A M/S. AIR LIQUIDE NORTH INDIA PVT. LTD.

v.

COMMISSIONER, CENTRAL EXCISE, JAIPUR-I

(Civil Appeal No. 43 of 2005)

B AUGUST 30, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise Tariff Act, 1985 – Chapter 28 – C *Manufacture – Appellant purchased Helium gas from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market – Whether the treatment given or the process undertaken by the appellant to Helium gas purchased by it* D *from the open market amounted to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of the Act – Held: If a product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability,* E *then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act – Appellant purchased Helium gas under a generic description but after the tests and analysis, sold it to different* F *customers based on their specific requirements at profit margin ranging from 40% to 60% in different cylinders –The various tests resulted into categorization of the gas into different grades – The appellant supplied the gas not as such and under the grade and style of the original manufacturer* G *but under its own grade and standard – Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas – This explains the high price at which the appellant was selling the gas – The Tribunal rightly observed that if no*

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treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing – Appellant is liable to pay excise duty for the reason that it manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act – Though the Helium purchased by the appellant was in a marketable state but by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different type of gas or a new type of commodity which would suit a particular purpose – Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity.

The appellant is engaged in the manufacture of Oxygen, Nitrogen, Carbon-di-oxide and other gases classifiable under Chapter 28 of the Central Excise Tariff Act, 1985. The appellant purchased Helium gas from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market. The adjudicating authorities held that the processes undertaken by the appellants amounted to manufacture and consequently confirmed demand with penalty. The order was set aside by the Commissioner (Appeals). Thereafter, the respondent-Department filed appeal before the Customs, Excise & Service Tax Appellate Tribunal which allowed the same holding that the process undertaken or the treatment given by the appellant amounted to "manufacture" in terms of Chapter Note 10 of Chapter 28 of the Act.

In the instant appeal, the appellant contended that it had only conducted various tests like moisture test, etc. to determine quality and quantity of Helium gas in the

A cylinders; and that even after the activity of testing, Helium gas remained as Helium gas only and no new product, other than Helium gas came into existence and, therefore, it cannot be said that the appellant had carried on any manufacturing activity. The appellant further B contended that the gas, when purchased by the appellant, was already marketable and, therefore, the process of testing of the gas by the appellant cannot be said to be a manufacturing process, rendering the product marketable.

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The appellant claimed that the issuance of certificate along with the cylinder at the time of sale did not amount to re-labelling and also that as there was no suppression of facts of any sort on the part of the appellant, extended period of limitation could not have been invoked.

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Per contra, the respondent submitted that the testing of Helium gas came under the category of "treatment" as mentioned in Chapter Note 10 of Chapter 28 of the Act and the Tribunal clearly gave a finding to that effect; that E issuance of a separate certificate along with cylinder at the time of sale containing all the details regarding moisture, purification, etc. amounted to re-labelling of the gas cylinders; and also that the revenue authorities were fully justified in invoking the extended period of limitation F as there had been willful suppression of facts on the part of the appellant with an intent to evade payment of duty.

The issue that therefore arose for consideration in the instant appeal was whether the treatment given or the process undertaken by the appellant to Helium gas G purchased by it from the open market amounted to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of the Central Excise Tariff Act, 1985.

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Dismissing the appeal, the Court

HELD: 1.1. In view of Chapter Note 10 to Chapter 28 of the Central Excise Tariff Act, 1985, the manufacturing activity would mean either; a) labelling or re-labelling of containers and repacking from bulk packs to retail packs; or b) an adoption of any other treatment to render the product marketable to the consumer. Thus, either an activity of labelling or relabelling of containers and repacking from bulk packs to retail packs or adoption of any treatment so as to render the product marketable to the consumer would amount to "manufacture". [Paras 8, 9] [876-D-E]

1.2. The appellant had purchased Helium gas from the open market and its quality control officer had conducted various tests and issued analysis report/quality test report stating the results of the tests carried out. The appellant issued certificates of quality at the time of sale on the basis of tests carried out by it to the effect that the gas supplied by it confirmed a level of purity and specifications in conformation with the orders of the customers. The appellant had purchased Helium gas under a generic description but after the tests and analysis, it was sold to different customers based on their specific requirements at profit margin ranging from 40% to 60% in different cylinders. [Para 10] [876-F-H; 877-A]

1.3. When the appellant was asked about the process which was being carried out on Helium gas before selling it to its customers, the representative of the appellant had refused to give any detail with regard to the process because, according to him, that process was a trade secret and he would not like to reveal the same. Thus, the respondent or his subordinate authorities were not informed as to what was being done by the appellant to Helium gas purchased or what treatment was given to the

