

(1980) 04 DEL CK 0027
In the Delhi High Court

Modi Carpets Limited and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-04-1980

Acts Referred:

Citation : (1980) CENCUS 370 : (1980) 6 ELT 320

Hon'ble Judges : V.S. Deshpande, J;B.N. Kirpal, J

Bench : Division Bench

Judgement

B.N. Kirpal J.

1. This writ petition the petitioners are challenging the validity and levy of excise duty in respect of "Silver" which is obtained by them as an in process material in the manufacture of woollen yarn in it factory premises.

2. The petitioner-Company manufactures, inter alia, woollen yarn from raw-wool. The writ petition sets out the entire process of manufacture of the woollen yarn from raw-wool.

3. Briefly stated according to the petition the raw-wool purchased from the market is first of all opened in the cleaning machine and loose dirt, grease and vegetable matter is removed. This opened wool is there after cleaned and washed. The washed wool is dried and thereafter the partially dried wool is opened in a machine called the preparatory willow. This machine separates the wool fibres and further removes the dirt and vegetable matter which may have remained in it. Thereafter different types of wool are blended. At this stage, the wool is conveyed to the spinning department in the factory. In the said department humid conditions are maintained as the same are necessary and essential for further processing. The wool is then put on a carding machine. This carding machine consists of cylindrical speed rollers with pins mounted on their surface. Rolling on this machine straightens the fibres and opens the wool. The wob of wool emerging from these rollers is pulled by a drawing head. This reduces the width of the carded wob of wool and gives it the appearance of a

cylindrical form being a mere collection of loosely held fibres. However, this cylindrical form consists of the fibres of varying lengths which have been carded. There is no twist in these fibres. This form of wool, which is still in its fibre form it described by the petitioner as "Silver".

4. This Silver is then processed through three stages to make it more uniform in diameter and to further reduce the weight per meter and to make it suitable for feeding into ring frames for spinning Yarn. These machineries are called "Draft-O-Matic machines Inter Draw Frame and Finisher Draw Frame." It is essential to note that his product is not combed. The processing of wool through the Draft-O-Matic machines called gilling. The process of gilling has to be completed prior to combing. Combing is a separate operation which is done in order to remove the short fibres. Thereafter the combed sliver is given a false twist and rolled into balls to form wool tops which are used in the manufacture of worsted yarn. The contention of the petitioner is that the combing of silver is not done by it. The uncombed sliver which is obtained by the petitioners is used in the manufacture of semi-worsted yarn which in turn is used in weaving carpets. It is contained by the petitioner that this silver which is not processed by combing false twisting or winding into balls is not traded in the market and in other words is not a marketable commodity.

5. Prior to 1979 excise duty was being levied and charged in inter alia, on wool tops, In view of the facts that petitioner do not product wool tops, they wee not subject to the levy of excise duty. By the Finance Act, 1979 however Item No 43 of the 1st Schedule of the Central Excise and Salt Act (hereinafter referred to as "the Act") was amended. The new item is as follows :-

6. On the 1st of March 1979 the Range Officer Central Excise Range III (respondent No. 4) wrote to the petitioner asking them to apply for grant of the license and for filing of a classification list under Rule 173-B of the Rules in respect of petitioner " factory. Thereafter correspondence was exchanged between the petitioner factory. Thereafter correspondence was exchanged between the petitioner and the respondents. The contention of the petitioners being that they were not liable to pay any excise duty inter alia, for the reasons that the silver could not be described as being goods which are known to the market and there was not manufacture in respect of thereof. It was also contend that there was no removal of the goods with in the meaning of Rules 9 and 49 of the Central Excise Rules. Nevertheless, the petitioner did apply for license under protest and further requested that they should be granted provision assessment thereafter under Rule 173-b(2A) read with Rule 9B of the Rules. The petitioners received later date 20th March, 1979 from the Range Officer Central Excise directing the petitioner not to clear the goods except on payment of excise duty. By the said letter as also by the letter dated 21-3-1979 of the Assistant Collector, the petitioner request for grant of provisional assessment under Rule 9B was also rejected. Petitioner made representation against the said rejections but before the any final decision could be taken or the representation disposed, the present

writ petition was filed.

