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

Appeal No.E/640/2009-DB, E/1284,1285/2009-DB, & E/557/2012-DB;
E/MA(EXTN)/14584,14585,16527/2014
[Arising out of OIO-10/COMMISSIONER/RKS/AHD-II/2009, dt.28.04.2009, OIO-01-06/COMMR/RAJU/AHD-II/2012, dt.29.03.2012, passed by Commissioner of Central Excise & Customs, Ahmedabad-II and OIA-143/2009-AHD-II-CE/ID/COMMR-A-/AHD, dt. 27/03/2009 passed by the Commissioner (Appeals-I), Central Excise, Ahmedabad]

1. M/s Quippo Energy Private Ltd,
2. Shri Montu Patwa - Appellants

Vs

Commissioner, Central Excise & Service Tax, Ahmedabad-II - Respondent

Represented by:
For Appellant: Shri V. Laxmikumaran, Shri Jigar Shah,
Shri Anand Nainawati Advocates.
For Respondent: Shri P.R.V. Ramanan, Special Counsel

CORAM:
HONBLE MR. P.K DAS, MEMBER (JUDICIAL)
HONBLE MR. P.M. SALEEM, MEMBER (TECHNICAL)

Date of Hearing: 18.06.2015
Date of Decision: 15.10.2015

Order No. A/11498-11501/2015, dt.15.10.2015

Per: P.K. Das

Common issue is involved in these appeals and therefore, all are taken up together for disposal.

2. The relevant facts of the case, in brief, are that in November, 2006, M/s Quippo Energy Pvt.Ltd. (formerly a division of M/s Quippo Infrastructure Equipment Ltd) the Appellants herein, started business of leasing of power pack on rental basis to their clients. They were importing the Gas Generating Sets (in short Gensets) comprising of engine (prime mover) coupled with Alternator on common base frame. The imported Gensets were assessed by the Customs authorities under sub-heading 8502.2090 of the Customs Tariff Act and cleared on payment of proper customs duty. Thereafter, certain activities / processes were undertaken by the Appellants and cleared as Containerized Gensets also termed as Power Pack (in short Power Pack). They were supplying Power Pack on lease basis to the customers and also providing manpower to operate and maintain the power pack in the customers premises. They were registered with Service Tax authorities under the category Supply of Manpower and Recruitment Agency and paying Service Tax on the service charges received by them. By letter dt.22.11.2007, the Appellants narrated the detailed process undertaken by them and requested the Assistant Commissioner of Central Excise to clarify of any liability under the Central Excise or Service Tax law.

3. On 17.07.2008, the officers of Central Excise (Preventive), Ahmedabad-II visited the Appellants factory and examined the process undertaken by them. By letter dt.19.08.2008, the Assistant Commissioner of Central Excise, Ahmedabad-II, informed the Appellants that the activities of the Appellants, would amount to manufacture by virtue of Note 4 and 6 of Section XVI of the Schedule to Central Excise Tariff Act, 1985. The Appellants filed appeal before the Commissioner (Appeals) against the communication dt.19.08.2008 of the Assistant Commissioner of Central Excise.

3.1 A Show Cause Notice dt.19.11.2008, was issued by the Commissioner of Central Excise, proposing demand of duty alongwith interest and to impose penalty on the power pack cleared during the period from November 2006 to July 2008, classifiable under sub-heading 8502.2090 of the First Schedule to the Central Excise Tariff Act, 1985 (CETA). It has also proposed confiscation of the goods cleared during the said period. Thereafter, six nos. periodical Show Cause Notices were issued proposing demand of duty alongwith interest, to impose penalty and confiscation of goods as already cleared during the said period, on the identical issue, for the period from August 2008 to March 2011.

3.2 By order dt.27.03.2009, the Commissioner (Appeals) of Central Excise rejected the appeal filed by the Appellant against the communication dt.19.08.2008 of the Assistant Commissioner of Central Excise. The Appellants filed appeal No.E/640/2009 against the order dt.27.03.2009 passed by the Commissioner (Appeals), before the Tribunal.

3.3 By order dt.28.04.2009, the Commissioner of Central Excise, confirmed the demand of duty of Rs.7,08,99,886.00 alongwith interest and also imposed penalty of equal amount of duty under Section 11AC of Central Excise Act, 1944, and a penalty of Rs.2,00,00,000.00 under Rule 25 of the Central Excise Rules, 2002 on the Appellant Company. It has confiscated the goods cleared by them during the period November 2006 to July 2008 without payment of duty and imposed a fine in lieu of confiscation amounting to Rs.4,50,00,000.00. Further, a personal penalty of Rs.50,00,000.00 was imposed on Shri Montu Patwa, General Manager (F&A) of the Appellant Company (Appellant No.2 herein), under Rule 26(1) of the Central Excise Rules, 2002. The Appellants filed appeal Nos.E/1284-1285/2009 against the order dt.28.04.2009 passed by the Commissioner, before the Tribunal.

3.4 By order dt.29.03.2012, the Commissioner of Central Excise, disposed of the six show cause notices and confirmed the demand of duty of Rs.3,45,34,494.00 alongwith interest and imposed penalty of Rs.1,00,00,000.00 under Section 11AC of Central Excise Act, 1944 read with Rule 25 of the said Rule on the Appellant Company. It has also confiscated the goods cleared during the period August 2008 to March 2011, without payment of duty and imposed a fine of Rs.22,00,000.00 in lieu of confiscation. The Appellants filed Appeal No.E/557/2012 against the order dt.29.03.2012 passed by Commissioner of Central Excise.

3.5 In these orders, it has been held that Containerized Gensets also termed as Power Pack manufactured by the Appellant are having a distinct name, character and use and are capable of being sold and marketed and satisfy the conditions of manufactureas defined under Section 2(f) of Central Excise Act, 1944, and classifiable under sub-heading No.8502.2090 of the Schedule to the Central Excise Tariff Act, 1985 and are liable for Central Excise duty.

4. Shri V. Laxmikumaran, the learned Advocate appearing on behalf of the Appellants contested the demand of duty alongwith interest, penalty and fine on merit as well as on limitation. He submits that the Appellants imported Gensets to install at the premises of their customers on the basis of lease agreement. The Appellants had undertaken certain activities in their premises by using few components for the purpose of transportation from the Appellants premises to customers premises and proper maintenance. There is no change of identity, character and use of Gensets and therefore, the activity undertaken by the Appellant would not amount to manufacture in terms of Section Notes 4 & 6 of Section XVI of Central Excise Tariff Act, 1985. The Gensets would remain Gensets after the process undertaken by them. He referred to the decision of Honble Supreme Court in the case of Union of India Vs DCM Ltd 1977 (1) ELT J 199.

4.1 The Adjudicating authority erroneously proceeded on the basis of functionalityas the relevant test for deciding the question of manufacture, which is beyond the scope of the decision of Honble Supreme Court.

4.2 The recent decision of the Honble Supreme Court in the case of Servo-Med Industries Pvt. Ltd Vs CCE Mumbai 2015-TIOL-103-SC-CX would be applicable in the present case. In that case, the issue was whether the process of sterilizing of syringe and needle before the products are sold in the market as disposable syringe would amount to manufacture or not. The Honble Supreme Court held in favour of the Assessee. It is stated that merely the goods were sold under the name and style of Power Pack, would not change the character and use of the item.

