

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NOS. 4822-4825 OF 2015****COMMISSIONER OF CENTRAL EXCISE
& SERVICE TAX, BANGALORE****... APPELLANT****VERSUS****M/S KARNATAKA SOAPS & DETERGENTS LTD.****... RESPONDENT****J U D G M E N T****S.ABDUL NAZEER, J.**

1. These appeals raise two questions, namely:

- (i) Whether the Board's Circular No.495/61/99-CX.3, dated 22.11.1999 exempts payment of excise duty on perfumery compound manufactured by the respondent; and
- (ii) Whether actual marketing of the perfumery compound is necessary for the levy of excise duty.

2. The respondent is a manufacturer of agarbathi perfumes. The agarbathi perfumes are odoriferous compound prepared by the respondent in its Bangalore unit and then transported to its Mysore unit, where it is applied to agarbathis to complete the process of manufacture of agarbathis. The respondent was paying excise duty

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JAYANT KUMAR BHORA
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in respect to these odoriferous compounds till March 2001 as this substance is covered under Chapter Sub-Heading 3302.90 of the First Schedule to the Central Excise Tariff Act, 1985. The Central Board of Excise and Customs (for short 'the

Board') issued the aforesaid circular which clarified that the odoriferous substance, not capable of being bought and sold in the market in the normal course of trade, is not excisable. The respondent transferred the odoriferous compounds to its Mysore unit on stock transfer basis. Some part of the compounds was sold to M/s. Tibetan Handicrafts Centre, Bylkuppe, Mysore District.

3. The Additional Commissioner of Central Excise, Bangalore-III, issued show-cause notices calling upon the respondent to pay excise duty along with penalty and interest at the appropriate rates under Sections 11A, 11AB and 11AC of the Central Excise Act, 1944 (for short 'the Act') for the period 2001-2002 to 2006-2007. These notices were contested by the respondent. The Additional Commissioner passed orders holding that the Board's circular dated 22.11.1999 is not applicable to the respondent and hence the respondent is liable to pay excise duty, penalty and interest thereon in respect of odoriferous substance prepared by it. These orders were confirmed by the appellate authority in the appeals filed by the respondent. The respondent challenged the said orders before the CESTAT, South Zonal Bench, Bangalore. The CESTAT has allowed the appeals and set aside the said orders to the extent they uphold the demand of duty, interest thereon and the penalty imposed on the appellant for which there was no evidence of sale. The Revenue has challenged the legality and correctness of the said orders in these appeals.

4. Appearing for the Revenue, Sri P.S. Narasimha, learned Additional Solicitor General, submits that the rate of duty to be paid on the perfumery compounds is clearly mentioned under Chapter Sub-Heading 3302.90 of the First Schedule to the

Central Excise Tariff Act, 1985 and it is on this rate that the respondent used to pay duty till March, 2001. The respondent is, therefore, not entitled to the benefit under the ambit of the circular dated 22.11.1999. The respondent does not manufacture agarbathi as per the general practice which has been contemplated under the circular dated 22.11.1999. The respondent manufactures perfumery compounds in its Bangalore unit and then transports them to its Mysore unit where it is finally applied to raw agarbathis to complete the manufacturing process of agarbathis. In this process of manufacturing, the perfumery compounds are capable of being sold in the open market.

5. It is further submitted that CESTAT erroneously devised a test of actual sale of the odoriferous substance to hold that in the absence of actual sale of such substance, no excise duty could be levied on the same. It is argued that the respondent has sold the Venkateshwara Brand agarbathi perfumery compound to Tibetan Handicrafts Centre vide invoice Nos. 9 and 33 dated 11.5.2004 and 10.8.2004 respectively. The CESTAT ought to have appreciated that although the final product, i.e. the agarbathi, is exempted, the intermediate product has got marketability.