A said gas before selling the same to different customers at different rates with different certifications in different containers/cylinders. [Para 11] [877-B-D]

1.4. From the facts, it is clear that the gas cylinders
B were not sold as such but they were sold only after certain tests or processes as specified by the customers of the appellant. It is also clear that only after the analysis and tests, it could be ascertained as to whom the gas was to be supplied and at what rate. The various tests resulted into categorization of the gas into different
C grades namely, Helium label 4, high purity Helium and Helium of technical grade. Helium label 4 was sold at higher rate as it matched superior standards. [Para 12] [877-E-F]

D 1.5. In the instant case, Helium gas was having different marketability, which it did not possess earlier and hence the gas sold by the appellant was a distinct commercial commodity in the trade, rendering it liable to duty under Chapter Note 10 of Chapter 28 of the Act. If
E the product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to
F "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act. [Para 13] [877-G-H; 878-A]

1.6. The tests and "process" conducted by the appellant would amount to "treatment" in terms of Chapter Note 10 of Chapter 28 of the Act. The fact that
G the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. If it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When
H this question was put to the officer of the appellant, he

could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and under the grade and style of the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas. The Tribunal rightly observed that if no treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing. In the circumstances, it cannot be said that no treatment was given to the gas purchased by the appellant. For the said reasons, it cannot be said that the appellant was not carrying out any manufacturing activity within the meaning of Chapter Note 10 of Chapter 28 of the Act. [Paras 14, 15, 17] [878-B-F-H; 879-A]

1.7. It is also pertinent to elucidate on the phrase "marketable to the consumer". The word "consumer" in this clause refers to the person who purchases the product for his consumption, as distinct from a purchaser who trades in it. The marketability of the product to "the purchaser trading in it" is distinguishable from the marketability of the product to "the purchaser purchasing the same for final consumption" as in the latter case, the person purchases the product for his own consumption and in that case, he expects the product to be suitable for his own purpose and the consumer might purchase a product having marketability, which it did not possess earlier. Therefore, the phrase "marketable to the consumer" would naturally mean the marketability of the product to "the person who purchases the product for

A his own consumption". Hence, the argument of the appellant that as the product was already marketable, the provisions of Chapter Note 10 of Chapter 28 of the Act would not be attracted, will have to be rejected. [Paras 18, 19] [879-B-E]

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1.8. The appellant is liable to pay excise duty for the reason that it has manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act. [Para 20] [879-F]

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CCE v. Lupin Laboratories 2004 (166) A116 (SC) and *Lakme Lever Ltd. v. CCE* 2001 (127) ELT 790 (T) – cited.

2. So far as the issue with regard to re-labelling is D concerned, the Tribunal rightly held that re-labelling would not mean mere fixing of another label. When the appellant was selling different cylinders with different marking or different certificates to its different customers, the appellant was virtually giving different marks or E different labels to different cylinders having different quality and quantity of gas. Though the Helium purchased by the appellant was in a marketable state but by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different F type of gas or a new type of commodity which would suit a particular purpose. Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity. [Paras 21, 22] [879-G-H; 880-A-B]

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BOC (I) Ltd. v. CCE 2003 (160) ELT 864 – cited.

3. So far as the issue with regard to limitation is concerned, the Tribunal rightly arrived at the finding that H the appellant did not disclose details about the activities

or treatment given to the gas by the appellant. No duty was ever paid by the appellant on the Helium sold by it after giving some treatment so as to make it a different commercial product. Therefore, there is no reason to interfere with the finding with regard to limitation also. [Para 23] [880-C-D]

Case Law Reference:

2004 (166) A116 (SC)	**cited**	**Para 5**
2001 (127) ELT 790 (T)	**cited**	**Para 5**
2003 (160) ELT 864	**cited**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 43 of 2005.

From the Judgment & Order dated 31.8.2004 of the Customs, Excise New Delhi in Appeal No. E/247/04-NB (C).

Alok Yadav for the Appellant.

R.P. Bhatt, Sunita Rani Singh, B.K. Prasad, Rajiv Nanda, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. This appeal has been filed against the Judgment and Order dated 31.8.2004 passed in Final Order No 595/2004-NB(C) by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. E/247/2004-NB(C), whereby the Tribunal has allowed the appeal filed by the Department and reversed the findings of the Commissioner(Appeals).

2. The issue which falls for consideration in the present appeal is whether the treatment given or the process undertaken by the appellant to Helium gas purchased by it from the open market would amount to manufacture, rendering the goods liable to duty under Chapter Note 10 of Chapter 28 of

A the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the Act'). Chapter Note 10 of Chapter 28 of the Act, in relation to 'manufacture', reads as under:

> "10. In relation to products of this chapter, labelling or
> B relabelling of containers and repacking from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture."

