(1991) 02 MAD CK 0020

In the Madras High Court

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

DCW Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 26-02-1991

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

Citation : (1996) 56 ECC 47

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kanakaraj, J.—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 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 hydrochloric acid fumes which are absorbed in water to make commercial grade hydrochloric 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

hydrochloric 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 hydrochloric acid. W.P. 8647 of

1988 concerns the order of the Assistant Collector of Central Excise dated 25.4.1988 imposing a duty of Rs. 8,00,839.80 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 the 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 35-A 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 Moorthy, 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 Z. Raja Beedi Factory v. The Collector of Central Excise,

Madras - 34 (W.A. No. 257 of 1988 dated 2.3.1988), W.A. No. 1730 of 1987 dated 25.10.1988 and Southern Engineering Industries,

Coimbatore v. The Superintendent of Central Excise, Coimbatore I Division, Coimbatore (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 hydrochloric 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 CE dated 17.3.1985 if the end-product hydrochloric

acid suffers duty in full or in part. In this case, the hydrochloric acid used in the ''ilmenite'' had not suffered duty. Therefore, the 2nd respondent

seeks to impose a duty on the chlorine content used in the manufacture of hydrochloric 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 during the period from

1.5.87 to 31.10.87. .... 22248.050

Requirement of chlorine for 1 M.T. of

hydrochloric acid (30-33%)

(Theoretical requirement 321 kg. for

33% hydrochloric acid) .... 400 kg.

Total chlorine consumed during

the period from 1.5.87 to

31.10.87 in the manufacture of

hydrochloric acid. .... 22248.05 x 400 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/- per 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 hydrochloric 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 ELT 199, the Government also held that the gas under consideration is not brought to

the market, nor is it capable of being brought in the wet condition in which it is 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 hydrochloric 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 liquified 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 liquifaction.

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 liquidation 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, anodised 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 are 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 good 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 Excises and Salt Act, 1944. Accordingly, we confirm the

findings of the Collector of Central Excise (Appeals), New Delhi.

10. In such circumstances, if the Courts 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. No. 13838 of 1988. The writ petitions are allowed. Rule nisi is made

absolute. There will be no order as to coats.

