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**(1991) 02 MAD CK 0109**

**In the Madras High Court**

**Case No :** Writ Petition No's. 8647 of 1988, 12177 and 13838 of 1988

D.C.W. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 21-02-1991

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 2, 3, 35A

**Citation :** (1991) 56 ELT 310

**Hon'ble Judges :** Kanakaraj, J

**Bench :** Single Bench

**Advocate :** Mr. P.S. Raman, for the Appellant; Mr. A.S. Venkatachala Moorthy, Addl. Central Government Standing Counsel, for the Respondent

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## **Judgement**

1. The petitioner in all the cases is the same. The petitioner-company manufactures caustic soda by electrolysis of sodium chloride brine by BASF type high amperage mercury cells. During this process in the primary primary cell a mixture of gases consisting of Hydrogen, oxygen, nitrogen water vapour and a substantial percentage of chlorine content are produced. This mixture of gases is fed through pipe line and diverted into two branches. One branch goes to the liquid chlorine plant, with which we are not concerned. The other branch is taken to a furnace where it is burnt with Hydrogen resulting in Hydro chloric acid fumes which are absorbed in water to make commercial grade Hydro chloric acid. The bone of contention between the parties is whether the mixture of gases liberated in the primary and taken through pipe lines for manufacture of Hydro chloric acid, otherwise called wet chlorine, is goods within the meaning of Section 3 of Central Excises and Salt Act, 1944 and whether it is classifiable under sub-heading 2801.10 of the Central Excise Tariff Act, 1985. The subsidiary question is whether in that form, it is marketable even though the petitioner does not actually market it and captively consumes the same for the manufacture of Hydro chloric acid. W.P. No. 8647 of 1988 concerns the order of the Assistant Collector of Central Excise dated 25-4-1988 imposing a duty 800,839.80 for the total quantity of wet chlorine manufactured and removed without payment of

duty for the period from 1-5-1987 to 31-10-1987. W.P. No. 12177 of 1988 is against a similar order dated 8-7-1988 for period from 1-11-1987 to 30-4-1988 imposing a duty of Rs. 8,41,204.44. W.P. No. 13838 of 1988 is against a show cause notice proposing to levy Rs. 8,20,421.78 for the period from 1-5-1988 till 30-9-1988. It is not disputed that the petitioner-company has an alternative remedy of filing an appeal u/s 35A to the Collector of Central Excise (Appeals). Similarly in W.P. No. 13838 of 1988, the petitioner-company can submit its explanation and if an order is passed against it, an appeal can be filed.

2. Let me at the outset deal with the preliminary objection of Mr. A. S. Venkatachala Muoorthy, counsel for the respondents. The submission is that this court should not interfere with the impugned orders on the short ground of availability of adequate alternative remedy. In support of the contention, the following judgments are relied upon : (1) Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , (2) Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, and S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Another, . Reliance is also placed upon the unreported judgments in M/s. Z. Raja Beedi Factory v. The Collector of Central Excise, Madras-34 (W.A. No.257 of 1988 dated 2-3-1988), W.A. 1730 of 1987 dated 25-10-1988 and Southern Engg. Industries Vs. Supdt. of C. Ex., (W.A. Nos. 865 to 875 of 1989 dated 30-10-1989). The Principles are too well known. For more than one reason Courts should not take upon the duty of correcting every illegal order especially when it involves assessment of factual material or technical questions with which the prescribed authorities are more conversant and have expert knowledge. Equally, there is one other well accepted principle that when a writ petition has been admitted and is pending for some time, it will be improper to drive the party to an alternative remedy. Having all these principles in mind, it is for the Court to exercise its discretion in a judicious manner with the interest of both parties in mind. No doubt, the Division Bench in W.A. Nos. 865 to 875 of 1989 (cited supra) has considered this very aspect and still directed the party to invoke the alternative remedy. I have myself considered this aspect in Madura Coats Ltd. Vs. Asstt. Collector of C. Ex., ]. There is also the judgment of the Supreme Court in Miss Raj Soni Vs. Air Officer in Charge Administration and another, . I, therefore, feel, it would be more appropriate to decide the issue after examining the merits of the case especially because the writ petitions are pending from 1988. If, while examining the merits of the case, it is felt that it would be more appropriate to relegate the petitioners to the remedy of appeal, it can always be done.

3. The impugned order proceeds as follows :-

The petitioner company manufactures hydro choric acid. For this purpose, it uses hydrogen and chlorine indigenously prepared. Hydrogen is exempted from duty if captively consumed. Chlorine is exempted under Notification 40/85-C.E., dated 17-3-1985 if the end product hydro chloric acid suffers duty in full or in part. In this case, the hydro chloric acid used in the "ilmenite" has not suffered duty.

Therefore, the 2nd respondent seeks to impose a duty on the chlorine content used in the manufacture of hydro chloric acid. Since there is no manner or method of finding out the actual quantity of chlorine utilised, the 2nd respondent has adopted the following method :-

"Quantity of Hydrochloric Acid captively consumed ..22248.050 during the period from 1-5-1987 to 31-10-1987. Requirement of Chlorine for 1 M.T. of Hydrochloric ..400 kg Acid (30-33%) (Theoretical Requirement 321 kg. for 33% hydrochloric Acid) Total Chlorine consumed during the period from ..22248.05 x 400 1-5-11987 to 31-10-1987 in the manufacture of Hydr- ----- chloric Acid. 1000 MT = .. 8899.22 MT The total duty payable on the said quantity of Chlorine removed without payment of duty is given below : Duty at the rate of Rs. 90/- M.T. - 8899.22 x 90 = Rs. 8,00,339.80."