4.3 He drew the attention of the Bench to Notes 4 and 6 of Section XVI of Central Excise Tariff Act, 1985. It is stated that the imported Gensets is complete in itself and fully functional and classified under sub-heading No.8502.2090 under Customs Tariff Act, as electricity generator and therefore, the same goods would not come under sub-heading No.8502.2091 of CETA. He relied upon the decisions as under:-

a) Eureka Forbes Ltd Vs CCE Mumbai - 2000 (125) ELT 1195 (Tri-Mum)
(upheld by Honble Supreme Court - as reported at 2001 (131) ELT A 85 (SC)
b) Eureka Forbes Ltd Vs CCE - 2000 (120) ELT 533 (Tri-LB)
c) BPL Mobile Communications Ltd Vs CCE - 2006 (198) ELT 226 (Tri-Mum.)
d) CCE Vs Hutchison Max Telecom Ltd - 2008 (224) ELT 191 (Bom.)
e) Xerox India Ltd Vs CCE Hyderabad - 2010 (252) ELT 273 (Tri-Bang.)

4.4 The learned Advocate also submits that the extended period of limitation by Show Cause Notice dt.19.11.2008 cannot be invoked. It is stated that the Appellants by letter dt.22.11.2007, had informed the Department about their activity. After several correspondences, the Central Excise Officers visited the Appellants factory on 17.07.2008. The Appellants were registered with the Service Tax authorities. The Appellants acted on a bonafide belief. He has strongly relied upon by the decision of Honble Gujarat High Court in the case of CCE Surat-II Vs Gujarat Glass Pvt. Ltd 2013 (290) ELT 538 (Guj.). It is also submitted that the entire situation is revenue neutral as the Appellants were eligible to avail CENVAT Credit during the material period and therefore, the extended period of limitation cannot be invoked. He relied upon the decision of Honble Supreme Court in the case of Nirlon Ltd Vs CCE 2015-TIOL-96-SC-CX.

4.5 In any event, the Appellant, is entitled to avail CENVAT Credit which is more than the duty as demanded, would show that the demand of duty alongwith interest and imposition of penalty and fine cannot be sustained. The learned Advocate submitted written submissions alongwith case laws. It is submitted that the Appellant No.2 is an employee of the Appellant Company and acted as per the policy of the Company and imposition of penalty is not warranted.

5. Shri P.R.V. Ramanan, the learned Special Counsel appearing on behalf of the Respondent, reiterates the findings of the Adjudicating authority. He also filed written submission with case laws. The learned Special Counsel particularly drew the attention of the Bench to the process undertaken by the Appellant in detail and the photographs of imported Gensets and Power Packs. He submits that the process undertaken by the Appellant would amount to manufacture, as it brings into existence, a new product having distinct name Containerized Genset termed as Power Pack. The character and use of Power Pack is different from the imported Gensets. He drew the attention of the Bench to the relevant portion of the findings of the Adjudicating authority and case laws relied upon by the Adjudicating authority. It is stated that the radiator Oil Tank, Fan etc used by the Appellants are in the nature of accessories and not components of imported Gensets. Regarding the eligibility of CENVAT Credit, the learned Special Counsel submits that they are required to produce the evidence in support of their claim.

5.1 He submitted that the Heading No.8502 of Central Excise Tariff Act includes even a simple combination of 2 machines of engines and alternators. The goods in question Power Pack, would cover under the Heading 8502 of Central Excise Tariff Act 1985 as it covers simple combination of engines and alternator. He relied upon the decision of Honble Supreme Court in the case of Laminated Packings Pvt.Ltd. Vs CCE 1990 (49) ELT 326 (SC).

5.2 The demand of duty for the period upto September 2007 is not barred by limitation, as the Appellant had not informed the Department prior to that period. It is a case of suppression of fact with intent to evade payment of duty and demand of duty for extended period of limitation is to be invoked and the penal provisions are warranted.

6. After hearing both the sides and on perusal of the records, we find that the Appellant imported Gensets with alternator classified under sub heading No.8502.2090 of the Customs Tariff Act and cleared the goods on payment of Customs duty. The Appellants had undertaken certain activities and cleared the goods as Containerized Gensets also known as Power Pack. According to the Revenue, the process undertaken by the Appellant would amount to

manufacture and classifiable under sub-heading 8502.2090 of the Schedule to the Central Excise Tariff Act, 1985.

