M/S. Cadila Laboratories Pvt. Ltd vs C.C.E. Vadodara on 13 February, 2003

Equivalent citations: AIR 2003 SUPREME COURT 1700, 2003 AIR SCW 1115, (2003) 1 SCR 1048 (SC), 2003 (2) SLT 72, 2003 (2) SCALE 63, 2003 (4) SCC 12, (2003) 8 ALLINDCAS 181 (SC), 2003 (1) SCR 1048, (2003) 2 KHCACJ 76 (SC), 2003 (2) ACE 319, (2003) 152 ELT 262, (2003) 107 ECR 420, (2003) 2 GUJ LR 1706, (2003) 1 SUPREME 981, (2003) 2 SCALE 63, (2003) 3 INDLD 368

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Bench: S.N. Variava, B.N. Agrawal

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           CASE NO.:
Appeal (civil)  6745 of 1999
Appeal (civil)  6922 of 1999

PETITIONER:
M/s. Cadila Laboratories Pvt. Ltd.

RESPONDENT:
C.C.E. Vadodara

DATE OF JUDGMENT: 13/02/2003

BENCH:
S.N. Variava &  B.N. Agrawal

JUDGMENT:
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J U D G M E N T S. N. Variava, J.

Civil Appeal No. 6745 of 1999 is against the judgment of the Customs Excise & Gold (Control) Appellate Tribunal (CEGAT) dated 20th July, 1999, whereas Civil Appeal No. 6922 of 1999 is against the judgment of CEGAT dated 30th July, 1999.

The Appellants in these Appeals manufacture various drugs. In Civil Appeal No. 6745 of 1999 the concerned drugs are Mebendazole, Thrimethoprim, Tinidazole and Dexa-methazone. In the process of manufacture of above drugs certain intermediate products come into existence. For the purposes of this Appeal the intermediate products are Thiourea Derivatives, 3-4 Diamino Benzophenone, Anilino Compound, Brown Oil and Epoxy Derivatives. In Civil Appeal No. 6922 of 1999 the concerned drug is Ethambutol Hydrochroride. In the process of manufacture an intermediate product viz. D-2 Aminobatanol Tartrate is also manufactured.

The question in these two Appeals is whether excise duty is payable on these intermediate products and whether the Respondents were entitled to the extended period under Section 11A of the Central Excise and Salt Act, 1944. The questions being common in both the Appeals they are being disposed off by this common Judgment. In both the cases it has been held by the CEGAT that the Appellants were liable to pay excise duty and that the claim was not time barred. Before the Orders of the Tribunal are considered it is necessary to set out the law on the subject.

In the case of Union Carbide India Limited vs. Union of India and others reported in 1986 (2) SCC 547 the question was whether excise duty was payable on Aluminium cans produced from aluminium. The cans were in a crude and elementary form. By a further process they were then made into torch bodies. It was held that in order to attract excise duty the article must be manufactured and it must be capable of sale to a consumer. It was held that the expression goods in the Central Excise and Salt Act, 1944 only covers an article which can ordinarily come to the market to be bought and sold. It was held that the burden of showing that the goods are marketable was on the department. In this case the department had shown that on one occasion, the Appellants (therein) had ordered such aluminium cans from one M/s. Krupp Group of Industries. It had also been shown that in the past the Appellant had submitted a price list to the department, which price list included a margin of profit. It was held that this was not sufficient to show that the product was marketable. It was held that the instance of purchase from M/s. Krupp Group of Industries was a works contract and nothing more. It was held that merely because the Appellant had submitted a price list under a mistaken belief would not show that the goods were marketable. It was held that as there was no sufficient material to show that the goods were marketable excise duty was not payable on the aluminium cans.

In the case of Bhor Industries Ltd., Bombay vs. Collector of Central Excise, Bombay reported in 1989 (1) SCC 602, the Appellants manufactured leather clothes, laminated jute mattings and PVC tapes. In the process of manufacture of such products, an intermediate product viz. a PVC film was manufactured. The question was whether the Appellant (therein) was liable to pay excise duty on such PVC film. The department had shown that PVC films or sheets were available in the market. However, what was available in the market was a finished, embossed and printed PVC films whereas what was manufactured by the Appellant was a crude PVC film which had much less tensile strength than that of the PVC film available in the market. On behalf of the department it was submitted that if the good was one which fell within the Schedule, then excise duty would be payable. This argument was repelled. It was held that for the goods to be excisable they must be known in the market and must be capable of being sold in the market as goods. It was held that actual sale in the market was not necessary and that even though it may be used for captive consumption, they would be liable to excise provided they were capable of being sold in the market or known in the market as goods. It was held that the excise duty would be leviable on manufacture of goods as known in the market. It was further held that it was the duty of the department to adduce proof or evidence that the PVC films were goods which were marketable.

