Commissioner Of Central Excise-I,New ... vs M/S S.R. Tissues Pvt. Ltd. & Anr on 5 August, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3694, 2005 (6) SCC 310, 2005 AIR SCW 4021, 2005 (6) SCALE 156, (2005) 7 JT 475 (SC), 2005 (6) SLT 47, (2005) 6 SCJ 96, (2005) 6 SUPREME 302, (2005) 3 RECCIVR 759, (2005) 6 SCALE 156, (2005) 186 ELT 385, (2005) 197 CURTAXREP 437

Bench: B.P. Singh, S.H. Kapadia

CASE NO.:
Appeal (civil) 5293-5294 of 2001

PETITIONER:
Commissioner of Central Excise-I,New Delhi

RESPONDENT:
M/s S.R. Tissues Pvt. Ltd. & Anr.

DATE OF JUDGMENT: 05/08/2005

BENCH:
B.P. SINGH & S.H. KAPADIA

JUDGMENT:

J U D G M E N T WITH C.A. Nos.8436-8438 OF 2001, C.A. Nos.194-195 & 6535 OF 2002, C.A. Nos.9274-9275 OF 2003, C.A. Nos.4682, & 5709-5710 OF 2004 AND C.A. Nos.2408-2409 & 3001 OF 2005.

KAPADIA, J.

A short question which arises for determination in these civil appeals filed by the department under section 35-L(b) of the Central Excise Act, 1944 (for short "the said Act") is whether the process of unwinding, cutting and slitting to sizes of jumbo rolls of tissue paper would amount to "manufacture" on first principles or under section 2(f) of the said Act?

The above question arises in this batch of civil appeals. For the sake of convenience, we mention herein below the facts in Civil Appeal Nos.5293-5394 of 2001.

The assessee was engaged in the activity of cutting/slitting of jumbo rolls of tissue paper of a width exceeding 36 cms. The jumbo rolls were purchased on payment of excise duty from various suppliers like M/s Ellora Paper Mills and M/s Padamjee Paper Mills etc., who are the manufacturers of such jumbo rolls. The duty was paid under tariff heading 48.03 Central Excise Tariff Act, 1985 (hereinafter referred to as "the Act, 1985"). The jumbo rolls purchased by the assessee were of a kind

normally used for household or sanitary purposes. All that the assessee was doing was to reduce the width to less than 36 cms. On such reduction of the width, the department sought to assess and demand duty under tariff sub-heading 4818.90.

For the sake of convenience, we quote herein below tariff headings 48.03 and 48.18.

Heading No. Sub-Heading No. Description of Goods Rate of Duty 48.03 4803.00 Toilet or facial tissue stock, towel or napkin stock and similar paper of a kind used for household or sanitary purposes, cellulose wadding and webs of cellulose fibres, whether or not creped, crinkled, embossed, perforated, surface-coloured, surface-

decorated or printed in rolls of a width exceeding 36 cm. or in rectangular (including square) sheets with at least one side exceeding 36 cm. in unfolded state.

18% 48.18 Toilet paper and similar paper, cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 centimeters, or cut to size or shape;

handkerchiefs, cleansing tissues, towels, table cloths, serviettes, napkins for babies, tampons, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories of paper pulp, paper, cellulose wadding or webs of cellulose fibres.

4818.10 Sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles.

13% 4818.90 Other 18% On 14.10.1998, proceedings were initiated against the assessee by the department on the ground that cutting and slitting of jumbo rolls of tissue paper falling under heading 48.03 amounted to manufacture. On 12.4.1999, a show-cause notice was issued to the assessee by the department in which it was alleged that the assessee was engaged in the manufacture and storage of tissue paper rolls, napkins and facial tissues, which were liable to be seized and confiscated for non- compliance of the provisions of the said Act. On 12.7.1999, another show-cause notice was issued to the assessee by the department alleging that during the period 1.8.1997 to 14.10.1998, the assessee was engaged in the manufacture of toilet rolls, napkins and facial tissue papers, from jumbo rolls of tissue paper, falling under tariff sub-heading 4818.90 of the Act, 1985.

The assessee replied to the said show-cause notices. The assessee submitted that cutting and slitting of jumbo rolls of tissue paper into specific width and different shapes did not amount to manufacture. According to the assessee, there was no change in the characteristics or the end-use of the tissue paper. According to the assessee, such a reduction in the width on the duty-paid jumbo rolls cannot amount to manufacture. The assessee also denied the allegations of the department that they were manufacturing / making tissues of wet type. The assessee also denied the allegations of the department that they were imparting fragrance to the napkins made by them. The assessee pointed out that there was no allegation in the show- cause notice that wet tissues or tissues having

fragrance were being made by the assessee.

