CASE NO.:
Appeal (civil) 2243 of 1999

PETITIONER:
M/S. BPL INDIA LTD.

Vs.

RESPONDENT:
COCMOMCIHSISNI,ONER OF CENTRAL EXCISE,

DATE OF JUDGMENT: 07/05/2002

BENCH:
N. Santosh Hegde & Shivaraj V. Patil

JUDGMENT:

SHIVARAJ V. PATIL, J.

The appellant imported 100 kits of VTR with colour monitors in disassembled condition. These items were described in invoices and bills of entry as "sets of assembly, sub-assembly and other hardware items for assembly of complete VTR and colour monitors". The said goods were subjected to countervailing duty @ 8% ad valorem falling under tariff item No. 68. During the period 2.12.1981 to 26.2.1982, the appellant started assembling these goods into VTRs and colour monitors at their factory at Palghat and cleared the sets without payment of duty, without intimation and without observing the Central Excise formalities.

The Superintendent of Central Excise, Range-II, Palghat, while perusing advice notes of the factory observed that certain VTRs and colour monitors were manufactured and cleared by the appellant during the period June, 1982 to August, 1982 and issued letter dated 12.8.1982 asking the appellant to furnish details of the sets cleared and to explain why duty should not be demanded on such sets and why action should not be taken for contravention of Central Excise rules. However, the appellant did not furnish the required information. Thereafter, the Superintendent issued a show cause notice dated 6.12.1982 asking the appellant why a duty of Rs. 5,58,000/- due on 56 sets of VTRs and colour monitors should not be demanded under Section 11-A of the Act and another show cause notice dated 2.4.1983 was issued for Rs. 1,78,500/- due on 17 sets of VTRs and colour monitors. The appellant in response gave replies by letters dated 31.1.1983 and 11.2.1984 respectively.

On 9.6.1983, the Central Excise Officers searched the factory of the appellant and on 14.6.1983 the Offices of the Directorate of Anti-Evasion searched the factory premises on 20, K.H. Road, Bangalore. 20 Nos.

of VTRs were detained which were reported to have been brought there from the factory of the appellant at Palghat. The Manager was not able to produce any document to show that the Central Excise Duty had been paid on these sets. In subsequent investigations, it was found that the appellants had manufactured and cleared VTRs and colour monitors without disclosing details thereof to the Department and without observing the Central Excise formalities. Evidence to show actual price at which VTRs and colour monitors were sold to independent wholesale buyers was also collected during the course of investigation. One more notice was issued on 20.2.1986 by the Collector, Central Excise, in continuation of show cause notices dated 6.12.1982 and 2.4.1983 issued earlier giving the detailed facts asking the appellant why Central Excise duty of Rs. 9,43,884.38 on 100 VTRs and 100 colour monitors cleared without payment of duty should not be demanded. In reply dated 7.4.1986 given on behalf of the appellant, it was stated that two show cause notices were already issued and replies were furnished and request was made to dispose of the earlier show cause notices before deciding the last one. A further reply dated 14.7.1986 was furnished by the appellants.

The stand of the appellant was that assembly of components imported in Semi Knocked Down (SKD) condition into VTRs/colour monitors did not amount to manufacture for the purpose of levy of excise duty. According to them, the imported components in SKD condition were only put together by using fasteners; that no manufacturing activity or use of power was involved in the process; the show cause notice dated 2.4.1983 was hit by limitation in respect of the clearances effected prior to 3.10.1982. Extended period of limitation under Section 11-A was not available to the Revenue. The appellant also took up the stand that the valuation adopted was not correct. Further, without completing the proceedings pursuant to the two earlier show cause notices issued, the Collector could not have issued the third notice and proceeded against the appellant in confirming the demand for Rs. 9,43,884.38 and directing the appellant to pay the said duty and imposing a penalty of Rs. 3,00,000/-.

The Collector, after considering all aspects, by his detailed order dated 24.7.1987 rejected all the contentions raised by the appellant and confirmed the demand. The appeal filed by the appellant before the Tribunal (CEGAT) challenging the said order of the Collector dated 24.7.1987 was dismissed on 6.3.1997. The application filed by the appellant under Section 35-F of the Act for reference was also rejected on 1.9.1998. Hence, this appeal.

