2) does not envisage return of inputs after completion of processing resulting in a semi-finished goods or intermediate goods without payment of duty.*

7.18 *In case of Desh Rolling Mills v. CCE, Delhi - 2000 (122) E.L.T. 481 (Tri.), the Appellate Tribunal confirmed duty demand upon the job worker as the job work activity was not undertaken in terms of Notification No. 214/86-C.E. The Tribunal held as under :*

"Notification No. 214/86 provides exemption to the goods manufactured in a factory as a job work and used in or in relation to the manufacture of final product on which duty of excise is leviable whether in whole or in part subject to the condition that supplier of the raw materials gives an undertaking to the Assistant Collector of Central Excise, having jurisdiction over the factory of the job worker, that the goods shall be used in or in relation to the manufacture of the final products in his factory; the said supplier produces evidence that the goods have been so used and he undertakes the responsibilities of discharging the liabilities in respect of duty leviable on the finished products. We find that no evidence has been brought on record by the Appellants to prove that the supplier of the raw-material had supplied the materials to them under the provisions of Notification No. 214/86. In view of absence of any material to this effect, it is not open to the Appellants to claim that they were working under the provisions of Notification No. 214/86. The copies of challans brought on record by the Appellants only refer to the movement of excisable goods under Rule 57F(2). In view of this, the reliance placed by the Appellants on the observation of the Tribunal in respect of Notification No. 214/86 in the remand order is not tenable. We also observe that the Tribunal directed the Adjudicating Authority to decide the matter in the light of the observations and also according to the law. Notification No. 214/86 nowhere provides that the supplier of the raw material will be liable to pay the duty on the goods manufactured as a job work. Para 2 of the Notification No. 214/86 speaks of the liability of the supplier for discharging the duty leviable on the finished products and not on the goods manufactured on job work basis. The Adjudicating authority has rightly relied upon the decision in the case of Jina Bakul Forge Pvt. Ltd. (supra). Accordingly, we uphold the demand of Central Excise Duty as confirmed by the Commissioner (Appeals) in the impugned Orders."

7.19 *The Hon'ble Apex Court in case of M/s. Kartar Rolling Mills v. Commissioner of Central Excise, New Delhi - 2006 (197) E.L.T. 151 (S.C.) held that the assessee job worker i.e. the appellant failed to bring any evidence on record to prove that the supplier of raw material had supplied the materials to them under the provisions of Notification No. 214/86 and thus the duty demand against the*

assessee undertaking job work was upheld. The ratio laid down in the said judgment is squarely applicable to the present reference.

7.20 *In case of Commissioner v. Span Heat Transfer Equip. Mfrs. P. Ltd. - 2001 (135) E.L.T. 861 Tribunal held that the Notification No. 214/86-C.E. envisages the duty payment by the supplier of the goods for job work if he undertakes to pay the same. In the normal course of business, it is the job worker being manufacturer is liable to pay duty. We are in agreement with such views of the Tribunal as in absence of undertaking by the principal manufacturer to discharge duty liability on the job worked goods, it is the manufacturer of goods i.e. job worker who is liable to pay duty. The order of Tribunal in case of M/s. Jinabakul Forge Pvt. Ltd. v. Commissioner - 1997 (93) E.L.T. 373 (Tri.) relied upon by the Revenue is also on the identical issue. Same views has been taken by the Tribunal in case of M/s. International Engg & Mfg. Serv. P. Ltd. v. Commissioner - 2001 (135) E.L.T. 551 (Tri.).*

7.21 *Revenue has also relied upon the judgment of the Apex Court in case of M/s. Empire Industries Ltd. v. UOI - 1985 (20) E.L.T. 197 (S.C.) holding that neither hardship nor loss of benefit is criteria in fiscal statutes as the job worker is liable to pay duty. Further, that the job worker being manufacturer of intermediate goods is liable for duty as has been held in case of Britannia Biscuit Co. Ltd. v. CCE, Madras - 1997 (89) E.L.T. 22 (S.C.). Therefore it is settled position of law that the job worker as the manufacturer of goods, unless otherwise exempted, is liable to pay duty. In the present reference, the undisputed fact being that the principal manufacturer did not pay duty and did not follow the procedure and conditions of Notification No. 214/86-C.E. supra, the job worker as a manufacturer is liable to duty on the job worked goods.*

8. *As per above discussion, we hold that the job worker M/s. Thermax being manufacturer of excisable goods is liable to pay duty on the intermediate goods manufactured by him on job work basis which supplied to their principal M/s. Thermax Babcock. The question referred to this larger bench is answered accordingly. Registry is directed to place the appeals before the referral bench for appropriate orders.*

From the above detailed finding of the Larger Bench, it is settled that irrespective of the ownership of goods whoever undertakes the manufacturing activity he has to pay the duty. Applying the ratio of the Larger Bench in the present case since, the job worker has carried out all the activities which as per the department amounts to manufacture, the job worker is alone to pay the excise duty, therefore, the duty demand raised against the appellant is not sustainable, hence, the same is liable to be set aside. Since, the issue that who is liable to pay the duty has been decided by us as above, we are not going into the issue whether the activity *per se* is amount to manufacture or otherwise and the same is kept open.

05. As per our above discussion and findings, we are of the considered view that the appellant in any case is not liable to pay the excise duty in the facts and circumstances of the present case, therefore, the impugned order is set aside, appeals are allowed with consequential relief, if any, in accordance with law. The miscellaneous application filed by the appellant stands disposed of.

(Pronounced in the open court on 12.08.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul