
(1985) 07 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1271 of 1982

Tata Export Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-07-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 176, 49, 49(1), 9, 9(1)
Central Excises and Salt Act, 1944 — Section 2, 3, 35
Constitution of India, 1950 — Article 19(1), 226
Finance Act, 1982 — Section 51

Citation : (1986) 8 ECC 106 : (1989) 20 ECR 204 : (1985) 22 ELT 732 : (1986) ILR (MP) 425 : (1986) 31 MPLJ 561 : (1986) MPLJ 561

Hon'ble Judges : S. Avasthy, J;C.P. Sen, J

Bench : Division Bench

Advocate : R.J. Joshi and P.H. Talayarkhan, for the Appellant; A.P. Tara, for the Respondent

Judgement

C.P. Sen, J.

In this petition under Article 226 of the Constitution the petitioner is challenging levy of duty on pigment slurry and nitrocellulose lacquer under Central Excises and Salt Act, 1944, and also challenging Section 51 of the Finance Act, 1982 and Notification dated 20-2-1982 giving retrospective effect to Rules 9 and 49 of the Central Excise Rules, 1944, from the date of framing of the rules.

The petitioner is a Company incorporated under the provisions of the Indian Companies Act, 1956. The petitioner has a factory at Dewas wherein it is manufacturing finished leather, garments and shoe uppers. These products are exempted from excise duty. For the completion of manufacturing of finished leather, the petitioner apply pigment slurry and nitrocellulose lacquer to the leather in the course of manufacture of finished leather. At the said factory, the petitioner has a Research and Development Cell in a separate building about 100 metres from the factory and within the same campus where amongst other

activity, the petitioner mixes pigment powders like titanium dioxide with certain solvents. These pigment powders and solvents are obtained from the market and are products upon which the duty of excise has been paid. After adding preservatives, the mixture of pigment powder and solvents become slurry. This slurry is used directly by the petitioner in the tanning of leather and is part and parcel of the process to obtain finished leather. Similarly, in the case of nitrocellulose lacquer, certain chemicals such as nitrocellulose, alkydes etc. are combined with solvents with or without water, with or without pigments depending upon the end use. The resultant mixture is also used by the petitioner for manufacture of finished leather. The pigment slurry as well as nitrocellulose lacquer are used for captive consumption in the petitioner's factory. Under Notification No. 80/80, the Central Government exempted excisable goods specified therein from the whole of the duty of excise leviable thereon if the first clearances did not aggregate rupees 5 lacs in value provided that the clearances of all excisable goods manufactured should not exceed rupees 20 lacs in value. The total value of slurry and lacquer did not exceed 5 lacs of rupees in the year in question though the outturn of the finished product i.e. leather was much above 20 lacs in the relevant year. Section 3 of the said Act provides that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India at the rates set forth in the First Schedule to the Act. u/s 2(d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt. In Section 2(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product Rule 9(1) of the said Rules prescribe the time and manner of payment of duty on excisable goods to be removed from one 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 excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules. Under Rule 49(1) duty is chargeable only on removal of goods from the factory premises or from an approved place of storage. These rules, as they stand, were amended in 1982 but by Section 51 of the Finance Act, 1982 these rules were given retrospective effect from the date of framing of the rules i.e. 1944, as per Notification dated 20-2-1982. Under Item No. 14 I(2)(iii) in the First Schedule to the Act water pigment finishes for leather is chargeable to 10% of excise duty ad valorem and under Item No. 14 III(i) nitrocellulose lacquers, clear and pigmented and nitrocellulose ancillaries in liquid, semi-solid or pasty form is chargeable at the rate of 20% ad valorem. Here the question is whether excise duty is leviable on pigment slurry and nitrocellulose lacquer used by the petitioner under the aforesaid items, whether the goods so manufactured were exempted from excise duty under Notification No. 80/80 as their total value was less than 5 lacs though the turnover of the factory was over 20 lacs and whether the Rules 9 and 49 can be given retrospective effect from the date of framing of the rules.

