COMMISSIONER OF CENTRAL EXCISE, BANGALORE-II A

v.

M/S. OSNAR CHEMICAL P. LTD.

(Civil Appeal Nos. 4055-4056 of 2009)

JANUARY 13, 2012 B

[D.K. JAIN AND ASOK KUMAR GANGULY, JJ.]

Central Excise Act, 1944 – s.2(f) – Addition and mixing of polymers and additives to heated bitumen to get superior quality bitumen viz. Polymer Modified Bitumen (PMB) or C *Crumbled Rubber Modified Bitumen (CRMB) – If amounts to manufacture of a new marketable commodity and as such exigible to Excise duty – Held: In order to bring a process in relation to any goods within the ambit of s.2(f) of the Act, the same is required to be recognised by the legislature as* D *manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act – Therefore, in order to bring petroleum bitumen, falling under CSH 27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH* E *27150090, the process of its treatment with polymers or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27 – No such process or processes have been specified in the Section* F *notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture – Thus, the process of adding polymers and additives to heated bitumen to get a* G *better quality bitumen, viz. PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of s.2(f)(ii) of the Act – PMB or CRMB cannot be treated as bituminous mixtures falling under CSH 27150090 and*

A *would classified under CSH 27132000 pertaining to tariff for petroleum bitumen – Central Excise Tariff Act, 1985 – Chapter Sub-heading 27132000 and 27150090.*

Excise Laws – Manufacture – Test to determine – Held:"Manufacture" can be said to have taken place only when
B *there is transformation of raw materials into a new and different article having a different identity, characteristic and use – Mere improvement in quality does not amount to manufacture – It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be*
C *regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place.*

Words and Phrases – Manufacture – Meaning of.

D **The question which arose for consideration in the present appeals was whether the addition and mixing of polymers and additives to heated bitumen to get superior quality bitumen viz. Polymer Modified Bitumen (PMB) or Crumbled Rubber Modified Bitumen (CRMB) amounts to**
E **manufacture of a new marketable commodity and as such exigible to Excise duty under the Central Excise Act, 1944.**

Dismissing the appeals, the Court

HELD:1.1. The expression 'manufacture' defined in
F **Section 2(f) of the Central Excise Act, 1944, *inter alia* includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Central Excise Tariff Act, 1985. It is manifest that in order to bring a process in relation to any goods within**
G **the ambit of Section 2(f) of the Act, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. Therefore, in order to bring petroleum bitumen, falling under CSH**
H **27132000, within the extended or deemed meaning of the**

expression 'manufacture', so as to fall under CSH 27150090, the process of its treatment with polymers or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27. [Para 15] [1049-F-H; 1050-A]

1.2. In the present case, a plain reading of the Schedule to the Act makes it clear that no such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture. Thus, it is evident that the said process of adding polymers and additives to the heated bitumen to get a better quality bitumen, *viz.* PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of Section 2(f) (ii) of the Act. [Para 18] [1051-D-F]

1.3. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place. [Para 19] [1051-G-H; 1052-A]

1.4. The process of mixing polymers and additives with bitumen does not amount to manufacture. Both the lower authorities have found as a fact that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process

A **did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for constructing the roads. [Para 23] [1054-E-G]**

B **1.5. PMB or CRMB, therefore, cannot be treated as bituminous mixtures falling under CSH 27150090 and shall continue to be classified under CSH 27132000 pertaining to tariff for petroleum bitumen. [Para 25] [1055-E]**

C *Shyam Oil Cake Ltd. v. Collector of Central Excise, Jaipur* **2004 (174) E.L.T. 145 (SC);** *Commissioner of Central Excise, New Delhi-I v. S.R. Tissues Pvt. Ltd.* **2005 (186) E.L.T. 385 (SC);** *M/s. Tungabhadra Industries Ltd. v. The Commercial Tax Officer, Kurnool,* **1961 (2) SCR 14;** *Union* D *of India & Ors. v. Delhi Cloth & General Mills Co. Ltd. & Ors.* **1977 (1) ELT (J199) (SC);** *Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers* **1980 (6) E.L.T. 343 (SC)** ***and*** *Commissioner of Central Excise & Customs v. Tikatar Industries* **2006 (202)** E **E.L.T. 215 (S.C.) – relied on.**

