

Union Carbide India Limited

Vs

Union of India and Others

Civil Appeal No. 1103 of 1972

(R. S. Pathak, A. P. Sen, D. P. Madon JJ)

04.04.1986

JUDGMENT

PATHAK, J. -

1. This appeal by certificate granted by the High Court of Allahabad raises the question whether the manufacture of aluminium cans or torch bodies is liable to excise duty under Entry 27(e) of the First Schedule to the Central Excises and Salt Act, 1944.
2. The appellant, the Union Carbide India Limited, is a public limited company and carries on the business of the manufacture and sale of flashlights (torches), dry cell batteries, chemicals and plastics. The flashlights are manufactured by one of its divisions, the Eveready Flashlight Company, Lucknow. The appellant purchases aluminium slugs from the manufacturers of aluminium in India and produces aluminium cans or torch bodies at its factory by a process of extrusion. Before March 1, 1970 aluminium cans were subjected to basic excise duty at 20% ad valorem plus special duty a 20% of the basic duty on a value of Rs 8600 per metric tonne fixed as the tariff value by the Government of India by a notification dated January 21, 1969. By an amendment incorporated in the Finance Act, 1970 with effect from March 1, 1970 the basic duty was fixed at 25% ad valorem plus special duty at 20% of the basic duty. By Notification 65/70 dated March 1, 1970 the notification of January 21, 1969 was rescinded.
3. The appellant received a letter dated March 3, 1970 from the Superintendent of Central Excise, Lucknow stating that the tariff rate of duty on extruded shapes and sections of aluminium had been raised and that aluminium cans would be subjected to duty on ad valorem basis on the value as determined under Section 4 of the Act, and that the appellant should send price lists for approval. The appellant, anxious to avoid coercive action, filed price declaration in which the price of aluminium cans was calculated as the cost of production plus a margin of profit of 5% of the cost. The appellant, however, took the position that aluminium cans were neither sold nor were capable of being sold in the market, and therefore could not be described as 'goods' for the purposes of the Central Excises and Salt Act, 1944. It was also asserted that the preparation of aluminium cans out of aluminium slugs did not amount to manufacture, and that aluminium cans were merely an intermediate product in the manufacture of flashlights. The contentions of the appellant did not find favour with the excise authorities.
4. The appellant filed a writ petition in the High Court of Allahabad for a mandamus directing the excise authorities not to levy and collect excise duty on aluminium cans, and to refund the excise duty levied and collected from the appellant on aluminium cans from March 1, 1965. A learned Single Judge of the High Court allowed the writ petition by his judgment and order dated April 15,

1971, but on appeal by the Union of India a Division Bench of the High Court reversed the judgment and order of the learned Single Judge and dismissed the writ petition on February 22, 1972. Before the learned Judges an attempt was made by the appellant to show that the process employed in the preparation of the aluminium cans could not be described as a process of "extrusion" but in fact should properly be described as a process of "impact extrusion". The learned Judges were not impressed by the distinction attempted by the appellant and held that the manufacture of the aluminium cans fell under Entry 27(e) of the First Schedule to the Central Excises and Salt Act, 1944, which refers to "extruded shapes and sections including extruded pipes and tubes". The learned Judges pointed out further that even otherwise the aluminium cans would fall under Entry 27(d) which mentions "pipes and tubes other than extruded pipes and tubes", and inasmuch as the rate of duty was the same the point raised by the appellant was of no significance. The learned Judges also held that the production of aluminium cans from aluminium slugs amounted to manufacture and that the aluminium cans could be described as "goods" for the purposes of the Central Excises and Salt Act, 1944.

5. The only contention urged by the appellant before us is that the aluminium cans produced by the appellant cannot be described as "goods" for the purposes of excise duty inasmuch as they are not marketable and are prepared entirely by the appellant for the flashlights manufactured by it.

6. It does seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List I of Schedule VII to the Constitution specifically speaks of "duties of excise on tobacco and other goods manufactured or produced in India ...", and it is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context, the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In *Union of India v. Delhi Cloth & General Mills* (1963 Supp 1 SCR 586 : AIR 1963 SC 791), this Court considered the meaning of the expression "goods" for the purposes of the Central Excises and Salt Act, 1944 and observed that "to become 'goods' an article must be something which can ordinarily come to the market to be brought and sold", a definition which was reiterated by this Court in *South Bihar Sugar Mills Ltd. v. Union of India* ((1968) 3 SCR 21 : AIR 1968 SC 922).

7. The question here is whether the aluminium cans manufactured by the appellant are capable of sale to a consumer. It appears on the facts before us that there are only two manufacturers of flashlights in India, the appellant being one of them. It appears also that the aluminium cans prepared by the appellant are employed entirely by it in the manufacture of flashlights, and are not sold as aluminium cans in the market. The record discloses that the aluminium cans, at the point at which excise duty has been levied, exist in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. The cans have sharp uneven edges and in order to use them as a component in making flashlight cases the cans have to undergo various processes such as trimming, threading and redrawing. After the cans are trimmed, threaded and redrawn they are reeded, beaded and anodised or painted. It is at that point only that they become a distinct and complete component, capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. We find it difficult to believe that the elementary and unfinished form in which they exist immediately after extrusion suffices to attract a market. The appellant has averred on affidavit that aluminium cans in the form are unknown in the market. No satisfactory material to the contrary has been placed by the respondents before us. Reference has been made by the respondents to the instance when aluminium cans were ordered by the appellant from Messrs Krupp Group of Industries. This took place, however, in 1966 as a solitary instance, and what happened was that aluminium slugs were provided by the appellant to Messrs Krupp Group of

Industries for extrusion into aluminium cans. The facts show that the transaction was a works contract and nothing more. Apparently, the appellant made use of the requisite machinery owned by that firm for extruding aluminium cans. Not a single instance has been provided by the respondents demonstrating that such aluminium cans have a market. The record discloses that whatever aluminium cans are produced by the appellant are subsequently developed by it into a completed and perfected component for being employed as flashlight cases.

8. Much emphasis has been laid by the respondents on the circumstance that the appellant had in the past treated the aluminium cans produced by it as excisable goods and had submitted price lists to the excise authorities which included a margin of profit in the specified price. It is clear that the appellant did so under the mistaken belief that the aluminium cans attracted excise duty. The margin of profit included in the price was arrived at notionally, in order merely to comply with the demand of the excise authorities for the submission of price lists. The conduct of the appellant in the past, having regard to the circumstances of the case, cannot serve as evidence of the marketability of the aluminium cans. Indeed, subsequent price lists were submitted under "protest" by the appellant, who maintained that the article did not attract excise duty.

9. We are satisfied upon the material before us that the aluminium cans produced by the appellant cannot be described as excisable goods and therefore do not fall within the terms of Section 3 of the Central Excises and Salt Act, 1944 read with Entry 27 of the First Schedule thereto.

10. In the result, the appeal is allowed, the judgment and order dated February 22, 1972 of the Division Bench of the High Court of Allahabad are set aside and the judgment and order dated April 15, 1971 of the learned Single Judge of that High Court are restored. The appellant is entitled to its costs of this appeal.

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