SUPREME COURT OF INDIA

CCE Lucknow

Vs.

Wimco Ltd

(Dr. Arijit Pasayat and Lokeshwar Singh Panta JJ.)

05.10.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the order passed by the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi (in short the CEGAT). By the impugned judgment dated 28.11.2001 CEGAT allowed the appeal filed by the respondent holding that waste/scrap/parings of paper board which are generated during the process of manufacture of paper and paper board is nothing new, distinct in name, character and use for the purpose of levy of duty. Therefore, it was held that no duty was chargeable.

2. Background facts in a nutshell are as follows: During investigation of the accounts of M/s Wimco Ltd. Bareilly, it transpired that the respondent was using paper and paper board for the manufacture of printed paper board boxes. During the course of manufacture of such boxes, waste/scrap/parings are generated, it was alleged that this waste was classifiable under Chapter sub-heading 4702.90 of Central Excise Tariff Act, 1985 (in short the Tariff Act). Scrutiny of records revealed that the respondent was selling this waste/scrap/parings. It was also noticed that they did not declare transactions of waste/scrap/parings, and did not file classification list under Rule 173-B of the Central Excise Rules, 1944 (in short the Rules) and did not issue any invoices prescribed under Rule 52-A. Accordingly, a show cause notice (in short SCN) was issued to the respondent asking it to explain as to why duty amounting to Rs.23,20,000/- should not be demanded and why penalty should not be imposed and why interest should not be charged. In reply to the SCN, the respondent submitted that scrap is generated at two stages; that it arises before the manufacturing operation starts; that the demand of duty on the quantity of scrap which is generated during the pre-manufacturing operations cannot be sustained; that the scrap is not a result of manufacturing process; that the word manufacture is generally understood to mean as bringing into existence a new substance and does not mean merely to produce some changes in a substance; that manufacturing implies a change; that every change in an article is the result of treatment; that every treatment is not manufacture as something more is necessary; that there must be transformation and a new different article must emerge having a distinctive name, character and use. It was submitted that in their case, generation of scrap was not manufacture. It was also submitted that longer period is invokable and substantial part of the demand was beyond a period of six months; there was no evidence of any suppression or mis- statement; there was a bona fide belief that waste generated in the process of manufacture of match boxes was not dutiable as it arose out of duty paid paper and card board. Commissioner of Central Excise confirmed the payment of duty amounting to Rs.23,20,000/- imposed penalty of identical amount and also directed payment of interest at the appropriate rate

under Section 11 AB of the Central Excise Act, 1944 (in short the Act).

3. The stand of the respondent before the CEGAT was that there was no manufacture inasmuch as whatever is used is paper and paper board and whatever is generated as waste/scrap/parings is generated out of duty paid paper and paper board and a new different article must emerge having a distinctive name, character and use to constitute manufacture. It was submitted that in their case, generation of scrap was not manufacture and hence not dutiable. In essence, it was submitted that since duty paid paper and paper board was used by it, duty cannot be demanded again on waste/scrap/parings which are nothing but paper and paper board.

4. It was also submitted that if Departments stand is accepted, assessee would be entitled to modvat credit. Such credit available on paper and paper board would be much higher than duty payable on waste/scrap/parings.

5. The stand of revenue on the other hand was that what is generated is waste/scrap/paring and there is specific heading for these items in the Central Excise Tariff and, therefore, the items are classified distinctively under Chapter heading 4702.90. It was submitted that as a result of manufacture, waste/scrap and paper board come into existence which are distinct in name, character and use and, therefore, dutiable.

6. Tribunal noted that the Chapter Heading 4702.90 of the Schedule to the Tariff Act reads Recovered (waste and scrap) paper or paper board, and is not recovered waste or scrap. In the instant case, whatsoever is generated in the process of manufacture of match boxes is paper and paper boards in small pieces. This paper and paper board are used as inputs and continue to be paper and paper board when they appear as waste/scrap/parings. Charging of duty tantamounts to charging of duty on the same product twice. CEGAT also noted that in the instant case there is no value addition.

7. In support of the appeal, learned counsel for the appellant submitted that effect of classification list filed under Rule 173 B has not been considered and there is a sale of waste/scrap/parings.

8. The Commissioner observed that the benefit of exemption under Notification No. 89/95 dated 18.5.1995 is not available. 9 Reference was made to following observations of the adjudicating authority :

I find that the case has not been contested on merits at all by the party. The SCN to the party was issued on the allegation that during the course of manufacture of printed paper board boxes waste parings scrap is generated which is classifiable under the Chapter sub-heading 4702.90 of the schedule to the Central Excise Tariff Act 1985 (for short tariff). The scrap so generated is liable to Central Excise duty if sold to outside buyers by the manufactures who also manufacture and clear other excisable goods on payment of duty. Since the party manufacture and clear matches apart from the scrap waste parings which are chargeable to duty they are not entitled to the benefit of exemption from duty in terms of Notification No. 89.95 dated 18.5.95.

In this case the partys contention that such waste arises during pre-manufacturing operation is not correct. Because manufacture means the entire process of the converting raw material into finished goods. It is an afterthought that they divided their waste & scrap in two categories because in their 173B declaration dated 28.2.1999 manufacturing process of match has been described in detail in

which phase-II (process of making of empty boxes) starts from the receipts of cardboard in the form of Jumbo Rolls from various papers mills. So this variety of scrap cannot be said to be a pre-manufacturing waste. The manufacturing activity commences the moment the processing of the inputs is started inside the manufactory. The party has not denied that the so called pre-manufacturing took place somewhere else then the manufacturing premises.