Medley Pharmaceuticals Limited v. Commissioner of Central Excise & Customs, Daman **2011 (263) E.L.T. 641 (SC);** *Nicholas Piramal India Ltd. v. Commnr. Of Central* F *Excise, Mumbai* **2010 (260) E.L.T. 338 (SC);** *Commissioner of Central Excise, Bangalore v. Ducksole (I) Ltd. & Ors.* **(2005) 10 SCC 462;** *Commissioner of Central Excise, Delhi-III v. Uni Products India Ltd. & Ors.* **(2009) 9 SCC 295: 2009 (14) SCR 199;** *Commissioner of Central Excise, Gujarat v. Pan Pipes Resplendents Limited* **(2006) 1 SCC 777;** *Crane Betel Nut* G *Powder Works v. Commissioner of Customs & Central Excise, Tirupathi & Anr.* **(2007) 4 SCC 155: 2007 (4) SCR 109;** *Commissioner of Central Excise, Chennai-II v. Tarpaulin International* **2010 (256) E.L.T. 481 (SC);** *Commissioner of Central Excise, Mumbai v. Lalji Godhoo & Co.* **2007 (216)** H **E.L.T. 514 (SC);** *Commissioner of Central Excise v. Indian*

Aluminium Co. Ltd. **(2006) 8 SCC 314: 2006 (6) Suppl. SCR 886;** *Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur* **(2005) 2 SCC 662: 2005 (2) SCR 391;** *Metlex (I) (P) Ltd. v. Commissioner of Central Excise, New Delhi* **(2005) 1 SCC 271;** *Hindustan Poles Corpn. v. Commissioner of Central Excise, Calcutta* **(2006) 4 SCC 85: 2006 (3) SCR 461;** *HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh* **(2006) 5 SCC 208: 2006 (1) Suppl. SCR 125;** *Commissioner of Central Excise, Navi Mumbai v. Amar Bitumen & Allied Products Private Limited* **2006 (202) E.L.T. 213 (S.C.);** *Commissioner of Central Excise, Mumbai v. Tikitar Industries,* **2010 (253) ELT 513 (SC);** *Collector of Central Excise, Vadodara v. Tikitar Industries* **2000 (118) E.L.T. 468 (Tri.) – referred to.**

McNicol & Anr. v. Pinch **1906 (2) K.B. 352 – referred to.**

Case Law Reference:

2011 (263) E.L.T. 641 (SC)	**referred to**	**Para 5**
2010 (260) E.L.T. 338 (SC)	**referred to**	**Para 5**
(2005) 10 SCC 462	**referred to**	**Para 6**
(2009) 9 SCC 295	**referred to**	**Para 6**
1961 (2) SCR 14	**relied on**	**Para 7,19**
(2006) 1 SCC 777	**referred to**	**Para 7**
(2007) 4 SCC 155	**referred to**	**Para 7**
1977 (1) ELT (J199) (SC)	**relied on**	**Para 7, 20**
2005 (186) E.L.T. 385 (SC)	**relied on**	**Para 8,10, 17,21**
2004 (174) E.L.T. 145 (SC)	**relied on**	**Para 8,16**
2010 (256) E.L.T. 481 (SC)	**referred to**	**Para 10**

A	**2007 (216) E.L.T. 514 (SC)**	**referred to**	**Para 10**
	(2006) 8 SCC 314	**referred to**	**Para 10,11**
	(2005) 2 SCC 662	**referred to**	**Para 10,11, 16**
B	**(2005) 1 SCC 271**	**referred to**	**Para 11**
	(2006) 4 SCC 85	**referred to**	**Para 11**
	(2006) 5 SCC 208	**referred to**	**Para 11**
C	**2006 (202) E.L.T. 215 (S.C.)**	**relied on**	**Para 12, 24**
	2006 (202) E.L.T. 213 (S.C.)	**referred to**	**Para 12**
	2010 (253) E.L.T. 513 (S.C.)	**referred to**	**Para 12**
D	**1906 (2) K.B. 352**	**referred to**	**Para 13**
	1980 (6) E.L.T. 343 (SC)	**relied on**	**Para 22**
	2000 (118) E.L.T. 468 (Tri.)	**referred to**	**Para 24**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4055-4056 of 2009.

From the Judgment & Order dated 25.09.2008 of Customs, Excise, and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore in Appeal Nos. E/522 & 523 of F 2007.

