

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.76147 of 2019

(Arising out of Order-in-Appeal No.246-247/Pat/ST/Appeal/2018-19 dated 30.01.2019 passed by Commissioner(Appeals) of Customs, Central GST &Central Excise, Patna.)

M/s.Carrycon Services Private Limited

(SitaSadan, Dadaji Sweets Lane, Gandhi Nagar, Boring Road, Patna-800001.)

...Appellant

VERSUS

Commissioner of CGST & CX, Patna-I Commissionerate

.....Respondent

(C.R. Building (Annex), Bir Chand Patel Path, Patna.)

APPEARANCE

Shri Ankit Kanodia, Advocate for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

**CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75457/2022

DATE OF HEARING : 16 June 2022
DATE OF DECISION : 10 August 2022

P.K.CHOUDHARY :

The present appeal has been filed against the Order-in-Appeal dated 30.01.2019 by which the Learned Commissioner (Appeals)has upheld the Order-in-Original confirming the demand for payment of

Service Tax including cess amounting to Rs. 67,99,067/- for the Financial Years 2010-11 to 2014-15 on the grounds that activity of filling LPG in the cylinders by the Appellant does not amount to manufacture and that it falls within the ambit of taxable category of "Packaging Service" under the service tax regime and an amount of Rs.12,20,990/- under Works Contract Services with equivalent penalty as proposed in the impugned Order-in-Original.

2. Briefly stated, the facts of the case are that the Appellant is engaged in assisting IOCL in producing "gas cylinders" by executing the work of segregation of cylinders, sealing of filled cylinders, de-shaping of cylinders by hydraulic pressure, spray of pesticides, disposing of collected muck/sludge, dirt, and bottling of LPG into cylinders to be sold by IOCL for the purpose of domestic use within the bottling premises set up by IOCL and for which the Appellant is being paid charges as fixed by IOCL for carrying out the above gamut of activities. The department was of the view that such activities tantamount to packaging service under Section 65(76b) of the Finance Act, 1994 and the same does not amount to manufacture under Section 2(f) of the Central Excise Act, 1944 in order to provide the Appellants with any exemption from payment of service tax on such charges received. Further, the Appellant had carried out certain works contract activity also in the premises of the IOCL and on which the demand has been confirmed by invoking extended period of limitation and after allowing the abatement as provided by the law. The demands were confirmed after due process of law.

3. The Ld. Counsel for the Appellant submits that the activity of filling LPG in cylinders is a complex process and that LPG is to be handled very carefully at correct pressures and temperatures in course of a detailed operation procedure that comprises of LPG suction, vapour distribution, de-gasification, compression of LPG vapor, external and internal cleaning of gas cylinders, hydro pressure test, refilling, sealing, quality control etc. The activity involves extensive use

of independent electrical, electronic and mechanical equipment and appliances like motors, pumps, high speed electronic weighers, compressors and different controlling devices. It is to be noted that technology, science and economics are the predominant features of the process of bottling LPG. The Appellant further invited our attention to Rule 2(xxxii) of the Gas Cylinder Rules, 2004, which defines "manufacture of gas" as filling of a cylinder with any compressed gas and includes transfer of compressed gas from one cylinder to any other cylinder. Thus the Appellant contended that such services are exempted being a process amounting to manufacture both prior to the negative list regime and even after the negative list regime vide Section 66D(e) of the Finance Act, 1994. The Appellant further contended that IOCL has been paying excise duty on such clearance of cylinders under CETH 2711 which has not been disputed by the revenue. Further the chapter notes to Chapter 27 also states that such process would amount to manufacture. They further relied upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax -1, Mumbai Vs. Hindustan Petroleum Corporation Ltd. [MANU/SC/0936/2017].

4. The Appellant also contended that the demand under works contract service is barred by limitation as there cannot be any suppression in the case of the Appellant as everything was recorded in the books of the Appellant.

