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W.P.No.26422 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.03.2023

Pronounced on: 06.06.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

**WP.No.26422 of 2015**

M/s.Xomox Sanmar Ltd.  
Rep. by its Authorised Signatory  
No.9, Cathedra Road,  
Chennai 600 086.

... Petitioner

Vs

1.The Director General of Foreign Trade  
DES I Section, Room No.404, 4<sup>th</sup> Floor  
Udyog Bhawan  
New Delhi-110 011

2.The Additional Director General of Foreign Trade  
26, Haddows Road  
Sastri Bhavan Annexe  
Chennai-600 006

... Respondents

**PRAYER:** Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the First Respondent in the impugned Order F.No.01/80/050/00670/AM11/DES.1/1162 dated 12.08.2014, quash the same.



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W.P.No.26422 of 2015

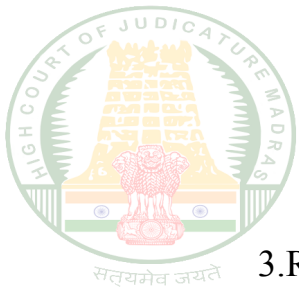
For Petitioner : Ms.Varshitha  
For Ms.Radhika Chandrasekaran

For Respondents : Mr.AR.L.Sundaresan,  
Additional Solicitor General  
assisted by  
Mr.V.Chandrasekaran  
Senior Panel Counsel

### **ORDER**

The challenge in this writ petition is to an order dated 12.08.2014 passed by the Director General of Foreign Trade/R1. The petitioner claims to be engaged in the manufacture of industrial valves and clears the final products both domestically as well as to the export market. The petitioner had received a purchase order from M/s.Thyssenkrupp on 22.06.2010 for supply of 1451 numbers of Gate, Globe and Check valves ('industrial valves' in short).

2.The supply was to be effected to Anrak Aluminium, a unit in a Special Economic Zone in Vizag and since Thyssenkrupp had an advance authorisation from the Customs Department, the import was made by the petitioner without payment of customs duty on 17.01.2011. The advance authorisation, on the strength of which the inputs were imported without customs duty, was specific to the condition that the petitioner must use those inputs for manufacture.



W.P.No.26422 of 2015

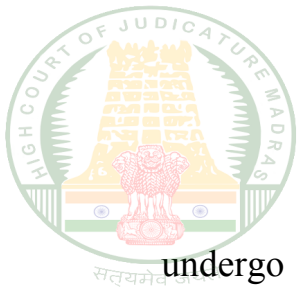
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3.R1 sought details from the petitioner in regard to the operational/manufacturing activities that it carried out and the petitioner duly supplied the particulars called for. By a communication dated 15.09.2011, the stand of the petitioner was rejected, R1 being of the view that the items imported and ultimately exported were one and the same and there was no manufacturing activity involved that brought into existence a new product with a distinctive identity and name.

4.The petitioner took the matter further before the Deputy Director of Foreign Trade and Convener Norms Committee I, which confirmed communication dated 15.09.2011 by way of its communication dated 06.09.2013. As a consequence, the respondents raised a demand of customs duty and interest amounting to Rs.20,04,068/- and Rs.9,99,182/- which the petitioner states that it has paid under protest.

5.A further representation has also come to be rejected confirming the position that no manufacturing activity was involved justifying the benefit under advance authorisation.

6.Ms.Varshitha for Ms.Radhika Chandrasekaran, learned counsel, who appears for the petitioner strenuously argues that after import, the valves



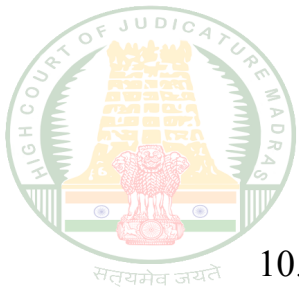
W.P.No.26422 of 2015

undergo various processes in the petitioner's factory including the fitting of indigenously procured actuators, gear boxes and subsequent assembly.

