

(1991) 02 GUJ CK 0013

In the Gujarat High Court

Case No : Special Civil Application No. 576 of 1979

Merchant Steel Industries (P) Ltd.

APPELLANT

Vs

Collector of Customs and Central Excise

RESPONDENT

Date of Decision : 19-02-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 173G(4), 173Q(1), 53

Central Excises and Salt Act, 1944 — Section 2

Constitution of India, 1950 — Article 226, 227

Citation : (1994) ECR 694 : (1993) ECR 293 : (1992) 57 ELT 540 : (1992) 1 GLR 591

Hon'ble Judges : J.N. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Advocate : K.M. Patel, for J.A. Shelat, for the Appellant; Jayant Patel, for the Respondent

Judgement

Ravani, J.—The petitioner challenges the legality and validity of the order passed by the Collector, Central Excise holding that the petitioner had manufactured tin containers with the aid of power and therefore it was not entitled to the benefits of Exemption Notification No. 94/70 dated May 1, 1970.

2. On August 30, 1976, the factory premises of M/s. Excel Industries Ltd. Bhavnagar were visited by the officers of the Excise department. On inquiry it was found that tin containers which were being used by the Excel Industries Ltd. for packing its product "calphos" tablets were supplied by the petitioner. Further inquiry and the statement of Shri Jaswant N. Oza, the administrative officer of the petitioner company disclosed that the petitioner had entered into a contract with Excel Industries Ltd. to supply printed tins with lids of components. It was further disclosed that the tin sheets used in the containers were got printed from M/s. Gujarat Metal Box, Ahmedabad with the aid of power operated machines.

3. On the basis of the material collected, a show cause notice dated February 14, 1977 was issued to the petitioner alleging that the petitioner had contravened

the provisions of Rule 53 read with Rule 173G(4) of the Central Excise Rules, 1944. It was also alleged that the petitioner had failed to account for 49,885 metal containers and that these goods were removed without filing classifications, price lists and without issuing Central Excise gate passes in form GP-I and without determining and paying the Central Excise duty leviable thereon at the appropriate rates. The petitioner submitted reply and resisted the show cause notice on facts as well as on law points. It was mainly contended that the petitioner was entitled to exemption under Notification No. 94/70 dated May 1, 1970 which provided for exemption in case the containers were manufactured without the aid of power. After hearing the petitioner, the Collector of Customs and Central Excise, Ahmedabad passed order dated December 20, 1978. By this order it is held that the petitioner was liable to pay excise duty at the appropriate rate on 49,885 metal containers manufactured by it with the aid of power and removed by it without the payment of duty. As provided under Rule 173Q(1) a penalty of Rs. 2,000/- was also imposed upon the petitioner. The petitioner has challenged the legality and validity of this order.

4. It may be noted that a common order dated December 20, 1978 was passed by the Collector, Customs & Central Excise, Ahmedabad in the case of the petitioner as well as in the case of M/s. Mahavir Industries, Bhavnagar. M/s. Mahavir Industries, Bhavnagar had also filed Spl. C.A. No. 677 of 1979 challenging the legality and validity of the same order as well as that of another order dated February 17, 1977 by which demand of Rs. 9,747.95 ps. was confirmed. Since in that petition, two different orders have been challenged, we think it proper to deal with that petition separately.

5. It is an undisputed position that Item 46 in the First Schedule to the Central Excises & Salt Act, 1944 covers metal containers not elsewhere specified. The explanation to the item provides that the expression "containers" had the meaning assigned to it in the explanation to Item No. 27. This explanation takes within its sweep all containers ordinarily intended for packing of goods for sale including casks, drums, cans, boxes, gas cylinders and pressure containers whether in assembled or unassembled condition and containers known commercially as flattened or folded containers. In view of this provision, it was evident that the product manufactured by the petitioner was container within the meaning of Item No. 46 inasmuch as the same was intended for packing calphos tablets. The contention of the department is that the printing of the sheets as per the requirements of Excel Industries, Bhavnagar, was done with the aid of power. Therefore the containers manufactured out of such sheets are deemed to be metal containers manufactured with the aid of power. Hence manufacture of such containers is ineligible for the benefits of exemption contained in Notification No. 94/70 dated May 1, 1970.

