BOMBAY HIGH COURT

Bush (India) Ltd

Vs

Union of India

(B Lentin and S Desai, JJ.)

01.01.1800

JUDGMENT

B. Lentin, J.

1. The only point which we are required to decide in this Special Civil Application is whether by placing certain record changer decks imported by the petitioner-company, on a wooden base with a cover,amounts to the manufacture of a new and different article within the meaning of section 2(f) of the Central Excises and Salt Act,1944(referred to hereafter as "the Act").

2. The petitioner is a limited company carrying on business of manufacturing radios and allied equipment. The petitioner import ed from the United Kingdom, Garrard record changers in the form of Garrard record changer decks which were completely finished articles,ready for use and capable of being used either in the form in which they were imported or after placing them on a wooden base with a cover. These decks so imported by the petitioner were mechanically, electrically and functionally com plete. The petitioner installed these record changer decks on a wooden base manufactured by the petitioner,or at its order, and sold them under the trade name of "Bush Auto Changer".At all relevant times, import duty was payable on the record changer decks imported by the petitioner-company. Countervailing duty was also payable under the provisions of the Indian Tariff Act. For the purpose of the payment of the countervailing duty, the im ported record changer decks were treated as being in a fully assembled condition and not as components and parts of record changers or gramophones. The petitioner-company was accordingly assessed to countervailing duty at 20% which it paid, and not at the countervailing rate of duty at 30% which would have been payable had the record changer decks been treated for the purpose of countervailing duty as components or parts of record changers or gramophones.

3. On 9th July 1966, Central Government issued a Notification No. 112 of 1966 whereunder all parts and accessories of electrically or battery operated gramophones,record players,etc.,other

than turn- tables,were therefore rely exempt from the payment of Cen tral Excise duty. No duty was therefore payable on the wooden bases used in making electrically or battery-operated record players. On 11th July, 1970, the petitioner addressed a letter to the Assistant Collector of Central Excise, Bombay, pointing out the aforesaid fact and seeking a clarification as to whether any excise duty was payable on the Bush Auto Changers removed by the petitioner-company from its factory Apparently no specific reply was vouchsafed to this query by the Assistant Collector,who informed the petitioner-company that it could, if it so desired, avail itself of the procedure under Rule 56A, so that it could, it would be entitled to set off against the excise duty payable on the auto-changers, the amount paid as countervailing duty on the import of the record changer decks. The thereupon availed itself of the procedure under Rule 56A of the Central Excise Rules, 1944.In March 1971, the petitioner -company was advised that on a true interpretation of the provisions of the Act, the assembly of the auto- changers,which consisted of placing the complete auto-changer decks each on a wooden base, could not be regarded as a manufacturing process and hence it was not liable to pay any excise duty on the said auto-changers. Thereupon, on 4th May 1971, the petitioner-company submitted a revised classification list to the Superintendent of Central Excise (namely the 2nd respondent) in which it was stated that no excise duty whatever was payable on the said auto-changers. On 7th July 1971 the 2nd respondent rejected the petitioner's classification list on the ground that as the Assistant Collector of Central Excise had permitted the petitioner-company to avail itself of the procedure under Rule 56A, it was clear that the Assistant Collector had treated the Bush Auto Changer Model as manufactured in the petitioner's factory. Thereupon, on 4th August 1971, the petitioner-company preferred the requisite appeal to the Appellate Collector of Central Excise (namely the 3rd respondent) who, after giving a personal hearing, passed his order dated 26th February 1973 rejecting the petitioner's appeal and holding that as the said Bush Auto Changers were manufactured in India, excise duty was leviable thereon. Against that order, the petitioner-company preferred its revision petition on 12th October 1973 to the Government of India, Ministry of Finance. After giving a personal hearing,the Joint Secretary to the Government of India passed his impugned order dated 10th October 1975,rejecting the revision petition, holding that-

> "....the Bush Auto Changer, as named by the petitioner for their product under consideration in this case, comes into shape designed for the obtaining facility of proforma credit under Rule 56A would show that the finished product is an excisable commodi ty under the Tariff. The Government of India, therefore, observes that the order-in-appeal is correct in law and based on the facts of the case."

To complete the narration of events, here it may be stated that the petitioner-company paid central excise duty on the Bush Auto- Changers from 1st July 1971 till 31st October 1975. The

petition er-company had also availed itself of the credit facility under Rule 56A and had set off against the excise duty payable are set out in a statement annexed as Ex.I to the Special Civil Applica tion, showing the difference of Rs. 3,40,222.24 between the Central Excise duty amounting to Rs.5,35,758/- and the counter vailing duty amounting to Rs.1,95,535.76 paid by the petitioner- company between 1st July 1971 and 31st October 1975.

4. It is in these circumstances that the petitioner-company has filed the present Special Civil Application for setting aside the impugned orders dated 7 July 1971,25th February 1973 and 10th October 1975 passed by the 2nd, 3rd and 1st respondents respectively, and for refund of the amount of Rs. 3,40,222.24.

