

(1978) 09 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No. 4586 of 1976

Binny Limited

APPELLANT

Vs

Superintendent, Central Excise and Others

RESPONDENT

Date of Decision : 20-09-1978

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 3, 4

Citation : (1979) CENCUS 107 : (1979) 4 ELT 65

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Natarajan, J.—The petitioner impugns a demand notice relating to the levy of differential duty of excise and prays for a writ of certiorari to quash the notice. The petitioner is the owner of a textile mill known as Buckingham and Carnatic Mill situate in Perambur and its main object is to carry on business of manufacture and sale of textile goods. In the course of the manufacture of textile fabrics the petitioner produces an intermediary product viz., sodium bichromate liquor which is used for captive consumption in the processing of textiles. Sodium bichromate liquor is eventually used for the production of other derivatives known as (8) basic chromium sulphate liquor, (2) basic chrometan, (3) sodium bichromate crystals, (4) chrome oxide green, and (5) chromic acid. Sodium bichromate liquor is not sold or marketed by the petitioner, but is only used for captive consumption, viz., for conversion to basic chromium sulphate liquor for mineral khaki dyeing and for manufacture of basic chrometan for sale as well as conversion to sodium bichromate crystal as necessary for the manufacture of chrome oxide green. Under Tariff Item 14AA (1) bichromates of potassium or sodium are liable to excise duty at the rate of 10 per cent ad valorem. The item mentioned in the tariff list is sodium bichromate in crystalline form or, in other words, sodium bichromate crystals and will not refer to sodium bichromate liquor. Sodium bichromate liquor is not the end product, but only an intermediary

product and is, unlike sodium bichromate crystals, not a product offered for sale. However, the petitioner as well as the Central Excise authorities had been acting on the mistaken impression that sodium bichromate liquor produced by the petitioner and used for captive consumption would also fall under Tariff Item 14AA (1) and, on account of that mistake, the Excise authorities had been demanding the petitioner to pay excise duty on the product. Since sodium bichromate liquor is neither "goods" nor "excisable goods" within the meaning of Section 3 or Item 14AA (1) of Schedule I of the Central Excises and Salt Act, the respondents are not entitled to demand payment of excise duty either as full payment or as differential payment.

2. In the mistaken impression in which both parties were acting hitherto, the petitioner was conforming to the following procedure for payment of duty on sodium bichromate liquor. In accordance with rule 173B the petitioner used to file a classification in the prescribed form viz., RT 12, classifying the product as sodium bichromate and also furnishing the cost of the product. After filing the returns, the petitioner used to clear the product under the self-removal procedure permitted under the rules. The respondents used to revise the assessable value of the product at times, alleging that the duty had been levied according to the price furnished for the preceding year and the cost of construction had gone up during the relevant year. On such revisions the respondents would issue a show cause notice calling upon the petitioner to pay the differential duty based upon such revision in the assessable value in accordance with Rule 10 of the Central Excises and Salt Rules. Lately, the petitioner had been paying the differential duty under protest as he was contending that excise duty was not payable on the product. Lastly, the petitioner received two show cause notices dated 2-4-1976 regarding a sum of Rs. 1,16,406-60 and another notice dated 30-10-1976 regarding a sum of Rs. 63,170-80, as representing differential duty between the period 1-4-1974 to 31-3-1976. It was averred in the notices that there was need for revision on account of the cost of construction during the relevant years being more than that of the preceding year on which excise duty had been levied in the first instance. The show cause notices had been issued under Rule 10 of the Central Excise Rules. The petitioner was taking steps to file its objections to the proposed revision. But, in the meanwhile, it received a letter on 20-11-1976, from the first respondent saying that the show cause notices had been withdrawn, but nevertheless, the differential duty demanded should be paid within the stipulated time. According to the petitioner, even if differential duty has to be paid, the procedure adopted by the first respondent is not in accordance with law, because it had been denied an opportunity of putting forth its objections to the revised demand and, on that score also, the demand notice should be quashed. Thus, the petitioner seeks quashing of the demand notice on two grounds, viz., (1) that sodium bichromate liquor is not an excisable item and (2) that, in any event, no demand can be made without the petitioner being given an opportunity to put forth its objections.