In the case of Collector of Central Excise, Baroda vs. M/s. Ambalal Sarabhai Enterprises (P) Ltd. reported in 1989 (4) SCC 112, the Respondents were manufacturing Sorbitel. An intermediate product "starch hydrolysate" was manufactured. The department contended that the intermediate

product was glucose and excise was payable on it. The question before the Court was whether the starch hydrolysate manufactured by the Respondents was goods within the meaning of Central Excise and Salt Act. It was shown that starch hydrolysate manufactured by the Respondents was highly unstable and fermented if kept for a day or two. On behalf of the department it was submitted that the test was not whether the product was unstable and resulted in fermentation but whether it was capable of being marketed. It was held that goods with unstable character can be theoretically marketed but that one had to take a practical approach. It was held that the evidence showed that hydrolysed starch fermented and decomposed and at higher concentration it crystalised within two or three days. It was held that this was evidence indicating propensity of its not being marketed. It was held that this was good evidence to conclude that it would be unlikely to be marketable. The Court noted that the department had made no enquiry whatsoever as to whether starch hydrolysate was ever marketed by anybody. It was held that the department merely relied on the fact that starch hydrolysate was stored in tanks. It was held that this was not sufficient as it had been shown that such storage was only for a period of few hours and only as a step in the process of transfer. It was held that the burden of showing that the starch hydrolysate was marketable was on the department. It was held that as no enquiry had been made nor any evidence produced the department had not discharged the burden. It was held that starch hydrolysate manufactured by the Respondents were not goods within the meaning of Central Excise and Salt Act.

In the case of Union of India and another vs. Delhi Cloth & General Mills Co. Ltd and another reported in 1997(5) SCC 767, the question was whether an intermediate product "calcium carbide" was excisable. It was shown that the calcium carbide manufactured by the Respondents was not of a purity that rendered it marketable. It was held that the rationale for levying excise duty is that the goods, which are manufactured, must be a distinct commodity as such known in common parlance or to the commercial community for the purposes of buying and selling. It was held that the manufacture of calcium carbide by the Respondents was not of the purity nor was it packed in air-tight container so as to make it marketable. It was held that the commodity must be marketable as it is and not become marketable by a further process.

In the case of Collector of Central Excise, Baroda vs. United Phosphorus Ltd. reported in 2000 (4) SCC 18 certain intermediate products came into existence in the process of manufacture of insecticides, fungicides, weedicides and pesticides. The question was whether those intermediate products were excisable. It was held that even though an intermediate product may be one which is specified in the Schedule it was still not subject to duty unless it satisfied the test of marketability. It was held that the burden of showing that the goods were marketable was on the department and that in the absence of any proof by the department it could not be held that the goods were marketable. It was held that merely because some of the items were entitled to draw back duty under a Notification did not mean that the test of marketability was satisfied.

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.

The Appellants have all along contented that the intermediate product manufactured by them are in crude and unstable form. They have shown that the intermediate products manufactured by them have a shelf-life of only a few hours unless and until by a further processing they are purified. In respect of some of the products they have shown that they are in an impure form. They have also filed affidavits of traders to show that some of the products are not marketable. We have seen the Order passed by the Collector on 18th September, 1991 in Civil Appeal No. 6922 of 1999. By the Order dated 18th September, 1991, the Collector had accepted the Appellants case and dropped the show cause proceedings. However, thereafter the Central Board of Excise and Customs exercised powers under Section 35-E and had the matter referred to the Tribunal. We have also seen the Order dated 19th August, 1993 passed by the Collector in Civil Appeal No. 6745 of 1999. In this Order the Collector has relied on a report of a chemical analyser, statements made by one Shri Champaklal Maniklal, a Manager of the Appellant and a Customs Notification bearing No.14/88-C. Reliance is also placed on fact that Appellants store their products in cans for some period of time. Reliance was also placed on the fact that at one stage the Appellants had bought one of the products from the market. On this material the Collector concludes that "these facts make it evident that the impugned products can conceivably be sold to another industrial user who needs that kind of product". 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.

At this stage it must be mentioned that the 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.

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 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.

The Tribunal thereafter has passed a very perfunctory Order accepting the reasoning of the Collector. In that Order, the Tribunal has held as follows:

> "that marketability is essentially a question of fact to be decided in the facts of each case. In the present matters the fact of purchase of some of the impugned products from the market, their storage, weighment and storage indicate that the impugned goods can ordinarily come to the market to be bought and sold. We are, therefore, of the view that the Department has discharged its onus to prove that the impugned products are marketable."

In Civil Appeal No.6922 of 1999 the Tribunal has adopted the same reasoning. For the above reasons we hold that it has not been established that the intermediate products manufactured by the Appellants are marketable. The demand raised in the show cause notices cannot thus be sustained.

The other question raised by the Appellant is that the extended period under Section 11-A of the Central Excise and Salt Act was not available to the Revenue. The law on the subject is also very clear.