In the month of October 1980 Officers of the Enforcement Branch of the Excise Department visited the factory and threatened to seize the existing stock of pigment slurry and nitrocellulose lacquer as they were manufacturing and clearing them without a valid licence and without paying excise duty leviable thereon and the petitioner was made to apply for a licence on 29-10-1980 under Rule 176. However, the petitioner by their letter dated 10-11-1980 pointed out that it is not manufacturing water pigment finishes for leather but only mixing pigment with certain solvents with a view to convert pigment from dry form to slurry. Similarly, in case of nitrocellulose lacquer, certain chemicals are mixed with solvents and there is no manufacture. The products so mixed are used for completion of manufacture of finished leather. The said pigment slurry and nitrocellulose lacquer are used in the single stream of production of finished leather and do not ever leave the factory or the place of manufacturing nor are the same ever sold or supplied to the open market. The pigment slurry so produced is not a marketable product. So the classification list was being filed under protest. The Superintendent of Central Excise by letter dated 13-11-1980 pointed out that the slurry and the lacquer could not be cleared without payment of duty and Notification No. 80/80 was not applicable as value of clearances of the petitioner's factory of all excisable goods exceeded rupees 20 lacs and, therefore, classification list submitted by the petitioner was returned and was directed to file revised classification list which was done on 24-11-1980 under protest pointing out that no excise duty is payable on slurry and lacquer. In spite of the protest, the respondents recovered duty on slurry and lacquer amounting to Rs. 20,051.74 p. up to 31-12-1980 under Item No. 14 I(2) (iii) and 14 III(i) of the First Schedule. The petitioner thereafter filed the present petition at the Indore Bench of this Court on 16-1-1981. The respondents submitted their return on 22-6-81 denying the allegations made by the petitioner. On 16-9-81 the petitioner filed counter-affidavit to the return, of its Chief Accountant Mohanlal Jain. The respondents filed reply to the rejoinder on 11-1-1982. The petitioner then filed another counter-affidavit of its Chief Accountant on 19-3-1982 and in consequence the respondents filed affidavit of Assistant Collector Yadav Kholkute on 8-4-82 pointing out that the Rules 9 and 49 have been given retrospective effect under Finance Act of 1982. The petitioner, therefore, filed an application for amendment of the petition on 9-8-82 challenging Section 51 of the Finance Act and the Notification giving retrospective effect to these rules which was allowed and amendment incorporated. Additional return was filed by the respondents on 23-2-1983. The petitioner then filed rejoinder to the additional return on 5-3-1984 and the respondents filed reply to this rejoinder on 26-2-1985. Since validity of Rules 9 and 49 was under challenge, the case was sent to the main seat of this Court for hearing.

The Supreme Court in Union of India (UOI) Vs. Delhi Cloth and General Mills, has held that manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and

manipulation. But something more is necessary and there must be transformation ; a new and different article must emerge having a distinctive name, character or use. Relying on this decision, the Supreme Court in *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, further held that there must be such a transformation that a new and different article must emerge having a distinctive name, character or use. In *Sandoz India Ltd. v. Union of India-* 1980 E.L.T. 696 a Division Bench of the Bombay High Court held that the processing of the physical form from a solid state to a liquid state by the addition of dispersing agents and water did not result in manufacture as there was no change in the chemical composition of the pigment. In *Shakti Insulated Wires v. Union of India*-1982 E.L.T 10 , the Bombay High Court further held that it is obvious that merely because some process is carried on any article it would not necessarily amount to a manufacture of a fresh article amounting to "manufacture" u/s 2(f) of the Act. In *Coromandal Prodorite Pvt. Ltd. Vs. Govt. of India and Others*, a Division Bench of the Madras High Court held that if as a result of the process, raw-materials have been transformed into a distinct and commercially new product, then alone the process can be taken to be a manufacture. In this case since the end product brought about by the process of mixture or dilution continues to have the same chemical properties as resin, there cannot be said to be any manufacturing process. Recently, the Supreme Court in *Empire Industries Limited and Others Vs. Union of India and Others*, reiterated that any process or processes creating a new commodity commercially known as a distinct and separate commodity having its own character, use and name would be "manufacture". It is settled law that in a case of taxation the burden of proving that the necessary ingredients prescribed by the taxing provision are satisfied is entirely upon the taxing authority [(*Sandoz India Ltd. v. Union of India (Supra)*)]. It is, therefore, primarily for the taxing authority to satisfy the Court that formulation of pigment slurry is entirely distinct commodity having entirely distinct name, character and use as compared with the pigment itself.

It is evident that pigment slurry is merely a mixture made by mixing pigment powders like titanium dioxide with water containing chemical wetting agents. This is done only to facilitate application of pigment to leather. Chemical properties and characteristics of the pigment powder remaining unchanged when it becomes slurry. Pigment slurry is only powder in a wet form. Though in the return, the respondents contended that pigment slurry is water pigment finishes for leather falling under Item No. 14 I (2) (iii) of the First Schedule, this was met in the rejoinder by the petitioner dated 16-9-1981 pointing out that water pigment finishes involve "film former" for pigment dispersion in water. Making of pigment slurry does not involve addition of any film former. Reference has been made of the book R.N. Shreve on Chemical Process Industries. In the reply to the rejoinder dated 11-1-1982 in para 6 it has been admitted by the respondents that pigment slurry manufactured by the petitioner does not contain film former, yet the product thus manufactured is used for processing the finished leather. So

