

Orient Paper Mills Ltd.

Vs

Union of India

(M. Hidayatullah, S. M. Sikri, C. A. Vaidialingam JJ)

16.03.1967

JUDGMENT

HIDAYATULLAH, J.

The appellant is a public limited company which carries on the business of manufacturing and selling whole sale, paper and boards at Brajrajnagar in the State of Orissa. The appellant company holds a licence under the Central Excise Act in Form L - 4 prescribed by the Central Excise Rules, 1944. The appellant company's factory and its premises and precincts have been demarcated under the said Rules. The Factory is traversed by railway lines, because the appellant company enjoys the benefit of a private siding. In 1960, the appellant Company constructed a new railway siding outside the original factory premises where bamboos and other raw materials were stored and constructed a new railway siding outside the original factory premises where bamboos and other raw materials were stored and constructed a platform for loading and unloading. This extension has not been included in the factory or its premises or precincts for purposes of the Excise Rules. It is presumably so, because to reach the new siding, a public road has to be traversed which is not enclosed and from which public cannot be excluded. It is in evidence that after this new siding was constructed, the appellant company requested the Excise authorities to amend the licence to include the new railway siding; but this was refused.

On February 27, 1961, the appellant company, loaded 20 wagons of paper after effecting clearance of these goods by payment of the excise duty under r. 52 of the Excise Rules. On February 28, 1961, the appellant company loaded 13 more wagons and cleared them. These wagons were sealed by the railway administration and railway receipts were issued to the appellant company. The company also obtained gate pass. The wagons then passed into the control of the railway administration, but as a pilot engine was not available the wagons were shunted into the new siding. The exit from the new siding is only through the factory premises because the railway comes to a dead - end on the other side.

The Deputy Superintendent of Central Excise wrote to the appellant company on March 1, 1961 that the wagons loaded on February 27 and 28, 1961 were found inside the factory premises till 9-45 A.M. on March 1, 1961 and the goods were therefore liable to be assessed at the higher rates of excise duty current from March 1, 1961. The appellant company contended before the Deputy Superintendent that the wagons were duly sealed after the completion of loading in his presence, were taken out of the factory premises and were not in the factory when the new rates came into force. The appellant company relying upon r. 9A of the Central Excise Rules, 1944 submitted that duty was payable at the rate in force on the date on which the duty was actually paid. In the alternative, the appellant company submitted that the goods having been cleared or removed from the factory premises before the midnight of February 28, 1961, could not be made liable for the enhanced duty which came into force from March 1, 1961. These contentions were not accepted by

the Deputy Superintendent who demanded payment of Rs. 45,475.83, from the appellant company as differential excise duty. The amount was paid under protest and without prejudice to the rights of appeal and representation to the proper authorities under the Excise Act.

The matter was then placed by the appellant company before the Assistant Collector, Central Excise, Cuttack and the company requested that the differential duty be refunded as it had been illegally collected. The Assistant Collector rejected the claim and confirmed the collection of differential duty. The appellant company appealed to the Collector of Central Excise, Calcutta and Orissa before the Government of India (Central Excise Revision Application No. 473 of 1963). The application for revision was rejected was given in the order communicated to the appellant company. The present appeal has been filed by special leave against the last order.

The first contention in this appeal is that the order of the Deputy Superintendent confirmed by the Assistant Collector, the Collector of Excise and the Central Government was illegal and contrary to the provisions and intendment of the Central Excise Act and the rules framed thereunder, because under r. 9A, first part, these goods were cleared by payment of excise duty and could not be reassessed to the enhanced duty. It is further submitted alternatively that the goods were removed from the factory proper before the midnight of February 28, 1961 and therefore could not be assessed to the enhanced duty even if the latter part of rule 9A applied. A third contention that the order of the Central Government was bad because it gave no reason for the rejection of the application for revision was not pressed seriously. We shall examine the first two arguments only.

The duty of excise on paper and boards was increased by s. 13 of the Finance Act, 1961 (Act XIV of 1961) read with item 17 of the Schedule. Under the of Central Taxes Act (XVI of 1931) this duty became payable from the 1st day of March, 1961. The question therefore, arises whether the goods are to bear the old duty or the new. This question depends upon the time at which the duty was payable on the goods in this case. That in its turn depends upon the true construction of r. 9A of the Central Excise Rules, 1944. The rule consists of two sub-rules. But we are concerned with the first sub-rule and first proviso to that sub - rule. The relevant portion of the rule may be read even at this stage :

" 9A. (1) Alteration of duty or tariff valuation.-

The rate of duty and the tariff valuation (if any) applicable to goods cleared on payment of duty shall be the rate and valuation (if any) in force on the date on which duty is paid, or if the goods are cleared from a factory or a warehouse, on the date of the actual removal of such goods from such factory or warehouse :

Provided that if the goods have previously been removed from warehouse under bond to be reware-housed, and the duty is paid on such goods without their being reware-housed, the rate and valuation (if any) in force on the date on which duty is paid or, if duty is paid through an account - current maintained with the Collector under Rule 9, on the date on which an application in the proper form is delivered to the office - in - charge of the warehouse from which the goods were removed.

