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**(1994) 09 MP CK 0064**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Petition No. 779 of 1989**

Bajaj Tempo Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision : 08-09-1994**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11A, 2  
Constitution of India, 1950 — Article 14, 265

**Citation : (1994) 09 MP CK 0064**

**Hon'ble Judges : A.R. Tiwari, J**

**Bench : Single Bench**

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## **Judgement**

A.R. Tiwari, J.—This order shall also govern the disposal of the Connected Writ Petitions particularised as M.P. No. 1350/88 (National Steel Industries Ltd v. The Collector of Customs and Central Excise and Ors.), M.P. No. 1101/88 (Indore Steel and Iron Mills Ltd. v. Union of India and Ors.), M.P. No. 933/90 ( Shree Synthetic Ltd. v. Union of India and Ors.), M.P. No. 1076/90 (STI Biplus Tubing (India) Ltd. v. Union of India and Ors.), and M.P. No. 932/90 (Reliance Ispat Industries Ltd v. Union of India and Ors.).

2. Briefly stated the facts of these petitions are that the petitioners constructed shed with the aid of duty-paid product and material. The shed is built by trusses, columns, girders, purlins, and other articles. The respondents felt that this construction is not fabrication of certain articles as noted above, but manufacture of the said article. They held that the process of subjecting the plates, channels and angles through process of cutting, drilling and welding amounted to "manufacture" and the material used was goods liable to central excise duty. The Respondent (Additional Collector) in the aforesaid view of the matter, issued the show cause notice to the petitioner as to why the excise duty should not be recovered under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Central Excises and Salt Act, 1944 and why a penalty under Rules 9(2), 52A(5), 173(2) and 226 of the Central Excise Rules, 1944 be not imposed upon the petitioner on the ground of contravention of the aforesaid provisions of

Rules. Aggrieved by such show cause notices in all the petitions, the petitioners have filed this writ petition dubbing the aforesaid notices as without authority of law and without jurisdiction.

3. The respondents have filed reply to the show cause notices opposing the petition and treated the same as return after admission of this petition subsequent to the show cause notice.

4. I have heard both sides.

5. The counsel for the petitioners contended that no tax can be levied or collected except by authority of law as mandated by Article 265 of the Constitution of India. He has placed on record the undernoted decisions in support of the contention that "Making of trusses, trestles, bent pipes, fabricated beams, ducting, benzene columns etc. from raw materials like channels, angles, HR sheets, CR sheets, HS Plates, rounds etc. is fabrication activity and does not amount to manufacture as envisaged by Section 2(f) of the Central Excises and Salt Act, 1944.

(1) 1989 (19) ECC 69

(2) E/Appeal No. 927/89-B-I (Mis. Pratap Steel Rolling Mills, v. Collector of Central Excise, Indore decided by Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi

(3) 1989 (19) ECC 69

(4) 1990 (27) ECR 364 and

(5) 1986 (9) ECC 35

6. In view of the aforesaid judgments and position of law as indicated therein, the counsel for the respondents was unable to support the show cause notice impugned in these writ petitions.

7. In A. Venkata Subba Rao Vs. State of Andhra Pradesh, (A. Venkata Subbarao and Ors. v. The State of Andhra Pradesh), it is held that the words "levy and collection" as used in Article 265 of the Constitution of India are comprehensive enough and are intended to include the entire process of taxation from taxing statute to the taking away of the money from the pocket of the citizen. In other words what the aforesaid article enjoins is that every stage in this entire process must be shown to be authorised by law.

8. In the light of the aforesaid decisions, it becomes luculent that the respondents erred in not noticing, the essential difference between Fabrication and Manufacture, as envisaged by the charging section.

9. In view of the aforesaid decisions, the position is no longer in tenebrosity and it would be indeed inutile and futile to ask the petitioners to go back to the department and contest the notices.

10. The show cause notices stand vitiated on account of apparent flaw and fault in decision-making process. The burden of proof was on the department which it failed to establish.

11. The Court is required to act fairly and reasonably. In 1956, Lord Radcliffe put it elegantly when he said of the parties to an implied term:

their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself." See: Davis Contractors Ltd v. Fareham Urban District Council (1956) AC 696 .

12. Lord Denning put it elegantly in Breen v. Amalgamated Engineering Union: (1971) 1 All ER 148 and Supreme Court stated in Khudiram Das Vs. The State of West Bengal and Others, that in a Government of Laws "there is nothing like unfettered discretion immune from judicial reviewability". Fairness, founded on reason, is the essence of the guarantee epitomised in Article 14. If the power has been exercised improperly or mistakenly so as to impinge unjustly on legitimate rights or interests of the subject, then Courts must so declare. The Courts stand between the executive and the subject alert, alert to see that discretionary power is not exceeded or misused. Lord Atkin highlighted that aspect. Liver Sidge v. Anderson (1942) AC 206 is instructive and indicator of the amplitude of the power available with the Courts.

13. The position is well settled and poses no conundrum. "Manufacture" implies a change but every "change" is not manufacture excisable to duty. The nature and extent of processes may be somewhat different in each case but may not be difficult of categorisation. When the change or series of change take the commodity to a point where commercially it can no longer be regarded as the original commodity but becomes recognisable as a new and distinct article, then it can fittingly be said that manufacture has taken place. Admittedly the taxable event is "manufacture", nothing more, nothing less. Even in case of doubt, benefit should belong to the subject.