7. It is seen from the Adjudication order that Shri Divyesh Shah, General Manager of the Appellant Company, in his statement dt.18.07.2008, has inter alia stated that Generating Set is not functional on its own. After assembly of the various items only and that accessories like Radiator/Cooling Tower, Cooling Fan (ventilation fan), Air Filter Unit, Oil Tank, Pipes, Flanges, Nut-bolts, Gasket, Control Panel, Cables, Pump, Valve, Silencer, etc are required to make these Gensets functional as would be required for any Gas Generating Sets and that some items are purchased from local market; that the Genset is put into the Container with the help of crane/rolling pipe and then placed on the anti-vibration mounting inside the container, that parts like Radiator, Pumps, Valves, Silencer, Control Panel, Cooling Fan, Air Filter Unit, Oil Tank, etc are fitted alongwith cables and welded pipes, that finally, the container contains Gas Genset (with all knocked down imported parts fully assembled) alongwith Low Temperature/High Temperature Pumps and Pipelines, Control Panel and Power Cables; that on top of the container, there are Remote Radiator, Butterfly Valves, Lube Oil Tank and Silencer and on both sides, Ventilation Fans with Filter are fitted by bolts and that one Window-AC is fitted outside the container to keep Control Panel cool. On being specifically asked whether the imported Genset will be saleable/marketable without the locally bought parts/accessories, he stated that though the Gensetcan be sold without the above parts/ accessories, it would not be functional (operational) without these accessories.

8. The Central Excise Officers obtained opinion of a Government approved Engineer Shri Deepak C. Shah. By letter dt.12.11.2008, it is observed that the Appellant had not cleared the Gensets as such, in the form which they have imported. The Adjudicating authority observed on the basis of the statement of Shri Divyesh Shah and the report of Shri Deepak Shah that though the Gensets can be sold without above parts/accessories, it would not be functional (operational), without these parts/accessories. It is further observed that the imported Gensets have been carried out a process of assembly of various components/accessories and cleared/marketed the same as Containarized Gensets termed by them as Power Pack for the purpose of marketing strategy. Thus, the goods cleared by them are covered the sub-heading No.8502.2090 of Central Excise Tariff Act, 1985. It is observed that the Containerized Gensets also known as Power Pack, it is a new distinct product, which is marketable and the same satisfies all the conditions of manufacture as provided under Section 2(f) of Central Excise Act, 1944.

9. In Appeal No.E/557/2012, the Adjudicating authority observed that Power Packs are designed to provide sustained power for long periods in remote locations. The Gensets used by them not fitted with Radiator/cooling devices cannot operate for long sustained periods. Similarly, without Filter unit, the Gensets cannot provide sustained long term power supply. Without the Control Panel, Silencer, Oil Tank, and all parts, the Gensets cannot operate and function for supply of sustained power. The Power Packs are substantially different, as Genset is only one of the components of the composite integrated machine namely power pack, consisting of various components.

It is further observed that as a result of process/activity undertaken by them, a new product known as Containerized Genset or Power Pack comes into existence, and which becomes operational. It is beyond imagination that without the assembling of indigenous components/ parts with the imported machinery, a complete operational Generator Set can come into existence. Therefore, it is held that the activities carried out by the Appellants are squarely covered under the Chapter Note No.4 & 6 of Section XVI of the First Schedule to the Central Excise Tariff Act, 1985.

9.1 For the purpose of proper appreciation of the case, we reproduce below the relevant portions of Tariff description, Chapter Note etc, as under:-

(A) Heading 85.02 of the Central Excise Tariff Act, 1985.

8502	Electric Generating Sets and Rotary Connectors.
....	...
850220	-- Generating sets with spark - ignition internal combustion piston engines.
85022010	-- Electric portable generators of an output not exceeding 3.5 KVA
85022090	-- Other

(B) Heading 85.03 of the Central Excise Tariff Act, 1985.