7. The writ petition was admitted primarily for the reason that one of the contentions of the petitioners was that the point in issue regarding the removal of the goods have been decided in favor of the petitioner by this court in the case of the Delhi Cloth & General Mills Co. Ltd. & Another v. The Joint Secretary, Govt. of India & Another 2nd (1978) Del 216-1978 E.L.T. (J121).

8. Before us three contentions have been raised on behalf of the petitioners. It is first of all contended that the aforesaid amended Item No. 43 is ultra vires section 3 of the Act. The second contention is that the Parliament was not competent under Entry 84 of List 1 of the 7th Schedule to the Constitution to amend Item No. 43 so as to include therein an item which is not "goods" and which is not "manufactured". The third contention is that before the 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 is contended that if the product is not removed from the factory and is only obtained at an intermediary stage within a process in the factory, there is no removal and there can be no liability for the payment of excise duty.

9. With regard to the first two contentions the learned counsel for the petitioners has relied on a number of decisions of Supreme Court and contended that it has been laid down that the excise duty can be levied on manufactured goods which are known to the market. If the product which is sought to be taxed is not "goods" as known to the market and the in fact are not marketable than under the aforesaid Entry 84 of List 1 and also u/s 3 of the Act, no excise duty can be levied. It is contended that it is only such a marketable commodity which is produced as a result of manufacturing process which can be subject to excise duty. We, however, feel that it is not necessary to go into this aspect of the matter because in our opinion the writ petition is liable to be allowed on the third contention raised by the petitioner.

10. Before dealing with the third contention it is necessary to set out the relevant provision of the Act and the Rules, section 3(1) of the Act reads as under :-

"There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods or other than salt which are produced or manufactured in India and 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."

It will be seen that it is only in the prescribed manner and the duty of the excise is levied and collected section 4 of the said act prescribes the mode of computing the value of the excisable goods. Section 4(1)(a) which is relevant of this case, as well as sub-section 4(b)(i) read as under :-

" 4(1) Where under this act the duty of excise is chargeable on any excisable goods with the reference to value, such value shall subject to the other provision

of this section be deemed to be -

(a) the normal price thereof, that is to say, price at which such goods are ordinarily sold by the assessed to a buyer in the course of the wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. :-

4(4) For the purposes of this section,-

(a)

(b) "place of removal" means -

(i) a factory or any other place or premises of production or manufacturer of the excisable goods."

It will thus be seen that reading section 3 and 4 together the duty of the excise is levied with reference to the value of the goods at the time and the place of the removal and is to be collected in the manner which is prescribed in the Rules. The relevant Rules in this behalf are Rules 9 and 49, the relevant portions of which read as under :-

"9(1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export, or manufacture of any other commodity in or outside such place, until the excise duty livable thereon has been paid at such place and in such manner as is prescribed in these Rules or ass the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :

49(1) Payment of duty shall not be required in respect of excisable goods made in factory until they are about to be issued out of the place or premises specified under rule 9 or are about to be removed from a store-room or other place of storage approved by the Collector under rule 47 :"

Rule 49, it will be seen, makes it clear that payment of duty is required to be made only when the goods are removed from the place or premises specified under rule 9 or from an approved place of storage, Rule 9, inter alia, enables, the Collector to specify the place where the goods can be said to be produced, cured or manufactured from which they cannot be removed without payment of duty. The Collector may specify the place of manufacture to be not only the entire factory but a part of the factory in which the actual manufacturing process is carried it, under the said Rule 9. It is admitted between the parties that in the present case the Collector has not specified any part of the factory as the place of manufacture. In the absence of any place having been so specified the place of manufacture is necessarily to be the factory in which the manufacturing process takes place.

