(2003) 08 KL CK 0014

In the High Court Of Kerala

Case No : M.F.A. No. 198 of 2003

Chem Teak Company — APPELLANT

Vs

Additional Sales Tax Officer - II — RESPONDENT

Date of Decision : 01-08-2003

Acts Referred:

Citation : (2003) 3 KLT 610 : (2005) 139 STC 168

Hon'ble Judges : J.B. Koshy, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : P.B. Sahasranaman, K. Jagadeesh and T.S. Harikumar, for the Appellant; Raju Joseph, Spl. Government Pleader, for the Respondent

Judgement

J.B. Koshy, J.—The question to be decided in this appeal is whether chemically treated rubber wood is a commercially different product from the raw rubber wood and consequently whether production of chemically treated rubber wood can be treated as a manufacturing activity for claiming benefit under S.R.O. No. 1729/93, dated 1st January, 1994.

2. The appellant is a manufacturer of chemically treated rubber wood. It is having a small scale industrial unit in the Industrial Estate and commenced its production from 29.5.1995. It purchases raw rubber wood from plantations and various sources and manufactures chemically treated rubber wood. Under S.R.O. No. 1729 of 1993 dated 1.1.1994, new industrial units are eligible to get sales tax exemption for a period of seven years in respect of tax payable by such units under the Kerala General Sales Tax Act on the turnover of sale of goods manufactured and sold by them within the State and on the turnover of goods taxable at the point of last purchase in the State which are used by such units for manufacturing other goods within the State or inter State. The benefit of the notification is applicable only if a totally different commercial product is manufactured and what is meant by manufacture is defined in the notification itself. It is specifically mentioned that manufacture shall not include mere process applied for preserving the goods in good condition or for easy

transportation. Earlier Government clarified that procedure of chemically treated rubber wood will not amount to manufacturing process. Appellant approached this Court by filing O.P. No. 20644 of 1999 and this Court by Annexure A1 judgment directed the Commissioner of Commercial Taxes to consider whether the petitioner is entitled to get the benefit of the above notification and whether the petitioner''s product, chemically treated rubber wood satisfies the definition of manufacture. After considering the various decisions, thorough discussion on the subject in Annexure Al, well considered judgment the learned Single Judge (Justice Sivarajan) held as follows:

"........... In the light of the legal principles discussed above coming to the present case the task of the Commissioner of Commercial Taxes is made easy. He has only to adjudicate as to whether the process (as described in para 3 supra) applied by the petitioner to the ''raw rubber wood'' brings into existence a new and distinct commercial commodity by its name, character or use. This is a matter which requires evidence as to how the ''chemically treated rubber wood'' is regarded in the trade and by those who deal in it as observed by the Supreme Court in Pio Food Packer''s case itself and in M/s. B.P.L. India Ltd. ''s case (supra)........

In the result, I quash Ext.P3 circular issued by the Government. Consequently, Exts.P2 and P5 proceedings of the second and third respondents respectively are also hereby quashed. I direct the Commissioner of Commercial Taxes, Thiru vananthapuram to consider the petitioner''s application for sales tax exemption afresh as provided u/s 59A(1)(e) of the K.G.S.T. Act, 1963 by complying with the procedure provided in Sub-section (2) thereof and to take a decision whether the petitioner''s product viz., ''chemically treated rubber wood'' satisfies the definition of ''manufacture'' in S.R.O.1729/93 for getting the exemption under the notification...."

The Commissioner on the basis of the above judgment reconsidered the matter and held as follows:

".... From the materials made available by the petitioner it is seen that the chemical treatment given to raw rubber wood is preservative in nature ie., to give durability to it so that otherproducts can be made using it as a raw material. However, it has not been established that through the chemical process applied to raw rubber wood, a different commercial commodity is produced. In the Union of India (UOI) Vs. Delhi Cloth and General Mills, the Hon''ble Supreme Court has observed as follows:

"The word ''manufacture'' used as a verb is generally understood to mean as ''bringing into existence a new substance'' and does not mean merely to produce some change in a substance however minor in consequence the change may be". Thus the process of chemically treating rubber wood does not come within the definition of ''manufacture'' as given in S.R.O. No. 1729/93, to become eligible for the incentives mentioned therein.

