UNION OF INDIA & ORS.

v.

CIBATUL LIMITED

SEPTEMBER 27, 1985

[P.N. BHAGWATI, CJ., R.S. PATHAK AND AMARENDRA NATH SEN, JJ.]

Central Excises and Salt Act, 1944 - Sub-s.(2) of s. 36 - Manufacture of Goods - Joint programme of seller and buyer - Goods manufactured by seller - Supplied to buyer - Who is manufacturer - 'Wholesale' price charged by seller - Whether true basis for determination and levy of Excise Duty.

The respondent - Cibatul Ltd. (the "seller") entered into two agreements with Ciba Geigy of India Ltd. (the "buyer") for manufacturing Resins by the seller. The joint manufacturing programme indicated that the Resins were to be manufactured in accordance with the restrictions and specifications constituting the buyer's standard and supplied at prices to be agreed upon from time to time. The buyer was entitled to test a sample of each batch of the goods and after its approval the goods were to be released for sale to the buyer. The products would bear certain trade-marks being the property of the foreign company - Ciba Geigy of Basle. Tripartite agreements were also executed between the buyer, the seller and the foreign company, recognising the buyer as the registered or licensed user of the trade-marks, authorising the seller to affix the trade-marks on the products manufactured "as an agent for and on behalf of the buyer and not of his own account" and the right of the buyer being reserved to revoke the authority given to the seller to affix the trade-marks.

The respondent filed declaration for the purposes of the levy of excise under the Central Excises and Salt Act, 1944 showing the wholesale prices of different classes of goods sold by it during the period May, 1972 to May, 1975. The declaration included the wholesale prices of the different Resins manufactured under the two aforesaid agreements. The Assistant Collector of Customs revised those prices upwards on the basis that the wholesale price should be the price for which the buyer sold the product in the market. According to the Assistant Collector the buyer was the manufacturer of goods and not the seller.

A

The Collector of Central Excise allowed the appeals of the respondent and accepted the plea that the wholesale price disclosed by the seller was the proper basis for determining the excise duty.

B The Appellate orders were, however, revised by the Central Government under sub-s.(2) of s.36 of the Act and the orders made by the Assistant Collector were restored. According to the Central Government the buyer is the person engaged in the production of the goods and the seller merely manufactures them on behalf of the buyer and that under the agreements the seller is required to affix the trade-marks of the buyer on the C manufactured goods and that indicates that the goods belong to the buyer.

The orders of the Central Govt. were challenged under Article 226. The High Court held that the goods were manufactured by the seller as its own goods, and therefore, the wholesale price charged by the seller must form the true basis for the levy D of excise duty.

Dismissing the appeals of the Union of India,

HELD: 1. The High Court was right in concluding that the wholesale price of the goods manufactured by the seller is the E wholesale price at which it sells those goods to the buyer, and it is not the wholesale price at which the buyer sells those goods to others. [101 D-E]

2. The relevant provisions of the agreements and the other material on the record show that the manufacturing programme is F drawn up jointly by the buyer and the seller and not merely by the buyer, and that the buyer is obliged to purchase the manufactured product from the seller only if it conforms to the buyer's standard. For this purpose the buyer is entitled to test a sample of each batch of the manufactured product and it is only on approval by him that the product is released for sale by the G seller to the buyer. It is apparent that the seller cannot be said to manufacture the goods on behalf of the buyer. [100 B-C; F]

3. It is clear from the record that the trade-marks of the buyer are to be affixed on those goods only which are found to H conform to the specifications or standard stipulated by the buyer. All goods not approved by the buyer cannot bear those trade-marks and are disposed of by the sellers without the

advantage of those trade-marks. The trade-marks are affixed only after the goods have been approved by the buyer for sale by the seller to the buyer. The seller owns the plant and machinery, the raw material and the labour and manufactures the goods and under the agreements, affixes the trade-marks on the goods. The goods are manufactured by the seller on its own account and the seller sells the goods with the trade-marks affixed on them to the buyer.

Union of India v. Delhi Cloth and General Mills, [1963] Supp. 1 S.C.R. 586, 592, 598, **South Bihar Sugar Mills Ltd., etc. v. Union of India and Others.** [1968] S.C.R. 21 at 31, **Union of India and Others v. Free Indian Dry-Accumulators Ltd.** [1983] **Excise Law Times** 733 at 734 and **Union of India and others etc. etc. v. Bombay Tyre International Ltd. etc. etc.** [1983] **Excise Law Times** 1896, inapplicable.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2619 of 1977.

