

(1996) 05 DEL CK 0102

In the Delhi High Court

Case No : Civil Writ Petition No's. 3836, 3903 and 3939 of 1995 and 1008 of 1996

Kissan Chemicals

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-05-1996

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37B

Citation : (1996) 3 AD 510 : (1996) 64 DLT 73 : (1996) 37 DRJ 623 : (1996) 88 ELT 648

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : A.N. Haksar, Archana Wadhwa and A.K. Wali, for the Appellant;

Judgement

C.M. Nayar, J.

(1) The present judgment will dispose of Civil Writ Petition Nos-3903/95 (M/s Kissan Chemicals v. Union of India and others), 3836/95 (PI Industries Ltd. and another v. The Union of India and others), 3939/95 (M/s Hindustan Pulverising Mills v. Central Board of Excise and Customs) and 1008/96 (M/s Markfed Agro Chemicals v. Union of India and others). The petitioners in all these petitions have challenged the issuance of Circular/Order, Annexure P-3 to the petition, issued u/s 37B of the Central Excise and Salt Act, 1944 by the Central Board of Excise and Customs. The learned counsel have contended that common questions arise in all the cases, though in some cases the Circular has been impugned and in other cases the issuance of show cause as well as the consequent orders have been challenged. The petitions are, Therefore, disposed of by this judgment.

(2) The facts of writ petition No-3903/95 (M/s Kissan Chemicals v. Union of India and others) may be noticed.

(3) The petitioner is a Unit of M/s Montari Industries Ltd. having its works at 41,

Industrial Area, Phase-II, Chandigarh and is engaged in the formulation of pesticides. The petitioners submit that the process employed in the manufacture of formulating pesticides consists of buying of highly concentrated pesticides either from the market or from the manufacturers directly. The highly concentrated pesticides are cleared from the factory of the manufacturer after payment of appropriate duty of excise livable thereon under Chapter 38 of the Central Excise Tariff Act, 1985. These pesticides are diluted by the addition of certain dilutants/solvents or inert carriers. The dilution of the highly concentrated pesticides results, it is alleged, in lowering the concentration of the product. The products even after dilution are marketed by the same name and style. This activity of dilution of highly concentrated pesticides has been held to be a non-manufacturing activity by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, in their decision and judgment passed in the case of 1994 (50) ECR 417 . The said judgment was rendered by the Tribunal on 15th September, 1993.

(4) The Tribunal relied upon the judgments of the Supreme Court as reported in Deputy Commissioner, Sales Tax (Law) Board of Revenue, Emakulam v. Pio Food Packers 1980 Elt 343 and of the Bombay High Court in Sandoz India Ltd v. Union of India and others 1980 Elt 696 to reiterate the proposition that though the nature and extent of processing may vary from one case to another yet, it is only when the change or a series of changes take the commodity to the point where commercially it is recognised as a new and distinct article that a manufacture can be said to have been taken place. Paragraph 7 of the judgment of the Tribunal reads as follows:

"IT is seen that the processing of the concentrated basic pesticides Chemicals in question carried out by the respondents through addition of inert carriers / solvents and dispersing and stabilising agents resulted only in their dilution rendering them suitable for use either directly or after addition of water and formulations retained the name of the basic Chemicals. Evidently no new product having distinctive name, character and use appeared as a result of such processing. Under these circumstances on the ratio of the decisions quoted above, we hold that the processes carried out by the respondents did not constitute "manufacture" within the meaning of Section 2(f) of the Central Excises and Salt Act, 1944."

(5) The respondent Department did not file any appeal against the judgment of the Tribunal and the Board merely issued Notification dated 27th July, 1995 in exercise of powers u/s 37B of the Act to order that "the addition of Chemicals and other ingredients like inert carriers or solvents and also surface active dispersing and stabilising agents to pesticide Chemicals in highly concentrated form would amount to "manufacture" within the meaning of Section 2(f) of the Act since it results in the emergence of a new and distinct product having different properties viz pesticide/insecticide fit for direct use. The Pesticide Chemicals and the formulations will both be classified under heading 38.08 of

Ceta 1985." The Board further directed that a copy of the order be sent to all Chief Commissioners of Central Excise and Commissioners of Central Excise for being observed and followed and for being made available to all other persons employed in the execution of the Central Excise and Salt Act, 1944, and for issue of Trade Notices. Therefore, it was held that the dilution of technical grade pesticides by dilution of solvents etc. amounts to manufacture. The Board did not accept the decision of the Tribunal as cited above and issued the above said Notification of which paragraphs 2, 3 and 4 dealing with the reasons may be reproduced as follows:

"2.The Hon"ble Tribunal, while stating the accepted principle that for "manufacture" to take place a new product having a distinctive name, character and use must emerge, have held that addition of inert carriers/solvents and dispersing and stabilising agents resulted only in their dilution rendering them suitable for use either directly or after addition of water and formulations retained the name of the basic Chemicals, evidently no new product having distinctive name, character and use appeared as a result of such processing.

