

(1989) 01 SC CK 0032

In the Supreme Court Of India

Case No : Civil Appeal No. 2820 of 1984

Bhor Industries Ltd., Bombay

APPELLANT

Vs

Collector of Central Excise, Bombay

RESPONDENT

Date of Decision : 31-01-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 3

Citation : AIR 1989 SC 1153 : (1989) 40 ELT 280 : (1990) 184 ITR 129 : (1989) 1 JT 450 : (1989) 1 SCALE 226 : (1989) 1 SCC 602 : (1989) 1 SCR 382 : (1989) 73 STC 145 : (1989) 1 UJ 503

Hon'ble Judges : Sabyasachi Mukherjee, J;S. Ranganathan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sabyasachi Mukharji, J.—This is an appeal u/s 35L of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act') from the order passed and judgment delivered on 25th April, 1984/4th May, 1984 by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as 'the Tribunal'). The question involved is whether the crude PVC film is dutiable. The appellant is, inter alia, a manufacturer of crude PVC films for the purpose of use in final products such as leather cloth and laminate jute mattings and PVC tapes—both insulation and adhesive. The said crude PVC films are manufactured by the appellant in a continuous process in the factory premises of the appellant which are licensed premises under the Act. The appellant filed classification list No, XIV/75 dated 20th November, 1975 in respect of crude PVC films used for lamination with jute and for tapes claiming that the said PVC films were non-excisable on the ground that the same were non-marketable intermediate products used exclusively for captive consumption. The said classification was approved by the Assistant Collector, Central Excise on 9th December, 1977.

2. There was an order passed by the Appellate Collector on 14th June, 1974 holding that crude PVC films were not marketable and were not liable to excise

duty. It is necessary to refer to the Tariff Entry involved in this case. Tariff Item 15-A (2) of the Central Excise Tariff reads as follows:

Articles made of plastics, all sorts including tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, including levy flat tubing?s and polyvinyl chloride sheets, not otherwise specified.

The same crude PVC films which have been manufactured by the appellant and used in the manufacture of some other end product were subject-matter of adjudication by the concerned authorities in the period 1.3.1970 to 29.5.1971. The Appellate Collector of Central Excise in an order dated 14th January, 1974 held that the said PVC films manufactured by the appellant are not marketable intermediate products and hence not liable to duty. The Appellate Collector, Central Excise in his order noted the contentions of the appellant that the appellant had produced sufficient evidence to prove that the crude PVC sheets which were the subject-matter of the Show Cause Notice in that case and which are also the subject-matter of the present show cause notice were not known as in the market as PVC sheets nor were these marketable PVC sheets. After reference to the rival contentions, the said Appellate Collector in his order held, inter alia, as follows:

PVC films/sheets for the clearance of which demand letters are issued are not marketable as the same are neither embossed nor printed nor any finishing work is done when compared to PVC films/sheets which are marketed by them. It was further stated that the tensile strength of PVC sheets which is marketed by the appellants is as per the international standards laid down by A.S.T.M./I.S.I. and is much higher than the crude PVC sheets manufactured by them as an intermediate product for further manufacture of leather cloth. As such, it was contended that the product manufactured by the appellants is not liable to central excise duty. Shri Patel further stated that it was not necessary to prove from technical angle that the crude PVC sheets manufactured by the appellants for manufacturing leather cloth are different from PVC sheets which are manufactured by them and sold in the market as such. Crude PVC sheets used in the appellants' factory for further manufacture of leather cloth can be distinguished from PVC sheets which are marketed by them as such by naked eye. Moreover, all the processes which are required in case of PVC sheets which are marketed by the appellants so as to make these sheets marketable are not carried out in the case of crude PVC sheets which are used by the appellants in their factory for the manufacture of leather cloth...

The Appellate Collector further held in the said order that from the technical point of view, crude PVC sheets are different from marketable PVC sheets inasmuch as the tensile strength of crude PVC sheets is much lower than that of marketable PVC sheets. He further held that:

This is so because marketable PVC sheets are passed through the calender at

very high temperature and at a slow speed to that gelation/curing fusion takes place while in the case of crude PVC sheets, the same are passed through the calender at very fast speed and lower temperature with the result that gelation fusion in the course of heating and ageing is not formed resulting in lower tensile strength. When these crude PVC sheets are coated with textile fabrics, the two layers are passed through the rollers at slow speed and at high temperature and it is only at this stage that the GEL is properly formed and resin particles become swollen by diffusion of plasticizer into them that they touch each other. As heating progresses, the swollen particles begin to weld together, resulting in the required degree of strength.

