

A

M/S. KORES INDIA LTD., CHENNAI

v.

COMMISSIONER OF CENTRAL EXCISE, CHENNAI

NOVEMBER 23, 2004

B

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

C

D

E

Central Excise and Salt Act, 1944—Section 11A proviso—Central Excise Rules, 1944—Rule 9(2)—Assessee engaged in cutting of typewriter/telex ribbons into standard pre-determined lengths—Levy of excise duty invoking period of limitation—Case of assessee that cutting of jumbo rolls into smaller size does not amount to manufacturing process and bonafide belief of non-exciseability—Correctness of—Held : Process of producing ribbons in spools out of jumbo rolls results in producing commercially distinct and identifiable article having distinct name, function and use and has separate market—Also assessee has a separate unit, machinery and work force to manufacture in spool form—Thus, the process is a manufacturing process—Further, from facts it is clear that there was suppression of fact relating to manufacture and removal of goods with the intent to evade payment of duty, thus, extended period of limitation invocable under Rule 9(2) read with proviso to Section 11A for demand duty—Order of Collector as upheld by tribunal does not call for interference.

Words and Phrases :

'Manufacture'—Meaning of.

F

G

H

Appellant-assessee's factory is engaged in a process whereby typewriter/telex ribbons are cut into standard pre-determined lengths. Collector of Excise levied duty on typewriter ribbons cleared by the assessee during certain period holding the transaction as a manufacturing process by invoking extended period of limitation under proviso to section 11A of the Central Excise and Salt Act, 1944. It was assessee's case that since appropriate duty had been levied on jumbo rolls received by them from two small scale units, duty could not be levied again; and that apart from cutting of ribbons into standard pre-determined lengths, the assessee did not take any activity on the ribbons received. Tribunal held that the cutting of ribbons in smaller size and spooling them into

on the automatic spooling machines amounts to manufacture and as such duty is payable on typewriter/telex ribbons; and that as there was clear contravention of Rule 9(1) with the intention to evade, extended period of limitation was applicable. In the connected appeals it was held the transaction was not a manufacturing process and as such the duty was not payable. Hence, the present appeals.

Appellant – assessee contended that cutting the jumbo rolls into smaller size may amount to processing but does not amount to manufacturing; that the product was not subject to levy of excise duty; and that the extended period of limitation is not applicable because to infer suppression of facts the Revenue had to establish something more than mere *bonafide* mistake.

Respondent – Excise Department contended that manufacturing activity is involved by which a different commercial commodity has come into existence, having a new name and character; and that with clear knowledge that the process involved manufacture, the activity was undertaken and, as such it is the legal duty of the assessee to take out the licence and pay duty; and the same being deliberately avoided with *malafide* intention, it was clear case of suppression of facts attracting extended period of limitation.

Disposing of the appeals, the Court

HELD : 1. In the instant case, assessee submitted that ribbon in rolls of 210 mtrs, and above in length are purchased from two small scale units. The said Jumbo rolls were fed into cutting and splitting machines in their premises and ribbons of standard lengths of 10 mtrs. and 5 mtrs. were cut/slit and subsequently wound/spooled on the metal spools and 10 such spools are blister packed and sealed with aluminium foil. It was categorically observed that the assessee produced ribbons in spools out of Jumbo rolls and the resultant product is a distinct, identifiable article having distinct name, function and use. The resultant product is also commercially distinct as understood in commercial parlance and has a separate market. Both products are not interchangeable. Once the Jumbo rolls are cut into smaller sizes, they completely lost their earlier identity and cannot be used for the same

A purpose as was done before cutting. The ribbon in Jumbo rolls cannot be used in a typewriter and similarly a person who requires 30 pieces of spool ribbon will not be satisfied if he is offered Jumbo rolls of equal length. Furthermore, the assessee has a separate unit, machinery and work force to manufacture in spool form. Therefore, the process amounted to manufacturing process and no case is made out for interference with the factual findings. [328-E-F-G-H; 329-D]

B

Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres, [1992] Supp. 1 SCC 290; Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan, [1991] 4 SCC 473; M/s. Saraswati Sugar Mills and Others v. Haryana State Board and Others, [1992] 1 SCC 418; Ujagar Prints v. Union of India, [1989] 3 SCC 488 and Empire Industries Ltd. v. Union of India, [1985] 3 SCC 314, relied on.

