

SUPREME COURT OF INDIA

Commissioner of Central Excise, Jaipur

Vs.

Hindustan Zinc Ltd.

C.A.No.3252 of 1998

(S. N. Variava and H. K. Sema JJ.)

24.03.2004

JUDGMENT

S. N. Variava, J.

1. All these Appeals can be disposed by this common Judgment as the point involved is the same.

2. Briefly stated the facts are as follows: The Respondents are engaged in the manufacturing of zinc, lead and products thereof. Zinc is manufactured by a process known as electrolysis. In this process zinc sulphate solution is electrolyzed with the help of an electric current which is passed through it. The current is introduced into the solution by means of electrodes. A lead sheet fixed with a header acts as positive electrode (anode) and an aluminium sheet fixed with a header acts as negative electrode (cathode). For the purposes of electrolysis the Respondents manufacture the cathodes and anodes. The cathodes are manufactured in the following manner. Aluminium Header of the size of 1030 x45 x 25 mm is welded with an Aluminium Sheet of the size 1105 x 610 x 5 mm. Thereafter, Copper Tips are welded on the Header for better conductivity. The last process is to weld Aluminium Hooks on Header for facilitating the lifting of Cathodes as and when desired. The Cathode is of specific size which consists of various parts namely, sheet, Header, Copper tips and Hooks and not merely of aluminium Sheet and Header.

3. The anodes are manufactured by procuring lead ingots containing 1-02% silver. These ingots are melted and the molten is cast in the required size. The size of the cast/rolled product is 1070 x 1575 x 8 mm. A header is welded with the cast rolled plate. The header is manufactured by casting the copper bed in lead. In the lead cast/rolled product three holes are provided in which anode spacers are put for avoiding contact between anodes and cathodes. At this stage, it must be mentioned that the Respondents have a unit at Visakhapatnam. They also have a unit at Debari, Udaipur, Rajasthan. It is an admitted position that in respect of Debari unit the Respondents filed a Classification list showing the anodes and cathodes having headers. The Debari unit paid duty on the cathodes. However, in respect of Visakhapatnam unit the Respondents filed a Classification list merely showing anodes and

cathodes without showing that they had put headers on them. Show-cause-notices were issued to the Respondents as to why they should not pay duty on cathodes and anodes manufactured by them. The Commissioner of Customs and Central Excise held that there was a manufacture and directed payment of duty and also imposed a penalty. The Customs, Excise and Gold [Control] Appellate Tribunal (for short Tribunal), however, allowed the Appeal of the Respondents on the ground that there was no manufacture. It was held that the headers were attached only to facilitate the use of aluminium or lead sheet in the process of electrolysis. It was held that no new product with a distinct name, character and use has emerged. The Tribunal further held that these headers were not marketable. The Tribunal did not go into the contention, raised on behalf of the Respondents, that the manufacture, if any, was done by the job workers and that if duty was to be paid it would have to be paid by the job workers.

4. We have already noted the manufacturing process. The lead and aluminium sheets by themselves cannot and do not act as electrodes. They become electrodes only after the process mentioned above is undertaken. Thus the lead and aluminium sheets are converted into electrodes which is a new product known in the market with a distinct name, character and use. The Respondents pay duty on that product at the Debari unit as they accept that there has been manufacture. The Commissioner in his Order dated 31st March, 1997 has also noted that the product is bought in the market by one M/s. Cominico Binani Zinc Limited. This shows that the product is marketable. The Tribunal has failed to notice this. Even otherwise, it is settled law that for a product to be marketable there need not be actual purchase or sale. So long as a new and distinct commodity known in the market has come into existence there is manufacture. We are unable to accept the submission that the headers are attached merely to keep the lead and aluminium sheets emerged in the cell. From the process set out above it is clear that the headers are attached in order to see that the lead and aluminium sheets become positive and negative electrodes so that the current can pass through them. Without the headers it would not be possible to pass the current through the sheets. On behalf of Respondents it was submitted that in two of these matters the Department had invoked the extended period of limitation when they were not entitled to do so. In dealing with this aspect the Commissioner has set out as follows:

"During the relevant period, i.e. June, 89- February, 94, the assessee, interalia, furnished the following description in their classification List submitted for approval.

