

(1994) 03 MP CK 0022

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 522 of 1990

S.N. Sunderson (Minerals) Ltd.

APPELLANT

Vs

Suptd. (Preventive), C. Ex.

RESPONDENT

Date of Decision : 03-03-1994

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 9(2)
Central Excise Tariff Act, 1985 — Section 2(f)
Central Excises and Salt Act, 1944 — Section 11A, 14, 2, 4, 6
Madhya Pradesh General Sales Tax Act, 1958 — Section 2(j)

Citation : (1995) 75 ELT 273 : (1964) ILR (MP) 516 : (1994) 1 MPJR 251

Hon'ble Judges : U.L. Bhat, C.J.; P.P. Naolekar, J

Bench : Division Bench

Advocate : V.S. Dabir, for the Appellant; A.G. Dhande, for the Respondent

Judgement

P.P. Naolkar, J.

The petitioners in this petition have initially prayed for quashing of the proceedings initiated by the respondent No. 1, Superintendent (Preventive) Central Excise, Indore. During the pendency of this petition, orders have been passed quantifying the liability of the petitioner No. 1 and for imposition of penalty. The orders of quantification of the excise duty and imposition of penalty (Annexure-M & N) are challenged in this petition by way of amendment.

The petitioner No. 1 M/s. S.N. Sunderson (Minerals) Ltd. is a company registered under the Companies Act, having its head office at New Delhi. This company has a branch at Maihar in the State of Madhya Pradesh, manufacturing lime. The petitioner No. 2, M/s. Diwan Lime Company Pvt. Ltd. is a company registered under the Companies Act, having its registered office at New Delhi and a branch at Maihar in the State of Madhya Pradesh and is engaged in the manufacture of lime. The petitioner-companies are also holding mining leases in the State of Madhya Pradesh. The lime stone extracted from the mines are utilised for the manufacture of lime and is also supplied to the Government Undertakings,

including the Durgapur Steel Plant belonging to the Steel Authority of India Ltd., a Government of India Enterprise.

The Superintendent (Preventive) Central Excises, Indore issued summons to the petitioners on 17-11-1989, exercising powers u/s 14 of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act), calling upon the petitioners to produce before him the documents referred in the summons issued pertaining to the contract and supply of lime stone to Durgapur Steel Plant.

According to the petitioners, before issuance of the summons, inquiries were made by the Superintendent himself regarding supply of lime stone made to Durgapur Steel Plant and statement was recorded u/s 14 of the Act from the authorised representative of the petitioners. The petitioners made their written submissions before the Superintendent, Central Excise, raising the question that they are not involved in the manufacturing activities and, therefore, no tax is leviable and the authority has no jurisdiction to issue summons. The Superintendent, Central Excise again issued summons to the petitioners on 21-12-1989 and further summons was issued on 19-1-1990. The petitioners have reiterated that they are not involved in the process of manufacture of lime stone, the authority does not have any jurisdiction to issue summons. A further summons was issued on 14-2-1990, along with a covering letter dated 16-2-1990 containing information by the authority that the crushed lime stone attracts excise duty at 12 per cent ad valorem.

Orders have been passed by the respondent No. 2 on 4-5-1990 whereby the petitioner No. 1's liability was quantified for the period November 1986 to March 1991 on the crushed lime stones to the tune of Rs. 24,51,214.18 under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Act and also imposed a penalty of Rs. 5,00,000/- under Rules 9(2) and 173Q of the Central Excise Rules, 1944, vide Annexure-M. Another order was passed on 4-5-1992 quantifying and confirming the demand of Rs. 2,60,551.58 under Rule 9(2) read with Section 11A of the Act for the period April 1991 to August 1991 and also imposed a penalty of Rs. 50,000/- under Rules 9(2) and 173Q of the Central Excise Rules, 1944.