Butthe S.R.O. No. 1729/93 was lateramended by S.R.O. No. 295/98, under which chemical treatment of rubber wood shall be deemed to be ''manufacture'' for the purpose of this notification with effect from 1.4.1998. It is seen that the intention of the Government was to provide some incentives to industries engaged in chemical treatment of rubber wood, though such treatment cannot strictly be regarded as ''manufacture''.

Taking into consideration the above facts and circumstances, it is clarified that the chemical treatment of rubber wood is not ''manufacture'' in the strict sense of the term. However, such treatment will be deemed as manufacture with effect from 4.4.1998 in accordance with the provisions of S.R.O. No. 295/98. The request for clarification is disposed of accordingly."

The above order is challenged in this appeal.

3. Before going into the question whether the process applied to make chemically treated rubber wood is a manufacturing process and whether chemically treated rubber wood is a commercially different product from raw rubber wood, we would consider the definition of ''manufacture'' as defined in Sub-clause (ix) of the notification S.R.O. No. 1729/93 which was in force at the time the appellant started production. In the notification the term "manufacture" is defined as follows:

"''Manufacture'' shall mean the use of raw materials and production of goods commercially different from the raw materials used by shall not include mere packing of goods, polishing, cleaning, grading, drying, blending or mixing different varieties of the same goods, sawing, garbling, processing one form of goods into another form of the same goods by mixing with chemicals or gas, fumigation or any other process applied for preserving the goods in good condition or for easy transportation. The process of producing desiccated coconut shall be deemed to be ''manufacture'' for the purpose of this notification".

The following process shall not be deemed to be ''manufacture'' for the purpose of this notification:-

(a) Crushing copra and producing coconut oil and coconut oil cake.

(b) Converting timber logs into timber sizes.

(c) Crushing rubble into small metal pieces.

(d) Converting sodium silicate into liquid silicate.

(e) Type-retreading.

(f) Cutting granite or marble slabs into smaller pieces and/or polishing them.

(g) Such other processes as may be notified by Government in this behalf.

(x) Industrial units manufacturing the following items shall not be eligible for the concession under this notification:-

(a) biscuits

(b) Cement paint

(c) Packing cases, tea chests, plywood, splints, veeners, wooden crates and wooden cable drums.

(d) Bricks and tiles".

4. Now we will consider the process applied by the appellant industrial unit in making chemically treated rubber wood. In paragraph 3 of Annexure A1 judgment and in the impugned order the manufacturing process is explained as follows:

"The slaughter tapped rubber tree which is felled for replanting has to be prophylactically treated with fungicide and antiblue chemical in order to prevent the timber from fungi attack and sap stain. This timber is then taken to factory and quarter sawing is done to the customers actual size requirement. The sawn timber is then loaded to the impregnation bullet and is sealed airtight. A vacuum of one atmosphere (i.e. 76 mm of mercury) is created and is maintained for one hour.

Maintaining the vacuum, nonleachable CCA solution is pumped into the bullet and the auxiliary pressure vessel. A pneumatic pressure of 20 kg/cm2 is applied and from the level difference of the CCA solution in the auxiliary pressure vessel the quantity of absorbtion is calculated. Once the desired quantity has been absorbed, the salt solution is pumped out and 100% Moisture content timber is cross stacked for air curing to get the CCA solution stabilised with the timber. The 100% Moisture content timber is then loaded into the Thermic fluid heated cross ventilated seasoning kiln for controlled drying by controlling the relative humidity of the chamber. The process of mechanical curing take 14 days of continuous drying by controlling the wet bulb and dry bulb temperatures which are monitored in a oven with a relative load of material as in the kiln. The timber cured in the kiln is stabilised with respect to the equilibrium moisture content of the region where the timber is to be used. This process is a cycle of 48 hours where in steam is used for controlling the wet bulb and dry bulb temperatures".