C

Prince Khadi Woollen Handloom Prod. Coop. Indl. Society v. C.C.E., [1996] 88 ELT 637 SC; Union of India v. J.G. Glass Industries Ltd., (1998) 97 ELT 5 SC and Aman Marble Industries Pvt. Ltd. v. Collector of C. Ex. Jaipur, (2003) 156 ELT 396 SC, referred to.

D

Black's Law Dictionary 5th Edition, referred to.

E

2. With regard to the plea of non-excisability, the Collector factually focussed on the conduct of the assessee to conclude lack of *bonfides*. At no point of time the Revenue Department was informed about the manufacturing activity undertaken by the assessee at their unit as required under law. Collector's order with reference to the price lists, and some gate-passes seized from the make up depot, notes that the assessee was manufacturing identical goods in their other unit apart from other varieties. With reference to sales invoices it was noted that the price quoted is inclusive of excise duty, though no excise duty was paid in respect of the goods which according to Revenue was manufactured at Madras. It held that the charge of suppression of fact and removal of goods in contravention of Rules with intent to evade payment of duty is fully established and the extended time limit under Rule 9(2) read with proviso to Section 11A is invocable for demand duty which was upheld by the Tribunal and does not warrant any interference being based on factual conclusions which cannot be termed as perverse. [330-D-E; 331-A-E]

F

G

H

M/s. Padmini Products v. Collector of Central Excise, Bangalore, [1989] 4 SCC 275 and CCE v. Champhar Drugs and Liniments, Hyderabad, [1989] 2 SCC 127, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4322 of 1999.

From the Judgment and Order dated 19.3.99 of the Central Excise Customs and Gold (Control) Appellate Tribunal, South Zonal Bench at Chennai in A No. E/SB/5261/94 in F.O. No. 605 of 1999.

WITH

C.A. Nos. 2682-2690 of 2004.

V. Lakshmikumar, Alok Yadav and V. Balachandran for the Appellant in C.A. No. 4322/99 and Respondent in C.A. Nos. 2682-90/2000.

Mohan Parasaran, Additional Solicitor General, Ms. Binu Tamta and P. Parmeshwaran for the Respondent in C.A. No. 4322/99 and Appellant in C.A. Nos. 2682-90/2000.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : These appeals are inter-linked. In Civil Appeal No. 4322 of 1999 M/s Kores India Ltd., Chennai (hereinafter referred to as the 'assessee') calls in question legality of the judgment rendered by the Customs, Excise and (Gold) Control Appellate Tribunal, South Zonal Bench, Chennai (in short the 'Tribunal') holding that demand for duty raised in respect of typewriter/telex ribbons is in order. In the connected appeals Commissioner of Central Excise, Indore calls in question legality of the New Delhi Bench of CEGAT taking a divergent view in holding that duty was not payable.

Background facts in a nutshell are as follows:

So far as civil appeal no. 4322/1999 is concerned, show cause notice was issued by the Collector of Central Excise, Chennai (in short the 'Commissioner') on 22.3.1993, *inter alia*, proposing levy of duty on the

