CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH

EXCISE APPEAL NO. 41252 OF 2013

(Arising out of Order–in-Original No. 1 to 7/2013 dated 30.01.2013passed by Commissioner of Central Excise, Chennai-I, Commissionerate)

Popular Carbonic Pvt. Ltd. **...Appellant**
No. 198/6A, Bharathiar Street,
Manali, Chennai 600068

VERSUS

Commissioner of Central Excise, **...Respondent**
Chennai-I Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai- 600034

With

41253 of 2013	41254 of 2013	41255 of 2013	41256 of 2013
41257 of 2013	41258 of 2013	41259 of 2013	41260 of 2013
41261 of 2013	41262 of 2013	41263 of 2013	41264 of 2013
41951 of 2014	41355 of 2015		

APPEARANCE:

Ms. Radhika Chandrasekaran, Advocate for the Appellant
Shri L. Nandakumar, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: July 23, 2021
Date of Decision: August 4, 2021

FINAL ORDER No. 41717-41731 / 2021

JUSTICE DILIP GUPTA:

The issue involved in all the appeals is whether compression of carbondioxide received through pipelines and the subsequent filling into cylinders would amount to manufacture in terms of Chapter Note 9 of Chapter 28 of the Central Excise Tariff Act 1985[1].

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1. **the Tariff Act**

2. Chapter 28 of the Tariff Act deals with Inorganic Chemicals, Organic or Inorganic Compounds of Precious Metals, of Rare-Earth Metals, of Radioactive Elements or of Isotopes. Chapter Note 9, as stood prior to 01.03.2008, is as follows:

> "9. In relation to products of this products of this Chapter, labeling and relabeling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to "manufacture"."

3. The only amendment that was made on 01.03.2008 to Chapter Note 9 is that **'and'** was replaced **'or'.**

4. **Excise Appeal Nos. 41252, 41253, 41254, 41255, 41256, 41257** and **41258** of **2013** seek the quashing of a common order dated 30.01.2013 passed by the Commissioner, adjudicating the seven show cause notices covering the period from April 2005 to March 2012, by which the demand has been confirmed with interest and penalty.

5. **Excise Appeal Nos. 41259, 41260, 41261, 41262, 41263** and **41264** of **2013** have been filed to assail the order dated 31.01.2013 passed by the Commissioner, adjudicating the seven show cause notices covering the period 2005-06 to 2011-12, by which the demand has been confirmed with interest and penalty. However, for the show cause notice No. 12/2010 dated 30.06.2010, even after confirming the demand, the Commissioner ordered that the demand shall stand dispensed because of the overlapping period confirmed by Order No. 5/2013, which order has been assailed in one of the Excise Appeals mentioned in the second paragraph of this order. Thus, only

six appeals have been filed against the seven orders passed by the Commissioner.

6. **Excise Appeal No. 41951** of **2014** has been filed to assail the order dated 28.04.2014 passed by the Commissioner, adjudicating the show cause notice dated 15.07.2013 for the period 2012-13 by which the demand has been confirmed with interest and penalty.

7. **Excise Appeal No. 41355 of 2015** has been filed to assail the order dated 26.03.2015 passed by the Commissioner, adjudicating the show cause notice dated 09.07.2014 for the period 2013-14, by which the demand has been confirmed with interest and penalty.

8. M/s. Popular Carbonic Pvt. Ltd.[2] is engaged in the process of compressing carbon dioxide falling under Chapter 28 of the Tariff Act and the compressed carbon dioxide is filled into cylinders brought by the customers. The appellant claims that it receives carbon dioxide from M/s. Madras Fertilizers Limited through pipelines on payment of applicable excise duty. The carbon dioxide undergoes two processes at the premises of the appellant namely (i) compression and filling up into cylinders as gas and (ii) compression to make the carbon dioxide in liquid form.

9. The Department issued 16 show cause notices covering the period of 2005-06 to 2013-14 proposing to levy excise duty on the ground that the activity undertaken by the appellant namely, compression of carbon dioxide and the subsequent filling into cylinders amounts to manufacture in terms of Chapter Note No. 9 to Chapter 28 of the Tariff Act. The show cause notices further alleged that the

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2. the appellant

appellant was not entitled for the Small Scale Industry benefit in terms of Notification dated 01.03.2003 since the goods cleared by the appellant contain a brand name of some other person. The show cause notices also proposed to levy interest and penalties under rules 25 and 27 of the Central Excise Rules, 2002.

