

UNION OF INDIA AND ORS.

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v.

SONIC ELECTROCHEM (P) LTD. AND ANR.

SEPTEMBER 17, 2002

[SYED SHAH MOHAMMED QUADRI AND S.N. VARIAVA, JJ.]

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Central Excise Tariff Act, 1985:

Schedule—Sub heading 85.16—Excise duty on plastic body of Electro Mosquito Repellant (EMR) and 'Fragrant Mat'—EMR exempted under clause(d) of Notification No. 160/86-CE dated 1.3.1986—Revenue issuing show cause notice to respondent-manufacturer, demanding excise duty on plastic body of EMR as it fell within 'domestic electrical appliances' and on fragrant mat—According to the Revenue, the items were chargeable to excise duty respectively under clause 5(f) of Notification No. 160/86-CE dated March 1, 1986 and sub-heading 3307.49 of the Act—High Court quashed the show cause notices holding that plastic body was not 'goods' within the meaning of Tariff Act and not liable to excise duty, as also that 'Fragrant Mat' did not answer the description of sub-heading 3307.49—Held, plastic body, which is a part of EMR of respondent-manufacturer, is not 'good' so as to be liable to duty as part of EMR under clause 5(d) of the Notification—It is being manufactured by respondents for its captive consumption—It is not a product in the market with any commercial name—The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being brought and sold—Plastic body of EMR does not satisfy these criteria—Fragrant Mats are classified under sub-heading 3307.41 and not under 3307.49.

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A.P. State Electricity Board v. Collector of Central Excise, Hyderabad, [1994] 2 SCC 428, referred to.

Sub-heading 3307.41—'Agarbatti' 'Dhoop' and similar preparations—'Fragrant Mat', a mosquito repellant—Excise duty—Revenue contending that 'Fragrant Mat' being a mosquito repellant could not be brought under sub-heading 3307.41 as it could not be said to be 'Agarbatti' or 'Dhoop'—Held, not merely 'Agarbatti' and 'Dhoop' but preparations which are akin

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A to 'Agarbatti' and 'Dhoop' and which can produce vapour on burning and spread perfume would fall within the meaning of the entry—From the process of manufacture of Fragrant Mat, it cannot but be held that preparation in Mat form is similar to that of 'Agarbatti'—Therefore, Fragrant Mats are classifiable under Sub-Heading 3307.41 and not under 3307.49 of the Tariff Act.

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Words and Phrases

'goods'—Meaning of in the context of Excise Tariff Act, 1985.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 182 of 1995.

From the Judgment and Order dated 24.3.1994 of the Madhya Pradesh High Court in M.P. Nos. 1817 of 1991.

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C.A. Nos 108/95 and 1649 of 1996.

Mukul Rohtagi, Additional Solicitor General, N.K. Bajpai, Hemant Sharma, Ms. Rekha Pandey and B. Krishna Prasad for the Appellants.

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A.R. Madhav Rao, Alok Yadav, M.P. Devnath, Vishwanath Shukla, Vivek Gambhir and V. Balachandran for the Respondents.

The following Order of the Court was delivered :

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In these appeals, the short question that arise for consideration is: whether plastic body, a part of Electro Mosquito Repellant, and 'Fragrant Mat' are chargeable to excise duty under Clause 5(f) of Notification 160/86-CE dated March 1, 1986 and Sub-Heading 3307.49, respectively, of the Central Excise Tariff Act, 1985.

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Show cause notices were issued to the appellants under Section 11-A of the Central Excise Act, 1944 (for short, 'the Excise Act') by the Superintendent Central Excise Range II, Pithampur, raising demand of excise duty on plastic body of Electro Mosquito Repellant (for short, 'E.M.R.') [which falls within 'Domestic electrical appliances] classifiable under Sub Heading 85.16 of the Central Excise Tariff Act, 1985 (for short, 'the Tariff Act') and on Fragrant mat. The respondents in Civil Appeal Nos. 182 of 1995 and