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To understand this rule and its implications something must be said first about the scheme of the Central Excise and Salt Act, 1944 and the Central Excise Rules, 1944. The Central Excise Act defines 'excisable goods' to mean goods specified in its First Schedule and subject to a duty of

excise. The Act further defines 'factory' to mean any premises including the precincts wherein excisable goods are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried or is ordinarily carried on. 'Manufacture' is defined to include any process identical or ancillary to the completion of a manufactured product, and certain processes in relation to tobacco and salt are included in manufacture, but with these we are not concerned. It also defines 'curing' as including any process for rendering an unmanufactured product fit for marketing or manufacture. Section 3 of the Act lays down inter alia that there shall be levied and collected in such a manner as may be prescribed duties of excises on all excisable goods which are produced or manufactured in India at the rates set forth in the First Schedule. Section 4, which is headed " Determination of value for the purpose of duty ", provides that where any article is chargeable with duty at rates dependent on the value of such article such value shall be deemed to be the whole sale cash price for which an article of like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery, etc. The emphasis in s. 4 is on the time of removal of the article chargeable with duty from the factory. This is the only guidance which the Act furnishes. We may now turn to the Rules.

Under the Rules, duty means duty payable under s. 3 of the Act above - mentioned. Rule 2 (xv) defines 'warehouse' as any place or premises appointed or licensed under rule 140. We now come to Chapter III which deals with levy and refund of and exemption from duty. Rule 7 provides that every person who produces, cures or manufactures any excisable goods or who stores such goods in a warehouse shall pay the duty or duties leviable on such goods at such time and place and to such person as may be designated in or under the authority of the Rules, whether the payment of such duty or duties is secured by bond or otherwise. Rule 9 lays down the time and manner of payment of duty. The rule may be read here :

"9. Time and manner of payment of duty.-

(1) No excisable goods shall be removed from any 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 the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :

Provided that such goods may be deposited without payment of duty in a store - room or other place of storage approved by the Collector under rule 27 or rule 47 or in a warehouse appointed or licensed under rule 140 or may be exported under bond as provided in rule 13 :

Provided further that such goods may be removed on part payment of duty leviable thereon if the Central Government, by notification in the Official Gazette, allow the goods to be so removed under rule 49 :

Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store - room or warehouse duly approved, appointed or licensed by him keep with any person dealing in such goods an account - current of the duties payable thereon and such account shall be settled at intervals not exceeding one month, and the account - holder shall periodically

make deposit therein sufficient in the opinion of the Collector to cover the duty due on the goods intended to be removed from the place of production, curing manufacture or storage.

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This rule prohibits the removal of goods from the factory or any premises appurtenant thereto until the excise duty leviable thereon has been paid. The factory and the premises appurtenant thereto has to be specified by the Collector. To this rule there are exceptions. One of them is that the goods may be deposited without payment of duty in a store - room or other place of storage approved by the Collector under rule 27 or under rule 47 any warehouse appointed or licensed under rule 140. Another exception is that the goods may be removed on part payment of duty leviable if the Government notifies and allows the goods to be so removed or the Collector if he thinks fit, approves the opening of an account - current of the duty payable and the account - holder periodically makes deposits sufficient in the opinion of the Collector to cover duty due on the goods intended to be removed from the place of manufacture or storage. As we are not concerned with export under bond we may not refer to rule 13 but it is necessary to see rules 47 and 140. Rule 47 is headed " goods may be stored without payment of duty". Under this rule a manufacturer has to provide a store - room or other place of storage at his premises for depositing goods made on the same premises without payment of duty. Duty - paid goods and goods other than excisable goods made in the factory must not be deposited in such store - rooms or place. The store - room or place must be declared by the manufacturer and approved by the Collector. To this rule there is an exception and it is that if the manufacturer undertakes to pay duty on all the manufactured goods and clears them immediately on completion of manufacture the Collector may exempt him from providing a store - room or other place of storage. Rule 140 deals among other matters with the appointment and licensing of warehouse. Under this rule the Collector shall by order in writing from time to time approve and appoint a public warehouse and may in like manner license private warehouse for the storage of excisable goods on which duty has not been paid.

