

(1990) 03 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 4619 of 1985

Precision Rubber Industries

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 07-03-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35A

Citation : (1990) 3 BomCR 294 : (1991) ECR 705 : (1990) 49 ELT 170

Hon'ble Judges : Sharad Manohar, J;G.H. Guttal, J

Bench : Division Bench

Advocate : Haresh M. Jagtiani, Harsh Desai and Divya Bahi, for the Appellant;
R.V. Desai and T.R. Rao, for the Respondent

Judgement

G.H. Guttal, J.—The petitioners are manufacturers of rubbers products known as "aprons" and "cots", components of textile machinery. The respondent No. 2 and the respondent No. 1 are, respectively, the Assistant Collector of Central Excise, Thane Division I, and the Collector of Central Excise, Bombay III, who perform the duties under the Central Excise and Salt Act 1944, and the Rule made thereunder. The petitioners impugn the validity of two orders :

(i) The Order made by the respondent No. 1 on 7th October, 1985 u/s 35-A(2) of the Act whereby he reversed the order of the respondent No. 2 made on 21st May, 1981. The respondent No. 1 held that aprons and cots are excisable under the residuary Tariff item No. 68 of the Act and are not exempt from excise duty under Notification No. 197/67 dated 29th August, 1967 as claimed by the petitioners.

(ii) The order of the Customs Excise and Gold Control Appellate Tribunal New Delhi, dated 8th August, 1989 in Appeal No. 3116/88 whereby the demand of excise duty Rs. 36,55,234.30 and penalty of Rs. 10 lakhs imposed by the respondent No. 1 was upheld.

2. The facts out which this petition arises are briefly as under :

On 6th May, 1975, the respondent No. 2 advised the petitioners that rubber products known as "aprons" and "cots" manufactured by them are exempt from excise duty under the Notification No. 197/1967 issued by the Central Government. The petitioners products were thus exempted from excise duty. Yet a notice dated 24th September, 1980 seeking to levy such duty was issued which was impugned by the petitioners in Writ petition No. 1193 of 1980. The respondent No. 1 stated before this Court that "the order, if any, made after the disposal of the show cause notice will not be enforced for a period of 15 days from the receipt of the same" by the petitioners. In view of this statement, the Writ Petition No., 1193 of 1980 was withdrawn.

On 21st May, 1981, an adjudication pursuant to the show cause notice dated 24th September, 1980 was made by the respondent No. 2. He held that aprons and cots which are classifiable under Tariff Item No. 16-A(3) of the Central Excise and Salt Act are exempt from duty by virtue of the Notification No. 297/1967. The show cause notice was discharged. The Collector of Central Excise, Bombay-III, the respondent No. 1 herein, decided to resort to his revisional power u/s 35-A of the Act and issued a notice on 30th September, 1981 calling upon the petitioners to show cause why the order dated 21st May, 1981 made by the Assistant Collector of Central Excise should not be set aside. The respondent No. 1 specifically observed in the notice that the aprons and cots are "essentially textiles machinery component parts" but asserted that they do not attract the Notification No. 197/67. Pending his decision on the proceedings pursuant to the notice, the respondent No. 1 stayed the operation of the order of the respondent No. 2 dated 21st May, 1981.

3. On 7th October, 1985, the respondent No. 1 set aside the order of the respondent No. 2 dated 21st May, 1981 and held that aprons and cots manufactured by the petitioners are liable to excise duty under the residuary Tariff Item No. 68 and were not exempt under Notification No. 197/67. This is the first order impugned by the petitioners. The order of the Assistant Collector dated 21st May, 1981 which was initially "stayed" by the notice dated 30th September, 1981 was set aside by the respondent No. 1 on 7th October, 1985. Therefore, the Superintendent of Central Excise, Thane, by his notice dated 20th February, 1986 demanded from the petitioners excise duty of Rs. 42,88,131.20 for the period from April 1980 to October 1985. When the petitioners pointed out to the respondent No. 1 that no demand could be made without complying with section 11-A of the Act, the Respondent No. 1 issued a show cause notice dated 4th July, 1986. The procedure u/s 11-A of the Act and Rules 9(2) of the rules was followed. After hearing the petitioners, the respondent No. 1 made the order of adjudication dated 28th September, 1988 confirming the demand and imposing the penalty of ten lakh rupees. Against this order, the petitioners filed an appeal before the Tribunal on 8th November, 1988. The Order dismissing the appeal is the second order impugned by the petitioners.

