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UNION OF INDIA AND ANR.

v.

DELHI CLOTH AND GENERAL MILLS CO. LTD.

MAY 6, 1997

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[S.P. BHARUCHA, S.C. SEN AND M. JAGANNADHA RAO, JJ.]

*Excise Law :*

*Central Excises and Salt Act, 1944 : Tariff Item 14-AA(1).*

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*Excise—Excise duty—Levy of—Calcium carbide, manufactured for production of acetylene gas, but not marketable due to want of purity and proper packing—Held : Such calcium carbide, not excisable.*

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*Excise—Excise duty—Levy of—Condition precedent—Held : In order to be excisable, the commodity must be marketable as it is—The fact that by further processing the commodity may be made marketable, not material.*

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The respondent company manufactured and sold calcium carbide in the market until the year 1967. Thereafter it utilised the calcium carbide that it manufactured in the process of the production of acetylene gas in its acetylene gas plant. The calcium carbide that was manufactured was tapped from the furnace in liquid form, placed in trays, allowed to cool and solidify and thereafter broken into cakes of the required size. Called upon to pay excise duty on such calcium carbide, the respondent contended that it was not excisable being an intermediate product used for the

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generation of acetylene gas in the factory of manufacture.

The respondent contended that the calcium carbide produced in its factory was an intermediate product not marketed as such and, therefore, it was not an excisable commodity. The appellant-Revenue contended that the calcium in question was in fact marketed by the respondent till 1967.

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The appellant-Revenue further contended that the said calcium carbide was in any event covered by Tariff Item 14 AA(1). The Appellate Collector held that the said calcium carbide produced in the respondent's factory was excisable. The order of the Appellate Collector was upheld by the Government of India in revision. The respondent thereupon filed a writ

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petition before the High Court, which was allowed. Hence this appeal.

Dismissing the appeal, this Court

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**HELD : 1.1.** The order of the Collector shows that the calcium carbide that was manufactured by the respondent for further utilisation in the production of acetylene gas was not of a purity that rendered it marketable nor was it packed in such a way as to make it marketable, that is to say, in airtight containers. This is a fact. Therefore, it has to be held that the calcium carbide manufactured by the respondent is not excisable.

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[154-H; 155-A-B]

*Moti Laminates Pvt. Ltd. v. CCE*, (1995) 76 ELT 241 and *Dharangadhra Chemical Works Ltd. v. Union of India*, (1997) 91 ELT 253, relied on.

*Union of India v. Delhi Cloth & General Mills Co. Ltd.*, AIR (1963) SC 791; *South Bihar Sugar Mills Ltd. v. Union of India*, AIR (1968) 2 SC 922; *A.P. Seb v. CCE*, [1994] 2 SCC 428; *Union Carbide India Ltd. v. Union of India*, [1986] 2 SCC 547; *Bhor Industries Ltd. v. CCE*, [1989] 1 SCC 602; *Hindustan Polymers v. CCE*, [1989] 1 SCC 323 and *Indian Cable Co Ltd., Calcutta v. CCE*, [1994] 6 SCC 610, referred to.

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**1.2.** Tariff Item 14-AA(1) is not attracted in the present case. The commodity, which is sought to be made liable to excise duty, must be a commodity that is marketable as it is and not a commodity that may by further processing be made marketable. [155-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2062 of 1979.

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From the Judgment & Order dt. 16.2.78 of the Delhi High Court in C.W. No. 1358 of 1975.

A.B. Divan, M.G.S. Murthy, Dilip Tandon, V.K. Verma, S. Ganesh, R. Narain, A. Sarar, A. Mitra, Sajjan Narain for M/s. JBD & Co. and Sonu for the appearing parties.

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The following Judgment/Orders of the Court was delivered :

**S.P. BHARUCHA, J.** This civil appeal arising upon the judgment and order of a Division Bench of the Delhi High Court was referred to a larger bench on 11th March, 1997 (1997) 91 E.L.T. 230.

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The respondent company manufactured and sold calcium carbide in the market until the year 1967. Thereafter it utilised the calcium carbide that it manufactured in the process of the production of acetylene gas in

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A its acetylene gas plant. The calcium carbide that was manufactured was tapped from the furnace in liquid form, placed in trays, allowed to cool and solidify and thereafter broken into cakes of the required size. Called upon to pay excise on such calcium carbide, the respondent contended that it was not excisable being an intermediate product used for the generation of acetylene gas in the factory of manufacture. The order of the Superintendent Central Excise, Kota Division, being against the respondent, it preferred an appeal to the Appellate Collector, Central Excise, New Delhi. He enquired into the process of manufacture of the calcium carbide in the respondent's factory and observed that the enquiry had confirmed the respondent's contention that the calcium carbide produced in its factory was an intermediate product and was not marketed by the respondent. The enquiry also revealed that the calcium carbide, which was initially produced in the form of cakes, was broken into smaller pieces after the cakes attained room temperature and the broken pieces were forthwith put into use for the production of acetylene gas. The Appellate Collector added :

D "This confirms their contention that the calcium carbide is not produced to the purity as required in the specification laid down by the Indian Standards 1040/60 nor the carbide is packed in any containers for the purpose of storage for any length of time."