5. Before going into the merits we may also take note of the submission by the appellant that several industrial units were given the benefits of the above notification for manufacturing chemically treated rubber wood, as can be seen from Annexures A3 and A4. The fact that several industrial units doing the same process were given the benefit of the notification treating making of chemically treated rubber wood as manufacture was not specifically denied by the respondent. The matter was referred to the State Level Committee for sales tax exemption by order dated 12.6.1996. The above Committee considered the law as the subject and considered the process applied by such manufacturing units arid on the basis of facts and submitted its decision to the State Government. As per the minutes dated 12.2.1996 the Committee decided as follows:

"The Committee noted the arguments put forward and decided that in view of the court decision in the matter it would not be feasible to amend the existing definitions of the term ''manufacture'' for the purposes of grant of tax exemption". "The Committee decided that treatment of rubber wood is a ''manufacturing activity'' entitled to benefit under tax exemption scheme".

Therefore, the State Level Committee for sales tax exemption also considered the treatment of rubber as a manufacturing activity for the purpose of the above notification. After getting the report Government itself has amended the notification by issuing S.R.O. No. 295/98 which came into force with effect from 1.4.1998. The relevant portion of the above notification is as follows:

(ii) In Sub-clause (ix) of Clause 1l, after the words "desiccated Coconut out of Coconut", the following words shall be inserted, namely:-

"Chemical treatment of rubber wood and" production of dressed or tanned hides out of raw hides".

This notification shall come into force on the 1st day of April, 1998."

Therefore, there is no dispute with effect from 1.4.1998 that a unit which is engaged in the production of chemically treated rubber wood, is entitled to get the benefit of the notification. According to the learned Government Pleader, the industrial units started prior to 1.4.1998 are not entitled to the benefit as S.R.O. No. 295/98 is prospective. Further it is submitted that even if some of the units (as can be seen from Annexures A3 and A4) doing the same process were granted benefit of the notification, unless legally entitled, the appellant cannot claim exemption under the above notification. It is the contention of the petitioner that S.R.O. No. 295/98 (Annexure A2) is only clarificatory in nature. We are of the opinion that after the opinion of the State Level Committee, a fact finding body, and considering the fact that many similarly placed units were given the benefit, this S.R.O. was issued. The above is curative or remedial in character and clarificatory in nature.

6. It is not disputed that rubber wood before treatment can be used only as firewood. It is neither durable nor hard enough to make furniture. For making furniture, raw rubber wood has to be converted into chemically treated rubber wood. After complicated process of chemical treatment its utility and character are changed. The change made in the rubber wood which was earlier considered as a fire wood to a category of timber which can be used for making furniture etc. shows that the chemical treatment of rubber wood resulted in the production of a new and different article which is recognised by the trade as a new and different commodity as timber that can be used for manufacturing furniture. When timber like teak, rose wood, etc. are used for manufacturing furniture, it became costly. An alternative had to be worked out and chemically treated rubber wood was found out for using as timber or raw material for making furniture. Unless the mere slicing of pineapple after removing the unedible part as in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes),

Ernakulam Vs. Pio Food Packers, . the processing in this case is complicated in nature. People in the trade also understand chemically treated rubber wood as a different product or raw material for making furniture whereas untreated rubber wood is only used as firewood. The resultant commodity is no longer regarded as original commodity. The people generally dealing with rubber wood also consider them as two different products. After chemical treatment the value of rubber wood will increase by ten times. Its utility is different and process applied is not a mere process for preservation but a complicated process and the resultant product is commercially considered as a different product.

7. In Union of India (UOI) Vs. Delhi Cloth and General Mills, the Apex Court held as follows:

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use".

The Supreme Court in the said decision defined manufacture thus:

"The word ''manufacture'' used as a verb is generally understood to mean as ''bringing into existence a new substance'' and does not mean merely to produce some change in a substance, ''however minor in consequence the change may be''".

The Apex Court in the above case held that refined oil was not covered by the expression "non-essential vegetable oils of all sorts" and conversion of vegetable oil into refined oil is a manufacturing process. In this case, after the processing of chemically treated rubber wood, a commercially different article was emerged from raw rubber wood. In Aspinwall & Co. Ltd. v. The Commissioner of Income Tax, Ernakulam AIR 2001 SCW 3444 the Apex Court held that conversion of raw berries into coffee beans is manufacture.