4. It is undisputed that the petitioners manufacture in their factory at Thane

rubber pipes and tubes which are cut into smaller parts known as "aprons" and "cots". The process consists manufacturing long rubber pipes/tubes than cutting small pieces out of them only in such a manner that their cylindrical character is always retained. The aprons and cots come into existence upon the cutting of the larger tubes/pipes into small cylindrical pieces known as aprons/cost. Aprons and cots are components of textile machinery (The Order of the Respondent No. 1 dated 7th October, 1985.

"There appears to be no dispute that what the party manufactures primarily upto the last stage are pipings/tubings of unhardened Vulcanised rubber and that they are classifiable under item 16-A(3) of C.E.T. The dispute has arisen only at the last stage of process where the tubings are cut into smaller pieces and are recognised as cots and aprons distinctly identifiable component parts of textile machinery not specified in item 16-A of C.E.T.) Excisable goods are the goods specified in the First Schedule to the Act (section 2(d) of the Act). Excise duty is leviable on all excisable goods (except Salt) which are "produced or manufactured in India" at the rates set forth in the First Schedule (section 3 of the Act). The word "manufacture" includes any process incidental or ancillary to the completion of the manufactured product (section 2(f) of the Act). The definition sets down what manufacture includes, with reference to certain specified items, such as tobacco product, medicines and so on. But in respect of rubber products such specification has not been made. Nevertheless, by virtue of section 3 of the Act, all excisable goods produced or manufactured in India attract duty from the manufacture or the producer. Section 11-A empowers the Central Excise Officer to serve notice on the person chargeable with duty, if any duty of excise has not been levied or paid, or has been short levied or short-paid erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts. Upon hearing the person to whom such notice is issued, the Assistant Collector is empowered to determine the amount of duty of excise due from such person. However, such notice to show cause as to why the amount should not be recovered has to be issued within six months from the "relevant date". There is however one exception. If the failure to levy or to recover the duty has been caused by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provision of the Act with intent to evade payment of duty, the notice could issued within five years from the "relevant date" (proviso to sub-section (1) of section 11-A of the Act).

The First Schedule to the Act sets out the items of the articles which attract excise duty. Item No. 16(3) of the First Schedule impose on "piping and tubing of unhardened vulcanised rubber" a duty of twenty-five per cent ad valorem (16-A. RUBBER PRODUCTS,

THE FOLLOWING NAMELY (1) Larex foan sponage Fifty-five percent Explanation: This Sub- ad-valorem. Item includes: (2) Plates, sheets and strips Thirty-five percent unhardened, whether vulcanised ad -valorem or not, and whether combined with any textile material or otherwise. (3) Piping and tubing

of unhardened Twenty-five per cent vulcanised rubber cent of ad-valorem (4) Transmission, conveyor or Twenty-five per cent elevator belts or belting of ent ad-valorem.

vulcanised rubber). Item No. 68 is the residuary article which is captioned "ALL OTHER GOODS, NOT ELSEWHERE SPECIFIED, BUT EXCLUDING " alcohol, opium and certain medicinal preparations (68. ALL OTHER GOODS, NOT ELSEWHERE SPECIFIED, BUT EXCLUDING:

(a) alcohol, all sorts, including alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; and

(c) dutiable goods as defined in section 2(c) of the Medicinal and Toilet Preparation (Excise Duties) Act, 1955 (16 of 1955).

(a) designed as component parts of machinery or (b) such piping and tubing is converted in the factory of its production into component parts of the machinery. Thirdly such product should not perform function of conveying air, gas or liquid). Under Tariff item No. 68, the duty is Twelve per cent ad valorem. Item No. 68 was introduced in the Act in 1975.