3. The respondents have filed a common counter affidavit to controvert the averments contained in the petitioner's affidavit. The respondents have stated that since sodium bichromate liquor manufactured by the petitioner was consumed within the factory of the petitioner for the purposes of dyeing fabrics and for further manufacture of sodium bichromate crystals, assessment was being made on the basis of the assessable value determined u/s 4(b) of the Central Excises Act upto 30-9-1963 and the petitioner had accepted the arrangement adopted by the department. The petitioner was following the self-removal procedure prescribed in Chapter VII-A. The assessable value is determined by the cost accounting methods duly certified by a Chartered Accountant. Since the assessable value furnished by the petitioner for approval on a particular date is based on cost particulars relating to previous years, it was always accepted provisionally. Thereafter, the exact cost in respect of a relevant year would become known and the assessable value finalised in the light of that information and demand, if any, for differential duty will be made. This procedure had been accepted without demur by the petitioner in the previous years. In pursuance of such a procedure, the first respondent evaluated the differential duty to be paid by the petitioner in respect of clearances made during the periods 1-4-1974 to 31-3-1975 and 1-4-1975 to 31-3-1976, and found that the amounts of differential duty payable were Rs. 1,16,406-60 and Rs. 63,170-80 respectively. Therefore, the first respondent issued notices on 2-4-1976 and 30-10-1976, to the petitioner to show cause why the differential duty should not be collected. But, subsequently, the notices were withdrawn as unnecessary because, in accordance with the accepted procedure, a demand could straightaway be made for payment of the correct excise duty determined with reference to production cost particulars for the relevant year. Therefore, there was no need to give opportunity to the petitioner to show cause before raising a demand for the differential duty.

4. As regards the first contention of the petitioner, the case of the respondents is that under Tariff Item 14AA(1) sodium bichromate liquor is as much liable to excise duty as sodium bichromate crystals, because it is only one form of the product and no distinction has been made in the tariff levy between different forms of the product. The respondents have also stated that sodium bichromate liquor is an end product by itself, though, for deriving products like sodium bichromate crystal, chromate tan etc. it may form a raw material. The petitioner itself has admitted in its letter dated 17th February, 1976, that the difference between sodium bichromate liquor and sodium bichromate crystals is only in terms of concentration. By another letter dated 8-3-1976, the petitioner had conceded that in terms of chemical composition the liquor and crystals are one and the same except in their physical form. The chemical formula has also been given as the same except for the varying content of water. The Central Excise Department had therefore consistently been taking the view that sodium bichromate liquor is also liable to payment of excise duty. The respondents have, therefore, justified the demand and prayed for the dismissal of the petition.

5. Having regard to the contentions of the parties, the two questions that arise for consideration are --

(1) Whether sodium bichromate liquor will fall within the definition of bichromate of sodium occurring in tariff Item 14-AA(1) so as to attract the levy of excise duty ? and

(2) If sodium bichromate liquor "is an excisable item, whether the respondents are justified in raising the demand without giving opportunity to the petitioner to show cause against the revision of assessment ?

Mr. Dilip Singh, learned counsel for the petitioner, strenuously argues that sodium bichromate liquor is being manufactured by the petitioner only for captive consumption and it is only an intermediary product and not an end product and there is a considerable difference between sodium bichromate liquor and sodium bichromate crystals and as such, it is only sodium bichromate in its crystalline form that will attract excise duty. He points out that sodium bichromate liquor is prepared in the following manner. The raw materials are ground to a fine powder and mixed. The ground mix is roasted to give sodium chromate. The sodium chromate is extracted from the material roasted on the furnace. The waste mud is discarded. The sodium chromate is concentrated in an evaporator and acidified with sulphuric acid. The sodium sulphate is separated out in a centrifuge. The sodium bichromate liquor is further concentrated, filtered and pumped into storage tanks.

6. There is difference between sodium bichromate liquor and sodium bichromate in form and content. Sodium bichromate liquor exists in a state of solution and not as dihydrate of sodium bichromate. Sodium bichromate crystals will be orange red in colour and will be crystalline in form.

7. To derive sodium bichromate crystals from sodium bichromate liquor, further proceedings as stated below has to be done. Sodium bichromate liquor is heated in a tank to the required temperature, and allowed to flow through crystallisers. The crystals and the liquor are separated by means of a centrifuge. The crystals are dried in a drier and packed in drums-moisture proof bags. Only after they are made into crystals, the chemical compound viz, sodium bichromate dihydrate comes into its full being as sold in the market.