14. The dictionary meaning of word "manufacture" is preparation of things by hand or machinery on a large scale whereas of word "fabrication" is construction, unless new identity is the consequence it earns only the insignia of fabrication activity immune from excisability.

15. Show-cause notices are not issued at will and are required to be backed by legal authority. The notices do not spell out as to in what way the raw material, as chronicled, was subjected to process of manufacture. The aforesaid decisions declare the debility in the steps taken to torture those who deserved different treatment. The discretion has not been used properly.

16. Lord Mansfield stated in classic terms in John Wilkes" Case (1770) 4 Burr 2528 that discretion meant sound discretion governed by law and guided by

rules, not by humour. Douglas J. in *United States v. Wunderlick* (1951 342 4598 Law Ed 113) observed elegantly that "Law has reached its finest moments, when it has freed man from unlimited discretion of some ruler. Where discretion is absolute, man has always suffered.

17. Macbeth of Shakespeare lamented that "The attempt and not the deed confounds us." Charles De Gaulle held that "Deliberation is the work of many men, action of one alone". Attempt and action of the authority, issuing the notices, falling foul of law, are liable to be pointed by legal armoury.

18. In the cases on hand what has happened is that with the help of various articles of iron and steel, sheds have been erected on site. Basic activity is thus one of erection and not manufacture of goods or products excisable to duty under the relevant rules. There is thus, no event of taxation. In identical fact-situation, CEGAT (Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Case E/Appeal No. 927/89-B-I (supra)(M/s Pratap Steel Boiling Mills v. Collector of Central Excise, Indore), held that:

In this view of the matter we are of the opinion that no process of manufacture was involved. And goods were manufactured. Hence there was no cause for issue of show cause notice and learned Collector has erred in holding the appellants guilty of violation of Central Excise Law and demanding duty and imposing penalty.

19. Show cause notices, under challenge, are likewise illegal and infirm and tend to destroy the principle that "Like should be treated alike".

20. The respondents were thus unable to satisfy me about the legality and validity of the notices. In the face of decisions, as noted above, they realised that silence was gold and quashment of notices was inevitable.

21. Factual matrix, as projected herein, is identical to the one considered and examined in the aforesaid cases. I am satisfied that case on hand is squarely covered by the decisions rendered therein. Absent, manufacture process, the notices are insentient. The attempt of respondents is evidently inept and insipid. Precisely for this reason, the respondents, like Browning, as noted above, seemed to suggest "I give the fight up. let there be an end." On my consideration, I hold that erection of sheds did not amount to manufacture of goods or products, in terms of law and is only a fabrication activity-simpliciter and as such, petitioners are not violators of law or evaders of duty as noticed. There is no new or distinct article.

22. *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, and most of later decisions, the Supreme Court in *Income Tax Officer and Others Vs. Biju Patnaik*, has held that "conditions" precedent to the exercise of jurisdiction under relevant law should be shown to exist. Here condition, in the absence of manufacture of goods or production, is nonexistent. Hence, there was no case or cause to issue notice and demand duty or impose

penalty. Notices are thus liable to be incinerated right at infant stage. Dr. Gunnar Myrdal lamented that the law abiding citizens of Sweden were converted into law avoiding "people by excessive taxation. In 1979, Ireland abolished wealth-tax, Germany substantially lowered it, USA cut capital gains tax and U.K. reduced its maximum rate of personal tax from 83 to 60 percent. In slashing taxes, India is demonstrable in excellent company. To maintain state of adherence to laws of taxation, it is essential both for feature and faith that correct interpretation is reached and citizens are not consigned to turmoil and not kept lugged into avoidable fight. It is not comforting either for honesty of tax-payers or for economic efficiency of nation to know what is right and still persist in doing what is wrong. Uncomplicated question deserves unmixed answer. Quashment is sought for freedom from quagmire. But why not retrace and retreat?

23. Accordingly, I hold that demand, proposed by show-cause notices, is unpropitious on facts and untenable in law. The activity, ex facie of fabrication, cannot be branded as of process of manufacture of goods or products to put it under the umbrella of charging section. After all, law has to remain on talking terms with justice.

24. In the result, I find that the show cause notices demanding duty and penalty are without jurisdiction and deserve to be mortalised.

25. Ex-consequenti, I allow this as well as all the aforesaid writ petitions and quash the show cause notices: (Annexure-A) in M.P. No. 779/89, (Annexure-C) in M.P. No. 1350/88, (Annexure-A) in M.P. No. 1101/88, (Annexure-A) in M.P. No. 933/90, (Annexure-A) in M.P. No. 1076/90 and (Annexure-A) in M.P. No. 932/90, demanding duty and penalty as being without authority of law and thus, being without jurisdiction.

26. In the circumstances of the case, I find it fit to leave the parties to bear their own costs of these petitions as incurred. Security cost shall be refunded to each petitioner after due verification.

27. A copy of this order shall be retained in the records of each of the aforesaid petitions.