IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.1983-1987 OF 2008

COMMISSIONER OF CENTRAL EXCISE, VADODARA ...APPELLANT(S)

VERSUS

M/S VADILAL GASES LTD. & ORS. ...RESPONDENT(S)

O R D E R

1. The adjudication of a show cause notice under Section 11A of the Central Excises and Salt Act, 1944 by the Commissioner, which was adverse to the assessee, was interdicted by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench (hereinafter referred to as "the Tribunal") by the impugned order on a finding that the process deployed in the unit of the assessee did not amount to manufacture within the meaning of Note 10 of Chapter 28 of the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff Act"). The learned Tribunal having interdicted

the attempt on the part of the adjudicating authority to hold that the assessee was liable to pay the differential duty on the finding recorded on the core issue, namely, that the activity undertaken by the assessee did not amount to manufacture, the other questions arising, namely, the availability of the extended period of limitation under the proviso to Section 11A of the Act and also whether the sales/transfers were to related person and not made at arms length were not gone into by the learned Tribunal.

2. The above truncated scope of the matter is what would require consideration of this Court in the present proceedings.

3. We have heard the learned counsels for the parties.

4. Note 10 of Chapter 28 of the Tariff Act is in the following terms :

> **"In relation to products of this Chapter, labelling or relabelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'."**

5. Reading the aforesaid Note 10 of Chapter 28 of the Tariff Act would go to show that the deeming provision contained therein with regard to what would also amount to manufacture is in two parts. The first is where labelling or relabelling of containers and repacking from bulk packs to retail packs is undertaken and secondly where the adoption of any other treatment is undertaken to render the product marketable to the consumer. Whether either of the two situations are attracted to the present case, is the moot question that would require an answer from the Court.

6. The learned Commissioner in the adjudication order dated 08.12.2006 has elaborately dealt with the process deployed in the unit of the assessee after receipt of liquified Nitrogen and Argon in bulk in cryogenic tankers. The details in this regard may be usefully extracted below :

> **"The cryogenic tankers are owned by M/s. VCL, a sister company of M/s. VGL. The liquefied Nitrogen and Argon are re-gassified, and packed in cylinders of 6 cubic metres or 7 cubic metres**

capacity for retail sale. The cylinders are owned by M/s. VCL. Before filling the gases, the cylinders are cleaned for removal of impurities like moisture, oxygen, carbon dioxide, etc., so that the gases filled in the cylinders are as much free of the impurities of oxygen, moisture, carbon dioxide etc., as possible. The gases according to the level of purity are graded as VCL I Nitrogen, VCL I Argon, VCL II Nitrogen, VCL II Argon, UHP Argon, etc., - the UHP grade being the purest. Besides pure Argon and Nitrogen, M/s. VCL also make mixtures of gases i.e., Argon with Carbon Dioxide, Argon with Oxygen, Argon with Nitrogen, Nitrogen with Carbon Dioxide, Nitrogen with Oxygen, etc., in which gases are mixed in a fixed proportion and the same are also packed in retail cylinders of 6 or 7 cubic metres capacity. After packing of the Nitrogen, Argon, and gas mixtures in retail cylinders, the same are affixed with a label mentioning the name of the product, purity grade, the level of impurities, batch no. and cylinder no. The labels also bear the name of the marketing company – M/s. Vadilal Chemicals Ltd. (M/s. VCL), a sister company, as well as the monogram of Vadilal group. The labels being affixed on the cylinders."

7. Insofar as the first limb of Note 10 of Chapter 28 of the Tariff Act is concerned, even if we proceed on the basis that labelling or relabelling had taken place after transfer of the gases from the bulk containers/tankers to smaller cylinders, Note 10 of Chapter 28 of

the Tariff Act mandates that the additional requirement that has to be satisfied so as to attract the deeming provision contained therein is that repacking from bulk packs to retail packs have also taken place.

8. The above issue need not detain the Court. We have a decision of the learned Tribunal in *Ammonia Supply Company* vs. *CCE, New Delhi*[1] wherein the Tribunal has taken the view that Amonia coming in tankers cannot be treated to have come in bulk packs. In this regard, there is also a Circular dated 08.10.1997 where this question has been dealt with by the Ministry of Finance (Department of Revenue) in the following way:-

> **"In this context clarification have been sought regarding the scope of the expression "relabelling of containers and repacking from bulk packs". Doubts have been raised as to whether receiving of liquid chemicals in bulk in containers and offloading the same at the dealers premises or godown into available empty vessel and consequent delivery of these material in the very same condition to customers against orders can be held to be an act of repacking operations as envisaged in the said chapter note or not.**

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1 2001 (131) E.L.T. 626 (Tri.-Del.)

