(2009) 01 KL CK 0013

In the High Court Of Kerala

Case No : Writ Petition (C) No. 33901 of 2008 (J)

Koldy Petroleum (India) Ltd. APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 28-01-2009

Acts Referred:

Explosives Act, 1884 — Section 4
LPG Gas Cylinders Rules, 1981 — Rule 2

Citation : (2009) 1 ILR (Ker) 945 : (2009) 1 KLT 869 : (2010) 27 VST 284

Hon'ble Judges : K.M. Joseph, J

Bench : Single Bench

Advocate : C.K. Karunakaran, for the Appellant; C.K. Govindan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—The petitioner challenges exhibits P5 and P10 and seeks a direction to pass fresh orders on exhibits PI after considering all the grounds raised in exhibits PI appeal. Further ancillary prayers are also raised.

2. The case of the petitioner in brief is as follows:

Petitioner is a small-scale industry which applied for exemption from payment of sales tax under the provisions of SRO No. 1729/1993. The fifth respondent, namely, the General Manager, District Industries Centre, Palakkad, rejected the application. The petitioner preferred an appeal to the second respondent, State Level Committee for exemption of sales tax. The appeal was allowed and the matter was remitted back to the fifth respondent. The fifth respondent again rejected the application. Thereafter, the petitioner preferred exhibit PI appeal which has been rejected by exhibit P10 by the second respondent.

3. The petitioner is a company incorporated under the Companies Act, 1956, for the purpose of establishing, operating LPG bottling plants and sale of LPG cylinders and other functions. It is the case of the petitioner that hearing of

exhibit PI appeal was scheduled on March 6, 2006 and the petitioner was notified by exhibits P3. It is stated that the counsel was out of station and, therefore, the petitioner sought for an adjournment and the request was made through exhibit P4 letter. It is thereafter that the petitioner came to know about exhibit P10 order passed on exhibit PI appeal after filing the writ petition. A counter-affidavit is filed to which a reply affidavit is filed.

4. I heard learned Counsel for the petitioner and learned Government Pleader. It is contended that the finding that there is no manufacture involved is absolutely unsustainable. He would point out that actually the process involved in the case satisfied the requirement of the definition of the word "manufacture" in the notification. "Manufacture" has been defined as follows in Clause 11(ix) of SRO No. 1729/93:

''Manufacture'' shall mean the use of raw materials and production of goods commercially different from the raw materials used but shall not include mere packing of goods, polishing, cleaning, grading, drying, blending or mixing different varieties of the same goods, sawing, garbling, processing one form of goods into another form of the same goods by mixing with chemicals or gas, fumigation or any other process applied for preserving the goods in good condition or for easy transportation. The process of producing desiccated coconut out of coconut shall be deemed to be ''manufacture'' for the purpose of this notification.

The following processes shall not be deemed to be ''manufacture'' for the purpose of this notification:

(a) Crushing copra and producing coconut oil and coconut oil cake.

(b) Converting timber logs into timber sizes.

(c) Crushing rubble into small metal pieces.

(d) Converting sodium silicate into liquid silicate.

(e) Tyre-retreading.

(f) Cutting granite or marble slabs into smaller pieces and/or polishing them.

(g) Such other processes as may be notified by Government in this behalf.

5. The process "manufacture" has been detailed in the appeal memorandum. Paragraphs 6 and 7 would appear to be devoted to the process involved and it is extracted as hereunder:

6. Without prejudice to the above submissions, it is submitted that the process of bottling LPG is not mere packing. The petitioner purchases bulk quantity of LPG from oil refineries and LPG importers and transports it in tanker lorries to its factory. The same is unloaded and stored in large storage tanks and thereafter filled into smaller cylinders. This is a complex process, which involves expertise and special knowledge, especially the process of purging of oxygen from the

cylinder by pumping in nitrogen and thereafter decanting nitrogen to fill LPG under strict controls of the parameters like pressure and temperature. Moreover, the Gas Cylinder Rules, 1981, which was formulated under the Explosive Act, 1994, which is an Act to regulate the manufacture, possession, use, sale, etc., of explosive material, defines ''manufacture of gas'' in Rule 2(xxv) as filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder. Similarly Section 4(h) of the Explosive Act also gives a definition for the word ''manufacture'' in the same lines. Similarly even the word ''manufacture'' expressed in SRO No. 1729 of 1993 means the use of raw materials and production of goods commercially different from the raw materials. The submissions made in the preceding paragraph will definitely show that the bottling of LPG is not mere packing.

