

SUPREME COURT OF INDIA

Gujarat Nermada Valley Fert. Company Limited

Vs.

Collector of Ex. and Customs

C.A.No.448 of 2000

(Ruma Pal, Arijit Pasayat and C.K.Thakker JJ.)

26.04.2005

JUDGMENT

C.K.Thakker, J.

1. The question in this appeal is whether the intermediate chemicals which are formed in the process of manufacture of Butachlor are liable to tax under the *Central Excise and Salt Act, 1944* (referred to as the Act). The two chemicals in question are Diethyl Chloro Acetanilide (DECA) and Chloro Methyl Butyl Ether (CMBE).

2. The period in question is 1989 to 1991. During this period of time, Butachlor was exempted from payment of excise duty. However, a demand was raised by the Assistant Collector (Excise) on the appellant in respect of the intermediate products because they were "coming into existence". The demand, however, was set aside by the Commissioner (Appeals) who was of the view that the Assistant Collector had not come to any finding whether the products in question could be treated as marketable. It was held that there was no factual basis whatsoever on the basis of which the Assistant Collector could have reached the conclusion that the products were marketable and unless the goods were marketable, they were not subject to excise duty. It was, therefore, held that reading Section 2(F) with Section 3 of the Act, the products in question were not marketable only because it happened to be mentioned in Chapter Note 1(a) to Chapter 29 of the *Central Excise Tariff Act, 1985*.

3. The Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), however, reversed the order of the Collector holding that the goods were stable and therefore marketable. It was noted that the appellant had not brought any technical data or chemical report in support of the appellant's contention that the products were unstable or were in unfinished form. On the other hand, the department had brought on record the test report of a Chemical Examiner, according to which both the products DECA and CMBE were organic chemicals. It was said that since the sample was tested, this showed that the products were stable and had adequate shelf life. It was then concluded that once the products were stable it could be brought to the market for sale. This, according to CEGAT, fulfilled the test of marketability as required by this Court in several decisions. It was also held that the mere fact that the entire quantity of

DECA and CMBE was consumed by the appellant in the manufacture of Butachlor did not affect the question of marketability and that "if similar technique is adopted by any other manufacturer the product in question can be bought and sold". CEGAT also relied upon a letter written by M/s. Gharda Chemicals produced by the appellant. Finally the Tribunal said that since the appellant had given production figures of the two intermediate products on the basis of actuals and not on theoretical basis, this showed that the product was marketable.

4. The appellant is right in its contention that the decision of the CEGAT is based on conjectures, hypotheses and is illogical. After the decision of this Court in *Bhor Industries Ltd. Bombay v. Collector of Central Excise, Bombay*, unless the product is capable of being marketed and is known to those who are in the market as having an identity as a distinct identifiable commodity that the article is subject to excise duty. Simply because certain articles fall within the schedule does not make them marketable. Actual sale in the market is not necessary but the articles must be capable of being sold in the market or known in the market as goods.

5. This view as has been recently reiterated in the decision of *Union of India & Ors. v. Sonic Electrochem (P) Ltd.(SC)* where this Court was to consider whether the plastic body of an Electro Mosquito Repellant (EMR) was liable to excise duty. In negating the question it was held:

"It may be noticed that in the cases referred to in the passage, quoted above, the reasons for holdings the articles "not marketable" are different, however, they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase the plastic body of EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product. For these reasons, the plastic body, which is a part of EMR of the respondents, is not "goods" so as to be liable to duty as parts of EMR under para 5(f) of the said exemption notification."

6. This passage would clearly show the level at which the marketability has to be established.

7. The onus was on the Revenue. The only piece of evidence which has been produced by the Revenue was a test report which merely stated that the sample showed that the items were organic chemicals. It does not in any way establish marketability. Nor can marketability be established on the basis of mere stability. Something more would have to be shown to establish that DECA AND CMBE were known in the market as commercial products.

8. The Tribunal has ignored the evidence given by the employees of the appellant. In fact the wrong test was applied to determine the issue. The issue was not whether there was a hypothetical possibility of a purchase and sale of the commodity but whether there was sufficient proof that the product is commercially known.

9. We fail to understand how the letter of M/s. Gharda Chemicals could in any way be stated to have supported the conclusion of the Tribunal that the product was marketable as the letter categorically states that none of the intermediates of Butachlor are marketable in India or overseas.

10. For all the these reasons, the decision of the CEGAT is set aside and the order of the Collector (Appeals) is restored. The security, if any, deposited by the appellant pursuant to interim orders of this Court be discharged. The appeal is allowed. There shall be no order as to costs.