WITH

C.A. Nos. 5633 of 2009 & 7142 of 2010.

Mukul Gupta, Arijit Prasad, Som Prakash, Shipra Ghose, G Anil Katiyar, B. Krishna Prasad for the Appellant.

S.K. Bagaria, Meenakshi Arora, Vaishnavi, V. Lakshmi Kumaran, Alok Yadav, M.P. Devanath for the Respondent.

H The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. This batch of appeals by the revenue, under Section 35L(b) of the Central Excise Act, 1944 (for short "the Act") arises out of final orders dated 23rd December, 2008 in Appeal No. E/379/2007; 25th September, 2008 in Appeal Nos. Excise/522 & 523/2007 and 28th October, 2009 in Appeal No. E/225/2009 passed by the Customs, Excise & Service Tax Appellate Tribunal South Zonal Bench, Bangalore (for short "the Tribunal"). By the impugned orders in cross-appeals by the revenue and the assessee, the Tribunal has held that the mechanical mixing of polymer with heated bitumen does not amount to manufacture of a new commercially identifiable product and therefore, is not exigible to Excise duty under the Act.

2. Since these three appeals involve a common question of law, these are being disposed of by this common judgment. However, in order to appreciate the controversy, the facts emerging from C.A. Nos. 4055-4056 of 2009, which was treated as the lead case, are being adverted to.

The respondent in this appeal (for short "the assessee") is engaged in the supply of Polymer Modified Bitumen (for short "PMB"). We may note that in one of the appeals (C.A. No.5633/2009), the assessee additionally supplies Crumbled Rubber Modified Bitumen (for short "CRMB"), stated to be a different kind of modifier. The assessee entered into a contract with one M/s Afcons Infrastructure Ltd. (for short "Afcons") for supply of PMB at their work site at Solur Village, Viswanathpura Post, Bangalore. As per the agreement, the base bitumen and certain additives were to be supplied by Afcons to the assessee directly at the site, where the assessee, in its mobile polymer modification plant, was required to heat the bitumen at a temperature of 160?C with the help of burners. To this hot bitumen, 1% Polymer and 0.2% additives were added under constant agitation, for improving its quality by increasing its softening point and penetration. The process of agitation was to be continued for a period of 12 to 18 hours till the mixture becomes homogenous and the required properties were met.

A The said bitumen in its hot agitated condition was mixed with stone aggregates which was then used for road construction. The resultant product was considered to be a superior quality binder with enhanced softening point, penetration, ductility, viscosity and elastic recovery.

B 3. 'Bitumen' is classifiable under Chapter Sub Heading 271320.00 and 'Polymers' are classifiable under Chapter Sub Heading 390190.00 of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff Act"). The relevant tariff items read as follows:

C

"Tariff Item	Description of goods
2713	**Petroleum coke, petroleum bitumen and other residues of petroleum oil of oils obtained**
D	**from bituminous minerals.**
271132000	Petroulem bitumen
2715	**Bituminous mixtures based on natural asphalt, on natural**
E	**bitumen, on petroleum bitumen, on mineral tax or on mineral tar pitch (for example, bituminous mastic, cut backs)**
F 27150090	Other
3901	**Polymers of ethylene, in primary forms**
3901 90	Other"

G 4. The assessee had been paying Central Excise duty on the PMB processed at their factory in Mumbai but had not paid the same for the conversion done at the work site. Consequently, a show cause notice was issued to them by the Commissioner of Central Excise,
H Bangalore (hereinafter referred to as "the

Commissioner"), demanding duty in respect of PMB falling under sub-heading 271500.90 of the Tariff Act, for the period from 18th August 2004 to 19th September 2006. The Commissioner adjudicated upon the said show cause notice and vide Order-in-original, dated 23rd April 2007, held that the aforesaid process carried out by the assessee amounted to manufacture of PMB in terms of Section 2(f) of the Act, irrespective of the fact whether such process was carried out on their own account or on job work basis and therefore, was dutiable. He accordingly, confirmed the demand indicated in the show cause notice. Aggrieved thereby, the assessee filed an appeal before the Tribunal. Reversing the decision of the Commissioner, the Tribunal has come to the conclusion that since PMB cannot be bought and sold in the market as it is fit for use only in a molten condition, at a temperature around 160?C and resultantly cannot be stored unless kept in continuous agitated state @ 100?C so as to avoid separation of polymer and bitumen; the process carried out by the assessee does not amount to manufacture. A similar view has been expressed by the Tribunal in other orders which are the subject matter of these appeals by the revenue.

