M/S. NICHOLAS PIRAMAL INDIA LTD. A

v.

COMMNR. OF CENTRAL EXCISE, MUMBAI

(Civil Appeal No. 5829 of 2002)

NOVEMBER 29, 2010 B

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944: C

s.2(f) – Intermediate goods – Captive consumption of – Levy of excise duty – Held: Intermediate goods captively consumed are liable to levy of excise duty if they satisfy the test of both manufacture and marketability – Crude vitamin A emerged in the manufacture of Vitamin A – Emerged product used in the manufacture of animal feed supplements – The fact that assessee used the emerged product instead of purchasing the same from market for the manufacture of animal feed supplements would show that emerged product was marketable – Duty leviable on the emerged product. D E

s.2(f) – Marketability – Short shelf-life cannot be equated with no shelf life and would not mean that it is not marketable.

s.11A – Demand – Limitation – Suppression of facts – Intermediate goods arising in the manufacture of final product – Use of intermediate product in manufacture of another product without payment of duty – Non- disclosure of this fact to the revenue – Held: Extended period of limitation is invokable for demanding excise duty. F

Appeal: G

Appeal before Supreme Court – Concurrent findings of fact – Scope of interference – Held: Supreme Court should be slow in interfering with the concurrent findings of fact

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unless it is shown that the said findings were perverse or patently illegal.

The appellant-assessee was engaged in the manufacture of Vitamin A in finished and marketable form. It was also manufacturing animal feed supplements. During the intermediate stage of manufacture of Vitamin A, Vitamin A in its crude form emerged. The department issued five show cause notices to the assessee demanding excise duty on the intermediate product consumed by the assessee in the manufacture of animal feed supplements. The Commissioner confirmed the liability to duty for the goods manufactured and cleared between December 1989 and February 1995 and imposed a penalty on the appellant. The Tribunal upheld the finding of the Commissioner as regards the excisability of the product in question. As regards the question that demands were barred by limitation, the Tribunal held that three notices relating to period November 1994 to February 1995 were within limitation. The instant appeal was filed by the assessee challenging the order of the Tribunal.

Dismissing the appeal, the Court

HELD: 1.1. The taxable event for the levy of excise duty is the manufacture of goods. The term "manufacture" is of wide import and may include various activities and processes which may not be termed as 'manufacture' in the common parlance. But manufacture of goods alone is not enough. In order to attract the levy of excise duty, the goods should not only be manufactured, i.e., come into existence, but also should be articles or products that are known to the market and must be capable of being bought and sold. There cannot be any doubt that the intermediate products, even if captively consumed and not actually sold, may be liable to levy of excise duty if they satisfy the test of both

manufacture and marketability. The marketability of a product is essentially a question of fact. Therefore, the question of marketability has to be determined in the facts of each case and cannot be strait-jacketed into pigeon holes. The orders passed by the Commissioner as also the Tribunal clearly demonstrated that the product in question was commercially known and was capable of being marketed. The fact that the appellants had chosen not to sell the product in question would not mean that the same was not capable of being marketed. There was also no dispute that the said product in question was used in the manufacture of the animal feed supplement sold by the appellant. If the appellant had not used the product in question, they would have had to buy the same from the market to manufacture and sell the animal feed supplement. This would clearly show that a marketable product emerged. Furthermore, in dealing with a question of fact, this Court would be reluctant in interfering with concurrent findings of fact on the issue of marketability unless it is shown that the said finding is perverse or patently illegal. [Paras 10-12] [1173-C-H; 1174-A-D]

T.N. State Transport Corporation Ltd v. CCE, Madurai **2004 (116) ELT 433 – relied on.**

Union of India v. Delhi Cloth and General Mills Co. Ltd **(1997) 5 SCC 767;** *Nirlon Synthetic Fibres and Chemicals Ltd v. Collector of C. Excise* **1996 (86) ELT 457;** *Hindustan Zinc Ltd v. CCE, Jaipur* **2005 (181) ELT 170;** *CCE, Baroda v. United Phosphorus Ltd* **2000 (117) ELT 529;** *Cipla Ltd v. CCE, Bangalore* **2008 (225) ELT 403;** *A.P. State Electricity Board v. CCE, Hyderabad* **1994 (70) ELT 3;** *Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur* **2005 (181) ELT 170 (SC);** *Union of India v. Delhi Cloth & General Mills Co. Ltd.* **1997 (92) ELT 315 (SC);** *Cadila Laboratories Pvt. Ltd. v. Commissioner* **2003 (152) ELT 262 (SC) – referred to.**