As per the respondents, the respondent No. 1 has only summoned the petitioners for production of certain documents for further query, which were not produced by the petitioners; the respondent No. 1 has every right to satisfy himself regarding duty liability on the product and for that purpose he is required to visit the spot as well as peruse various documents; the respondents are entitled to conduct investigation and issue summons; the petitioners are required to make available the information by way of documents and records for the purpose of investigation; it is the duty of the respondents to see that there is no evasion of excise duty on the part of the petitioners and thereby to satisfy themselves by looking into the records of the company; and there is nothing for which the petitioners should feel aggrieved. As regards the excisability of lime stone, the respondents have submitted that the petitioners are engaged in the

business of extracting lime stone from the mines, the lime stone as they extracted is not supplied to Durgapur Steel Plant; the lime stone after extraction, is crushed to the required size and the crushed lime stone is supplied to the buyer; the lime stones extracted from the mines are crushed and grinded to the desired size in a crushing machine to get lime stone chips; the process of crushing and grinding is ancillary to the completion of manufactured products, viz., lime stone chips or crushed/grinded lime stone, which is excisable goods; the crushing of lime stone is a process of manufacture; and the crushed lime stone chips are a different commercial commodity than the lime stone lumps.

It is contended by the counsel for the petitioners that the crushing of the lumps of lime stone into pieces is not a manufacturing process within the meaning of Section 2(f) of the Act; it is merely a process of making the lime stone into commercial product without losing its quality and characteristic. On the other hand, it is the case of the respondents that the lime stone, lime stone chips, lime stone lumps and crushed and grinded lime stone are different commercial commodities and, therefore, conversion of lime stone lumps into crushed and grinded lime stone involves a transformation from non-excisable goods to excisable goods, through crushing or grinding which is a process of manufacture in terms of Chapter Note No. 2 of Chapter 25 of the Act.

With effect from 28-2-1986, the definition of Section 2(f) of the Central Excise Tariff Act, 1985 has been substituted by Section 4 of the Act, which reads as under:

(f) "manufacture" includes any process :

(i) incidental or ancillary to the completion of manufactured product;

(ii) which is specified in relation to any goods in the section or chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture;

and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

Chapter Note 2 of Chapter 25 reads :

2. Headings, Nos. 25.01, 25.03 and 25.05 cover only products which have been washed (even with chemical substances, eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, or concentrated by floatation, magnetic separation or other mechanical or physical processes (except crystallisation), but not products that have been roasted, calcined or obtained by mixing.

A tax statute is to be strictly construed. In *The Martand Dairy and Farm Vs. The Union of India (UOI) and Others*, Justice Krishna Iyer, J. observed "taxation considerations may stem from administrative experience and other factors of life

and not artistic visualisation or neat logic, and so the literal, though pedestrian, interpretation must prevail."

On a plain reading of Section 2(f)(ii) with Chapter Note 2 of Chapter 25 of the Central Excise Tariff Act, 1985 it is clear that "manufacture" includes any process which is specified in relation to any goods as amounting to manufacture under any section of the Act or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985. If any process is specified in the section or Chapter Note to be a manufacture then under the definition it shall be a "manufacture", otherwise not. By artificial definition of the word "manufacture" the Legislature have retained the power to equate any process with "manufacture" by providing accordingly in the section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985. Chapter Note 2 of Chapter 25 does not equate the process of crushing as amounting to manufacture but merely enumerated the forms of products falling under the Headings Nos. 25.01, 25.03 and 25.05 in which they can be taxed. The intention of the Legislature is clearly not to equate the process of crushing as amounting to manufacture.