11. Reading the aforesaid provisions together it is evident that duty can be

charged only when excisable goods are removed from the place of manufacture, in this case the factory, and the value which it may have at the time of removal from the place of manufacturing. The question which now arises is whether any duty can be levied when there is no removal from the place of manufacture. It is an admitted case of the parties that the sliver which is obtained by the petitioners is consumed within the very premises in which it is manufactured, namely, within the spinning section of the factory. We are of the opinion that in this view of the matter as there is no removal from the place of manufacture, no duty of excise can be levied and recovered. In coming to this conclusion we are fortified by the decision of this Court in *The Delhi Cloth & General Mills Co.'s* case (supra). Dealing with the question as to whether the assessable value of the product could be determined u/s 4, this Court observed that the crucial requisite of section 4 was that the value has to be determined at the time of the removal of the article chargeable with duty from the factory. In that case there were two plants, both situated in the same factory. One plant manufactured Calcium Carbide which was used in the manufacture of acetylene gas in their acetylene gas plant. It was alleged therein that the Calcium Carbide manufactured by it was not removed from the factory but was straightway used to generate acetylene gas by the transfer of the article from one plant to another in the same factory. It was held by the court that as Calcium Carbide is not removed from the factory the point of time at which the value of the product had to be determined u/s 4 was not reached and consequently the question of levy and collection of duty did not arise. This Court further observed that the expression "factory" is defined in section 2(e) to mean any premises including the precincts thereof, wherein or in any part of which excisable goods are manufactured. The definition covers the present case because the calcium carbide is manufactured in one part of the factory while the acetylene gas is manufactured in another part thereof. The definition of "factory" makes it clear that the meaning of factory is not restricted to only the part in which the excisable goods are manufactured. On the other hand, it includes the whole of the premises in a part of which such goods are manufactured. At any rate the case of the petitioner is that the whole of the premises which comprise both the plants making calcium carbide and acetylene gas are its factory. It is not contended by the respondents that the calcium carbide plant constitutes a separate factory and the acetylene gas plant constitutes another factory. It cannot be said, therefore, that the so-called calcium carbide made by the petitioner is removed from the factory in which it is made. A perusal of Rules 9 and 49 makes it clear that the question of collection of any excise duty cannot arise unless and until the goods are removed from the factory".

12. Mr. Chopra on behalf of the respondents has referred to two decisions. The first decision relied upon by him is the case reported as *Caltex Oil Refining (India) Limited v. Union of India and others* 1979 E.L.T. (J 581) (Civil Writ No. 357 of 1970 decided on 3-4-1972). In that case the Court was concerned with the question of removal of goods under Rule 9. While construing rule 9 it was

observed as follows :-

"Rule 9, which we have read earlier, in terms lays down that no excisable goods shall be removed from any place where they are produced, or any specified premises appurtenant thereto, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty livable has been paid. The Rule thus contemplates the citus on manufacture as the place from where removal has to take place whether fro consumption, export or manufacture of any other commodity. It obviously makes no reference to the plant or equipment. But where there are two distinct plants within the same factory premises removal can take place either outside the factory premises or within the factory premises if the product obtained by working of one plant is sent to another plant for obtaining another product. There can be no removal of a product within the plant itself so long as the product is in the process of manufacture. There can be removal only if the product goes out of one stream of production into another stream of production or if the product is issued out or taken out or consumed if no further processing of that product is to be done. The Rule also contemplates that consumption within the place of manufacture would also amount to removal. The consumption of the product contemplated by Rule 9 is consumption of the product by itself and not for converting it into another product, as in the case of Polymer Chips. The integrated continuous process contemplated by Rule 9 read with Rules in Chapter 7A comes to an end when no further processing is to be done of that particular product parlance is known as "home consumption" or exported or used for manufacture of any other commodity in or outside the place of manufacture the excise levy is attracted."