A **1.2. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it is shown that the product has absolutely no shelf-life or the shelf-life of the product is such that it is not capable of being bought or sold during that shelf-life. It was brought** B **on record by the appellants themselves that the product had a shelf-life of 2 to 3 days. Short shelf-life cannot be equated with no shelf-life and would not *ipso facto* mean that it cannot be marketed. A shelf-life of 2 to 3 days is sufficiently long enough for a product to be commercially** C **marketed. [Para 13] [1174-E-F]**

2. The Tribunal found that while the show cause notice for the period from February 1993 to October 1993 dated 29.12.1994 was barred by limitation, but in so far as other three notices relating to the period November D **1994 to April 1994, May 1994 to October 1994 and November 1994 to February 1995 were concerned, they were held to be within limitation. The records showed that the appellant did not disclose to the revenue that it was manufacturing the product in question. The assessee** E **also did not maintain an account and paid no duty on it. Therefore, the Commissioner as also the Tribunal were justified in holding that the extended period of limitation under the proviso to Section 11A (1) of the Central Excise Act, 1944 was invokable. In that view of the matter,** F **demand made for the said three periods cannot be said to be time-barred. [Para 14] [1175-A-D]**

T.N. State Transport Corpn. Ltd. v. Collector of Central Excise, Madurai **2004 (166) ELT 433 (SC) – relied on.**

G **Case Law Reference:**

(1997) 5 SCC 767	**referred to**	**Para 8**
1996 (86) ELT 457	**referred to**	**Para 8**
H **2005 (181) ELT 170**	**referred to**	**Para 8**

2000 (117) ELT 529	**referred to**	**Para 8**	A
2008 (225) ELT 403	**referred to**	**Para 8**	
1994 (70) ELT 3	**referred to**	**Para 9**	
2004 (116) ELT 433	**relied on**	**Para 9, 13, 15**	B
2005 (181) ELT 170 (SC)	**referred to**	**Para 10**	
1997 (92) ELT 315 (SC)	**referred to**	**Para 10**	
2003 (152) ELT 262 (SC)	**referred to**	**Para 10**	C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5829 of 2002.

From the Judgment & Order dated 16.5.2002 of the Customs Excise Gold Control Appellate Tribunal, West Zonal Bench, Mumbai in appeal No. E/2406/96-Bom. D

A.R. Madhav Rao, Priyanka, Alok Yadav, V. Balachandran for the Appellant.

Arijit Prasad, Sunita Rani Singh, B.K. Prasad for the Respondent. E

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. 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 "Vitamin A Acetate Crude" and "Vitamin A Palmitate" (hereinafter referred to as the product in question) or "Crude Vitamin A" is excisable to duty. F G

2. The present appeal filed by the appellant – assessee herein under Section 35L(b) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') arises out of an order dated 16.05.2002 passed by the Customs, Excise Gold Control H

A Appellate Tribunal, West Zonal Bench at Mumbai (hereinafter referred to as 'the CEGAT') in appeal No. E/2404/96-Bom holding that "crude vitamin A" is marketable and hence liable to duty.

B 3. The appellant – assessee is engaged in the manufacture of Vitamin A in a finished and marketable form. These are cleared on payment of applicable excise duties under Heading 29.36 of the Schedule to the Central Excise Tariff Act, 1985. The assessee is also engaged in the manufacture of animal feed supplements with the brand name C 'Rovimix' (now called 'Endomie') and 'Rovibe' (now called 'Endobee').

4. During the intermediate stage of manufacture of vitamin A, "Vitamin A Acetate Crude" and "Vitamin A Palmitate" or D Vitamin A in its crude form emerges. The crude Vitamin A acetate is subjected to further process of crystallization using Methanol and the crystals centrifuged and dried to obtain finished Vitamin A, which is marketed by the appellant.

E 5. Five show cause notices were issued to the appellant demanding excise duty on the product in question consumed by the appellant in the manufacture of animal feed supplements. Adjudicating upon these five show cause notices issued to the appellant, the Commissioner confirmed the liability to duty for the goods manufactured and cleared between December 1989 F and February 1995 and imposed a penalty on the appellant. The relevant portion of the finding of the Commissioner is reproduced herein :

> *"SOURCE: MARTINDALE – THE EXTRA* G *PHARMACOPOEIA*
>
> From the above it can be seen that this is a commercially known and marketable product. Merely because it is unstable at room temperature does not exclude it from commercial marketability.