A typewriter ribbons cleared by the assessee during the period 1.3.1988 to 30.9.1992 by invoking extended period of limitation under proviso to Section 11A of the Central Excise and Salt Act, 1944 (in short the 'Act'). In the reply to the show cause notice, assessee took the stand that no process of manufacturing is involved in the concerned transaction. Assessee receives excise duty paid on typewriter/telex ribbons in jumbo rolls of 210 mtrs. or more length from two small scale units in Madras. In the assessee's factory typewriter rolls are fed into cutting and spooling machines wherein the ribbons of standard length of 10 mtrs. and 5 mtrs. are cut and spooled into metal spoons. The ribbons in spoons are packed and sold by the assessee. With reference to Heading 96.12 of the Schedule to the Central Excise Tariff Act, 1985 (in short the 'Tariff Act') it was submitted that since appropriate central excise duty had been levied on the rolls there is no question of paying any further duty. Apart from cutting of ribbons into standard pre-determined lengths, the assessee does not take any activity on the ribbons received. It is to be noted that by order-in-original no. 40/93 dated 19.8.1993 passed by the Collector of Central Excise, duty of Rs. 2,89,76000 was levied on clearance of carbon papers and typewriter ribbons from the assessee's factory at Madras. Duty was affirmed under Rule 9(2) of the Central Excise Rules, 1944 (in short the 'Rules') read with proviso to sub-section (1) of Section 11A of the Act. Further demand of Rs. 2,14,066 was confirmed on seized carbon papers and ribbons. Seized goods of both varieties valued at Rs. 5,36,276.36 were held to be liable for confiscation and were released by enforcing the Bank Guarantee furnished to the extent of Rs. 50,000. Collector also levied penalty of Rs.30 lakhs under Rule 173Q of the Rules.

F Show cause notice related to the two products i.e. carbon papers for the period 1.3.88 to September, 1992 and typewriter/Telex ribbons for the period 1.4.88 to September, 1992. The present dispute relates only to typewriter/telex ribbons.

G The CEGAT held that the cutting of ribbons in smaller size and spooling them into on the automatic spooling machines amounts to manufacture and, therefore, duty is payable on these ribbons. The conversion is done as per requirement of consumers in different spoons to suit Typewriter machines of different brand names. Ribbons received by the Madras Unit cannot be supplied to the customers in the form received by merely reducing the length by cutting. It is further held that the product becomes saleable H commodity only after it is spooled according to the desired sizes and,

therefore, excise duty is payable as a new and distinct identity is acquired. The factual findings recorded by the Collector were affirmed.

In the connected appeals the stand of the assessee was accepted and the levy of duty by the Collector of Central Excise, Indore was deleted. While the Chennai Bench observed that manufacturing process was involved the New Delhi Bench held otherwise. It was concluded that manufacturing of ink ribbon is complete without process of cartridges and that Chapter Heading 96.12 does not make any distinction in Cartridges and the cassettes.

In support of civil appeal no. 4322/1999 Mr. V. Lakshmikumaran, learned counsel submitted that CEGAT was not justified in holding that any manufacturing process was involved. According to him cutting the jumbo rolls into the smaller size may amount to processing but by no stretch of imagination it amounts to manufacturing. Reference was made to *Prince Khadi Woollen Handloom Prod. Coop. Indl. Society v. C.C.E.*, (1996) 88 ELT 637 SC and *Union of India v. J.G. Glass Industries Ltd.*, (1998) 97 ELT 5 SC to buttress the plea. It was submitted that whenever the intention was to include a particular activity within the manufacturing activity it was specifically provided. Reference was made to Chapters 37, 48 and 85 of the Tariff Act, as position stands in 2002-2003. In any event, according to him, the extended period of limitation was not available to be applied because to infer suppression of facts something more than mere *bonafide* mistake was necessary to be established by the Revenue. As a matter of fact, various authorities have entertained doubt as to whether the activities in question involved manufacturing process. Particular reference was made to the New Delhi Bench judgment of CEGAT which is the subject matter of appeal in civil appeal nos. 2682-2690/2000.

Burden is on the Revenue to prove manufacture. Strong reliance was placed on *Aman Marble Industries Pvt. Ltd. v. Collector of C.Ex., Jaipur*, (2003) 156 ELT 396 SC, which involves cutting of marble blocks into slabs. It was pointed out that if cutting of the blocks of marble into slabs does not amount to manufacturing, as was held by this Court, there is no reason to adopt a different yardstick so far as cutting of typewriter rolls of ribbons into smaller sizes is concerned.

At this juncture it is necessary to note that the duty component involved in the present dispute after grant of revenue by the CEGAT in respect of

A carbon paper is Rs. 42,72,308.03. This was in addition to Rs. 54,335 which related to seized articles. Penalty was limited to Rupees 5 lakhs. In civil appeal nos. 2682-2690/2000 the duty involved is Rs. 70,22,974.46, which was deleted by the impugned judgment.