3.The matter has been carefully considered by the Central Board of Excise & Customs (hereinafter referred to as the "Board"). The above mentioned judgment of the Hon"ble Tribunal had not been accepted by the Board on merits. The appeal, was however, not filed on account of very low amount of duty involved. Further this judgment is with reference to the old tariff and will not be applicable to Ceta, 1985. Further neither any opinion of technical experts was obtained nor any Chemical test conducted to ascertain whether any new product had emerged on addition of the solvents and dispersing and stabilising agents.

4.It is observed that the addition of Chemicals and other ingredients like inert carriers or solvents and also surface active dispersing and stabilising agents to pesticide Chemicals in highly concentrated form results in the emergence of a new and distinct product having different properties viz pesticide/insecticide fit for direct use. The above processes are not mere dilution of the concentrate but they modify the surface properties as well as the strength of the raw material, thus bringing about a new product."

(6) The learned counsel for the petitioners have questioned the validity of circular issued on 27th July, 1995 in the light of the decision rendered by the Tribunal. It is argued that the Board had no right to issue circulars incorporating directions which are contrary to the decision of the Tribunal. It was open for the Department to move either the High Court or the Supreme Court to get the correctness of the decision of the Tribunal decided but having not done so, the effect must be given to the decision of the Tribunal. The counsel have further referred me to the Division Bench judgment of the Bombay High Court in Special Civil Application Nos.9034,8580,8730,9035 and 9036 of 1995 decided on 15th April, 1996 where similar challenge to the same circular was made. The learned Judges after reproducing the provisions of Section 37B of the Act came to the following conclusion:

"THIS section empowers the Board to issue circular for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. Certainly, this section does not authorise the Board to issue directions which is contrary to the decision rendered by the Tribunal. Mr.Ajmera, learned Advocate could not point out anything which would suggest that the Board has such powers or that the Board was justified in issuing such circular. It may be that the Board may not be in agreement with the view taken by the Tribunal then in that case, the Board may carry the matter in appeal, but once the decision has become final by issuing circular, the decision rendered by the Tribunal cannot be made to be nugatory."

(7) The learned counsel for the respondents have not been able to assail the settled position of law that the Board can not merely issue a-circular which will render the decision of the Tribunal as irrelevant and nugatory. It is, however, argued that the respondents did not file appeal against the decision of the Tribunal on the ground that the Hon''ble Supreme Court declined to interfere in many cases where the subject mater of Excise Duty involved was not substantial. The counsel have further referred to the departmental communication dated 13th January, 1993 from Ministry of Finance to various Collectors of Central Excise filed as Annexure R.2 with the counter affidavit of the respondents. Paragraphs 2,3,4 and 5 of this Communication may be reproduced as under:

"2.TAKINGcue from this judgment the learned Attorney General conveyed that the Supreme Court "had also observed that the Government should not file cases, petitions where amounts involved are very small.

3.Considering the aforesaid background, the avalanche of litigation which has choked the judicial forum has to be contained. The sheer number of cases makes it difficult for the Court to render justice in time.

4.The Government, Therefore, have decided that filing of appeal may he considered only where substantial questions of law arc involved and there is no direct ruling or case law of the Supreme Court on the issue.

5.Further, no appeal to the Supreme Court may he filed where such duty involved is Rs.5 lakhs or less."

(8) The above considerations cannot be held to be relevant to reverse the decision of the Tribunal which has been rendered on cogent "grounds. The decision of the Tribunal having become final, the only option left with the Department was to take the matter in appeal and impugn that decision. The issuance of circular by the Board in the present facts cannot be held to be an appropriate remedy.

(9) For the aforesaid reasons, the writ petitions are allowed. The impugned Notifications and the consequent proceedings are hereby quashed. There will be no order as to costs.