10. Learned counsel for the respondent supported the order of the CEGAT.

11. In Commissioner of Central Excise v. Indian Aluminium Co. Ltd. (2006 (203) ELT (S.C.) 3) it was observed inter alia as follows:

18. The entry in question does not contain any legal fiction. It does not say that any residue having more than a certain percentage of the metal would be deemed to have been manufactured or would be excisable. Records maintained by Respondent whereupon the Revenue has relied upon may be a relevant factor to identify dross as a marketable commodity but then percentage of the metal in dross may not by itself make it excisable, if it is otherwise not. An article is not exigible to tax only because it may have some saleable value.

19. It may be that dross no longer answers the description of waste and scrap in view of the changes made in the Tariff. It is, however, almost well-settled that even if some percentage of metal is found in the dross the same in absence of something more in the entry would not be rendered as an excisable article. This Court in Indian Aluminum (supra) in fact noticed that some amount of metal is found in dross and skimming. A distinction, however, was made that dross and skimming are not metals in the same class as waste or scrap. Even assuming that dross having a high percentage of metal is a marketable commodity, the question, in our opinion, would arise as to whether the same can be said to be a manufactured product. The term manufacture implies a change. Every change, however, is not a manufacture. Every change of an article may be the result of treatment, labour and manipulation. But manufacture would imply something more. There must be a transformation; a new and different article must emerge having a distinctive name, character or use. [See Union of India and Another v. Delhi Cloth and General Mills Co. Ltd. AIR 1963 SC 791].

12. It is to be noted that merely because there is a tariff entry it does not become excisable unless manufacture is involved. In Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries [2003 (153) ELT 491 (S.C)] it was observed as follows:

2. The question for consideration is whether "spent earth" is liable to excise duty or not. Under the Tariff, prior to its amendment in 1985, it had been consistently held that "spent earth" was not liable to duty. However, with the enforcement of new Tariff in 1985, a conflict arose between various benches of the Tribunal. Some benches held that "spent earth" was still not excisable, whereas other benches held that, as it now stood included by a specific sub-heading, it became excisable. In view of these conflicting decisions, the matter was placed before the larger Bench of the CEGAT which by the impugned judgment has held that "spent earth" was still not dutiable. Hence these appeals.

3. The only question for consideration for us is whether a goods becomes excisable merely because it falls within a tariff item. After 1985 Tariff item 1507 reads as "residue resulting from the treatment of fatty substances". It is submitted that "spent earth" is a residue resulting from treatment and is thus now excisable. What we have to consider is whether the well settled twin tests of "manufacture and marketability" cease to apply if a goods falls within a tariff entry.

4. Prior to this Entry being introduced in 1985, it had been consistently held that "spent earth" was not manufactured. It had been consistently held that "spent earth" remained "earth" even after processing. It had been consistently held that all that happened was that its capacity to absorb was reduced. It had been consistently held that duty having been paid on "earth", no duty was leviable on "spent earth as it remained the same product. It had been held that to levy duty on "spent earth" would amount to levying duty twice. It is on this ground that it has been held that "spent earth" was not excisable. Even now it has not been shown that there is manufacture. The only submission is that "spent earth" is a residue resulting from the treatment of fatty substances. The submission is that now that there is a specific Entry which makes "residue resulting from the treatment of fatty substances" excisable, duty has to be paid on "spent earth". In other words, what is submitted is that merely because a good falls within one of the Tariff items it becomes excisable.

5. In support of their submission, reliance in placed on the case of Lal Wollen & Silk Mills (P) Ltd., Amritsar v. Collector of Central Excise, Chandigarh, (1999 (4) SCC 466). In this case the question was whether excise duty was to be paid on dyed worsted woolen yarn made from duty paid worsted woolen grey yarn. It was argued that there was no manufacture. The Court however held as follows:

"Admittedly both "dyed yarn" and "grey yarn" are covered by two separate distinct heads of tariff items with different duty. So this itself recognizes them to be two different goods with separate levy. In this view of this it cannot be urged that there is no manufacture of "dyed yarn" from the "grey yarn".

Undoubtedly this authority appears to support the contention which is raised.

6. However, it appears to us that the observations made in this authority are "per incuram". In so observing, the decision of a larger Bench of this Court in the case of Collector of Central Excise, Indore v. Universal Cable Ltd. reported in 1995 Supp (2) SCC 465, has not been noted or considered. In this case an argument that a good become excisable because it is covered by Tariff Entry, has been negatived. In the case of B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, (1995 Supp (3) SCC 1) it has also been held that merely because there is a change in the Tariff Item the goods does not become excisable. Subsequently in a judgment dated 13th February, 2003 in Civil Appeal No. 6745 of 1999 it has been held that merely because an item falls in a Tariff Entry, it does not become excisable unless there is manufacture and the good is marketable. In Lal Woolen & Silk Mills' case (supra) it has been held that the twin test of manufacture and marketability is not to apply. It is not possible to accept the contention that merely because an item falls in a Tariff Entry it must be deemed that there is a manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is on the revenue. In this case no new evidence is placed to show that there is manufacture. "Spent earth" was "earth" on which duty has been paid. It remains earth even after the processing. Thus if duty was to be levied on it again, it would amount to levying double duty on the same product.

13. What amounts to manufacture has been dealt with by this Court in Kores India Ltd., Chennai v. Commissioner of Central Excise, Chennai (2005 (1) SCC 385).

14. Since CEGAT has not dealt with the factual scenario in detail and has abruptly come to an abrupt conclusion that no manufacture is involved, the matter is remitted to it for fresh consideration in the light of decisions referred to above.

15. The appeal is allowed. No cost.