

A COLLECTOR OF CENTRAL EXCISE, BARODA

v.

UNITED PHOSPHORUS LTD.

APRIL 7, 2000

B [S. RAJENDRA BABU AND R.C. LAHOTI, JJ.]

C *Central Excises and Salt Act, 1944—Excise Duty—Levy of—On intermediate products—Which came into existence at a certain stage of a multiple stage integrated chemical process—Held, intermediate products may be liable to levy of excise duty if they satisfy the test of being goods on the touchstone of marketability—Onus to establish that an article is ‘goods’ and marketable is on the department—Indian Evidence Act, 1872—Chapter VII.*

D During manufacture of a product by the respondents, three intermediate products came into existence as intermediate products. The appellant passed orders of adjudication holding the three intermediate products liable to excise duty.

E Respondents filed appeal before Collector (Appeals) who allowed the appeals, exonerating the intermediate products from levy of excise duty, finding that the three intermediate products came into existence at a certain stage of a multiple stage integrated chemical process leading to the final products and therefore they could not be held to be goods as understood in commercial parlance because they were not marketable and that the department had failed in showing if any facility existed for separation of the said three products and whether in the form in which the said three products came into existence in the reaction process were capable of being marketed.

F Appellant filed appeal against the order of the Collector (Appeals), before the Tribunal, wherein it did not challenge the finding of fact arrived at by the Collector (Appeals), and the only argument was that the three items were mentioned as ‘goods’ in the dictionary and one of the goods was mentioned as entitled to drawback in Duty Drawback Rules. The appeal before the Tribunal was dismissed. Hence this appeal.

G Dismissing the appeal, this Court

H HELD : 1. No fault can be found with the view taken by the Tribunal

that the mentioning of the items as “goods” in the dictionary and in the excise tariff and mere mentioning of an item in Duty Drawback Rules as one entitled to duty drawback with reference to a different context was not enough to satisfy the test of marketability unless it was shown that the intermediate products were capable of being taken to market and bought and sold. [1065G-H; 1066-A-B]

2. Excise is a duty on goods as specified in the Schedule. The taxable event in the case of excise duty is the manufacture of goods. In Order to be excisable goods (i) there must be goods (ii) having come into existence as a result of manufacture, and (iii) to be goods, the article must be known to the market as such and as would ordinarily come to the market for being bought and sold. Actual sale of the article is not required but it must be capable of being bought and sold. Intermediate products even if captively consumed may be liable to levy of excise duty if they satisfy the test of being goods on the touchstone of marketability. Though the intermediate goods so coming into existence may be specified in the Schedule as excisable they would not be subjected to duty unless they satisfy the test of marketability. [1064-E-G; 1065-B-C]

*Bhor Industries Ltd. v. Collector of Central Excise*, (1989) 40 ELT 280 SC; *Union of India v. Delhi Cloth and General Mills Co. Ltd.*, (1997) 92 ELT 315 SC and *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad*, (1995) 76 ELT 241 SC, relied on.

3. Onus to establish that an article is ‘goods’ and marketable, is on the department.

*Collector v. Amba Lal Sara Bhai Enterprise*, (1989) 43 ELT 214 SC, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8999-9000 of 1996.

From the Judgment and Order dated 15.11.95 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in A. No. E/796/92-C and E/3103/93-C.

Gauri Shankar Murti, K.C. Kaushik and P. Parmeshwaran for the Appellant.

A Dushyant A. Dave, Jay Savla, J.K. Das and N. Menon for the Respondent.

The Judgment of the Court was delivered by

B R.C. LAHOTI, J. The respondents are engaged in the manufacture of insecticides, fungicides, weedicides and pesticides falling under Tariff sub-heading 3808.10 and excisable thereunder. During the process of manufacturing Mercuric Acetate (MA), Para Chloro Phenyl Valeric Acid (PCA), and Chloro Synthemic Acid Chloride (CSA Chloride) came into existence as intermediate products. The Collector of Central Excise passed orders of adjudication holding the abovesaid three intermediate products liable to payment of excise duty. The respondents preferred appeals before the Collector (Appeals) who has allowed the appeals exonerating the said three intermediate products from levy of excise duty. The appeals preferred by the Revenue against the order of Collector (Appeals) have been dismissed by a common order by the CEGAT. The aggrieved Revenue has come up by filing these appeals to this Court.

E It is well settled by a series of pronouncements of this Court from *Bhor Industries Ltd. v. Collector of Central Excise*, (1989) 40 ELT 280 SC to *Union of India v. Delhi Cloth and General Mills Co. Ltd.*, (1997) 92 ELT 315 SC that excise is a duty on goods as specified in the Schedule. The taxable event in the case of excise duty is the manufacture of goods. In order to be excisable goods (i) there must be goods (ii) having come into existence as a result of manufacture, and (iii) to be goods, the article must be known to the market as such and as would ordinarily come to the market for being bought and sold. Actual sale of the article is not required but it must be capable of being bought and sold. Intermediate products even if captively consumed may be liable to levy of excise duty if they satisfy the test of being goods on the touchstone of marketability. In *Union of India v. Delhi Cloth & General Mills Co. Ltd.*, (1997) 92 ELT 315 SC the following statement of law from *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad*, (1995) 76 ELT 241 (SC) has been re-affirmed:-

G "The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be *usable, moveable, saleable and marketable*. The duty is on manufacture or production but the production or manufacture is carried on *for taking such goods to the market for sale*. The obvious

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rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling.”

(underlining by us)

Though the intermediate goods so coming into existence may be specified in the Schedule as excisable they would not be subjected to duty unless they satisfy the test of marketability. In the case of *Delhi Cloth and General Mills Co. Ltd.* (supra) the intermediate product was calcium carbide, which initially produced in the form of cakes, was broken into smaller pieces after the cakes attained room temperature and the broken pieces were forthwith put into use for the production of acetylene gas. The Appellate Collector had found that the calcium carbide which was sold in the market was packed in airtight containers and conformed to ISI specifications which the intermediate product of DCM did not. Their Lordships held that as the calcium carbide manufactured by the DCM for further utilisation in the production of acetylene gas was not of a purity that rendered it marketable nor was it packed in such a way as to make it marketable, that is to say, in airtight containers it was not excisable on the ratio of *Moti Laminates*. As held in *Collector v. Amba Lal Sara Bhai Enterprise*, (1989) 43 ELT 214 SC onus to establish that an article is “goods” and marketable, is on the department.

In the case at hand the Collector (Appeals) has found that the abovesaid three intermediate products came into existence at a certain stage of a multiple stage integrated chemical process leading to the final products and therefore they could not be held to be goods as understood in commercial parlance because they were not marketable. The department had failed in showing if any facility existed for separation of the said three products and whether in the form in which the said three products came into existence in the reaction process were capable of being marketed. The finding of fact so arrived at has not been challenged much less dislodged before the Tribunal. The only argument advanced before the Tribunal was that the three items were mentioned as “goods” in the dictionary and in the excise tariff and Mercuric Acetate (MA) was also mentioned as one of the items entitled to drawback in Duty Drawback Rules. The Tribunal has observed that these facts and mere mentioning of an item in Drawback Rules with reference to a different context was not enough to satisfy the test of marketability unless it was shown that

**A** the intermediate products were capable of being taken to market and bought and sold.

No fault can be found with the view taken by the Tribunal. The appeals are devoid of any merit and hence are dismissed though without any order as to the costs.

**B** K.K.T.

Appeals dismissed.