

M/S. HINDUSTAN ZINC LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, JAIPUR

FEBRUARY 24, 2005

[S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

*Central Excise Act, 1944—Section 2—Intermediate product arising in manufacture of final product—Dutiability of—Held, duty is leviable thereon if such product can be sold or purchased in the market—Burden to prove marketability is on the department which it failed to discharge—Duty not leviable.*

*Central Excise Tariff Act, 1985—Tariff Heading 28.43—Silver Chloride arising in the manufacture of Zinc—Test of marketability—Department not taking steps to collect evidence of marketability—Consequently assessee's appeal allowed for want of evidence—Lethargy and reluctance on the part of department to collect evidence on marketability, deprecated.*

The question which arose for determination in the present appeal is whether the intermediate product 'silver chloride' produced in the course of manufacture of zinc in the assessee's factory is marketable and if it is marketable then whether the product is classifiable under Tariff Heading 28.43.

Assessee contended that the silver chloride so produced has no market; that the silver chloride sold in the market at Rs. 9600 per kg. was a different product made from silver having purity of 99% and its silver content is 75% whereas the silver content in the silver chloride produced in its factory is only 53% and that it would be very costly to purify such silver chloride to compete with silver chloride sold in the market and that the burden was on the department to prove that the silver chloride which is the residue of the treatment constituted "goods" in terms of manufacture and marketability.

Allowing the appeal, the Court

**HELD :** 1.1. Excise duty is leviable on an item, if two conditions are

A cumulatively satisfied, namely, that the process by which an item is obtained is a process of manufacture and that the item so obtained is commercially marketable and bought and sold in the market or known to be so in the market. [394-A, B]

B 1.2. Applying the above twin tests to the facts of this case, the first test of "manufacture" is satisfied. Marketability is essentially a question of fact. Silver chloride sold in the market had 75% silver content and purity level of 99%. In the present case, the department has made no efforts to ascertain whether silver chloride emerging from the treatment adopted in the assessee's factory, having 50% to 53% silver content, had a market. The burden was on the department to prove such marketability which it has failed to discharge. [394-C, D; 396-B, D-E]

C 2. The question of excisability of silver chloride has been cropping up and yet till this day no steps have been taken by the department to go to the market and collect proper evidence of marketability. In most of the matters, there is lethargy and reluctance on part of department to collect evidence on marketability and even in cases where market enquiry is made it is made in perfunctory manner. [396-F, G]

E *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad*, (1995) 76 ELT 241; *Union of India v. Delhi Cloth & General Mills Co. Ltd.*, (1997) 92 ELT 315; *Cadila Laboratories Ltd. v. Commissioner of Central Excise, Vadodara*, (2003) 152 ELT 262 and *Hindustan Zinc Ltd. v. Collector of Central Excise*, (1990) 45 ELT 155, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 430 of 2000.

F From the Judgment and Order dated 24.8.99 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. No. 761/99-C in A. No. E/223 of 1998-C.

G V. Lakshmikumaran, Alok Yadav, M.P. Deynath and V. Balachandran for the Appellant.

R. Venkataramani, A.Subba Rao, Hemant Sharma, Ashok Panigrahi, Ms.V. Vijaylakshmi, P. Parmeswaran and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

H KAPADIA, J. The short question which arises for determination in this

civil appeal filed by the assessee under section 35L(b) of the Central Excise Act, 1944 is - whether the intermediate product produced in the manufacture of zinc in the assessee's factory is marketable and if it is marketable then whether the product is to be classified under tariff heading 28.43. A

Assessee is a fully owned Government of India undertaking in the business of manufacturing zinc in its factory. In the course of extraction of zinc from zinc-silver concentrate, a mixture or a combination of zinc chloride, silver chloride, lead and other material emerges from which, by further treatment, sulphates of all other material are filtered out leaving behind the residue of silver chloride. B