10. The appellant denied the allegations made in the show cause notices and stated that the process undertaken by the appellant did not amount to manufacture under Chapter Note 9 to Chapter 28 of the Tariff Act. The appellant also stated that no sale under a brand name took place and in fact it was only to ensure compliance of the mandatory requirements of the Explosives Act that the appellant had to identify the owners of the cylinders. The appellant also placed reliance upon a decision of the Tribunal in their own case to contend that the activity undertaken by the appellant would not amount to manufacture under Chapter Note 9 to Chapter 28 of the Tariff Act.

11. As noticed, above four orders dated 30.01.2013, 31.01.2013, 28.04.2014 and 26.03.2015 passed by the Commissioner have been assailed in the appeals. The first order and the second order adjudicated seven show cause notices each, while the third order and the fourth order adjudicated one show cause notice each.

12. It would be useful to examine the four orders.

Order dated 30.01.2013

13. The Commissioner noted that the issue actually first arose for the period from 2002-03 upto March 2004, during which period two orders, each dated 29.09.2004, were passed by the Deputy Commissioner holding that the process undertaken by the appellant

amounted to manufacture and the practice of clearing carbon dioxide in cylinders of the buyers with their identification marks would render the product as branded goods, disentitling the appellant from claming the exemption. The appellant, however, filed appeals which were allowed by the Commissioner (Appeals) by order dated 11.04.2005 holding that the activity did not amount to manufacture. The Department filed an appeal before the Tribunal, which appeal was dismissed and a further appeal by the Department to the Supreme Court was also dismissed on 15.07.2011.

14. After having noted the aforesaid factual position, the Commissioner observed that though the Tribunal while deciding the aforesaid matter in the case of the appellant had placed reliance upon the decision of the Supreme Court in **Commissioner of Central Excise** vs. **Boc (I) Ltd.**[3]**,** but in view of the subsequent decision of the Supreme Court in **Air Liquide North India Pvt. Ltd.** vs. **Commissioner of C. Ex., Jaipur-I**[4] and the amendment made in Chapter Note 9 of Chapter 28 of the Tariff Act on 01.03.2008, the process undertaken by the appellant would amount to manufacture. The Commissioner also observed that since carbondioxide gas was filled in cylinders which bore identification marks/names of the buyers, the appellant would not be entitled to claim exemption under the Notification dated 01.03.200. The demand was, therefore, confirmed with penalty and interest.

Order dated 31.01.2013

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3. 2008 (226) E.L.T. 323 (S.C.)
4. 2011 (271) E.L.T. 321(S.C.)

15. The Commissioner held that the activity undertaken by the appellant would amount to manufacture and the relevant portion is reproduced below:

> "**Whether the above described activity of M/s. PCPL amounts to manufacture by a fiction of law:**
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> 4.2 Carbondioxide in liquid or gaseous state when packed from pipeline in bulk to retail packs after being subjected to certain treatment/process amounts to manufacture by virtue of gaining marketability after passing through the factory of production of the assessee in the aforesaid manner. The said canbondioxide gas attracts the fiction of manufacture in terms of Section 2(f) of the Central Excise Act, 1944 read with Note 9 of chapter 28 of the Central Excise Tariff Act, 1985.
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> 4.3 Section 2(f) of Central Excise Act, 1944 read with Note 9 of Chapter 28 of the Central Excise Tariff Act, 1985 specifies that in relation to the products of that chapter, labeling or relabeling of containers or repacking from bulk pack to retail packs or adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture. Going by the third ingredient of the referred note viz., adoption of any other treatment to render the product marketable to the consumer, which ingredient of its incorporation in the Central Excise Tariff Act, 1985 to the present period of dispute, it can be concluded that the subject activity of M/s. PCPL of receiving the carbondioxide gas in pipeline and refilling it into cylinders would clearly amount to manufacture as per the Excise law discussed in detail above since the above described treatments render the goods certainly marketable to their customers according to their required standards/ specifications.
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> 4.4 The fact that the gas was not sold as such is further established from the fact that the gas after the said process / treatment has acquired further value addition thereby resulting in a higher market price compared to the price at which it was procured. This is clear evidence to show that the treatment given to the CO2 gas cleared in cylinders has conferred on the final product a distinctly different marketability among its buyers/dealers in this case. Thus it satisfies the requirement of the third ingredient of Note 9 of Chapter 28 of the Central Excise Tariff Act, 1985 i.e., adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. (Case of Air Liquide North India Pvt. Ltd. 2011 (271) ELT 321 (S.C.) refers)