5. However, the Central Government in exercise of its power under sub-rule (1) of rule 8 of the central Excise Rules published a notification No. 197/67 dated 29th August, 1967. By this notification, the Central Government exempted " piping and tubing of unhardened vulcanised rubber falling under sub-item (3) of item 16-A and specified in column (2) of the label below from the whole of the duty of excise leviable thereon". The exempted articles have been described in the notification as under :

"Piping and tubing designed to be, or converted in the factory of its production, into component parts of machinery articles(including typewriters) provided such component parts do not perform the function of conveying air, gas or liquid".

6. The question is whether the products known as "aprons" and "cots" fall within the exemption granted by the Notification No. 197/1967. It is necessary to understand the essentials of the notification. The notification has employed two phrases of significance. The product has to be "piping and tubing". Secondly such piping and tubing has to be

7. A pipe is a long hollow cylinder used for conducting a fluid, gas or finely divided solid and for structural purposes(Webster's Third New International Dictionary, Unabridged, Col. II, page 1721.

Pipe. 2a : a long hollow cylinder (as of metal, clay, concrete, plastic) used for conducting a fluid gas or finely divided solid and for structural purposes: typically: metal tubing in standard diameters and lengths threaded at the ends of joining and used for water, steam, and other conduits,

3a : a tubular or cylindrical object, part or passage: as (1): the tubular stem of a

plant-compare PIPE TREE (2) BURROW (3): the hollow part of a pipe key (4) BLOWPIPE (5) : isinglass dried in the form of long hollow pieces (6) : PLAYPIPE). Its primary purpose is to conduct or convey gasses or fluids. It could be a tubular or cylindrical object, part of passage (- do- -do-).The word "piping " is the gerund or ver-noun of pipe.

"Tube" is a hollow elongate cylindrical body that is used to convey fluids and is mechanically nearly or precisely the same as a pipe (Webster's Third New International Dictionary Unabridged, Vol. II, page 2459 Tube. 1a : a hollow elongated cylindrical body that is used to convey fluids and is mechanically nearly or precisely the same as a pipe and but in use is arbitrarily associated with particular items and devices). In substance, pipe and tube have the same meaning and are used interchangeably. The word "tubing " signifies gerund of "tube".

8. Thus, piping and tubing are the verb-nouns of pipe and tube respectively. Although pipings and tubings are essentially conveyors of fluids and gases, they are adaptable to different purposes. The adaptation to a particular purpose determines their functional identity. For instance, as in this case, the pieces of tubing/piping perform the function of gripping the fabric. In other case such pieces may be used for holding together two tubular structures. It is not suggested that the Aprons and Cots perform the function of conveying air, gas or fluids so as to attracts the proviso carved put in the last clause of the notification. Therefore, the only question is whether they are components of textile machinery.

The Aprons and cots are admittedly parts cut from pipings and tubings. It is common ground that before the introduction of Tariff item No. 68 aprons and cots were considered as pipings and tubings which attracted article 16-A. The process of bringing aprons and cots into being was gone into by the Assistant Collector. His finding accepted by the respondent No. 1 is: "Finally tubes are cut to required width and required length and called as "aprons" and "cots" (Order of the respondent No. 1 dated 7th October, 1985). Their character as piping and tubing has been accepted by the respondent No. 1 too in the impugned order. They are Piping/tubing "converted" into different units known as aprons and costs. This process of changing the piping and tubing into aprons and cots takes place within the petitioners" factory. The aprons and cots are made from pipings and tubings and, therefore, satisfy the first ingredient of the exemption.

Then the question is: Are these pipings and tubings "converted in the factory of its production into component parts of machinery"? The conversion of pipings and tubings by cutting them into smaller parts is an accepted fact. The impugned order of the respondent No. 1 accepts the aprons and cots are produced by cutting of the pipings and tubings. Therefore, the "conversions" of the pipings and tubings is also established.

9. The crucial question is whether they are converted into "component parts of

machinery articles". This is where respondent No. 1 missed the obvious and concluded that the aprons and cots are "accessories".

10. It is undisputed that the process of manufacture of aprons and cots consists of cutting them out of pipings and tubings. The word "component" means a Constituent part or ingredient such as the various components of electric motor. In the case of chemical compound. In another sense the word is used to denote smallest unit of classification (Webster's Third New International Dictionary, Unabridged, Vol. II, page 466.

