Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2377 OF 2002

Bata India Ltd. …. Appellant(s)

Versus

Commissioner of Central Excise, New Delhi ….Respondent(s)

J U D G M E N T

K.S. RADHAKRISHNAN, J.

1. The question that arises for consideration in this appeal is whether unvulcanised sandwiched fabric assembly produced in the Assessee's factory and captively consumed can be termed as "goods" and can be classified as "rubberized cotton fabrics" falling under sub-heading number 5905.10 of the schedule to the Central Excise Tariff Act, 1985.

2. The above question came up for consideration before the Customs, Excise and Gold (Control) Appellate Tribunal (for short 'the Tribunal). The Member (Judicial) took the view that the product would not

attract duty unless it is established that the goods in question is marketable or capable of being marketed as a distinct product and that the Revenue has failed to discharge the burden to prove the marketability and dutiability of the intermediate product in the manufacture of rubber/canvas foot wear. The Member(Technical), however, disagreed with that finding and held that the Revenue has discharged its burden and took the view that the goods in question attracts duty.

3. In view of the difference of opinions expressed by the two members, the matter was placed before a third member who concurred with the view expressed by the Member (Technical) and a final order was passed on the above issue by the Tribunal on 24.12.2001 holding that double textured rubberized fabric / unvulcanised sandwiched fabric is an excisable product liable to central excise duty. No opinion was expressed by any of the members on the question of exemption, applicability of notification and the quantum of penalty imposed and those issues were left to be considered when the appeal is finally posted for hearing.

4. Aggrieved by the findings of the Tribunal dated 24.12.2001 the assessee has come up before us with this appeal.

5. The Assessee is a well known manufacturer of foot wear. For the manufacture of foot wear, various raw materials are purchased by the assessee from the market and / or from their respective manufacturers such as fabrics, rubbers, chemicals, solvents etc. During the process of manufacturing of foot wear various chemicals / rubbers / solvents etc., are mixed together and a thin layer of such mixed materials is sandwiched in between two sheets of textile fabric, in running length, through a three bowl calendering machine. The product is later cut and stitched according to the assessee's requirements and in-process materials are used as shoe-uppers in the foot wear. Such fabrics are also at times sent to job workers for stitching purposes only and the fabric sandwiched with the mixed materials are inputs of the intermediate stage during the course of manufacture of footwear. Vulcanisation of the foot wear takes place only after completing the entire process and then it would be a finished product as a footwear, made available in the market and acquires commercial identity and turns out to be a commercially known product.

6. The Collector of Central Excise (in short the Collector) noticed that during the manufacture of foot wear the assessee manufactures an excisable product called double textured fabric which is further used as upper material in the manufacture of foot wear and this double textured

fabric is nothing but rubberized, water proof fabric with a thin layer of rubber sandwiched between two sheets of cotton fabric in running length. As a result of that process a double textured fabric emerges as a distinct product with specific properties and character other than that of original fabric used as input which is known in commercial trade parlance as double textured fabric which is used in considerable quantities for making rain-coats, holdalls, hand bags etc.

7. The Collector therefore, came to the conclusion that this double textured fabrics are marketable products fulfilling the requirement of the definition of excisable goods as per Section2(d) of the Central Excise 1944 (in short the Act) attracting the levy of central excise duty under the Act. The Collector then issued a show cause notice dated 29.03.1995 to the assessee stating it had manufactured and cleared double textured fabric valued at Rs.7,96,43,247/- for captive consumption in the manufacture of shoe-uppers used in 2,51,29,646 numbers of exempted canvas shoes without payment of duty amounting to Rs.88,80,782/- during the period from 01.04.1990 to 31.08.1994 without the cover of excise gate pass, without filing classification list, price list without accounting for production and clearance in the statutory central excise records and without observing other formalities prescribed under the Central Excise Rules, 1944. The

assessee was directed to show cause why the above amount be not recovered from them under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11(A) of the Act and also to show cause why penal action be not taken against them under Rule 173 Q(1) of the Central Excise Rule, 1944. Yet another show cause notice dated 30.03.1995 also was issued to the assessee claiming duty amounting to Rs. 5,95,181 during the period from 01.09.1994 to 06.12.1994 stating that the assessee had failed to pay duty for the rubberized fabric manufactured and cleared for captive consumption for the above period as well and to show cause why penal action be not initiated under Rule 173Q(1) of Rules 1944.

8. The assessee filed detailed objections to the show cause notices on 22.09.1995 and 19.02.1996 respectively, and the matter was heard by the Commissioner, Central Excise who confirmed the demands made in both the show cause notices and a total amount of Rs.89,77,064 was demanded from the assessee. The Commissioner of Central Excise also imposed a penalty of Rupees 1 crore on the assessee under Section 173 Q(1) of the Central Excise Rules, 1944. Aggrieved by the above mentioned order the assessee approached the Tribunal and the Tribunal by a majority order held that double textured rubberized fabrics / vulcanized stitched fabric is an excisable product attracting duty the correctness or

otherwise of that order is the issue that has come up for consideration before us.