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108 of 1995 filed writ petitions, under Article 226 of the Constitution, before

the High Court of Madhya Pradesh challenging the validity of the show cause notices. However, the respondent in Civil Appeal No.1649 of 1996 filed reply before the concerned authorities. The Collector of Customs and Central Excise, Indore, confirmed the demand which was assailed before Customs, Excise and Gold (control) Appellate Tribunal in appeal. The High Court, in writ petitions, held that the 'plastic body' is not 'goods' within the meaning of the Tariff Act and, therefore, it is not liable to excise duty and that the Fragrant Mat, did not answer the description of Sub-Heading 3307.49 and, therefore, it quashed the show cause notices. Against the judgment and order of the High Court dated March 24, 1994, allowing in the writ petitions, the aforesaid two appeals; being Civil Appeal Nos. 182 of 1995 and 108 of 1995, are filed by the Revenue. Civil Appeal No.1696 arose from the order of the customs, Excise and Gold (Control) Appellate Tribunal dated April 6, 1995, allowing the appeal in the light of the said judgment of the High Court of Madhya Pradesh.

Mr. Mukul Rohtagi learned Additional Solicitor General, argues that, so far as the plastic body is concerned, it is a finished product; it cannot be termed as an intermediate product and the fact that it is not being bought and sold in the market, will not militate against the marketability of the goods, therefore, it is liable to excise duty under clause 5(f) of Notification No. 160\86-CE. In support of his contention, he relies upon the judgment of this Court in *A.P. State Electricity Board v. Collector of central Excise, Hyderabad* [1994] 2 SCC 428.

Mr. A.R. Madhava Rao, learned counsel appearing for the respondents-assesseees, submits that the plastic body is manufactured to cater to the requirements of the respondents' EMR. The plastic body is not a standardised item and is not known by any name in the market and as such the High court has rightly found that it is not marketable.

It is a common ground that EMR, is exempt under clause 5(d) of Notification No.160\1986-CE dated March 1, 1986. The case of the Revenue is that under clause 5(f) of the said Notification, the plastic body, a part of EMR, is liable to excise duty.

To appreciate the contentions of the learned counsel, it would be apt to read the Notification in question, insofar as it is relevant, here:

"Electric motors, generators, appliances, etc., falling under specified heading of chapter 84 or 85.

- A In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts the goods specified in column (3) of the Table hereto annexed and falling under the Heading No. or Sub Heading No. of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon which is specified in the said Schedule, as is in excess of the amount calculated at the rates specified in the corresponding entry in column (4) of the said Table.
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C	Sl. No.	Heading No. or Sub- Heading No. of the Schedule to The Central Excise Tariff Act, 1985.	Description of goods	Rate
	1	2	3	4
D	5.	85.16	(a) to (c) x x x	
			(d) Other domestic electrical appliances	Nil
E			(e) x x x	
			(f) Parts	20% ad valorem

- As can be seen from the excerpts of the Notification in question, the EMR has been exempted from the payment of excise duty but the parts of EMR are liable to duty at the rate of the twenty percent *ad valorem*. There is no dispute that the plastic body is a part of EMR. but for the purpose of clause (f) a part will be liable to duty only if it satisfies the attributes of 'goods' within the meaning of the Tariff Act. The twin requirements of 'goods' under the Tariff Act are : (a) manufacture and (b) marketability. Insofar as the first requirement is concerned, there is no dispute that plastic body is being manufactured by the respondents. The germane question is whether it has marketability. The plastic body is being manufactured to suit the requirements of the EMR of the respondents and is not available in the market for being bought and sold. It is not a standardised item or goods known and generally dealt with in the market. It is being manufactured by the respondents for its captive consumption. It is not a product known in the
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market with any commercial name.

We do not consider it necessary to discuss the cases on the question of marketability, as this court has dealt with all relevant cases in *A.P. State Electricity Board's* case (supra). In that case, the question was whether electric poles manufactured with cement and steel for the appellant-Board were marketable. After considering various cases on the question of marketability of goods, Jeevan Reddy, J., speaking for the Court, summed up the position thus:

“It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non-deodorised) concerned in *Union of India v. Delhi Cloth and General Mills*, (1963) Suppl. 1 [SCR] 586 or Kiln gas in *South Bihar Sugar Mills Ltd. v. Union of India*, (1968) 3 SCR 21 or aluminium cans with rough uneven surface in *Union Carbide India Ltd. v. Union of India*, [1986] 2 SCC 547 or PVC films in *Bhor Industries Ltd. v. Collector of Central Excise*, [1989] 1 SCC 602 or hydrolysate in *Collector of Central Excise v. Ambalal Sarabhai Enterprise*, [1989] 4 SCC 112 the finding in each case on the basis of the material before the Court was that the articles in question were not *marketable* and were not known to the market as such. The ‘*marketability*’ is thus essentially a question of fact to be decided on the facts of each case. There can be no generalisation. The fact that the goods were not in fact marketed is of no relevance.”