3. Thereafter, the Classification List was filed in respect of crude PVC films manufactured for use in adhesive tapes on 9th December, 1975 and the said list was approved by the Assistant Collector of Central Excise after making an inquiry in that behalf. On 15th February, 1977, however, a Show Cause Notice was issued by the Assistant Collector, calling upon the appellant to show cause as to why crude PVC films should not be classified under tariff Item 15A (2) and appropriate duty not recovered under Rule 10 of the Central Excise Rules, as these then stood, read with Rule 173-J of the Central Excise Rules. There was a corrigendum issued on February 23, 1977 to the said Show Cause Notice dated 15th February, 1977 substituting the words 'Rule 10' by the words 'Rule 10A'. A reply was given by the appellant to the said Show Cause Notice. In the said reply, the appellant stated as follows:

We have repeatedly pointed out that the issue of "Crude Film" has been decided by the Appellate Collector and also by the Assistant Collector while approving classification. However, the Superintendent persisted in pressing us for giving information about production figures of 'Crude Film' possibly with a view to raise demand. We had requested the Superintendent to let us know the provision under which he required us to give the information in regard to a product which was non-excisable. He was not able to clarify this and tried to invoke wrong sections and rules according to us. The present action of re-classification, in order to make the product excisable some how or other, seems to us to be a continuation of the matter which the Superintendent was not able to enforce on us. There is no change in the market terminology of "PVC Film". Our product is not known in the market as "PVC Film". Even technically also a further process is required to be carried out on our product before it is "PVC Film" as is known to the market. The various decisions of Supreme Court on this point are well-known to the Department. It is also known that the Appellate I Collector's decision is binding on you. The principles of natural justice cannot be served by serving a show cause notice on us in order to change the Appellate Collector's decision in some manner or other. We have an uneasy feeling that an attempt is being made to somehow bring the product under excise duty.

There was an order passed on 16th February, 1978 by the Assistant Collector confirming the Show Cause Notice. On 10th October, 1979 an appeal was

preferred by the appellant against the order of the Assistant Collector dated 16th February, 1978 which was rejected by the Appellate Collector of Central Excise. On 6th February, 1980 a revision application was preferred by the appellant to the Joint Secretary, Government of India. That was transferred to the Tribunal and by the impugned order, the Tribunal has rejected the appeal under challenge.

4. The Tribunal in the order has set out the contentions and observed that the question for determination was whether crude PVC film fell for classification under Item 15A(2) of the Central Excise Tariff or not. A submission was made that the Appellate Collector had held that the crude PVC sheets were not marketable and had not acquired the character and status of PVC films as known to the market. It was contended on behalf of the appellant that only marketable PVC film would fall within the said item. On the other hand, the Department's contention was that there was nothing to show that the film/sheet was crude and the test of marketability was not relevant. According to the Tribunal, the crude PVC films/sheets would fall under the Tariff Item. The Tribunal was of the view that the tariff entry did not spell out whether it covered only finished film/sheet or whether it covered also crude film/sheet. The Tribunal came to the conclusion that the tariff item covered all types of films/sheets. The Tribunal also came to the conclusion that the concept of marketability was not relevant and all sorts of crude films would be covered by the entry.

5. The Tribunal was of the view that the Appellate Collector's observations were made entirely in different context. In that view of the matter, the Appellate Collector's order was confirmed subject to the modification that duty in respect of clearances prior to the issue of the Show Cause Notice was restricted to the period permissible in terms of Rule 10 read with Rule 173-J, that is to say, for 12 months. In other words, the Tribunal's view was that if the description of the goods in question fell into the entry, it was dutiable in the intermediate list and as such the goods had become goods as known to the market and the question of marketability or being capable of being sold in the market was not relevant.

6. In support of this appeal, on behalf of the appellant, it was contended by Shri Harish Salve that it was only the 'goods as specified in the Schedule' to the Central Excise that could be subject to the duty. It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods. That was necessary. This has been clearly spelt out by this Court in *Union of India v. Delhi Cloth & General Mills* (1963) Supp. I SCR 586. There this Court held that excise duty being leviable on the manufacture of goods and not on their sale, the manufacturer could not be taxed unless manufacturing process resulted in production 'of goods