> **Whether an operation amounts to repacking or not, is a question to be decided on facts. However, activity such as simply transferring the material from one container to another container may not be categorised under the scope of this description. The goods are packed either for wholesale or for retail sale. Generally the expression "Packing" is considered as package containing a prepacked commodity and the quantity of product contained therein is also pre-determined. The packing is also generally done without the purchaser being present. The packages also contain information such as name of the manufacturer, quantity, value and other details of the product."**

9. The decision of the learned Tribunal in *Ammonia Supply Company* (supra) has attained finality as the Department had not challenged the same.

10. Having read the relevant part of Note 10 of Chapter 28 of the Tariff Act, the reasoning adopted by the learned Tribunal in *Ammonia Supply Company* (supra) and the contents of the Circular dated 08.10.1997, we are of the view, that the conclusion of the learned Tribunal, as above, does not suffer from any infirmity which would require our

interference.

11. This would bring the Court to a consideration of the second limb of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act, namely, deployment of any other treatment to render a product marketable.

12. From the manufacturing activity undertaken by the assessee, as found by the learned Commissioner himself, and as extracted above, the assessee apart from packing pure Argon and Nitrogen in smaller cylinders is also engaged in the activity of mixing of inert gases (like argon, nitrogen, helium etc.) with other gases like oxygen, nitrogen, carbon dioxide and making available such combination to the consumers in smaller cylinders. Whether such mixing of the gases in question amount to manufacture has been gone into by the learned Tribunal in *Goyal Gases (P) Ltd. vs. CCE, Meerut*[2]. Paragraph 11 of the report in *Goyal Gases (P) Ltd.* (supra) being relevant may be extracted below :-

2 2000 (115) ELT 467 (Tribunal)

"Appellants M/s. Goyal Gases (P) Ltd. have stated that they had been initially supplying various gases like liquid Nitrogen, liquid Argon, Hydrogen, Helium, etc. separately but subsequently, on demand from customers they had started supply of such gases in one cylinder as this was considered more economical to the customer as also convenient and time saving. The mixing of oxygen was with inert gases viz., crypton, helium, neon etc. which did not chemically react with each other. Since the mixture was with inert gases like argon, crypton, etc. which did not react chemically with each other, the inert gases remain separate even though kept in the same container. There was no lending or borrowing of any electron by either of the gases and the gases remained individually identified. The individual gases also retained their properties and were separately identifiable while in use. For example, when the mixture of argon and nitrogen is used in the manufacture of electric lamp, the argon gas performs the function of making the illumination. The Nitrogen gas gives long life to the filament of the bulb. Similarly, when the mixture of argon and carbondioxide is used in welding, the argon gas creates an inert atmosphere while the carbon dioxide gas stops oxidization of the material. Thus the individual gases retained their individual properties even when filled in the same cylinder. With the advent of modern techniques and the facility of filling two or more gases in one cylinder, the customers found them more economical to handle the gases and it saved labour. Further it was not necessary for the customer to mix these gases individually in a desired ratio, since such an exercise was more risky and needs expert technical handling. The question is

> **whether in such circumstances the mixture of two or more gases in one cylinder amounted to manufacture in terms of Section 2(f) of the Central Excise Act....."**

13. The decision of the Tribunal in *Goyal Gases (P) Ltd.* (supra) to the effect that such activity (mixing of gases) did not amount to manufacture has been affirmed by this Court by its order dated 03.04.2000 reported in *Commissioner of Central Excise* vs. *Goyal Gases (P) Ltd.*[3] which is in the following terms :-

> **"The Tribunal has categorically held that no evidence was led by the Department to controvert the assessee's case that no new product with distinct usage and marketability had been produced. Even so, it is contended that the Tribunal failed to appreciate that by the mixing of four more gases a totally different product with distinct use and marketability was produced. We find, having heard the learned Additional Solicitor General, that there is, in fact, no evidence led by the Department to establish that case. The reliance upon the order of the Commissioner would appear to be misplaced because the Commissioner's *ipse dixit* carries the matter no further."**

14. While it may be correct that in *Goyal Gases (P) Ltd.* (supra), the scope and

3 2000 (119) E.L.T. 5 (S.C.)

effect of Note 10 of Chapter 28 of the Tariff Act was not specifically under consideration, nonetheless, the conclusion of the learned Tribunal, affirmed by this Court, to the effect that the mixture of an inert gas with oxygen, nitrogen etc. does not result in creation of a new commodity, marketable as such, would be relevant insofar as the second limb of Note 10 of Chapter 28 of the Tariff Act is concerned. The finding in *Goyal Gases (P) Ltd.* (supra) that notwithstanding the mixing, the gases retained their individual properties even after being filled up in the same cylinder would clearly demonstrate that a new marketable product does not come into existence by the process of mixing. In this regard, the fact that the two items constituting the mixture are also separately marketable would be relevant in determining the applicability of the second part of Note 10 of Chapter 28 of the Tariff Act to the present case.

