

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No.III**

(1) EXCISE APPEAL NO. 40413 of 2019

(Arising out of Order-in-Appeal No.665 & 666/2018 (CTA-I) dated 24.12.2018 passed by Commissioner GST & Central Excise (Appeals-I), Chennai North, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034)

M/s. Medical Research Foundation

.... Appellant

(Sankara Nethralaya),
Old No.18, New No.41, College Road,
Nungambakkam, Chennai 600 034

Versus

The Commissioner of GST & Central Excise

...Respondent

Chennai North Commissionerate,
26/1, Mahatma Gandhi Road
Chennai 600 034.

WITH

(2) EXCISE APPEAL NO. 40414 of 2019

(Arising out of Order-in-Appeal No.665 & 666/2018 (CTA-I) dated 24.12.2018 passed by Commissioner GST & Central Excise (Appeals-I), Chennai North, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034)

Ms. Susila Girisan, DGM (Finance)

.... Appellant

(Sankara Nethralaya),
Old No.18, New No.41, College Road,
Nungambakkam, Chennai 600 034

Versus

The Commissioner of GST & Central Excise

...Respondent

Chennai North Commissionerate,
26/1, Mahatma Gandhi Road
Chennai 600 034.

APPEARANCE :

Ms. Vishnu Priya, Advocate
For the Appellant

Mr. Harendra Singh Pal, Assistant Commissioner (A.R)
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

DATE OF HEARING :31.08.2023
DATE OF DECISION:04.10.2023

FINAL ORDER No.40865-40866/2023

ORDER : Per Ms. SULEKHA BEEVI, C.S.

1. The issue involved in both these appeals being connected they were heard together and are disposed of by this common order.
2. Brief facts are that, the appellant namely, M/s.Sankara Nethralaya, according to department are manufacurers of spectacles falling under chapter heading 9004 of Central Excise Tariff Act, 1985. Based on the intelligence gathered that the appellant is engaged in manufacturing spectacles and are clearing them without payment of Central Excise Duty, the officers of Preventive Unit visited the premises of the appellant. It was noted that the main inputs for manufacture of spectacles are lens and frames. The lens (blanks) were procured from various listed vendors, of standard sizes and fixed to the frame using a sophisticated technical process which involves a higher level of precision. The department was of the view that after fitment of the lens in to the frames a distinct new marketable commodity viz. "spectacle" emerges. Hence, it appeared that these activities undertaken by the appellant amounts to manufacture of spectacles as provided in section 2 (f) of Central Excise Act, 1944 which attracts Central Excise duty at 2% (without CENVAT Credit) vide Notification No.16/2012-CE dated 17.03.2012 and at 6% (with CENVAT Credit) vide Notification No.19/2012 – CE

dated 17.03.2012. Also, the appellant did not obtain registration from the Central Excise department for the manufacture of excisable goods. Show Cause Notice was issued to the appellants proposing to demand duty for the spectacles cleared by them for the period from August 2012 to June 2017 along with interest and also for imposing penalties. The Show Cause Notice further proposed separate penalty on M/s. Susila Girisan, DGM-Finance under Rule 26 of the Central Excise Rules 2002. After due process of law, the original authority confirmed the demand of Rs.1,09,51,375/- being the Central Excise Duty for the period August 2012 to June 2017 along with the interest and imposed equalpenalty under section 11 AC of the Central Excise Act 1944. A separate penalty of one crore was imposed on M/s. Susila Girisan under Rule 26 of CER 2002.

3. Against such order the appellant filed appeal before Commissioner (Appeals), who vide order impugned herein upheld the demand of duty, interest and penalties. However, the penalty of one crore imposed on M/s. Susila Girisan was reduced to be Rs.10 lakhs. Aggrieved by such order, the appellants are now before the Tribunal.

4. The Ld. counsel Ms. Vishnu Priya appeared and argued on behalf of appellants. It is submitted that:-

M/s. Medical Research Foundation (also known as "Sankara Nethralaya") (hereinafter referred to as the "Appellant No.1") is a registered Society holding Registration No.25/1978 under the

provisions of the Tamil Nadu Societies (Registration) Act, XXI of 1960. It is a Trust registered under Section 12AA of the Income Tax Act, holding Approval No.1146-III(51)/1978, dated 20.09.1978 issued by the Commissioner of Income Tax.