7. Now the next question is whether there is an emergence of any goods during the manufacture, which is commercially different from the raw materials. The process of bottling LPG has not been deemed as packing of LPG under the KG ST Act. Entry 91 of the First Schedule to the KGST Act and SRO No. 405 of 1994 which gives details of various packing materials for commodities does not include the steel cylinder for LPG in the said list. LPG is listed under item 97(vi) of the First Schedule. As no packing is specified in LPG under item 97(vi) or item 91 of the First Schedule, it can only be presumed that LPG under the First Schedule is the commercial product LPG and not the bulk LPG. Bulk LPG has to be processed and bottled to make it suitable for domestic and commercial use. Hence by no means is a product substantially different from LPG obtained in the process of refining of petroleum. It has been held by the honourable Supreme Court as well as various High Courts, including the Kerala High Court, that it is the marketability of the product that attracts the incidence of tax. From the foregoing paragraph it can be seen that the process of bottling LPG has every characteristic of a manufacturing process and has to be rightly classified as ''manufacture'' for the purpose of SRO No. 1729 of 1993.

6. It is stated that there is manufacture and he would submit that this Court should discourage this sort of approach to the matter by the State Level Committee. He would submit that under the Explosive Rules, it is treated as manufacture. It is also stated that bottling of LPG was a regulated industrial activity and covered with the First Schedule of the Industries (Development and Regulation) Act, 1951 and licence under the Act was necessary till 1994. It is also pointed out that in Karnataka and Andhra Pradesh, it is being treated as manufacture. It is also pointed out that a new commercially different product emerges in this process.

7. Per contra, learned Government Pleader Sri C.K. Govindan would submit that it is a clear case where absolutely no manufacture is involved. LPG remained as LPG even after process undertaken by the petitioner is completed. It is further pointed out that actually it would amount to packaging and no new commercial product emerged.

8. There can be no doubt that the question as to whether it is manufacture or not is to be answered with reference to the terms of the definition of the word "manufacture" in the notification. On a perusal of the definition, there are three crucial elements involved in "manufacture" as defined. In the first place, there must be raw materials. Secondly, there must be production and lastly, what is produced must be a commercially different product. Applying these three tests to the process undertaken in the petitioner''s factory, I am of the firm view that it cannot be said that there is any manufacture involved. It is not in dispute that what was LPG continues to be LPG. In other words, the product which was present in bulk form is put into smaller form and thereafter it is sold to the end consumer. In this process, what is involved is stated by the petitioner itself in its appeal memorandum which I have already extracted. A perusal of the same would clearly show that the petitioner specifically admits that LPG is purchased in bulk from oil refineries and LPG importers and transported in tanker lorries to its factory. It is unloaded and stored in large storage tanks and later filled into smaller cylinders. This is the process which is involved. Therefore, there is no dispute that what is filled into the smaller cylinders continues to be LPG. There is no case that there is any chemical change in the product. What is stated as a complex process involving skill and special knowledge is as follows : Oxygen is purged from the cylinder by pumping in nitrogen and thereafter nitrogen is decanted to fill LPG under strict control of the parameters like pressure and temperature. This is the complex process which is adverted to. This process, in my view, is apparently undertaken for the purpose of filling the small cylinders with LPG. In other words, what is brought in bulk is transferred into small cylinders and for carrying out this process, purging of oxygen from the cylinder by pumping in nitrogen and subsequently decanting nitrogen under the strict control of the parameters like pressure and temperature is undertaken. By no stretch of imagination, can it be said that this involves production of a commercially different article. What was LPG remains LPG in smaller cylinders. Learned Counsel for the petitioner relied on the decision reported in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Coco Fibres, . Therein, the apex court was considering whether making of coconut fibre from husk involves any manufacturing process. The court proceeded to hold as follows:

In view of the admitted position that green husk is soaked into saltish sea water for days together and after decomposition, on being subjected to beating either by manual or mechanical process, fibre is produced in the process, which is a distinct commodity known in the commercial parlance. No one in the market would sell or supply husk when fibre is asked for. Accordingly, it must be held that the coconut fibre is commercially a different identifiable commodity known as such in the commercial parlance....

9. It is noted, in the facts of this case, that there is no case that what is marketed is a product different from LPG.

10. No doubt, learned Counsel for the petitioner would submit that the process involved by the petitioner satisfies the requirement of the manufacture as what emerges is a commercially different article. I feel that there is no merit in the said contention. In the first place, the said contention overlooks the indispensable requirement of "manufacture" as defined in the clause as already noted that there must be raw material and an act of production and the product being commercially different. It may be true that to reach it to the end consumer it has to be packed into smaller cylinders. It may be necessary for marketing it to the end consumer. I am not able to find out as to what are the raw materials from which this LPG is made. In other words, LPG is transferred from bulk quantity into smaller cylinders. There is no raw materials as such from which a product is made which can be said to be commercially different. Apparently, the makers of the notification intended to promote manufacturing activity within the State. It has expressed its clear intention not to extend the benefit to activities like packaging as the definition shows. As already noted, there is no production of a commercially different article from a different raw material and LPG remains as LPG after the entire process is over. In such circumstances, I see no merit in the writ petition and it is dismissed.

