

**Philips India Ltd. Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Jul-08-1997

**Reported in :** (1999)(80)LC719Tri(Mum.)bai

**Judge :** K Venkataramani, Vice-, J S Murthy

**Appellant :** Philips India Ltd.

**Respondent :** Cce

**Advocate for Pet/Ap. :** Mr. Dholakia

**Judgement :**

1. These appeals arise out of a common order passed by the Commissioner of Central Excise, Mumbai-III. The appellants manufacture GLS Lamps and Bulbs falling under heading 85.39 of the Central Excise Tariff Act, 1985. The lamps are fully exempt under Notification No. 63/83 as amended. During the course of manufacture of lamps and bulbs, the Department found that a product called 'Stem emerges which is produced in the stem making machine. Proceedings were initiated against the appellants by a show cause notice issued on 2.9.1993 on the ground that the stems produced by the appellants are identifiable parts of bulb and are capable of storage. It was also alleged the stems by virtue of Section Note 2(b) of Section XVI of the Central Excise Act, 1985 are classifiable as parts of GLS lamps and bulbs under sub-heading 8539.00 CETA. The show cause notice proposed to demand the duty of Rs. 75,98,428/- for the period August, 1988 to June, 1993 and further five show cause notices were also issued periodically for

the period from July, 1993 to December, 1995. After considering the reply to the show cause notice and hearing the appellants in the matter, the Commissioner rejected their contention that the goods are not marketable and therefore are not excisable goods at all and confirmed the demand invoking the longer period under Section 11A for a total duty in all the show cause notices of Rs. 1,42,38,790.50. He also imposed a penalty of Rs. 75,98,428/-, on the appellant under Section 11 AC of the Central Excises Act, 1944 as also a further penalty of Rs. 50.00 lacs under Rule 173Q of Central Excise Rules in respect of other 5 show cause notices. The Commissioner also demanded interest at the rate of 20% on the delayed payment of duty as per the provisions of Section 11AB of Central Excise Act, 1944.

2. The Ld. Counsel Shri D.B. Shroff for the appellants referred to the detailed process of manufacture of the stem as given in their appeal memorandum. The Ld. Counsel pointed out that the process is a integrated one. The stem is manufactured in the stem making machine.

The inputs for the stem are flares, exhaust tubes, and lead-in-wire which are manufactured in their factory. The flare is loaded and clamped in flare jaw. Two lead-in-wires are loaded in the fire pot through the flare. The exhaust tube is loaded in the centre of the flare and clamped with the help of exhaust tube jaw. After further process the whole assembly is annealed, stem is made. The entire process, the Ld. Counsel submitted, is one composite and integrated process and at no stage is it possible to handle any material including the stems; if any material is so handled the same will have to be rejected and discarded and cannot be used for further process for conversion into a bulb. The Ld. Counsel urged that the stem is not marketable and it is not known in the market also. The Ld. Counsel referred to the reasoning in the Commissioner's order that because the appellants are using the goods captively, the marketability criterion is satisfied and also that because the goods as parts of bulbs are listed in the CETA, they are excisable goods. The Ld. Counsel in this context cited and relied upon the Supreme Court judgment in the case of Bhor Industries Ltd. v. Collector of Central Excise Nirlon Synthetic Fibres & Chemicals Ltd. v. Collector of Central Excise in which it was held that it was not enough that there should be manufacture and manufactured

product should find mention in the Excise Tariff. It was necessary also to establish marketability, and if it was not done, no Excise duty could be levied upon the material. In the present case the appellants have produced the Affidavit of Shri V.D. Patankar B.E. Sr. Manager Technical, who has stated therein that the stems are not stored but are taken and loaded mechanically on to the mounting unit Holding Jaws continuously. Stems cannot be stored and any handling thereof by human hands will deteriorate the bulb quality and drastically reduce the lamp life. The appellants have also supported their case of non-marketability by Affidavit from dealers in electric bulbs, who have stated that there is no market for such stems, and nobody buys and sells the material. As against this, the department has not produced any evidence. The Ld.

Counsel further contended that there was no justification for involving the longer period for demanding the duty in this case since for so many years the appellants have been manufacturing bulbs and the department is very much aware of their production process and the stems as part of the bulb are visible to the naked eye. Reliance was placed by the Ld.

Counsel in this regard on the Supreme Court judgment in the case of Cosmic Dye Chemical v. Collector of Central Excise, Bombay and Tamil Nadu Housing Board v. Collector of Central Excise, Madras that intent to evade payment of duty must be proved for involving the longer period under Section 11A of the Central Excise Act, 1944. It was further contended by the Ld. Counsel that even assuming the stems are liable to duty the appellants will be entitled to Modvat credit on the inputs used in its manufacture irrespective of the facts that the procedural requirement of Modvat credit had not been fulfilled. For this arguments the Ld. Counsel relied upon the Supreme Court judgment in the case of Formica India Division v. Collector of Central Excise . It was also contended that the penalty under Section 11 AC and interest under Section 11AB are not chargeable during the period when these statutory provisions were not in force, as has been decided by the Tribunal in the case of Maruti Udyog Limited v. Collector of Central Excise, New Delhi 1998 (25) RLT 246 (Cegat). In the present case the duty demand relates to a period prior to 28.9.1996 when these provisions came into effect.