5. Mr. Desai, the learned Counsel appearing on behalf of the petitioner company, urged that merely by placing the Garrard Record- Changer decks on a woolen base with covers and selling them under the trade name of Bush Auto-Changer, the petitioner- company had not brought about or manufactured any new or different article having a distinctive having a distinctive name, character, or use, inasmuch as the Garrard Record-Changer Decks imported by the petitioner-company were already completely finished articles, mechanically, electrically and functionally, and were capable of being used and utilised as such whether or not they were placed on a wooden base with or without a cover. On the other hand, Mr. Govilkar, the learned Counsel appearing on behalf of the respondents, confined his resistance to the Special Civil Application on the grounds set out in paragraph 4 of the affidavit-in-reply filed by one Doddihal Pralhad Raghavendra, Assistant Collector of Central Excise. The gist of paragraph 4 of that affidavit-in-reply is that though the record-changer decks were mechanically and electrically complete, they were not functionally complete as they were not capable of being sold to the customer in the original form in which they were imported and were not purchased by general users for reproduction of music or audio-signals and that they could be purchased in the original form only by manufacturers of record-changers of radiograms. Pausing here for a moment, it may be stated that this ground of resistance does not appear to have been even in the contemplation of any of the respondents who passed the impugned orders and has been taken for the first time in the affidavit-in-reply. It is trite to repeat what has been stated times out of number by the Supreme Court and various High Courts that it is not open to an authority to urge in its affidavit-in-reply a ground not taken in the order sought to be impugned and thereby seek to make out a new case in justification of the impugned order. All the greater reason, when as in this case, the justification is attempted by all altogether different Officer, other than the authority which passed the impugned order. In paragraph 4 of the affidavit-in- reply, the process of manufacture is sought to be imputed to the petitioner- company because it sold the record-changers imported by it after fixing them on a wooden base with the petitioner's trade name of "Bush Auto-Changer" Paragraph 4 of the affidavit- in-reply concluded with the averment that the record-changer decks as imported are

distinct from the record-changer marketed by the petitioner-company. Here it may be stated that while in pleadings the phraseology used is "cabinet", it is common ground that what is thereby mean by the parties is a wooden base (with or without cover) on which the imported record changer decks were fixed.

6. There is considerable substance in the contentions urged by Mr. Desai on behalf of the petitioner. It is indisputable that the Garrard Record-Changer decks imported by the petitioner-company were undoubtedly articles which were completely finished mechanically, electrically and functionally and that these imported record-changer decks were capable of being used in the condition in which they were imported without their necessarily having to be placed on a wooden base either with or without a cover. There can be no manner of doubt that with or without the wooden base or with or without the cover, the imported Garrard record-changer decks remained the same commodity and that there was no change whatsoever in the end product merely because it was placed on a wooden base with or without a cover. That it was so done could be for many reasons viz. to make it more saleable by presenting it in a more appealable way or by making it more convenient to carry, or for several other reasons, none of which change in the slightest the nature or character of the product imported by the petitioner, viz. Garrard record-changer. With or without the base and cover, the Garrard record-changer remain the same completely finished articles, mechanically, electrically and functionally. Marketing those articles under the trade name "Bush Auto-changer" makes no difference, for thereby the imported Garrard record-Changer do not acquire any new, different or distinct characteristics. Whatever be the name under which those record-changer were sold, they still remained the very same completely finished articles, mechanically, electrically and functionally, ready for use in the condition in which they were imported. In Union of India v. Delhi Cloth and General Mills Co. Ltd., , it was held that the word "manufacture" must mean the "bringing into existence of a new substance known to the market". In paragraph 14 of the Report it was observed as under :-

> ".... The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance" however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American Judgment. The passage runs thus :
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> ".... Manufacture, implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be

7. Mr. Govilkar, however, relied on the decision of the Patna High Court in M/s Hindustan General Electrical Corporation Ltd. v. Superintendent of Central Excise, , where it was held that

the definition clause (f) of section 2 indicates that the stage of completion of a manufactured produce is not reached until all the processes incidental or ancillary have also been completed. It is unnecessary to dilate at any length upon that decision of the Patna High Court in view of the ratio laid down by the Supreme Court in the Delhi Cloth Mill's case and the S.B. Sugar Mill's case.

8. Mr. Govilkar attempted, though with justifiable faintness, to place some reliance upon the old rule 11 of the Central Excise Rules which prohibits the refund of duties or charges erroneously paid unless claimed within 3 months. It is unnecessary to advert at any length on Rule 11 as it has no application in the facts and circumstances of this case. The respondents are liable to refund to the petitioner- company the difference of the amounts paid between July 1971 and October 1975, aggregating to Rs. 3,40,222.24 as claimed by the petitioner in prayer (b) of the Special Civil Application.

9. In the result, the impugned orders dated 7th July, 1971, 26th February 1973 and 10th October 1975 are set aside. The respondents shall refund to the petitioner-company the amount of Rs. 3,40,222.24 within three months from today. This is a fit case where the respondents should be ordered to pay to the petitioner the costs of this Special Civil Application, which the respondents shall do. Rule is made absolute accordingly.