4.1. As a medical institution, it is also registered with service tax and has been faithfully discharging service tax during the periods under the categories applicable on health services by Clinical Establishment, Information Technology Software Service, Commercial Training or Coaching, Technical Testing and Analysis Services and Business Support Services. Periodical service tax audits have also been conducted and accounts have been perused. While so, the SCN No.3/2017-GST(C.N) dated 7th September, 2017 was issued alleging that the activity of fitting lens into a frame amounts to "Manufacture" as per the provisions of Section 2(f) of the Central Excise Act, 1944 (hereinafter referred to as the "Act") and demanded central excise duty.

4.2. The Appellant No.1 runs a store which vends Spectacles with Nil power. In other words, what is displayed on the rack in the shop is a spectacle with Nil power. What happens in the case of a patient who has his power tested in the hospital is only fitment of lens on to a frame available on the rack in the shop.

4.3. The blank lens which contains power required for a patient is not manufactured by Appellant No.1. It is manufactured by a third

party who is a central excise assessee. Accordingly, the appellant receives the duty-paid lens is received by way of outright purchase. After power is tested of a patient, these duty-paid lenses are made to specifications and specific power which is set out in the prescription. Similarly, the duty-paid frames are also received by Appellant No.1 by way of purchase from vendors. The duty-paid lens which is received is fitted on to the frame purchased by the patient and then delivered to the patient. Thus, neither the lens nor the frame is manufactured by the Appellant. Importantly, the spectacle delivered is not marketable as an asset or chattel or goods transferable from hand to hand. It is made to the specific requirement of only one patient. It does not possess the characteristic of marketability. In this regard, the Ld. Counsel argued that it is a settled legal principle that the "twin tests" criteria, i.e., "Manufacture and "Marketability" needs to be satisfied in order to levy excise duty on the goods. The following decisions were relied.

- i) Board of Trustees vs. CCE, A.P. – 2007 (216) ELT 513 (SC) at para 3 (Kindly refer to Page 1 of Volume 1)
- ii) Needle Industries (India) Pvt. Ltd., vs. CCE, Salem – 2017 (6) GSTL 159 (Tri-Chennai) at para 7 to 9 (Kindly refer to Page 2 to 3 of Volume 1)

4.4 The Ld. counsel submitted that the Appellate Authority ought to have seen that the provisions of the main part of Section 2 (f) of the Act, incorporates the principle of manufacture in its traditional sense as bringing into existence an article with a distinctive name,

character, and use. This is non-existent in the present case. To support this argument the decision in the case of Ujjagar Paints Ltd., vs. Union of India – 1988 (38) ELT 535 (S.C.) at para 7 was relied.

4.4.1 The Ld. Counsel drew support from the decision of the High Court of Rajasthan in Mehta Opticians Vs. The Assistant CTO dated 16.05.1994 as approved by Hon'ble Supreme Court and reported (2009) 9 Section 309. In the aforesaid case, two questions arose for consideration before the Hon'ble High Court of Rajasthan and before the Hon'ble Supreme Court. The first question was, whether exempted product made out of two exempted inputs can be taxed? The Assessee contended that the frames and glasses were exempted from tax. The second contention of the assessee was that there was no manufacturing activity. Both contentions were approved by the Hon'ble Division Bench of the Rajasthan High Court and later by the Hon'ble Supreme Court in the decision reported in 2001 (9) SCC 309. In Para 2 of the aforesaid judgment, the Hon'ble Supreme Court held "all that an optician does is to fit the lens into a spectacle frame; it carries out no process of manufacture and no separate or distinct commodity emerges". These decisions are clear authorities for the position that fitting of lens on to a frame does not amount to manufacturing activity.