16. The Commissioner also held that as carbordioxide was filled in cylinders which bore identification marks/ names of the buyers, the benefit of Notification dated 01.03.2003 would not be available to the appellant.

Orders dated 28.04.2014 and **26.02.2015**

17. The confirmation of demand under the remaining two orders 28.04.2014 and 26.03.2015 are based on the same reasonings as the aforesaid two orders.

Order dated 21.07.2016 for subsequent period

18. What transpires from the records is that though the dispute as to whether compression of carbordioxide and the subsequent filling into cylinders would amount to manufacture was an issue raised in all the show cause notices for the period from 2005-06 to 2013-14, which notices are in issue in all the fifteen appeals, but subsequently a show cause notice dated 15.07.2015 was also issued to the appellant for the period March 2014 to April 2015 proposing a demand of Rs. 71,32,248/- as duty payable for the same reasons, namely that filling of gas received through pipelines into cylinders by compression amounts to manufacture in terms of the Chapter Note 9 of Chapter 28 of the Tariff Act. The Principal Commissioner, by order dated 21.07.2016, dropped the demand holding that the activity would not amount to manufacture. For arriving of this conclusion, the Principal Commissioner noted:

a) The earlier order dated 29.09.2004 passed by the Deputy Commissioner confirming the demand, the order dated 11.04.2005 passed by the Commissioner (Appeals) setting aside the order passed by the Deputy Commissioner, the order dated 17.12.2019 of the Tribunal confirming the order passed by the Commissioner (Appeals) and the order dated 15.07.2011 passed by the Supreme Court dismissing the appeal to assail the order of the Commissioner;

b) The present dispute is with regard to the same provisions contained in Chapter Note 9 to Chapter 28;

c) The activity undertaken by the appellant cannot be construed as labeling, re-labeling or re- packing;

d) The amendment made on 01.03.2008 to Chapter Note 9 of Chapter 28 is of no relevance to the issue;

e) The decision of the Supreme Court in **Air Liquide North India** would not come to the aid of the Department as the factual controversy is different; and

f) The activity of the appellant would not amount to manufacture even under the third requirement of Chapter Note 9 of Chapter 28 of the Tariff Act.

19. It would be useful to reproduce the relevant portions of the order dated 21.07.2016 passed by the Principal Commissioner and they are:-

> 1 M/s. Popular Carbonic Pvt. Ltd., 198 / 6A, Bharathiar Street, Manali, Chennai - 600 068 (hereinafter referred to as Ms. PCPL) are manufacturers of Liquefied and Solidified Carbon-di-oxide (CO2) falling under Chapter 28 of the First Schedule to the Central Excise Tariff Act, 1985. They are registered with the Central Excise Department with Registration No.AACCP9974FXM001 since October, 2004. **M/s. PCPL receive Carbon-di-oxide gas (CO2) from M/s. Madras Fertilizers Ltd, Chennai through pipeline and by compression process the CO2 gas is filled in cylinders and supplied to their customers.**
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> 2 In view of Chapter Note 9 of Chapter 28 of the Central Excise Tariff Act, 1985 which reads "in relation to the products of this Chapter labelling or relabeling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture" **the department took a view that the activity of filling the gas received through pipeline into cylinders by compression amounted to manufacture and issued a Show Cause Notice No.19/2015 dated 15-07-2015 proposing to demand an amount of 71,32,248 as duty payable in respect of goods cleared during period March 2014 to April 2015.**
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> 4.6 **The present note 9 to chapter 28 incorporates the identical provision to chapter note 10 considered during the initial period of dispute. I find there are three distinct activities listed in this provision.**

- **Labelling or relabeling of containers**
- **Repacking from bulk packs to retail packs**
- **Adoption of any other treatment to render the product marketable to the consumer**

Admittedly M/s PCPL have not undertaken any activity that could be construed as labelling, relabeling or repacking.