8. Pointing out these differences, Mr. Dilip Singh says that the power of the respondents to levy excise duty u/s 3 (which is the charging section) read with Section 2(b) of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) can be exercised only upon bichromate of sodium in its crystalline form which is the end product and not on an intermediary and non-marketed item like sodium bichromate liquor. In support of his argument he places reliance on two decisions of the Supreme Court. The first is *Union of India v. Delhi Cloth and General Mills*, 1977 ELT 199. The question for consideration in that case was whether groundnut and seed oil purchased by manufacturers of Vanaspathi and subjected to different processes in order to turn them into Vanaspathi will

constitute "vegetable non-essential oils, all sorts" so as to attract levy of excise duty. The Supreme Court found against the Revenue and held as follows: --

"If, from the raw material, has been brought into existence a new substance by the application of processes one or more of which are with the aid of power and that substance is the same as "refined oil" as known to the market, an excise duty may be leviable under item 23."

The second case is *South Bihar Sugar Mills v. Union of India* -- 1978 E.L.T. 336. The controversy in that case was whether the gas generated by the appellant company was kiln gas and not carbon dioxide as known to the trade and therefore did not attract Item 14H in the First Schedule of the Act for levy of excise duty. It was contended by the Revenue before the Supreme Court that kiln gas admittedly contained a certain percentage of carbon dioxide and could be marketed as such and therefore, it would attract excise levy. The Supreme Court repelled the contention in the following manner: --

"It is true, as the Revenue contended, that the gas produced through the kiln can be made marketable in the sense that it can be sold in the very same condition in which it is produced to concerns interested in the carbonation process through, for example, pipes. But, apart from such a method of disposal being uneconomic and hardly likely to be employed by the trade, though it is possible in theory, what would be transported is that which is produced through the kiln, viz., kiln gas containing, among other things, certain quantity of carbon dioxide."

9. Adopting the ratio in these cases, Mr. Dulip Singh says that sodium bichromate liquor may contain a certain percentage of sodium bichromate, but on score, it will not become sodium bichromate which is an end product and which is alone excisable under the tariff item. His further argument is that sodium bichromate liquor is produced by the petitioner only for captive consumption, and not for marketing purposes and on that score also, it will not amount to an "excisable goods" as contemplated under the Act.

10. To disprove the contentions of the petitioner's counsel, Mr. Chengalvarayan, senior standing counsel for the Central Government, points out that excise duty is payable on goods which are manufactured, and not on goods which are manufactured for sale or actually sold. He, therefore, submits that the question of the petitioner offering sodium bichromate liquor for sale or not cannot have any impact on the question of excise liability of the product. In support of his contention he cites *Chhotabhai Jethabhai Patel and Co. v. Union of India*, 1962 Supp. 2. S.C.R. 1006, where it was laid down that a duty of excise is a tax-levy on home-produced goods of a specified class or description, the duty being calculated according to quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them. The further argument of Mr. Chengalvarayan in this behalf is that in its letter dated 11th February, 1976, the petitioner has clearly stated that previously it had.

been manufacturing sodium bichromate liquor for captive consumption, but currently it is manufacturing the commodity in the crystalline form and offering it for sale and, as such, the fresh price list filed by it may be approved. Therefore, according to the respondents' counsel, it is futile for the petitioner to say that it was not manufacturing sodium bichromate liquor for marketing purposes, but only for captive consumptions and therefore, it is not an item of excisable goods.

11. Dealing with the petitioner's contention that sodium bichromate liquor is only an intermediary product and not an end product, Mr. Chengalvarayan says that position cannot alter things in any manner, because the crucial factor for consideration is whether, on account of the manufacture, the petitioner has brought into existence a substance which will fit in with the description of sodium bichromate. In support of his argument, the counsel places reliance on the following passage occurring in *Union of India v. Delhi Cloth and General Mills* -- 1977 E.L.T. 199 :

"Excise duty is on the manufacture of goods and not on the sale. Mr. Pathak is therefore right in his contention that the fact that the substance produced by them (the manufacturer) at an intermediate stage is not put in the market will not make any difference. If, from the raw material, has been brought into existence a new substance by the application of processes one or more of which are with the aid of power and that substance is the same as "refined oil" as known to the market, an excise duty may be leviable under Item 23."

12. According to Mr. Chengalvarayan, there is nothing in Tariff Item 14AA(1) to indicate that sodium bichromate would attract excise levy only in its crystalline form and not in its liquor form. He points out that in the same item bleaching paste and bleaching powder have been made excisable and therefore, it is not the shape or form of the excisable item, but the qualitative content of it that should decide the question whether excise duty is attracted or not. Opposing this argument Mr. Dulip Singh points out that under Item 14B excise duty is made leviable on caustic potash, whether in solid form or in lye and, in the absence of a similar provision, sodium bichromate liquor cannot be considered excisable.

