
(1982) 03 AHC CK 0062

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 427 of 1979, 192 and 193 of 1980 and 14 of 1981

Ashok Griha Udyog Kendra Pvt. Ltd.

APPELLANT

Vs

Collector of Central Excise and Customs

RESPONDENT

Date of Decision : 05-03-1982

Acts Referred:

Central Excise Rules, 1944 — Rule 9B
Central Excises and Salt Act, 1944 — Section 2, 3, 3(1), 35, 36
Constitution of India, 1950 — Article 16, 366(12)
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2(c)

Citation : (1982) 10 ELT 309

Hon'ble Judges : R.R. Rastogi, J;K.N. Seth, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

R.R. Rastogi, J.—It would be convenient to dispose of this bunch of writ petitions in a common order. The question for consideration is as to whether mixed ground Masala is liable to excise duty under Tariff Item 68. Tariff Item No. 68 was introduced by the Finance Act, 1975 and on its introduction it read as under :-

"68. ALL OTHER GOODS, NOT ELSEWHERE One per cent ad SPECIFIED, MANUFACTURED IN A FACTORY valorem. BUT EXCLUDING-

(a) alcohol, all sorts, including alcoholic liquors for human consumption;

(b) opium, Indian|hemp and other narcotic drugs and narcotics and

(c) dutiable goods as defined in Section 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

Explanation : In this term, the "Factory" has the meaning assigned to it in Section 2(m) of the factories Act, 1948".

By the Finance Act, 1979 the exclusions remained as before but the description

of the Tariff Item was modified so as to read :

"All other goods not elsewhere specified."

The Finance (No. 2) Act, 1980 added an Explanation to this Tariff Item, but that is not relevant for the purposes of the present petitions.

2. The brief facts, as set out in Writ Petition No. 427 of 1979 are these. M/s Ashok Griha Udyog Kendra Private Limited, a private Limited company (hereinafter referred to as "the petitioner"), carries on business in purchase and sale of spices whole, ground and mixed. It purchases spices from the market like Jeera, Ajwaine, Saunf, Methi, Saunf Mahin, Rai and Kalaunji and sells the same as such after cleaning them. The second activity is that the petitioner grinds these whole masalas into powder form and sells the same as such. The last activity is that the petitioner grinds the Masalas and mixes them and prepares Garam Masala, Dal Masala, Sabzi Masala, Rayta Masala, Jal Jeera and Chana Masala. We are concerned with this item of mixed spices in the present writ petitions because the time of the hearing of these petitions it was stated before us by the learned Standing Counsel that whole Masalas and ground Masalas do not fall under Tariff Item 68 and excise duty is not sought to be levied on the same.

3. The case set out by the petitioner is that it has been carrying on this business since 1957 but since the goods prepared by the petitioner were beyond the purview of the Central Excises and Salt Act (Act No. 1 of 1944) (hereinafter referred to as "the Act"), the petitioner was never required to pay any excise duty on the same. On 18-6-1977 the Central Excise Inspector inspected the petitioner's factory and asked its Director to obtain a licence under the Act since spices are excisable goods. As demanded the petitioner submitted a stock list. It was granted a licence on 22-6-1977. The rate of excise duty was two per cent and up to 5-9-1979 the petitioner deposited Rs. 5,17,048.81 as excise duty. According to the petitioner this excise duty was for the period from 22-6-1977 and it had been paying the same under protest and it has been making representations before the Departmental Authorities. It was granted exemption in respect of 12 items by an order dated 8/9-3-1978 passed by the Superintendent, Central Excise, Kanpur. That provisional exemption was allowed under Rule 9-B of the Central Excise Rules and the petitioner was obliged to furnish a bond for Rs. 50,000/-, but by the time that order was passed the petitioner had already paid Rs. 89,998.74 as excise duty. On 22-5-1979 the petitioner claimed refund of this amount but no reply was received and instead it was served with a notice on 28-5-1979 by which, it was required to furnish an additional bond in the sum of Rs. 1,50,000/-. The petitioner submitted another classification list on 7-7-1979 of exempt goods but by letter dated 30-8-1979 the Superintendent, Central Excise, demanded the execution of a fresh security bond in the sum of Rs. 1,50,000/- from it. By means of this writ petition the petitioner seeks the quashing of the provisional assessment and the demand raised on its basis and also for refund of Rs. 5,17,048.81.

