(1997) 03 P&H CK 0123

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 1320 of 1983

Himayayam Tea Private Limited APPELLANT

Vs

The Superintendent of Central Excise and Another RESPONDENT

Date of Decision : 18-03-1997

Acts Referred:

Citation : (1997) 58 ECC 46 : (1997) 92 ELT 52 : (1997) 116 PLR 703 : (1997) 3 RCR(Civil) 253

Hon'ble Judges : N.K. Agrawal, J

Bench : Single Bench

Advocate : J.K. Sibal and Kumar Sethi, for the Appellant; Arun Nehra, Sr. Central Govt. Standing Counsel, for the Respondent

Judgement

N.K. Agrawal, J.—This is a petition under Articles 226/227 of the Constitution of India for quashing the order dated 27.12.1982 passed by the Superintendent of Central Excise and Customs, Ambala Cantt.

2. The petitioner-Company is engaged in the business of packing loose tea at Ambala. The petitioner receives loose tea in bulk as an agent from M/s. Duncans Tea Sales Limited, Calcutta. Loose tea is first blended and then packed in printed small cartons and packages varying in weight from 25 grams to 500 grams. Excise duty is leviable on the manufacture of various articles under the Central Excise and Salt Act, 1944 (for short, "the Act"). The word ''Manufacture'' has been defined in clause (f) of Section 2 of the Act which reads as under:-

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

(i) In relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff,

(i-a) In relation to manufactured tobacco, includes the labelling or re-labelling of containers and packing from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer;

(ii) In relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce elementary salt, and the excavation or removal of natural saline deposits or efflorescence;

(iii) In relation to patent or proprietary medicines, as defined in Item No. 14-E of the First Schedule and in relation to cosmetics and toilet preparations as defined in Item No. 14-F of that Schedule, includes the conversion of powder into tablets or capsules, the labelling or relabelling of containers intended for consumers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumers;

(iv) In relation to goods comprised in Item No. 18-A of the First Schedule, includes sizing, wrapping, winding or reeling, or any one or more of these processes, or the conversion of any form of the said goods into another form of such goods;

and the word ''manufacture'' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

Different varieties of tea are chargeable to excise duty at the rates specified in Item No. 3 of the First Schedule to the Act. Item No. 3 in the said Schedule, relating to the levy of excise duty on tea reads as under :

"3. TEA.

''Tea'' includes all varieties of the product known commercially as tea, and also includes green tea and "instant tea".

(1) Tea, all varieties except Not exceeding two rupees package tea and "instant per Kilogram as the Central tea" falling within sub- Government may, by items (2) and (3) notification in the Official respectively, of this item: Gazette, fix.

(2) Package tea, that is to say, One rupee and twenty-five packed in any kind of paise per Kilogram plus the container containing not duty for the time being more than 27 Kilograms net leviable under sub-item (1) of of tea but excluding this item, if not already paid, "instant tea".

(3) "Instant tea". Ten per cent ad valorem plus the duty for the time being leviable on tea falling under sub-item (1) if this Item, if such tea is used in the manufacture of such "instant tea".

3. From the reading of the above entry it is obvious that excise duty is leviable under three different heads depending upon the variety of the tea. Under sub-item (1), excise duty not exceeding two rupees per kilogram, as the Central

Government may fix, is leviable on tea of all varieties except package tea and instant tea. Under sub-item (2), the rate of excise duty on package tea has been fixed at Rs. 1.25 per kilogram in addition to the duty leviable under sub-item (1). Excise duty on "instant tea" under sub-item (3) is levied at 10 per cent ad valorem in addition to the excise duty leviable under sub-item (1).

