

Goodyear India Ltd. Vs. Collr. of Cus. and Cen. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-24-1985

Reported in : (1998)(98)ELT807TriDel

Appellant : Goodyear India Ltd.

Respondent : Collr. of Cus. and Cen. Ex.

Judgement :

1. The two appeals were heard together as common questions of fact and, law arise for determination in both appeals, the appeals arising out of a common order.

2. M/s. Goodyear India Limited manufacture tyres, classifiable under Tariff Item No. 16 of the first schedule to the Central Excises and Salt Act. On 26-2-1982 a truck bearing No. HYA 9448 was intercepted and it was found loaded with defective/retreadable tyres. On verification it was learnt that they had been removed from the manufacturing premises of M/s. Goodyear India Limited by M/s. Vijaya Traders. They were seized as they had not been removed under any Central Excise Gate Pass and as it was believed that they had been removed without payment of Central Excise duty payable thereon under Tariff Item No. 16.

Statements were recorded from the Manager of M/s. Vijaya Traders as well as the Quality Control Manager of M/s. Goodyear India Limited.

Therein they had stated that the goods seized were not tyres but scrap and no duty was payable thereon and that the removal was in pursuance of an interim

order obtained by M/s. Goodyear India Limited from the Delhi High Court in a Civil Writ Petition filed by them. They contended that tread (sic) had been removed in two portions in these goods and they were not tyres and not known as tyres thereafter.

3. Notice dated 11-5-1982 was thereupon issued to both appellants calling upon them to show cause why action should not be taken for contravention of the Central Excise Provisions with reference to these goods as well as other similar materials removed earlier also. In their respective replies the two appellants again contended that the seized goods as well as similar goods removed earlier were all waste and not tyres and the duty was payable thereon and therefore no contravention of the Central Excise provisions had been committed. On adjudication the Collector of Central Excise, Delhi under his order dated 13-7-1983 held that the goods in question were tyres on which duty was payable under Tariff Item No. 16 of the Schedule to the Central Excise Act and as the goods had been removed without payment of such duty the case against both appellants had been fully made out. Accordingly he ordered confiscation of the seized goods with option to redeem the same on payment of fine of Rs. 7,500/-. He demanded basic excise duty as well as special excise duty on these goods as well as the goods already cleared. He imposed a penalty of Rs. 75,000/- on M/s. Goodyear India Limited under Rule 173Q of the Central Excise Rules. With reference to the truck in which seized goods were being removed he ordered confiscation thereof with option to redeem it on payment of fine of Rs. 5,000/-.

4. It is against the said order that these two appeals have been separately preferred by M/s. Goodyear India Limited and M/s. Vijaya Traders. Sri Ravinder Narain, Senior Advocate represented M/s. Goodyear India Limited. Sri K.M.K. Nair, Advocate represented M/s. Vijaya Traders. Sri K.D. Tayal, Senior Departmental Representative appeared for the respondent Collector. We have heard both sides and perused the records.

5. Reference had been earlier made to a Civil Writ Petition filed by M/s. Goodyear India Limited in the Delhi High Court. It was Civil Writ Petition No. 2586 of 1981. It came to b 6. Therefore, when these appeals were taken up for hearing a doubt

was felt by this Bench whether in terms of the said order the goods in dispute in the present proceedings would also be governed within the amplitude of that order and, if so, whether proceeding further with the hearing in these appeals would not in effect be impinging on the order of the Delhi High Court itself. The difficulty felt was that in the event of this Tribunal coming to a conclusion on the excisability of the articles seized (said to be tyres with the tread scooped out in placed and called, according to the appellants, carcass of tyres) the same subject matter would not again be canvassed in the proceedings before the High Court also. Thereupon after some discussion Sri Ravinder Narain, the learned Counsel for M/s. Goodyear India Limited, submitted that his clients undertake that they would not be raising in the proceedings before the High Court the question of such carcass of tyres being part of the goods covered by the writ petition. He stated that in view of the said undertaking there would be really no conflict between the proceedings in these appeals and the proceedings in the writ petition in the High Court and this Tribunal could therefore proceed further with the hearing of these appeals. Sri Tayal, the learned representative for the department, at that stage stated that the contention for the department had all along been that the seized tyres as well as similar tyres cleared earlier were not part of the goods with reference to which the proceedings in the High Court were pending and that would be really the position irrespective of the concession by the appellants as abovementioned. He, therefore, stated that subject to that understanding we may proceed to hear the appeals.