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Intermediate goods of distinctly and differently known in the commercial sense of the word constitute manufacture under Section 3 of Central Excises & Salt Act, 1944. Vitamin A acetate crude and Vitamin A Palmitate are different commercial item from that of Rovimix and Rovibe. It is also known in different pharmacopoeia as such. Merely because the company has not sold the product does not exclude it from the purview of commercial marketability. It has to be kept in an oxygen free environment to prevent oxidizing by other agents which similarly is the case in many drugs and chemical compositions. The fact that it has no standard specification and potency does not exclude it from distinct commercial entity as it still remains Vitamin A acetate and Vitamine A Palmitate.

Apart from the aforesaid the Tariff head 2936.00 of Central Excise Tariff Act, 1985 covers "Provitamins and Vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as Vitamins and intermixtures of the foregoing whether or not in any solvent and Vitamin A acetate and Vitamin A Palmitate clearly falls within the parameter of this Tariff head. This clearly indicates that there are commercially marketable entities and supports the earlier arguments of distinct commercial entity"

6. The Tribunal considered the entire facts and the records and on appreciation thereof, upheld the finding of the Commissioner. The Tribunal also considered the fact that nobody would manufacture a pharmaceutical of such purity unless the manufacturer was interested in its sale. The Tribunal however remanded the matter back to the adjudicating authorities for the purposes of determining the valuation of the products in question.

7. So far the other issue with regard to demands being barred by limitation was concerned, the Tribunal held that the show cause notice dated 29.12.1994 would be barred by

A limitation for the period from February 1993 to October 1993 but so far other three notices relating to the period November 1994 to April 1994, May 1994 to October 1994 and November 1994 to February 1995 were concerned, they were held to be within limitation. The aforesaid findings and conclusions arrived B at by the Tribunal are under challenge in this appeal on which we heard the learned counsel appearing for the parties.

8. The Counsel appearing for the appellant submitted that crude vitamin A, on which duty is being demanded by the Revenue is an intermediary and that such demand is untenable C and unjustified inasmuch as the said product cannot be termed as "goods" and is incapable of being marketed, particularly in view of the fact that the life of the item would not be more than two days. He also submitted that the burden to prove the "marketability" of a product would always rest on the respondent D and that the department has failed to lead any evidence indicating its capability of being marketed, particularly owing to the fact that it is unstable if it is not stored in sub-zero degree centigrade. He also submitted that the anti-oxidants which are needed to give stability to the product are not added to the E crude vitamin A separately but are added to crude vitamin A simultaneously along with other ingredients in a single operation to obtain the final product, namely the animal feed supplement and therefore demand raised by the Revenue is unwarranted. In support of his submissions, reliance was placed on *Union* F *of India v. Delhi Cloth and General Mills Co. Ltd* reported in (1997) 5 SCC 767; *Nirlon Synthetic Fibres and Chemicals Ltd v. Collector of C. Excise* reported in 1996 (86) ELT 457; *Hindustan Zinc Ltd v. CCE,* Jaipur reported in 2005 (181) ELT 170; *CCE, Baroda v. United Phosphorus Ltd* reported in 2000 G (117) ELT 529; *Cipla Ltd v. CCE, Bangalore* reported in 2008 (225) ELT 403.

9. The aforesaid contentions of the counsel appearing for the appellant were, however, refuted by the counsel appearing for the respondent contending, *inter alia*, that the products in H

question admittedly retain its properties for a period of 1-2 days and therefore it is a marketable product. He also submitted marketability of the said product is a finding of fact, having been so decided by the Tribunal as also by the Commissioner and therefore, such a finding of fact should not be disturbed unless the same is perverse. Reliance was placed on *T.N. State Transport Corporation Ltd v. CCE, Madurai* reported in 2004 (116) ELT 433; *A.P. State Electricity Board v. CCE, Hyderabad* reported in 1994 (70) ELT 3.