4. Subsequently, that provisional assessment was made final by an order dated 9-12-1980 and that order forms the subject matter of challenge by the petitioner in Writ Petition No. 14 of 1981.

5. In the meantime, for non-compliance with the demand served on the petitioner certain goods belonging to it as also to its agent M/s Ashok Agencies, Kanpur, were seized and Writ Petitions 192 and 193 of 1980 have been filed by the petitioner and M/s Ashok Agencies respectively challenging the order of seizure of goods.

6. A preliminary objection was raised by the learned Standing Counsel for the Department that the petitions are premature inasmuch as no demand notice has been served on the petitioners as yet and further when the assessment order has been made, the petitioner has an alternative remedy by way of filing an appeal u/s 35 of the Act and a revision u/s 36. The dispute raised by the petitioner can be gone into and decided by the appellate and the revisional authorities. After hearing counsel for parties we do not agree with this learned submission because the petitioner has attributed violation of Article 16 of the Constitution and also challenged the vires of Tariff Item 68. These questions cannot be decided by the authorities created under the Act. The writ petitions are hence maintainable.

7. The following submissions were made before us on behalf of the petitioners by Sri Jagadish Swarup, their learned counsel: That mixed ground masalas are not excisable goods because they are not specified in the First Schedule to the Act, secondly that no manufacturing activity is involved in producing these goods; and lastly that these ground masalas are food and hence are exempt from the levy of excise duty under Notification No. 55/75, dated 1-3-1975. We may take up these contentions one by one.

Section 3 of the Act is the charging Section. It reads :

"(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule.

(1A) The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government as they apply in respect of goods which are not produced or manufactured by Government.

(2) The Central Government may, by notification in the official Gazette, fix, for the purpose of levying the said duties tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed for different classes or descriptions of the same article."

Thus, under Sub-section (1) duties of excise are to be levied and collected in such manner as may be prescribed. The levy is on all excisable goods produced or manufactured in India. The goods are to be set forth along with the rates in the First Schedule. "Prescribed" as defined in Section 3(1) means "prescribed by the rules under this Act" "Excisable goods" as defined in Section 2(d) means "goods specified in the First Schedule as being subject to a duty of excise and includes salt". The First Schedule to the Act contains the description of goods and the rates of duty and earlier it comprised of 67 Tariff Items. With the growth in trade and commerce and production of goods of various types, from time to time amendments were made in these entries and getting tired of netting in items year after year for its annual Budget on the indirect taxation side, the Central Government considered proper to introduce a compendious omnibus item. In its Budget for the year 1975-76, it introduced Tariff Item "68 in the First Schedule to the Act. It would be useful to recall the relevant portion of the Budget speech made by the Finance Minister on that occasion. The Finance Minister said :-

"I now come to a new concept in central excise taxation. Hitherto, the. Central Excise Tariff concerned only certain specified goods. With a view to widen the coverage of taxable goods and to provide a more dependable information base for future revenue raising excise. I propose to introduce a new item in the Central Excise Tariff Schedule which with a few exceptions will cover all goods produced for sale or other commercial purposes, not elsewhere specified in the Schedule. This levy is admittedly an experimental measure."

Accordingly, Tariff Item No. 68 was introduced by the Finance Act, 1975. We have already extracted this Item above. It was modified by the Finance Act, 1979 and again by Finance Act, 1980. At first the tariff rate was kept low at one per cent, but subsequently it was raised because it was found that the Government could net in substantial revenue under this Tariff Item. However, this Tariff item was introduced with two avowed purposes (a) to widen the coverage of taxable goods and (b) to provide a more dependable information base for future revenue exercises.