7. Thereafter, there is a process of hydro testing and re-assembling to meet the standards specified by the customers. It is only at this stage that the manufacturing process will attain completion and the valves would be offered to the customers for inspection and confirmation.

8. According to her, it is only these processes, fitting of the actuators and switches, testing and inspection to test compliance with customer specifications that render the valves commercially fit to use. My attention is drawn to the expansive definition of 'manufacture' under the Exim policy that includes processes such as 'testing'. Reference, in this context, is made to several judgments of the Hon'ble Supreme Court for the proposition that when the meaning of term used is clear, the interpretation must be as expressed in the statute.

9. Per contra, the respondents represented by learned Additional Solicitor General and Mr.V.Chandrasekaran would point out that the petitioner had suffered three orders that concurrently rejected their contention relating to manufacture. They submit that the statement in writ petition to the effect that indigenous items have been procured for fitting is factually incorrect.



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10.As regards hydro-testing, it is the respondents contention that the imported valves are already subjected to hydro-testing under Indian Boiler Regulations (IBR) in the country of manufacture. Hence, even assuming that the petitioner subjects the valve to hydro-testing once again, it would not tantamount to manufacture.

11.Heard learned counsel and studied carefully the rival contentions. The purchase order placed by Thyssenkrupp Industries is for supply of valves that are to be procured by the petitioner from abroad. The minutes of meeting dated 28.04.2010 states that the vendor (this has been clarified to mean the vendor abroad) should not commence the process of manufacture before clearance from purchaser.

12.Thus, admittedly, the valves have been imported. The petitioner has given a write-up dated 07.04.2011 elaborating on the process of manufacture setting out details of the processes such as fabrication of the body of the valve and the addition of components, like bonnet/yoke, flow closure elements, gaskets, fasteners, spindle and others to complete the assembling. These processes are not relevant as they would have been carried out at the end of the vendor abroad.



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13. According to the petitioner, the imported valves are mounted with electric actuators, limit switches are fixed after fabrication and welding on to the imported valves to indicated the opening and closing fixture and they are, after re-assembly, tested, packed and shipped to the SEZ.

14. The common counter filed by the respondents does not dispute this factual position, proceeding instead on the basis that was no manufacture. In my considered view, neither in the impugned order nor in the counter have the respondents considered the specific question as to whether the processes carried on by the petitioner would tantamount to ‘manufacture’, in the right perspective.

15. The Foreign Trade Policy for the period 27.08.2009 to 31.03.2014 as relevant to the petitioner’s case, in Chapter 8 deals with ‘Deemed Exports’. Clause 8.2 sets out various categories of supply in clauses (a) to (j). The supply in the present case would fall under a permissible category being supply to an export oriented unit, provided that the goods supplied have been manufactured in India.

16. The term manufacture has been defined in Clause 9.36 to read thus:

*‘9.36 “Manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and*



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*shall include processes such as refrigeration, re-packing, polishing, labelling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.'*

17. The terms of purchase refer, in Article 2 to the scope of supply, which is inclusive of packing and forwarding, as per the requirements and technical specifications of the purchaser/client. The technical specifications were called for which learned counsel for the petitioner states, are unavailable. Be that as it may, Article 2 makes it clear that the processes of testing for compliance with technical specs is mandatory.

18. Clause 13 of the purchase order requires the petitioner to carry out Performance Guarantee Tests in the following terms:

*'13. PERFORMANCE GUARANTEE TESTS*

*13.1 Performance Guarantee Tests means the tests specified in the Purchase Order which are to be carried out by the Supplier in the presence of Purchaser/Client to verify that the Equipment and Components of various systems supplied to fulfil the performance requirements of the Purchase Order. Performance Guarantee Tests shall be conducted within two months after commissioning. The following details shall apply to the Performance Guarantee Tests:*

*13.2 Should any equipment or any portion thereof [ai] under these tests to meet the Performance Guarantees, then any further tests which may be considered necessary by the Purchaser/Client shall be carried out in the similar manner by the Supplier.*



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13.3 The performance measurements shall be undertaken and operated in accordance with the recommendations of the Supplier for the maximum life and integrity.