By order dated 22.11.1999, the commissioner adjudicated the above show-cause notices and confirmed the demand. He also imposed a penalty. It was held that the assessee was the manufacturer of table napkins, toilet rolls and ordinary wet and fragranted facial tissues with distinct brands/trademark. Accordingly, the commissioner confirmed the aforestated demand.

Aggrieved by the order dated 22.11.1999, the assessee filed an appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal").

By judgment and order dated 10.11.2000, the appeal preferred by the assessee was allowed. It was held that the assessee was purchasing duty-paid jumbo rolls of tissue paper; that, thereafter they used to cut/slit the tissue paper to various sizes suitable for use as toilet papers, table napkins or facial tissues and that this activity did not alter the name, character or end-use of the material and, therefore, the said activity / process did not amount to manufacture, both on first principles as well as in terms of section 2(f) of the said Act. In this connection, the tribunal placed reliance on the judgment of the Madras High Court in the case of Computer Graphics Pvt. Ltd. v. Union of India reported in 1991 (52) ELT 491. It was further held by the tribunal that the mere existence of a separate tariff entry (48.18) for the tissue paper product of a smaller size obtained by cutting/slitting of jumbo rolls of tissue paper (48.03) would not necessarily lead to inference that such activity/process on the duty-paid jumbo rolls of tissue paper amounted to manufacture. Moreover, there was no section or chapter note in the tariff defining the activity of cutting/slitting of tissue paper as a process amounting to manufacture and, therefore, section 2(f) of the said Act was not applicable. On facts, the tribunal found that the assessee used to purchase jumbo rolls from the market and they used to cut and slit the same to smaller sizes of required dimensions suitably in use as table napkins, facial tissues etc. It was not disputed before the tribunal that the duty paid jumbo rolls of tissue paper were bought by the assessee from M/s Ellora Paper Mills and M/s Padamjee Paper Mills etc. It was also not in dispute before the tribunal that the jumbo rolls of tissue paper were classifiable under tariff heading 48.03. It was also not disputed before the tribunal that the table napkins and facial tissues obtained by cutting and slitting of jumbo rolls fell in tariff heading 48.18. The only dispute before the tribunal was whether conversion of duty-paid jumbo rolls of tissue paper into table napkins and facial tissues by the process of unwinding, cutting & slitting and packing constituted "manufacture". The tribunal held that the above process of cutting/slitting of jumbo rolls of tissue paper into facial tissues and table napkins did not constitute "manufacture"; that there was no section note/chapter note in chapter 48 to bring in the activity of slitting and cutting of jumbo rolls of tissue paper into smaller sizes within the ambit of section 2(f) of the said Act; that a mere existence of a separate tariff entry 48.18 would not, by itself, make facial tissues and table napkins excisable. The tribunal further held that by the said activity of slitting and cutting, no new commodity with different name, character, end- use or commercial identity emerged and, therefore, there was no "manufacture" both in terms of first principles as well as in terms of section 2(f) of the said Act. Accordingly, the appeals filed by the assessee stood allowed. Hence, these civil appeals.

Mr. Dutta, learned senior counsel appearing on behalf of the department submitted that the activity of cutting/slitting of jumbo rolls of tissue paper into smaller sizes amounted to "manufacture" under section 2(f) of the said Act. It was further submitted that the definition of the word "manufacture" in section 2(f) was inclusive and, therefore, the normal meaning of the term could be ascertained for judicial interpretation. He submitted that on cutting/slitting of jumbo rolls, several different products emerged, namely, table napkins, toilet rolls, facial tissues etc. and, therefore, cutting/slitting constituted "manufacture" and, therefore, the department was right in raising the demand under sub-heading 4818.90. It was urged that in the present case, the test of character or end-use have to be applied and on applying the said test one finds that on cutting/slitting of the tissue paper from the jumbo rolls, a new product with a distinct character and with the distinct end-use known to the market and to the buyers had emerged and, therefore, even on first principles the process of cutting/slitting amounted to manufacture. It was submitted that in the present case, the tribunal ought to have referred the matter to the larger bench particularly when the co-ordinate bench of the tribunal in the case of Foils India Laminates Pvt. Ltd. v. Commissioner of Central Excise, Jaipur reported in 1999 (111) ELT 728 had taken a contra view. Lastly, it was urged on behalf of the department that the tribunal had ignored the findings of the commissioner that there was a value addition of 180% in the final product on account of the price difference between price of the jumbo roll and the price of the final product; that when the jumbo roll of tissue paper was subjected to the process of cutting/slitting, rewinding and packing, the resultant products namely, table napkins, facial tissues, toilet paper rolls emerged as products of different varieties and for specific purposes and in the circumstances, cutting/slitting amounted to "manufacture".