B In response, Mr. M. Parasaran, learned ASG, submitted that nature of activity has been analysed in great detail by the Collector and CEGAT. Taking note of the factual position it has been concluded that manufacturing activity is involved. It has been clearly established that different commercial commodity has come into existence and the commodity which was already in existence serves no purpose and no commercial use after the process. A new name and character has come into existence. The original commodity after processing does not possess original identity. It is pointed out that there cannot be *bonafide* doubt in the mind of assessee in not obtaining licence and not disclosing the turnovers. With clear knowledge that the process involved manufacture, the activity was undertaken and, therefore, duty was payable. It is the legal duty of the assessee to take out the licence and pay duty. It has been deliberately avoided to be done with *malafide* intention and, therefore, there was clear case of suppression of facts attracting extended period of limitation.

E In Black's Law Dictionary, (5th Edition), the word 'manufacture' has been defined as, "the process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine". Thus by process by **F** manufacture something is produced and brought into existence which is different from that out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres*, [1992] Supp. 1 SCC 290).

H Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more

processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to (sic that the) manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See *Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan*, [1991] 4 SCC 473.

‘Manufacture’ is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See *M/s. Saraswati Sugar Mills and Others v. Haryana State Board and Others*, [1992] 1 SCC 418).

The prevalent and generally accepted test to ascertain that there is ‘manufacture’ is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic

A distinction between 'processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See *Ujagar Prints v. Union of India*, [1989] 3 SCC 488).

To put differently, the test to determine whether a particular activity amounts to 'manufacture' or not is: Does new and different goods emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted. Etymologically the word 'manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case. (See *Empire Industries Ltd. v. Union of India*, [1985] 3 SCC 314).

Keeping in view the aforesaid principles it has to be examined whether the Collector and CEGAT were justified in holding that manufacturing activities were made out. As appears from the order of the Collector, reference was made to the statements given by two officials of the assessee. Ribbon in rolls of 210 mtrs. and above in length are purchased from M/s. Solar Packaging (P) Ltd., Madras and M/s. Saket Stationery Mfg. Co. Bombay. The said Jumbo rolls were fed into cutting and splitting machines in their premises and ribbons of standard lengths of 10 mtrs. and 5 mtrs. were cut/slit and subsequently wound/spooled on the metal spools and 10 such spools are blister packed and sealed with aluminium foil. It was categorically observed that the assessee produced ribbons in spools out of Jumbo rolls and the resultant product is a distinct, identifiable article having distinct name, function and use. The resultant product is also commercially distinct as understood in commercial parlance and has a separate market. Their function and use are also completely different and both products are not inter-changeable. The ribbon in Jumbo rolls cannot be used in a typewriter and similarly a person who requires 30 pieces of spool ribbon will not be satisfied if he is offered Jumbo rolls of equal length. In fact, assessee has a separate unit, machinery and work force to manufacture in spool form. In that view of the matter, it was held that the process involved amounted to manufacturing.

At this juncture it is relevant to point out that the assessee had contended before the Collector that the inputs/raw materials used have suffered excise duty and if any duty is payable, they should be allowed Modvat credit and the proportionate amount on account of such credit should be deducted from the proposed demand. This plea was turned out as required documentary evidence to show that entire quantity of inputs used have suffered tax was not produced. Before CEGAT it was accepted that there was possibility that manufacturers were operating under exemption available to SSI Units and the goods would have discharged "nil" duty. It was also accepted that since the goods were received from the depots and not directly received from one factory, therefore, any duty (paying documents) were not available. It is to be noted that once the Jumbo rolls are cut into smaller sizes, they completely lost their earlier identity and cannot be used for the same purpose as was done before cutting. In a hypothetical case, even if the smaller sized ribbons are stitched together or fixed together in any manner, there is no possibility of its use as Jumbo rolls. The factual findings recorded that the processing resulted in coming into existence of a commercial product having distinct name, character, and use are on terra firma. No case is made out for interference with the factual findings.