4. In reply to the show cause notice, the petitioner-company contended that the wet chlorine which is taken through special pipe lines to the adjacent plant for manufacturing hydro acid is not excisable goods. The petitioner-company relied on the order in Revision No. 1842/77 dated 30-7-1977 passed by the Government of India. That order of the Government was based on two grounds. (1) Wet chlorine did not satisfy the Technical meaning of compressed gas which alone could be brought under erstwhile Tariff Item 14 H. Compression as contemplated under 14 H should be compression as understood in the trade. Therefore, going by ISI standards wet chlorine did not satisfy the entry 14 H which related to compressed chlorine. (2) Following DCM's case 1977 (1) ELT J 199, the Government also held that the gas under consideration is not brought produced to be brought and sold. The Government proceeded to say that being violently reactive the wet chlorine in question will attack steel pipes or metal containers if stored as such. They went on to say that the "wet chlorine" in question does not fulfil the requirements of being "goods" within the meaning of Section 3 of the Act. It was also pointed out that the very fact the Department had to work out the quantity of chlorine on the basis of Hydro chloric acid produced and converting the wet chlorine into dry chlorine on the basis of arithmetic formula goes to prove the inherent difficulty in holding the goods as excisable.

5. The second respondent says that after the Central Excise Tariff Act, 1985 sub-heading 2801.10 is as follows :-

"2801.10 - Chlorine (including liquefied or solidified gas)"

The aspect of compression being no longer insisted upon in the entry and purity being no longer the deciding factor, the decision of the Government of India cannot be relied upon. Therefore, he came to the conclusion that wet chlorine is nothing but chlorine except that it undergoes the process of chilling, drying and liquefaction.

6. The second respondent conveniently ignored the second reasoning of the Government of India and proceeded to say that inasmuch as chlorine as a specified item is brought under sub-heading 2801.10, it cannot escape duty. The

second respondent says,

"In this particular case, it cannot be said that the product is not marketable but it can at best be said it is not marketed. Actual marketing and marketability are two distinct words having entirely different meaning. The product is not marketed for the reasons best known to the assessee. That does not mean that the product is not marketable. The fact that he is removing the wet chlorine to the Hydrochloric Acid Plant itself establishes the marketability of the goods. Even for the sake of argument if we accept the contention of the assessee, it cannot be said that marketability is the sole criterion and that too when chlorine has got a specific entry in the tariff."

He then concludes that wet chlorine is an excisable product under sub-heading 2801.10 of the Central Excise Tariff Act, 1985. That the observations of the second respondent quoted above regarding marketability is not a correct statement of law in view of the judgment of the Supreme Court in *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, cannot be disputed. But on this ground, the counsel for respondents presses for a remand, even if the plea of alternative remedy is not accepted. This plea of the respondents ignores the categorical finding of the Government of India on the second aspect of the case where it is held that wet chlorine is not goods excisable u/s 3 of the Act. In fact, even according to the second respondent, wet chlorine has to undergo the process of chilling, drying and liquefaction before it can be stored or conveniently transported.

7. A few more decisions which take the issue conclusively in favour of the petitioner may now be noticed. In *Union Carbide India Limited Vs. Union of India (UOI) and Others*, aluminium cans at the point at which excise duty was levied existed in a crude and elementary form. To be a marketable commodity, it needed trimming, threading and redrawing. Therefore, they should be reeded, beaded, anodized and painted. The Supreme Court observed as follows :-

"Not a single instance has been provided by the respondents demonstrating that such aluminium cans have a market. The record discloses that whatever aluminium cans are produced by the appellant subsequently developed by it into a completed and perfected component for being employed as flashlight cases."

It was held that such aluminium cans did not fall within Section 3 of the Act. In *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, , it is observed by the Supreme Court as follows :-

"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 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 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 Excise Tariff Act, 1985."

8. In Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., , the Supreme Court observed as follows :-

"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 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. It is, therefore, necessary to find out whether these 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. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985."

9. Finally on the identical goods in 1990 (29) ECC 259 , the Tribunal has held as follows :-

"We follow the judgment of the Govt. of India and are of the view on the basis of the evidence available on record that wet chlorine cannot be categorised as goods and does not fall under the purview of Section 3 of the Central Excise and Salt Act, 1944. Accordingly, we confirm the findings of the Collector of Central Excise (Appeals), New Delhi."

10. In such circumstances, if the Court is to drive the party to an alternative remedy after nearly 2 1/2 years after the admission of the writ petitions, it will, in my opinion, amount to shirking our responsibility to do justice. One cannot be blind to hard facts. There is no need to repeat, that each case has to be weighed on its own merits. There can be no hard and fast rule to the application of the principle of alternative remedy.

11. I have, therefore, no hesitation in quashing the impugned orders of the second respondent and first respondent in W.P. Nos. 8647 and 12177 of 1988 respectively and show cause notice of the respondent in W.P. Nos. 13838 of 1988. The writ petitions are allowed. Rule nisi is made absolute. There will be no order as to costs.