

2004(168) ELT 289 (SC)

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 10218 of 1983 and 7114 of 2000

Decided On: 28.11.2000

Appellants: F.G.P. Ltd.

Vs.

Respondent: Union of India (UOI)

Hon'ble Judges:

Syed Shah Mohammed Quadri and S.N. Phukan, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Sanjiv Sen, Alok Yadav and Ravinder Narain for JBD & Co.

For Respondents/Defendant: Mukul Rohatgi, ASG, Dileep Tandon, B.K. Prasad and P. Parmeswaran

Subject: Excise

Catch Words:

Appeal, Appellate Tribunal, Assistant Collector, Board, CEGAT, Collector, Consideration, Consume, Cost, Date, Demand, Duty, Electricity, Evidence, Excisable Goods, Excise Duty, Goods, High Court Judgment, India, Interest, Intermediate Product, Manufacture, Manufactured Products, Manufacturer, Manufacturing Process, Marketability, Marketable Goods, Material, Notice, Order, Oxygen,

Person, Process, Purchaser, Question of Fact, Raw Material, Record, Report, Show Cause Notice, Soda Ash, Superintendent, Trade Notice, Tribunal, Writ, Writ Petition

Acts/Rules/Orders:

Central Excise Act, 1944 - Section 3

Cases Referred:

South Bihar Sugar Mills Ltd. etc. v. Union of India and Ors., 1978 (2) E.L.T. (J 336) (S.C.), 1968 (3) SCR 21; A.P. State Electricity Board v. Collector of Central Excise, Hyderabad, 1994 (70) E.L.T. 3 (S.C.)

Prior History:

From the Bombay High Court Judgment dated 25-1-1985 in W.P. No. 5095 of 1984

Disposition:

Appeal allowed

ORDER

1. Leave is granted in SLP (C) No. 7908 of 1985.

2. These two appeals are filed by the same appellant by special leave. In Civil Appeal No. 10218/83 which arises from the order of Customs, Excise & Gold (Control) Appellate Tribunal ('CEGAT' in short) in appeal No. ED9SB(I)605/83-D dated August 22, 1983, the question that arises for consideration is, whether intermediate product 'glass lumps' are exciseable goods under residuary item 68 till February 28, 1979 and with effect from March 1, 1979 under item

23-A(4) (hereinafter this appeal will be referred to as the main appeal).

3. In the connected Civil Appeal No. 7114/2000 (arising out of SLP (C) 7908/85) which is from the order of the High Court of Bombay in Writ Petition No. 5095/84 dated January 25, 1985, the question is whether demand of duty without being preceded by a show cause notice, is sustainable in law (hereinafter this appeal will be referred to as the connected appeal).

4. Since the result of the connected appeal depends upon the decision in the main appeal, we shall deal with and advert to the facts giving rise to it.

5. The appellant is a manufacturer of 'glass wool' and 'glass staple fibre'. The raw material used for those goods are Silica Sand, Soda Ash, Bo-rax/Rasorite etc. They are mixed in required proportion and heated in a furnace to a temperature of around 1400 degree celcius. During the process the surplus molten glass when drained and sprinkled with water forms into lumps which is called 'glass lumps'. It is the classifiability of this intermediate product which is in question. The appellant utilises 'glass lumps' for manufacturing the end products referred to above.

6. The appellant was served with Trade Notice No. 35/81 dated 7-9-1981 indicating that 'glass lumps' were classifiable under Item 68 before March 1, 1979 and thereafter they are exigible to duty under Item 23-A(4). On considering the reply of the appellant to the said notice, the Assistant Collector held that 'glass lumps' were manufactured products and also goods under the Excise Law. Against that order the appellant filed appeal before the Customs Excise Collector who upheld the order of the Assistant Collector and dismissed the appeal on January 19, 1983. The appellant carried the matter in appeal before CEGAT which was also

dismissed. Against the order of the CEGAT dated August 22, 1983 dismissing its appeal, the appellant is before us in the main appeal.

7. While so the Superintendent, Central Excise, Range VIII, Division VI, Bombay-2 issued a notice on 28-3-1983 demanding excise duty for the period 1-3-1979 to 31-3-1983 amounting to Rs. 6,06,182/- (rupees six lac six thousand one hundred eighty two only). The appellant assailed the validity of the notice in Writ Petition No. 5095/84 filed before the High Court of Bombay. The High Court dismissed the writ petition on 25-1-1985. That order is challenged in the connected appeal.