8. According to Shri Jagadish Swaroop, as provided in Section 2(d) of the Act, "excisable goods" mean goods specified in the First Schedule as being subjected to a duty of excise. In other words, goods have to be "specified" in the First Schedule. Tariff Item 68 also says "all other goods not elsewhere specified". In other words unless the goods are specified in First Schedule they cannot be treated as excisable goods. Emphasis was laid on the word specified" and it was contended that since it is a fiscal statute strict interpretation is to be put on its provisions. Therefore, if the goods are not specified they are not liable to any excise duty. According to the counsel, since mixed ground masalas are not specified in the First Schedule, they cannot be subjected to the levy of any excise duty even though other conditions required in Tariff Item 68 are satisfied. Reliance was placed on a decision of the Bombay High Court in Garware Nylons

Ltd. v. Union of India and Ors., (1980 E.L.T. 249) . Garware Nylons Limited manufactured nylon yarn and nylon twine in its factory at Pimpri in Pune District. Prior to the insertion of Tariff Item 68 nylon twine was taxed at Rs. 4.00 per kg. under Notification No. 68/71-CE dated 29-5-1971. After the introduction of Tariff Item 68, the Department sought to tax nylon twine under it on the view that it was different from nylon yarn specified in Tariff Item 18. The order of the Assistant Collector was confirmed by the Appellate Collector. The revision petition was also rejected and the matter came up before the Bombay High Court by way of a writ petition. Mrs. Sujata V. Manohar J. was of the view that before any product can be put in the residuary item, it is necessary to establish that the product is not covered by any of the other items which are specified in the First Schedule. They must, therefore, establish that nylon twine is not covered by Item 18 which deals, inter alia, with nylon yarn. After referring to the various definitions and trade enquiries cited at the bar, the learned Judge held that nylon twine could not be considered other than nylon yarn and, therefore, it was covered by Tariff Item 18. Masodkar, J. who delivered a concurring judgment, took the view that it is of utmost importance and it appears to be the clear intention underlying such a fiscal statute that there would be sufficient description with regard to the Item of goods which are subject to excise duty. According to his Lordship :

"When sufficient prescriptive or descriptive details of the goods are not available one would tend to raise, in keeping with the fairness, the liability by applying the principle of benefit to the subject."

and further :

"Fiscal statutes, for this reason, should always be specific and leave no manner of doubt in the minds of those who are required to obey the same particularly as to the item that is being subjected to fiscal levy."

He further said :

"To introduce general Entries, like the one at Entry No. 68, may have expedient legislative purpose behind it, but, for the purpose of tariff in the context of Section 2(d) and Section 3, that can hardly be an appreciative exercise of legislative activity for obviously it does not give the definite description of the goods, nor does it disclose the identity of the goods, everything being left to the applicative adjudications by the Authorities concerned as the Entry embraces universally "all other goods", which is too wide and too general without any descriptive details and being always open to doubt and debate."

The Tariff Item 68, however, survived the challenge in that case because that was not a case where total exemption from excise liability was sought for. The controversy was circumscribed to find out as to whether a particular item describing the goods or the general item, called the residuary item should hold the field for the purpose of fiscal liability. In the present case, however, the controversy is not so circumscribed. The controversy is as to whether the

disputed item calls for total exemption from excise liability or falls in the residuary item. It is correct that Tariff Item No. 68 does not contain the definite description of the goods, nor does it disclose the identity of the goods and the matter is left to the applicative adjudication of the authorities concerned. The entry 68 expressed in words are too wide and too general but there are some guidelines which can serve the purpose and apart from this if we look to the purpose behind the introduction of this Item, the entry cannot be treated as running counter to the letter and spirit of Section 3 of the Act.