"S. Effective Classification S.No. of Description No. Date List No. the item of the goods -----

1. 1.3.1989 7/88-89 7 Lead Anodes

Cast Anode Sheets

2. 20.3.1990 2/89-90 7 -do-

3. 24.7.1991 1/91-92 7 Lead Anodes

Cast Anodes

4. 1.3.1992 2/91-92 7 -do-

5. 1.3.1993 -- - Not Shown

In letter C.No.V/L/CL-1/91-92/HZL/VAL, dated 20.9.1991 a specific query had been raised by the concerned Assistant Commissioner, regarding classification of the product, relevant extracts of which are reproduced as under:

"In respect of the products mentioned at S.No.7, viz., Lead Anodes, Cast Anode Sheets, such description of the goods does not appear in Central Excise Tariff. So you must write the exact description of the goods [emphasis supplied] as mentioned in Central Excise Tariff to avoid any type of confusion and possibility of misclassification".

5. The assessee in the letter reference No. VZS/S&D/CE/CL/91-92/16949, dated 30.9.1991, interalia, stated that "We have written the full description of the goods [emphasis supplied] being manufactured by us mentioning Heading number as we felt correct these sheets are not rolled products, but are only cast" [emphasis supplied].

6.2. From the above classification furnished by the assessee, it is evident that the Lead Anodes/Cast Anode Sheets mentioned in the classification List referred to mere Cast Lead Sheets. It did not include the impugned product, viz. "Lead Anodes" which comprised 2 distinct excisable goods, 1. Cast Lead [Anode] Header 2. Cast Lead [Anode] Sheets. In none of their classification Lists, the assessee had shown the product, Cast Lead Header/Anode Header, an integral part of Lead Abode, for approval. The material information regarding manufacture of "lead Anodes" [Cast Lead Sheet + Cast Lead Header] and their captive use in the electrolysis process was never disclosed in the classification Lists which were approved by the Department not the fact intimated to the Department at any stage. The assessee's contention that they had exhibited the product, "Lead Anodes", in their classification List is not borne out by the evidences on the record. The description "lead Anodes mentioned with Cast Anode Sheets", in the Classification List referred to only the Cast Lead [anode] Sheets. This fact is amply clear from the clarification given by the assessee in their letter quoted above. It is emphasized that the fact of manufacture of Lead Anode out or assemblage of Cast Lead Sheet and Cast Lead Header was not disclosed/mentioned in any of their Classification Lists nor in any correspondence on the subject. This is in stark contrast to their disclosure of all material particulars pertaining to manufacture and captive use of Lead Anodes in the Classification List filed in respect of their other manufacturing unit at Debari [Udaipur, Rajasthan]. The description furnished by their unit at Debari is mentioned as below:

----- S.No. Effective Classification
 S.No. of Description Date List No. the item of the goods -----

1. 1.3.1989 - 5 Lead Anodes

[Complete with Headers] used in the electrolysis plant for recovery of Zinc and / or Cadmium 2. 1.9.1989 - 7 Lead Headers [i.e. Copper Strip around which casting of Lead is done]. This is finally fixed with Lead Anode Sheet which is ultimately used in the manufacture of Zinc and / or Cadmium. -----

6.3. The same description had been repeated in their subsequent approved classification List, with effect from 20.3.1990, 25.7.1991, 1.3.1992 and 1.3.1993. The point to be stressed is that while the assessee furnished the complete description of the product, viz., Lead Anodes manufacturer in their Debari Unit, they had willfully suppressed the fact of manufacture and captive use of Lead Anodes in respect of Visakhapatnam Unit. They did not make any mention of the manufacture of Lead Anode in the Classification Lists submitted during the relevant period. This was a clear case of willful suppression of facts and/or deliberate concealment of facts. If the intention of the assessee were bonafide, they would have certainly furnished the complete particulars of manufacture in their Classification List relating to Visakhapatnam Unit as they did in respect of their other Unit at Debari. The assessee knew fully that the goods were excisable and liable to duty as their other unit paid duty on those goods. Hence, they cannot plead ignorance/doubts etc. Conscious or deliberate withholding of information and/or suppression of facts is fully established in this case."

6. On these facts we are in full agreement with the Commissioner that there was conscious withholding of information and thus the extended period of limitation had been rightly invoked. In this view of the matter, the Order of the Tribunal cannot be sustained. It is accordingly set aside. That brings us to the question as to whether the Respondents are liable to pay duty or the job workers are liable to pay duty. This would require looking into the facts and material. We therefore remit the matters back to the Tribunal who shall, after going into the facts and materials, decide the same.

7. For the above-mentioned reasons the impugned Orders are set aside. The Appeals are allowed to the extent set out above. There will be no order as to costs.