

(1985) 04 AHC CK 0036

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 130 of 1980

Diamond Rubber Mills

APPELLANT

Vs

Superintendent, Central Excise, Lucknow Range and Others

RESPONDENT

Date of Decision : 25-04-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 2, 47, 49, 9
Central Excises and Salt Act, 1944 — Section 2, 3, 37
Finance Act, 1982 — Section 51

Citation : (1986) 7 ECC 157 : (1985) 21 ELT 646

Hon'ble Judges : N.D. Ojha, J; A.N. Dikshit, J

Bench : Division Bench

Advocate : Keshari Nath Tripathi, for the Appellant; R.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

N.D. Ojha, J.—The case of the petitioner in this Writ Petition is that it manufactures in its factory in the district of Aligarh rubber belting including "V belt and other rubber products which fall under Excise Tariff Item No. 16-A(4) of Schedule 1 to the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act). According to it excise duty on the said item is exempted up to a limit of production and its production is below the prescribed limit. Its case further is that a notice dated 30-10-1972> a copy whereof has been filed as Annexure 1 to the writ petition, was served on it by the Superintendent of Central Excise M.O.R. Aligarh stating that the goods manufactured by it were processed cotton fabrics falling under Tariff Item No. 19-1(I) of Schedule 1 to the Act. The petitioner was required to show cause why necessary demand may not be raised against it accordingly. The petitioner filed a reply dated 4-11-1972 to that notice a copy whereof has been filed as Annexure 2 to the writ petition in which it was asserted that the petitioner was a manufacturer of Rubber belting and used canvas and rubber as raw materials to achieve the product namely rubber belting. The process of manufacture was also indicated in the said reply. The plea of the

petitioner was accepted by the Assistant Collector, Central Excise, Aligarh, by his order dated 3-3-1978 and the demand raised by the Superintendent, Central Excise, was dropped. A copy of this order has been attached as Annexure 3 to the Writ Petition.

2. According to the petitioner the Superintendent, Central Excise, thereafter kept quiet for nearly seven years. He, however, served a fresh notice dated 13/14-2-1985 asserting that what the petitioner was manufacturing was rubberised cotton fabrics (Intermediary product) falling under Tariff Item No. 19-I(b) of Schedule 1 to the Act. The petitioner was required to show cause as to why the amount mentioned in the said notice may not be realised from the petitioner. A further order of detention of goods of the petitioner was passed by the Superintendent, Central Excise on 14-2-1985. A copy of the notice dated 13/14-2-1985 has been filed as Annexure 4 to the writ petition and that of the order of detention dated 14-2-1985 as Annexure 5. It is this notice and the detention order which are sought to be quashed in the present writ petition.

3. A counter-affidavit has been filed on behalf of the respondents and the petitioner has filed a rejoinder-affidavit. Counsel for the parties were agreed that the writ petition may be decided finally at the admission stage itself as contemplated by the second proviso to Rule 2 of Chapter XXII of the Rules of Court. We have accordingly heard counsel for the parties on the merits of the writ petition.

4. Before dealing with the respective submissions made by counsel for the parties it would be useful to find out the nature of the goods in question. Paragraph 4 of the counter-affidavit of Sri D.R. Sandhu gives the process of manufacture of the goods in question. The reply to paragraph 4 of the counter-affidavit is contained in paragraph 4 of rejoinder-affidavit. Their perusal indicates that what in substance the petitioner does is that canvas and rubber are placed over one another along with chemicals, pigments and carbon black in four or more plies to give them the thickness desired for belts and are vulcanised. The material which is, thus, prepared and which is termed by the respondents as rubberised cotton fabrics (intermediary product) shall hereinafter for the sake of facility be referred to as the vulcanised sheets. These vulcanised sheets are cut into required sizes and made into rolls for being used as belts. What the respondents assert is that after the vulcanised sheets are cut into required sizes of belts the same may fall under Tariff Item No. 16A(4) and may be exempt from excise duty, as asserted by the petitioner, but the vulcanised sheets themselves fall under Tariff Item No. 19-I(b) and the goods falling under this Tariff item not being exempt from excise duty, the petitioner was liable to pay excise duty in respect of the said vulcanised sheets the same being Rubberised Cotton Fabrics (Intermediary product).

5. It was urged by counsel for the petitioner that once the matter had been finally decided by the Assistant Collector, Central Excise, Aligarh, by his order dated 3-3-1978 and the case of the petitioner that the goods manufactured by it

fell under Tariff Item No. 16-A(4) was accepted the Superintendent, Central Excise, had no jurisdiction to issue the impugned notice and pass the impugned detention order. It was further asserted that the impugned notice and detention order were without jurisdiction also on the ground that they were barred by time.