In order to answer the aforesaid issue which arises for our
C consideration, it would be necessary to set out some facts giving rise to the present appeal. The appellant is engaged in the manufacture of Oxygen, Nitrogen, Carbon-di-oxide and other gases classifiable under Chapter 28 of the Act. The appellant had purchased Helium gas during the period
D commencing from December, 1998 to 31st March, 2001, from the market in bulk and repacked the same into smaller cylinders after giving different grades to it and then sold the same in the open market. The appellant purchased the said gas for Rs.520/- per Cum. Various tests were conducted on the gas so
E purchased and on the basis of the tests and some treatment given, the gas was segregated into different grades having distinct properties and sold at different rates to different customers.

3. The adjudicating authorities held that these processes
F undertaken by the appellants amounted to manufacture and consequently confirmed the demand with penalty. An appeal filed by the appellant before the Commissioner (Appeals) was allowed. Thereafter, an appeal was filed by the Department before the Tribunal and the Tribunal, by its impugned judgment
G held that the process undertaken or the treatment given by the appellant amounted to "manufacture" in terms of Chapter Note 10 of Chapter 28 of the Act. The aforesaid conclusion arrived at by the Tribunal is under challenge in this appeal.

H 4. On behalf of the appellant it was vehemently argued that

the appellant had only conducted various tests like moisture test, etc. to determine quality and quantity of Helium gas in the cylinders. It was further submitted that even after the activity of testing, Helium gas remained as Helium gas only and there was no change in the chemical or physical properties. No new product, other than Helium gas came into existence and, therefore, it cannot be said that the appellant had carried on any manufacturing activity.

5. It was further submitted that the gas, when purchased by the appellant, was already marketable and, therefore, it cannot be said that the testing of the gas by the appellant had rendered the product marketable. In the circumstances, the process of testing cannot be said to be a manufacturing process, rendering the product marketable. It was also submitted that the crucial requirement for the application of the last portion of Chapter Note 10 of Chapter 28 of the Act is that by adoption of some treatment, the product should become marketable to the consumer. According to the learned counsel, the product, i.e. Helium gas was already in a marketable state when it was purchased by the appellant and, therefore, it cannot be said that the appellant made it marketable. To substantiate his claim, the learned counsel for the appellant relied on the cases of *CCE v. LUPIN LABORATORIES* 2004 (166) A116 (SC) and *LAKME LEVER LTD. v. CCE* 2001 (127) ELT 790 (T).

6. The learned counsel for the appellant brought to our attention a decision of this Court rendered in the case of *BOC (I) Ltd. v. CCE* 2003 (160) ELT 864 to substantiate his claim that the issuance of certificate along with the cylinder at the time of sale does not amount to re-labelling. He also contended that as there was no suppression of facts of any sort on the part of the appellant, extended period of limitation could not have been invoked in the present case.

7. Per contra, the learned counsel for the respondent

A submitted that the testing of Helium gas comes under the category of "treatment" as mentioned in Chapter Note 10 of Chapter 28 of the Act and that the Tribunal has clearly given a finding to that effect. He also submitted that issuance of a separate certificate along with cylinder at the time of sale B containing all the details regarding moisture, purification, etc. amounted to re-labelling of the gas cylinders. He also submitted that the revenue authorities were fully justified in invoking the extended period of limitation as there had been willful suppression of facts on the part of the appellant with an intent C to evade payment of duty.

8. We have heard the learned counsel for the parties and perused the records. In view of Chapter Note 10 to Chapter 28 of the Act, the manufacturing activity would mean either;

D (a) Labelling or re-labelling of containers and repacking from bulk packs to retail packs; OR

(b) An adoption of any other treatment to render the product marketable to the consumer.

E 9. Thus, either an activity of labelling or relabelling of containers and repacking from bulk packs to retail packs OR adoption of any treatment so as to render the product marketable to the consumer would amount to "manufacture".