6. On the other hand, Ms. L. Charanya, learned counsel appearing for the respondent-assessee submits that the perfumery compound manufactured by the respondent and the stock transferred to their Mysore unit for use in particular brands of agarbathis is non-excisable as per the Board circular dated 22.11.1999. It is further contended that the perfumery compound manufactured as such, is not marketed by the respondent. Therefore, it does not attract excise duty. She prays for dismissal of the

appeals.

7. We have carefully considered the submissions of the learned counsel for the parties. The basic issue is with regard to the exciseability of the product, viz. agarbathi perfume also called as odoriferous compound which is used in manufacture of agarbathis sold in the market. The Board vide its circular clarified that such odoriferous compound mixed with dough is not excisable. For better understanding, the Board's circular is as under:

“The Board's Circular No.495/61/99-CX.3 dated 22.11.1999:

Subject: Excisability of Odoriferous compound/Agarbathi mix arising during the course of manufacture of Agarbathi – Regarding.

It has been brought to the notice of the Board that field formations are demanding duty on the compound preparation arising during the course of manufacture of Agarbathi classifying them under Heading 3302.90 of the Central Excise Tariff as odoriferous compound.

2. The matter has been examined in the Board. The Agarbathi manufacturing process involves simple mixing of a few aromatic chemicals with a base oil in a container in liquid form which is mixed directly with the dough or applied on Agarbathi in the required proportion and such dough, mixed with the aromatic compound; is used for rolling of Agarbathi. The Agarbathi manufacturers normally carry out the whole process in a continuous manner in the course of manufacture of Agarbathi.
3. Moreover, each brand of Agarbathi has a different fragrance which is on account of the different formulation used by the manufacturers which is specific to that particular brand. Preparation of such odoriferous compound, substances applied on the Agarbathi varies from one Agarbathi manufacturer to another. Such preparations are not sold by them in the market so as to

keep their respective trade secrets. As the constituents, their proportions and formula of preparation are kept as secret, such compounds cannot be considered to be marketable in the commercial parlance.

4. Accordingly, it is clarified that the odoriferous compound or Agarbathi dough mixed with odoriferous substances, not being capable of being bought and sold in the market in the normal course of trade, is not an excisable product and no duty is therefore, leviable on such compound arising during the course of manufacture of Agarbathi.”

8. The above circular is issued in the context of dispute with regard to dutiability/excisability of mixture, viz. aromatic chemicals (perfumes) which is also classifiable as odoriferous compound, under Central Excise Tariff and comes into existence during the course of manufacture of agarbathis, in a continuous process, as an intermediate product. The circular clarifies that odoriferous substances are not marketable because these products are not sold by manufacturers in order to protect their trade secret. The circular by way of illustration also stated that the whole process of manufacturing agarbathi, that is preparation of the odoriferous compounds and their mixing with the dough or agarbathi is normally carried out in a continuous manner since the whole process is continuous. These odoriferous substances do not remain with the manufacturer to be sold in the market.

9. The Central Excise Chapter Heading No. 3302.90 covers all types of mixtures of odoriferous substances of a kind, used as raw materials in industries. It is clear from the records that respondent does not manufacture agarbathi as per general practice which has been contemplated under the circular dated 22.11.1999. The respondent manufactured perfumery compound in its Bangalore unit and then

transported it to Mysore where it is finally applied to raw agarbathis to complete the manufacturing process of agarbathi. In this process of manufacturing, the perfumery compound is capable of being sold in the open market. It is not in dispute that appellant has sold some part of the compound to M/s. Tibetan Handicrafts Centre, Bylkuppe, Mysore District.

10. Thus, it is evident that the clarification is applicable to the product which comes into existence, at intermediate stage in the form of paste/dough in a continuous process of manufacture and not to the manufacture of odoriferous perfume, which is in liquid form and transported/stored in barrels/drums. The said circular cannot be made applicable to cases beyond its scope. The circular cannot be equated with that of an exemption notification but is required to be read within the limited scope of its context in which it was issued. The circular did not give exemption to products which are otherwise dutiable. The circular clarifying certain doubts cannot give effect of an exemption notification. Therefore, it cannot be said that the agarbathi compound manufactured by the respondent is covered under the aforesaid circular.