Thereupon we recorded the undertaking of M/s. Goodyear India Limited as abovenoted and, on the basis thereof, proceeded further with the hearing. Sri K.M.K. Nair, Counsel for M/s. Vijaya Traders more or less adopted the arguments of Sri Ravinder Narain for M/s. Goodyear India Limited and added further arguments with reference to the liability for imposition of penalty and quantum thereof. Therefore on the main matters the arguments for both appellants were the same and do not require separate consideration.

7. The main argument of Sri Ravinder Narain was that the subject matter of adjudication was known as the carcass of a tyre and that the same is not a tyre and therefore no duty was attracted under Tariff Item No. 16 with reference

thereto. His further contention was that such tyres were "waste" and therefore were not excisable and did not attract duty and could be removed from the factory without any excise records being maintained separately therefor. These contentions are therefore to be considered in the first instance.

8. Sri Ravinder Narain pointed out that with reference to the said contention of carcass of tyres not being commercially known as tyres he had produced three affidavits before the Collector also but that the Collector had refused to consider them on the ground that they were not relevant to the issue under consideration. The three affidavits are respectively of - 1. Sri E.P. Rodricks, working as Manager (Development and Production Analysis) in the factory of M/s. Goodyear India Limited; 2. Sri Jagdish Lal Khanna carrying on business as owner and player of trucks under the name and style of M/s. Jaipur Golden Transport Company Private Limited; and 3. Sri Brij Mohan Kaushik, carrying on business, amongst others, in retreading of tyres under the name and style of M/s. New Standard Tyres.

All these affidavits are to the effect that if the tread in a automobile tyre is scooped out in one or more places the leftover cannot be used as a tyre and would be a waste product so far as the tyre manufacturer is concerned and that these are not commercially known as tyres. Shri Rodricks has further added in his affidavit that these are sold as waste or scrap, generally at a price which is substantially lower than even the cost of the raw materials used in the production thereof. Since these affidavits deal with the character of the commodity under seizure the Collector may not have been justified in ignoring their contents for arriving at any conclusion on the matter in dispute. We have therefore taken these affidavits also into consideration in appreciating the arguments of both sides.

9. As already stated, the argument for the appellants is that the tyres from which the tread had been sliced away in one or more places are unfit for use as tyres and would not therefore be known as tyres. They stated that they would be known as the carcass of tyres only and not as tyres. The three affidavits had also been produced to this effect. But we see even from the records before us that this assertion is not correct. It is the admitted case that these tread removed tyres were being removed by M/s. Vijaya Traders under an agreement with M/s.

Goodyear India Limited. They had entered into an agreement in this connection as evidenced by a letter of M/s. Goodyear India Limited to M/s. Vijaya Traders dated 7-2-1981 (page 76 to 79 of the paper book of M/s. Vijaya Traders). Item 17 of that agreement relates to tyres and reads as under: "You will make arrangements to cut the beads of scrap tyres on day work week before these tyres are taken to scrap yard." It may be seen that there is no reference to tread removal, either in one or two portions or otherwise, with reference to what are termed as scrap tyres but only to the cutting of the bead. The goods under seizure were covered by invoice No. ZS035, dated 26-2-1982 (page 97 of the paper book of M/s. Vijaya Traders). The description of the goods herein is "scrap auto tyres without bead cut". It may be noted that they are described as auto tyres, no doubt with the word "scrap" prefixed thereto. Sri Tayal points out that in the various invoices these tyres had been described either as "scrap retreadable carcass (without bead cut)" or "scrap carcass tyre without bead cut" or "scrap auto tyres without bead cut". It would therefore be incorrect to argue that these were never recognised as tyres or dealt with as tyres but only as carcass. Though, initially under the agreement dated 7-12-1981 (which was to be in force from 1-1-1982 to 30-6-1982), the arrangement appears to have been that the scrap tyres to be removed thereunder were to be with their beads cut, a subsequent modification appears to have been arrived at under letter dated 13-2-1982 (page 20 of the respondent's paper book in the appeal of M/s. Goodyear India Ltd.).