Component: 1: a Constituent part: 2 any one of the vector terms added to for a given vector sum of resultant 3: an ingredient of a chemical system the concentration of which in the different phases is capable of independent variation 4: either of the sequences defining an alphabet in cryptography, 5: the smallest unit of classification). On the other hand, "accessory" has altogether different connotation. It signifies aiding or contributing in a secondary or subordinate way. It is used to denote a role or status which is supplementary or secondary to something of greater or primary importance. The word "accessory" is used to suggest that something or somebody is incidental to the main subject. In other words accessory is something which is inessential and secondary or subordinate to another object (Webster's Third New International Dictionary, Unabridged, Vol. II, page 11.

"accessory " a: aiding or contributing in a secondary or subordinate way: supplementary or secondary to something of greater or primary importance, b: incidental to a main contract or some other obligation). While "component" is always an essential element of a machine, an accessory is an aid to the machine. A machine is not a machine without a component. But a machine can perform without a given accessory. The meaning of the words "component" and "accessory" and the distinctions between them are known to the respondents Nos. 1 and 2. They have examined the use of aprons and cots. That is why the character of aprons and cots as components of textile machinery was never in dispute. That is why in his notice, dated 30th September, 1981 the respondent No. 1 observes:

"It is observed that synthetic rubber aprons and cots are essentially textile machinery component parts. They are also distinctly known as such and are marketed as textile machinery components".

11. Yet in his Order dated 7th October, 1915 impugned in this petition, the Collector holds that aprons and cots are accessories and not components. For this purpose, he relies upon the I.S.I specification No. 4892 1968 for "Synthetic Rubber Aprons (Reinforced) for drafting systems." The foreword of the publication records that "this Indian Standard was the adopted by the Indian Standards Institution after the draft finalized by the "Textile Mill Accessories (Other Than Jute) Sectional Committee "has been approved"....." (I.S.I. - Specification for Synthetic Rubber Aprons

(Reinforced) For Drafting Systems.

Foreword para O. 1

O. 1 "This Indian Standard was adopted by the Indian Institution on 16th December, 1968 after the draft finalized by the Textile Mill Accessories (Other Than June) Sectional Committee had been approved by the Textile Division Council "). According to the Collector, since the standard was drafted by the committee named as the "Textile Mill Accessories Committee", the Aprons whose standard was adopted are accessories. There is nothing in the standard to suggest that the Committee was called upon to distinguish between accessories and components. Nor does the publication purport to conclude that Apron are not components. What the Collector missed is that the publication refers to the Standard for Rubber Aprons for " Drafting Systems". In the paragraph titled "Terminology" the Indian Standards Institute defines "drafting system" as the "part of the spinning machinery (I.S.I. Specification for Synthetic Rubber Aprons (Reinforced) For Drafting Systems.

TERMINOLOGY.

2.1 "For the purpose of this standard, the drafting system shall mean the part of the spinning machinery for drafting a sliver or roving made out of natural or man made fibres, with or without twist, between several pairs of rollers rotating at successive increasing circumferential speeds").Aprons are meant for drafting system which are parts of machinery. We are of the opinion that publication of the I.S.I though authoritative does not suggest that Aprons are not "components". It has not been held by the Collector by reference to their functions in the textile machinery that the aprons perform the function of accessories.

Similarly the publication of the Indian Standards Institution titled "Specification for COTS for Top Rollers" determined the standard for cots. The Foreword sets out the nomenclature of drafting committee as "the Spinning Machinery (Cotton System) Sectional Committee (16, ISI - Specification for Cote for Top Rollers No. IS 7175-1974.

Foreword para O.1.

O.1 " This Indian Standard was adopted by the Indian Standards institution on 21 January, 1974, after the draft finalized by the Spinning Machinery (Cotton System) Sectional Committee had been approved by the Textile Division Council").The publication states in so many words that rubber cots are used for top rollers in textile spinning machinery. The collector does not refer to the publication because in the nomenclature of the Committee the words "spinning machinery" are used. These words would not have supported his "reasoning".