6. It is an undisputed position that the petitioner manufactured metal containers as per the specifications of M/s. Excel Industries, Bhavnagar. As per their purchase order dated April 10, 1976 produced on record before the Collector, the

order described the physical dimension and also the gold lacquering in accordance with certain quality and the printing was required to be done as per the sample. Specification given in the order read as follows :-

"printed tins for calphos fabricated from 30 gauge electrolytic tin plates golden lacquered body."

In view of this position, the tin containers as per the specification of M/s. Excel Industries, Bhavnagar were required to be manufactured by the petitioner and were required to be supplied to the buyer M/s. Excel Industries, Bhavnagar.

7. On facts it is found that the petitioner got the tin sheets printed from M/s. Gujarat Metal Box, Ahmedabad. It was to the knowledge of the petitioner that such printing was done by M/s. Gujarat Metal Box with the aid of power operated machines. The Collector found that the printing had specific relation to the order placed by the manufacturer of metal containers. The printing of the sheets was the first stage of the manufacture of the containers for a particular buyer i.e. M/s. Excel Industries Pvt. Ltd. The printing of the sheets was for the specific purpose of packing the product i.e. calphos tablets. The Collector held that the fact that printing process was carried on by some other firm had no relevance. Important and relevant thing was the use or aid of power in the process of printing. Once this is established, there is no difficulty in reaching the conclusion that the manufacturing of containers was with the aid of power and the power was used in or in relation to the manufacture of the containers.

8. The learned counsel for the petitioner submitted that after the sheets were printed and lacquered the sheets remained sheets and no new commodity came into existence. Therefore even after the printing and lacquering, the commodity has not undergone any process. It is also contended that even if printing and lacquering is held to be a process, it is not a manufacturing process. Therefore, it is submitted that the order passed by the Collector, Customs and Central Excise be quashed and set aside. The contention may be examined.

9. In support of the contention that there is no change in the commodity (i.e. sheets) and therefore the commodity has not undergone any process, the learned counsel has relied upon the definition of "manufacture" in Section 2(f) the Central Excises & Salt Act, 1944 ("the Act" for short) and upon a decision of the High Court in the case of S.K. Patel v. Union of India reported in 23 (1) G.L.R. 670. The term process is not defined under the Act. However, term "manufacture" is defined u/s 2(f) of the Act, relevant part of which reads as follows :-

"2.

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

.....

....."

In the case of S.K. Patel v. Union of India reported in 23(1) G.L.R. 670, the term "process" came up for consideration before a Division Bench of this High Court. In that case the question was as to whether the transportation of certain raw materials from one place to other elevated place without effecting any change in the components of the raw materials would amount to any process or not. In the facts of the case, the Court held that the transportation of raw materials from one place to another, may be to an elevated place, would not amount to process if in the activity of transportation there is no change in the commodities so transported.

10. However, while considering this question, the Court considered the decision of the Supreme Court in the case of Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, . In the context of the provisions of the Central Sales Tax Act, the Supreme Court held that the operation of blending of ore would amount to "processing" of ore within the meaning of Section 8(3)(b) of Central Sales Tax Act and Rule 13 of Central Sales Tax Rules, 1957. In the course of the judgment the Supreme Court inter alia observed that whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. The Supreme Court further observed that what is necessary in order to characterise an operation as "processing" is that the commodity must as a result of the operation experience some change.

11. Following this decision of the Supreme Court, this in the case of S.K. Patel (supra) observed as follows :-

"..... it is clear that before any activity can amount to processing, it must be found that the commodity has, as a result of the operation, experienced some change. If there is no change there cannot be said to be any process involved in that particular activity."

Hence the question : "Does the commodity undergo any change on account of the process in question ? The change may not necessarily result into manufacture of a commodity. On account of the operation performed on it or in relation to it, if some change is brought about in the commodity, it would amount to processing of the commodity within the meaning of the term "process" explained by the Supreme Court and by this Court.

12. In view of the aforesaid settled legal position, the question to be examined is simple one. When the petitioner got the sheets printed from M/s. Gujarat Metal Box, Ahmedabad, did the sheets undergo any change so as to call it a "process" ? The very purpose of getting the sheets printed was to see that the sheets be changed as per the requirement of the buyer i.e. Excel Industries, Bhavnagar. The idea behind getting the sheets printed was to bring about changes in the sheets. After printing and lacquering the sheets, they remained sheets, but not the same sheets. Printing of the sheets was not like a holy dip in

sacred water of some river or pond for spiritual rejuvenation or for salvation of the soul. After printing and lacquering process there is a physical and visible change in the sheets. Therefore it cannot be said that because the sheets remain sheets there is no process. In this view of the matter, the reliance placed on the decision of this court in the case of S.K. Patel (*supra*) is of no help to the petitioner.