At the outset, it may be pointed out that according to the commissioner, the assessee on its own admission was engaged in the manufacture of various items from tissue paper like table napkins, toilet rolls and dry, wet and fragranted facial tissues. However, in their counter affidavit, the assessee has stated that they are not having any infrastructure to carry out the process of making wet and fragranted type of facial tissues. This issue has not been examined by the tribunal. Therefore, we are confining our judgment only to the question of conversion of jumbo rolls of tissue paper into tissue paper napkins, tissue rolls, toilet rolls and facial tissues excluding wet and fragranted facial tissues.

At the outset, we may point out that the assessee is one of the downstream producers. The assessee buys duty-paid jumbo rolls from M/s Ellora Paper Mills and M/s Padamjee Paper Mills. There are different types of papers namely, tissue paper, craft paper, thermal paper, writing paper, newsprints, filter paper etc. The tissue paper is the base paper which is not subjected to any treatment. The jumbo rolls of such tissue papers are bought by the assessee, which undergoes the process of unwinding, cutting/slitting and packing. It is important to note that the characteristics of the tissue paper are its texture, moisture absorption, feel etc. In other words, the characteristics of table napkins, facial tissues and toilet rolls in terms of texture, moisture absorption capacity, feel etc. are the same as the tissue paper in the jumbo rolls. The said jumbo rolls cannot be conveniently used for household or for sanitary purposes. Therefore, for the sake of convenience, the said jumbo rolls are required to be cut into various shapes and sizes so that it can be conveniently used as table napkins, facial tissues, toilet rolls etc. However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely,

for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues.

In the case of Brakes India Ltd. v. Supdt. of Central Excise & Others reported in (1997) 10 SCC 717, this Court has very aptly brought out the test of character or end-use by observing as follows:

> "If by a process, a change is effected in a product, which was not there previously, and which change facilitates the utility of the product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product. It will not be safe solely to go by a test as to whether the commodity after the change takes in a new name, though in stated circumstances, it may be useful to resort to it. This may prove to be deceptive sometimes, for it will suit the manufacturer to retain the same name to the end product also. The 'character or use' test has been given due importance by pronouncements of the Supreme Court. When adopting a particular process, if a transformation takes place, which makes the product have a character and use of its own, which it did not bear earlier, then the process would amount to manufacture under section 2(f) irrespective of the fact whether there has been a single process or have been several processes."

Applying the above tests, we hold that no new product had emerged on winding, cutting/slitting and packing. The character and the end-use did not undergo any change on account of the abovementioned activities and, therefore, there was no manufacture on first principles.

Similarly, there was no deemed manufacture under section 2(f) of the said Act. In order to make section 2(f) applicable, the process of cutting/slitting is required to be recognized by the legislature as a manufacture under the chapter note or the section note to chapter 48. For example, the cutting and slitting of thermal paper is deemed to be "manufacture" under note 13 to chapter 48. Similarly, note 3 to chapter 37 refers to cutting and slitting as amounting to manufacture in the case of photographic goods. However, slitting and cutting of toilet tissue paper on aluminium foil has not been treated as a manufacture by the legislature. In the circumstances, section 2(f) of the Act has no application.

In the case Shyam Oil Cake Ltd. v. Collector of Central Excise, Jaipur reported in 2004 (174) ELT 145, this Court held that if a process is indicated in a tariff entry without specifying that the same amounts to manufacture then indication of such process is merely for identifying the product. For a deeming provision to come into play, it must be specifically stated that a particular process amounts to manufacture and in its absence, the commodity would not become excisable merely because a separate tariff item exists in respect of that commodity. In that matter, the question which arose for determination was - whether refining of edible vegetable oil, as a process, constituted "manufacture". It was held that the product even after refining continued to remain an edible

vegetable oil. It was further held that neither in the section note nor in the chapter note, refining as a process was indicated as amounting to manufacture. In the circumstances, it was held that refining of edible vegetable oil did not amount to "manufacture". In our view, the ratio of the said judgment is squarely applicable to the facts of the present case. As stated above, the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper in the toilet rolls, table napkins, facial tissues etc. Moreover, cutting/slitting of tissue paper is not indicated in the section note or in the chapter note as amounting to "manufacture" and, therefore, section 2(f) of the Act was also not applicable to the facts of this case.

In the case of Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad reported in 1995 (76) ELT 241, this Court held that section 3 of the Act levies duty on all excisable goods mentioned in the schedule provided they are produced and manufactured. Therefore, where the goods are specified in the schedule, they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the assessee on whom duty is proposed to be levied. Consequently, it is always open to an assessee to prove that even though the goods in which he was carrying on his business were excisable as they are mentioned in the schedule, they could not be subjected to duty as they were not goods either because they were not manufactured or having been produced or manufactured, they were not marketed or capable of being marketed.