The intention of the Legislature can be further seen on a comparison of Chapter Note 2 of Chapter 25, Chapter Note 2 of Chapter 9, Chapter Note 3 of Chapter 2, Chapter Note 2 of Chapter 26, Chapter Note 6 of Chapter 2 Chapter Note 4 of Chapter 33, Chapter Note 6 of Chapter 2 and Chapter Note 2 of Chapter 83. Chapter Note 2 of Chapter 25 does not provide that the process of crushing referred to therein shall amount to manufacture, whereas in the aforesaid Chapter Notes it has been expressly provided that the process referred therein shall amount to manufacture in respect of the specified goods. The Legislature has expressly made provision where the process undergone shall amount to manufacture wherever it is intended to extend the artificial definition. On the aforesaid view, we are of the opinion that Note 2 of Chapter 25 does not by artificial extension of the definition of the word "manufacture" extend the process of crushing of lime stone to be a manufacturing process.

It is open for the revenue to establish that the process involved in the present case, i.e. crushing of lime stone, extracted from the mines, into lime stone chips is a process of manufacture. The question whether a particular process is a manufacture or not has to be judged and determined having regard to the facts and circumstances of each case and having regard to the well-known test laid down by the Supreme Court in a number of decisions. The Supreme Court in *Union of India (UOI) Vs. Delhi Cloth and General Mills, , Empire Industries Limited and Others Vs. Union of India and Others, , South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, has held that taxable event under the excise law is manufacture and liability to duty is attracted, the moment there is transformation of goods in new commodity commercially known as distinct commodity, on account of one process or several processes. Manufacture would certainly cover transformation, but where transformation brings about a fundamental change, brings a new substance into existence or a new and

different article having distinct name, character or use results from a particular process or particular activity depends on the facts and circumstances of each case because every change in the raw material is not manufacture.

Shri Shyamlendu Kumar Chatterjee, Law Officer of M/s. S.N. Sunderson (Minerals) Ltd., Maihar was examined and his statement was recorded u/s 14 of the Act by the Superintendent of Central Excises and Salt Act on 31-8-1989. In answer to questions he has stated that the company is manufacturing lime stone in a particular size by crushing the lime stone in lump form. According to him, the company purchases lime stone in lump form or excavates it from their mines and then crushes it by putting it in crusher machine to obtain the desired sizes of lime stone chips, as per the requirement of the buyer by screening. He has further stated that the company had purchased lime stone in lump form from M/s. R.S. Minerals, Maihar and M/s. Diwan Lime Co. Pvt. Ltd., Maihar. According to him, prior to 1-4-1989 the company had no crusher, so they used to get the lime stone crushed into particular size by supplying lime to Subash Stone Crusher, Maihar; Rakesh Stone Crusher, Kami, Vijay Stone Crusher, Maihar and Maa Sharda Stone Crusher, Baraiya and thereafter by their own crusher at Reusa. Apart from their own crusher, they are getting the lime stone crushed from M/s. Subash Stone Crusher. They were selling crushed lime stone of particular size to Durgapur Steel Plant only. It is further stated that he did not know that the crushing of lime stone falls under Heading 25.05 and attracts excise duty at 12 per cent.

The statement of the Law Officer of the petitioner No. 1 company clearly establishes that lime stone crushed by processing through crusher to a particular size, as per the order placed by the buyer and the buyer is supplied lime stone after it is crushed; the lime stone as it is extracted or purchased from other persons is not supplied to the buyer; it is only after it is converted to a particular size by application of mechanical process, it is supplied to the buyer. The crushing operation is meant for the purpose of supply of particular size of lime stone chips, as per the order placed by the buyer.

The aforesaid facts establish that lime stone chips of a particular size are prepared as per the order placed by the buyer. The concept of manufacture has to be viewed considering the emergence of a new marketable product. The lime stone chips of specific size is a new product brought about by crushings of lime stone lumps. The operation of crushing brings into existence a new product which has a different name, character and use. Process in this case is "manufacture" of lime stone chips which are excisable goods liable for duty under Chapter 25 of the Central Excise Tariff Act, 1985 at the rate of 12 per cent. The Collector, Central Excise, is right in levying duty on lime stone chips.