8503 Parts suitable for use solely or principally with the machines of Heading 8501 or 8502.

(C) Notes 4 & 6 of Section XVI of Central Excise Tariff Act:-

4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

... ...

6. In respect of goods covered by this Section, conversion of an article, which is incomplete or unfinished but having the essential character of the complete or finished article (including blank, that is an article, not ready for direct use, having the appropriate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into a finished article or a part), into complete or finished article shall amount to manufacture.

(D) The definition of manufactureunder Section 2(f) of Central Excise Act, 1944, it 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 schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture; or
(iii) which, in relation to the goods specified in the Third Schedule (MRP goods etc) involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.

(E) Section XVI HSN:

GENERAL

... ...

(IV) INCOMPLETE MACHINES
[See General Interpretative Rule 2(a)]
Throughout the Section any reference to a machine or apparatus covers not only the complete machine, but also an incomplete machine (i.e. an assembly of parts so far advanced that it already has the main essential features of the complete machine). Thus a machine lacking only a flywheel, a bed plate, calendar rolls, tool holders, etc is classified in the same heading as the machine, and not in any separate heading provided for parts. Similarly, a machine or apparatus normally incorporating an electric motor (e.g. electro-mechanical hand tools of heading 84.67)

is classified in the same heading as the corresponding complete machine even if presented without that motor.

(F) Notes to Heading 85.02 of HSN:-

(I) ELECTRIC GENERATING SETS

The expression generating setsapplies to the combination of an electric generator and any prime mover other than electric motor (e.g. hydraulic turbines, steam turbines, wind engines, reciprocating steam engines, internal combustion engines). Generating sets consisting of the generator and its prime mover which are mounted (or designed to be mounted) together as one unit or on a common base (see the General Explanatory Note to Section XVI), are classified here provided they are presented together (even if packed separately for convenience of transport).

Electric generating sets for welding equipment are classified in this heading when presented separately, without their welding heads or welding appliances. However, they are excluded (heading 85.15) when presented together with their welding heads or welding appliances.

Note 4 of Section XVI of CETA covers a machine consisting of individual components intended to contribute to defined function. Similarly, Note 6 of the said Section would apply of an article incomplete or unfinished but having the essential character of the complete or finished goods. The learned Advocate submitted that Genset is a complete article and fully functional and has been classified by the Customs authority as electricity generator under heading No.85022090 of Customs Tariff. We are unable to accept the contention of the learned Advocate, as no material was placed in support of their contention.

9.2 On the other hand, the learned Special Counsel for the Revenue, in his written submissions had narrated the activities/processes undertaken by the Appellant in detail as follows:-

(i) Using jacks and rollers, the imported equipment is first rolled into a steel transport container and properly positioned on anti-vibrating mounting pad.

(ii) Remote radiator is lifted by crane and properly positioned onto the roof of the container. Further, it is arrested on the roof with suitable sized nuts, bolts and washers.

(iii) Lube Oil Tank is lifted by crane and moved onto the roof of the container. It is properly placed on the mounting channels and locked on the roof top by suitable nuts, bolts and washers.

(iv) For the purpose of HT, LT, Water and Lube Oil pipe lining on the roof of the container, necessary fittings like pipes, reducers, valves, tee, elbows, flanges etc are fitted.

(v) Similar process is done for HT, LT, Water, DM Water and Lube Oil line inside the container. Pumps, 3-way valve etc are located inside the container.

(vi) Ventilation fans and cowls are thereafter mounted.

(vii) Silencer is lifted by crane and located on the roof top at the appropriate position.

(viii) Necessary Cable Trays are placed inside and outside the container; proper earthing is done,
(ix) Control panel and other electrical items are properly placed inside the container.