4.7 The Deputy Commissioner had held the activity of compression and filling into cylinders as "adoption of any other treatment to render the product marketable to the consumer". The Commissioner (Appeals) however, had held that this activity amounts to 'packing' and consequently applying the ratio of the Tribunal order in the case of Ammonia Supply Co held that the same would not amount to manufacture. The Commissioner (Appeals) has also found that 'compression' does not amount to manufacture in respect of goods falling under chapter 28. These findings of the Commissioner (Appeals) have attained finality as his order has merged with the judgment of the Hon'ble Supreme Court.

4.9 The amendment to the chapter note with effect from 01-03-2008
substituted the word 'and' with the word 'or' between the first two activities listed in the chapter note. Thus prior to the amendment both the activities had to be undertaken simultaneously for the fiction of deemed manufacture to be invoked while under the amended chapter note existence of any one activity is sufficient to invoke the legal fiction. However, it is an admitted fact on record that the activity of 'packing the gas into cylinders by compression does not fall within the scope of either of the first two activities. The Commissioner (Appeals) has also held that this activity would not be covered by the third residual activity listed in the chapter note. Such being the case I have to agree with the submission of M/s PCPL that the amendment to the chapter note has no relevance to the facts of their case. In consequence I find that the ratio of the judgement of the Hon'ble Supreme Court in their favour is applicable even after the amendment to the chapter note.

4.12 I find that my learned predecessors have placed reliance on the case of Air Liquide North India Pvt. Ltd. on a finding that it was a later case in which the Hon'ble Supreme Court as put forth a new interpretation to the chapter note which should be preferred to the one adopted in the earlier case of M/s BOC (I) Ltd reported in 2008 (226) ELT 323 which was relied on by the CESTAT. However, I find that the facts averred to by the Hon'ble Supreme Court in the case of BOC (I) Ltd is mere packing while in the case of Air Liquide North India Pct. Ltd., as extracted above, the facts indicate a process that goes far beyond 'mere packing'. **In fact I find that the case of BOC (I) Ltd has been referred to in the judgement relating to Air Liquide North India Pvt. Ltd. and the same has not been doubted or departed but the** differing judgment emanates from the different factual scenario. **In the case of M/s PCPL, admittedly the Commissioner (Appeals) finding that the process can at best be called packing has reached finality. The subsequent orders passed by my learned predecessors also provide no finding that the process has**

> **changed so as to consider it as more than mere packing** Further, the fact that the Hon'ble Supreme Court has decided the issuein favour of M/s PCPL in their own case and the orders of the Commissioner (Appeals) and CESTAT have merged into this judgment appears to have been lost sight of. It is not in dispute that whether the text of the earlier chapter note is considered or the amended text is considered the process carried out by M/s PCPL is sought to treated as manufacture only with reference to the residual activity referred of any other treatment to render the product marketable to the consumer'. This statutory provision and the process undertaken by M/s PCPL having remained unaltered through the entire period of dispute I am unable to agree with the conclusion that the ratio of the Hon'ble Apex Court decision in their favour can be overlooked and the judgment in the case of Air Liquide North India Pvt. Ltd. applied to the facts of their case particularly when the facts relating to the process are distinguishable. **The decision of the Hon'ble Apex Court rendered in their own case has become a binding precedent and in the absence of any change in either the facts or the law I find that it would be impermissible to take a contrary view.**
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> **(emphasis supplied)**

20. Ms. Radhika Chandrasekaran, learned counsel appearing for the appellant submitted that:

(i) The issue is to whether the process of compressing carbondioxide and subsequent filling in cylinder amounts to manufacture in terms of Chapter Note 9 to Chapter 28 of the Tariff Act has been settled in favour of the appellant by the Tribunal in the own case of the appellant in **Commissioner of Central Excise, Chennai** vs. **Popular Carbonic Pvt. Ltd**[5]**;**

(ii) The appeal filed by the Department **(Commissioner** vs. **Popular Carbonic Pvt. Ltd.**[6]**)** was dismissed by the Supreme Court on 15.07.2011.

