

Collector of Central Excise, New Delhi

Vs

Ballarpur Industries Ltd

Civil appeal No. 2882 of 1989

(M. N. Venkatachaliah, N. D. Ojha JJ)

29.09.1989

JUDGMENT

VENKARACHALIAH, J. –

1. This appeal, under Section 35-L(b) of the Central Excises and Salt Act, 1944, arises out of and is directed against the Order No. E/1351/88-C, dated December 2, 1988, by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, allowing the appeal preferred by the respondent and holding that respondent was entitled to certain proforma credits of the duty paid on "Sodium Sulphate" used in the manufacture of paper and paperboards in which respondent is engaged.

2. The short point for consideration in this appeal is whether the respondent - Manufacturer, - The Ballarpur Industries Ltd., - was entitled to be benefit of Central Government's Notification No. 105/82-C.E., dated February 28, 1982 a question which in turn, depends on whether Sodium sulphate could be said to have been used as "raw-material" in the manufacture of 'paper' and 'paperboard'. In the proceedings before the authorities, the dispute initially concerned six other inputs. But the controversy before us was limited, as it should rightly be, only to sodium sulphate inasmuch as even in the appeal before the Collector (Appeals), the department's grievance, apparently, was confined to the pro forma credits of duty earlier paid on sodium sulphate (see column 6 of the Assistant Collector's Memorandum Appeal dated 15-7-1987 before the Collector (Appeals)).

3. Respondent is a manufacturer of paper and paperboards in the processes relating to which "sodium sulphate" is used "in the chemical recovery cycle of sodium sulphate which forms an essential constituent of sulphate cooking liquor used in the digestion operation. The notification dated 28-2-1982 under which the credit is claimed reads :

"In exercise of the power conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 178/77 - Central Excise, dated 18 June, 1977, the Central Government hereby exempts all excisable goods (hereinafter referred as "the said goods") on which the duty of excise is leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) (hereinafter referred as "the inputs") have been used as raw material or component parts (hereinafter referred to as "the inputs") from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the "inputs".

4. The Superintendent of Central Excise, Range-2, Yamunanagar, declined the pro forma-Credit to the duty paid on "sodium sulphate" on the ground that sodium sulphate "was burnt-up in the process of manufacture and was not retained in the paper" and that, therefore, it could not be considered "raw Material" in the manufacture of paper. Accordingly, he caused a notice dated 18-1-1988 to be issued requiring respondent to show cause why the amounts of pro forma credit availed of by the respondent for the period between 28-2-1982 and 31-10-1982 should not be recovered. The reason why "sodium sulphate" could not be held to be a "raw material" in the manufacture of paper was set out in the notice thus :

".... The pro forma credit claimed and granted in respect of the abovementioned items from 28-2-1982 to 31-10-1982 is not admissible because these chemicals are burnt out and do not remain in the finished product. The amount of pro forma credit availed is, therefore, liable to be recovered...."

5. However, the Assistant Collector of Central Excise, Ambala, by his order dated 27-6-1986 took a different view and held that sodium sulphate, even as the other inputs referred to in the said notice, was an essential raw material in the manufacture of paper and attracted the benefit of the notification. The show cause notice dated 18-1-1983 was, accordingly, set aside.

6. But, the Collector of Central Excise (Appeals) set-aside the order of the Assistant Collector and remitted the matter to Assistant Collector for a read judication. The respondent-manufacturer challenged this order before the Tribunal. The Tribunal upheld the contention of the respondent-manufacturer, set-aside the order of the Collector (Appeals) and restored the order of the Assistant Collector. The Tribunal adopted the reasoning in its earlier decision in *Seshasayee Paper and Boards Ltd. v. Collector of Central Excise* (1985 22 ELT 163 (Trib)) in which the Tribunal had held : (ELT p. 164, para 4)

"... the term "raw material" has to be interpreted in the circumstances of each case in the absence of any acceptable or useful definition of the term either in the dictionary or in the technical literature... sodium sulphate lye, sodium sulphate, Daicol (Gaur Gums) and Fluo solid lime used for the bleaching of pulp should be considered as raw materials in the manufacture of paper; they serve a distinct and definitive purpose in the normal and recognised process of manufacture of paper and are essential for the process of manufacture."

