



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(32)/153/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

2493-97

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-450-2017-18
दिनांक Date : 23-03-2018 जारी करने की तारीख Date of Issue ~~5-5-18~~ 17/04/18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. MP/11/AC/Div-IV/17-18 दिनांक: 9/11/2017 issued by Assistant
Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Berger Paints India Ltd.
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को
अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as
the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक
के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली
: 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit
Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New
Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first
proviso to sub-section (1) of Section-35 ibid :

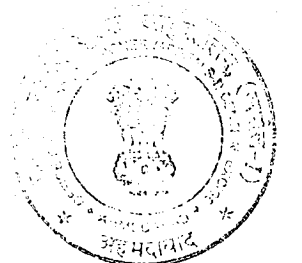
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे
भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के
दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to
another factory or from one warehouse to another during the course of processing of the goods in a
warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of
on excisable material used in the manufacture of the goods which are exported to any country
or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हों।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

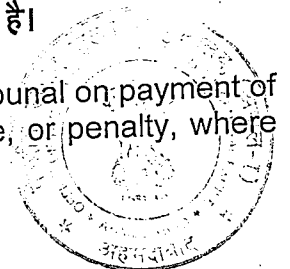
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER IN APPEAL

M/s Berger Pints Limited (Now British Paint Division), Godown No. 7, Jamnagar Estate, B/h Alifa Hotel, N. H. No-8, Aslali, Ahmedabad- 380015 (Dealer Reg. AABCB 0976E XD043) (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number MP/11/AC/Div-IV/17-18 dated 09.11.2017 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, CGST, Div-IV, Ahmedabad- South Commissionerate, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief are that appellant, register dealer u/r 9 of CER, 2002, have cleared the paints from his depot after process of 'tinting' in said depot. The process of Mixing base paint with the colourant(s) to obtain the paint of desired shade is referred to as 'tinting' which amounts to manufacture in terms of section 2(f)(iii) of CEA, 1944 (substituted w.e.f. 01.03.2003- packing/repacking, labeling/relabeling amounts to manufacture). During 01.10.2015 to 30.09.2016, appellant had cleared 3583 ltrs/kg of paint after tinting on which C.Ex. duty of Rs. 96,714/- u/s 4 of CEA, 1944 had not paid.

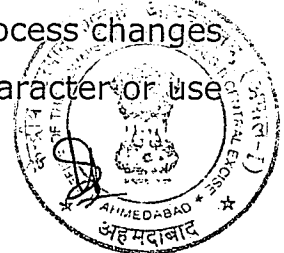
3. Adjudicating authority confirmed the C.Ex. duty of Rs. 96,714/- u/s 11-A with interest liability u/s 11AA and imposed the penalty of Rs. 96,714/- u/r 25 of CER, 2002 r/w Section 11AC of CEA, 1944.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 05.01.2018 before the Commissioner Appeals, CGST, Ambawadi GST Bhavan, Ahmadabad wherein it is contended that-

a. Depot at Ahmadabad receives duty paid Base paint and strainer from its manufacturing plant situated at Sikandrabad (U.P.) which clears goods on MRP.

b. Some quantity of Base paint are cleared as such but some quantity of base paint is subjected to 'tinting' process for which lid of container of base paint is opened and small quantity of strainer is added to obtain required shade and again lid is placed back.

c. CBEC vide circular No. 247/81/96-Cx dated 03.10.1996 has clarified that consequent upon undertaking 'tinting' process changes do not take place, no goods having different name, character or use



emerges and base paint remains the same after 'tinting'. Therefore 'tinting' does not amount to manufacture u/s 2(f) of CEA, 1944.

d. W.e.f. 01.03.2003 the definition of the term 'manufacture' was amended by addition of sub-clause (iii) vide which packing or re-packing, labeling or re-labeling of container to render product marketable amounts to manufacture. That consequent upon amendment in definition, CBEC circular has neither been withdrawn nor rescinded.

e. The last clause in section 2(f)(iii) reading 'to render the product marketable to consumer' is pre-requisite for any of the specified activities to amount to manufacture. The base paint is also sold as such without tinting, it is therefore marketable. In this view, the amended definition is not applicable.

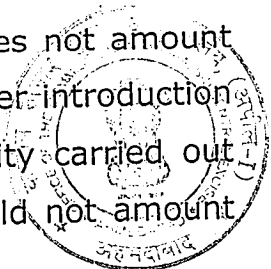
5. Personal hearing in the case was granted on 31.10.2018. Shree M.A. Mateen, Sr. V.P. and Shri M. R. Arya, Advocate, Consultant appeared before me and reiterated the grounds of appeal. They submitted citation 248 ELT 812 (T) in case of Berger Paint India Ltd and other citation of Commissioner (A)'s order. They further stated that where interpretation is involved no penalty should be imposed.

DISCUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of personal hearing.

7. The process of 'Tinting' involves adding required quantity of strainer with emulsion/enamel base and mixing them in order to obtain the desired shade of the emulsion/enamel as per the requirement of customer. In other words the base paint is tinted with the desired quantity of strainer to make the product into a particular shade according to the customers' specification.

8. Appellant has contended that CBEC vide circular No. 247/81/96-Cx dated 03.10.1996 has clarified that process of 'tinting' does not amount to manufacture and same has not been retracted even after introduction of new clause (iii) in section 2(f), therefore tinting activity carried out along with packing-repacking and labeling-relabeling should not amount

to manufacture. In this regards I am considered view that said circular is issued for activity stated in clause (i) and (ii) in section 2(f) and still relevant for said clause (i) and (ii) of section 2(f). said circular is not applicable for activity stated in section 2(f)(iii) to qualify manufacture for purpose of imposing C.Ex. duty u/s 4 of CEA, 1944.

9. The definition of the term "manufacture" as given under Section 2(f)(iii) of Central Excise Act, 1944, reads as under:

"(f) "manufacture' includes any process,-

(i).....

(ii).....

(iii) which, in relation to the goods specified in the third Schedule, involves packing or repacking of such goods in a unit container or labeling 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 and the word "manufacture" shall be construed accordingly."

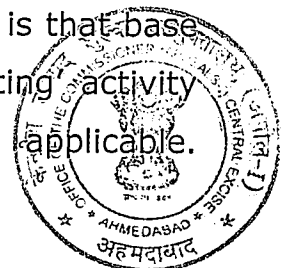
10. Interpretation of definition, by dissecting it three different activities separately, as per department view is as below-

a. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves packing or repacking of such goods in a unit container or**

b. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves labeling or re-labelling of containers including the declaration or alteration of retail sale price on it or**

c. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves adoption of any other treatment on the goods to render the product marketable to the consumer**

11. After 'tinting' in white base paint in depot appellant have affixed label to shade obtained in container. Appellant is selling white base paint as it is and also after undertaking 'tinting' activity to obtain desired shade. Contention of appellant, in terms of above sub-definition (c), is that base paint itself marketable, which shows that even without 'tinting' activity base paint is marketable, therefore section 2f(iii) is not applicable.



Appellant is silent upon *packing or repacking labeling or re-labelling of containers including the declaration or alteration of retail sale price on it stated in above dissected sub definition (a) and (b).*

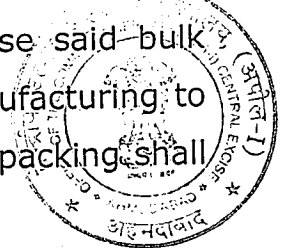
12. It has been argued, by the appellant, that the processes outlined in the amended Section 2(f) are to be construed as activities which should make the product marketable. Appellant is twisting definition by adding **comma (,)** between the sentence **".....or adoption of any other treatment on the goods"** and **"to render the product marketable to the consumer....."** as below

"(iii) which, in relation to the goods specified in the third Schedule, involves packing or repacking of such goods in a unit container or labeling 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 and the word "manufacture" shall be construed accordingly."

If comma is added between above two sentence as above then the phrase "to render the product marketable to the consumer" would become common for all three activity stated above and the final interpretation would be as below-

- a. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves packing or repacking of such goods in a unit container to render the product marketable to the consumer**
- b. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves labeling or re-labelling of containers including the declaration or alteration of retail sale price on it to render the product marketable to the consumer**
- c. **"manufacture' includes any process, which, in relation to the goods specified in the third Schedule, involves adoption of any other treatment on the goods to render the product marketable to the consumer**

13. Any bulk goods/ large container which is re-packed to smaller container was marketable prior to such repacking otherwise said bulk goods/ large container would not have been sold after manufacturing to re-packer. Therefore contention of appellant that packing/repacking shall



not be covered in section 2f(iii), if bulk pack/large container from which they are made, are marketable "as it is", is not convincing.

14. I find that whatsoever small tinting [i.e. *adoption of any other treatment as stated in section 2(f)(iii)*] is done on the base paint the process would amount to manufacture as without tinting the products are not saleable in the ultimate consumer, therefore in terms of dissected sub-definition (c), the said process amounts to manufacture for the purpose of section 2(f)(iii). In the case of Air Liquide North India Pvt. Ltd. vs. C.C.E., Jaipur - 2011 (271) ELT 321 (SC) in the Honble Supreme Court, it has been held that the phrase marketable to the consumer means marketability to the person who purchases the product for his own consumption.