8. In Empire Industries Limited and Others Vs. Union of India and Others, the Supreme Court held that "''Greyfabric'' after they undergo the various processes of bleaching, dyeing, sizing, printing, finishing, etc. emerges as a commercially different commodity with its own price-structure, utility and other commercial incidents and that there was in that sense a ''manufacture'' within the meaning of Section 2(f), even as unamended". The Supreme Court in Aditya Mills Ltd. Vs. Union of India (UOI), with reference to the principles laid down in earlier decisions observed in para 6 thus:

"Hence, the short question involved in this appeal, is: whether the goods in question, namely, a special type of Yarn marked as a finished product known as ''PPRF Yarn'', should be treated as such and taxed on that basis. Excise duty is a duty on the manufacture of goods and not on sale. Manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. If a new substance is brought into existence or if a new or different article having a distinct name, character or use results from particular process or processes, such process or activity would amount to manufacture. The moment there is transformation into a new commodity commercially known as a separate and distinct commodity having its own character and use, ''manufacture'' takes places".

This view is again taken in Deputy Commissioner of Sales-tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Shiphy International, Alleppey, where it is observed as follows:

"Every processing does not bring about a change in the character and identity of the commodity. The nature and extent of processing may vary from one case to another and indeed there may be several stages of processing and perhaps different kinds of processing at each stage. With each process suffered, the original commodity experiences change. But it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct commodity that it can be said that a new commodity, distinct from the original, has come into being. The test is whether in the eyes of those dealing in the commodity or in commercial parlance the processed commodity is regarded as distinct in character and identity from the original commodity. See in this connection the observations of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, : Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, ".

Recently the Supreme Court in B.P.L. India Ltd. v. Commissioner of Central Excise, Cochin AIR 2002 SCW 2175 observed that the question as to when a manufacture takes place is a mixed question of law and fact and that nature and the extent of process may vary from case to case. It was also observed that "when a change takes places and a new distinct article comes into existence known to the consumers and the commercial community as a commercial product, which can be no longer regarded as the original commodity, such a change constitutes a process of manufacture". The definition of ''manufacture'' in S.R.O. No. 1729/93 also tallies with the dictum laid down by the Supreme Court in this case. The State Level Committee also after going into the matter in detail found that conversion of raw rubber wood which can be used only as fire wood into a commercially different product as chemically treated rubber wood which can be used as a raw material for making furniture will be a manufacture and consequently amendment was made. Therefore, amendment is only clarificatory in nature. The amendment brought into by S.R.O. No. 295/98 is only clarificatory in nature. Further citizens doing industrial units in similar activity are cannot be treated differently. Even before the amendment came into force, several units were given the benefit and there cannot be any descrimination and it cannot be stated that it is manufacture for some units and not manufacture for the appellant''s unit. State cannot descriminate the industrial units doing the same manufacturing activities and cannot ignore the mandate of Article 14. The detailed chemical treatment is not mainly to preserve the goods in good condition and for easy transportation. By the processing, wood in question becomes not only durable but it is transformed into timber having strength and capability for making furniture and the entire trade as well as the ordinary people who deals with rubber wood consider it as a commercially different product. After detailed chemical treatment the character of a mere rubber wood will change as a commercially known timber for manufacturing furniture. The process applied in this case is not a mere processing or preserving the goods in good condition or for easy transportation. In any event, it is commercially a different product. In this connection we may refer to the decision of the Supreme Court in Ujagar Prints v. Union of India (: AIR 1989 SC 516) wherein it was held that processing of bleaching, dyeing, sizing, printing, finishing, etc. emerges as a commercially different commodity with its own price structure. In Rajasthan Roller Flour Mills Association and another Vs. State of Rajasthan and others, it was held by the Apex Court that when wheat is consumed for producing flour, maida or suji, the commodities so obtained are different commodities from wheat. In M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others, it was held that process of changing crude oil into refined oil is a manufacturing activity.

9. In this case, raw rubber wood emerges as a commercially different commodity with its own price structure with different use and independent identity as a distinct product recognised by the trade and, therefore, we are of the opinion that the process of making chemically treated rubber wood as done by the appellant is a manufacturing activity even prior to 1.4.1998 and they are entitled to get benefit of the notification, S.R.O. No. 1729/93 dated 1.1.1994. Therefore, Order No. C3-47632/02/CT dated 1.1.2003 passed by the Commissioner is not correct and is set aside. We hold that the appellant is entitled to the benefit of the notification, S.R.O. No. 1729/93.

The appeal is partly allowed.