According to the department, silver chloride thus produced in the factory of the assessee is an assessable commodity liable to duty under tariff item 2843.10. According to the department, the said product is in the form of white paste and that the assessee opts for the slurry form of silver chloride as it is convenient to extract silver and separate other residues of metals subsequent to the stage of emergence of silver chloride. C D

According to the assessee, silver chloride is the residue of the treatment whereby sulphates of other materials are filtered out and, therefore, silver chloride can at best be referred to as an intermediate process not amounting to excisable goods; that such a product has no market; that there is no company to buy such a product; that the silver chloride sold at Rs. 9600 per kg. at the relevant time was a different product made from silver; that silver chloride which is sold in the market is sold in the special packing and that the content level of silver and the purity level of the silver chloride sold in the market is different from silver chloride produced in the factory of the assessee which has silver content of only 50% to 53%. According to the assessee, the product which emerges in its factory is in the form of slurry and not in the powder form and such a slurry has no market and that it is not capable of being used in photography, ceramics etc. to which silver chloride sold in the market is capable of. According to the assessee, it is a residue and not a compound. According to the assessee, silver chloride sold in the market has purity of 99% and its silver content is 75%. According to the assessee, the silver content in the silver chloride produced in its factory is only 53% and that it would be very costly to purify such silver chloride to compete with silver chloride sold in the market. According to the assessee, the burden was on the department to prove that the silver chloride which is the residue of the treatment constituted "goods" in terms of manufacture and marketability. E F G H

A Excise duty is levied under section 3 on goods manufactured or produced in India. Thus, before excise duty is levied on an item, even if it is mentioned in the tariff, two conditions have to be cumulatively satisfied, namely, that the process by which an item is obtained is a process of manufacture and that the item so obtained is commercially marketable and bought and sold in the market or known to be so in the market. This legal position has been laid down by this Court in a number of judgments including *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad* reported in (1995) 76 ELT 241, *Union of India v. Delhi Cloth & General Mills Co. Ltd.* reported in (1997) 92 ELT 315 and *Cadila Laboratories Pvt. Ltd. v. Commissioner of Central Excise, Vadodara* reported in (2003) 152 ELT 262.

C Applying the above twin tests to the facts of this case, we find from the flow-chart, which has two sides, namely, zinc line and silver line, that at the stage of "Flotation", there is a separation of sulphides of silver and zinc from zinc ferrites, to avoid loss of silver in jarosite waste solids. [See: *Hindustan Zinc Ltd. v. Collector of Central Excise* reported in (1990) 45 ELT 155 at page 157. In fact, the flow-chart indicates installation of silver recovery tank for recovery of silver. Further, silver chloride so obtained is essentially a chemically defined compound classifiable under chapter heading 28.43. In the circumstances, the first test of "manufacture" is satisfied.

E At this stage, it, therefore, becomes necessary to see what is the product of the assessee and what is the product in the market. At the outset, it may be pointed out that both the products are silver chloride. Both exist in the form of white pasty mass. However, the question which arises for determination is on marketability. According to the assessee, silver chloride as a residue of the treatment of filtration, having silver content of 50% to 53%, has no market. According to the assessee, silver chloride which is sold in the market emerges from pure silver and, therefore, the content of silver in the silver chloride, which is sold in the market, is 75% and the purity level of 99%.

F In the case of *Cadila Laboratories Pvt. Ltd. (supra)*, the Division Bench of this Court, speaking through one of us [Variava, J.] has held:

G "9. Thus, the law is that in order to be excisable, not only goods must be manufactured i.e. some new product brought into existence, but the goods must be marketable. By marketable it does not mean that the goods must be actually bought and sold in the market. But the goods must be capable of being bought or sold in the market. The law also is that goods which are in the crude or unstable form and

which require a further processing before they can be marketed, cannot be considered to be marketable goods merely because they fall within the Schedule to the Excise Act.