This agreement reads that this is in respect of disposal of factory's scrap tyres as and when available without cutting the beads, the specific condition being.

"please note that you will be required to remove the complete tread from atleast two different places on the circumference for atleast minimum of 8". Goodyear and other markings tyill also have to be buffed before these tyres are disposed of. This is to ensure that these tyres cannot be used without retreading. However, you will be allowed to inspect these tyres before loading and free to reject any tyre not found suitable for the purpose being bought." 10. It is admitted that if the bead is cut in a tyre it could not thereafter be remade into a tyre by any process except a re-manufacture thereof if possible. As the agreement originally stood M/s. Vijaya Traders were entitled to remove only such bead cut tyres which were termed as

scrap tyres. But subsequently the parties appear to have entered into a fresh agreement under which tyres were to be removed without bead cut but after removal of tread at two places in order to render them unusable as tyres as they then stood. We had seen two such samples out of the samples retained by the department of the seized goods. We found that one was a truck tyre and the other a car tyre, in each of which tread had been removed upto a depth of about 1/2" in two different places to a length of about 6 to 8 inches. The name of the manufacturer had been buffed out but the other details regarding their rating etc., were found left intact. The term of the agreement dated 13-2-1982 would itself establish that though the tyres may not have been (as they stood) usable as tyres after removal of the tread at two different places, they were retreadable and in fact were being purchased by M/s. Vijaya Traders for the purpose of retreading and resale as automobile tyres. Sri Bhaskaran, Manager of M/s. Vijaya Traders had in fact admitted in his statement that they were retreading and reselling these tyres and in some instances they had even disposed of them as they stood. These circumstances appear to be sufficient to establish that though the tyres as they stood could not be used as automobile tyres straightaway, they were dealt with and treated as automobile tyres, though a process of retreading had to be applied to make them immediately usable. As earlier seen the descriptions in the invoices themselves referred to them as tyres, though with a supplementary word also added.

11. In fact when during the arguments at the early stages Sri Ravinder Narain was enquired as to why beads were cut in respect of some of the tyres but not in others, his reply was that it is not relevant for deciding the matter in issue, since all that matters is that the goods sold to M/s. Vijaya Traders could not be used as tyres as they stood.

12. The reason why M/s. Goodyear India Limited altered their method of operation in respect of disposal of what are called scrap tyres becomes discernible if we look into the sequence of the events. In July 1981 a trade notice had been issued to the effect that waste arising during the processing of tyres is classifiable under Tariff Item 68 of Central Excise Tariff. This had been followed by a letter from the Superintendent to M/s. Goodyear India Limited on 17-10-1981 requiring them to

comply with excise formalities on the said basis. Thereupon M/s. Goodyear had on 16-11-1981 filed a Civil Writ Petition in the High Court of Delhi questioning the validity of the trade notice and the directive of the Superintendent and seeking for consequential reliefs as mentioned earlier. In connection with the same they had filed an application for interim orders and had obtained an order dated 19-11-1981 under which they were permitted to clear "scrap rubber compound and other waste" on execution of a bond. Sri Tayal pointed out that the writ petition related to waste rubber compound and other waste only and removal thereof as seen from the prayer paragraph. Paragraph 3 of the petition deals with the subject matter of the writ and the middle portion thereof reads as follows: "During the production of a rubber compound a small quantity of the compound is rejected due to process defects such as wrong mixing or over heating etc. This defective or rejected rubber compound is in the nature of waste. In addition thereto at various stages of the manufacture of such goods rubber cuttings and similar processed waste emerges and is discarded. These waste materials are hence sold at substantially lower price as waste. It is submitted that there is no manufacture of such waste material. The said waste materials come into existence in the course of manufacture of tyres, tubes, flaps and other rubber products and the event of manufacture is not the waste matter as the manufacture of tyres, tubes, flaps and other rubber products." Sri Tayal therefore pointed out that the subject matter of the writ petition was rejected rubber compound and processed waste as above described and not what are termed as rejected tyres themselves. The argument for the department is that it was with reference to the rejected rubber compound and the waste that the interim order had been applied for and obtained but that subsequently under the guise of the said order M/s. Goodyear India Limited began to remove from their factory, without excise formalities, manufactured tyres themselves under the pretext that they were total rejects and not tyres at all.