Now the question is whether the penalty imposed on the petitioners is in accordance with law. Under Rule 173Q of the Central Excise Rules, 1944, if any manufacturer, producer or licensee of a warehouse, (a) removes any excisable goods in contravention of any of the provisions of the rules; or (b) does not

account for any excisable goods manufactured, produced or stored by him or enters wilfully any wrong or incorrect particulars in the gate pass issued for the goods removed by him with intent to facilitate the buyer to avail of credit of the duty in respect of such goods which is not permissible under the rules, or engages in the manufacture, production or storage of any excisable goods without having applied for the licence required u/s 6 of the Act; or contravenes any of the provisions of the rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and shall be liable to penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to above has been committed or five thousand rupees, whichever is greater.

The principal object of the Act is not to levy penalty, its object is calculation and enforcement of payment of Central Excise duty. The manufacturer is liable to pay penalty on account of certain acts or omissions committed by them. Under Rule 173Q of the Central Excise Rules, 1944, a maximum limit of penalty which could be levied is provided and, therefore, the penalty could not be wholly disproportionate to the incidence of infringement. In *Hindustan Steel Ltd. Vs. State of Orissa*, it has been held that:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

This decision was followed and approved in later decisions of the Supreme Court in *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, , *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, and *Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay*,

Law on the subject is whether the crushing of the lime stone is a process of manufacture and resultant goods lime stone chip are excisable item under the Act was not settled in Madhya Pradesh. In a case decided by this Court under the M.P. General Sales Tax Act, 1959 in *Bedaghat Mineral Industries v. Divisional Deputy Commissioner of Sales Tax*, decided on 10th April 1987, a Division Bench of this Court has ruled, while considering Section 2(j) and 2(r)(ii) of the M.P. General Sales Tax Act, 1959 that dolomite lumps broken into chips and powder for convenience in use retain the same characteristics and qualities of dolomite

lumps, therefore, there is no manufacture by crushing dolomite lumps into chips or powder. In *S.A.I.L. v. Collector of Central Excise*, C.E.G.A.T. had held that crushing of lime stone into lime powder does not amount to manufacture as lime powder not being known and recognised as a distinct commodity in the market. In 1991 (32) ECC 133 it was held that crushing, grinding and sieving of lime stone to obtain lime stone chips and powder amounts to "manufacture". Thus, there are divergent views of Courts raising bona fide doubt in the mind of the petitioners whether the crushing of lime stone lumps to obtain lime stone chips will amount to manufacture and consequently excisable under the Act? The statement recorded of the Law Officer of the petitioner company also indicates that as on 31-8-1989 there was a bona fide belief in the mind of the petitioner that the process of crushing does not amount to manufacture. The aforesaid state of affair clearly indicate that the breach in payment of excise duty flows from a bona fide belief of the company that they are not liable to pay excise duty, as they were not engaged in the "manufacture" of lime stone chips. Conversion of lime stone lumps into lime stone chips was never taken to be a "manufacturing" process by the petitioners.

The proceeding for imposition of penalty being quasi-criminal in nature, the burden to prove the alleged offence is on the excise department. No facts or circumstances are brought about by the department nor are considered by the 2nd respondent to show deliberate avoidance of payment of duty. There is nothing in the Excise Act or the Rules framed thereunder that the authority is bound to impose penalty, the moment there is default in payment of duty. The petitioners were under a bona fide belief that they are not liable to pay excise duty on the lime stone chips. The Collector Central Excise, while passing orders (Annexures M & N) imposing penalty has not at all taken into consideration this aspect of the case. Therefore, we are of the opinion, that as the petitioners were under a bona fide belief about their liability to pay excise duty, the Collector, Central Excise has acted rather harshly in imposing penalty of Rs. 5,00,000/- and Rs. 50,000/- under Annexures M & N.

Consequently, this petition is partly allowed. The orders (Annexures M & N) so far as they relate to, imposition of penalty, are hereby quashed. There shall be no order as to costs. The outstanding amount of security be refunded to the petitioners.