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5. 2010 (253) E.L.T. 628 (Tri.- Chennai)
6. 2015 (316) E.L.T. A31 (S.C.)

(iii) The amendment made on 01.03.2008 to Chapter Note 9 of Chapter 28 of the Tariff Act would not make any difference and the activity carried out by the appellant would not amount to manufacture; and

(iv) The period involved in the show cause notices impugned in the present appeals is from 2005-06 to 2013-2014. Subsequently a show cause notice dated 15.07.2015 was issued to the appellant for the period March 2014 to April 2015 also alleging that the activity of filling gas received through pipeline into cylinders by compression amounted to manufacture. The Principal Commissioner by order dated 21.07.2016 dropped the proceedings holding that the process did not amount to manufacture. This order of the Principal Commissioner had attained finality as not appeal was filed by the Department. In such circumstances, it is not open to the Department to take a different stand in this appeal.

21. Shri L. Nandakumar, learned Authorised Representative appearing for the Department however supported the impugned orders and submitted that they do not call for any interference in this appeal:-

(i) Learned Authorised Representative placed emphasis on the third requirement contained in Chapter Note 9 of Chapter 28 which is "adoption of any treatment to rendered the product marketable" to contend that the activity undertaken by the appellant would amount to

manufacture. In this connection learned Authorised Representative placed reliance upon the following decisions of the Supreme Court:-

a) **Air Liquide North India Pvt. Ltd.** vs. **Commissioner of C. Ex. Jaipur-I**[7]**;**
b) **Moti Laminates Pvt. Ltd.**[8]**;** and
c) **Indian Cable Co. Ltd.** vs. **Collector C. Ex., Calcutta**[9]**.**

(ii) Learned Authorised Representative for the Department also submitted that in view of the decision on Supreme Court **Air Liquide North India Pvt. Ltd.** The appellant cannot take the benefit of the decision would amount to manufacture.

22. The submissions advanced by learned counsel for the appellant and the learned Authorised Representative for the Department have been considered.

23. Before adverting to the main submission advanced by learned counsel for the appellant that in view of the subsequent decision of the Principal Commissioner holding that the process undertaken by the appellant would not amount to manufacture. It will be necessary to examine a decision concerning the relevant provisions of Chapter Note 9 of Chapter 28 of the Tariff Act.

24. In the case of the appellant, a Division Bench of the Tribunal in **Popular Carbonic,** relying upon the decision of the Supreme Court in **BOC (I) Limited,** upheld the decision of the Commissioner (Appeals) held that the process undertaken by the appellant would not

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7. 2011 (271) E.L.T. 321 (S.C.)
8. 1995 (76) E.L.T. 241 (S.C.)
9. 1994 (74) E.L.T. 22 (S.C.)

amount to manufacture and the relevant portion of the decision is reproduce below:

> "Heard both sides. The appellants received Carbon-di-oxide gas from M/s. Madras Fertilizers, through pipeline which is stored and compressed and subsequently filled in cylinders. Cylinders carry the buyers name "PILLAY" apart from the particulars of gross weight and net weight.
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> 2. The lower appellate authority has taken note of the Chapter Note 10 to Chapter 28 which required at that time labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable, to satisfy the requirement of 'manufacture' and, thereafter, he has followed the ratio of the Tribunal's decision in the case of Ammonia Supply Company v. CCE, New Delhi - 2001 (131) E.L.T. 626 (Tri.-Del.), in which the tribunal had decided in favour of the respondents that the process undertaken by them did not amount to manufacture.
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> 3. We find that the view taken by the Tribunal was also approved by the Hon'ble Supreme Court in the case of CCE, Mumbai v. BOC (I) Ltd. - 2008 (226) E.L.T. 323 (S.C.). We note that for the subsequent period, the word 'and' in the relevant chapter note has been replaced by the word 'or'. But at the material time April, 2002 to March, 2004, the Chapter Note contained the word 'and' and hence, the cited Tribunal's decision as well as the cited decision of the Hon'ble Supreme Court squarely apply to the present case. Hence, we hold that the impugned order passed by the lower appellate authority requires no interference. Consequently, the department's appeal is dismissed."