That appears to be the explanation why while initially M/s. Vijaya Traders were to remove the tyres sold to them after bead cut, they were subsequently allowed to remove tyres without bead cut. As already stated, a bead cut tyre cannot be remade into a usable tyre while a tread removed tyre could be remade into a usable tyre by way of process of retreading only.

13. In this connection the terms of the original contract as evidenced by the letter dated 7-12-1981 are important. Term 17 thereof has already been extracted. It has been noted that the articles to be removed are described as scrap tyres and it is made clear that bead are to be cut before such removal by the purchaser. Another letter which is also relevant in this connection is the letter dated 2-3-1982 from M/s.

Goodyear India Limited to the Superintendent of Central Excise, Range VII, Faridabad. Herein they described the procedure adopted by them for disposal of scrap tyres. They stated herein at page 2 of the letter (as found in the paper book) as follows : "As per rules scrap tyres are to be cut and punched. We are removing tread portion at different places on the circumference of the tyres.

Cutting of beads on two different places are well accepted term (SIC) for scrap tyres as per the terms of the Tyre Trade." Therefore what M/s. Goodyear India Ltd. appear to have been originally doing appears to have been in pursuance of the provisions of Rule 49 of the Central Excise Rules in order to render the manufactured product into scrap for avoidance of liability for payment of excise duty thereon before the removal of the same from the factory. That is why in this letter the words used are - That would indicate that when the said procedure was being followed, M/s. Goodyear India Ltd. themselves were aware, and were accepting the position, that the tyres to be disposed of as scrap were in fact fully manufactured products but that as M/s. Goodyear India Ltd. found them evidently not fit for marketing or for consumption they were willing to scrap them and render them useless in order to relieve themselves, under the Second Proviso to the Rule 49, of the liability to pay excise duty as provided. But, subsequently, evidently after obtaining the interim order from the High Court, M/s. Goodyear India Ltd. appear to have hit upon the idea of disposing of atleast the retreadable rejected tyres by scooping out the tread in two portions and disposing of the tyres under the name of scrap of waste, though the product continued to retain the shape and structure of a tyre and could, in fact, as evidenced by the agreement dated 13-2-1982 itself, be remade into a serviceable tyre by the process of retreading.

14. In this connection it would be relevant to refer to the Supreme Court judgment in P.C. Cherian v. Burfi Devi 1979 (4) E.L.T. (J593). No doubt that judgment did not arise out of a case under the Central Excises and Salt Act and in fact a reference is made to the same in Paragraph 11 of the judgment. But in effect the judgment laid down that, by retreading, an old tyre does not become a different entity and acquire a new identity. It therefore hold that retreading an old tyre does not amount to manufacturing a tyre as it was already manufactured and the retreading was by way of repair work only. If, in the said way, a retreadable tyre would continue to be a tyre though it may not be usable on the road as such, it suggests that a manufactured tyre does not cease to be a tyre merely because tread is intentionally removed at one or more places thereby making the same unusable on the road in the said condition. So long as the same could be put back into the shape of a serviceable tyre by the process of retreading, a partly detreaded tyre would not cease to be a tyre merely because of the process of part detreading carried out on it.

15. In this connection it may be relevant to refer to the decision in Collector of Central Excise v. Titagur Paper Mills Co. 1984 (17) E.L.T.417 cited by Sri K.D. Tayal. In that case it was contended that a part of the manufactured paper was found to be of bad quality which was not fit for marketing and was therefore destroyed by repulping as brokes.