5. Mr. Arijit Prasad, learned counsel appearing for the revenue, vehemently argued that having regard to the nature of the process involved, PMB and CRMB are different from bitumen. According to the learned counsel, ordinary bitumen is heated upto a temperature of 200?C, in the Polymer modification plant; to this heated mixture, polymer is added and samples are taken; if the samples, are found to be satisfactory, additives are added and the PMB is either stored or dispatched. It was submitted that the end products, viz. PMB and CRMB are different from bitumen, inasmuch as polymers and additives are the raw materials consumed in the process of manufacture of the said final products and are therefore,

A covered by the definition of the term "manufacture" in Section 2(f) of the Act. To buttress his submission that PMB and CRMB are exigible to Excise duty, both falling under a specific entry, learned counsel referred to the Tariff Act, whereunder, while bitumen is classifiable under Chapter Sub heading 271320.00, B and polymer is classifiable under Chapter Sub Heading 390190.00, the finished products, PMB and CRMB are classifiable under Chapter Sub Heading 271500.90. In support of his submission that PMB and CRMB are commercially known in the market for being bought and sold and therefore, C satisfy the test of marketability which is one of the essential conditions for the purpose of levy of Excise duty, learned counsel commended us to the decisions of this Court in *Medley Pharmaceuticals Limited Vs. Commissioner of Central Excise & Customs, Daman*[1] and *Nicholas Piramal India Ltd. Vs. Commnr. Of Central Excise, Mumbai*[2]. It was D also urged that Circular No. 88/1/87-CX.3, dated 16th June, 1987, issued by the Department of Revenue, Ministry of Finance, clarifying that a slight modification of the grade or quality of bitumen, brought about by the process of air blowing to duty paid bitumen did not amount to manufacture, was E wrongly relied upon by the Tribunal as it had subsequently been modified by Circular No. 88/1/88-CX.3, dated 1st July, 1988, wherein the said department had clarified that duty would be chargeable on blown-grade bitumen.

F 6. *Per contra,* learned counsel appearing on behalf of the assessees, led by Mr. S.K. Bagaria, senior advocate, while supporting the decision of the Tribunal, fervently submitted that based on the documents, evidence and materials on record, the Tribunal has found, as a fact, that the process of mixing an G insignificant dose of polymer with duty paid bitumen only enhanced the quality of bitumen and did not amount to manufacture and therefore, in the absence of any plea of perversity, the finding does not warrant any interference by this

1. 2011 (263) E.L.T. 641 (SC)

H 2. 2010 (260) E.L.T. 338 (SC)

Court. In support of the proposition, learned senior counsel placed reliance on the decisions of this Court in *Commissioner of Central Excise, Bangalore Vs. Ducksole (I) Ltd. & Ors.*[3] and *Commissioner of Central Excise, Delhi-III Vs. Uni Products India Ltd. & Ors.*[4].

7. Learned senior counsel vehemently argued that the mechanical process of adding polymer and additives to heated bitumen to bring into existence the so-called new substance, known as PMB, did not amount to 'manufacture' in terms of Section 2(f) of the Act. It was explained that by the said process, only the grade or quality of bitumen is improved by raising its softening point and penetration, for improving the quality of the road; but even with the improved quality, bitumen remained bitumen with the same end use. It was the say of the learned counsel that a mere improvement in the quality did not amount to manufacture, as 'manufacture' takes place only when there is a transformation of raw materials into a new and different article, having a distinctive name, character and use, which is not the case here as the end use of both the articles remained the same. In support of the proposition, learned senior counsel commended us to a plethora of decisions of this Court, including *M/s. Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*[5], *Commissioner of Central Excise, Gujarat Vs. Pan Pipes Resplendents Limited,*[6] *Crane Betel Nut Powder Works Vs. Commissioner of Customs & Central Excise, Tirupathi & Anr.*[7] and *Union of India & Ors. Vs. Delhi Cloth & General Mills Co. Ltd. & Ors.*[8].

8. It was contended that since the period involved in these appeals is post substitution of clause (f) in Section 2 of the Act

3. (2005) 10 SCC 462.
4. (2009) 9 SCC 295.
5. 1961 (2) SCR 14 : AIR 1961 SC 412.
6. (2006) 1 SCC 777.
7. (2007) 4 SCC 155.
8. 1977 (1) ELT (J199) (SC).

