

(1990) 04 AP CK 0008

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4506 of 1985

BMF Belting Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-04-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 233B
Central Excises and Salt Act, 1944 — Section 2, 3

Citation : (1990) 2 APLJ 87 : (1991) 31 ECC 401 : (1990) 50 ELT 10

Hon'ble Judges : Sardar Ali Khan, J;S. Parvatha Rao, J

Bench : Division Bench

Advocate : B. Seetharamaiah, Director and General Manager and Y. G. Rama Murthy, for the Appellant; I. Koti Reddy, for the Respondent

Judgement

1. The petitioner, M/s. B. M. F. Beltings Limited, Patancheru, Medak District, has filed this writ petition for the issue of a writ of certiorari to quash the orders C. No. V/19-I/17-12/82-VC dated 22-1-1985 and to direct the first respondent not to treat the unvulcanised friction cloth in the process of manufacture of belts as cotton fabrics or goods within the description of Tariff Item No. 19I(b) of the First Schedule to the Central Excises and Salt Act, 1944 read with Section 3 thereof and the Rules made thereunder and also prays for the consequential relief by way of refund of the amounts, if any, collected thereon.

2. The petitioner is a public limited company registered under the Companies Act, 1956. They manufacture fan belts, V. belts and other allied products in their licensed factory at Patancheru. The process of manufacturing of the fan belts and V-belts involves the preparation of a sticky material, styled as "friction cloths". The preparation of the friction cloth involves application of rubber compound to the cotton fabrics. It seems, the petitioner-company purchased gray cotton sheetings falling under Central Excise Tariff Item No. 19I(a) which is coated with rubber compound and which, after a continuous process, ultimately takes shape as fan belts and V-belts. The contention of the petitioner-company is that at no

stage in the manufacturing process, goods, as known in common trade parlance, emerge in the factory. In other words, the end product, which is eligible as rubber beltings, will be in a continuous and uninterrupted process in which gray fabrics undergo application of rubber compound when fed in a calendering machine. The petitioner-company has been paying duty on the ultimate goods, known in the market as "rubber beltings". The sticky material, styled as "friction cloth", has no commercial characteristic and is not known in the market as such. The petitioner-company says that there is reason to believe that a similar view has been taken by the Chief Chemist of the respondents' department as early as in 1984 in connection with certain doubts raised in the matter of exigibility of friction cloth and type cord warp sheet with reference to TI 19.

3. The sum and substance of the petitioner's argument is that the material, called "friction cloth", is merely an inprocess material undergoing preparation for manufacturing rubber belts. It serves after the necessary cutting and melting for the purpose of an outer jacket enclosing the other ingredients forming the shape of the belt which is taken further to the culminating stage of vulcanisation of the rubber products, called beltings, eligible under TI 16 A (4). The inprocess material, known as "friction cloth" does not come within the category of "goods" and cannot be classified as "rubberised cotton fabric"s under Tariff Item No. 19I(b). The petitioner-company was served with a Tariff Advice No. 66/80 dated 13-10-1980 and was obliged to pay excise duty for the inprocess material, viz., friction cloth, under protest. Since the petitioner-company questioned the legality and validity of such a classification, levy and collection of duty on the material in process, the matter was brought to the notice of the Assistant Collector, who, by his letter dated 17-7-1982, stated that the unvulcanised friction cloth attracted Tariff Item No. 19 I (b) as rubberised cotton fabrics. Thereupon, the petitioner-company again filed a representation on 11-9-1982 as contemplated in Rule 233-B of the Central Excise Rules setting out their objections and contending that the manufacture of fan belts and V-belts is a composite, integrated and uninterrupted process in which the gray fabric was treated within rubber compound and that it is not a product in any sense of the term. The petitioner-company brought to the notice of the Assistant Collector that no speaking order was passed by the Assistant Collector and reminded him of his duty to pass a reasoned order in the matter. A hearing was given to the petitioner-company on 29-10-1984 in which the petitioner-company reiterated the stand taken by them and relied upon several judicial pronouncements of the various High Courts in support of their claim. Thereafter the impugned order dated 22-1-1985 was passed which was received by the petitioner-companion February, 1985. In the said order a detailed technical analysis is sought to be made of the process of manufacture involved in the manufacture of fan velts and V. belts and in the end it is concluded that the rubberised friction cloth was not generally marketed but was captively used in the manufacture of other finished goods. It would be in the fitness of things to reproduce hereunder the operative part of the impugned order, which is in the following lines :