11. The next question for consideration is whether actual marketing of the perfumery compound manufactured by the respondent is necessary for the levy of excise duty. It is settled that to hold the product as excisable/dutiable, actual marketing/sale of goods is not necessary. What is required to be proved is that the capability of marketing the product. Marketability is decisive test for dutiability. Whether the goods are, in fact, marketed or not is of no relevance. It is also not necessary that goods in question should be generally available in the market. Even if

the goods are available from only one source or from a specified market, makes no difference so long as they are available for purchasers. (See **A.P. State Electricity Board v. Collector of Central Excise, Hyderabad**, (1994) 2 SCC 428.)

12. In **Escorts Limited vs. Commissioner of Central Excise, Faridabad**, (2015) 9 SCC 109, this Court has held that for excise duty to be chargeable under the constitutional entry read with Section 3 of the Central Excise Act, two prerequisites are necessary. First, there must be “manufacture” which is understood to mean the bringing into existence of a new substance. And secondly, the word “goods” necessarily means that such manufacture must bring into existence a new substance known to the market as such which brings in the concept of marketability in addition to manufacture. ‘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 goods are not in fact marketed is of no relevance. So long as the goods are marketable, they are goods for the purposes of Section 3 of the Act. It is also not necessary that the goods in question should be generally available in the market. The marketability of articles does not depend neither upon the number of purchasers nor is the market confined to the territorial limits of this country.

13. In the instant case, the assessee manufactures agarbathi perfumes (odoriferous compound) by mixing inputs, aromatic chemicals, perfume oil and acids according to the pre-determined formula. It is prepared by the respondents in their Bangalore factory and then transferred to their Mysore factory where finally it is applied on raw agarbathis. In this process of manufacturing the perfumery compounds are capable of

being sold in the open market. The odoriferous compound has got a shelf life and capable of being stored/transported/sold and bought by agarbathi industries. As noticed above, the assessee had sold certain quantity of perfumery compound to M/s. Tibetan Handicrafts Centre Bylkuppe, Mysore District. Therefore, we are of the view that it is an excisable product falling under Chapter Sub-Heading 3302.90. The counter view taken by the CESTAT cannot be justified. Hence, the appeals are allowed and the orders dated 11.11.2010 passed by the CESTAT are hereby set aside. No costs.

.....J.
(MADAN B. LOKUR)

.....J.
(S. ABDUL NAZEER)

.....J.
(DEEPAK GUPTA)

New Delhi;
OCTOBER 12, 2017.

ITEM NO.1501

COURT NO.4

SECTION IV-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 4822-4825/2015

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX,
BANGALORE

Appellant(s)

VERSUS

M/S KARNATAKA SOAPS & DETERGENTS LTD

Respondent(s)

Date : 12-10-2017 These appeals were called on for Judgment today.

For Appellant(s) Mr. B. Krishna Prasad, AOR

For Respondent(s) Mr. L. Badri Narayanan, Adv.
Ms. L. Charanya, Adv.
Mr. Aditya Bhattacharya, Adv.
Mr. Victor Das, Adv.
Ms. Apeksha Mehta, Adv.
Mr. M. P. Devanath, AOR

Hon'ble Mr. Justice S. Abdul Nazeer pronounced the reportable Judgment of the Bench comprising Hon'ble Mr. Justice Madan B. Lokur, His Lordship and Hon'ble Mr. Justice Deepak Gupta.

The appeals are allowed.

Pending Interlocutory Applications, if any, stand disposed of.

(JAYANT KUMAR ARORA)
COURT MASTER

(SNEH LATA SHARMA)
COURT MASTER

(Signed reportable Judgment is placed on the file)