A by Act 5 of 1986, which gives an extended meaning to the expression "manufacture" by including in terms of sub-clause (ii) to clause (f), any process "which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting
B to manufacture", the said provision would be applicable. However, wherever the legislature intended to give an extended or artificial meaning to the said expression in relation to any goods, it has clearly specified it. According to the learned counsel, since the addition of polymer or additives to the
C bitumen has not been specified in the Section or Chapter notes of the Tariff Schedule as amounting to manufacture, the amended definition is of no avail to the revenue. In support of the contention, heavy reliance was placed on the decisions of this Court in *Commissioner of Central Excise, New Delhi-I Vs. S.R. Tissues Pvt. Ltd.*[9] and *Shyam Oil Cake Ltd. Vs. Collector*
D *of Central Excise, Jaipur*[10].

9. Relying on the two afore-mentioned Circulars, F.No. 88/1/87-CX.3, dated 16th June 1987 and F.No.88/1/88-CX.3, dated 1st July 1988, issued by the Department of Revenue,
E Ministry of Finance, clarifying that blown grade bitumen produced by oxidation of straight grade bitumen is not liable to duty; learned senior counsel submitted that the present case is on a much better footing than the blown grade bitumen, inasmuch as, unlike oxidation, where chemical change takes
F place, in the mixing of polymer and bitumen, no chemical change in bitumen takes place, and therefore, PMB cannot be subjected to Excise duty as a new commercial commodity. Additionally, reliance was also placed on Circular No.623/14/2002-CX., dated 25th February, 2002, wherein the Central
G Board of Excise and Customs has clarified that the process of preparation of Hot Asphalt Mix used in making roads does not amount to manufacture as contemplated under Section 2(f) of the Act.

9. 2005 (186) E.L.T. 385 (SC)

H 10. 2004 (174) E.L.T. 145 (SC).

10. It was argued that merely because bitumen (the basic material) and PMB (the end material) are specified under two different headings, it cannot be presumed that the process of obtaining PMB automatically constituted manufacture, unless in fact there has been a transformation of bitumen into a new and different product or alternatively, the Section Notes or Chapter Notes created a deeming fiction by providing an artificial or extended meaning to the expression 'manufacture' in respect of the goods in question. In support of the proposition, learned counsel placed reliance on the decisions of this Court in *S.R. Tissues Pvt. Ltd* (supra), *Commissioner of Central Excise, Chennai-II Vs. Tarpaulin International*[11], *Shyam Oil Cake Ltd.* (supra), *Commissioner of Central Excise, Mumbai Vs. Lalji Godhoo & Co.*[12], *Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd.*[13] and *Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur*[14], wherein it was held that merely because the raw materials and the finished product fall under two different tariff entries, it cannot be presumed that the process of obtaining the finished product from such raw materials automatically constituted manufacture.

11. Learned counsel also strenuously urged that even if it is assumed that the said process amounted to manufacture, still PMB cannot be subjected to excise as it is not commercially marketable. It was argued that for levy of Excise duty, the twin conditions of 'manufacture' and 'marketability' have to be satisfied cumulatively. In support of the proposition, reliance was placed on the decisions of this Court in *Hindustan Zinc Ltd.* (supra), *Indian Aluminium Co. Ltd.* (supra) and *Lalji Godhoo & Co.* (supra). Learned counsel also contended that the burden to prove that the process in question constitutes manufacture and that the goods so manufactured are

11. 2010 (256) E.L.T. 481 (SC)

12. 2007 (216) E.L.T. 514 (SC)

13. (2006) 8 SCC 314.

14. (2005) 2 SCC 662.

A marketable as new goods, known to the market, lies on the revenue and the same has not been discharged in the present case. To support the contention, reliance was placed on *Lalji Godhoo & Co.* (supra), *Metlex (I) (P) Ltd. Vs. Commissioner of Central Excise, New Delhi*[15]; *Hindustan Poles Corpn. Vs.* B *Commissioner of Central Excise, Calcutta*[16] and *HPL Chemicals Ltd. Vs. Commissioner of Central Excise, Chandigarh*[17].