25. This order of the Tribunal was upheld by the Supreme Court and the judgment is reproduced below:

> "Delay condoned"
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> "We have heard learned senior counsel appearing for the appellant."
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> "In our opinion, no question of law arises from the impugned judgment, warranting our consideration. This appeal is dismissed accordingly."

26. It would now be necessary to examine the main contention raised by the learned counsel for the Appellant that since the order dated 21.07.2016 passed by the Principal Commissioner for the subsequent period attained finality, as no appeal was filed by the Department to assail the said order, the Department cannot now agitate that the activity undertaken by the appellant would amount to manufacture.

27. This submission advanced by the learned counsel for the appellant deserves to be accepted.

28. A Division Bench of the Tribunal in **M/s. Rosmerta Technologies Ltd.** vs. **Commissioner of C.E. & ST, LTU Delhi**[10]**,** had an occasion to examine this contention. It was held that when for a subsequent period in the own case of the appellant it was held that service tax cannot be levied, which order had attained finality, the Department cannot be permitted to take a stand that service tax is leviable. The relevant portion of the decision is reproduced below:

> "16. Learned Counsel for the Appellant, on instructions, has stated that the aforesaid order dated 31 December, 2015 of the Commissioner has also attained finality as the Department did not file any Appeal.
>
> 17. The submission of the learned Counsel for the Appellant is that in such circumstances, the Department cannot agitate that the Appellant is liable to pay Service Tax under BAS. To support this contention, learned Counsel has placed reliance upon a decision of Allahabad Bench of this Tribunal in **Shri Niraj Prasad** vs. **CCE & ST, Kanpur**[11] decided on 17 July, 2019. In the aforesaid case, it was sought to be submitted by the Appellant that the Department cannot be allowed to discriminate between various assesses on the same issues. A view was taken that the centres of the Appellant would not be required to pay Service Tax under BAS, if Service Tax had been paid on the

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10. Service Tax Appeal No. 57703 of 2013 dated on 25.11.2019
11. Service Tax Appeal No. 3834 of 2012

entire amount by the agency. This submission was made in view of the order dated 25 October 2012 passed by the Commissioner (Appeals), which order had attained finality. It is in this context that the Tribunal held that once the Department has permitted the order to attain finality, it cannot be permitted to contend that the Appellant should also be required to pay Service Tax on BAS and to arrive at this conclusion, reliance was placed on the decision of the Supreme Court in Damodar J Malpani vs. CCE , wherein it was held:

> 3. It appears from the records that several letters were written by the Appellants to the Excise Authorities requesting that a sample of the Appellants" product may be chemically analysed at the Appellants" cost for the purpose of determining whether the Appellants" product or process in any way differed from the product and process of M/s. Chandulal K. Patel and Company. However, the Excise Authority decided against the Appellants without heeding such request. On 4-8- 88 a decision was taken by the Assistant Collector to classify the Appellants" product under Tariff Heading 24.04. On 11-8-88 a sample of the Appellants" product was taken by the respondents but returned within one week without testing on the ground that the issue was being finalised by the Assistant Collector. In the appeal preferred to the collector, the Appellants again raised the issue specifically that the process followed by and the product of the Appellants were identical with that of M/s. Chandulal K.P. Patel and Company and that the Appellants product should be similarly classified under Heading 24.01. While upholding the decision of the Assistant Collector, the Collector did not consider this aspect of the matter at all. The point was again taken specifically in the Appellants" Appeal before the Customs, Excise and Gold (Control) Appellate Tribunal. The Tribunal however dismissed the appeal and said:
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> > The Appellants have stated that some of the manufacturers who were producing similar goods, were not paying any excise duty on their production. These matters are not before us and it is neither possible nor desirable for us to deal with these matters. Suffice it to say that each and every case has to be examined in the light of our above observations, and it is for the competent Central Excise Officers to come to correct decisions in consonance with the principles of uniformity, equity and justice.
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> 4. It is difficult to understand the reasoning of the Tribunal. The least that the Tribunal could have done in the interest of uniformity' was to call upon the Revenue Authorities to explain why they were making a distinction between the Appellants product and that of M/s. Chandulal K. Patel without subjecting the Appellants' product to any chemical analysis.
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> 5. In their Appeal from the decision of the Tribunal before us the Appellants have again raised the issue that the Tribunal should have considered the fact that the Appellants and Chandulal K. Patel & Co's products were identical and were the outcome of an identical process, and that since the