(x) Cabling with all other accessories is thereafter done,
(xi) All pipings are de-assembled, and then caustic cleaned, hydraulic test thereon is done and painted. Testing process involves hydraulic testing of piping for leakage and electrical testing of all electrical connections.

10. The term manufactureas explained by the Honble Supreme Court in the case of DCM Limited (supra), that the transformation of the product with distinct name, character and use. It is submitted by the Appellant that the manufacture of a product cannot depend on functional character, as observed by the Adjudicating authority. The learned Advocate strongly relied upon the recent decision of Honble Supreme Court in the case of Servo-Med Industries Pvt. Ltd (supra). In that case, the Appellants purchased the Syringes and the Needles in bulk from the open market. They would then sterilize the syringes and the needles and put one syringe and one needle in an un-assembled form in a printed plastic pouch. The Syringe and the needle were capable of use only once and hence, were disposable. According to the Revenue, the process of sterilizing was found to be an integral and un-assembled part of the manufacturing process to make the product marktetable. It was further held that the process of sterilization brings about the transformation of the product by making something non-sterilized/sterilized. The Commissioner (Appeals) set aside the Adjudication order reasoning that the process of sterilization does not bring about any change in the basic structure of syringe and the needle even though post-sterilization, the value of the product gets enhanced. The Tribunal, in turn, set aside the order of the Commissioner (Appeals) and restored the Adjudication order.

11. The Honble Supreme Court in the case of Servo-Med Industries Pvt. Ltd (supra) set aside the order of the Tribunal and observed as under:-

..... If a surgical instrument is being used five times a day, it cannot be said that the same instrument has suffered a process which amounts to manufacture in which case excise duty would be liable to be paid on such instruments five times over on any given day of use. Further, what is to be remembered here is that the disposable syringe and needle in question is a finished product in itself. Sterilization does not lead to any value addition in the said product. All that the process of sterilization does is to remove bacteria which settles on the syringes and needles surface, which process does not bring about a transformation of the said articles into something new and different. Such process of removal of foreign matters from a product complete in itself would not amount to manufacture but would only be a process which is for the more convenient use of the said product. In fact, no transformation of the original articles into different articles at all takes place. Neither the character nor the end use of the syringe and needle has changed post-sterilization. The syringe and needle retains its essential character as such even after sterilization.

12. The Honble Court, after discussing the various decisions had laid down a test of manufacture as under:-

27. The case law discussed above falls into four neat categories.

(i) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.

(ii) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.

(iii) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the Brakes India case and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also, no manufacture of goods takes place.

(iv) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place.

13. The learned Advocate on behalf of the Appellant submits that the present case covers Para 27 (ii) of the said decision. It is submitted that the Gensets imported by the Appellant remains essentially the same. We have already observed that in the present case, the imported Gensets after certain process sold as Power Pack, different and distinct nature. As per statement of Shri Divyesh Shah, the Gensets imported by the Appellant is incomplete machine, can be used into complete form after assembly of various accessories/components. Note 6 of the Section XVI of Customs Tariff Act provides that the conversion of an incomplete or unfinished article into complete or finished goods shall amount to manufacture. It is evident from the record that the activities undertaken by the Appellant are incidental to the completion of manufacture of Power Pack, and without such activities Power Pack cannot be used by the customers. Section 2(f) of Central Excise Act, 1944, the definition of manufacture includes the process incidental to the completion of a manufactured product. Heading 85.02 covers Electric Generating Sets and Rotary Connectors. Sub-heading 8502.2090 covers Generating sets with spark-ignition internal combustion piston engines other than Electric portable generators of an output not exceeding 3.5 KVA. As per Notes of Chapter 85 of HSN, Generating Sets consisting of the generator and its prime mover which are mounted (or designed to be mounted) together as one unit or on a common base. In the present case, the activities of fixing of anti-vibrating mounting pad, radiator, Lube Oil Tank, Ventilation, fans, silencers, Cable Trays, Control Panel and other electrical items, hydraulic test processing etc, are mounted together as one unit on a common base, known as Power Pack and also Containerized Gensets.