12. It is an admitted position that the department has (1) made no efforts to ascertain whether any of the intermediate products are available in the market; (2) even if available whether or not products available in the market are the same as that produced by the Appellant; (3) none of the intermediate products manufactured by the Appellants were got analysed by a chemical analyser. It is admitted that the Report of the chemical analyser, relied on, was based only on the write up given by the Appellant. In his cross-examination the chemical analyser admits that there was no facility available in his laboratory to carry out tests to establish the identity of the products. He also admits that, except for 3-4 Diamino Benzophenone there was no reference available, regarding other intermediate products, in the technical literature available in the laboratory.

13. At this stage, it must be mentioned that Customs Notification relied upon does not refer to all the products. Reliance on such a Notification may be relevant and may show marketability if the goods are identical. However, where a question is raised that goods available in the market are finished or refined product whereas what is manufactured is in a crude and unrefined form, the burden would be on the department to show that what is available in the market is the same as the goods manufactured. In this case, no attempt is made to find out whether any of these products are bought or sold in the market and more importantly it has not been verified, by drawing samples of Appellants' products and getting them chemically analysed, whether their claim is false. It has not been ascertained whether or not Appellants' products are in crude and unstable form and/or whether these products had a shelf life of only a few hours. Mere fact that they are stored in tins or cans for a short period would not *ipso facto* lead to the conclusion that the products were stable.

14. It is admitted that the Appellants had bought one of the products from the market at one stage. However, they have explained that what was bought was in a purer form and the product they manufacture does not have that purity. It was for the department to check this. The department has chosen not to do so. The burden being on the

A department it will have to be held that they have not discharged that burden. The order passed only on the basis that these goods "can conceivably be sold" cannot be sustained in the light of the law which has been set out hereinabove."

B Thus, marketability is essentially a question of fact. In the show-cause notice it is stated as follows :

C "As per market enquiry conducted revealed that silver chloride (75%) was being sold ex-factory @ Rs. 1000 per 100 Gms. i.e. Rs. 10,000 per Kg. The silver chloride manufactured by M/s Hindustan Zinc Ltd. Debari containing 53.7% silver its assessable value of the comparable goods under the provisions of Rule 6(b)(i) of Central Excise (Valuation) Rules, 1975 works out to be Rs. 7160 per Kg."

D This seems to suggest that some market enquiry was made. However, it could not be shown to us what that market enquiry was. The above statement also shows that silver chloride sold in the market had 75% silver content. In the present case, the department has made no efforts to ascertain whether silver chloride emerging from the treatment adopted in the assessee's factory, having 50% to 53% silver content, had a market. Mathematical ratio between total quantity of silver chloride and silver content cannot establish marketability. The burden was on the department to prove such marketability.

E In the circumstances, on facts, we hold that the department has failed to prove the test of marketability.

F Before concluding, we may point out that since 1990, when the case of *Hindustan Zinc Ltd.* (supra) came to be decided, the question of excisability of silver chloride has been cropping up and yet till this day no steps have been taken by the department to go to the market and collect proper evidence of marketability. In most of the matters, we find lethargy and reluctance on the part of the department to collect evidence on marketability and even in cases where market enquiry is made it is made in a perfunctory manner. Consequently, despite the department having good case on classification, we are constrained to allow the appeal of the assessee on marketability for want of evidence.

G

H For the aforesaid reasons, the appeal stands allowed; the impugned judgments and orders of the tribunal dated 24.8.1999 in Appeal No. E/223/98-C and of the Commissioner dated 28/29.10.1997 in Order-in-Original No. 9/CE/JP-11/97 are set aside, with no order as to costs.

During the pendency of the civil appeal before this Court, the department has recovered the full duty with interest of about Rs. 1.13 crore. Since the appeal of the assessee stands allowed, we hereby order the department to return the collected amount(s) with interest, if any, in accordance with law. A

D.G.

Appeal allowed.

B