9. We have already referred to the object which the Legislature had in mind while introducing this entry in the First Schedule. The purpose was to widen the coverage of taxable goods and secondly to provide a more dependable information based for future revenue exercises. In order to attract this entry the first condition is that there must be goods and the second is that they must not be elsewhere specified in that Schedule. In other words, if what is sought to be taxed is not goods or in spite of being goods are such as are specified elsewhere, then they would not fall within this Item. There was yet another condition and it was that only those goods could be chargeable to excise duty which are produced or manufactured in India. The expression "goods" in itself has not been defined in the Act. Under Article 366(12) of the Constitution this expression has been defined to include all materials, commodities and articles. That is an inclusive definition. The Central Excises Act, however, concerns itself with goods manufactured or produced and without going in detail in the dictionary meanings of this word, suffice it to say that to become goods article must be something which can ordinarily come to the market to be bought and sold. It is not necessary that before an article can be treated as goods it should have been actually brought to the market for being bought or sold but must be one which is capable of being brought to the market for being bought or sold. We may refer in this behalf to the observations made by the Supreme Court in *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, . It was held :

"The duty is levied on goods. As the Act does not define goods, the Legislature must be taken to have used this word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which must ordinarily come to the market to be bought and sold and is known to market."

Apart from this, the meaning given to an article in a fiscal statute must be as people in trade, commerce, conversant with the subject generally treat and understand in the usual course. The article with which we are concerned in the present petitions is well known in the commercial community and in our opinion it would be "goods" under Tariff Item 68.

10. The next question is whether these goods are elsewhere specified in the First Schedule. There is no controversy that they are not elsewhere specified in the Schedule. According to Sri Jagdish Swarup unless goods are specified in the First Schedule they cannot be treated as excisable goods and since these goods are not so specified even in Tariff Item 68 they cannot be subjected to levy of excise

duty. We do not agree because under Items 1 to 67 certain goods are specified. In other words they are definitely formulated. This exercise, however, cannot be exhaustive and hence a residuary item has been introduced as a compendious and omnibus item. There was a purpose to do so as mentioned above. Therefore, these articles which are not specified elsewhere in the Schedule and satisfy the requirements contained in Tariff Item 68, would fall under it. Those conditions as noted above are : the articles must be goods; they must not be specified elsewhere in this Schedule and they are manufactured in a factory. The entry thus does not suffer from any charge of vagueness or ambiguity on this account of lack of specification.

11. There now remains the question whether these goods are manufactured or not in a factory. How, that amounts to manufacture has come up for consideration before the Supreme Court and other Courts on a number of occasions and in different contexts. In *Commissioner of Sales Tax v. Hexbiles Rai & Sons* [(1968) 21 S.T.C. 17] where pig bristles plucked by Kanjars from pigs and purchased by the assessee, who then boiled and washed them with soap and other chemicals and after sorting out according to their sizes and colours, prepared separate bundles of different sizes and despatched the same to foreign countries for sale, the question was whether such sales were liable to sales tax u/s 2(h) of Explanation II (ii) of the U.P. Sales Tax Act. It had been held by this Court that the assessees were not manufacturers and as such not liable to tax on such sales under the aforesaid provision. That view was approved by the Supreme Court and it was observed :-

"In our view, the word "manufacture" has various shades of meaning and in the context of sales tax legislation, if the goods to which some labour is applied remain essentially the same commercial article, it cannot be said that the final product is the result of manufacture."

Their Lordships quoted with approval the meaning attributed to the word "manufacture" in Section 2(ff) of the Punjab General Sales Tax Act, 1948, in *Devi Dass Gopal Krishnan v. The State of Punjab* (20 S.T.C. 420(P&H)), where Subba Rao, Chief Justice, observed :

"On the other hand, the dictionary meaning of "manufacture" is "transform or fashion raw material into a changed form for use". When oil is produced out of the seeds the process certainly transforms raw material into different article for use. We cannot, therefore, accept this contention.