The manufacturer had not entered the said quantity of paper in the RG 1 register and had not paid duty thereon also. The Tribunal accepted the contention that if the benefit of the Second Proviso to Rule 49 is to be claimed in respect of such repulped paper the manufacturer should have kept proper excise accounts with reference thereto and should have abided by the necessary conditions laid down by the Collector for the destruction of what was termed to be bad quality paper. This judgment therefore laid down that once the process of manufacture was completed the end result would not cease to be classifiable under the relevant tariff entry merely because the manufacturer found the manufactured product to be either not fit for marketing or not fit for consumption.

Similarly, in the present instance also so long as it is [not] in dispute that the manufacturing process which was to bring into existence the tyre concerned had been completed the resultant product would not cease to be a tyre falling under the relevant entry (No. 16) merely because the manufacturer felt that the product was defective and should not be marketed under his name for the purposes for which it was intended.

16. In this connection it is further significant to note that M/s.

Goodyear India Limited were anxious to buff out their brand name from the tyre but allowed the order particulars to continue, giving an option to the purchaser (M/s. Vijaya Traders) to retread the same and market the resultant product for use as tyres, the contract dated 13-2-1982 making it further clear that it was open to M/s. Vijaya Traders to reject such tyres which were felt by them to be not usable for the purpose for which the purchase was being made, i.e. retreading and resale. This circumstance would also clearly establish that even M/s. Goodyear India Ltd. were satisfied that what were being offered for sale, and what was purchased by M/s. Vijaya Traders, were tyres, though not usable straightaway in the condition in which they stood, after removal of tread in two places.

17. It is also significant that while in their appeal in paragraph 7 M/s. Goodyear India Ltd. referred to the impugned goods as scrap, the term used by M/s. Vijaya Traders is waste tyres (paragraph 5 of their appeal and later). It has been earlier noted that M/s. Goodyear India Ltd. themselves had admitted that in order to render a manufactured product into scrap, if it was a tyre, the requirements of the rule are that the same should be cut and punched. It is not disputed that a tyre with either a bead cut or a hole punched in the circumference could not be remade into a usable tyre either by retreading or otherwise.

18. The claim for M/s. Goodyear India Ltd. is that by the reason of the manufacturing defect the tyres in issue were neither seconds nor substandard which they disposed of as seconds but totally unusable as tyres and therefore constituted scrap or waste.

19. It is with reference to the above background that, it appears to us, the entire issue has to be approached and appreciated. As contended by the appellants it is no doubt true that the onus is always on the department to prove under which tariff entry particular goods fall.

This has been so laid down in the case of India Tool Manufacturers 1983 (13) E.L.T. 1170, Bhor Industries 1983 (12) E.L.T. 179 and Advani Oerilikon 1981 (8) E.L.T. 432. In the present instance there is no dispute that tyres of the description manufactured by M/s. Goodyear India Ltd. would fall under Tariff Item 16. The question is whether the tread cut tyres (which alone are in dispute in the present appeals and not even bead cut tyres) would also fall under the same tariff entry.

The cases referred to by Sri Tayal in this connection are - and order No. 767/83-D, dated 17-12-1983 in Appeal No. 22/80-D of this Tribunal (Super Tyres Pvt. Ltd.) 1987 (31) E.L.T. 452 (Tribunal). But Sri Ravinder Narain stated that each, of these decisions is distinguishable on facts from the present case and therefore reliance on the said decisions is not appropriate in the present context.

20. As pointed out by him the decisions in 1983 (13) E.L.T. 1186 (case dealing with Bagasse) and 1984 (16) E.L.T. 317 (case dealing with saw dust arising during the sawing of timber logs) dealt with by-products arising during the manufacturing of the main product and the classifiability of the said byproducts. Therefore those decisions may not be strictly relevant to this case. The decision in 1983 (14) E.L.T.2502 dealt with cutting and trimming of Polyurethane Foam coming into existence during the manufacture of Polyurethane products by cutting 'buns' of Polyurethane Foam. It was held that though such cuttings and trimmings were termed as waste and scrap they are really smaller pieces of high quality and usable Polyurethane Foam and in fact used as such for manufacture of other articles than the main product. It was therefore held that such cuttings and trimmings were classifiable under Tariff Item 15A(3). The contention of Sri Tayal is that similarly in the present instance also even if the manufactured tyres were found by M/s. Goodyear India Ltd. to be not marketable by them due to some defect, they were admittedly sold without cutting or punching and in a fit condition to be retreaded for making them usable tyres, though not under the name of M/s.