13.4 In addition to the test measurements required by the agreed test standards, it may be necessary \*\*\*\*\* additional measurement to provide baseline operational data. These extra readings shall be \*\*\*\*\* by the Purchaser and agreed with the Supplier as part of the testing programmed.

13.5 If any equipment is found to be defective or fails to achieve the Performance Guarantees, the Supplier shall investigate the cause and undertake to rectify and replace, free of cost to the Purchaser, the defects in the equipment and prove the achievement of Performance Guarantees within a period of 30 (thirty) days from the date of such Equipment found defective or failing to achieve the Performance Guarantees and if the Supplier fails to prove the achievement of Performance Guarantees within the said period of 30 (thirty) days from the date of first Performance Guarantee Test, the Purchaser shall charge Liquidated Damages. However if any of the Performance parameters of Equipment and Components fall below the parameters as set out above, shall be liable for rejection, in addition to the Liquidated Damages so charged.

13.6 The Supplier shall be responsible and liable for the entire Scope of Equipment and Components and for achieving the performance parameters as guaranteed.

19.The petitioner is also required to carry out the exercise of inspection

and expediting of the supply under Article 21 reading as follows:

*'21.Inspection & Expediting*

*Stagewise / Final Inspection of critical items / equipments (list of which will be mutually drawn) and expediting shall be carried out by Purchaser / Client or a third party, who have right to carry out inspection of the equipment other than equipment falling under Indian Boiler Rules & Regulations which will be inspected by the statutory authorities at Suppliers work site. The Supplier shall inform the Purchaser minimum 7 days in advance*





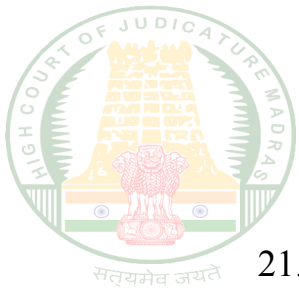
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*by fax/e-mail regarding readiness of inspection. The Purchaser / Client will either give waiver in writing or carry out the inspection on the appointed date, failing which Supplier will be free to proceed and dispatch the material. However inspection and acceptance of items / materials or waiver of inspection shall not absolve Suppliers obligations under this order. While carrying out inspection of the equipment at Suppliers work site, Supplier will extend all co-operation and not charge any amount towards the cost of manpower and related \*\*\*\*\* incurred by Supplier during inspection. Approval and inspection by statutory authorities, wherever necessary, shall be arranged by the Supplier at his cost. Whenever required to submit the test certificates for getting waiver of inspection for dispatch, it is mandatory to submit all the relevant test certificates for review and approval to the Purchaser / Client at least seven days prior to the date of despatch.'*

20.The definition of 'manufacture' in Clause 9.6 of the Exim Policy is wide and inclusive. The petitioner has pressed into service the judgment of the Hon'ble Apex Court in *Doypack Systems (Pvt) Ltd. v. Union of India*<sup>1</sup> wherein one of the questions related to the interpretation of the phrase 'in relation to'. At paragraph 64 of the judgment, they hold that that phrase has been interpreted to be one of the widest amplitude, citing the judgment in *National Textile Corporation Limited and Others v. Sitaram Mills Ltd. and Others*<sup>2</sup>. The phrase introduced a deeming fiction which is intended normally to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provision.

<sup>1</sup> 1988 (36) E.L.T. 201 (S.C.)