9. Shri Ravindra Narain, learned counsel appearing for the assessee submitted that the Tribunal has committed a grave error in holding that the product manufactured by the assessee for their captive consumption is liable to duty under the Act. He submitted that the Tribunal has not properly appreciated the manufacturing process undertaken by the assessee and the question whether that intermediate product has commercial identity or marketability. Learned counsel also submitted that the Revenue has not discharged their burden of proof to establish that the product is excisable and marketable and capable of being marketed and that the Revenue has only produced three documents viz., the test report dated 20.10.1994, the SSB hand book of rubber products and the statement of Superintendent (Supply and Transportation) of the assessee's company which are insufficient to hold that product is marketable or capable of being marketed. On the other hand assessee has produced sufficient materials to establish that the material used by the assessee is not marketable and has no commercial identity.

10. Shri Narain also submitted that marketability is an essential ingredient to hold whether a product is dutiable or excisable and it is for the

Revenue to prove the same. Learned counsel also submitted that it is not the function of the Tribunal to enter into that arena and make suppositions, rather it should examine the question whether sufficient materials have been produced by the Revenue to discharge its burden. In support of his contention learned counsel placed reliance on various decisions of this court such as *Hindustan Ferodo Ltd*. vs. *Collector of Central Excise, Bombay* (1997) 2 SCC 677; *Union of India* vs. *Sonic Electrochem (P) Ltd*. (2002) 7 SCC 435; Cipla Ltd. vs. Commissioner of C.Ex., Bangalore 2008 (225) ELT 403 (SC).; *Gujarat Nermada Valley Fert. Co. Ltd.* vs. *Collector of Ex.& Cus*.(2005) 7 SCC 94.

11. Mr. V. Sekhar, learned senior counsel appearing for the Revenue, on the other hand, contended that the materials produced by the Revenue would be sufficient to hold that the product in question is a distinct product having commercial identity and is capable of being marketed. Learned counsel submitted that by the process undertaken by the assessee a new product emerges which is capable of being brought to market or being sold. Learned senior counsel also submitted that the material is also being sent out of the factory to the job workers for stitching purposes and is brought back from them, and, hence the said product is a commercially distinct product liable to be classified under the sub-heading

5905.10 of schedule to Central Excise Tariff Act. Reference was also made to the judgment of this court in *UOI* vs. *Delhi Cloth & General Mills Co.* 1997 (1) ELT J-199. Referring to the division bench judgment of the Calcutta High Court reported in (1993) 68 ELT 756 (Calcutta), learned counsel submitted that the Calcutta High Court on identical products, dealt with by the assessee, decided against the assessee.

12. We have heard counsel on either side at length and have also gone through the show cause notices issued by the Collector, objections filed by the assessee and the order passed by the Commissioner, views expressed by both the members and the order passed by the Tribunal on the question of exigibility of the product. The process undertaken by the assessee has been elaborately dealt with in the above mentioned orders and it is unnecessary to reiterate the same. Suffice it to say that the product in question is used as an intermediate product, goes to make the component for the final product. The burden to show that the product in question is marketed or capable of being bought or sold in the market so as to attract duty is entirely on the Revenue. Reference may be made to the decision of this Court in *Union of India* vs. *Delhi Cloth and General Mills Co.* (1997) 5 SCC 767. The test of marketability often called 'Vendability test' has been elaborately considered by a constitution Bench

Judgment of this Court in *Union of India* vs. *Delhi Cloth and General Mills Company Limited* AIR 1963 SC 791. This legal position has been reiterated by this Court in *A.P. State Electricity Board* vs. *Collector of Central Excise, Hyderabad* (1994) 2 SCC 428 and various other decisions, wherein this Court held that the marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization, and the fact that goods are not in fact marketed is of no relevance and the question whether they are capable of being marketed. Admittedly, the assessee is not marketing the product but still the question is whether the product is capable of being marketed.

13. The Revenue in this case has not produced any material before the Tribunal to show that the product is either been marketed or capable of being marketed but expressed its opinion unsupported by any relevant materials. This Court in *Hindustan Ferrado Limited* (supra) explained the function of the Tribunal in such situations as follows:-

> "It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that a party before it has failed to lead. Other than supposition, there is no material on record that suggests that a small scale or medium scale manufacturer of brake linings and clutch facings "would be interested in buying" the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants' averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself.

> Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution."

14. In the above case this Tribunal was concerned with articles such as rings punched from asbestos boards and two types of asbestos fabrics, namely, special fabrics in coil of continuous length and M.R. grey in rolls. This Court noticed that the Revenue had not produced any evidence to establish that the said rings fell within Item 22F of Schedule to the Act and held in favour of the assessee.