4. The petitioner''s case is that no excise duty is payable because it has already been paid by the Principals at Calcutta and the petitioner was only doing packaging at Ambala and therefore, it did not fall within the meaning of ''manufacture''. It is argued by Shri J.K. Sibal, learned Senior Advocate for the petitioner, that packaging was not "manufacturing" as defined in clause (f) of Section 2 of the Act. The word ''manufacture'' means the bringing of a change in a material by some processing. Every change in a material is, however, not ''manufacture''. There must be a transformation and thereby a new and different article should emerge with a distinct name, character and use. Mere process of packaging of tea from bulk containers into small containers, without making any alteration in the ingredients of tea, would nor amount to ''manufacture''. Shri Sibal has vehemently argued that charging of excise duty on mere packaging is in conflict with the meaning of clause (f) of Section 2 of the Act. Excise duty is charged under Sub-section (1) of Section 3, which reads as under :-

"3. Duties specified in the First Schedule to be levied :- (1) 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 and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates set forth in the First Schedule."

5. The petitioner''s case is primarily based on the plea that the levy of excise duty on packaging is outside the powers of Parliament inasmuch as packaging was not an act of manufacturing. Since the petitioner was only doing packaging of duty - paid loose tea, it was an unauthorized levy of excise duty on packaging. Duty had been already paid on loose tea by M/s Duncans Tea Sales Limited as charged under subitem (1) of Item 3 of the First Schedule and no duty was required to be paid again by the petitioner at the time of packing the same loose tea into smaller packets. The petitioner was doing the work of packaging as an agent of the principals, M/s Duncans Tea Sales Limited. Small packets were prepared for marketing purposes. Though the petitioner has been paying excise duty on the packaging for the last 4 years but that was under a mistaken belief and, therefore, the petitioner cannot be debarred from challenging the levy of excise duty simply for the reason that, in the earlier years, the petitioner did not challenge the levy and paid excise duty on the packaging of tea.

The petitioner paid the excise duty in the earlier years as under :-

(Rupees) (i) 1979-80 (July 1979 to March 1980) 37,245.00, (ii) 1980-81 (April 1980 to March 1981) 1,64,283.00 (iii) 1981-82 (April 1981 to March 1982) 3,42,034.00 (iv) 1982-83 (April 1982 to March 1983) 5,70,194.00 Total:-

11,13,756.00

6. The petitioner has sought the refund of the amount of excise duty paid in the earlier 4 years as mentioned above. It is also prayed that sub-item (2) of Item 3 of the First Schedule to the Act be declared as ultra vires and the respondents be prohibited from recovering excise duty from the petitioner on the packaging of tea.

7. The respondents have contested the claim of the petitioner with the plea that the petitioner, after receiving tea in bulk from M/s Duncans Tea Sales Limited, did two acts, namely, (i) blending and (ii) packaging. This has been admitted by the petitioner in its letter dated 16.12.1982 sent to the respondents. It is contended by Shri Arun Nehra, Senior Standing Counsel for the Central Government, that blending was an activity incidental and ancillary to the completion of manufacture and so was packaging. Since the petitioner was doing not only packaging and blending also, there was no force in the petitioner''s plea that the package tea was not liable to excise duty. "Package tea" has been specifically subjected to the levy of excise duty under sub-item (2) of Item 3 of the First Schedule and, therefore, the levy of duty was legal and within the ambit of the Schedule. Column 3 specifying the rate of duty in respect of package tea in sub-item (2) made it explicitly clear that package tea is subjected to the levy of duty in addition to the duty leviable under sub-item (1). Shri Nehra has argued that the petitioner obtained a licence under the Act in the month of February, 1979, for package tea. The petitioner was doing the blending and packaging for and on behalf of M/s Duncans Agro-Industries Limited, Calcutta. Printed packets were supplied to the petitioner by the Principals, M/s. Duncans Agro-Industries Limited. Package tea was a distinct variety of tea and has been separately specified as an item under sub-item (2) of Item No. 3 of the Schedule.