Now coming to Civil Appeals Nos. 39 to 43 of 1965, the first additional point raised is that when iron scrap is converted into rolled steel it does not involve the process of manufacture. It is contended that the said conversion does not involve any process of manufacture, but the scrap is made into a better marketable commodity. Before the High Court this contention was not pressed. That apart, it is clear that scrap iron ingots undergo a vital change in the process of manufacture and are converted into a different commodity, viz., rolled steel

sections. During the process the scrap iron loses its identity and becomes a new marketable commodity. The process is certainly one of manufacture".

It would appear, therefore, that manufacture implies a change. Every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. If a transformation is brought about and a new and different article emerges having a distinctive name, character or use, then it would be taken that the process is one of manufacture. In short, if a new marketable commodity comes into existence on such treatment, labour and manipulation then it is a case of change.

Sri Jagdish Swarup invited our attention to a recent decision of the Supreme Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, but we do not think that that decision is of much help. In that case processing of pineapple fruit into pineapple slices for selling in sealed cans was not treated as manufacture. In the instant case different spices are mixed in certain proportion and they are powdered and as a result of the same different commodities come into existence, for example, Garam Masala, Dal Masala, Chana Masala etc. The components of these different types of Masalas are not essentially the same and in the same proportion. By this process of mixture and grinding the original property of the particular ingredient loses its identity and is mixed with the properties of the other ingredients with the result that a new and a different article having a distinctive name, character or use emerges. The petitioner, therefore, manufacture these goods. In our opinion, therefore, mixed ground Masalas are covered by Tariff Entry 68.

Coming to the last submission of the petitioner, Notification No. 55/75-CE, dated 1-3-1975 exempts :

"All kinds of food products and food preparations including-

- (i) meat and meat products;
- (ii) dairy products ;
- (iii) fruit and vegetable products ;
- (iv) fish and sea products;
- (v) Bakery products; and
- (vi) grain mill products.

The definition is certainly inclusive. Unless it can be shown that the item under consideration is a food product or food preparation, the petitioner cannot get any benefit under this Notification. The words "food products" and "food preparations" are not defined in the Act. The definition of "food" given in the Food Adulteration Act reads :-

"Food means any article used as food or drink for human consumption other than drugs and water and includes :-

- (a) any article which ordinarily enters into or is used in the composition of preparation of human food ;
- (b) any flavouring matter or condiments ; and
- (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, specify by notification in the official Gazette as food for the purposes of this Act."

According to the petitioner since spices are an article which are used in the composition and preparation of human food as also as a flavouring matter they should be treated as a food product. We do not agree, because the definition of food given in the Food Adulteration Act is for a different purpose. Food is different from food products and food preparations and in *Brooke Bond India Limited v. Union of India and Ors.* (1980 E.L.T. 65) Coffee-Chicory-blend was held to be neither a food product nor a food preparation. It was treated as a beverage and not a food. In our opinion spices are neither food products nor food preparations. They may be used in preparation of human food for the sake of giving flavour and taste to it. This item, therefore, will not be entitled to exemption under notification No. 55/75-CE, dated 1-3-1975.

In the result, therefore, we confirm the final order of assessment dated 9-12-1980 the provisional assessment having merged into it in so far as levy of excise duty on mixed ground Masalas under Tariff Item 68 is concerned.

In so far as the order of seizure of goods dated 4-6-1980 which forms the subject matter of challenge in Writ Petitions No. 192 and 193 of 1980, is concerned, the same have already been released under interim orders passed by this Court on petitioner's furnishing security bond, no further order is required.

The Department shall be at liberty to realise the impugned excise dues payable by the petitioner in the manner prescribed by law after giving adjustment for the amounts already realised.

The writ petitions are disposed of accordingly. Parties shall bear their own costs.