
(1990) 12 BOM CK 0043

In the Bombay High Court

Case No : Writ Petition No. 3040 of 1982

Garware Plastics and Polyester Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-12-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2

Citation : (1991) 2 BomCR 631 : (1991) 93 BOMLR 1 : (1991) ECR 178 : (1991) 52 ELT 506

Hon'ble Judges : Sujata V. Manohar, J;M.F. Saldhana, J

Bench : Division Bench

Advocate : Mr. M.O. Chinoy, Mr. S.N. Parekh and Mr. A.Y. Sekhare, for the Appellant; Mr. R.V. Desai, P.N. Menon and Mr. K.C. Sidhva, for the Respondent

Judgement

Sujata Manohar, J.—The 1st petitioner is a Company registered under the Indian Companies Act, 1956. The 2nd petitioner is the Managing Director of the 1st petitioner Company. The 1st petitioner Company has two units - one at Aurangabad and the other at Nasik. The petitioners carry on the activity of manufacturing Polyester film in their factory at Aurangabad. The polyester film manufactured by the petitioners at Aurangabad is metallised or lacquered at the petitioners factory at Nasik.

2. The petitioners pay excise duty on the polyester film; manufactured by them at Aurangabad under Tariff Item 15A(2). The duty paid film is then sent to Nasik where the process of lacquering and metallising the film is carried on. The respondents have claimed excise duty also on lacquered and metallised polyester film under Tariff Item 15A(2) or tariff Item 15BB (which was in force for the period 1-3-1981 to 1-3-1982). They have sought to classify the lacquered and metallised polyester film under the said tariff item in force at the relevant time and have sought to levy excise duty on it. These orders, which are at Exhibits O, P-1, P-2 and Q of the petition. They cover the period from 16-3-1982 to 30-4-1982 and 12-7-1982 to October 1982, the date of the filing of the petition.

3. Prior to March 1981 Tariff Item 15A of the Central Excise Tariff Act was as follows :

"15A - ARTIFICIAL OR SYNTHETIC RESINS AND PLASTIC MATERIALS AND CELLULOSE ESTERS AND ETHERS, AND ARTICLES THEREOF :-

(1) The following artificial or synthetic resins and plastic materials, and cellulose esters and ethers, in any form, whether solid, liquid or pasty, or as powder, granules or flakes, or in the form of moulding powders, namely :-

(i) Condensation, Poly-condensation and polyaddition products, whether or not modified or polymerised and whether or not linear such as Phenoplasts, Aminoplasts Alkyds, Polyamides, Super Polyamides, Polyesters, Polyallyl esters, Polycarbonates Polyethers, Polyethylene imines, Polyurethanes, Epoxide Resins and Silicones;

(ii) xxx xxx xxx (iii) xxx xxx xxx

(2) Articles made of plastics, all sorts, including tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, including lay flat tubings, and Polyvinyl chloride sheets, not otherwise specified.

Explanations :

1. For the purpose of sub-item (2), "Plastics" means the various artificial or synthetic resins or plastic materials or cellulose esters and there included in sub-item (I)."

4. By a Tariff Advice No. 8/73 dated 27th August 1973, the Central Board of Excise and Customs had clarified that metallised/lacquered polyester/P.V.C. film or sheets on would not be liable to duty again under sub-item (2) of Item 15A of the Central Excise Tariff, if the same are produced plain/bare polyester film/P.V.C. film or sheets on which appropriate amount of excise duty or the additional duty leviable under Sec. 2A of the Indian Tariff Act, has already been paid under that sub-item. In view of this clarification the respondents, who had originally made a claim against the petitioners for payment of excise duty on metallised and lacquered polyester film under Tariff Item 68 withdrew their show cause notice. This was done by respondent No. 2 by his order dated 5-1-1981. The excise duty collected was also ordered to be refunded.

5. With effect from March 1981 a new tariff item 15BB was inserted in the excise tariff. This item covered polyester films. In view of the existing tariff advice No. 8 of 1973 the petitioners were allowed to clear lacquered/metallised film without payment of excise duty even after the coming into force to of Tariff Item 15BB in view of the fact that they had already paid excise duty on polyester film under the said entry. Subsequently, however, respondent No. 3 issued a show cause notice dated 2-7-1982 calling upon the petitioners Company to show cause why lacquered/metallised polyester film should not be classified under Tariff Item

15BB for the period 1-5-1981 to 28-2-1982. The petitioners have challenged this show cause notice in the writ petition No. 2418 of 1962 which has been admitted and an interim injunction has been granted in terms of an order dated 30-9-1982. Thereafter by tariff advice dated 24-11-1981 from the Central Board it has been stated that the lacquered polyester film is classifiable under Item 15BB, but the same would not be liable to duty again provided that it is manufactured from duty paid bare polyester film.

6. From 1-3-1982 Tariff Item 15BB has been omitted and Tariff Item 15A has been amended. The amended Tariff Item 15A is as follows.