4.4.2. Though the aforesaid decisions were rendered in the context of Sales Tax Law, the decisions are relevant even for Central Excise Law. While Central Excise duty is concerned with

manufacturing activity to levy duty of excise, the sales tax is leviable wherever commercially different products are brought into existence to be taxed at different rates. While there is no dispute about the fact that mere trading activity can also attract sales tax, the rate of sales tax will vary whenever there is manufacturing activity and therefore the test laid down in Sales Tax Cases as to whether there is manufacture, will equally apply to Central Excise Law. The decision of Hon'ble Supreme Court in (1976) 1 SCC 834 at Para 14 – State of Tamil Nadu vs. Pyare Lal Malhotra, was referred by the Ld. Counsel.

4.5. These decisions have been relied upon recently by the Hon'ble Madras High Court in the case of Titan Company Limited, M/s. Premier Optical Pvt Ltd, Mrs. Geetanjali D Souza Prabhu Vs Commissioner of Central Excise, LTU and Others reported in 2021 (10) TMI 1029- MAD HC at para 20 to 23 and the Hon'ble Madras High Court has held that the aforesaid activity of fitting to lens into frames does not amount to manufacture.

4.6. Again, the billing is done separately for the two articles; namely lens and frame. There is no value addition undertaken at the hands of the Appellant. Only activity of fitting is involved. The Appellant No.1 does not contribute any raw material to either the frame or the lens. The Appellant is also duty bound to maintain transparency to its patients as regards the cost of the lens and the frame. For this simple reason and also because there is no value addition undertaken at the hands of the Appellant No.1, except the activity of fitment, the

Appellant collects charges for the lens and frame separately. The Appellant No.1 discharges TNVAT separately on these two. Thus, the billing of the Appellant No.1 is consistent with its case that there is no manufacturing activity.

4.7. Without prejudice to the above, it is submitted that mere mention of an article in the Tariff Heading does not result in manufacturing activity. The following decisions were relied.

(i) CCE vs. Technoweld Industries – 2003 (155) ELT 209 (SC)- at para 8.

(ii) CCE, New Delhi vs. S. R. Tissues (P) Ltd - 2005 (186) ELT 385 (SC) at para 19.

4.8. The Appellate Authority in para 8 of the impugned order has erred by relying upon the judgment in the case of M/s. Krishna Udyog Vs CCE, Lucknow reported in 2016 (343) ELT 252(Tri-All). In this regard, it is submitted by the Ld. Counsel that, in the aforesaid case, the input was "Copper Wires" and the output was "PVC insulated winding wires" and both were commercially distinct products and were also "Marketable" in the market, thereby satisfying the "twin tests" criteria for attracting excise duty. Whereas, in the present case "twin tests" criteria is not satisfied.

4.9. The Ld. counsel put forward arguments with regard to quantification of duty demand. The figures have been collected by the department from the income tax returns filed by appellant.

During the course of the personal hearing on 23.05.2018 before the adjudicating authority, appellant had filed a "reconciliation statement", indicating the break-up of the proposed demands as per Show Cause Notice. This "statement" has 8 Pages. In Page1, there is a tabular statement which is titled as break-up income reported as "optical shop collections". In the audited accounts in turn this is reported in the major head "Hospital Collections" as well as in the I.T. return. Page 1 contains financial year-wise figures and has a summary of TN + West Bengal Division. The present SCN is only in relation to operations in Tamil Nadu. In Page 2 the total figures as per SCN dated 07.09.2017 is mentioned. Illustratively for the year 2012-13, the total revenue from 01.04.2012 to 31.03.2013 on Optical Shop Collections is Rs.8,54,95,930/- But the Show Cause Notice is only from August, 2012 to March, 2013. Between August 2012 to March 2013, the figure adopted by department is Rs.5,56,75,318/- in the Show Cause Notice. In this figure, only Rs.5,49,90,559/- pertains to assembly of lens with frame and delivery. Balance of Rs.7,24,759/- pertains to ready-to-sell items available in the shop. These are usually spectacles with zero power or other accessories. Similarly for the year 2013-14, the total figure adopted in the Show Cause Notice comes to Rs.10,03,23,973/-. Out of this, the revenue generated out of assembly and delivery comes to Rs.9,89,66,610/- and outright sales comes to Rs.13,57,363/-. It is pointed out that there is no liability at all to pay excise duty on the figures pertaining to outright sales and have to be excluded from the demand. The Ld. Counsel asserted that there is much error in quantification of the demand.