as known in the market'. (emphasis supplied). In that case, the respondents, who were manufacturers of vegetable products known as Vanaspati, were assessed to excise duty under Item 23 of the First Schedule to the Central Excises and Salt Act, 1944, on what the taxing authorities called the manufacture of 'refined oil' from raw oil which according to them fell within the description of "vegetable non-essential oils, all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". The common case made by the respondents in their petition under Article 226 of the Constitution challenging the imposition was that for the purpose of manufacturing Vanaspati they purchased groundnut and til oil from the market and subjected them to different processes before applying hydrogenation to produce Vanaspati and that nothing that they produced at any stage was covered by that item. Affidavits by experts were filed by both the parties and the High Court found in favour of the respondents and allowed the petitions. The Union of India appealed. It was urged on its behalf before this Court that before finally producing Vanaspati the respondents produced at an intermediate stage what was known as 'refined oil' in the market and although they might not sell it and although Vanaspati, when produced, was liable to excise duty under another item, that could not affect their liability. It was held that excise duty being leviable on the manufacture of goods and not on their sale, the petitioners in that case no doubt be liable if they produced 'refined oil', as known in the market, at an intermediate stage. But the Court found that it was clear that there could be no 'refined oil' as known in the market without deodorisation according to the specification of the Indian Standards Institute and the affidavits of the experts, Since, however, the process of deodorisation was admittedly applied in the respondents' factories only after hydrogenation was complete, they could not be said to produce 'refined oil', at any stage. Nor could the respondents be held to manufacture some kind of 'non-essential vegetable oil'. K.C. Das Gupta, J., who spoke for the Court, at page 595 of the report, observed as follows:

On a consideration of all these materials we have no doubt about the correctness of the respondents' case that the raw oil purchased by the respondents for the purpose of manufacture of Vanaspati does not become at any stage "refined oil" as is known to the consumers and the commercial community.

After considering the definition of the word 'manufacture' and several authorities and Words and Phrases, Permanent Edition, Vol. 18, from a judgment of the New York Court and also other relevant authorities, this Court held that the definitions made it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold. (Emphasis supplied). In that view of the matter this Court agreed with the High Court and dismissed the appeal. Therefore, the first principle that emerges is that excise was a duty on goods as specified in the Schedule. In order to be goods an article must be something which can ordinarily come to the market and is brought for sale and must be known to the market as such. Therefore, the marketability in the sense that the goods are known in the market or are capable of being sold and

purchased in the market is essential. This principle was again reiterated by this Court in *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, , where this Court held that the gas generated by the appellant companies in that case was kiln gas and not carbon dioxide as known to the market, i.e., to those who deal in it or who use it. Therefore, the kiln gas in question is neither carbon dioxide nor compressed carbon dioxide known as such to the commercial community and could not attract duty under Item 14-H of the First Schedule. It was held by this Court that the duty being on the manufacture and not on the sale, the mere fact that kiln gas generated by those concerns was not actually sold did not make any difference if what they generated and used in their manufacturing process was carbon dioxide. Justice Shelat speaking for the Court at page 31 of the report observed:

The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market (Emphasis supplied). That it would be such an article which would attract the Act was brought out in *Union of India v. Delhi Cloth & General Mills Ltd.* (1963) Supp 1 SCR 586.

In that view of the matter, the Court came to the conclusion that the gas generated by these concerns was kiln gas and not carbon dioxide as known to the trade, i.e., to those who deal in it or who use it. It must be capable of being sold in the market and known in the market as such. Then only it would be dutiable.

7. This view was reiterated again in *Union Carbide India Limited Vs. Union of India (UOI) and Others*, where Pathak, J. as the learned Chief Justice then was, speaking for the Court observed that in order to attract excise duty the article manufactured must be capable of sale to a consumer. The expression "goods manufactured or produced" must refer to goods which are capable of being sold to the consumer. This Court observed as follows:

It does not seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List I of Schedule VII to the Constitution specifically speaks of "duties of excise on tobacco and other goods manufactured or produced in India...", and it is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context, the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In *Union of India v. Delhi Cloth & General Mills*, this Court considered the meaning of the expression "goods" for the purposes of the Central Excises and Salt Act, 1944 and observed that "to become 'goods' an

article must be something which can ordinarily come to the market to be brought and sold", a definition which was reiterated by this Court in *South Bihar Sugar Mills Ltd. v. Union of India*.

8. It is necessary in this connection to reiterate the basic fundamental principles of excise. The Judicial Committee of the Privy Council in *Governor General in Council v. Province of Madras* 1945 F.C.R. 179, this Court observed at page 1287 of the report that excise duty was primarily a duty on the production or manufacture of goods produced or manufactured within the country. This Court again in *In Re The Bill to Amend Section 20 of the sea Customs Act, 1878 And Section 3 of the Central Excises and Salt Act, In Re: The Bill To Amend S. 20 of The Sea Customs Act, 1878 and S. 3 of The Central Excises and Salt Act, 1944*, of the report referring to the aforesaid observations of the Judicial Committee reiterated that taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. Therefore, the essential ingredient is that there should be manufacture of goods. The goods being articles which are known to those who are dealing in the market having their identity as such. Section 3 of the Act enjoins that 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. "Excisable goods" u/s 2d of the Act means goods specified in the Schedule to the Central Tariff Act, 1985 as being subject to a duty of excise and includes salt. Therefore, it is necessary, in a case like this, to find out whether there are goods, that is to say, articles as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not "goods" known to the market. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Tariff Act, 1985.