<sup>2</sup> 1986 Suppl. S.C.C. 117



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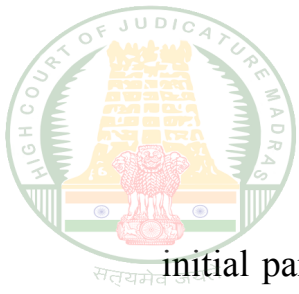
21. Referring to the word 'includes' they state, *it is well settled that the word 'includes' is an inclusive definition and expands the meaning. See The Corporation of the City of Nagpur v. Its Employee (1960 2 S.C.R. 942) and Vasudev Ramchandra Shelat v. Pranal Jayanand Thakar and Others (1975 1 S.C.R. 534). The words 'all other rights and interests' are words of widest amplitude. Section 4 also uses the words "ownership, possession, power or control of the Company in relation to the said undertakings". The words 'pertaining to' are not restrictive as mentioned hereinbefore.*

22. Thus, the fact that 'testing' of the goods is included in the ambit of 'manufacture' and since admittedly, such testing has been carried on by the petitioner, this would suffice to entitle it to its claim. In *Commissioner of Central Excise, Hyderabad v. Detergents India Limited and Another*<sup>3</sup> the Hon'ble Supreme Court considered the definition of 'related person' under the Central Excise Act, 1944.

23. In that context, they refer to the definition of related person which used the expressions 'means' and 'includes' stating that this, according to them, indicates the clear intention of the legislature to extend the definition to bring in various other persons that would not have otherwise being included. Thus a related person would also include, apart from those entities covered in the

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3 (2015) 7 SCC 198



W.P.No.26422 of 2015

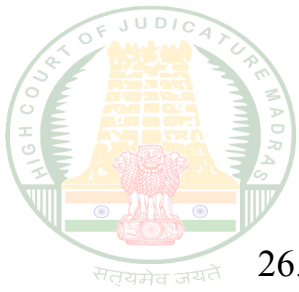
initial part of the definition, a holding or subsidiary company, a relative and a distributor or sub-distributor of the assessee concerned. Such a deeming fiction was necessary to lift the corporate veil and reach the economic realities of who constituted a relative person.

24. In this case, the deeming fiction by inclusion of various activities in the latter portion of the definition of manufacture, is clearly to expand the ambit of 'manufacture'. By including processes such as refrigeration, re-packing, polishing, labelling, re-conditioning repair, remaking, refurbishing, testing, calibration and re-engineering within the ambit of manufacture itself, the legislature clearly intended an expansive understanding of what constituted 'manufacture' for the purposes of 'deemed export'. This becomes necessary for the reason that such processes would not normally be understood to connote 'manufacture' in the absence of such a deeming fiction.

25. In *Commercial Taxation Officer v. Rajasthan Taxchem Ltd.*<sup>4</sup> also, the Hon'ble Supreme Court arrived at a similar conclusion in the context of Section 2(34) of the Rajasthan Sales Tax Act, 1994, which, while defining 'raw material' included therein, 'preservatives fuel and lubricant required in the process of manufacture' in that definition.

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<sup>4</sup> 2007 taxmann.com 1786 (SC)[12-01-2007]



W.P.No.26422 of 2015

26. In *Flex Engineering Limited v. Commissioner of Central Excise, U.P.*<sup>5</sup>

the question that came up related to whether inspection/trial of the packaging/sealing pouches would constitute manufacture. The Court opined that the process of testing the customised 'Automatic Form Fill and Seal Machines' was inextricably connected with the manufacturing process and until this process was carried out the manufacturing process was not complete and the machines were not fit for sale.

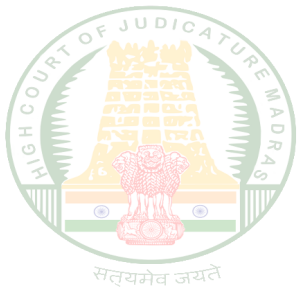
27. The argument that both the imported and sold product remain one and the same, that is, valves, is also liable to be rejected since the emergence of a commercially distinct commodity is satisfied in the present case by the requirement of inspection and testing which falls within the definition of 'manufacture'.