The Rules make a distinction between manufactured and unmanufactured goods. The relevant rules may also be seen. Rule 25 provides for unmanufactured goods and rules 52 and 52A for manufactured goods. Rule 25 deals with clearance of un-manufactured products on payment of duty. This rule applies to a curer who may apply to an officer to get the goods weighed and duty assessed. If the duty so assessed is then paid the curer is granted a transport permit authorising him to remove the products to any destination named by him. Rule 52 deals with manufactured goods. It deals with clearance on payment of duty. The rule reads as follows :-

"52. Clearance on payment of duty.-

When the manufacturer desires to remove goods on payment of duty, either from the place or premises specified under rule 9 or from a store - room or other place of storage approved by the Collector under rule 47, he shall make application in triplicate (unless otherwise by rule or order required) to the proper officer in the proper Form and shall deliver it to the officer at least twelve hours (or such other period as may be elsewhere prescribed or as the Collector may in any particular case require or allow) before it is intended to remove the goods. The officer shall, thereupon, assess the amount of duty due on the goods and on production of evidence that this sum has been paid into the Treasury, or paid to the account of the Collector in the Reserve Bank of India or the State Bank of India, or has been dispatched to the Treasury by money order shall allow the goods to be cleared".

We may also refer to rule 52A which provides for the actual removal of the goods from the factory. The rule provides that no excisable goods shall be delivered from a factory except under a gate pass signed by the owner of the factory and counter signed by the proper officer. Such a gate pass is made out in triplicate and must be presented to the proper officer for counter signature at least one hour before the actual removal of the goods from the factory. In the present case a gate pass had been obtained. Rule 51A then provides that except as otherwise expressly provided for in the Rules, no duty - paid goods shall be allowed to re - enter or be retained in, any part or premises of factory. We may now turn to rule 9A, the interpretation of which has given to the case.

The dispute, shortly stated, is as to the application of the two parts of Rule 9A. According to Mr. B. Sen for the appellant company, the first part applies where duty is paid and the goods cleared and in such a case the critical point of time is the payment of duty and the point of time of the removal from the factory is not relevant. In the second part, according to him, the critical time is the removal of the goods from a factory or warehouse without payment of duty such as happens when they are removed under the provisos to Rule 9A. In this view of the matter he contends that this case falls within the first part of Rule 9A. On the other hand, the learned Solicitor General on behalf of the Union of India submits that the main rule is in the first part and the second part of the rule is an exception. He suggests that one part speaks of payment of duty and the other of removal and the difference in point of time is between clearance of duty in the case of unmanufactured goods and the actual removal of the goods from the factory or warehouse in the case of manufactured goods. To prove his point he emphasises the separate provisions regarding manufactured goods in Chapter V and unmanufactured goods in Chapter IV of the Rules.

In our opinion Rule 9A cannot be read on the basis of the classification suggested by the Solicitor General. No doubt rules 9 and 9A apply to manufactured as well as unmanufactured goods because rule 9 speaks in terms of both and rule 9A mentions in one place goods without adverting to the source and in the other the factory or warehouse. But the distinction in the two parts of rule 9A cannot be founded on the basis of a difference to be found in Chapters IV and V of the Rules. Rule 25 allows the clearance of unmanufactured products on payment of duty but rules 26 and 27 allow such products to be despatched to a bonded warehouse or to be deposited in a curer's bonded store room. A special rule applies to the latter goods deposited in the store- room. They must be cleared on payment of duty ordinarily before the 30th day of June (extended to 31st December under certain conditions) of the year following that in which they are harvested or deposited. On the other hand, under rule 49 payment of duty is not required in respect of goods made in a factory until they are about to be issued out of the place or premises specified under rule 9 or are about to be removed from a store - room or other place of storage approved by the Collector. The only exception to this is their removal to a licensed warehouse. Rule 52 then says that when the manufacturer desires to remove goods on payment of duty from the factory or store - room or other place of storage, he can get the duty assessed, pay it and get a clearance and a gate pass. He must then remove the goods and such goods must not lie in the factory etc. or after removal re - enter the premises. (Vide r. 51A).

It will thus be seen that in the case of manufactured goods the payment of duty and the clearance of goods may be removed (provisos to r. 9). This immediately sets up two kinds of cases in respect of manufactured goods, The critical time thus becomes the removal from the factory or warehouse but if the payment of duty is made before the removal then the critical time is the payment of duty. In the present case the payment of duty was synchronous with the clearance of the goods actually been cleared for removal. The above construction of the Rules agrees with the construction placed by the Board of the Rules agrees with the construction placed by the Board of Revenue in its ruling of 1957 when the effect of the sealing of the wagons by the Railway after loading and the issuance of

railway receipts was considered. The Board ruled that such goods would not be considered as lying in the stock in the factory premises. When we add to it the fact in this case that duty was paid on the goods and gate pass was also issued, there remains little to argue except to say that the wagons being in the new siding must be treated as still in the factory. Here the difficulty in the way of the Union of India is that the Excise authorities themselves refused to recognise this portion as part of the factory. If the goods were put in the wagons after payment of duty, and the wagons were sealed and shunted out of the factory proper on a gate pass, not only under the ruling of the Board but also on the application of the Rules as explained here these goods became free of the enhanced duty. The recovery was accordingly erroneous. The duty collected must, therefore, be refunded and we order accordingly. The appellant's costs must be paid by the respondent.

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