14. According to the Appellant, the Gensets imported by them were capable of generating electricity, and the Gensets itself is marketed. But, it is seen from the record that the process undertaken by the Appellant on the imported Gensets for the industrial customers. Thus, the industrial customer would buy Power Pack rather than Gensets. The imported Gensets and Power Pack are known separately in the trade and parlance. It is also noted that the use of both the items are for different purposes. In our considered view, the process undertaken by the Appellant would constitute manufacture as it emerges a new commodity in the market.

15. In the case of Servo-Med Industries Pvt. Ltd (supra), the Honble Supreme Court, while considering the decision of the Apex Court in the case of Laminated Packings Pvt. Vs CCE 1990 (49) ELT 326 (SC), observed that it was found on the evidence raised in that case that the laminated kraft papers is a distinct and separate product known in the market as such and is apart from kraft paper. The relevant portion of the decision of Honble Supreme Court in the case of Servo-Med Industries (P) Ltd (supra) is reproduced below:-

> 31. Ms.Shirin Khajuria then cited a few other judgments. The judgment in Laminated Packings (P) Ltd Vs CCE 1990 (49) ELT 326 = 2002-TIOL-285-SC-CX held:
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> > 4. Lamination, indisputedly by the well settled principles of Excise law, amounts to manufacture. This question, in our opinion, is settled by the decisions of this Court. Reference may be made to the decision of this Court in Empire Industries Ltd Vs Union of India [(1985) 3 SCC 314 : 1985 SCC (Tax) 416] = 2002-TIOL-27-SC-CX-LB. Reference may also be made to the decision of this Court in CCE v. Krishna Carbon Paper Co. [(1989) 1 SCC 150: 1989 SCC (Tax) 42: (1988) 37 ELT 480] = 2002-TIOL-390-SC-CX. We are, therefore, of the opinion that by process of lamination of kraft paper with polyethylene different goods come into being. Laminated kraft paper is distinct, separate and different goods known in the market as such from the kraft paper.
> >
> > 5. Counsel for the appellant sought to contend that the kraft paper was duty paid goods and there was no change in the essential characteristic or the user of the paper after lamination. The fact that the duty has been paid on the kraft paper is irrelevant for consideration of the issue before us. If duty has been paid, then benefit or credit for the duty paid would be available to the appellant under Rule 56-A of the Central Excise Rules, 1944.
> >
> > 6. The further contention urged on behalf of the appellant that the goods belong to the ,same entry is also not relevant because even if the goods belong to the same entry, the goods are different identifiable .goods, known as such in the market. If that is so, the manufacture occurs and if

manufacture takes place, it is dutiable. 'Manufacture' is bringing into being goods as known in the excise laws, that is to say, known in the market having distinct, separate and identifiable function. On this score, in our opirJion, there is sufficient evidence. If that is the position, then the appellant was liable to pay duty. We are, therefore, clearly of the' opinion that the order of the CEGAT impugned in this appeal does not contain any error. The appeal, therefore, fails and is accordingly dismissed. "

32. This judgment again does not take us any further. It was found on the evidence led ir that case that laminated kraft paper is a distinct and separate product known in the market as such and is apart from kraft paper.

16. In the case of Laminated Packings Pvt. Ltd (supra), the Honble Supreme Court considered that manufacture is bringing into the goods as known in the Excise law, i.e. known in the market having distinct and separate and identifiable function. In the present case, we have also noticed the photograph of the products of the Gensets and the Power Pack are different and distinct items. The learned Advocate contended that the imported Gensets is covered under the sub-heading 8502.2090 of the First Schedule to Customs Tariff Act Generating sets with Spark - Ignition Combustion System Engineof an output not exceeding 3.5 KVA.It is submitted that the Customs Department had assessed the goods as complete electric generating sets and classification under the same heading under the Central Excise Tariff Act, 1985, cannot be sustained. We find that the identical issue was raised before the Honble Supreme Court in the case of Laminated Packings Pvt. Ltd (supra). It has been observed that the goods belongs to the same entry is also not relevant because even if the goods belong to the same entry, the goods are different identifiable goods known as such in the market. If that is so, the manufacture occurred and if manufacture takes place, it is dutiable. The said decision would squarely apply in the present case and the Power Pack is rightly classified under sub-heading No.85022090 of Central Excise Tariff Act, 1985.

