
(1987) 08 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No. 1180 of 1980

Gokalchand Rattanchand Woollen Mills Pvt. Ltd.

APPELLANT

Vs

U.O.I.

RESPONDENT

Date of Decision : 24-08-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 9

Central Excises and Salt Act, 1944 — Section 3

Citation : (1988) 15 ECC 45 : (1987) 13 ECR 921 : (1992) 61 ELT 566

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

H. Suresh, J.—Petitioner No. 1 is company manufacturing woollen yarn. In the petition the petitioners have set out the process for the manufacture of woollen yarn. During the process of the manufacture of the woollen yarn, an intermediate product known as "silver" comes into existence. The question is as to whether that item is liable for excise duty or not ?

2. Till the year 1979, silver obtained in the said process of manufacture of woollen yarn was not at all liable to the levy of excise duty. However, by the Finance Act of 1979, the Tariff Item 43, which originally made woollen tops alone excisable, was sought to be amended, and after the said amendment the said tariff item included silver as liable to the levy of the excise duty. The relevant portion of Tariff Item 43 after its amendment is as follows :-

"43. The wool tops and carded and gilled slivers containing in either case, more than 50% by weight of wool calculated on its total fibre contents."

3. After this amendment, the department called upon the petitioners to classify this item and to obtain a licence in that behalf. The petitioners pointed out that the carded and gilled silver is not an item bought and sold in the market and as such would not qualify for the status of "goods" within the meaning of Section 3 of the Central Excises and Salt Act. They also pointed out that there is an exemption notification bearing No. 82 of 1979 dated 1-3-1979 stating that no

duty is chargeable on carded and gilled slivers if they are used for the manufacture of woollen tops. The petitioners used carded and gilled slivers in the manufacture of semi-worsted woollen yarn. Therefore, they pointed out that it is the same property it should be said that the carded and gilled slivers which are used in a continuous process in the manufacture of spinning and semi-worsted woollen should be considered as exempted under this said notification.

4. However, the department would not take a categorical decision on this matter, but at the same time the department would not accept the contentions of the petitioners. Therefore, by their order dated 30th September, 1980 they directed the petitioners that they should pay the duty under protest. The petitioners have challenged this order of the department under Article 226 of the Constitution of India.

5. It is not necessary for me in this present petition to set out in detail the process whereby the said carded and gilled silver is obtained, but it is an admitted position that the product comes into existence at an intermediate stage. According to the petitioners it is a part of the continuous process of manufacturing semi-worsted woollen yarn. The petitioners' contention contained in the present petition is that the silver obtained in the process employed by the petitioners consists of a mere collection of loosely held fibres. The wool fibres in the said silver are not of uniform length and are not combed. The silver has no cohesive properties and cannot stick together and remains in loose form. This sliver is very brittle in nature and is liable to fall apart by handling. There is also a danger of its entanglement if it is not handled gently and if entangled, it becomes unsuitable for spinning. The said silver cannot also be allowed to be dried and the humidity condition prevailing at the stage of carding of the wool into silver has also to be maintained in the spinning section. If the moisture content is lost, the sliver gets dried up and the fibre strands fall apart and collapse and become unfit for spinning. The sliver cannot be packed and transported in view of its non-cohesive and brittle nature. Any form of packing entailing even the slightest pressure would entangle the fibre and render it unfit for spinning. Once the said silver gets entangled, it would cease to be sliver. The petitioners particularly pointed out that the sliver because of its non-cohesive and brittle property and because of the requirement of raising it at a particular level of humidity cannot be bought or sold in the market and is not a commodity which is marketable or known to the trade.

6. In the petition, the petitioners have set out in the detail as to how the sliver is to be used for spinning woollen yarn. In that process it is possible to remove this item from one department to another, but it is clear from the facts placed before me that this item is not marketable, nor it is sold or bought outside the factory. Therefore, the question is as to whether this item can still come within the definition of "excisable goods" as contemplated under the Act.