We do not think that the nomenclatures of the committees of the I.S.I. by themselves are determinative of whether aprons and cots are components of textile machinery. This question has to be decided on the basis of the function

performed by these articles. The Assistant Collector and Collector have accepted aprons and cots as components of Textiles Machinery.

Then the Collector refers to the judgment of the Customs Excise and Gold (Control) Appellate Tribunal, in *INARCO Limited. Bombay v. Collector of Central Excise, Bombay* 1985(5) E.T.R. 698. The Tribunal has not held that aprons and cots are accessories. Yet the Collector relying upon the two publications of Indian Standards Institution concludes that aprons and cots are accessories. In our opinion, the two publications do not suggest that aprons and cots are accessories. The function performed by aprons and cots is of gripping the fabric and the aprons and cots are accepted as components of machinery.

12. Learned Counsel for the respondents relied upon the Supreme Court's judgments in *Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd.*, . The thrust of his argument based on these decisions was that the object and purpose of the exemption and the nature of the actual process involved in the manufacture of the commodity should be kept in mind. Now the purpose of the exemption is to promote the Industry which is required to use pipings and tubings converted into components of machinery. The process of manufacture of aprons and cots set out by the Collector of Central Excise in the impugned order reveals that aprons and cots are the result of conversion of tubings into smaller parts of specified dimension. Since these products are components of textile machinery, they attract the exemption.

13. For the reasons stated in the foregoing paragraphs, we hold that aprons and cots manufactured by the petitioners are components of textile machinery and that they do not perform the function of conveying air, gas or fluids. These articles are the result of conversion of piping and tubing into smaller units known as "aprons" and "cots" which, as already stated, are the components of textile machinery. They, therefore, fall within the description of the articles exempted by the Notification No. 197/67 dated 29th August, 1967 issued by the Central Government. In exercise of its power under sub-rule (1) of rule 8 of the Central Excise Rules. These articles are therefore not excisable. The order of the Collector of Central Excise dated 7th October, 1985 made u/s 35-A(2) of the Central Excise and Salt Act is hereby set aside. The Assistant Collector of Central Excise was right in holding by his order dated 21st May, 1981, that the aprons and cots are exempt from excise duty.

14. The order of the Customs Excise & Gold Control Appellate Tribunal, New Delhi, dated 8th August, 1989 which is the second order impugned in this petition is based on the Collector's decision that the aprons and cots are excisable under Tariff Item No. 68. The Collector himself had noted that the confirmation of demand made by him and upheld by the Tribunal was subject to the decision in the writ petition. The demand and the imposition of penalty were based on computation of excise duty leviable under Tariff Item No. 68.

Since we have held that aprons and cots manufactured by the petitioners are not

excisable at all, the Collector's demand, penalty and the order of the Tribunal all become illegal. We, therefore, set aside the demand made by the Collector and the Tribunal's order dated 8th August, 1989 in Appeal No. 3116 of 1988.

15. Rule is made absolute in terms of prayers (a), (a1) and (b) of the petition.

The petitioners will get costs from the respondent No. 1.

Per SHARAD MANOHAR, J.:--- 1. I am in complete agreement with the judgment of my brother Judge Guttal, J. I am writing this short separate judgment only with a view to pinpoint certain additional anomalies and features of the proceedings which are the subject matter of this petition.

2. It is not necessary to state the facts which are fully set out in the judgment of my brother Judge. From that statement, it will be seen that the order passed by the Assistant Collector dated 21st May, 1988 was not one which could admit of any "stay" as such. While trying to have a second look at the order of the Assistant Collector dated 21st May, 1981, holding that cots and aprons produced by the petitioners were exempted from excise duty, the Assistant Collector stayed the operation of the order. Such stay is meaning less. You can have stay of an order which purports to start doing something or results in the starting of doing something. In a plaintiff's suit for possession, the Court may pass a decree for possession and the appeal Court might be inclined to stay the execution of that decree. But if the Court dismisses the plaintiff's suit for possession, there will be no question of anything being stayed by the appeal Court. In the instant case, the original view of the Assistant Collector was that the articles in question were not excisable. The same view was reiterated by the Assistant Collector on 21st May, 1981. There was, therefore, nothing which called for being "stayed" at all. If the Assistant Collector had originally held the articles to be excisable but had held in the subsequent order dated 21st May, 1981 that they were not excisable, then the Order of stay by the appeal Court would have some legal legitimacy. The order passed when there was nothing to be stayed is meaningless and anomalous on the face of it.