3. Shri S.V. Singh the Ld. JDR contended that the Department is justified in involving the longer period under Section 11A because the appellants at no stage gave a detailed disclosure of their manufacturing process relating to production of stems. They have also not indicated what is the basis for their belief that the stems are not excisable goods. The Ld. JDR pointed out that parts of bulb are classifiable under heading 85.39 as is evident from the Explanatory Note from HSN on which the Central Excise Tariff is based and the Notification 67/83 extending exemption to parts of bulbs would further confirm the conclusion of stems as articles which are traded in the market. The Ld. DR relied upon the Supreme Court judgment in the case of Moti Laminates Pot. Ltd. v. Collector of Central Excise where the Supreme Court has held that it is for the assessee to prove that even though the goods in which he was carrying on business were excisable goods being mentioned in the Tariff 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. In the present case the Affidavit by the two dealers according to the Ld. JDR will not be conclusive of the fact that the stems are not known in the market because they are dealing in electric bulbs, and the stems are consumed captively by manufacturers of such bulbs, which as has been observed in the impugned order, would itself indicate that the products being made especially to suit the requirement of the appellant are otherwise commercial products known to the market, for which the Commissioner has relied upon the Tribunal decision in the case of Indian Oil Corporation v. Collector of Central Excise utility of goods for the purpose to which the goods were put. The Ld.DR also referred to a judgment of the Delhi High Court in the case of Sylvania Laxman Ltd. v. Union of India and Ors. (1993) 41 ECC 100 (Del.), on the same issue where the High Court has held that the stems used in the manufacture of electric bulbs are not subject to duty in terms of Notification No. 67/83-CE read with Rule 49(4) of the Central Excise Rules, 1944.

4. We have carefully considered the submissions. The central issue in this appeal is whether the stems which are captively consumed by the appellants in the manufacture of GLS lamps can be considered as excisable goods and are chargeable to duty under sub-heading 8539.00 CETA. On the question of

determination of dutiability the law has been laid down by the Supreme Court some of whose judgments have been cited and relied upon by the appellants. In the Mori Laminates Pvt. Ltd. case of the Supreme Court it has been held that Section 3 of the Central Excise Act, levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. The Supreme Court observed that expression 'produced or manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. The Supreme Court has held in the decisions cited before us by the Id. Counsel that marketability is an essential ingredient for dutiability. Simply because certain article falls within the Schedule it would not be dutiable under Excise law if the said article is not goods known to the market as held in Bhor Industries (Supra) by the Supreme Court. The appellants in this case have produced evidence of their Senior Manager Technical who is conversant with the manufacturing operations of GLS Bulbs. He has said in his Affidavit that the stems are not stored but are taken and loaded mechanically on to the mounting unit holding jaws continuously and that there is no room for human interference or handling of the material, in this continuous process, and if done, would only result in qualitative deterioration of the product. The two dealers affidavit are also produced to say that there is no market for stems. As against these contentions, the Commissioner has observed in his order that where the manufacturer is producing commercial products to his own requirement and specification, he cannot claim exemption from excise duty on the ground that the product in question is not saleable in open market, and the Commissioner has concluded that but for the products being made especially to suit the requirement of the appellant, they are otherwise commercial products known to the market. Apart from making this observation, Commissioner has not led any evidence to substantiate this finding. We find that in the Mori Laminates Pvt. Ltd. case the Supreme Court has observed that duty is attracted in case of captively consumed goods not by such captive consumption but it must be goods within the meaning of the Act and it should be shown as marketable or capable of being marketed. Therefore, the adjudicating authority ought to have led evidence to substantiate the finding that the stems are marketable.

Moreover, in the Delhi High Court judgment cited by the Ld. JDR in Sylvania Laxman Ltd. case also the facts are same, where the petitioner manufactured GLS lamps and electric bulbs under Chapter 85 of the CETA. The Department's case was that in the manufacturing of bulbs stems come into existence and since they are identifiable form and shape having distinct name, character and use, should be subjected to excise duty.

There also the petitioners condition was that the process of manufacturing bulbs is a continuous process done by automatic machines, and that the stem coming into existence is not capable of being marketed. Paras 4 & 5 of the Delhi High Court judgment reads as follows: Mr. Dholakia, learned Counsel for the petitioner submitted that the petitioner-company is a composite unit and the manufacturing of electric bulbs and fluorescent [tubes] is done by automatic machines in a continuous process. He further submitted that in this continuous operation the item called "stem" comes into being but the said item is not a product by itself coming into existence and is not subject to any duty in terms of the Notification No. 67/83-CE dated 1st March, 1983 read with Rule 49(4) of the Excise Rules. In the counter-affidavit the respondents have admitted that the process of manufacturing of electric bulbs is a continuous one but it was pointed out that "stems" acquire their identity as such as are admitted to be capable of storage though for a short period in the case of the Petitioner. However, the case of the petitioner is that in order to ensure uniformity in standard and quality of the bulbs which is absolutely necessary, the "stems" are not stored and rather immediately put to further process. Even the left over of the stock of the day is consumed on the next date.

In view of the facts admitted in the counter-affidavit and the submissions made by the learned Counsel for the petitioner, we are of the view that the charge of suppression in the present case is without any force. In the present case the item "stem" which are used by the petitioner in manufacturing electric bulbs not exceeding 60 watts are not subject to levy of excise duty in terms of the Notification No. 67/83-CE dated 1st March, 1983 read with Rule 49(4) of the Excise Rules. The impugned show cause notices issued by the respondents are, therefore, without jurisdiction.

The High Court has held that Show Cause Notices issued were without jurisdiction. Therefore the High Court judgment supports the contention of the present appellants that the stems are not subject to levy of excise duty. Applying the ratio of the Delhi High Court judgment to the facts of the present case which are similar, impugned order is set aside and the appeals are allowed.

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