it can be said that by not mixing film former, they are producing an inferior quality of water pigment finishes for leather. In support, report of the Chemical Examiner in Central Excise Office was produced that on analysis of the pigment slurry, the ingredients found was titanium dioxide i.e. the powder which was used for making the slurry and there is no change in the end product. Again in the affidavit of the Asstt. Collector dated 8-4-82 it was admitted that the petitioner is manufacturing pigment slurry without using film former for processing the leather. The Supreme Court in *Dunlop India v. Union of India*- AIR 1977 S.C. 597 held that classification of articles with reference to their end-use is totally irrelevant. It is, therefore, clear that petitioner is not manufacturing water pigment finishes for leather which is leviable to excise duty under Item No. 14 1(2) (iii) of the First Schedule. But this cannot be said so far as nitrocellulose lacquer which is being prepared by the petitioner in its factory by mixing certain chemicals such as nitrocellulose, alkyds and combined with solvents with or without water and with or without pigment depending upon the end-use. So the resultant product is something different from the ingredients used for making them and so the petitioner is manufacturing nitrocellulose lacquer which is leviable to duty under Item No. 14 111 (i) of the First Schedule. But as the finished product of the petitioner i.e. leather goods, are totally exempted from excise duty, the same cannot be taken into consideration in order to assess excise duty on nitrocellulose under the exemption granted under Notification No. 80/80. Under this notification, nitrocellulose lacquer would be totally exempt from excise duty in case the value of the clearances of this product is less than 5 lacs. For calculating this amount, the total value of the finished product of the petitioner cannot be taken into consideration as the finished product is totally exempted from excise duty. The Supreme Court in *Punjab Wakf Board, Ambala Cantt. Vs. Cpat. Mehar Singh and Others*, held that after total exemption from tax, goods ceased to be taxable goods. Therefore, although nitrocellulose lacquer was chargeable to excise duty under Item No. 14 III(i) of the First Schedule, but as the value of production of this article was less than 5 lacs, the petitioner is exempted from paying any duty on this product under Notification No. 80/80.

Now remains challenge of the petitioner to Section 51 of the Finance Act of 1982 and Notification dated 20-2-1982 giving retrospective effect to the amended Rules 9 and 49 of the Excise Rules, 1944, on the ground that it is not permissible in law to provide for a statutory provision like Section 51 of the Finance Act giving retrospective effect to the rules and it is inconsistent with Section 37 of the Central Excise Act and is violative of Article 19(1)(g) of the Constitution. This restriction has no justification whatsoever and is neither reasonable nor in public interest. We are satisfied that there is no merit in this contention and the rules are intra vires of the Constitution. We fully endorse the decision of the Delhi High Court in *J.K. Cotton Spinning & Weaving Mills and Anr. v. Union of India* and Ors.-1983 E.L.T. 239 wherein it has been held as under :-

"Merely because the rules operate retrospectively by virtue of the provisions of Section 51 of the Finance Act, 1982, it would not make the rule or the section

ultra vires the legislative authority. However, if the retrospectivity is unreasonable to the extent that the whole legislation appears to be arbitrary then the provisions can be struck down as being ultra vires. Since in terms of the Explanation u/s 51 of the Finance Act, it is clear that criminal liability will not be attracted because of retrospective amendment and moreover civil liabilities such as recovery of duty not levied or not paid or short levied or short paid or erroneously refunded has to be done in accordance with the provisions of the Act and the rules as in force from time to time, therefore, there is no unreasonableness on account of length of retrospectivity of the amendment and Section 51 of the Finance Act, 1982 and Rules 9 and 49 of Central Excise Rules as amended are valid."

The only question that now survives for consideration is the contention of the respondents that since the petitioner had an alternative remedy of appeal u/s 35 of the Central Excise Act against the impugned orders, the present petition is not tenable. The Supreme Court in *Hirday Narain v. Income Tax Officer, Bareilly*-AIR 1971 S.C. 34 held that once a writ petition has been entertained and the alternative remedy was time-barred, the petition should be held to be maintainable. Following this decision, this Court has held in a series of decisions that once a petition has been admitted, it could not be dismissed on the ground of alternative remedy. The unreported decision in *Bharat Commerce Industries v. Union of India*-M.P. No. 351/80, dated 2-11-1983 is clearly distinguishable because in that case the petitioner had paid excise duty on blended fabrics without protest and without dispute. They claimed refund of duty by filing a petition on the ground that it is paid under mistake and such a mistake being discovered only when Gujarat High Court held in a Judgment that duty is not leviable on blended fabrics under tariff entry in question. In the present case, classification list was filed under protest by the petitioner on the threats given by the respondents to paralyse the petitioner's operation by seizure of stock unless licence was taken and excise duty was paid. So the excise duty was paid under protest. Besides, the petitioner has challenged validity of Section 51 of the Finance Act, 1982, and the Notification dated 20-2-1982 which could not have been challenged in an appeal that could be preferred u/s 35 of the Act.

Therefore, the petition is partly allowed, the orders of the Superintendent, Central Excise, dated 13-11-1980 and that of the Assistant Collector, Central Excise, dated 12-11-1980 are hereby quashed and the respondents are directed to refund excise duty of Rs. 20,051.74p. collected from the petitioner as excise duty on pigment slurry and nitrocellulose lacquer for the year 1980. In the circumstances, there shall be no order as to costs. The outstanding security amount be refunded to the petitioner.