This is stated because it appears that by taking advantage of this order of stay, duty was sought to be recovered from the petitioners without any show-cause notice and without any order of assessment.

3. Secondly, it has to be stated that the cots and aprons are cut for the piping and tubing in such a manner that they continued to be cylindrical. If the tubing is cut through horizontally, it will continue with its cylindrical shape. If it is cut vertically, it will cease to have any cylindrical shape. In that case, it will be just a sheet of rubber, not a tubing at all. It therefore follows that what resulted at the manufacturing process continue to have the character of the tubing as contemplated by the relevant entry. Failure to realise this elementary aspect has brought about this unwarranted litigation.

4. The above observation is being made by me particularly in the context of the

fact that the entire proceedings before the Assistant Collector and the Tribunal appear to have been entertained and handled by both the authorities in a most casual manner. The Collector himself stated in the show-cause notice that the aprons and cots are "essentially textile machinery component parts". It therefore follows that it was not this view of the Collector at any time that aprons and cots were accessories and not component parts. After having informed the petitioners of this position, the Collector thought it fit to penalise the petitioners with heavy penalty by holding that these goods were accessories and not component parts. Such order is perverse on the face of it. If the Collector wanted to take this view, it was incumbent upon him to have given another show-cause notice to the petitioners calling upon them to show-cause as to why the articles should not be held accessories rather than component parts. I make it clear that if such a view was taken even after the show cause notice, it would have been impossible for us to agree with the view. The reasons for this are already stated in the accompanying judgment. The point is that such a view could not be taken by the Collector against the party, to whom he has sent the show-cause notice, after stating unequivocally that the goods were very much of component parts. The controversy set up later on was as regards the two positions, whether they were component parts or accessories. If the Collector had notified to the petitioners that they were component parts, he could not have turned out at the fag end of the proceedings and held in the judgment that they were not component parts but were accessories and that too by relying upon certain classification mentioned in the I.S.I. Specification No. 4692-1968 for "Synthetic Rubber Aprons (Reinforced for Drafting Systems)". If the petitioners had the notice about this particular changed view point of the Collector, they would have lead evidence to show that the authority did not intend to include aprons and cots in the category of accessories.

Moreover, it needs to be seen that the said authority of the I.S.I. Specification cannot be relied upon for expecting any legal and logical approach towards the classification of things. For instance, in the case of a car, a steering will be a component part, but a shop-keeper may describe his business to be of selling of car accessories and he might sell the steering wheel as an accessory. The fact that he describes a component part such as steering wheel as a motor accessory would not make it as accessory. Words are loosely used even by people with technical minds. We have to consider the context in which they dealt with.

5. It may be further added here that after examining the judgments of both of the Collector and the Tribunal, what is noticed is (a) a sheer lack of application of mind and (b) somewhat transport determination to pass an order against the petitioners whether logically and rationally justified or not.

6. On the question as to whether the Tribunal was justified in holding that the petitioners were guilty of practising any fraud or of suppressing any fact, we have left the point open and hence have not called upon the Government's Advocate to justify the view taken by the Tribunal. We have done so because the

decision on the first part of the question as to whether the petitioners are entitled to exemption or not, the petition must succeed and hence, the decision of the above question becomes academic. But we want to keep on record that the manner in which the Tribunal has dealt with such a question, leaves much to be desired. We fail to see as to how the Tribunal could have said that particular document or position was or was not noticed to the High Court in the earlier petition. The petitioners had succeeded before this Court and this Court has not passed the order in favour of the petitioners because of suppression of any fact from the petitioners. To hold that the petitioners had suppressed some facts or documents before this Court and were therefore guilty of fraud, is perverse, at least prima facie.

But as stated above, we have kept the question open and hence, do not wish to base our judgment on this prima facie view of the Court.

7. For the reasons stated above as also for the reasons mentioned in the accompanying judgment, I agree with the order passed therein.