Before us, Mr. Raju Ramachandran, learned senior counsel urged that (1) fastening imported disassembled VTRs with colour monitors did not amount to manufacture within the meaning of Section 2(f) of Central Excise & Salt Act, 1944; the fasteners had also been imported alongwith disassembled VTRs and colour monitors; VTRs with colour monitors were not liable for payment of excise duty as the countervailing duty applicable to the same at the time of import under tariff item had

been paid; (2) the demand of duty was grossly barred by limitation; the Commissioner and Assistant Commissioner could not issue separate show cause notices; the very fact of Assistant Collector issuing notices earlier clearly shows that the Department was fully aware of the import of the disassembled VTRs alongwith the colour monitors and assembling of the same and selling them; there is no averment in the show cause notice of any willful suppression of any material fact or fraud or misrepresentation. Hence, the extended period of limitation could not be invoked.

Per contra, the learned Attorney General supported the impugned order stating that the Collector as well as the Tribunal have considered all aspects. In the light of the contentions raised by the appellants, a finding of fact is recorded looking to the process involved that the appellant manufactured VTRs with colour monitors and cleared them without intimation to excise authorities and without payment of duty. He pointed out that all was not well with the appellant in replying to the show cause notices. They were trying to avoid or delay in giving reply to show cause notices; when they themselves did not intimate as to when they manufactured the goods and when they cleared without completing the Central Excise formalities, they lacked bona fides. The third notice issued by the Collector on 20.2.1986 was issued only in continuation of the earlier two notices; merely because earlier notices were issued by the Assistant Commissioner, it could not be said that the Collector had no jurisdiction to continue the proceedings and pass adjudicatory order.

We have carefully considered the submissions made by the learned counsel for the parties. According to the appellant the imported kits of VTR and colour monitors in SKD condition were only assembled by using fasteners and as such no manufacturing activity was involved in bringing out VTRs/colour monitors so as to attract the excise duty as demanded. But the contention of the Revenue is to the contrary.

This Court in Union of India vs. Delhi Cloth and General Mills [1977 (1) ELT (J199)] defined manufacture thus "The word 'Manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance'." Following passage from an American Judgment, quoted in Permanent Edition of Words and Phrases Vol. 26, reads thus: -

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

It is well settled that a question as to when a manufacture of product takes place within the meaning of Section 2(f) of the Act is a mixed question of law and fact. The nature and the extent of processes may

vary from case to case. When a change takes place and a new and distinct article comes into existence known to the consumers and the commercial community as a commercial product, which can be no longer regarded as the original commodity, such a change constitutes a process of manufacture.

It is not disputed that the imported kits of components of VTRs and colour monitors in SKD condition were items falling under Item 68 for levy of countervailing duty. It is clear from the material placed on record that by the process undertaken by the appellant a change is brought about facilitating the utility of the product for which they were meant. In other words, pursuant to the process, a transformation has taken place at the hands of the technical experts or skilled persons and not by laymen, which made the product to have a distinct character and use. Such product of VTR/colour monitor as finished product was classified under Item 37BB.

The Collector as well as the Tribunal recorded a finding of fact based on the material placed on record that the assembly of imported kits of components into VTRs/colour monitors by using the fasteners constituted the process of manufacture and rightly so in our opinion. We have no good reason to take a contrary view on this finding of fact. The Tribunal in the impugned order has recorded thus: -

"It is seen that the appellant imported component part in SKD condition and the finished product was VCR with colour monitor. The VCR and the colour monitor were cleared together. Classifn. of the VTR is u/i 68 of the erstwhile tariff. But after undergoing the process of manufacture for the assembly, the product at the time of clearance from the factory was classifiable u/i 37BB. Therefore, a transformation in the character of the imported goods took place and the new product is emerged. It is, therefore, seen that the product kit of VCR at the time of import was trailable and notionally was classified u/i 68 of the erstwhile tariff and after assembly and at the time of clearance the resultant product was classified u/item 37BB and the product therefore, can be removed only on payment of duty. Similarly the kits for colour monitor is also classifiable under item 68 of the erstwhile tariff whereas after assembly, the product at the time of clearance was classifiable u/i 33A or 37BB when sold in combination with VCR. The invoices of the appellant bearing 245s and 246 and 171 and 172 mentioned in the SCN showed the basis of the value adopted in the case of VCR and colour monitor."