15. In *Sonic Electrochem Limited* (supra) this Court was dealing with the question whether plastic body, a part of electronic mosquito repellant and fragrant mat are chargeable to excise duty under Articles 5(f) of Notification 160/68-CE dated March 1, 1986 and sub-heading 3307.49 respectively of the Central Excise and Tariff Act, 1985. In that case, this Court held that in order to establish that goods are liable to duty, two test have to be satisfied viz., (a) manufacture and (b) marketability. On the question of marketability of the articles this Court held as follows :-

> "…..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 got and sold. The fact that product in question is generally not been got 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. 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."

16. In *Gujarat Narmada Valley Fertilisers Corporation* (supra), this Court was dealing with the question whether the intermediate chemicals which are formed in the process of manufacture Butachlor are liable to tax under the Salt Act and held that the test report produced by the Revenue will not establish the marketability of the product. It further held that unless the product is capable of being marketed and is known to those who are in the market as having an identity as distinctly identifiable that the article is subject to excise duty, the product cannot be treated as a product that is marketable. Marketability cannot be established by mere stability of the product. Something more would have to be shown to establish that the products are known in the market as commercial product.

17. In *Cipla Limited* (supra) this Court was examining the question whether Benzyl Methyl Salycylate (BMS) is marketable and therefore liable

to excise duty. After referring to various earlier decisions of this Court , it was held that marketability is an essential ingredient to hold that an article is dutiable or excisable to duty and it is well established principle of law that the burden is on the Revenue to prove that the goods are marketable or excisable and held that the product in question was neither marketed nor marketable and was only an intermediate product. It is useful to refer to the law laid down by this Court which reads as follows:-

> " Since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to prove that the product was marketable or was capable of being marketed. Manufacturing activity, by itself, does not prove the marketability. The product produced must be a distinct commodity known in the common parlance to the commercial community for the purpose of buying and selling. Since there is no evidence of either buying or selling in the present case, it cannot be held that the product in question was marketable or was capable of being marketed. Mere transfer of BMS by the appellant from its factory at Bangalore to its own unit at Patalganga for manufacture of final product was either marketed or was marketable."

18. Revenue in this case has not succeeded in establishing that the product in question was either marketed or was capable of being marketed. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. No evidence has been produced by the Revenue to show the product unvulcanised sandwiched fabric as such is capable of being marketed, without further

processing. The question is not whether there is an hypothetical possibility of a purchase and sale of the commodity but whether there is sufficient proof that the product is commercially known. The mere fact that the product in question was entrusted outside for some job work such as stitching is not an indication to show that the product is commercially distinct or marketable product. Without proof of marketability the intermediate product would not be goods much less excisable goods. Such a product is excisable only if it is a complete product having commercial identity capable of being sold to a consumer which has to be established by the Revenue.

19. The test report dated 25.10.1994 of the Chemical Examiner, SPB hand book of rubber products and the statement of the Superintendent (Supply and Transportation) of the assessee's company do not show that the product in question is capable of being marketed. The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold. Theory and practice will not go together when we examine the marketability of a product. On the other hand materials produced by the assessee i.e. affidavit of Mr. Shomnath Chokravarty, Consultant – Rubber and Plastic Technology, affidavit of the Production Manager of the assessee Company, certificate of

Prof. C.K.Das, IIT, Kharagpur, affidavit of Ms. Parvati Pada Mukherjee, certificate from Footwear Design and Development Institute, Ministry of Commerce, Government of India and The Vanderbilt Rubber Handbook, would show that the product in question is only an intermediary product generally used for captive consumption which has no commercial identity as such.

20. We are also of the view that no reliance can be placed on the Division Bench Judgment of the Calcutta High Court reported in *Union of India (UOI)* vs. *Bata India Ltd.* 1993 (68) ELT,756 (Cal) since this Court while dismissing SLP(C)No.6146 of 1993 filed by the assessee against the above judgment clearly opined that the merits of the case was not being looked into since the operative portion of the judgment was in favour of the assessee herein and hence the question as to whether the product was excisable or not was not decided.

21. In view of the above facts and circumstances, we are inclined to allow this appeal and set aside the order of the Tribunal and quash the show cause notices issued to the assessee since the Revenue had not produced any relevant materials to show the marketability of the product. We are informed that *vide* Notification No.143/94-CE dated 7.12.94 the product in question stands exempted if captively used for the manufacture

of exempted footwear. Civil appeal is, therefore, allowed as above, directing the Tribunal to dispose of the appeal without delay.

……..J.
(DALVEER BHANDARI)

……..J.
(K.S. RADHAKRISHNAN)

New Delhi;
April 12, 2010