E The Appellate Collector noted that the calcium carbide which was sold in the market was packed in airtight containers and conformed to the I.S.I. specifications. However, he declined to accept the respondents' contention that the calcium carbide produced by it, being not marketed as such, was not an excisable commodity. In his view, calcium carbide as occurring at Tariff Item 14AA(1) had not been qualified by any description so that the calcium carbide produced in the respondents' factory was excisable. The order of Appellate Collector was upheld by the Government of India in revision. It was found that in chemical description and physical properties what was manufactured by the respondent was calcium carbide irrespective of whether or not it conformed to any specification. The respondent thereupon filed a writ petition before the Delhi High Court and, by the order under appeal, the writ petition was allowed, it being found that the calcium carbide manufactured by the respondents was not marketable.

G When this civil appeal against the Delhi High Court's judgment reached hearing before a bench of two learned Judges, counsel on behalf of the respondent relied upon the judgment of a bench of three learned H Judges of this Court in the case of *Moti Laminates Pvt. Ltd. v. Collector of*

*Central Excise, Ahmedabad*, (1995) 76 E.L.T. 241, and contended that goods which were not marketable or acceptable in the market as a commercial commodity could not be subjected to excise duty. The bench was of the view that, reliance having been placed on the Moti Laminates judgment, this appeal should be heard by a larger bench. The papers having been placed before the Hon'ble the Chief Justice, the appeal is now placed before us.

The first question to which we address ourselves is whether the Moti Laminates judgment requires to be looked into again, Sahai, J., speaking for the bench of three learned Judges, noted that excise duty was levied by virtue of the provisions of Entry 84 of List 1 of the Seventh Schedule of the Constitution on goods which were manufactured or produced, which was why the charge under Section 3 of the Central Excise and Salt Act was on all excisable goods produced or manufactured. The expression "excisable goods" had been defined by clause (d) of Section 2 to mean goods specified in the Schedule. The scheme in the Schedule was to divide goods into two broad categories, those for which rates were mentioned under different entries and goods under the residuary entry. The work 'goods' had not been defined in the said Act but it had to be understood in the sense in which it had been used in Entry 84 of the Schedule. That was why Section 3 levied duty on all excisable goods mentioned in the Schedule provided they were produced and manufactured. The learned Judge added :

"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 person on whom duty is proposed to be levied. The expression "produced or manufactured" has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured they were not marketed or capable of being marketed.

A 9. The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling."

C Reliance was placed for the above findings on the judgments of this Court in *Union of India v. Delhi Cloth & General Mills Co. Ltd.*, AIR (1963) S.C. 791; *South Bihar Sugar Mills Ltd. v. Union of India*, AIR (1968) S.C. 922; *A.P. Seb v. C.C.E.*, [1994] 2 S.C.C. 428; *Union Carbide India Ltd. v. Union of India*, [1986] 2 S.C.C. 547; *Bhor Industries Ltd. v. C.C.E.*, [1989] 1 S.C.C. 602; *Hindustan Polymers v. C.C.E.*, [1989] 1 S.C.C. 323 and *Indian Cable Co. Ltd., Calcutta v. Collector of Central Excise Calcutta & Ors.*, (1994) 6 S.C.C. 610.

E We have perused the Moti laminates judgment with care and have heard learned counsel. We find that the view expressed in the Moti Laminates judgment is based on earlier judgments. It has been affirmed by this Court thereafter. We may refer to one such later judgment, *Dharan-gadhra Chemical Works Ltd. v. Union of India*, (1997) 91 E.L.T. 253 and that is also by a bench of three learned Judges. We do not entertain any doubt as to the correctness of the ratio of the Moti Laminates judgment. We proceed with the appeal on the basis that it lays down the correct law.

G learned counsel for the appellant submitted that the calcium carbide manufactured by the respondents was marketable and he relied in this behalf upon the orders of the Appellate Collector and Government of India, to which we have made reference. He also submitted that the calcium carbide manufactured by the respondents was in fact marketed till 1967.

H The order of the Collector shows that the calcium carbide that was manufactured by the respondent for further utilisation in the production of acetylene gas was not of a purity that rendered it marketable nor was it

packed in such a way as to make it marketable, that is to say, in airtight containers. This is a finding of fact. Applying the ratio of the Moti Laminates judgment thereto, we must hold that the calcium carbide manufactured by the respondents is not excisable. A

Learned counsel for the appellant submitted that Tariff Entry 14AA(1) was attracted, whatever might be the further process that the calcium carbide manufactured by the respondent might have to undergo by way of purification or packaging for that would not be tantamount to further manufacture. We are unable to agree for the simple reason that the commodity which is sought to be made liable to excise duty must be a commodity that is marketable as it is and not a commodity that may by further processing be made marketable. B C

In the result, the appeal is dismissed with no order as to costs.

Learned counsel for the appellant submits the appellant have given no instructions to the advocate on record. The appeals are, therefore, dismissed for want of prosecution. D

No order as to costs.

The application for intervention is dismissed.

V.S.S.

Appeals dismissed and  
Petition disposed of. E