4.10. The Ld. Counsel argued on the issue of limitation also. Appellant No.1 is a service tax assessee. During the periodical service tax audits conducted, various financial statements including Profit and Loss account and Balance Sheet have been submitted to the service tax department. In the course of these audits, there has been due disclosure. In addition to this, the Appellant No.1 is an Income Tax assessee. The income generated through spectacle sales has been disclosed in the audited books of accounts and also disclosed in the I.T. returns. It is well settled by a series of judgments that disclosure in the audited books of accounts and the I.T. return will mean that extended period cannot be invoked. The Ld. Counsel relied on the decision reported.

2014 (301) ELT 657 – Black Stone Polymers vs. CCE, Jaipur-II

4.11. Further the issue is interpretational in nature. The Appellate Authority in para 9 of the impugned order has erred by stating that in case of any doubt in the taxability, the Appellant ought to have approached the department for clarification. Since the appellant did not seek clarification the extended period of limitation has been invoked by department. It is argued that this is not sufficient ground to invoke extended period. The Ld. counsel submitted that the demand for the period between July 2012 to April 2016 is completely barred by limitation (demand covered: Rs.79,25,817.28/-) and the period between May, 2016 to June, 2017 would fall within normal period (demand covered: Rs.30,25,558.06). The issue being a

question of interpretation and the appellant being under bonafide that there was no manufacturing activity the demand invoking the extended period may be set aside. There is no willful suppression of facts with intent to evade payment of duty.

4.12. The authorities below have erred in imposing separate penalty on Ms. Susila Girisan. The provisions of Rule 26 cannot be made applicable to the present case since Appellant No.2 was not involved in transporting, removing or depositing or keeping or purchasing excisable goods. It is a settled law that rule 26 can be made applicable only when a person who deals with excisable goods knows that the said goods are liable for confiscation. In this regard, it is submitted that the Appellant No.2 was under a bonafide belief that the activity of fitting the lens into a frame does not amount to manufacture and consequently was also of the belief that the goods are not liable for confiscation. The Ld. Counsel prayed that the appeals may be allowed.

5. The Ld. AR Shri Harendra Singh Pal supported the findings in the impugned order. It is submitted by the Ld. AR that the appellant procured the lens (blanks) and the frames from separate sources. However, the blanks are not simply mounted on the frames and sold to the patients / customers. These two distinct items even though billed separately cannot be used by the customers. The spectacles prescribed to the customers attained the specification only at the hands of the appellant's technicians who are employed to do various

process on the frames and lenses. Without subjecting the lens (blanks) to various processes, the spectacles cannot provide clarity of vision to the customer.

5.1. The test of 'manufacture' lies in the emergence of a distinct new good after undertaking various processes. The decision of Hon'ble Supreme Court in the case of Delhi Cloth and General Mills Company Ltd. 1977 (1) ELT (J 199) (SC) was relied by the Ld. AR to argue that when a new distinct product emerges which can be put in the market to be bought and sold, the activity amounts to manufacture. In the present case, the frames and blanks undergo various processes and a new distinct product namely "spectacles" is created. These spectacles are goods which can be ordinarily brought and sold in the market. It is submitted that the demand of duty, interest and penalties have been correctly upheld by the Commissioner (Appeals).

6. Heard both sides.

7. The issue to be decided is whether the activity of the appellant of fitting the lens on to the frames to make spectacles that can be used by a customer amounts to manufacture. For better appreciation, the definition of manufacture as per section 2 (f) of Central Excise Act reads as under:-

(f) "manufacture" includes any process:

i. incidental or ancillary to the completion of a manufactured product.

ii. which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule] as amounting to manufacture; or

8. In the present case, the department alleges that fitting of the lens into the frames amounts to the activity of manufacture as defined in Section 2 (f). In para 9 of the Show Cause Notice, it is alleged that in workshops / laboratory of appellant, fitment of lenses to the frames are done by their lab technicians who are specially trained to work on the sophisticated instruments specially designed for the purpose. After fixing the lens in to the frames it becomes a distinct new product namely "spectacles" which is a marketable one.