8. Mr. Sanjiv Sen, learned Counsel for the appellant, has contended that 'glass lumps' are merely by-products, they are not known in the market by the same name and are not marketable goods, therefore they cannot be treated as excisable goods. The learned Additional Solicitor General, on the other hand, has argued that the appellant is the sole manufacturer of 'glass lumps' which are captively consumed in the manufacture of the end products; in a case as here where there is no other person in the country who would purchase the same, the test of marketability need not be insisted upon for the purpose of levying excise duty and relied upon the observations of this Court in *South Bihar Sugar Mills Ltd. etc. v. Union of India and Ors.* Also reported in 1978 (2) E.L.T. (J 336) (S.C.) [1968 (3) SCR 21].

9. It is the settled law that under Section 3 of the Excise Act, exigibility of duty is on the goods which are produced or manufactured and bought and sold in the market. In the instant case it cannot be disputed that the 'glass lumps' though a by-product, satisfy the test of manufacture. The only controversy is whether they are goods as understood in excise law. To fulfil the requirements of excisable goods, they must be capable of being bought and sold in the market.

10. In South Bihar Sugar Mills' case (supra) kiln gas was produced in the process of burning lime stone with coke and lime in the kilns containing mixture of gases consisting of carbon dioxide, nitrogen, oxygen etc. which was compressed and utilised for removing impurities from sugarcane juice. From this compressed mixture of gases only the carbon dioxide was used and the other gases escaped into the atmosphere. This was treated by the Revenue as manufacture of compressed Carbon Dioxide for levying excise duty. The question before this Court was : whether it was liable to excise duty under Item 14-H of the First Schedule. This Court held that the gas generated by those concerns was kiln gas and not Carbon Dioxide as known to the trade i.e., to those who deal in it or who use it; the kiln gas in question was therefore neither Carbon Dioxide nor compressed Carbon Dioxide as such known to commercial community and therefore could not attract item 14-H of the First Schedule.

11. On the basis of the following observation :-

"...at the same time the duty being on manufacture and not on sale the mere fact that kiln gas generated by these concerns is not actually sold would not make any difference if what they generate and use in their manufacturing process is carbon dioxide."

it is difficult to accept the contention of the learned additional Solicitor General that for levying excise duty the test of marketability in respect of the 'glass lumps' need not be established as the manufacture and the utilisation of the goods cannot be disputed.

12. The scope of the test of marketability has been discussed by this Court in A.P. State Electricity Board v. Collector of Central Excise, Hyderabad [1994 (70) E.L.T. 3 (S.C.)]. After referring to South Bihar Sugar Mills' case (supra), it was held,

"...The "marketability" is thus essentially a question of fact to be decided in the facts of each

case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country..."

13. From the above extracts of the judgment it is clear that there is a distinction between marketability of goods and availability of goods generally in the market. If the goods are available from only one source or from a particular market, it will not make any difference because the test of marketability will be satisfied so long as goods are available for purchases. There it was contended that the electric poles which were manufactured by the independent contractors, were being sold to the Kerala State Electricity Board and it was the only one purchaser so there was no marketability. Negating the contention, the principle that for goods to attract excise duty, they must satisfy the test of marketability, was reiterated and after referring to the aforementioned judgments it was held that no excise duty could be levied on goods which have been produced or manufactured but was not marketed or capable of being marketing and that even if there was only one purchaser of the goods it must still be said that there was a market for those goods.

14. It is thus clear that the marketability of the goods is an essential ingredient of excisable goods for being subjected to the excise duty.

15. That the goods are marketable, has to be proved by the excise authorities. In this case the appellants filed affidavits of certain concerns showing that they are not interested in purchasing 'glass lumps'. No evidence whatsoever has been brought on record by the excise authorities to show that the said goods are marketable in the sense stated above. Based on the evidence of affidavits filed by the appellant it is sought to be argued that the deponents may not be interested in purchasing 'glass lumps' but it does not disprove marketability of the goods. We are unable to accept this contention. The burden of showing that the goods are marketable is on the Revenue. In the absence of any proof brought on record by the Revenue that 'glass lumps' are marketable or capable of being marketed, it is not possible to hold that the test of marketability is satisfied. For these reasons we set aside the order of the CEGAT under challenge and allow the appeal with costs.

16. In view of the decision of the first appeal the question of validity of demand notice does not survive. This appeal has become infructuous and it is accordingly dismissed. No costs.