5. The Ld. Authorized Representative for the department reiterated the findings of the Appellate Authority and the Ld. Adjudicating authority. He relied upon the definition of Packaging services as existed prior to 01/07/2012 and stated that the packing activity was not subjected to service tax which amounted to manufacture within the meaning of the Section 2(f) of the Central Excise Act, 1944. He further stated that in the present case the excisable goods being bottled by the Appellant does not fall under natural gas and hence exemption cannot be given to the Appellant as the explanatory notes

to the Chapter 27 of the Tariff only provides for natural gas packaging as process amounting to manufacture and not to other LPG products. He submitted that the definition of manufacture as per the Central Excise Act, 1944 has to be relied upon in the case and not as per the interpretation under Income Tax Act by the Hon'ble Supreme Court. As regards works contract services demand, he contended that penalty is imposable and extended period of demand is also sustainable in the current case.

6. Heard both sides and perused the appeal records.

7. We find that the issue to be decided is whether the activities carried upon by the Appellant viz. work of segregation of cylinders, sealing of filled cylinders, de-shaping of cylinders by hydraulic pressure, spray of pesticides, disposing of collected muck/sludge, dirt, and bottling of LPG into cylinders to be sold by IOCL for the purpose of domestic use is a process amounting to manufacture or not.

8. In this regard, we find that on perusal of the definitions of packaging service as existed up to 30/06/2012 and the negative list entry post 30/06/2012, both the entries provide an exemption from service tax if the process amounts to manufacture. Section 2(f) of the Central Excises and Salt Act, 1944 states as under:

(f) "manufacture" includes any process –

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

Section 2(k) of the Factories Act, 1948 that defines "manufacturing process" states as under:

(k) "manufacturing process" means any process for –

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal;

Rule 2(xxxii) of the Gas Cylinder Rules, 2004, "manufacture of gas" means filling of a cylinder with any compressed gas and includes transfer of compressed gas from one cylinder to any other cylinder.

8.1 Therefore, on a combined reading of the provisions aforesaid, it can be clearly inferred that the activity of filling LPG into cylinder tantamounts to the process of manufacturing. We find that the Hon'ble Supreme court in the judgment cited supra has also held as below-

- a) LPG produced in the refinery cannot be directly supplied to the consumer for domestic use because of various reasons of handling, storage and safety.*
- b) LPG bottling is a highly technical and complex activity which requires precise functions of machines operated by technically expert personnel.*
- c) Bottling of LPG is an essential process for rendering the product marketable and usable for the end customer.*
- d) The word "production" has a wider connotation in comparison to "manufacture" and any activity which brings a commercially new product into existence constitutes production. The process of bottling of LPG renders it capable of being marketed as a domestic kitchen fuel and thereby, makes it a viable commercial product.*

9. We find that the revenue has not disputed the fact that excise duty is being paid by IOCL on clearances of gas cylinders and that the above expenditure is also a part of the valuation adopted for such purposes. Since these facts are not being disputed by the Revenue, therefore we are inclined to hold that the activities undertaken by the Appellant would squarely be covered under the definition of manufacture under Section 2(f) of the Central Excise Act, 1944 and thus the said demand under packaging service cannot sustain and we order accordingly.

10. The above is further fortified from the fact that the Chapter notes to Chapter 27 of the Tariff also provides such process to be manufacture under the Central Excise Act, 1944 for natural gas. Hence the argument of the Revenue that such explanation only is applicable for natural gas and that LPG is not a form of natural gas cannot be sustained in our view and hence the demand on the packaging services has to be set aside.

10. Further, as regards the demand of works contract services, we find that the Appellant has not disputed the demand on merits but only on limitation. We find that the demand was raised based on audit of IOCL records. We find that service tax is a self assessment regime and one cannot take the plea of being not paid/received service tax by the recipient. However under the peculiar circumstances of the case, we find that it would be in the interest of justice to waive penalty by invoking the provisions under Section 80 of the Finance Act, 1994 and we accordingly order so.

Thus, the appeal is partly allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 10 August 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/s
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)