10. The taxable event for the levy of excise duty is the manufacture of goods. The term "manufacture" is of wide import and may include various activities and processes which may not be termed as 'manufacture' in the common parlance. But manufacture of goods alone is not enough. In order to attract the levy of excise duty, the goods should not only be manufactured, i.e., come into existence, but also should be articles or products that are known to the market and must be capable of being brought and sold. Some emphasis has to be laid on the use of the word capable as actual sale of the product or article is not essential and required. This has been settled in a number of authorities of this Court and no longer *res integra*. There cannot be any doubt that intermediate products, even if captively consumed and not actually sold, may be liable to levy of excise duty if they satisfy the test of both manufacture and marketability. The aforesaid legal principle has been laid down by this Court in the judgments in *Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur,* reported in 2005 (181) E.L.T. 170 (S.C.), *Union of India v. Delhi Cloth & General Mills Co. Ltd.,* reported in 1997 (92) E.L.T. 315 *(S.C.), Cadila Laboratories Pvt. Ltd. v. Commissioner,* reported in 2003 (152) E.L.T. 262 (S.C.). In the decision in *Hindustan Zinc Ltd.* (supra), decided by three Judge Bench of this Court, it was also held by this Court that marketability of a product is essentially a question of fact.

11. Therefore, the question of marketability, being a

A question of fact, has to be determined in the facts of each case and cannot be strait-jacketed into pigeon holes. The orders passed by the Commissioner as also the Tribunal clearly demonstrate that the product in question is commercially known and is capable of being marketed. The facts that the appellants B have chosen not to sell the product in question does not mean that the same is not capable of being marketed. The matter can be looked from another angle. There is also no dispute that the said product in question is used in the manufacture of the animal feed supplement sold by the Appellant. Had the C Appellant not used the product in question, they would have had to buy the same from the market to manufacture and sell the Animal Feed Supplement. This clearly shows that a marketable product emerges.

12. Furthermore, in dealing with a question of fact, this D Court should be reluctant in interfering with concurrent findings of fact on the issue of marketability unless it is shown that the said finding is perverse or patently illegal.

13. One of the arguments placed by the Counsel for the E Appellant is that the product in question does not have shelf-life and hence cannot be said to satisfy the test of marketability. The said argument is contradicted by the evidence adduced by the Appellant themselves. It has been brought on record by the Appellants themselves that the product has a shelf-life of 2 F to 3 days. Short shelf-life cannot be equated with no shelf-life and would not *ipso facto* mean that it cannot be marketed. A shelf-life of 2 to 3 days is sufficiently long enough for a product to be commercially marketed. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless G it is shown that the product has absolutely no shelf-life or the shelf-life of the product is such that it is not capable of being brought or sold during that shelf-life. This Court in *T.N. State Transport Corporation Limited* (supra) has held that a shelf-life of 8 to 10 hours was enough to market the product in issue H before the Court in that case.

14. It was further urged by the counsel appearing for the appellant that the aforesaid show cause notices for the remaining three periods were also barred by limitation. However, the Tribunal found that while the show cause notice for the period from February 1993 to October 1993 dated 29.12.1994 was barred by limitation, but in so far as other three notices relating to the period November 1994 to April 1994, May 1994 to October 1994 and November 1994 to February 1995 were concerned, they were held to be within limitation. It is also disclosed from the records that the appellant did not disclose to the revenue that the assessee was manufacturing the aforesaid product. Assessee also did not maintain an account and paid no duty on this. Therefore, the Commissioner, Central Excise as also the Tribunal were justified in holding that the extended period of limitation under proviso to Section 11A (1) of the Central Excises & Salt Act, 1944 could be invokable. We find no reason to interfere with the said finding. In that view of the matter, demand made for the aforesaid three periods cannot be said to be time-barred.

15. In coming to the aforesaid conclusion, both on merit and also on limitation, we are supported by the Division Bench decision of this Court in *T.N. State Transport Corpn. Ltd. v. Collector of Central Excise, Madurai* reported in 2004 (166) E.L.T. 433 (S.C.). The facts of the said decision are almost similar to the facts of the present case and almost identical issues which are raised in the present appeal were also raised by the assessee in the said case. We, therefore, draw our support from the ratio of the aforesaid decision in arriving at the conclusion in the present case.

16. We, therefore, find no infirmity in the findings of facts arrived at by the Commissioner of Central Excise, Mumbai-III as also the Tribunal. The appeal stands dismissed but we leave the parties to bear their own costs.

D.G. Appeal dismissed.