9. The Ld. Counsel for appellant has been at pains to furnish various documents and explain the activity of the appellant is mere fitting of the powered lenses to the frames and argue that this activity does not amount to manufacture. The activity is explained as below:

A patient is first given a prescription denoting the type of lens (power required). The patient then chooses the type of lens for which a bill is issued. They obtain such lens from other source (ESSILR, India Pvt. Ltd.) which supplies them the lens having the required power. Excise duty is collected by ESSILR from them while supplying the lens. The patient chooses the frame which is billed separately. These frames are purchased in bulk by the appellant and the vendor

who supplies the frames to appellant has paid excise duty. While billing the customers, the appellant mentions the price of the lens as well as the frames separately. Even though the entire thing is called as spectacles, the billing of lens and frames is separate. From the documents produced before us, it is clear that the lens and the frames have suffered excise duty.

10. The Ld. Counsel has objected to the marketability of the goods as alleged in the Show Cause Notice. It is submitted that the spectacles as a whole is customer specific. After fitting the power lens in the frame a customer who buys it cannot sell it to another customer. So also a customer cannot purchase powered spectacles in bulk and resell them. The activity of the appellant can be considered only as an assembly of the lens and the frames. The activity does not fall within the definition of manufacture as defined in Section 2 (f) of Central Excise Act, 1944.

11. This view is supported by the decision of the Hon'ble High court, in the case of Titan Company Limited and others (supra) 2021 (10) TMI 1029 Madras High Court. In the said case, the High court was considering the very same issue whether the petitioners are liable to pay Excise duty for the activity of fixing prescription lenses in spectacle frames. The relevant para reads as under:

15. A perusal of the show cause notice reveals that the activity carried out in the show rooms was the manufacture and clearance of spectacles carrying Titan Eye+' Brand. Though adverse inferences are sought to be drawn by the respondents on other

grounds as well, such as violation of conditions contained in Notification 8/2003-CE dated 01.03.2003, this point has not been argued and both the parties before me have confined the scope of the arguments to (i) whether the respondents were right in law in having issued the impugned show cause notices inspite of binding judicial precedents to the opposite effect and (ii) whether the assembly of prescription lenses on to a spectacle frames is an activity that amounts to 'manufacture' attracting levy of duty under the Act.

... ..

17. That apart, the show room has also had the facilities for eye testing, the grinding of spectacle lenses and fixing of lenses in the spectacle frame to make a spectacle. The technicians were trained to do the work of cutting, edging, grinding of the lenses and fit the same in the frame to make a complete spectacle. For the aforesaid purposes, the following machines were used.

.... ..

18. The petitioner explained the manufacturing process at the time of the Inspection in the following terms:

1. The customer visits their premises
 2. The customer selects a frame of his choice depending on brand, price, look, quality, etc.
 3. The customer selects lenses of his choice depending on brand, price, look, quality, etc.
 4. The customer either already has a prescription (details of power of lenses required) or he gets his eyes tested at the showroom.
 5. If the customer wants to get his eyes checked, the optometrist of the showroom checks eyes of the customer, to get (ascertain) the power of lenses required for correcting his vision.
6. After getting the power of lenses/glass required for the customer, either they get the same from their store in the premises or if not available in the store, they place order to get the same from their warehouse at Bangalore.
 7. Their technician, after getting the lenses of requisite power of standard shape and size, resizes the same so as to make it fit in the frame chosen by the customer. For this purpose he undertakes the following processes-
 - i. Remove dummy lens from the frame, which comes fitted with the frame from the factory.
 - ii. Verify the power of the lens (Pre Quality Check)
 - iii. Makes pattern of lens with the help of dummy lens, by cutting the "un-cut plastic pattern" into the requisite shape,
 - iv. Keep the pattern in the blocker machine to get the optical centre of eye and for putting the optical centre of the lens at the centre of eye and affixes blocking tape at the optic centre of eye in the lens so determined, fixes the lens in the Auto Edging Machine to cut to the requisite size/shape.
 - v. Keeps lens in the Edging Machine for cutting and grinding to required size.
 - vi. Keep the lens in the grooving machine, if grooving is required.
 - vii. Fit the lens so made, in the frame selected by the customer, to get a complete spectacle.