"15A - ARTIFICIAL OR SYNTHETIC RESINS AND PLASTIC MATERIALS AND OTHER MATERIALS AND ARTICLES SPECIFIED BELOW :

(1) Condensation, Polycondensation and Polyaddition products whether or not modified or polymerised... ..

(2) Articles of materials described in sub-item (1), the following, namely :

Boards, sheeting, sheets and films, whether lacquered or metallised or laminated or not; lay flat tubings not containing any textile materials."

7. Under tariff advice dated 15-7-1982 issued by the Central Board of Excise and Customs it has been stated that process of metallising lacquering and laminating duty paid polyester film amounts to manufacture and is accordingly covered under Item 15A(2). Thereafter by an order dated 3-9-1982 the Assistant collector of Central Excise, Nasik negated the contention of the petitioners that metallised lacquered polyester films were not excisable and confirmed the classification of metallised lacquered polyester film produced by the Nasik factory of the petitioners under Tariff Item 15A(2) with effect from 12-7-1982. Consequently for the period 12-7-1982 to 31-8-1982 the respondents have demanded, by their notice dated 18-9-1982, duty amounting to Rs. 28,54,296/-. A show cause notice dated 27-9-1982 has also been issued to the petitioners in respect of the said amount. By an order dated 23-9-1982 the respondents have also rejected the petitioners claim for the refund of Rs. 20,90,354.10 being excise duty paid from 6-3-1982 to 30-4-1982. All these orders, which are at Exhibits O, P-1, P-2 and Q to the writ petition, are being challenged in the present petition.

8. It is the contention of the petitioners that lacquering/metallising of polyester film does not amount to manufacture within the meaning of that term under Sec. 2(f) of the Central Excises and Salt Act, 1944. Hence they are not liable to pay any excise duty on lacquered/metallised polyester film since they have already paid duty on polyester film.

9. Under Sec. 2(f) of the Central Excises and Salt Act, 1944 as it stood at the relevant time the term "manufacture" was defined to include any process incidental or ancillary to the completion of a manufactured product. In relation to various specified products, it was defined to include certain processes. We are

not concerned with this second part of the definition of "manufacture" since it does not cover polyester film. This definition of "manufacture" has been amended by Act 5 of 1986. The material part of the definition which is relevant in the present case, however, remains the same.

10. As far back as 1977 the Supreme Court in the case of Union of India v. Delhi Cloth and General Mills Co. Ltd. reported in 1977 (1) ELT 99 considered the meaning of the term "manufacture" under Sec. 2(f) of the Central Excises and Salt Act, 1944. The Supreme Court said that the word "manufacture" is generally understood to mean as bringing into existence a new product or substance and does not mean merely to produce some change in the substance. Therefore, "manufacture" implies a change but every change is not manufacture yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary. There must be transformation, a new and different article must emerge having a distinctive name, character or use. The Court also said that the definition of the word "manufacture" in Sec. 2(f) does not equate "processing" with "manufacture". Therefore, mere processing of goods is not liable to excise duty. We do not propose to go into the question whether processing by itself will amount to "manufacture" or not. We will assume, as intended by the respondents, that in a given case processing may amount to manufacture provided a different commercial commodity having a distinctive name, character or use emerges as a result of this processing. The basic test which is to be applied is whether as a result of the activities carried on by the petitioners at their Nasik factory, a new commercial commodity having a distinct name, character or use emerges.

11. In the case of South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, the Supreme Court was required to consider whether kiln gas is carbon dioxide. In the course of judgment it also considered the meaning of the term "manufacture" under Sec. 2(f) of the Central Excises and Salt Act, 1944. The Supreme Court reiterated the test laid down by it in the case of Union of India v. Delhi Cloth and General Mills Co. Ltd. (Supra). It said that a change in the material, in order that it should amount to "manufacture" must be such a transformation that a new and different article must emerge having a distinctive name, character or use.

12. In the case of Gujarat Steel Tubes Ltd. etc. Vs. State of Kerela and others, the Supreme Court held that the process of galvanisation did not amount to manufacture since no new marketable commodity emerged as a result.

13. In the case of Swastic Products, Baroda Vs. Superintendent of Central Excise, the Gujarat High Court held that no manufacturing process was involved in printing on white paper or in colouring a manufactured product, namely the paper.

14. Mr. Desai, learned advocate for the respondents, placed reliance on a decision of our High Court in the case of New Shakti Dye Works Pvt. Ltd. and

Mahalakshmi Dyeing and Printing Works and others Vs. Union of India and another, . Our High Court in that case held that the process of bleaching, dyeing, printing and finishing grey cloth amounted to manufacture. The court in fact applied the test laid down by the Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd. (supra) in order to decide whether bleaching, dyeing and printing processes could be considered as manufacturing processes. On first principles, the Court said that the test to be applied was whether as a result, a new substance or a new commercial commodity came into existence. It said : "The test to be applied must, therefore, be whether the processes in question have resulted into bringing into being a distinctively new article which is known in the market." It held that printed and finished cloth was a different commercial commodity from grey cloth and was so understood in the market. Therefore it held that the process of bleaching, dyeing, printing and finishing amounted to a process of manufacture. This decision, therefore, does not make any departure from the existing test to determine whether any activity or process amounts to manufacture or not.