12. Lastly, the learned counsel stressed that in the light of the decisions of this Court in *Commissioner of Central Excise* C *& Customs Vs. Tikatar Industries*[18], *Commissioner of Central Excise, Navi Mumbai Vs. Amar Bitumen & Allied Products Private Limited*[19] and *Commissioner of Central Excise, Mumbai Vs. Tikitar Industries*[20], the issue raised by the revenue in these appeals is no longer *res-integra,* and therefore, all the D appeals deserved to be dismissed.

13. Mr. Laxmi Kumaran, learned counsel appearing for the assessee in Appeal No.7142 of 2010, while adopting the arguments advanced by Mr. Bagaria, emphasised that apart from the fact that in his case the assessee was mixing the E additives at the site and not in a factory, the percentage of polymer or additives added to bitumen was inconsequential for determination of the issue at hand, as the predominant test was whether the treated bitumen underwent any change in its characteristics so as to acquire a new commercial identity. In F support, learned counsel referred to *McNicol & Anr. Vs. Pinch*[21], wherein Darling J., delivering the concurring majority opinion observed that:

15. (2005) 1 SCC 271.

G 16. (2006) 4 SCC 85.

17. (2006) 5 SCC 2008.

18. 2006 (202) E.L.T. 215 (S.C.).

19. 2006 (202) E.L.T. 213 (S.C.)

20. 2010 (253) E.L.T. 513 (S.C.).

H 21. 1906 (2) K.B. 352.

> "You can only make one thing out of another. I think the essence of making or of manufacturing is that what is made shall be different thing from that out of which it is made."

In other words, the counsel submitted that the same test namely, whether the product that emerges is something different from the goods with which it is made, was observed to be the determining factor. If bitumen, after its processing with additives and modifiers, remains bitumen; although it is known as PMB, then no new product emerges. It was asserted that in the present case, the revenue had failed to prove that with the addition of polymer or additives, bitumen had undergone any change in its chemical composition and commercial identity. According to the learned counsel, if the treated bitumen is not kept at a particular temperature, bitumen and polymer get separated and revert to their original state, which shows that no chemical reaction takes place when both the commodities are mixed.

14. Thus, the question which falls for consideration in all these appeals is whether the addition and mixing of polymers and additives to base bitumen results in the manufacture of a new marketable commodity and as such exigible to Excise duty?

15. The expression 'manufacture' defined in Section 2(f) of the Act, *inter alia* includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Tariff Act. It is manifest that in order to bring a process in relation to any goods within the ambit of Section 2(f) of the Act, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. Therefore, in order to bring petroleum bitumen, falling under CSH 27132000, within the extended or deemed meaning of the expression 'manufacture', so as to fall under CSH 271500900, the process of its treatment with polymers

A or additives or with any other compound is required to be recognised by the legislature as manufacture under the Chapter notes or Section notes to Chapter 27.

16. Dealing with the aspect of extended or artificial meaning of the expression 'manufacture' in Section 2(f) of the B Act in *Shyam Oil Cake Ltd.* (supra), this Court had held as under :-

"16. Thus, the amended definition enlarges the scope of manufacture by roping in processes which may or may not C strictly amount to manufacture provided those processes are specified in the Section or Chapter notes of the Tariff Schedule as amounting to manufacture. It is clear that the Legislature realised that it was not possible to put in an exhaustive list of various processes but that some D methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture. Of course, the specification must be in E relation to any goods.

XXX XXX XXX XXX

XXX XXX XXX XXX

F 24. In this case, neither in the Section Note nor in the Chapter Note nor in the Tariff Item do we find any indication that the process indicated is to amount to manufacture. To start with the product was edible vegetable oil. Even after the refining, it remains edible vegetable oil. As actual G manufacture has not taken place, the deeming provision cannot, be brought into play in the absence of it being specifically stated that the process amounts to manufacture."

17. Then again, in *S.R. Tissues Pvt. Ltd.* (supra), a H question arose whether slitting and cutting of toilet tissue paper

on aluminium foil amounted to manufacture under Section 2(f) of the Act. Answering the question in the negative, this Court had observed thus :-

> "15.....In order to make Section 2(f) applicable, the process of cutting/slitting is required to be recognized by the legislature as a manufacture under the chapter note or the section note to Chapter 48. For example, the cutting and slitting of thermal paper is deemed to be "manufacture" under Note 13 to Chapter 48. Similarly, Note 3 to Chapter 37 refers to cutting and slitting as amounting to manufacture in the case of photographic goods. However, slitting and cutting of toilet tissue paper on aluminium foil has not been treated as a manufacture by the legislature. In the circumstance, Section 2(f) of the Act has no application."