He also informed that the spectacles were delivered to the customer with a spectacle case, lens cleaning cloth, invoice. Titan Eye warranty card in a paper bag, that all these goods were provided by M/s Titan. The officers also resumed certain documents, sample spectacle case, lens cleaning cloth, paper bag, etc. under Panchnama dated 27.08.2015, drawn on the spot (RUD-3).

19. In addition a warranty was also extended to the customers. All in all, the Revenue is of the view that the processes involved in the activity were complex and complicated enough to constitute 'manufacture' Moreover, the activities led to the conversion of raw materials, being prescription lenses and spectacle frames, into a marketable commodity, being a spectacle, a commercially distinct product.

20. To a pointed query put by the Court, the petitioners would specifically confirm that manufacture of the power lens i.e., the conversion of lens blanks into prescription lens is a taxable activity and that such activity takes place in the workplace/factory. They also confirm that the frames used are either imported or manufactured indigenously in a factory, subject to central excise duty. These two activities Le manufacture of the spectacle frames and prescription lenses are, admittedly excisable events and the petitioners are liable to remit duty in regard to the aforesaid two events, where applicable. The petitioners also engage in sale of ready-made eye-wear that is purchased by customers, off-the-shelf. I am not, in these writ petitions, concerned with either of the aforesaid activities.

21. Post manufacture of the spectacle frames and lenses, the goods are sent separately to the petitioners' show rooms and what is undertaken in the show room is only an assembly of the prescription lenses and the spectacle frames wherein the lenses are merely mounted upon the frames, to result in a spectacle.

22. No doubt, the minute break-down of the machinery and the processes as described in the SCN indicate a chain of events requiring skill and sophistication, that appear very significant in magnitude and impact. However, the end result of all the processes only results in assembly of the lens with the frame. This, in my view, does not amount to manufacture. The process of assembly is bound to involve some amount of refining and fine-tuning of the individual components and this, by itself, will not tantamount to manufacture. In fact, most establishments engaged in selling eye-wear provide a gamut of services in this area including, having an optician in their employ or on call, and infrastructure for the testing of vision. Thus, notwithstanding that a distinct commercial product is obtained upon assembly of a lens with a spectacle frame, this would not result in such assembly being equated to manufacture.

23. The judgments in the cases of Mehta Opticians, Bholanath Sreemany and Amazon decide and reiterate the issue of whether the activity of assembly simpliciter including fitting and minor adjustments that are part and parcel of the process of assembly, constitute 'manufacture' for the purposes of the Act, in favour of the assessee. The show cause notices, to this extent, and insofar as they purport to equate the process of assembly to manufacture, are quashed.

24 These Writ Petitions are allowed. Connected Miscellaneous Petitions are closed. No costs.

12. As seen above, categorically held by the Hon'ble High Court that the activity of fitting the power lens into the frames does not

amount to manufacture. After appreciating the facts and evidence and also following the decision of the Jurisdictional High Court in the case of M/s. Titan Company Limited (supra) we hold that the activity does not amount to manufacture. The demand cannot be sustained. The issue on merits is answered in favour of the assessee and against the Revenue.

13. The Ld. Counsel has argued on the issue of limitation also. The department has derived the figures from the income tax returns filed by the appellant. Several audits were conducted as the appellant is registered with service tax commissionerate. Further the issue is purely interpretational in nature. There is no evidence that appellant has suppressed facts with intent to evade payment of duty. Taking these aspects in to consideration, we hold that the show cause notice issued invoking the extended period cannot sustain. The issue on limitation is answered in favour of assessee and against the department.

14. In the result, the impugned order is entirely set aside. The appeals are allowed with consequential reliefs, if any.

(Pronounced in court on 04.10.2023)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

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