Goodyear, and hence the principle laid down in 1983 (14) E.L.T. 2502 would apply. This contention appears to us to be quite proper.

21. The decision in 1983 (14) E.L.T. 1870 dealt with glass lumps coming into existence during the manufacture of fibre glass and it was held that such lumps were manufactured products and were excisable. Sri Tayal rightly contends that similarly in the present instance also though the end product may not have come up to the satisfaction of the manufacturer it would not for that reason become waste and non-excisable. So far as the decision in 1984 (16) E.L.T. 324 is concerned that decision appears to have dealt with a case similar to ours, in the sense that it dealt with defective Gramophone Records not entered in RG 1 register, but the decision appears to have proceeded on practically a concession by the Counsel for the manufacturer that inspite of such defects they would be records. So it may not be quite appropriate to rely on it as laying down that principle. The decision of this Tribunal in Order No. 767/83-D 1987 (31) E.L.T. 452 (Tribunal) above-referred to dealt With scrap rubber arising during the course of manufacture of tyres and tubes. It was held that as such scrap was also saleable and was being sold the contention for the party that only the particular goods intended to be manufactured could be taxed was not acceptable. The said scrap was held to fall under Tariff Item 68 as rubber scrap as such was not mentioned in the schedule of the Act. But in the present instance the commodity in question is not scrap arising in the process of manufacture but what is claimed by the manufacturer to be scrap at the end of the manufacture due to certain alleged defects. In the circumstances classification under Tariff Item 68 also may not be permissible, the correct classification being as under the product intended to be manufactured and in fact manufactured, i.e.

automobile tyres.

22. One more decision cited by Mr. Tayal is a decision of the Calcutta High Court reported in 1980 (6) E.L.T. 99 (1C. & E. Morton India Limited). That case related to the excisability of various small bits and crumbs of assorted sorts falling out in the manufacture of confectionery, which were known as "scraps". The assessee's claim was that such scrap was being collected and sold at a nominal price of about

Rs. 1.10 per Kg. as against the average price of Rs. 7.50 per Kg.

of actual confectionery, the purchasers of such scrap utilising the same for melting to extract sugar for the purpose of preparing cheap syrups used in the preparation of low grade sweetmeats. The assessee contended that such scrap was not known or sold in the market as confectionery and the same is therefore not covered by any item in the schedule to the Central Excises and Salt Act. The Appellate Collector had held that such scrap is nothing but part of the various manufactured pieces of confectionery and that they remained as goods as the sweets which are in whole form and are sold as confectionery. The assessee had contended in their appeal before the High Court that these small bits and crumbs are taken from the floor or cleared from the trays in which they fall and are dumped and that such waste products are known as scraps which are unfit for human consumption. The learned Judge held that if these scraps are broken parts of the boiled sweets certainly they would fall within the definition of confectionery and excise duty was liable to be paid. But he held that the Appellate Collector's findings that these scraps basically remained as boiled sweets and are sold as such was not based on evidence and he therefore remanded the matter directing the Collector to find out whether these scraps are parts of the manufactured product, i.e. confectionery that was manufactured by the assessee. Thus, in effect, the judgment held that if the process of manufacture was complete, the fact that part of the manufactured product was not of the regular shape but consisted of bits and pieces which were discarded and were therefore not subsequently marketed as confectionery would not relieve the manufacturer of the liability for payment of excise duty on these so called discards also. It would follow that similarly in the present appeals also though the goods at issue (tyres which were found unmarketable at the end of manufacture) were treated by M/s. Goodyear as scrap they would not for that reason be scrap not liable for excise duty. It has also been seen that so far as the subject goods are concerned they were admittedly fit for being retreaded and made into usable condition. Therefore applying the ratio of the decision in 1980 (6) E.L.T. 99 we are satisfied that the contention of the appellants regarding non-excisability of the said goods must fail.