In the case of Collector of Central Excise, Hyderabad vs. M/s. Chemphar Drugs and Liniments, Hyderabad reported in 1989 (2) SCC 127 the Assessee had not declared the goods under a belief that the exempted goods were not required to be declared. It has been held that the period of five years, under the proviso to Section 11-A, requires the commission of some positive and deliberate act of fraud, collusion, misstatement, suppression or contravention of a provision of the Act. It is held that mere inaction or failure on the part of the manufacturer or producer is not sufficient to extend the period of limitation. It is held that whether there was any fraud or collusion or wilful misstatement or suppression, is a question of fact depending on the facts and circumstances of each particular case. It is held that mere non-declaration of goods did not amount to any conscious or deliberate withholding of information.

In the case of M/s. Padmini Products vs. Collector of Central Excise, Bangalore reported in 1989 (4) SCC 275, the question was whether dhoop sticks were excisable. The Assessee, in the belief that they were Agarbatis, had not filed any declaration and had not paid any excise on the same. One of the questions was whether the extended period, under the proviso to Section 110A, was available to the Revenue. After setting out the above mentioned judgment, this Court held that there was scope for belief that there was no need to take out a licence or pay duty at the time of removing dhoop sticks. It was held that the Assessee was not guilty of either fraud or collusion, or wilful misstatement or suppression of fact or contravention of any provisions of the Act and the Rules. It was held that mere failure to pay duty or take out the licence did not amount to fraud, collusion, misstatement, suppression or contravention of provisions of the Act. The argument that failure to take out a licence and taking the goods out of the factory gate without payment of duty was itself sufficient to infer that the Assessee came within the mischief of the proviso, was negatived.

In the case of Tamil Nadu Housing Board vs. Collector of Central Excise, Madras and another reported in 1995 (Supp. 1) SCC 50, the Assessee had two manufacturing units one for commercial purposes and another for its own use. The Assessee obtained a licence for the commercial unit but did not obtain a licence for the unit which was for its own use. The Assessee claimed that it had been so advised by somebody in the Excise Department. The Assessee did not lead evidence of the officer who was supposed to have been so informed by the Excise Department. It was held that mere non examination of an officer could not give rise to an inference that the Assessee was intentionally evading payment of duty. It was held that the onus was on the Department to prove that there was a deliberate act of fraud, collusion, misstatement, suppression or contravention of the Act. It was held that if there was any scope for doubt then the proviso to Section 11-A of the Act would not be attracted. It was held that the department was not entitled to the extended period.

In the case of Collector of Central Excise vs. H.M.M. Limited reported in 1995 (Supp. 3) SCC 322, the show cause notice did not specifically state as to which of the default enumerated in the proviso to Section 11-A was committed by the Assessee. It was held that such a notice was not sufficient as the Assessee must know what case he has to meet. It was held that mere failure to make a declaration would not justify an inference that the intention was to evade payment of duty.

In this case, the Appellants had pointed out that in the same compound they have a sister concern which is also manufacturing identical intermediate product. That sister concern had been examined by the officers of the same Circle. That sister concern had disclosed what intermediate products were coming into existence. Thereafter no show cause notice was issued to the sister concern nor were they told that these products were excisable. The Appellants have contended that they were therefore under a bonafide belief that these intermediate products were not excisable. It was also pointed out that prior to 1.3.1986, all the intermediate products were exempted from payment of excise duty. Thereafter the final product was exempted with the intention of regulating price of these drugs. The Appellants claim that they were under a belief that intermediate products continued to be also exempted as otherwise the price of the final product would go up. The Appellants also claim that they were under a belief that as their intermediate products were crude and in an unstable form and not marketable, the same were not excisable. The Appellant also by their letters dated 21st April, 1987 and 23rd December, 1987 had pointed out that these intermediate products came into existence in the manufacture of final product.

The only ground on which it has been held that the extended period was applicable is there was suppression by non filing of the classification list and that in their letters dated 21st April, 1987 and 23rd December, 1987, it has not been set out that these intermediate products were separated and stored in plastic or tin containers. In our view these are not sufficient for the purpose of invoking the extended period of limitation. It could not be denied that no duty was sought to be levied on the same products manufactured by the sister concern. Therefore it could not be said that the belief of the Appellants was not bonafide. Further the premises of the Appellants were visited on 7th April, 1987. The officers saw that the intermediate products were being temporarily stored in plastic or tin containers. Thereafter by the letter dated 21st of April, 1987, it is pointed out that these intermediate products are being manufactured. There was thus no deliberate act of fraud, collusion, misstatement, suppression or contravention of the Act. Mere fact of not filing of the classification

lists is not sufficient to bring into play the extended period of limitation. It is therefore held that the extended period of limitation, under the proviso to Section 11-A, was not available.

In this view of the matter, both the Appeals are allowed. The demand made in the show cause notices are set aside. There shall be no order as to costs.