> latter had been exempted from paying any central excise duty on the ground that their product was classifiable under Tariff Heading 24.04, the Appellants should get the same benefit.
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> 6. At the hearing today we sought an explanation from the learned Counsel appearing on behalf of the Revenue Authorities as to why different stand had been taken in the cases of M/s. Chandulal K. Patel & Company and the Appellant. Since the matter had not been squarely dealt with on facts at any stage by any of the authorities below, it was not possible for learned Counsel to give us the reasons for drawing this distinction between the two manufacturers and differently classify what were alleged to be materially the same product.
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> 7. In the circumstances we deem it appropriate to set aside the order of the Tribunal and remand the matter back to the Tribunal for considering whether the product and process followed by M/s. Chandulal K. Patel & Co. is the same as that of the Appellants" product for the chemical analysis if not already done. The Tribunal will thereafter consider the question of classification of the appellants" product having regard to the classification of "Karta ChhapZarda" the chemical analysis report and any other material that may be placed before it by the respective parties.
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> 18. **In this view of the matter, when the Commissioner in regard to the appellant own case for a subsequent period held that Service Tax cannot be levied under the category of BAS, which order of the Commissioner attained finality, the Department cannot be permitted to contend in this appeal that Service Tax under the category of BAS can be levied upon the Appellant."**

29. This issue was also examined by the Supreme Court in **Commissioner of C. Ex., Hyderabad** vs. **Novapan Industries Tries Ltd.**[12] and the relevant portion of the judgment is reproduced below:

> "11. In our view, the point in issue is squarely covered by the judgment of this Court in MRF case [(1986) Suppl. SCC 751] read with the subsequent order passed in the Review Petition reported in (1995) 4 SCC 349.
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> 12. The Tribunal in its order has relied upon its earlier judgment in ICI India Ltd. v. CCE, Hyderabad [2000 (91) ECR 152 (T)] in which the similar issue was involved and the Tribunal had taken the view that interest being inbuilt in the price which had not been charged separately, was deductible from the assessable value.
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12. 2007 (209) E.L.T. 161 (S.C.)

> 13. Counsel for the Revenue fairly concedes mat the Department did not file an appeal against the decision of the Tribunal in ICI India's case (supra). Thus, the same has attained finality.
>
> 14. In view of a catena of decisions of this Court, it is settled law that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases [See: Birla Corporation Ltd. v. CCE [2005 (186) E.L.T. 266 (S.C.)], Jayaswals Neco Ltd. v. CCE, Nagpur [2006 (195) E.L.T. 142 (S.C.)] etc.]
>
> 15. The point in issue being concluded by the decision of this Court in MRF case (supra) and the fact that the Revenue did not file an appeal against the order of the Tribunal in ICI India case (supra), we do not find any merit in these appeals and dismiss the same with no order as to costs."

30. The aforesaid decision dated 21.07.2016 of the Principal Commissioner clearly records a finding that the activity undertaken by the appellant would not amount to manufacture and this order of the Principal Commissioner has attained finality as the Department has not filed any appeal.

31. Thus, when both the contention raised by the learned Authorised Representative of the Department that the decision of the Supreme Court in **BOC (I) limited** would not be applicable in view of the subsequent decision of the Supreme Court in **Air Liquide North India** and that the process undertaken by the appellant would amount to manufacture in view of the third requirement contained in Chapter Note 9 of Chapter 28 of the Tariff Act have been considered at length by the Principal Commissioner in the order dated 21.07.2016, which order has attained finality, the Department in regard to the same issues for the subsequent period cannot contend in this appeal that the process undertaken by the appellant would amount to manufacture.

32. Thus, for all the reasons stated above, the impugned orders dated 30.01.2013, 31.01.2013, 28.04.2014 and 26.03.2015 cannot be sustained and are set aside. All the fifteen appeals are, accordingly, allowed.

(Order pronounced on 04.08.2021)

Sd/-
(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/-
(P V SUBBA RAO)
MEMBER (TECHNICAL)

JB