23. Reference was made by Sri Tayal to Rule 96 of the Central Excise Rules which provides that if a manufacturer desires that certain tyres should in consequence of damage sustained during the course of manufacture, be assessed on a value less than the standard selling price he shall declare in writing on the application for the clearance of the goods that such damage has been sustained and each such tyre shall be clearly and legibly embossed or indelibly stamped with the word "seconds" or "clearance" or "defective". Sri Tayal points out that when M/s. Goodyear had failed to follow this provision, which was open to them with reference to the goods which, as already seen, were not totally unusable under any circumstances, they could not fall back on the ruse of declaring them to be waste to avoid excisability.

24. As already stated, the main argument for both appellants has been that the goods under consideration (automobile tyres without bead cut but tread removed in two places) were not commercially known as tyres, were never dealt with in trade as tyres and therefore could not be held to be tyres for purposes of levy of excise duty and that as they had to be disposed of due to certain manufacturing defects as scrap they were really waste and therefore neither excisable nor goods with reference to which excise records were to be maintained. Their alternative pleas have been that (1) if held to be excisable the goods under consideration would fall under Item 68 of the tariff (goods not elsewhere specified) and not under Item 16 (Tyres) and (2) if still held as tyres falling under Item 16, they would fall under sub-item III of Item 16 (all other tyres) and not under sub-item I thereof (tyres for motor vehicles) as in the condition in which they were cleared from their factory, someone could use them at the most on animal driven vehicles only and not on motor vehicles. The latter argument at (2) above is a new plea raised for the first time before us; it was not raised before the Collector. But even at the cost of repetition it has to be stated that the goods under consideration had come into existence at the completion of the entire process of manufacture and could not therefore be in the real sense termed as waste arising during the course of manufacture (which alone were described as the subject matter in the writ petition). It has also been seen that these goods were described as auto tyres, though with several prefixes or suffixes such as scrap or without bead cut etc. Admittedly they were fit to be retreated and used as automobile tyres and were in

fact so retreaded and sold by M/s. Vijaya Traders. This is in clear distinction to the cut and punched tyres which alone were originally being disposed of to M/s. Vijaya Traders and which could properly be described as scrap tyres, as they could not in future also be used as automobile tyres by any repair or retreading process being carried out thereon. Therefore, on a careful consideration of all the above facts and the authorities cited we are convinced that the goods under consideration were neither scrap nor waste nor some non-descript articles but were automobile tyres, though they required the process of retreading to be carried out thereon before they could be put to actual use. We are therefore further convinced that they fall under the specific Tariff Item 16 under First Schedule of the Central Excises and Salt Act and not under the residuary item No. 68. Since the goods, even in the condition cleared, basically retained the character of an automobile tyre (in the same way in which an old and used auto tyre with worn out tread does), we hold that they fell under sub-item I of Item 16 and not under sub-item III thereof. Duty was therefore properly demanded under the order of the Collector.

25. But M/s. Goodyear contend that in any event no penalty ought to have been levied. Sri Ravinder Narain contends that M/s. Goodyear bona fide believed that these auto tyres without bead cut were also scrap and waste and could therefore be removed without payment of duty in view of the interim order of the High Court. He therefore contends that though it may now turn out that the said belief was incorrect the fact that M/s. Goodyear acted under such a bona fide belief should suffice to hold that their action attracted no penalty. But we are fully convinced that M/s. Goodyear could not have had any such bona fide belief. We are in fact convinced that they themselves initially, and rightly, believed that manufactured tyres, though defective, could not be converted into waste or scrap except after bead cutting or punching a hole and were adopting the said procedure but yet after obtaining the interim order of the High Court they hatched the ingenious plan of removing such tyres without bead cut under the guise of scrap or waste.

The terms of the two agreements with M/s. Vijaya Traders had already been extracted and the significant variation in the above aspect would establish the above conclusion. Sri Ravinder Narain contends that the value realised by the sale of such tyres was a small fraction, about 10%, of the value of normal tyres and this

itself should establish that the appellants were bona fide in their belief that such goods were scrap or waste. On looking into the sale price of the goods and a comparison with regular prices (page 31 of the paper book of M/s.

Vijaya Traders, paragraph 22 of their appeal), it may be seen that the percentage works out between 25% to 35%. Sri Ravinder Narain contends that the value realised was lower than the cost of the raw materials.