13. The contention of the respondents is put forth in a slightly different manner by Mr. Chengalvarayan. He places reliance on a letter written by the petitioner on 17th February, 1976, wherein the petitioner has admitted that the percentage of purity in sodium bichromate crystals will be 98 to 99, whereas the purity content in sodium bichromate liquor will be 65 to 70 per cent. The petitioner has also admitted that the chemical composition for both items is $\text{Na}_2\text{Cr}_2\text{O}_7 \cdot 2\text{H}_2\text{O}$ W/W. The last attack on the petitioner's case is that the respondents have since gathered information that the petitioner has actually been making sales of sodium bichromate liquor besides sodium crystals and the respondents have been able to obtain details of three such transactions. They have produced copies of three bills. The first bill is dated 10th August, 1978 Where 5 tonnes of sodium bichromate crystals have been sold. The second and third bills are dated 12th August, 1978 and 18th August, 1978 and relate to sales of sodium bichromate

liquor of 2,000 litres and 5,000 litres.

14. On a consideration of the matter, I am of opinion that not only sodium bichromate crystals, but also sodium bichromate liquor will attract excise levy. The word used in Tariff Item 14AA(1) is not sodium bichromate crystals, but only sodium bichromate. Therefore, as pointed out by the Supreme Court in *Union of India v. Delhi Cloth and General Mills* -- 1977 E.L.T. 177 , if, from raw materials, a new substance by the application of processes is obtained with the aid of power and that product will constitute an item of excisable goods as enumerated in the tariff item, then it will clearly attract excise levy. The fact that (i) the product was derived at an intermediate stage, or (ii) it was not put in the market for sale, or (iii) its purity content will not be the same as another form of the product obtained by further processing, will not change matters in any way so far as excise liability is concerned. Sodium bichromate liquor is one form of sodium bichromate while sodium bichromate crystal will be another form. On that score, the petitioner cannot be heard to say that sodium bichromate liquor will not attract excise levy and only sodium bichromate crystals will attract levy. In the instant case, we have further proof that sodium bichromate liquor has been offered for Sale in that form itself and a portion of sodium bichromate liquor is also further processed into sodium bichromate crystals and sold as such in the market. Taking note of these factors, the petitioner's contention that no excise duty is leviable on sodium bichromate liquor cannot be accepted and such a plea has to fail.

15. Taking up the second contention of the petitioner, the argument is that the demand for the differential duty can be made only by resort to Rule 10 of the Rules. This plea contains a fallacy in it. As already stated, the procedure, to be followed is the self removal procedure. In accordance with that procedure the petitioner furnishes a return giving therein the cost particulars relating to previous years, Hence, it is always open to the Department to re-fix the excise duty in the light of intelligence acquired by it about the cost particulars on the particular date or during the particular year when the goods were removed. Once this position is recognised, it follows there can be no final assessment, but only a provisional or tentative assessment of the excise duty on the goods removed as per cost particulars given by the manufacturer. As pointed out by the Supreme Court, in *Asst. Collector, C.E. v. N.T. Co. of India Ltd.* -- 1978 E.L.T. 416 , there is a difference between levy and assessment and merely because an account current had been kept, it cannot be accepted that a legally valid or completed assessment had taken place. Any payment or collection of tax made on the basis of returns submitted under the self removing procedure cannot be construed as a completed assessment and, as long as a completed assessment has not taken place, there is no necessity for the department to resort to its powers under Rule 10 for recovery of short-levied duty surcharges. In my opinion, the second contention has been raised solely because the department had committed the mistake of issuing notices under Rule 10 and withdrawing them subsequently. The mistake committed by the department is clutched at by the petitioner to

project a contention that a completed assessment had taken place and such, it was entitled to a show cause notice before the differential duty can be claimed. According to the respondents, the revised demand has been made on the cost particulars furnished by the petitioner itself. It is not the case of the petitioner that the demand is not in accordance with the cost particulars furnished by it. Such being the case, the petitioner is not entitled to a show cause notice in the first instance before a demand is raised for the differential duty. Hence the second contention of the petitioner to impugn the demand notice must also fail.

16. In the light of what has been stated above, the writ petition fails and will accordingly stand dismissed. But there will be no order as to costs.