6. Counsel appearing for the respondents has, on the other hand, urged that in view of the insertion of Sub-clause (v) in the definition of the term "manufacture" contained in Clause (f) of Section 2 of the Act by Act No. 6 of 1980, with effect from 24-11-1979 as also the amendment made in Rules 9 and 49 of the Excise Rules, 1944, by the Central Excise (4th Amendment) Rules, 1982, [vide Notification No. 20/82-CE, dated 20-2-1982] the goods manufactured by the petitioner which are subsequently cut into pieces to give them the shape of belts are Rubberised Cotton Fabrics liable to excise duty under Tariff Item No. 19-I(b) of Schedule 1 to the Act and the mere fact that the vulcanised sheets constituted intermediary product in the sense that they came into being at a stage prior to their being cut into pieces to give them the shape of belts of no consequence. According to him in view of the definition of the term "manufacture" as amended by insertion of Sub-clause (v) as aforesaid excise duty could be levied not only on the end-product but also on the intermediary product if the requirements of Sub-clause (v) were made out. In order to appreciate the respective submissions made by counsel for the parties it will be useful to extract the definition of the term "manufacture" as relevant for this case as well as Tariff Item No. 16-A(4) and Tariff Item No. 19-I(b) of Schedule 1 to the Act and also the Central Excise (4th Amendment) Rules, 1982, Section 2(f) (v) reads :-

"2(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and

...

(v) in relation to goods comprised in Item No. 19-1 of the First Schedule, includes bleaching, mercerising, dyeing, printing, waterproofing, rubberising, shrink proofing, organdie processing or any other process or any one or more of these processes;..."

7. Relevant portion of Tariff Item No. 16-A(4) of Schedule 1 to the Act reads :-

"16A. Rubber products, the following namely

...

(4) Transmission, conveyor or elevator belts or belting, or vulcanised rubber."

Relevant portion of Tariff Item No. 19-I(b) of Schedule 1 to the Act reads :-

"Cotton fabrics, subjected to the process of bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink proofing, organdie processing or any other process or any two or more of these processes."

8. The Central Excise (4th Amendment) Rules, 1982 read as follows :-

"In exercise of the powers conferred by Section 37 of the Central Excises and Salt Act, 1944 (1 of 1944) the Central Government hereby makes the following rules further to amend Central Excise Rules, 1944 namely :

1. (1) These rules may be called the Central Excise (4th Amendment) Rules, 1982.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In Rule 9 of the Central Excise Rules, 1944 (hereinafter referred to as the said rules) the following Explanation shall be inserted at the end, namely :-

"Explanation-"For the purposes of this rule, excisable goods produced, cured or manufactured in any place and consumed or utilised :-

(i) as such or after subjection to any process or processes; or

(ii) For the manufacture of any other commodity, whether in a continuous process or otherwise, in such place or any premises appurtenant thereto specified by the Collector under Sub-rule (1) shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation."

3. In Rule 49 of the said rules, the following Explanation shall be inserted at the end, namely :

"Explanation-For the purposes of this rule, excisable goods made in a factory and consumed or utilised-

(i) as such or after subjection to any process or processes; or

(ii) for the manufacture of any other commodity,

Whether in a continuous process or otherwise, in such factory or place or premises specified under Rule 9 or store-room or other place of storage approved by the collector under Rule 47, shall be deemed to have been issued out of, or removed from such factory, place, premises, store-room or other place of storage, as the case may be, immediately before such consumption or utilisation."

9. The case of the petitioner is that vulcanised sheets which the respondents call as Rubberised Cotton Fabrics (intermediary product) are rubber belting and are not sold in the market as such meaning thereby that they do not fall within the category of marketable goods. According to the petitioner it is only the goods which come into being after the vulcanised sheets are cut into required sizes of belts which constitute marketable goods. Counsel for the petitioner has urged that since the vulcanised sheets, even if they are taken as an intermediary product come into existence during the continuous process of manufacturing the belts, etc., which are the end product and which alone are marketable goods

they are not liable to duty. In the alternative it was urged that since the vulcanised sheets constitute the material out of which belts are made they would fall under Tariff Item No. 16A(4) being "belting" and would not be rubberised cotton fabrics (intermediary product) falling under Tariff Item No. 19-I(b). Reliance in this connection has been placed on the dictionary meaning of the word "belting". According to Shorter Oxford English Dictionary "belting" means "belts collectively, or the material for making them". Reliance has also been placed on the Table at page 180 of Central Excise Manual Volume I, Eleventh Edition. Serial No. 22 at page 182 as follows :-

TABLE -----				
Sl. No.	Articles for manufacture	Excisable goods for manufacture	in bond.	of
articles	specified		Column	2.
				(1) (2)
(3)				22.
	Transmission conveyor	Cotton fabrics, rubber proces-	elevator belts or belting	
	sing chemicals, pigments and	of vulcanised rubber.	carbon black.	