The contention advanced on behalf of the appellant, that once countervailing duty was paid by them on the same items they were not liable to pay the

duty again on the VTRs/colour monitors, was rejected by the Tribunal relying on the decision of this Court in M/s. Narne Tulaman Manufacturers (P) Ltd. Vs. CCE, Hyderabad [1989 (2) ECR 129 (SC)]. Para 3 of the said judgment reads: -

"3. The appellant's contention before the Tribunal was that it was only preparing a part and that part is dutiable as a separate part. The appellant, however, did the work of assembling. As a result of the work of the appellant a new product known in the market and known under the excise item "weighbridge" comes into being. The appellant will become a manufacturer of that product and as such liable to duty. That is precisely what the Tribunal found on the facts of the case. The appellant seems to have been obsessed by the idea that as a part of machine is liable to duty then the whole end product should not be dutiable as separate excise goods. That is mistake, a part may be goods as known in the excise laws and may be dutiable. The appellant in this case claims to have manufactured only the indicator system. If the indicator system is a separate part and a duty had been paid on it and if the rules so provide then the appellant may be entitled to abatement under the rules. But if the end product is a separate product which comes into being as a result of the endeavour and activity of the appellant then the appellant must be held to have manufactured the said item. When parts and the end product are separately dutiable both are taxable."

This being the position, in our view, the Tribunal was right in its conclusion that the appellant was liable to pay duty on the end product. The decisions cited before us by the learned counsel for the appellant in support of his stand were considered by the Tribunal and rightly distinguished on facts. We do not think it necessary to consider them again.

The Collector as well as the Tribunal on detailed examination of facts and looking to the conduct of the appellant in delaying to give reply to the show cause notices and not giving necessary intimation to the Department before clearing the products manufactured by them, have held that the longer period of limitation was available. In this regard the Collector in his order, in para 11, has stated thus: -

"11. The stand taken by the assessee vice their reply dated 11.2.84 in response to the SCN dt. 2.4.83 was that the clearances effected prior to 3.10.82 would be hit by time bar, and the basis of value adopted by the Supdnt. was not correct. I would have accepted the

first objection provided M/s BPL had produced any evidence to show that they had declared to the dept. either by letter or through the documents (CL returns to be furnished by the assessee every month (like RT 12/GP) the details of manufacture/clearance. In this connection, I want to make it clear beyond any shadow of doubt that, an intimation regarding the total no. of kits imported by M/s. BPL could not be deemed to be an intimation in this regard as the liability to pay duty arises only after the manufacture is complete and clearance takes place. Since M/s. BPL have not produced any evidence to show that they had furnished the details of removal to the Supdnt. in time even in spite of specific request made vide OC No. 2786/82 dt. 17.9.82, M/s. BPL have no right to claim that the demand notice dt. 2.4.83 is barred by limitation."

Agreeing with the finding of the Collector on the question of limitation the Tribunal also in para 13 of the judgment recorded thus: -

"13. The next point of the appellant is that longer period of limitation is not invokable in this case. It is seen that the appellant having manufactured the product in question and removed the same without any intimation to the dept. which clearly goes to show that their action was with intent to evade payment of duty. There cannot be any bonafide belief on the part of the appellant in this regard. In these circumstances the contention of the appellant that the removal of the goods without payment of duty was not with intent to evade payment of duty cannot be accepted. Therefore, the duty demanded by invoking the longer period of limitation is in accordance with law."

Under these circumstances the contention advanced on behalf of the appellant on the question of limitation is untenable having regard to facts and circumstances of the case.

The contention, that the Collector could not have issued one more notice on the same set of facts when the proceeding initiated pursuant to the show cause notices issued by the Superintendent earlier were not completed, is equally untenable. The notice issued by the Collector subsequent to the issuance of notices by the Superintendent was only in continuation of the earlier two notices, which fact is evident from the notice itself. Further even issue of notice by the Superintendent earlier could not take away the jurisdiction and authority of the Collector in issuing a notice and passing the order of adjudication. The Tribunal was right in rejecting this contention also.

Thus, we find no merit in this appeal. Hence it is dismissed. No costs.

.....J.
[N. Santosh Hegde]

.....J.
[Shivaraj V. Patil]

May 7, 2002