"The contention of the assessee, that as there is no reference to "rubberising" in the main tariff description (definition) of Item 19 of Central Excise Tariff, it would not be correct to include rubberised fabrics under Item 19I(b), is not tenable inasmuch as the definition of manufacture u/s 2(f)(v) of Central Excise & Salt Act, 1944 specifically describes that "rubberising" forms one of the processes mentioned under Item 19-I of the Tariff as a process of manufacture. As such, the main description of Item 19, Tariff defining cotton fabrics to mean "fabrics manufactured either wholly or partly from cotton" read with definition of manufacture u/s 2(f)(v) of Central Excises & Salt Act, 1944, brings in such rubberised fabrics within the ambit of Item 19 of the Central Excise Tariff. In view of the fact that "manufacture" in relation to goods comprised in Item No. 19 of Central Excise Tariff includes several processes including "rubberising", rubberising of cotton fabrics amount to manufacture and as a result an article known as friction cloth comes in existence. Friction cloth has a distinct name, characteristics, and use. The rubberised friction-cloth is not generally marketed but captively used in the manufacture of other finished goods. In the instant case the friction cloth manufactured by the assess is captively consumed in the manufacture of V-belts manufactured by it. Moreover different High Court judgments do not tie up dutiability of the product to the criterion of salability. As long as a product manufactured by an assessee attracts the description of the article in the tariff entry, the article is liable to excise duty. It is not necessary to examine whether the article described in a tariff entry is capable of being brought to the market for purchase and sale. I, therefore, hold that Tariff Item No. 19-I(b) covers "Friction-cloth" and that the said "Friction-cloth" is rightly classifiable under Tariff Item No. 19 I(b) of C.E.T."

4. A reading of the abovesaid order reveals beyond any doubt that it is recognised by the authorities that friction is not generally marketed but is captively used in the manufacture of other finished goods. In the instant case it is held that the friction cloth manufactured by the assessee is captively consumed in the manufacture of V-belts. Then the order proceeds to take note of the fact that different High Courts have taken different view and they do not tie up dutiability of the product to the criterion of salability. Since the product manufactured by the assessee attracts the description of the article in the tariff entry, it is held liable to excise duty. It is significant to not that it is stated in the impugned order that it is not necessary to examine whether the article described in a tariff entry is capable of being brought to the market for purchase and sale. In this view of the matter it is held that Tariff Item No. 19I(b) covers friction-cloth and that the said friction-cloth is rightly classified under Tariff Item No. 19I(b) of the Central Excise Tariff. It may be mentioned here that the operative portion of the impugned order is in fact a mere re-production of a departmental clarification given with regard to friction-cloth (Tariff Item 16-A or 19) in which it is stated as follows :- (Relevant Paras are Paras 3 & 4).

"3. The Directorate of Inspection have recommended that Rubberised Friction Cloth is not generally marketed but captively used in the manufacture of finished

products, except in stray cases on charges for job work done. In view of the different High Court judgments which do not tie up dutiability of the product to the criterion of saleability and in the context of amendment to Item 19, (the Cotton Fabrics subject to process of rubberising having been included the friction cloth could be classified under T.I. 19-I(b).

4. The Board has accepted the suggestion to the effect that such goods would be correctly classifiable under 19-I(b). A model Trade Notice is appended...."

5. We would like to analyse the various components of the abovesaid order which will show that the order is based upon certain basic conceptions held by the authorities which will have to be tested in the light of the latest Supreme Court decisions pronounced in the matter. It is undoubtedly conceded in the impugned order that the rubberised friction-cloth is not generally marketed but it is captively used in the manufacture of other finished goods only. Further more, it is also clear that the opinion of the authorities is based upon the fact that the different High Court judgments do not tie up dutiability of the product to the criterion of saleability. It is also clearly stated in the impugned order that so long as the product manufactured by an assessee answers the description of the article in the tariff entry the article is liable to excise duty. The main question, therefore, arising in this writ petition is whether the approach made by the authorities in declaring the "FRICTION CLOTH" as eligible under Tariff Item No. 19-I(b) is correct or not.

6. Even though no counter has been filed in this case despite the fact that the matter has been pending in the High Court from 1985 onwards and no records worth the name were produced by the learned Standing Counsel for the Central Government, we have embarked upon an investigation into the facts to ascertain the correct position of law on the subject in the light of the decided cases.