28. The judgment of the Hon'ble Supreme Court in *Shri Hariprasad Shivshanker Shukla and Another v. Shri A.D. Divelkar and Others*<sup>6</sup> is an authority for the proposition that where a term has been defined in the statute, there is hardly any need for further scrutiny of the term and the statutory definition is itself to be scrupulously applied. The observation at paragraph 11 reads thus:

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<sup>5</sup> AIR 2012 SC 1219

<sup>6</sup> 1957 SCR 121



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‘.....

*11. There is no doubt that when the Act itself provides a dictionary for the words used, we must look into that dictionary first for an interpretation of the words used in the statute. We are not concerned with any presumed intention of the legislature; our task is to get at the intention as expressed in the statute.’*

29. That apart, it is not necessary in all cases that the end product must be unrecognisable from the inputs that constitute it as long as the processes carried out would satisfy the statutory definition of ‘manufacture’, and the present case is an illustration in point.

30. Admittedly, there is a grey area in regard to whether at all the petitioner has added any components to the imported valves. While it has been consistently representing to the authorities that it has been fitting indigenously procured actuators and gear-boxes to the valves, the authority has, in the impugned order, pointed out that there is a declaration in Form ANF 4A of the Advance Authorisation confirming that the petitioner has not procured any indigenous items for the export product.

31. Even in the writ affidavit, the petitioner has maintained that it has been procuring indigenously procured items for the process of manufacture. One approach is to state that even without such procurement and additions to the imported valves, the processes of testing of the valves prior to final supply



would suffice to satisfy the definition of manufacture under Clause 9.36 of the Exim Policy.

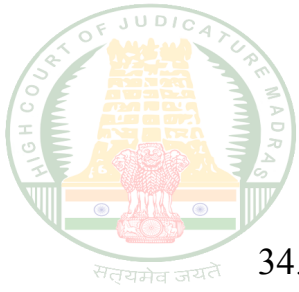
32.In fact, the Karnataka High Court in *Commissioner v. Hewlett Packard India Sales (P) Ltd* (316) ELT A32 (Kar.) has held that the process of testing, repacking and re-labelling of imports would satisfy the definition of ‘manufacture’ under the Foreign Trade Policy. The relevant portion of the decision reads thus:

*‘The Appellate Tribunal in its impugned order had held that appellants, 100% EOU had carried out export of imported goods ‘as such’ without subjecting to any manufacturing process. Goods imported under Notification No.52/2003-Cus., are subjected to testing and re-labelling before export. Such process of testing, packing, re-packing, labelling, re-labelling etc., amount to manufacture in terms of EXIM policy. Goods having been exported, there is no revenue loss. Quantum of goods exported as such small as compared to total imports. Goods are not confiscable. Export obligation was fulfilled and there is no violation of Notification No.50/2003-Cus. If Section 111(o) of Customs Act, 1962 is not invoked, then the SCN ought to have been issued invoking extended period. Grounds for invoking the longer period in terms of Section 28 ibid is not available to the Revenue. Hence, demand would be time-barred.’*

33.The Department has filed an SLP as against the aforesaid decision that has been admitted and rejoinder of the assessee sought in *Commissioner v. Hewlett Packard India Sales (P) Ltd*<sup>7</sup>.

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7 2016 (342) E.L.T. A99 (S.C.)



W.P.No.26422 of 2015

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34. In light of the aforesaid discussion, the impugned order is set aside and the matter remanded to the file of Respondent 1, to be decided afresh and in line with the discussion in this order after ascertaining if the petitioner has in fact, made any additions to the imported valves by procurement of indigenous products. This writ petition is allowed in terms of the above order. No costs.

**06.06.2023**

vs

Index : Yes

Speaking Order

Neutral citation: Yes

To

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DES I Section, Room No.404, 4<sup>th</sup> Floor  
Udyog Bhawan  
New Delhi-110 011.

2. The Additional Director General of Foreign Trade  
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**DR.ANITA SUMANTH, J.**

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