But that has not been established; nor would it be a relevant consideration to dub the goods as waste or scrap.

26. Sri Ravinder Narain contends that the goods were being sold after preparation of invoices in which they were being properly described and that necessary entries were being made in the bond register (kept in pursuance of the order of the High Court for removal on execution of bond) and that particulars of the invoices were also being mentioned in the bond register and these circumstances should disclose that M/s.

Goodyear were acting in good faith and, without any concealment. He contends that the nature of the goods that were being removed was thus within the knowledge of the departmental officials who were aware of the opening of the bond register. The said register was available for perusal at the time of the hearing and we had looked into the same.

Except for the entry as to the number of pages the register contained, which was evidently made when the register was opened, there was no indication of the register being periodically produced before or inspected by the departmental officials. Further, the register itself gave no details of the materials or their description, the invoice number alone being, mentioned therein. It has been already seen that the register had been opened in pursuance of the interim order of the High Court which permitted removal of "waste rubber compound and other waste" after execution of the bond. The contents of the writ petition itself have been extracted earlier to show what were mentioned therein as other waste. In the circumstances the mere mention of the invoice number, without description of the goods, would in no manner have been sufficient to bring it to the knowledge of the

departmental officials that tyres without bead cut were also being removed under the description of waste. Therefore the contention that everything was being done above board and without concealment cannot be accepted as correct.

27. In the circumstances and on a careful consideration of all the facts as discussed earlier we are convinced that M/s. Goodyear were not acting bona fide in removing such automobile tyres without bead cut under the guise of scrap or waste but that they wilfully and with knowledge contravened the provisions of the Excise Law, taking advantage of the interim order of the High Court though, from the very description in the writ petition, they must have been fully aware that the said proceedings before the High Court did not cover such fully manufactured tyres but only rejected rubber compound or rubber cuttings and similar waste arising during the various stages of the manufacture of tyres. We are therefore convinced that there was contumacious infraction of the provisions of the Excise Law by M/s. Goodyear. Taking into consideration the amount of duty evaded we are satisfied that the penalty of Rs. 75,000/- imposed on M/s. Goodyear was not excessive.

28. So far as M/s. Vijaya Traders are concerned, they are affected by the fine of Rs. 7,500/- imposed by the Collector in lieu of confiscation of the seized goods, the fine of Rs. 5,000/- imposed in lieu of confiscation of their truck and also (as explained below) the duty on the seized goods. In the light of our detailed findings above, we uphold the findings of the Collector that the seized goods were liable to duty and were removed unauthorisedly without payment of duty and without the cover of a Central Excise gate-pass. The goods and the truck which was used in their unauthorised removal were therefore rightly confiscated. The fine of Rs. 7,500/- in lieu of confiscation of the goods is not excessive, having regard to their value and the duty involved. So also the fine of Rs. 5,000/- in lieu of confiscation of the truck is not excessive. We accordingly uphold the orders of confiscation as well as the respective fines in lieu of confiscation.

29. We were informed by Sri Nair, the learned Advocate for M/s. Vijaya Traders, that they had paid the major part of the duty amount and were prepared to pay the balance amount, without prejudice to their rights and in order to secure release of

the seized goods. In his order the Collector had directed that the goods after being redeemed should be accounted for in the statutory excise records and cleared on payment of Central Excise duty. Although in the normal course duty is payable by the manufacturer, in the circumstances of this case it was paid by the purchasers of the goods, namely M/s. Vijaya Traders. In the view that we have taken, the duty was rightly payable on the goods. The question of M/s. Goodyear reimbursing M/s. Vijaya Traders for the amounts paid by them as duty is one which has to be settled between them. The position remains that duty was rightly payable on the goods and there is no question of giving any relief in this regard, except that duty on tractor tyres, if any comprised in the confiscated goods, should be calculated at the appropriate lower rate as applicable under the tariff. Apart from that, M/s. Vijaya Traders are not entitled to any relief.

30. In view of the above conclusions, we uphold the order of the Collector and dismiss both appeals except to the extent of relief granted under our observation in Para 29 above regarding calculation of duty on tractor tyres among the confiscated goods.

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