7. In this appeal, the Collector challenges the correctness of the decision of the Tribunal.

8. We have heard Sri A. K. Ganguly, learned senior counsel for the appellant and Sri Soli J. Sorabjee, learned senior counsel for the respondent-manufacturer. The thrust of Sri Ganguly's arguments is that the amplitude of the expression "raw-material" in the notification has to be ascertained with reference to and in the context of the purpose in substituting that expression in place of the words obtaining in the earlier notification No. 79/CE dated 4-6-1979, in which credit was given to duty paid on "goods" which have been "used" in the manufacture of excisable goods. Sri Ganguly says that the Tribunal has, virtually and in effect, ignored the essential and important distinction between goods being "used" in the manufacture on the one hand and "goods" used as "raw material" on the other, ignoring the conscious change intended by the substitution of the expression "raw-material" in the later notification dated 28-2-1982 which was clearly intended to cut-down the benefit. Sri Ganguly referred to the following observations of this Court in *Collector of Central Excise v. CC 244* : (1989) 43 ELT 201 (SCC p. 248, para 5 : ELT p. 204)

"In *J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. STO* (1965 16 STC 563 : AIR 1965 SC 1310 : (1965) 1 SCR 900) this Court while construing the expression 'in the manufacture or processing of goods for sale' in the context of sales tax law, though the concept is different under the excise law, has held that manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods...."

and contended that the import of the words "raw-material", judicially accepted, connotes something more than what is 'used' in the manufacture and requires that goods to become "raw-material" must, either in their original or altered form, endure as a composite element of the end product. Sri Ganguly submitted that the technical literature and evidence in the case as to the part played by sodium sulphate in the chemical technology of paper-making suggested two things : First, that sodium sulphate was utilised in the preparation of an anterior, intermediate product at the stage of 'digestion' of the pulp and did not, therefore, strictly belong to the process of manufacture of paper itself, and, secondly, that sodium sulphate did not go directly into and find a place in the finished product and did not, therefore, qualify for being "raw-material" in the manufacture of paper. Learned counsel said that no satisfactory answer to the question raised in the appeal could be afforded unless a clear line of demarcation between the material merely used in the manufacture of paper on the one hand and material used as "raw-material" on the other is drawn. Sri Ganguly sought to substantiate this distinction in the present case with reference to certain observations of this Court in *Deputy Commissioner of Sales Tax, Board of Revenue v. Thomas Stephen & Co. Ltd.* ((1988) 2 SCC 264, 267 para 9 : 1988 SCC (Tax) 190 : JT (1988) 1 SC 631, 634). One of the questions there was whether cashew shells used in the kiln by the dealer who was a manufacturer of tiles, terracotta ware and ceramic items were eligible to purchase tax under Section 5A(1)(a) of the Kerala General Sales Tax Act, 1963, on the ground that the dealer had "consumed such goods in the manufacture of the other goods...". The Tribunal had held that cashew shells had been used only as fuel in the kiln for the manufacture of tiles and that, therefore, the condition of 5A(1)(a) of the Act was not satisfied, there having been no consumption of cashew shells in the manufacture of the ceramic goods. This Court held: (SCC p. 267, para 9)

"The cashew shells in the instant case, has been used as fuel in the kiln. The cashew shells did not get transformed into the end product. These have not been used as raw materials in the manufacture of the goods. These have been used only as an aid in the manufacture of the goods by the assessee. Consumption must be in the manufacture as raw material or of other components which go into the making of the end product to come within the mischief of the section. Cashew shells do not tend to the making of the end product. Goods used for ancillary purposes like fuel in the process of the manufacture do not fall within Section 5A(1)(a) of the Act. Cashew shells, therefore, do not attract levy of tax under the said section."

9. Sri Ganguly says that "sodium sulphate" in the present case must, like the cashew shells, be held to have been used as an aid in the manufacture of paper and for ancillary purposes like fuel and not as "raw material" in the manufacture of paper.

10. Sri Sorabjee, for the respondent, sought to maintain that sodium sulphate was an essential chemical ingredient in the chemistry of paper technology and that the fact that the ingredient was actually burnt up or sublimated in the process and did not retain its identity in the end product, will not, necessarily, detract from its being a "raw material". The relevant test is how essential is the ingredient in the manufacture. Learned counsel said that in the complexity of the chain of chemical

reactions in the manufacturing process, undue emphasis on the search for the identity of any individual chemical ingredient in the final product would be artificial and unrealistic. Sri Sorabjee submitted that authoritative scientific treatises on the paper technology recognise that "sodium sulphate" is an essential raw material. Sri Sorabjee referred to the publication of the Food and Agriculture Organisation of the United Nations under the caption "Guide for Planning Pulp and Paper Enterprises" in which the following statement occurs : (pp. 270 and 275)

"For any pulp and paper enterprise a variety of non-fibrous raw materials are required : water, fuel, power and paper-making chemicals and, for pulp mills, pulping and bleaching chemicals...."

The sulphate (Kraft) pulping process, now the most common pulping process for both wood and non-wood fibrous raw materials, requires the purchase of salt cake (sodium sulphate) and limestone (calcium carbonate). Depending on the efficiency of the recovery system, about 40 to 80 kilograms of salt cake and 25 kilograms of limestone are needed per ton of pulp. These chemicals are converted in the chemical recovery and causticizing systems to give sodium hydroxide and sodium sulphide, which are the active chemicals in the pulping liquor."