15. Mr. Desai also relied on a decision of the Supreme Court in the case of Empire Industries Ltd. v. Union of India reported in 1985 (20) ELT (S.C.). Once again the Court said that to constitute "manufacture" the transformation in the material must be such as to bring into being a different commercial commodity having as distinct character, use and name. The decision of the Bombay High Court in New Shakti Dye Works Pvt. Ltd. was upheld by the Supreme Court in this case. Mr. Desai has also relied on the case of Ujagar Prints v. Union of India reported in 1988 (38) ELT (SC) for the same purpose. We need not multiply authorities on this aspect.

16. Undoubtedly there are cases where the court has held that the processing may amount to "manufacture". In the Karnatak case - Deepak Extrusion and Another Vs. J.T. Chopra Assistant Collector of Central Excise Bangalore and Another, the court was required to consider whether lacquering and printing aluminium tubes amounts to manufacture under Sec. 2(f) of the Central Excises and Salt Act, 1944. The Court took into account the fact that under amended Sec. 2(f) in terms, "manufacture" in relation to aluminium includes lacquering and printing or both of plain containers. In view of this express provision in Sec. 2(f) the Court held that lacquering and printing aluminium tubes would amount to "manufacture".

17. In the case of Laminated Packings (P) Ltd. Vs. Collector of Central Excise, Guntur, the Court was required to consider whether lamination of duty paid kraft paper with polyethylene resulting in polyethylene laminated kraft paper amounts to manufacture. The court said that lamination amounts to manufacture. It said that by the process of lamination of kraft paper with polyethylene different goods come in being. Laminated kraft paper is distinct, separate and different goods known in the market as such from the kraft paper and therefore it is liable to excise duty. The fact that the resultant laminated kraft paper belongs to the

same tariff entry is not relevant because both of them are different identifiable goods known as such in the market.

18. In the present case, we have no material before us which would show that as a result of the process of lacquering/metallising of polyester film any new distinct commercial commodity comes into existence having a different identity or name. The only difference which results from the process of lacquering/metallising is a change in the colour of polyester film. There is no material before us which would show that such lacquered/metallised film has any special properties or is known differently in the market or has uses different from the uses of polyester film. In these circumstances looking to the test laid down by the Supreme Court in *Delhi Cloth and General Mills Co. Ltd.*, we are unable to hold that the processing carried on at the petitioners' factory at Nasik amounts to "manufacture". In fact, right upto 1982 no excise duty was levied on the processed polyester film produced in the petitioners' factory at Nasik. From July 1982, however, the respondents have sought to levy excise duty only on the ground that to under the new Tariff Item 15A(2) lacquered/metallised polyester films are expressly referred to. This, in our view, can make no difference if in lacquering/metallising polyester film no process of manufacture is involved because a new commercial commodity does not come into existence. This is not to say that the process of lacquering or metallising can never amount to manufacture. Whether it will amount to manufacture or not will depend upon the end-product which emerges and on whether this end-product is a distinct commercial commodity having its own separate identity and use.

19. It was also urged on behalf of the petitioners that the respondents have sought to levy excise duty only on account of the tariff advice of July 1982. Since the respondents have to perform a quasi-judicial function in deciding to classify goods and levy excise duty on such goods, their judgment cannot be fettered by any tariff advice. (See in this connection *Orient Paper Mills Ltd. Vs. Union of India (UOI)*,). We, however, do not find anything in the impugned orders which would indicate that the decision taken by the respondents is based on the tariff advice in question. Hence we need not examine this argument any further.

20. Mr. Desai also urged that the impugned orders are appealable orders and hence we should not entertain the present writ petition. Looking to the fact that the writ petition has been admitted by this Court as far back as in October 1982, and interim orders have also been passed in this writ petition as far back as in October 1982, it would not be proper on our part, after a lapse of 8 years, to refuse to adjudicate on the petition on merit only on the ground that at the relevant time an alternative remedy was available to the petitioners.

21. In the premises, rule is made absolute in terms of prayers (a) and (b). This includes refund of excise duty paid under protest from 28-2-1982 on lacquered/metallised polyester film at the petitioner's factory at Nasik. Refund to be made within 10 weeks from today failing which the amount will carry interest at 12% per annum thereafter.

22. The petitioners have also prayed for interest on the amount to be refunded. Looking however, to the circumstances of the present case and the nature of the contentions raised on both sides, in our view, this is not a fit case where interest should be awarded, except as above.

23. In the circumstances, there will be no order as to costs.