It may be noticed that in the cases referred to in the passage, quoted above, the reasons for holding the articles ‘not marketable’ are different, however they are not exhaustive. It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR. Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase plastic body of EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product.

- A** For these reasons, the plastic body, which is a part of the EMR of the respondents, is not 'goods' so as to be liable to duty as parts of EMR under para 5(d) of the said exemption notification.

- B** The next point relates to the classification of the Fragrant Mat: whether it is classifiable under sub-heading 3307.41 or 3307.49. The Revenue's case is that the Mat, being mosquito repellant, cannot be brought under Sub-Heading 3307.41 as by no stretch of imagination it can be said to be [Agarbatti' or 'Dhoop' and it cannot also be used during religious rites.

The Sub-Headings read as follows

C	Heading No.	Sub Heading No.	Description of goods	Rate of duty
	1	2	3	4
D	33.07	3307.41	—'Agarbatti', 'Dhoop' and similar preparations in whatever form	Nil
		3307.49	—Other	15%

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Sub-Heading 3307.30 refers to 'preparations for perfuming or deodorising rooms, including odoriferous preparations used during religious rites'. Under sub-heading 3307.30 is a further sub-heading 3307.41 in which are grouped 'Agarbatti, [Dhoop' and similar preparations in whatever form. A careful reading of sub-heading 3307.41 shows that preparations similar to that of 'Agarbatti' and 'Dhoop' also fall under it. Does the Fragrant Mat of the respondents fall under it? The process of preparation of the Fragrant Mat is given by the respondents in the writ petitions filed before the High Courts follows :

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- G** "On the same pattern the petitioner also planned to innovate conventional Agarbatti - a concept of JETAGE Agarbatti. In first place the petitioner has changed the body, i.e. instead of woodflour and charcoal dough which forms the body of Agarbatti, the petitioner developed a Paper Mat. Secondly, the perfumes and spreading agents like D.E.P., Fragrances, Alcohol etc. are put in the dough and sticks
- H** made. In petitioner's came (sick) the perfume and the same chemicals

are put in paper Mats. Thirdly, Perfumes and Spreading Chemicals get the heat through turning of woodflour and charcoal stick when stick is burnt with the Match stick. The perfumes and chemicals in traditional Agarbatti burns and spread perfume. If final burning media are used there will be less smoke. Therefore, smoke and ash does not identifying the Agarbatti. Finer the burning Chemicals, finer will be smoke added to it, if finer the burning medial (Regular heat) finer will smoke or vapours." A B

It is further stated that to repel mosquitos with insecticides, coil insecticides are used to be spread through fire with its natural concomitant with smoke and ash of which mosquito mat is a latest development technology, but the one manufactured by the respondents is different and is a Fragrant Mat. This is not specifically denied by the Revenue. What is stated in the counter affidavit filed by the Revenue, is that 'Mat' cannot be said to be 'Agarbatti' by any stretch of imagination and the Mat cannot be used in substitution of 'Agarbatti' on religious rites. C D

We have already mentioned above that not merely 'Agarbatti' and 'Dhoo' but *preparations which are akin to 'Agarbatti' and 'Dhoo'* and which can produce vapour on burning and spread perfume would fall within the meaning of that entry. From the process of manufacture of Fragrant Mat, noted above, it cannot but be held that preparation in Mat form is similar to that of 'Agarbatti'. Therefore, Fragrant, Mats are classifiable under Sub-Heading 3307.41 and not under 3307.49 of the Tariff Act. E

In this view of the matter, we do not find any illegality in the orders under challenge. The Civil Appeals are, therefore, dismissed. There shall be no order as to costs. F

R.P.

Appeals dismissed.