9. It appears from the facts as aforesaid before that the crude PVC films as produced by the appellant in this case were not known in the market and could not be sold in the market and was not capable of being marketable.

10. The learned Solicitor General submitted before us that the Tribunal was right in considering that as the article fell within the Entry the marketability was irrelevant and the Tribunal was right in not considering whether the articles in question, namely, crude PVC films used in this case, were marketable or capable of being sold and used in the market.

11. Mr. Harish N. Salve on the other hand submitted that as it was found that the goods were not marketable by the Appellate Collector in the order of 1974 and no evidence was adduced before the Tribunal to the contrary and the Tribunal refused to consider the question of marketability no useful purpose would be served in remanding the matter to the Tribunal. The appeal should be allowed and no duty should be charged.

12. As mentioned before, the Appellate Collector has on 14.1.1974 held that the crude PVC sheets/films which formed the subject-matter of the appeal are manufactured by the appellant for the production of leather cloth in the factory are not marketable as PVC sheets and had allowed the appeal because he found that:

...because PVC sheets of the gauges manufactured by the appellants are invariably either embossed or printed or both. The nature of embossing may be with an engraving roll or with a mirror finished roller or a mat finish. The manufacture of PVC sheets marketable as such involves the following processing sequences, namely:

Polyvinyl chloride resin is formulated with plasticizer, colorants, heat stabilizers, etc. and the formulation is thoroughly mixed. When homogeneous, this mix is fed through a two roll mill to give heavy sheet stock, which in turn is fed to the calender, where it is reduced to the desired width, thickness etc. The temperature at which PVC sheets which are marketed as such are passed through the calender is about 178° C (330-350°) and the speed of the roller is adjusted accordingly. The speed of the roller and the temperature at which the sheets are passed through the calender are important factors in order to achieve the minimum standard of tensile strength of the sheets. Gelation, i.e., the change of state from the liquid to the solid condition that occurs during the heating and/or ageing, when the plasticizer has been absorbed by the resin to an extent resulting in a dry but weak and crumbly mass, and thereafter within normal proportions of resin and plasticizer, this state is attained when the resin particles have become so swollen by diffusion of plasticizer into them that they touch each other, is an important process in the case of PVC sheets which are marketed as such. As heating progresses the swollen particles begin to weld together, resulting in some degree of strength. After the GEL is formed in such PVC sheets and resins get fused with plasticizer, they are further subjected to the processing of finishing, embossing/printing. On the other hand, crude PVC sheets manufactured by the appellants for production of leather cloth in their factory are passed through the rollers at a temperature of 130°-140° (280°F) and the speed of the roller is, therefore, faster. Due to low temperature and faster speed of the rollers fusion is not completed in such crude plasticizers thus resulting in the tensile strength of such crude PVC sheets which is much less than the tensile strength of the PVC sheets which are marketable as such. The tensile strength of PVC sheets which are marketed as such and the crude PVC sheets which are used by the appellants in their factory for the manufacture of leather cloth are as under:

(1) Marketable PVC sheets.	Thickness	Tensile strength	Per cm. sq.	in Kgs.
Longitudinal	Transverse	0.08 mm	239 185	0.10 mm 230 201
		0.15 mm	268 233	0.20 mm 230 200
(2) Crude PVC sheets.	Thickness	Tensile strength	Per cm. sq.	kgs.
		0.11 mm	127 98	0.22 mm 144 107

The thickness of crude PVC sheets of 0.11 mm ultimately comes to 10 mm when

it is coated with textile fabrics and rolled. Similarly, the thickness of crude PVC sheets of 0.22 mm ultimately comes to when it is coated with fabrics and rolled.

The idea behind producing crude PVC sheets at low temperature and at high speed of the rollers is that when such crude PVC sheets are coated with textile fabrics and passed through a coating machine, high temperature is required to be maintained and the speed at which the rollers move has also got to be slow so that these partially fused crude PVC sheets are eventually fully fused at the time of coating these sheets with textile substrates. No finishing, embossing or printing is done in case of such crude PVC sheets. I, therefore hold that the crude PVC sheets manufactured by the appellants are used by them in the manufacture of leather cloth in their factory are not marketable as PVC sheets and as such the same are not liable to duty under Item 15A (2) of the said Schedule.

13. In view of the Appellate Collector's order dated 14.1.1974 it was the duty of the revenue to adduce evidence or proof that the articles in question were goods, No evidence or proof was produced. The Tribunal went wrong in not applying the proper test. The test of marketability or capable of being marketed was not applied by the Tribunal.

14. In that view of the matter that there being no contrary evidence found by the Tribunal in this case subsequent to the finding by the Appellate Tribunal, we are of the opinion that the appeal should be allowed and no excise duty should be charged u/s 15A(2) of the Central Excise Tariff on the Crude PVC sheets. In the facts and circumstances of the case, there will be no order as to costs.