F 10. It is not in dispute that the appellant had purchased Helium gas from the open market and that its quality control officer had conducted various tests and issued analysis report/ quality test report stating the results of the tests carried out. It is also not in dispute that the appellant issued certificates of G quality at the time of sale on the basis of tests carried out by it to the effect that the gas supplied by it confirmed a level of purity and specifications in conformation with the orders of the customers. Another undisputed fact is that the appellant had purchased Helium gas under a generic description but after the tests and analysis, it was sold to different customers based on H

their specific requirements at profit margin ranging from 40% to 60% in different cylinders. A

11. It is pertinent to note that when the appellant was asked about the process which was being carried out on Helium gas before selling it to its customers, the representative of the appellant had refused to give any detail with regard to the process because, according to him, that process was a trade secret and he would not like to reveal the same. Thus, the respondent or his subordinate authorities were not informed as to what was being done by the appellant to Helium gas purchased or what treatment was given to the said gas before selling the same to different customers at different rates with different certifications in different containers/cylinders. It is also pertinent to note that the gas which was purchased at the rate of about Rs.520/- per Cum. was sold by the appellant at three different rates namely Rs.700/-, Rs.826/- and Rs.1000/- per Cum. and thereby the appellant used to get 40% to 60% profit. B C D

12. From the above undisputed facts, it is clear that the gas cylinders were not sold as such but they were sold only after certain tests or processes as specified by the customers of the appellant. It is also clear that only after the analysis and tests, it could be ascertained as to whom the gas was to be supplied and at what rate. The various tests resulted into categorization of the gas into different grades namely, Helium label 4, high purity Helium and Helium of technical grade. Helium label 4 was sold at higher rate as it matched superior standards. E F

13. In the instant case, Helium gas was having different marketability, which it did not possess earlier and hence the gas sold by the appellant was a distinct commercial commodity in the trade, rendering it liable to duty under Chapter Note 10 of Chapter 28 of the Act. If the product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to G H

A "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act.

14. The only conclusion from the above is that the tests and "process" conducted by the appellant would amount to "treatment" in terms of Chapter Note 10 of Chapter 28 of the B Act. The fact that the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. If it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When C this question was put to the officer of the appellant, he could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and under the grade and style of D the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas.

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15. Therefore, in our opinion, the Tribunal has rightly observed that if no treatment was given to the gas purchased by the appellant, customers of the appellant would not have been purchasing Helium from the appellant at a price 40% to F 60% above the price at which the appellant was purchasing.

16. As stated hereinabove, it is clear that the appellant was purchasing Helium at the rate of Rs.520/- per Cum. and was selling the same after adding 40% to 60% profit. Further, the gas was segregated in different cylinders with different G properties and, therefore, the rate at which the gas was purchased by the appellant and the rate at which it was sold to its customers was substantially different.

17. In the circumstances, it cannot be said that no treatment H was given to the gas purchased by the appellant. For the said

reasons, it cannot be said that the appellant was not carrying out any manufacturing activity within the meaning of Chapter Note 10 of Chapter 28 of the Act.

18. It is also pertinent to elucidate on the phrase "marketable to the consumer". The word "consumer" in this clause refers to the person who purchases the product for his consumption, as distinct from a purchaser who trades in it. The marketability of the product to "the purchaser trading in it" is distinguishable from the marketability of the product to "the purchaser purchasing the same for final consumption" as in the latter case, the person purchases the product for his own consumption and in that case, he expects the product to be suitable for his own purpose and the consumer might purchase a product having marketability, which it did not possess earlier.

19. Therefore, the phrase "marketable to the consumer" would naturally mean the marketability of the product to "the person who purchases the product for his own consumption". Hence, the argument of the appellant that as the product was already marketable, the provisions of Chapter Note 10 of Chapter 28 of the Act would not be attracted, will have to be rejected.

20. For the aforetasted reasons, we agree with the Tribunal in holding that the appellant is liable to pay excise duty for the reason that it has manufactured Helium within the meaning of the term 'manufacture' as explained in terms of Chapter Note 10 of Chapter 28 of the Act.

21. So far as the issue with regard to relabelling is concerned, we are in agreement with the view expressed by the Tribunal that relabelling would not mean mere fixing of another label. When the appellant was selling different cylinders with different marking or different certificates to its different customers, we can say that the appellant was virtually giving different marks or different labels to different cylinders having different quality and quantity of gas.

22. It can be very well said that the Helium purchased by the appellant was in a marketable state but it is equally true that by giving different treatment and purifying the gas, the appellant was manufacturing a commercially different type of gas or a new type of commodity which would suit a particular purpose. Thus, the treatment given by the appellant to the gas sold by it would make a different commercial product and, therefore, it can surely be said that the appellant was engaged in a manufacturing activity.

23. So far as the issue with regard to limitation is concerned, we are in agreement with the findings arrived at by the Tribunal to the effect that the appellant did not disclose details about the activities or treatment given to the gas by the appellant. No duty was ever paid by the appellant on the Helium sold by it after giving some treatment so as to make it a different commercial product. We, therefore, do not see any reason to interfere with the finding with regard to limitation also.

24. For the reasons stated hereinabove, we are in agreement with the order passed by the Tribunal and dismiss the appeal but without any order as to costs.

B.B.B. Appeal dismissed.