This Table, according to counsel for the petitioner, indicates that the goods shown under Tariff Item No 16-A(4) are manufactured by using precisely the same excisable goods as are used by the petitioner and as such the goods manufactured by the petitioner would also fall under Tariff Item No.]6-A(4).

10. Reliance has further been placed by counsel for the petitioner on South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, , Flocks (India) Private Limited v. Government of India and Ors., 1983 Excise Law Times 197 and Punjab Rubber and Allied Industries and Ors. v. Union of India and Ors., 1984 (16) Excise Law Times 57. In the case of S.B. Sugar Mills (supra) it was held by the Supreme Court:-

"The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India (UOI) Vs. Delhi Cloth and General Mills,

11. In the case of Flocks (India) Private Limited (supra) it was held by a Division Bench of this Court that the excise duty is payable only on manufacture of goods which are per se marketable. So long as such marketable goods have not come into existence no question of paying any central excise duty in respect thereof can possibly arise.

12. In the case of Punjab Rubber and Allied Industries and Ors. (supra) the petitioner was manufacturing almost similar goods by adopting the same manufacturing process and a similar plea was raised on behalf of the Union of India that the intermediary product out of which the belts were ultimately prepared was friction cloth or Rubberised Cotton Fabrics liable to excise duty under Tariff Item 19-I(b). Reliance inter alia in the said case was placed on behalf of the Union of India on the same amendments in Rules 9 and 49 of the Excise Rules on which reliance has been placed by counsel for the respondents in the instant case. After taking into consideration the decision of a Division Bench of its own court between the parties reported in Punjab Rubber and Allied Industries and Ors. v. Union of India and Ors., 1983 Excise Law Times 54 it was held by a learned Single Judge of the Punjab and Haryana High Court :

"It seems to take away the effect of these decisions that Rules 9 and 49 of the Rules were amended and explanations to both these rules have been added in 1982. The effect of these two explanations is that the excisable goods produced, cured or manufactured at any place and consumed or utilised as such or after subjection to any process or for manufacture of any other commodity whether in continuous process or otherwise shall be deemed to have been removed from such place or premises and such goods shall be liable to pay excise duty even if they had not actually been removed from the place of their manufacture, processing, etc., under a pure legal fiction. u/s 2(d) of the Act, excisable goods have been defined to be goods specified in First Schedule as being subject to a duty of excise. It is provided in Section 3 of the Act that excise duty on all excisable goods which are manufactured in India shall be levied at the rates set forth in the First Schedule. According to Item No. 19 of this Schedule, cotton fabrics subjected to process mentioned therein are liable to excise duty at the rate of 25 per cent ad valorem. The goods manufactured by the petitioners viz. transmission belting/V shaped belts, etc.", are liable to excise duty at the rate of 24 per cent ad valorem under Item No. 16 of the First Schedule. It is manifest from a reading of the above statutory provisions contained in the Act, Schedule or rules that excise duty is leviable only on those articles which are goods and which articles ordinarily come to the market to be bought and sold and are known to the market. Any intermediary product which comes into existence during the process of manufacturing of transmission or V shaped belts, etc., has not been expressly and in clear terms made subject to excise duty. This friction cloth which is an intermediary product produced during the process of manufacture of the above-mentioned articles is not sold or purchased in the market. This fact has been averred in the writ petition and the same has not been denied in the written statement. In reply "to paragraph 15 of the Writ petition, it is mentioned that the so-called friction cloth, although it is an intermediary product for transmission belting, but in itself it is excisable product and Central Excise is leviable even if the goods are not marketable, but are meant for captive use, being used for manufacture of other goods. This stand of the revenue is directly in conflict with the law settled by the Final Court, in Union