13. On the basis of a decision of this High Court in the case of Extrusion Process Pvt. Ltd. v. N.R. Jadhav & Ors. reported in 15 G.L.R. 161, it is contended that printing and lacquering of sheets is not manufacturing process. In that case High Court did hold that printing and lacquering on the extruded aluminium tubes do not involve the process of manufacturing. It was on account of the fact that before the printing and lacquering took place, the plain tubes had already come into existence. When this plain tube came into existence it was a marketable commodity. After the plain tubes become marketable commodity process of lacquering thereon had taken place. Therefore in that context, this Court held that printing and lacquering on the extruded aluminium tubes on which excise duty was already paid did not form part of manufacturing process. This decision came up for consideration before the Supreme Court in the case of Empire Industries Limited and Others Vs. Union of India and Others, Explaining the decision, the Supreme Court *inter alia* observed that printing and lacquering were not even remotely connected with the manufacture of aluminium tubes. It was a process independent of the manufacture of aluminium tubes. Thereafter the Supreme Court observed to the effect that the question whether a particular process is a process of manufacture or not has to be determined naturally having regard to the facts and circumstances of each case and having regard to the well-known tests laid down by the Supreme Court.

14. In the instant case, the change in the raw material is brought about before the commodity (i.e. tin container) is manufactured and much prior to the stage at which the ultimate product comes into existence. Printing and lacquering on the sheets is one of the stages aimed at the ultimate manufacture of the product i.e. tin container. It is a step or intermediate process which does bring about a change in the raw materials i.e. sheets. This being the distinction, the decision of this High Court in the case of Extrusion Process Pvt. Ltd. (*supra*) does not help the petitioner.

15. The learned counsel for the petitioner has relied upon a decision of this High Court in the case of Prolite Engineering Co. v. Union of India reported in 31(2) G.L.R. 1092. In that case the petitioner company was a manufacturer of transformers. One of the components of the transformer was made out of lamination which was prepared from Cold Rolled Grain Oriented steel sheets. The petitioner company imported CRGO sheets or purchased the same from the market. Therefrom six different units manufactured laminations and supplied the same to the petitioner. These six units claimed exemption of excise duty on the ground that the total turn over of each one of them did not exceed Rs. 5 lacs in

the financial year in question. It was the case of the department that these six units were dummy created by the petitioner company. Therefore the petitioner company should be held to be the manufacturer.

16. In the context as indicated above, this court held that on the facts and circumstances relied upon by the department, it could not be inferred that the six units were the dummies set up by the petitioner. While deciding this question, the court inter alia observed that as a result of any process carried out by a processor on job work basis, a new commercial commodity comes into existence then that process amounts to manufacture under the Act. In such a case the processor/job worker will become liable to payment of excise duty on the goods manufactured by him. This may be so. But in this case, it is neither the case of the petitioner nor that of the respondents that after the sheets are printed and lacquered, a new excisable product comes into existence. In our opinion, this decision does not throw light on the question as to what is the process and as to whether printing and lacquering of sheets in the instant case would amount to process or not.

17. The petitioner claimed exemption under Notification No. 94/70 dated May 1, 1970 wherein it is inter alia provided that metal containers falling under Item No. 46 of the First Schedule to the Central Excises and Salt Act, 1944 is exempted from excise duty provided "in or in relation to the manufacture of which no process is ordinarily carried on with the aid of power." In the instant case it is an admitted position that in the process of printing and lacquering M/s. Gujarat Metal Box, Ahmedabad used power. Even the administrative officer of the petitioner company Shri J.N. Oza, whose statement was recorded by an excise officer, admitted that he knew that M/s. Gujarat Metal Box, Ahmedabad was using power while printing tin sheets. In view of this factual position, the impugned order cannot be interfered with in exercise of power under Article 226/227 of the Constitution of India. No other contention is raised.

18. In the result the petition is rejected. Rule discharged. Interim relief vacated.