18. In the present case, a plain reading of the Schedule to the Act makes it clear that no such process or processes have been specified in the Section notes or Chapter notes in respect of petroleum bitumen falling under Tariff Item 27132000 or even in respect of bituminous mixtures falling under Tariff Item 27150090 to indicate that the said process amounts to manufacture. Thus, it is evident that the said process of adding polymers and additives to the heated bitumen to get a better quality bitumen, *viz.* PMB or CRMB, cannot be given an extended meaning under the expression manufacture in terms of Section 2(f) (ii) of the Act.

19. We may now examine whether the process in question, otherwise amounts to manufacture under the expansive Section 2(f) of the Act. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be

A regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place. In this behalf the following observations by the Constitution Bench of this Court in *Tungabhadra Industries* (supra) are quite apposite :

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> "In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in the oil. The addition of the hydrogen atoms was effected
> C in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable *thus improving its quality and utility*. But neither mere absorption of other matter, nor inter-molecular changes necessarily *affect the identity of a substance* as ordinarily
> D understood.....The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the
> E *quality of the oil is improved* in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil."

(Emphasis supplied by us)

F 20. In *Delhi Cloth & General Mills Co. Ltd.* (supra), yet another Constitution Bench, exploring the concept of manufacture echoed the following views :

> "14.....*The word 'manufacture' used as a verb is generally understood to mean as "bringing into existence*
> G *a new substance" and does not mean merely "to produce some change in a substance"*, however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American
> H judgment. The passage runs thus:-

"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." A B

(Emphasis supplied by us)

21. In *S.R. Tissues Pvt. Ltd.* (supra), the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court *inter-alia,* held as under : C

"12.....However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. *The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue.* In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues." D E F

(Emphasis supplied by us)

22. In *Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*[22], a three Judge Bench of this Court, while deciding whether conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture, observed as follows:- G

22. 1980 (6) E.L.T. 343 (SC). H

A "4.....Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind
B of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead
C is recognized as a new and distinct article that a manufacture can be said to take place. *Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the*
D *manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity.*

(Emphasis supplied by us)"

E 23. Having considered the matter on the touchstone of the aforesaid legal position, we are of the view that the process of mixing polymers and additives with bitumen does not amount to manufacture. Both the lower authorities have found as a fact that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no
F change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely for mixing of aggregates for
G constructing the roads.

24. We also find substance in the contention urged on behalf of the assessee that the answer to the issue at hand stands concluded by the dismissal of the Civil Appeals filed by the revenue against the decision of the Tribunal in the case of
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Collector of Central Excise, Vadodara Vs. Tikitar Industries[23]. In that case the dispute was whether the process relating to improvement of the quality of bitumen by raising its softening point and penetration amounted to manufacture of a new and different commodity. The process involved in improving the quality of bitumen was oxidation, which converted straight grade bitumen into air blown bitumen. In revenue's appeal the Tribunal had *inter-alia* held as under :

> "19. The duty paid bitumen received by the Assessee is boiled so that foreign substances like sand and stone settle down; thereafter the air is blown into the material for *improving the quality of the bitumen by raising the softening point and penetration;* this makes the bitumen suitable for intended application. It is seen from the process undertaken by the Assessees that only the quality of the product which has already suffered duty is improved....."
>
> (Emphasis supplied by us)

As aforesaid, revenue's appeal was dismissed by this Court vide order dated 2nd August, 2006 in *Tikatar Industries* (supra).

25. We therefore, hold that PMB or CRMB cannot be treated as bituminous mixtures falling under CSH 27150090 and shall continue to be classified under CSH 27132000 pertaining to tariff for petroleum bitumen.

26. In view of the opinion expressed above, we deem it unnecessary to deal with the other grounds urged on behalf of both the sides.

27. For the foregoing reasons, no ground is made out for our interference with the impugned orders passed by the Tribunal in all the appeals mentioned in paragraph 1 supra. The appeals, being bereft of any merit, are dismissed accordingly, with no order as to costs.

B.B.B. Appeals dismissed.

23. 2000 (118) E.L.T. 468 (Tri).