of India (UOI) Vs. Delhi Cloth and General Mills, . After considering the meaning of word "goods" it has been held in paragraph 17 that these definitions make it clear that to become goods an article must be something which can ordinarily come to the market to be bought and sold. In this case, their Lordships were interpreting the entries in Schedule 1 and provisions of Section 3 of the Act. The same very view had been reiterated by the Apex Court in South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . Even the Division Bench in Punjab Rubber Allied case has held that it is nobody's case that this intermediary product is used or sold by the petitioners in the market. Since the so called friction cloth sought to be made excisable is only an intermediary produce and is used captively for further manufacture of transmission belting/V/shaped belts or conveyor belts and is not known to the trade and is not bought or sold as such, it cannot be termed to be goods as contemplated in Section 3 of the Act. Since this intermediary product is not an excisable article in itself, the amendments by way of explanations introduced in Rules 9 and 49 of the Rules do not change the situation. These two explanations only make those intermediary articles liable to excise duty which independently fall within the definition of any of the entries in the First Schedule. Previously, they could be made subject to excise duty only, if they were not used in a composite, continuous and interrupted process for the manufacture of any other excisable article and were removed from the premises within the meaning of the term as used in Rules 9 and 49 of the Rules. In the present case, the question of removal is not relevant because the so-called friction cloth or rubberised cotton fabrics do not fall within the definition of goods as envisaged in Section 3 of the Act."

13. Counsel for the respondents with reference to the amendments made in Rules 9 and 49 of the Excise Rules by the Central Excise (4th Amendment) Rules, 1982 relied on the observations made in Hari Vishnu Kamath Vs. Election Tribunal and Another, to the effect that the rule of interpretation is that when the legislature amends an Act by deleting something which was there, then in the absence of an intention to the contrary the deletion must be taken to be deliberate. On its basis it was urged that the amendments made in Rules 9 and 49 as aforesaid must be taken to be deliberate and have to be given effect to.

14. Reliance was also placed on the decision of a Division Bench of this Court in Union of India and Ors. v. Union Carbide India Ltd. 1978 Excise Law Times 1 where it was held that "the test of general marketability does not appear sound. It would fail in a monopoly product. For such a product, the relevant entry would become nugatory". In the case the question which came up for consideration was as to whether the aluminium cans or torch bodies which were an intermediate product in the process of manufacture of torches were goods contemplated by the Act. After making the aforesaid observation relied on by counsel for the respondents the Bench further held :-

"Assuming, however, that the product must be known to the trade as such, before it can be goods within the meaning of the Act, we are satisfied that the

aluminium cans or torch bodies are such a product.... This transaction would show that the aluminium cans are known and dealt with as an entity by itself, are marketable according to the needs of those who deal it. The fact that these cans have a very limited and specialised market would make no impact on the legal position."

This case is clearly distinguishable on facts because in the instant case it is not even the respondents' case that the vulcanised sheets which they call as Rubberised Cotton Fabrics (Intermediary product) are marketable in the same manner as aluminium cans were in the aforesaid case.

15. In this connection reliance was also placed by the counsel for the respondents on the following observations of the Supreme Court in *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, .

"In our view a duty of excise is a tax levy on home produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them. The duty in the present case satisfies this test and therefore, it is unnecessary to seek other grounds for sustaining the validity in of the tax."

These observations were made while repelling an argument that imposition of duty with retrospective effect had the effect of converting it into a direct and personal tax and was bad inasmuch as in that case it would be incapable of being passed on to a buyer from the tax-payer. Suffice it to say so far as this case is concerned that the question of the goods being marketable as was involved before the Supreme Court in the case of *S.B. Sugar Mills (supra)* was not really involved in this case and the observations quoted above were as seen above, made in a different context.

16. Counsel for the respondents then relied on *Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan and Ors.*, 1980 Excise Law Times 383. In that case while dealing with Tariff Item No. 22 it was held by the Supreme Court that Item 22 speaks of "all varieties of fabrics" which expression is wide enough to include the rayon tyre cord fabric. In that case the question for consideration was about exemption from sales tax and purchase tax and it was pointed out that the tyre cord fabric is a woven fabric in which the intermediate process of weaving the weft thread across the warp cord is an integral stage of manufacture and when the purchaser buys the product, it is the entire integrated woven fabric which he buys and not merely the tyre cord by itself. After pointing out that in determining the meaning or connotation of words and expressions describing an article or commodity the turnover of which is taxed in a sales tax enactment, if there is one principle fairly well settled it is that the words for expressions must be construed in the sense in which they are understood in the trade, by the dealer and the consumer, after taking into considerations the material placed on record

in this behalf it was held that, by and large, a tyre cord fabric is regarded as a textile fabric. This case is obviously distinguishable on the facts of the instant case.