8. Manufacture of black tea, which is commonly used in India, passes through various processes, namely, picking of green leaves, withering, rolling, fermentation, firing and grading. After tea is subjected to grading, the graded tea is stored in heaps and then despatched in plywood chests or jute bags. Loose tea is covered under sub-item (1) of Item 3 in the First Schedule for the levy of excise duty at such rate as the Central Government may, by notification, fix. package tea is the tea packed in containers weighing not more than 27 kilograms net tea. Blending is an important process before packing. Teas are blended keeping in view the colour and flavour of different varieties. The petitioner is engaged in tow activities, namely, blending and packaging in the brand names of "Duncans Gold Cup" and "Double Diamond".

9. The respondents have justified the levy of excise duty on the package tea with the plea that blending and packing were two distinct and essential processes towards the completion of the manufactured products known as package tea. These two processes are said to be incidental and ancillary processes of manufacture within the meaning of clause (f) of Section 2 of the Act. Since the Parliament has classified manufactured tea in different specific categories or

varieties under Item 3 of the First Schedule for the purposes of levy of excise duty at different rates, the levy of duty accordingly is stated to be within the scope of the Act.

10. Shri Nehra has further argued on behalf of the respondents that blending was a fine art and was, therefore, a necessary process and part of ''manufacture''. Different blends are obtained by proper mixing of different varieties of tea. Manufacture is complete after blending and packaging only.

11. "Packing" was held to be not a process of manufacture by the Calcutta High Court in Orissa Industries Limited v. Union of India and Ors. 1979 ELT 457. That was a case where chinaware, porcelain-ware, glass as well as glass-ware were delivered to customers in packed condition. It was held that packing by itself did not constitute a process which may be treated as identical or ancillary to be completion of such goods because they can be delivered to the customers even in wholesale without packing.

12. In another case, Calcutta High Court in Seth Chemical Works (P) Ltd. Vs. Union of India (UOI), , examined the question of duty on the ultramarine blue manufactured in bulk and sold in bulk as well as in small packets. It was held that packing in small packets, not being manufactured was not liable for duty.

13. The Mysore High Court had also an occasion to examine ''packing'' in Alembic Glass Industries Ltd. v. Union of India and Ors. 1979 E.L.T. 461. There also, the company was engaged in the manufacture and sale of glassware. It was held that ''packing'' was not incidental or ancillary to the process of manufacture of bottles.

14. The Bombay High Court has also, in Ogale Glass Works Ltd. v. Union of India and Ors. 1979 E.L.T. 468, taken the same view. There also, it was a case of glass and glassware. It was observed that if the goods are such that without packing they do not become excisable, then ''packing'' can be considered as a process incidental or ancillary to the completion of such goods. But, if the goods can be said to have completely been manufactured before they are packed, then ''packing'' cannot be considered as a process of manufacture even though such goods are delivered to customers in packet condition. The mode or manner of marketing or delivery or transporting excisable goods, which have been fully manufactured, can never by itself determine the assessable value of such excisable goods.

15. The Madhya Pradesh High Court has examined a similar question on the packaging of loose tea in Keshaodeo Shivprasad (Firm) and Others Vs. Union of India (UOI) and Others, . It has been held that where tea is the excisable goods produced or manufactured, including all incidental or ancillary processes, the process of ''packing'' alone cannot, by any stretch of imagination, be either incidental or ancillary to, nor in any manner, integrally or inextricably bound with the production or manufacture of tea. The process of packing is neither incidental nor ancillary to the completion of the manufactured product called tea. For that

matter, the transfer of the end product into containers which can be handled conveniently, and putting marks on the labels on the containers is not a process either incidental or ancillary to the completion of the manufactured articles called tea. Shri J.K. Sibal, learned counsel for the petitioner, has argued that neither blending nor packaging is part of the process of manufacturing inasmuch as these two activities were quite distinct from the manufacturing activities and were part of the marketing process. When once duty has been paid by the manufacturer at Calcutta, no further duty could be levied at the package stage. Therefore, levy of excise duty under sub-item (2) of Item 3 of the First Schedule is said to be without jurisdiction and outside the scope of the Act. Liability to pay excise duty would arise only where, on certain processing, a different article emerged. Blending was only the mixing of loose tea with different flavours and colours. Since it was an act of mixing alone, that could hardly be treated to be an act of manufacturing.