15. CESTATE final order No.55744/2016 dated 03.01.2017 in Central Excise Appeal No.692 of 2010 in case of Berger Paints India Ltd. (Rajdoot Division), Appellant, Vs. Commissioner of Central Excise, Delhi-I had held that process of packing-repacking, labeling-relabeling carried out for the purpose of carrying out "tinting" amounts to manufacture in terms of new amended definition of section 2(f)(iii) and further it is held that "to render product marketable" should not be read in context of packing-repacking, labeling-relabeling. Relevant para 3 of said judgment is reproduced as below-

"The amended clause of Section 2(f) clearly specifies that the activity of packing or repacking as well as labeling or relabelling of containers would amount to manufacture. Having said so, the definition further states that the said activity shall also include the activity in the nature of alteration of the retail sale price or adoption of any other treatment to the goods which would render the goods marketable to the consumer. The requirement of marketability would always be there to consider the product as manufacture, however, in the definition of Section 2(f), any treatment given to the goods with the intention to make the product further marketable to the consumer also amounts to manufacture . It is fairly obvious that the ultimate consumer of the paints shall be interested in purchase of paints of the required shade and not base paint. Consequently, the process of tinting resulting in the paint of the required shade is definitely covered within the amended definition of manufacture given in Section 2(f). Consequently, the orders passed by the authorities below holding the process as amounting to manufacture cannot be faulted with and is required to be upheld...."



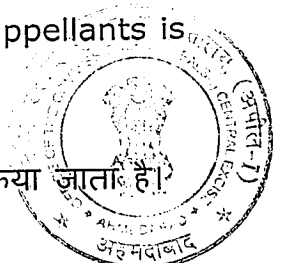
16. Since the activity carried out appellant amount to manufacture in terms of above dissected sub-definition (a), (b) and (c), they should have discharged Central Excise duty liability on the goods cleared to various customers after tinting process and should have followed all the procedures and formalities as envisaged in the Central Excise rules, after getting themselves registered under Rule 9 of Central Excise rules, 2002 as a manufacturer. In view of the above facts and circumstances, I hold that the said process amounts to manufacture in terms of Section 2(f)(iii) of Central Excise Act, 1944 and appellant is liable to pay duty demanded in SCN with applicable interest u/s 11AA.

17. Now coming to issue regarding imposition of penalty of Rs. 96,714/- (equal to duty) u/r 25 of CER, 2002 r/w Section 11AC of CEA, 1944. I find that the present SCN is periodical in nature, therefore can not be any mala fide intention to evade the duty as it is known to department. Moreover appellant is of strong view that 'tinting' does not amount to manufacture and as such they are not required to pay duty for activity carried out in their depot. It is question of interpretation of rule, circular etc, therefore I am considered view that penalty should not be imposed. My view is supported by CESTATE final order No.55744/2016 dated 03.01.2017 in Central Excise Appeal No.692 of 2010 in case of Berger Paints India Ltd. (Rajdoot Division), Appellant, Vs. Commissioner of Central Excise, Delhi-I had held at para 4 of order that-

"4. The process of tinting of base paint is not a new process in the industry. CBEC has taken the view in 1996 that such process cannot be considered to be process of manufacture. However, this view merits revision amendment of Section 2(f). The appellant have entertained a bona fide view that process of tinting may not be liable to excise duty in the light of long standing practice in the industry and CBEC clarification. It is also to be noted that the demands in the present case have been made for the period immediately after the amendment of Section 2(f). As such, we are of the view that the allegation of suppression made against the appellant cannot be sustained...."

18. In view of above I set aside the Penalty of Rs. 96,714/- imposed and up-hold the impugned OIO as far as it relates to duty confirmed with interest as discussed in foregoing paras. Appeal filed by the appellants is partly allowed.

19. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।



19. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

R.R. Patel
(R.R. PATEL)

SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD

To,

M/s Berger Pints Limited
(Now British Paint Division),
Godown No. 7, Jamnagar Estate,
B/h Alifa Hotel, N. H. No-8, Aslali,
Ahmedabad- 380015

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad South .
- 2) The Commissioner Central Tax, CGST, Ahmedabad South.
- 3) The Asst. Commissioner, Central Tax, Div-IV, Ahmedabad South
- 4) The Asst. Commissioner(System), Hq, Ahmedabad South.
- 5) Guard File.
- 6) P.A. File.