17. Reliance was also placed by counsel for the respondents on the decision of a Division Bench of the Delhi High Court in *Hyderabad Asbestos Cement Products Ltd. and Anr. v. Union of India and Ors.*, 1980 Excise Law Times 735 where it was held that if the legislature has treated a process of an article to be a "manufacture" it is not open to contend that the process is not manufacture. Apparently, no exception can be taken to this view. It was, however, further held in that case that it is now settled law that before excise duty can be levied, the goods brought into existence must be the goods which can be bought and sold in the market. Asbestos fibre which was the goods in question in that case was held to be a marketable commodity saleable as such

18. Lastly, reliance was placed by counsel for the respondents on the decision of a Division Bench of the Delhi High Court in *J.K. Cotton Spinning & Weaving Mills and Anr. v. Union of India and Ors.*, 1983 Excise Law Times 239. This was a case in which the scope of Section 51 of the Finance Act, 1982, whereby retrospective effect was given to the amendments made in Rules 9 and 49 of the Central Excise Rules, 1944, by the Central Excise (4th Amendment) Rules, 1982 came up for consideration. Dealing with Rules 9 and 49 as amended by the Central Excise (4th Amendment) Rules, 1982, it was held :-

"On our reading of the amended rule utilisation of excisable goods even in a continuous process, so long as the goods are identifiable and capable of physical removal would attract duty whether in fact they are physically removed or not. Indeed, in one way of looking at it there will always be physical removal either bodily or mechanically when goods go "within the pipe line" for being utilised to be converted into another type of goods. Under the un-amended Rules 9 and 49 we held that such utilisation would not amount to being issued out from the factory in the absence of place or a premises being specified under Rule 9. By the amended rules this view has been, so to say, nullified."

19. The facts in brief of this case were that a composite Spinning and Weaving" Mill was owned and run by the first petitioner in which yarn was spun and ultimately converted into fabrics of different types. It was not disputed that excise duty was payable on the end product, namely, the different kinds of fabrics produced in the mill. The dispute related to the liability to pay duty in respect of yarn which is further processed in the composite factory to obtain fabrics, and it was in this context that the aforesaid observations were made.

20. In this connection it is, however, necessary to take notice of the fact stated in paragraph 20 of the report that "Spun yarn is a commercial commodity known to the market and factually comes into existence." It is, therefore, clear that the intermediary product in that case was by itself a commercial commodity. It is however, not so in the instant case so far as vulcanised sheets are concerned

which are called Rubberised Cotton Fabrics (Intermediary product) by the respondents. To the facts of the instant case the decision of the Punjab and Haryana High Court in the case of Punjab Rubber and Allied Industries (supra) is apparently applicable, where the test of goods being marketable as laid down by the Supreme Court in the case of S.B. Sugar Mills Ltd. (supra) was applied even after Rules 9 and 49 of the Excise Rules being amended by the Central Excise (4th Amendment) Rules, 1982.

21. Further, even if for the sake of argument the test of the goods being marketable is held not to be applicable as urged by counsel for the respondents in regard to the vulcanised sheets which are called by the respondents as Rubberised Cotton Fabrics (Intermediary product) the question is as under which tariff item excise duty is payable on this intermediary product. Tariff Item 19 dealing with Cotton Fabrics is of a general nature and may also include within its sweep the vulcanised sheets referred to above in the category of cotton fabrics subjected to the process of rubberising if the submission made by counsel for the respondents is accepted. But in view of the dictionary meaning of the word "belting" used in Tariff Item 16-A(4) and its composition as enumerated at Serial No. 22 of the Table at page 150 (182) of the Central Excise Manual, Volume I (eleventh edition) quoted above the vulcanised sheets would squarely fall under Tariff Item 16-A(4); dealing with the specific goods known as belting namely the material out of which belts are prepared. On the principle contained in the maxim *generalia specialibus non-derogate* it would be more apt to treat the vulcanised sheets called by the respondents as Rubberised Cotton Fabrics (Intermediary product) as falling under Tariff Item No. 16-A(4) rather than under Tariff Item No. 19-I(b).

22. In this connection, it may be pointed out that in *Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills*, , while dealing with Tariff Items 19 to 22 of Schedule 1 to the Act it was held by the Supreme Court :-

"The well-known rule in interpreting items in statutes like the one we are concerned with is that resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense. *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*,

23. For all these reasons we are of opinion that the impugned notice and the detention order deserve to be quashed.

24. In the result the writ petition succeeds and is allowed. The impugned notice dated 13/14-2-1985 and the detention order dated 14-2-1985 (copies whereof have been attached as Annexures 4 and 5 to the writ petition) are hereby quashed and the respondents are directed not to give effect to them. We, bow-
ever, make no order as to costs.