

Union of India and Another

Vs

Delhi Cloth and General Mills Co. Ltd. and Another

Civil Appeals No. 2062 of 1979

(B. P. Jeevan Reddy, S. C. Sen JJ)

11.03.1997

ORDER

1. The Delhi Cloth & General Mills Company Ltd. used to manufacture calcium carbide and sell the same in the market till 1967. There are several plants in the factory of the Company in which various chemicals are manufactured. There is an independent plant for the manufacture of calcium carbide. Since 1967, the Company stopped selling calcium carbide and instead it started using the calcium carbide for manufacturing acetylene gas in their acetylene gas plant. Since the entire quantity of calcium carbide produced by the Company is consumed in the manufacture of acetylene gas, there is no question of selling calcium carbide to outside parties. The calcium carbide produced in the Company's factory is tapped from the furnace in liquid form and is placed in small trolley trays, where it is allowed to cool and solidify and thereafter it is broken into cakes of desired sizes.

2. The contention of the Company before the excise authorities and also the High Court was that the calcium carbide manufactured by it was only an intermediary product which was used for generation of acetylene gas in the same factory. This intermediary product cannot be subjected to excise duty for the following reasons :

(1) It is not "goods" as known to the market. By its very properties, calcium carbide in its naked form, turns into dust if it comes into contact with air in the atmosphere due to the reaction of the moisture in the air on it. It can become "goods" only when it attains commercial purity and is put into containers as prescribed by the provisions of Chapter III of the Carbide of Calcium Rules, 1967. The calcium carbide used by the Company for the generation of acetylene gas does not comply with these statutory provisions and is not, therefore, "goods".

(2) Since it is not marketable, its assessable value cannot be ascertained under Section 4 of the Central Excises and Salt Act, 1944 because no such article of the like kind and quality is sold or is capable of being sold.

(3) It is not removed by the Company from its factory and hence the question of levy and collection of duty on it at the time of its removal does not arise.

(4) The calcium carbide plant and the plant for the production of acetylene gas are both situated in one factory of the Company. The passage of calcium carbide from the former plant to the latter plant does not amount to its removal from the factory to any other place.

3. The Superintendent, Central Excise, Division Kota, by Order dated 5-1-1972, the Appellate Collector, by Order dated 25-11-1972 and the Central Government, by Order dated 16-9-1975, have, however, held that calcium carbide manufactured by the Company was assessable under the Central Excise Act. The Company, therefore, moved a writ petition in the Delhi High Court for quashing these orders.

4. The Union of India had opposed the writ petition on the ground that what is manufactured by the Company is calcium carbide as mentioned in Tariff Entry 14-AA of the First Schedule to the Act and as such is liable to ad valorem duty. This product which was actually sold in the market till 1967 by the Company and even thereafter is "goods" within the meaning of the Act. The applicability of the Calcium Carbide Rules to this product did not arise as the Company did not transport the calcium carbide, but used the entire production for captive consumption in its factory for the manufacture of acetylene gas. Compliance with the Carbide of Calcium Rules in respect of this product is not a condition precedent for the product to become excisable. At any rate, excise duty is levied on manufacture and not on sale. Calcium carbide of the like kind and quality is sold or is capable of being sold and is, therefore, assessable to duty under Section 4(b) of the Act. The use of the calcium carbide for captive consumption by the Company amounts to its removal in terms of Rule 9 of the Rules.

5. The High Court, however, was of the view that calcium carbide manufactured by the Company could not be treated as "goods" and as such did not come within the mischief of Central Excises and Salt Act, 1944. The High Court further held that even assuming that calcium carbide made by the Company could be treated as "goods", excise duty on these goods cannot be levied unless these goods were removed from the factory of the Company. In that view of the matter, the Orders passed by the Superintendent of Excise, dated 5-1-1972, that of the Appellate Collector, dated 25-11-1972 and that of the Central Government in revision, dated 16-9-1975 were quashed.

6. When the matter was taken up for hearing in this Court, Mr. Sorabjee appearing on behalf of the Company stated that he will not contend that it was necessary to remove the goods from the factory of the Company before excise duty could be levied. In that view of the matter, he stated that he will not press Grounds 3 and 4 set out hereinabove which were pressed before the High Court. He, however, contended that he was entitled to succeed on Grounds 1 and 2 because now it has been settled by a judgment of this Court that unless the thing manufactured by the Company could be treated as "goods" and is capable of being sold in the market as such, no excise duty could be levied on it. The question of imposing excise duty is inextricably linked up with the concept of marketability of the goods. If the goods are not acceptable in the market as a commercial commodity, the "goods" could not be subjected to excise duty. Reliance was placed by Shri Sorabjee on a judgment delivered by a Bench of three Judges of this Court in the case of *Moti Laminates (P) Ltd. v. CCE* [(1995) 3 SCC 23] in support of his contention.

7. We are of the opinion that these cases should be heard by a larger Bench. These matters may be placed before the Hon'ble Chief Justice for necessary directions.