Coming to the plea of limitation CEGAT noticed that there was manufacturing and removal under Rule 9(1) at the Madras unit and, therefore, demand of duty under Rule 9(2) read with Section 11A was applicable. It was concluded that there was clear contravention of Rule 9(1) with the intention to evade. Therefore, the contention that the assessee harboured *bonafide* and genuine belief of the non-exciseability of the product was not acceptable. No clarification from the department was sought for and accordingly extended period of limitation was applicable.

In *M/s. Padmini Products v. Collector of Central Excise, Bangalore*, [1989] 4 SCC 275 it was observed with reference to earlier judgment in *CCE v. Chmphar Drugs and Liniments, Hyderabad*, [1989] 2 SCC 127 that in order to avail limitation beyond a period of six months and up to a period of five years, in view of the proviso to sub-section (1) of Section 11A of the Act, it had to be established that the duty of excise had not been levied or paid or short-levied or short-paid, or erroneously refunded by reason of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. It was observed that something positive

- A other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information which the manufacturer knew otherwise, is required to be established before it is saddled with any liability beyond the period of six months. Whether, in a particular set of facts and circumstances, there was any fraud or collusion
- B or wilful mis-statement or suppression of facts contravention of any provision of the Act, is a question of fact depending upon the facts and circumstances of a particular case.

- C It is to be noted that strong reliance was placed on Government Order passed in 1982 ELT 4840 A (GOI), dated 16.1.1982 to contend that there was *bona fide* plea about non-excisability. Reference was also made to the order passed by the New Delhi Bench which is the subject matter of challenge in the connected appeals and the order dated 12.4.1996 passed by a Collector who dropped the proceedings initiated. Except the Government of India's order, all other orders were passed subsequent to the issuance of
- D the show cause notice. In this case the assessee could not have anticipated any such adjudication at the relevant point of view. Further, Government of India's order did not relate to ribbons. In any event, the Collector factually focussed on the conduct of the assessee to conclude lack of *bonafides*. At no point of time the Department was informed about manufacturing activity undertaken at their unit at Madras as required under law and, there was
- E suppression of facts relating to manufacturing and removal of such goods. In this context, the Collector observed as follows:

- F "Further perusal of invoices prepared for sale effected from Madras indicate that the price quoted is inclusive of excise duty whereas in reality they did not pay for Central Excise duty at all for the goods produced at Madras. This apart, perusal of copies of Price Lists; and certain gate passes seized from the Make up Depot disclosed that KIL, were manufacturing identical goods in question in their Thane Unit apart from other varieties. The goods in question have been appropriately classified as goods falling under 48.16 and 96.12 respectively and cleared on payment of duty. The copies of price list clearly indicate that KIL have filed price list and sought approval of assessable value for the goods in question. These factors goes to show that M/s KIL had clear knowledge that the subject goods are excisable goods and are eligible to duty under
- G Chapter 48.16 and 96.12 respectively. Knowing fully well about
- H

the classification and the obligation, they have deliberately suppressed the material facts in so far as their Madras Unit is concerned and have evaded payment of Central Excise duty. In the circumstances, I have no hesitation to hold that the charge of suppression of fact and removal of goods in contravention of Rules with intent to evade payment of duty is fully established and the extended time limit under Rule 9(2) read with proviso to Section 11A is invocable for demand duty.”

In view of the factual position as noted by the Collector and affirmed by the CEGAT there is no substance in the plea that the extended period of limitation was not applicable.

It is noted in the Collector's order with reference to the price lists, and some gate-passes seized from the Make up depot, that the assessee was manufacturing identical goods in their Thane unit apart from other varieties. Additionally, with reference to sales invoices it was noted that the price quoted is inclusive of excise duty, though no excise duty was paid in respect of the goods which according to Revenue was manufactured at Madras.

As noted above, looked from any angle order of the Collector as affirmed on the point involved by CEGAT does not warrant any interference being based on factual conclusions which cannot be termed as perverse. The conclusions are based on relevant materials. Civil Appeal No. 4322/1999 is dismissed.

Coming to the other appeals, in view of the position indicated in detail in civil appeal No. 4322/1999, these appeals deserve to be allowed and are accordingly allowed. There shall be no order as to costs in these appeals.

N.J.

Appeals disposed of.