11. Sri Sorabjee submitted that the Tribunal had consistently taken this view in several cases and that the department not having carried those matters up in appeal must be held to have accepted the correctness of that view. As instances in point, learned counsel referred to two decisions, in *Collector of Central Excise, v. Ballarpur Industries Ltd.* ((1983) 13 ELT 1263 (Cegat)) and in *Collector of Central Excise, v. Titagur Paper Mills* (1985 21 ELT 901 (Trib)).

12. Adverting to appellant's contention that use of sodium sulphate was at a stage of preparation of the pulp which is a stage anterior to the actual manufacture of paper, Sri Sorabjee submitted that, apart from the fallacy inherent in the attempt to dissect an otherwise integrated process of manufacture, the definition of 'manufacture' in Section 2(f) of the 'Act' which takes with in it all ancillary and incidental processes, should secure (sic enure) to render the contention in substantial.

13. The question, in the ultimate analysis, is whether the input of sodium sulphate in the manufacture of paper would cease to be a "raw-material" by reason alone of the fact that in the course of the chemical reactions this ingredient is consumed and burnt up. The expression "raw-material" is not a defined term. The meaning to be given to it is the ordinary and well accepted connotation in the common parlance of those who deal with the matter.

14. The ingredients used in the chemical technology of manufacture of any end product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end product; those which, as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end products and those, as here, which might be burnt up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "raw-material" for the end product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning up is its quality and value as raw material. In

such a case, the relevant test is not its absence in the end product, but the dependence of the end product for its essential prances at the delivery end of the process. The ingredient goes into the making of the end product in the sense that without its absence the presence of the end product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisations is in the manufacturing process as distinct from the manufacturing apparatus.

15. The decision of this Court in Deputy Commissioner of Sales Tax, Thomas Stephen & Co. Ltd. ((1988) 2 SCC 264, 267 para 9 : 1988 SCC (Tax) 190 : JT (1988) 1 SC 631, 634), relied upon by Sri Ganguly, does not really advance the appellant's case. The observations therein to the effect that "consumption must be in the manufacture of raw material or of other component which go into the making of end product" (SCC p. 267, para 9) were made to emphasise the distinction between the "fuel" used for the kiln to impart the heat treatment of ceramics and what actually went into the manufacture of such ceramics. The observations, correctly apprehended, do not lend themselves to the understanding that for something to qualify itself as "raw-material" it must necessarily and in all cases go into, and be found, in the end product.

16. We also find no substance in the contention of Sri Ganguly that the process in which the sodium sulphate was used, was anterior to and at one stage removed from the actual manufacture of paper. Sri Sorabjee's answer to this contention is, in our view, appropriate. That apart the following observations in Collector of Central Excise v. Eastend Paper Industries Ltd. ((1989) 4 SCC 244 : (1989) 43 ELT 201) cited by Sri Ganguly himself is a complete answer : (SCC p. 248, para 5)

".... Where any particular process, this Court further emphasised, is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process, would fall within the expression 'in the manufacture of goods'."

17. On a consideration of the matter, we are persuaded to the view that the Tribunal was right in its conclusion that sodium sulphate was used in the manufacture of paper as "raw-material" within the meaning of the Notification No. 105/82-C.E dated 28-1-1982.

18. Now a word about Sri Ganguly's insistence on drawing a line of strict demarcation between what can be said to be 'goods' merely "used" in the manufacture and what constitute goods used as "raw-material" for the purpose.

19. We are afraid, in the infinite variety of ways in which these problems present themselves it is neither necessary nor wise to enunciate principles of any general validity intended to cover all cases. The matter must rest upon the facts of each case. Though in many cases it might be difficult to draw a line of demarcation, it is easy to discern on which side of the borderline a particular case falls.

20. Sri Ganguly's insistence, however, serves to recall the pertinent observations of an eminent author on the point. It was said : (See Pragmatism and Theory in English Law, page 75, Hamlyn Lect ures of 1987)

"A common form of argument used by counsel in legal cases is to suggest that if the court decides in favour of the opposing counsel's arguments, it will become necessary to draw lines which may be very difficult or impossible to draw. "Where will you draw the line ?" is, of course, a question which must be faced by a legislator who is

actually proposing to lay down lines for all future cases, but it is not a question which needs in general to be faced by common law courts who proceed in slow stages, moving from case to case...."

The learned author recalls Lord Lindley's "robust answer" to the question - Where will you draw the line ? (See Attorney-General v, Brighton & Hove Co-operative Supply Association, ((1900) 1 Ch 276, 282 : 48 WR 314 : 16 TLR 144)

"Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals ? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal ?"

Again, Lord Coleridge in Mayor of Southport v. Morriss ((1893) 1 QB 359, 361) said :

"The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any line that could reasonably be drawn."

21. In the result for the foregoing reasons, we find no merit in this appeal which is, accordingly, dismissed.

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