From the Judgment and Order dated 29.6.1977 of the Gujarat High Court in Special Civil Application No. 1324 of 1976.

AND

Civil Appeal No. 4399 of 1985

From the Judgment and Order dated 14.12.1976 of the Gujarat High Court in Special Civil Application No. 68 of 1975.

K. Parasaran, Solicitor General, N.C. Talukdar, Suraj Udai Singh, Dalveer Bhandari, C.V. Subba Rao and R.N. Poddar for the Appellants.

N.A. Palkhiwala, J.C. Bhatt, D.B. Engineer, B.H. Antia, Ravinder Narain, O.C. Mathur, Kamal Mehta, Talat Ansari, Mrs. A.K. Verma, Ashok Sagar, Miss Rainu Walia, Sukumaran and D.N. Misra for the Respondent.

The Judgment of the Court was delivered by

PATHAK, J. These appeals by special leave are directed against the judgments and orders of the Gujarat High Court allowing two writ petitions preferred by the respondent challenging the levy of excise duty. As they raise identical questions of law for consideration they are disposed by a common judgment.

A The respondent is a company limited by shares. Of the total share capital, 65 per cent is owned by Atul Products Limited, 30 per cent belongs to a foreign company known as Ciba Geigy of Basle in Switzerland and the remaining 5 per cent to Ciba Geigy of India Limited. The respondent Cibatul Limited (referred to shortly as the "seller") entered into an agreement with the Ciba B Geigy of India Limited ("the buyer") on March 24, 1971 under which certain specified products, which included U.F. Rasins and M.F. Resins, were to be manufactured by the seller in accordance with a manufacturing programme drawn up jointly by the seller and the buyer. The resins were to be manufactured in accordance with restrictions and specifications constituting the buyer's standard, and they were supplied at prices agreed upon between C the seller and the buyer from time to time. The buyer was entitled to test a sample of each batch of these goods, and it was only after it had given its approval that the goods were to be released for sale to the buyer. Another agreement between the two took place on June 1, 1975 in respect of Epoxy Resins and the terms of the agreement were similar to the terms of the earlier agreement. It was understood that the products manufactured under D the two agreements would bear certain trade marks which were the property of the foreign company, Ciba Geigy of Basle. In this connection, on December 7, 1971 a tripartite agreement was executed between the buyer the seller, and the foreign company in respect of four trade-marks, Aerolite, Melocol, Melolam and Resicart. The foreign company, which owned these trade-marks, as E well as the seller recognised the buyer as the registered or licensed user thereof. The buyer authorised the seller to affix the said trade-marks on the products manufactured under the first contract, and the seller was to do so "as an agent for and on behalf of the buyer and not of his own account." The seller had also agreed to refrain from selling or dealing in, directly or F indirectly, goods bearing the said trade-marks or any other marks similar thereto save and except for the explicit purpose of fulfilling the seller's obligations under the first agreement. The buyer reserved the right to revoke the authority given to the seller to affix the trade-mark. A similar tripartite agreement was executed between the three parties on December 1, 1973 in G respect of the second agreement between the buyers and the seller, namely, that relating to Epoxy Resins. The trade-mark concerned was Araldite.

The respondent filed a declaration for the purposes of the levy of excise under the Central Excises and Salt Act, 1944 show- H ing the wholesale prices of different classes of goods sold by it

during the period May, 1972 to May, 1975. The declaration included the wholesale prices of the different resins manufactured under the two aforesaid agreements. The Assistant Collector of Customs revised those prices upwards on the basis that the wholesale price should be the price for which the buyer sold the product in the market. The Assistant Collector proceeded on the footing that the buyer was the manufacturer of the goods and not the seller. The respondent appealed to the Collector of Central Excise. The appeals were allowed by the Collector, and he accepted the plea that the wholesale price disclosed by the seller was the proper basis for determining the excise duty. The appellate orders were, however, revised by the Central Government under sub-s.(2) of s. 36 of the Act, and the orders made by the Assistant Collector were restored. The respondent filed a writ petition in the Gujarat High Court against the orders of the Central Government, and the High Court held that the Central Government was wrong and the appellate Collector was right on the question as to the liability of the seller to excise duty.