7. A similar question arose before the Delhi High Court in the case of Modi Carpets Limited and another Vs. Union of India and others, . That case directly

related to the silver used in the manufacture of woollen tops. Three contentions were advanced before the learned Judges. The first contention was that this Tariff Item 43 was ultra vires Section 3 of the Act. The second contention was that the Parliament was not competent under Entry 84 of List I of the VII Schedule to the Constitution of India to amend the T.I. 43 so as to include therein an item which is not "goods" and which is not "manufactured". The third contention was that before duty of excise can be charged and collected, there must be removal of the product within the meaning of Rules 9 and 49 of the Central Excise Rules, 1944. It was contended that if the product was not removed from the factory and was obtained only at an intermediatory stage within a process in the factory, there was no removal, and there could be no liability for the payment of the excise duty.

8. The Court did not deal with the first two contentions, but accepted the third contention advanced on behalf of the petitioners. On that ground, the impugned order was struck down. It is true that it was also contended on behalf of the petitioners that the silver which is obtained by them were not "goods" within the meaning of Rule 9 of the Central Excise Rules. The learned Judges did not go into this question as they were allowing the petition on the ground that the excise duty was not leviable on the goods if there was no removal of the goods as contemplated by Rules 9 and 49 of the said Central Excise Rules.

9. During the pendency of this petition, Rule 9 was amended by the Finance Act, 1982 and an explanation was added to the rule, whereby any commodity, whether it is in the course of the process of manufacturing an end product, or otherwise shall be deemed to have been removed. The said explanation to Rule 9 is as follows :

"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."

The Act further provided that this amended rule became enforceable with retrospective effect, as if it was always a part of the rule from the very beginning. With the result, the Delhi Judgment became questionable. I am told as against the judgment given by the Delhi High Court, the matter has gone to the Supreme Court and the interpretation of this very amended Rule 9 is under consideration by the Supreme Court. Mr. Rege, appearing for the respondents, pointed out that since the Supreme Court was considering this question, this petition should be adjourned till the Supreme Court decides this matter one way or the other. He also pointed out that in any event this Court will have to go into the question as to whether the amended Rule 9 would be applicable or not. He

submitted that if the amended rule would apply, in that event it cannot be said that this item is not liable for excise duty on the ground that it is removed from one department to the other department within the factory. In my view, I need not go into the question of the amended Rule 9 at all. It is true that the Delhi High Court did not go into the question whether this item can be considered as an item of excisable goods or no. But I think, the present petition can be decided on the question whether this item can be considered as "excisable goods" or not, within the meaning of the Act.

10. In this connection, I must refer to a recent judgment of the Supreme Court in the case of Union Carbide India Limited Vs. Union of India (UOI) and Others, . That was a case dealing with the manufacture of aluminium cans as an intermediate product, and the same was not marketed at all. It is on that basis the Supreme Court said that they were not "goods" within the meaning of the Act.

11. On the same reasoning as given by the Supreme Court, I would also hold that the item "sliver" is not excisable, inasmuch as it cannot be considered as "goods" within the meaning of the Act. The petitioners have set out in detail as to how that material remains incohesive and it cannot be bought and sold in the market and it is not a commodity which is marketable or known as such in the trade.

12. The department has not placed any material before me to say that this item has a market as such. Mr. Rege relied on the sentence appearing in Exhibit "A" to the petition, being a letter dated 3-9-1979 addressed by the petitioners to the Collector of Central Excise wherein the petitioners have stated that the carded gilled sliver being an intermediate product, the same is not ordinarily sold in the market. Mr. Rege pointed out that the word "ordinarily" would indicate that it might be sold in the market at some point of time or the other. I have seen the petition as a whole. The petitioners have made a categorical statement on oath that the product is not marketable and is not known to the trade as a commodity which is. The onus is heavily on the department to show as to how the same is marketable. Therefore, in my view it is clear that this intermediate product cannot be considered as "goods" within the meaning of the term under the Act and in that event it is not possible for the department to call upon the petitioners to pay any excise duty relying on Tariff Item No. 43. I, therefore, pass the following order :

ORDER

13. Rule made absolute in terms of prayer (b) (i), (iii) and (iv) of the petition.

14. The bank guarantees furnished by the petitioners pursuant to the interim orders to stand discharged and the same be cancelled by the department and handed over to the petitioners within a period of eight weeks from today.

15. In the circumstances of the case there will be no order as to costs.