15. If that be so, we do not see as to how on the findings recorded by the learned

Commissioner with regard to the "manufacturing process" and the data laid before us as well as the ratio of decision in *Goyal Gases (P) Ltd.*(supra), a view can be taken that the second part of the requirement stipulated by Note 10 of Chapter 28 of the Tariff Act is attracted in the present case and any new marketable product/item comes in existence by the process of mixture of gases in question.

16. The reliance placed by the appellant-Revenue on the decision of this Court in *Air Liquide North India Private Limited* vs. *Commissioner of Central Excise*[4] does not assist the Revenue in any manner. In the said case, neither the adjudicating authority nor this Court had the benefit of the details of the manufacturing process inasmuch as the same was kept away from the Court by the assessee by contending the same to be a "trade-secret". In these circumstances, this Court in coming to its conclusion that the process deployed amounted to manufacture within the meaning of Note 10

4 (2011) 15 SCC 264

of Chapter 28 of the Tariff Act relied on certain other features of the case, details of which have been set out in para 16 of the judgment, which may be noticed below :

> **"The only conclusion from the above is that the tests and the "process" conducted by the appellant would amount to "treatment' in terms of Chapter Note 10 of Chapter 28 of the Tariff Act of the Act. The fact that the gas was not sold as such is further established from the fact that the gas, after the tests and treatment, was sold at a profit of 40% to 60%. if it was really being sold as such, then the customers of the appellants could have purchased the same from the appellant's suppliers. When this question was put to the officer of the appellant, he could not offer any cogent answer but merely stated that it was the customers' preference. Further, he did not give proper answer as to how the profit margin was so high. The appellant had supplied the gas not as such and the under the grade and style of the original manufacturer but under its own grade and standard. Further, while selling the gas, different cylinders were given separate certificates with regard to the pressure, moisture, purification and quality of the gas. This explains the high price at which the appellant was selling the gas. Therefore, in our opinion, the Tribunal has rightly observed that if no treatment was given to the gas purchased by the appellant, the customers of the appellant would not have been purchasing helium from the appellant at a price 40% to 60% above the price at which the appellant was purchasing."**

17. In the light of the above, we do not see how the decision of this Court in *Air Liquide North India Private Limited* (supra) can assist the revenue in bringing home the point urged before us in the appeals under consideration.

18. For the reasons aforementioned, the appeals have to fail and the order of the learned Tribunal has to be affirmed, which we hereby do. Accordingly, the appeals are dismissed. The order of the Appellate Tribunal having been affirmed, we do not consider it necessary to decide any of the other issues decided by the learned adjudicating authority, as indicated by us.

.....,J.
(RANJAN GOGOI)

.....,J.
(ASHOK BHUSHAN)

NEW DELHI
JANUARY 12, 2017

ITEM NO.101 COURT NO.4 SECTION IIIB

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). 1983-1987/2008

COMMISSIONER OF CENTRAL EXCISE, VADODARA Appellant(s)

VERSUS

M/S VADILAL GASES LTD. & ORS. Respondent(s)

Date : 12/01/2017 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE RANJAN GOGOI
HON'BLE MR. JUSTICE ASHOK BHUSHAN

For Appellant(s) Mr. A.K. Panda, Sr. Adv.
Ms. Alka Agrawal, Adv.
Ms. Sunita Rani Singh, Adv.
Mr. B. Krishna Prasad,Adv.

For Respondent(s) Mr. V. Lakshmikumaran, Adv.
Mr. Aditya Bhattacharya, Adv.
Mr. Victor Das, Adv.
Mr. Anandh K, Adv.
Mr. Yogendra Aldak, Adv.
Mr. M. P. Devanath,Adv.
Mr. Karan Sachdev, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeals are dismissed in terms of the signed order.

Pending application(s), if any, stand disposed of.

(Neetu Khajuria)
Court Master

(Asha Soni)
Court Master

(Signed order is placed on the file.)