The basis on which the Central Government proceeded in holding that the wholesale price of the goods should be the wholesale price charged by the buyer is that the goods were manufactured by the seller on behalf of the buyer, specially as they were embossed with the trade-mark of which the buyer alone was the registered user in India, that the two agreements between the seller and the buyer envisaged that the goods were manufactured by the seller on behalf of the buyer and that therefore the buyer itself should be regarded as the manufacturer of the goods for the purpose of levying excise duty. The High Court has differed from the view taken by the Central Government and has held that the goods were manufactured by the seller as its own goods, and therefore the wholesale price charged by the seller must form the true basis for the levy of excise duty.

Excise duty is levied under s. 3 of the Central Excises and Salt Act, 1944 on goods manufactured in India and, broadly, for the purposes of computing the duty the value of the article is deemed under s. 4 of the Act (as it stood before its amendment by Act XXII of 1973) to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory for delivery at the place of manufacture. The words "manufacture" and "manufacturer" have been defined by clause (f) of s. 2 of the Act, and for the purposes of

A the present controversy what is relevant is that part of the definition which defines a "manufacturer" of goods as being "any person who engages in their production or manufacture on his own account." The appellant contends that on the facts and circumstances of this case it must be held that the buyer is the B person engaged in the production of the goods and the seller merely manufactures them on behalf of the buyer.

The entire question before us is whether the goods are manufactured by the seller or are manufactured by the seller on behalf of the buyer. The relevant provisions of the agreements and the other material on the record show that the manufacturing programme is drawn up jointly by the buyer and the seller and C not merely by the buyer, and that the buyer is obliged to purchase the manufactured product from the seller only if it conforms to the buyer's standard. For this purpose the buyer is entitled to test a sample of each batch of the manufactured product and it is only on approval by him that the product is released for sale by the seller to the buyer. In other words, the buyer has the right to reject the goods if he does not approve of D them. If the manufactured goods are not in accordance with the buyer's standard, they are either reprocessed to bring them up to the requisite quality or if that is not possible the goods are sold to the buyer for a different purpose if they are compatible with the specifications of some other product and provided that the buyer has a need for that product, or the goods are sold to E others in the market as sub-standard goods at a lower price of the goods are destroyed. It is sifnificant to note that the buyer is not obliged to purchase the goods manufactured by the seller regardless of their quality, and that in the event of rejection by the buyer the alternatives present before the seller extent to the sale of the manufactured goods to others or even to the very F destruction of the goods. It is apparent that the seller cannot be said to manufacture the goods on behalf of the buyer.

The appellant relies also on the circumstance that under the agreements the seller is required to affix the trade-marks of G the buyer on the manufactured goods and, it is said, that indicates that the goods belong to the buyer. It seems to us clear from the record that the trade-marks of the buyer are to be affixed on those goods only which are found to conform to the specifications or standard stipulated by the buyer. All goods not approved by the buyer cannot bear those trade-marks and are disposed of by the sellers without the advantage of those H trade-marks. The trade marks are affixed only after the goods

have been approved by the buyer for sale by the seller to the buyer. The seller owns the plant and machinery, the raw material and the labour and manufactures the goods and under the agreements affixes the trade-marks on the goods. The goods are manufactured by the seller on its own account and the seller sells the goods with the trade marks affixed on them to the buyer.

The appellant has invited our attention to certain observations in **Union of India v. Delhi Cloth and General Mills**[1963] Supp. 1 S.C.R. 586 at 592 and 598., **South Bihar Sugar Mills Ltd., etc. v. Union of India and Others**,[1968] 3 S.C.R. 21 at 31.,**Union of India and Others v. Free India Dry Accumulators Ltd.** [1983] Excise Law Times 733 at 734., and **Union of India & Others etc. etc. v. Bombay Tyre International Ltd. etc. etc.**, [1983] Excise Law Times 1896., but in none of those observations do we find any acceptable support for the proposition that the goods are manufactured by the seller on behalf of the buyer.

In the result, we hold that the High Court is right in concluding that the wholesale price of the goods manufactured by the seller is the wholesale price at which it sells those goods to the buyer, and it is not the wholesale price at which the buyer sells those goods to others.

The appeals are dismissed with costs.

A.P.J. Appeals Dismissed.