It will be seen that the Court laid importance to the fact that there can be no removal of a product within the plant so long a the product is in the process of manufacture. We understand the expression of the removal of the product from one stream of production into another stream of production as having reference to the place of manufacture or production as specified under Rule 9 of the said Rules as would be evident from the judgment itself when it was observed by the court that "excise duty is attracted on all excisable goods which are produced as and when the same are removed within the meaning of rules 9 and 49 of the excise Rules". We are accordingly of the opinion that this judgment can be of no assistance to the respondents. The other judgment relied upon by Mr. Chopra is the case of Manek Lal Hari Lal Spg. & Mfg. Co. Ltd. Ahmedabad and others v. Union of India and others¹⁹⁷⁸ E.L.T. (J 618). In the said case it was held that under rule 9 excise duty must be paid before the goods are removed from the place where they are produced or manufactured. It was, however, observed that 'unless the lace was specified in the license, it was not open to the manufacturer of any excisable goods to carry on manufacturing activity, and for the purpose of rule 9, it is the place specified in the license concerned that is the place where the goods are produced or manufactured and it is the removal from the place thus specified in the license in question that is the place referred to in rule 9". In the present case, we have been informed that in he license which had been

applied for by the petitioners the respondents have specified the place of manufacture as the factory and not any particular, part of the factory. The Gujarat High Court, however, did not agree with the following observations of this Court in the case of Delhi Cloth & General Mills (supra) :

"A perusal of rules 9 and 49 makes it clear the question of collection of any excise duty cannot arise unless and until the goods are removed from the factory."

With respect we are of the opinion that the observations of this Court in the case of Delhi Cloth & General Mills lay down the correct law and we are unable to agree with the contrary view expressed by the Gujarat High Court, particularly when the place of manufacture is not specified.

13. Mr. Chopra also referred to Rule 173G, first proviso which reads are under :-

"173-G.(1) Every assessed shall keep an account-current, with the Collector separately for each excisable goods falling under different items of the First Schedule to the Act, in such form and manner as the Collector may require, of the duties payable on the excisable goods and in particular such account (and also the account in Form R.G. 23, if the assessed is availing of the procedure prescribed in rule 173-K) shall be maintained in triplicate by using indelible pencil and double sided carbon, and the assessed shall periodically make credit in such account- current, by each payment into the treasury so as to keep the balances, in such accounts current sufficient to cover the duty due on the goods intended to be removed at any time; and every such assessed shall pay the duty determined by him for each consignment by debit to such account-current before removal of the goods :

Provided that -

(i) the duty due on the goods consumed within the factory in a continuous process may be so paid at the end of the factory day, except that in the case of cotton yarn in respect of which duty is payable in accordance with the provisions of sub-rule (1) of rule 96-W the duty due may be paid by the manufacturer in accordance with the provisions of the said rule."

This provision can be of no assistance to the respondents. The said provision only provides for the manner or time of the payment of the duty. It postulates that duty is leviable. We have, however, held that the duty can be collected only if the goods are removed from the place of manufacture specified under rule 9. Inasmuch as the sliver obtained by the petitioners it not removed from the said place of manufacture and is used in a continuous process within the same place, the question of any payment of duty cannot arise.

14. It was contended on behalf of the petitioner that the sliver which is obtained by them are not goods which are manufactured by them within the meaning of rule 9 of the Excise Rules. We are however not incline to go into that question as the petition is being allowed as we have already indicated above on the ground

that the excise duty is not livable because there has been no removal of the goods as contemplated by rules 9 and 49 of the said Rules.

15. The result is that the writ petition is allowed and the respondents are restrained from levying excise duty on the sliver, obtained by the petitioners as an in process material used in the manufacture of semi-woolen worsted yarn as the proposed levy and collection was not in accordance with the provisions of rules 9 and 49 of the Central Excise Rules parties to bear their own costs.