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**(2008) 09 SHI CK 0026**  
**In the High Court Of Himachal Pradesh**

Commissioner, Central Excise

APPELLANT

Vs

Karam Chand

RESPONDENT

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**Date of Decision :** 26-09-2008

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 2(f)

**Citation :** (2009) 163 ECR 209 : (2009) 236 ELT 647 : (2009) 1 ShimLC 37

**Hon'ble Judges :** V.K. Ahuja, J;Deepak Gupta, J

**Bench :** Division Bench

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## Judgement

Deepak Gupta, J.—This excise reference was admitted on the following question of law:

Whether dilution of Alletherin to 3.6% by weight concentration (w/w) from 90% concentration/purity by adding deodorized K-oil as inert carrier/solvent, perfume as masking agent, DHT (Dibutyl Hydroxy Tulune) as stabilizing agent amounts to manufacture?

2. To appreciate the question it would be relevant to refer to the definition of manufacture under the Central Excises and Salt Act. Manufacture has been defined in Section 2(f) of the Act as follows:

2(f) "Manufacture" includes any process,--

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture.

And the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacturer of excisable goods, but also any person who engages in their production or manufacture on his own account.

3. The brief facts are that the respondent is engaged in the manufacture of liquid mosquitoes destroyer which is classifiable under Chapter Heading No. 8516.00. The manufacturer obtains alletherin of minimum of 90% purity. This is diluted to 3.6% by adding solvent deodorized kerosene oil, perfume as masking agent and DHT as stabilizing agent. The question which arises is whether the addition of stabilizing agent, masking agent etc. is manufacture within the meaning of Section 2(f) quoted hereinabove.

4. The adjudicating authority held that both the concentrated alletherin used by the party and the diluted alletherin fall under the same subheading and there is no process of manufacture. The Department filed an appeal to the Commissioner (Appeals) who dismissed the same. Thereafter, the Department filed another appeal to the Customs, Excise & Gold (Control) Appellate Tribunal which also dismissed the same relying upon the earlier decision of the 1994 (50) ECR 417

5. After the decision in Markfed's case (supra) the Central Board of Excise and Customs issued an order wherein it was stated that the decision in Markfed's case was not challenged due to the small amount of duty involved. However, according to the Board the dilution of a concentrated insecticide would fall within the scope of the term manufacture u/s 2(f) of the Act.

6. This Departmental clarification was considered by the Gujarat High Court in *Indichem v. Union of India* 1996 (88) E.L.T. which held as follows:

This Section empowers the Board to issue circulars for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. Certainly, this Section does not authorize the Board to issue directions which is contrary to the decision rendered by the Tribunal. Mr. Ajmera, learned Advocate could not point out anything which would suggest that the Board has such powers or that the Board was justified in issuing such circulars. It may be that the Board may not be in agreement with the view taken by the Tribunal. Then in that case, the Board may carry the matter in appeal, but once the decision has become final by issuing circular, the decision rendered by the Tribunal cannot be made to be nugatory.

7. Similar view was taken by the Madras High Court in *Pioneer Miyagi Chemicals Vs. Central Board of Ex. and Cus.*, . The Delhi High Court has also taken the identical view in *Kissan Chemicals Vs. Union of India*, 1996(88)ELT648(Del) , wherein the Delhi High Court held as follows:

6. The learned Counsel for the respondents have not been able to assail the settled position of law that the Board cannot merely issue a circular which will render the decision of the Tribunal as irrelevant and nugatory. It is, however, argued that the respondents did not file appeal against the decision of the Tribunal on the ground that the Hon'ble Supreme Court declined to interfere in many cases where the subject-matter of Excise Duty involved was not substantial. The Counsel have further referred to the departmental communication, dated 13th January, 1993 from Ministry of Finance to various

Collectors of Central Excise filed as Annexure R.2 with the counter-affidavit of the respondents. Paragraphs 2, 3, 4 and 5 of this Communication may be reproduced as under:--

2. Taking cue from this judgment the learned Attorney General conveyed that the Supreme Court had also observed that the government should not file cases, petitions where amounts involved are very small.

3. Considering the aforesaid background, the avalanche of litigation which has choked the judicial forum has to be contained. The sheer number of cases makes it difficult for the Court to render justice in time.

4. The Government, therefore, have decided that filing of appeal may be considered only where substantial questions of law

are involved and there is no direct Ruling or case law of the Supreme Court on the issue.

5. Further, no appeal to the Supreme Court may be filed where such duty involved is Rs. 5 lakhs or less.

7. The above considerations cannot be held to be relevant to reverse the decision of the Tribunal which has been rendered on cogent grounds. The decision of the Tribunal having become final, the only option left with the Department was to take the matter in appeal and impugn that decision. The issuance of circular by the Board in the present facts cannot be held to be an appropriate remedy.

In this case also the dispute relates to the year 1995 and we are not dealing with the amendments made thereafter. We are in respectful agreement with the view taken by the Madras, Gujarat and Delhi High Courts that once the excise authorities had accepted and not challenged the judgment in Markfed's case, they could not in another case issue circular and take contrary view.

8. In addition thereto we find that in Union of India v. Delhi Cloth and General Mills Co. Ltd. 1977 (1) E.L.T. (99), the Apex Court while dealing with the definition of manufacture held as follows:

19. We are unable to agree with the learned Counsel that by inserting this definition of the word "manufacture" in Section 2(f) the legislature intended to equate "processing" to "manufacture" and intended to make mere "processing" as distinct from "manufacture" in the sense of bringing into existence of a new substance known to the market, liable to duty. The sole purpose of inserting this definition is to make it clear that at certain places in the Act the word "manufacture" has been used to mean a process incidental to the manufacture of the article. Thus in the very item under which the excise duty is claimed in these cases, we find the words "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". The definition of "manufacture" as in Section 2(f) puts it beyond any possibility of controversy that if power is used for any of the numerous processes that are required to turn

the raw material into a finished article known to the market the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available. It is only with this limited purpose that the legislature in our opinion, inserted this definition of the word "manufacture" in the definition Section and not with a view to make the mere "processing" of goods as liable to excise duty.

9. It is apparent that mere processing of the goods is not manufacture and to fall within the definition of manufacture a new substance should be formed. In the present case no new substance is formed and only a diluted form of original substance is packaged under a different brand name. Alletherin in its concentrated form is an insecticide and the final product manufactured by the respondent is a diluted form of insecticide which will only kill small insects like mosquitoes. There is no new substance which is created. The petitioner if it wanted to include dilution of insecticide within the meaning of manufacture could have made specific provision in this regard in Section itself or in the chapter notes of the schedule to Central Excise Tariff Act, 1985. In the absence of any such notes the mere process of diluting the alletherin by adding non-reactant substance cannot amount to manufacture. All that is being done is that the potency of the insecticide is being reduced. This cannot be termed to be manufacture.

10. In view of the above discussion, we find no merit in the petition. The question referred to us is answered against the petitioner. No order as to costs.