7. In Punjab Rubber and Allied Industries v. Union of India - 1984(16) E.L.T. 57 - it is held that the intermediary products will be dutiable when they come within the category of "goods" and are independently classifiable under any entry of Excise Tariff. In regard to the friction-cloth/rubberised cloth produced at an intermediate stage it is held that a reading of the statutory provisions contained in the Act makes it clear that excise duty is leviable on those articles which are "goods" and which articles come to the market to be bought and sold and are known as such in the market. It is further held that any intermediary product which comes into existence during the process of manufacturing of the transmission or V shaped belts etc., has not been expressly and in clear terms made subject to excise duty. Since the friction cloth is only an intermediary product captively used for the manufacture of belting V shaped belts or conveyor belts and not known to trade or sold as such it cannot be termed as "goods" as contemplated in Section 3 of the Central Excise Act. It is, therefore, evident that the above said decision is on all fours with the problem arising in the instant case. The friction-cloth has been held not dutiable as it is not known in the market as an article by itself and its saleability in the market also has not been

established. A similar view has been taken in *Brammer V. Link Belting India Ltd.* and another *Vs. C.L. Nangia*, Appellate Collector of Central Excise, Bombay, upholding the principle that intermediate product which is not marketable is not liable to excise to excise duty. In this case also the very question of dutiability of the cotton fabrics rubberised in the manufacture of V. Link belting was under consideration. Identical views have been expressed by the courts in *Diamond Rubber Mills Vs. Superintendent, Central Excise, Lucknow Range and Others*, and *Punjab Rubber and Allied Industries and Others Vs. Union of India (UOI) and Others*, and in an unreported decision of the High Court of Bombay in Misc. Petition No. 401 of 1963 dated 10-3-1966. In all the above cases the question of dutiability of friction cloth is involved and it is uniformly held that such an intermediary process in the manufacture of fan belts or V. belts, as the case may be, does not attract any excise duty.

8. Furthermore, in our opinion the controversy is now laid to rest in the light of the following Supreme Court decisions laying down certain basic principles to be followed to assess the dutiability of goods for the purposes of central excise. In *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, it is clearly held that an article is not liable to excise merely because of its specification in the Tariff Schedule unless it is "goods" known to the market. Marketability is an essential ingredient for dutiability. The Supreme Court has further observed that 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 2(d) of the Act means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise. Therefore, it is necessary 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 is, therefore, an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985. The burden to prove that goods are dutiable lies on the Department and it is the duty of the revenue to adduce evidence or proof that articles in question are in fact dutiable under the provisions of the Act or the Rules framed thereunder. In another decision of the Supreme Court in *Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd.*, the same principle has been rotated that the burden lies on the department to prove that goods are marketable and are therefore liable to duty and the failure of the department to adduce evidence will result in a favorable order to the assessee. It is further held by the Supreme Court that the duty of excise is on the manufacture of goods and for an article to be "goods", they must be known in the market as such or they must be capable of being sold in the market as goods. User in the captive consumption is not determinative of that the article is capable of being sold in the market or known in the market as goods. Even transient items of articles can

be goods provided they were known in the market as distinct and separate articles having separate uses; they would still become goods if they were capable of being marketed even during the said short period.

9. The impugned order has been passed under a mistaken notion that the pronouncements of the various High Courts do not tie up dutiability of the product to the criterion of salability and in this view of the matter the friction-cloth attracts tariff under Item No. 19 I(b) of the Schedule of the Central Excise Tariff. However, with the pronouncements of the Supreme Court, referred to above, the controversy has been laid to rest and it is clearly held that the marketability or salability of a product is an essential ingredient which can render it durable for payment of excise duty under the Act or the Rules, as the case may be. It is pertinent to note that in the impugned order it is clearly stated that the rubberised friction cloth is not generally marketed but captively used in the manufacture of other finished goods. If the product in question is not generally marketed and is not known in the market as a product by itself which can be bought or sold across the counter in the open market then it does not come within the category of "goods" as envisaged u/s 3 of the Central Excise Act. There is no denial of the fact alleged by the petitioner-company that the friction-cloth in the instant case is a sticky material which loses its characteristic for being used as a captive product in the manufacture of fan belts or V. belts within two or three days and is not known in the market as an article by itself. It is only an item which comes into existence in the process of manufacture of fan belts and V-Belts as a transient product. It cannot, therefore be said that it answers the description of Tariff Item No. 19 I(b) in regard to friction cloth. The law is now well settled on the point that even if an article answers the description of a tariff entry but if it is not known in the market as an independent product by itself it cannot be held to be dutiable for the purposes of excise duty. In view of the above said clear perception emerging from the decisions of the Supreme Court, cited above, we are of the opinion that no useful purpose would be served in remanding the matter to the concerned authorities for fresh consideration. Moreover, the matter has already been pending since 1985 and there would be no point in delaying the matter further by sending it back to the authorities concerned for a fresh appraisal of the case.

10. In view of the above discussion, we allow the writ petition and quash the impugned order bearing C. No. V/19-I/17/12/82-VC dated 22-1-1985 by holding that the unvulcanised friction cloth which is used as a product in the process of manufacture of belts cannot be classified as dutiable under Tariff Item No. 19I(b) of the Central Excise Tariff. In the circumstances of the case, there will be no order as to costs.