16. Shri Arun Nehra has placed reliance on a decision of the Supreme Court in Aditya Mills Ltd. Vs. Union of India (UOI), . That was a case where two plies of polyester Spun Yarn (PP) and one ply of Rayon Filament Yarn (RF), which are doubled together and the resultant yarn is referred to as PPRF Yarn. That resultant Yarn is a separate and distinct item and is taxable under Tariff Item 68 no withstanding that duties already paid on Polyester Spun Yarn and Rayon Filament Yarn. It was observed that excise duty is a duty on the manufacture of goods and not on sale. Manufacture is complete as soon as, by the application of one or more processes, the raw material undergoes some change. If a new substance is brought into existence or if a new or a different article, having a distinct name, character or use, results from a particular process or processes, such process or activity would amount to ''manufacture''. The moment there is a transformation into a new commodity, commercially known as a separate and distinct commodity having its own character and use,'' manufacture'' takes place.

17. In the case of the present petitioner, blending of different varieties of tea is done before packaging. The respondents have treated this blending to be a necessary part of the manufacturing process. It is for that reason that the levy of duty has been said to be within the ambit of sub-item (2) of Item 3.

18. It is evident from the facts arising from the rival contentions that the petitioner is only mixing different varieties of tea with different flavours and colours and, thereafter, packaging the same into small marketable packets. It is not disputed that excise duty was already paid by the manufacturers on loose tea at Calcutta. What was done at Ambala by the petitioner was, therefore, not anything but a part of the marketing process. Loose tea was received from Calcutta in big containers and, thereafter, it was, after blending (mixing), packed into small packages and containers. This can hardly be treated to be a process of manufacturing. The view taken by the Division Bench by Madhya Pradesh High Court in Keshardeo Shivaprasad''s case (supra) in a similar case is found to be in support of the petitioner''s plea. Therefore, the charging of excise duty on mere

packaging is found to be not justified inasmuch as it was not a part of the manufacturing activity. Small packets were prepared by the petitioner for marketing purposes. There is nothing on record to show that the tea manufactured in bulk and received by the petitioner at Ambala was not a saleable commodity as such or that, after blending and packaging, the bulk tea underwent any processing to be called a different commodity. Since it remains tea after blending and packaging, it is not different from the bulk tea on which duty had already been paid. There was no transformation nor any change in the character of the commodity. In these circumstances, the petitioner''s plea succeeds. Mere packaging, being not part of manufacturing, cannot be treated to be the subject for the levy of excise duty.

19. The petitioner has demanded the recovery of excise duty paid in the earlier four years. The petitioner has neither chosen to challenge the levy in any of the earlier years by way of any appeal or revision under the Act nor has shown that excise duty was not charged from the buyers. In Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and others, , the question of refund was examined in paragraph 23 of the judgment. That was a case where octroi duty had already been deposited by the Corporation-company. It was held that the question of refund did not arise because the Corporation-company had collected octroi duty from the dealers and agents who had, in turn, passed the burden to the consumers. Following the ratio of the said decision in the case of the petitioner also, there is found no equity to allow the refund of excise duty for any of the earlier four years. The petitioner has not shown that excise duty was not collected from the buyers. Therefore, the plea of refund is liable to be rejected.

20. In the result, the writ petition partly succeeds and is allowed accordingly. The levy of excise duty on the packaging of tea is held to be outside the scope of the Act inasmuch as it is not part of manufacture. The respondents are not entitled to collect excise duty on the packaging of tea done by the petitioner. However, the petitioner''s claim for the refund of the excise paid in the four years is rejected. No order as to costs.