17. However, we find force in the submissions of the learned Advocate that the extended period of limitation cannot be invoked. On perusal of the records, we find that the Appellants by letter dt.22.11.2007, informed the Assistant Commissioner of Central Excise for a clarification on any possible liability of Central Excise duty. The Appellant also pursued the

matter before the Department. There is no material on record of suppression of facts with intent to evade payment of duty. The Honble Gujarat High Court in the case of Gujarat Glass Pvt. Ltd (supra) observed that the Assessee on his own brought to the notice of the Department the fact about the clearance of the goods to its sister unit without duty before the date of visit of the officers. The Assessees conduct was candid and therefore, bonafide. There is no evidence of intentional evasion.

18. In the case of Anand Nishikawa Company Ltd Vs CCE Meerut 2005 (185) ELT 149 (SC), the Honble Supreme Court observed that there was no deliberate attempt of non-disclosure of excise duty. No claim as to suppression of factswould be entertained for the purpose of invoking extended period of limitation within the meaning of proviso to Section 11A (1) of the Act. It is also noted that Honble Supreme Court in series of cases, has held that the extended period of limitation, would not be invoked in the case of revenue neutrality as the CENVAT Credit is available against the demand of duty. The learned Advocate relied upon the following decisions:-

a) Nirlon Ltd Vs CCE - 2015-TIOL-96-SC-CX
b) CCE Vs Narmada Chematur Pharmaceuticals Ltd - 2005 (179) ELT 276 (SC)
c) CCE Vs Coca Cola India Pvt.Ltd - 2007 (213) ELT 490 (SC)
d) CCE Vs Textile Corporation Marathwada Ltd - 2008 (231) ELT 195 (SC)
e) AMCO Batteries Ltd Vs CCE - 2003 (153) ELT 7 (SC)
f) Jay Yuhshin Ltd Vs CCE - 2000 (119) ELT 718 (Tri-LB)
g) Jay Yuhshin Ltd Vs CCE - 2001 (137) ELT 1098 (Tri-Del.)
h) International Auto Ltd Vs CCE - 2005 (183) ELT 239 (SC)

19. We find that the Appellant acted under a bonafide belief that the activities undertaken by them would not amount to manufacture. It is the case of interpretation of the provisions of law and therefore, the imposition of penalties on the Appellants are not warranted. It is noted that the goods were available for confiscation. It is well settled that if the goods are available, the same cannot be confiscated. Accordingly, the confiscation of goods and imposition of penalty cannot be sustained.

20. In view of the above discussions, we hold that the activities undertaken by the Appellant would amount to manufacture and Power Pack also known as Containerized Gensets would be classifiable under sub-heading No.8502.2090 of the Schedule to the Central Excise Tariff Act,

1985 and the demand of duty alongwith interest for the normal period is upheld. The Adjudicating authority is directed to extend CENVAT Credit benefit, while quantifying duty, subject to verification of record. The demand of duty with interest for the extended period of limitation and confiscation and imposition of redemption fine and penalties are set aside. The appeal filed by the Appellant company is disposed of in the above terms. The appeal filed by the Appellant No.2 Shri Montu Patwa, General Manager (F&A) is allowed. The applications for extension of stay order are dismissed as infructuous.

(Pronounced in Court on 15.1.2015)

(P.M. Saleem)
Member (Technical)

(P.K. Das)
Member (Judicial)

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