In the case of Union of India v. J.G. Glass Industries Ltd. reported in 1998 (97) ELT 5, this Court has succinctly drawn a distinction between manufacture vis-`-vis process and in the course of the judgment, it has been observed as follows:

> "16. On an analysis of the aforesaid rulings, a two-fold test emerges for deciding whether the process is that of "manufacture". First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process. In the present case, the plain bottles are themselves commercial commodities and can be sold and used as such. By the process of printing names or logos on the bottles, the basic character of the commodity does not change. They continue to be bottles. It cannot be said that but for the process of printing, the bottles will serve no purposes or are of no commercial use."

Applying the above tests to the facts of the present case, we hold that mere mention of a product in a tariff heading does not necessarily imply that the said product was obtained by the process of manufacturing. That, just because the raw-material and the finished product came under two different headings, it cannot be presumed that the process of obtaining the finished product from such raw-material automatically constituted manufacture. In the present case, merely because tissue paper in the jumbo roll of the size exceeding 36 cms. fell in one entry and the toilet roll of a width not exceeding 36 cms. fell in a different entry, it cannot be presumed that the process of slitting and cutting of jumbo rolls of toilet tissue paper into various shapes and sizes amounted to manufacture.

The above tests would also apply to cutting and slitting of jumbo rolls of aluminium foils (which item is the subject matter of some of the civil appeals herein).

Lastly, in the instant case, the commissioner as an adjudicating authority has held that there was a value addition of 180%. He found that jumbo rolls of tissue papers were purchased by the assessee @ Rs.30/- to 70/- per kg. and the final product i.e. the toilet tissue paper was sold by the assessee @ Rs.85/- to Rs.100/- per kg. and, therefore, there was a value addition of around 180% i.e. between the range of Rs.30/- to Rs.85/- per kg. This finding of the commissioner is erroneous. Under the excise law, value addition based on a process is certainly a relevant criteria to decide as to what constitutes "manufacture". Such value addition should be on account of change in the nature or characteristics of the product. In the present case, as stated above, there is no change in the nature or characteristics of the tissue paper in the jumbo roll and the nature and characteristics of the tissue paper in the table napkin, facial tissues etc. Therefore, without such change in the nature or characteristics of the tissue paper, value addition on account of transport charges, sales tax, distribution and selling expenses and trading margin cannot be an indicia to decide what is manufacture. Thus, value addition without any change in the name, character or end-use by mere cutting or slitting of jumbo rolls cannot constitute criteria to decide what is "manufacture".

In the case of Decorative Laminates (India) Pvt. Ltd. v. Collector of Central Excise, Bangalore reported in 1996 (86) ELT 186, this Court held that the process of application of phenol resin on duty paid plywood under 100% heat amounts to manufacture and in that connection observed that value addition and separate use are also relevant factors which the Courts should consider in deciding the applicability of section 2(f) of the Act. Therefore, value addition based on price difference only without any change in the name, character or end-use is a dangerous criteria to be applied in judging what constitutes "manufacture". Lastly, the end-use in both the entries 4803 & 4818.90 is the same, namely, for sanitary or household purposes. In the circumstances, value addition criteria as applied by the commissioner is erroneous.

In the present case, learned counsel for the department has vehemently urged that the tribunal should have referred the dispute to a larger bench particularly in view of the fact that the co-ordinate bench of the tribunal in the case of Foils India Laminates (supra) had held that the process of cutting/slitting of jumbo rolls of films into flats constituted manufacture. We do not find any merit in this argument. While deciding the case of Foils India Laminates (supra), the tribunal has failed to consider the clarifications issued by the central board dated 5.9.1988 as well as the judgment of the Madras High Court in the case of Computer Graphics Pvt. Ltd. v. Union of India reported in 1991 (52) ELT 491 (Mad.), which had taken the view that the process of cutting of jumbo roll into the smaller sizes of flats did not amount the manufacture. Therefore, in the present case, the tribunal was right in not following the judgment in the case of Foils India Laminates (supra).

We reiterate that the department is right in its contentions that the tribunal has not examined the question as to whether the assessee had the requisite machinery, infrastructure and facility to manufacture wet tissues and fragranted tissues and, therefore, we remit this question to the commissioner to be decided afresh in accordance with law, after giving opportunity to the assessee who has stated before us that they do not possess such facility.

We express no opinion on wet and fragranted facial tissues.

We accordingly hold that the process of slitting/cutting of jumbo roll of plain tissue paper/aluminium foil into smaller size will not amount to "manufacture" on first principles as well as under section 2(f) of the said Act. As regards the manufacture of wet tissues and fragranted tissues, the matter is remitted to the commissioner to ascertain whether the assessee has the requisite infrastructure, facility, machines etc. for manufacturing fragranted and wet tissues and, if so, whether the process amounts to "manufacture".

Subject to above, civil appeals filed by the department are dismissed, with no order as to costs.