

Collector of Central Excise Vs. Parmali Wallace Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-29-1985

Reported in : (1985)(21)ELT231TriDel

Appellant : Collector of Central Excise

Respondent : Parmali Wallace Ltd.

Judgement :

1. The facts of this case, which are not in dispute, as taken from the appeal are set out below :- 1. "M/s. Parmali Wallace Ltd., Bhopal (hereinafter called the respondents) are manufacturers of among other goods, Wood-based Compreg Board and articles thereof falling under Tariff Item 16(B) of Central Excise Tariff, prior to 28-2-1982 the Wood-based Compreg Board and articles thereof were classifiable under the residuary head of the goods not elsewhere specified i.e. Tariff Item 68 of C.E.T. and chargeable to duty of excise accordingly. The tariff structure of Tariff Item 16B was revised w.e.f. 28-2-1982 vide Finance Bill, 1982, so as to cover the wood-based Compreg Board and articles thereof within its scope. Accordingly the goods viz.

Wood-based Compreg Board and articles thereof manufactured by the respondents have become classifiable under the new structured Tariff Item 16B of the C.E.T. w.e.f. 28-2-1982 and liable to duty of excise at the appropriate rate.

1.2. Due to above change in Tariff classification, Respondents, submitted an application in form AL 4 for the issue of licence in form L4 for manufacture of

excisable goods falling under Tariff Item 16B of Central Excise Tariff. The respondents also filed a classification list in respect of the said goods claiming its approval w.e.f. 28-2-1982, classifying Wood-based Compreg Board and articles thereof under Tariff Item 16B of C.E.T. with effective Basic Excise duty at the rate of 20% ad valorem. Simultaneously, they filed another classification list claiming approval of basic excise duty at the rate of 8% ad valorem under Tariff Item 68 of C.E.T. on pre-budget stock of Wood-based Compreg Board and articles thereof. The Superintendent Central Excise, Range IV Bhopal, having jurisdiction over the factory of respondents, however, rejected the respondents' claim, as inadmissible in terms of the provisions of Rule 9A of Central Excise Rules, 1944, which stipulates inter alia that in such cases the rate of duty and tariff valuation, if any, applicable to any excisable goods shall be the rate and valuation in force on the date on which duty is paid, which is apparently the date on which the clearances of goods are effected." 2. Against the above order of the Superintendent, the respondents went in appeal to the Collector of Central Excise (Appeals), New Delhi. The Collector allowed the appeal with the following observations :- "It is clear that the pre-budget stock of goods, which can be segregated and shown separately is liable to duty only under tariff head 68 of C.E.T. and not under 16-B into which the goods fall only with the introduction of the Finance Bill. Excise being a levy on manufacture and not on removal as has been held by the Courts including the Supreme Court of India and the correct tariff heading under which the pre-budget stock should have been classified happens to be Item 68 and not Item 16-B. The order of the Superintendent is, therefore, liable to be quashed." It is against this order that the Collector of Central Excise, Indore has come up in appeal to the Tribunal.

3. A large number of authorities were cited by the learned representatives of both sides. Most of them were with reference to the interpretation of Section 3 of the Central Excises and Salt Act and Rule 9A of the Central Excise Rules. Some were with reference to the similar provisions in Section 15 of the Customs Act. A few were with reference to other enactments. Most of the judgments were only listed and not referred to in detail. In this order we shall refer only to such of the judgments as were actually gone into or can be said to be directly relevant to the issue before us.

4. The arguments of Shri Raghavan Iyer, the learned representative of the Collector, were basically with reference to the interpretation of Rule 9A of the Central Excise Rules. He submitted that in the Order-in-Original of the Superintendent, reliance had been placed on the above Rule". However, in the order of the Collector (Appeals) there was no reference to the Rule] and it had been by-passed on general considerations, resulting in a wrong decision.

5. Shri Raghavan Iyer referred to the definition of "excisable goods" in para (d) under Section 2 of the Central Excises and Salt Act. That expression is defined as meaning "goods specified in the First Schedule as being subject to a duty of excise ...". According to him inclusion in the First Schedule with a rate of duty brought the goods within the scope of this definition. Admittedly the goods in this case were excisable goods both before and after introduction of the 1982 Finance Bill. The only difference was that immediately on the introduction of the Bill, together with the invocation of the Provisional Collection of Taxes Act, the excisable goods were specified under a different entry of the Schedule.

6. Shri Raghavan Iyer submitted that in some of the authorities reference had been made to the point of time when the goods came into existence. He submitted that the only reference which he had been able to find in the Act or in the Rules to "coming into existence" was in the proviso to Sub-rule (2) of Rule 224. That Rule imposed certain restrictions on the removal of goods beyond office hours, and also on the day of introduction of a Finance Bill or similar legislation. Even in this case, where "pre-budget" stocks were allowed to be removed with the permission of the Central Government, the applicant had to undertake to pay duty at the enhanced rate applicable in terms of the Finance Bill.

7. Shri Raghavan Iyer therefore submitted that if excise duty was interpreted as a tax on manufacture, and this in turn was interpreted with reference to the date of the manufacture being complete, there would be no need for the provisions of Rule 9A, relating the rate of duty to different dates dependant on different sets of circumstances.

No doubt Sub-section (1) of Section 3 of the Act stated that "there shall be levied and collected in such manner as may be prescribed duties of excise on all

excisable goods other than salt which are produced or manufactured in India ..." If, however, this was interpreted to mean that the date of duty was fixed immediately the manufacture was completed, then Rule 9A would have to be taken as either ineffective or inconsistent with the provisions of Section 3. He submitted that we should not adopt an interpretation of either the Section or the Rule which would lead to the above result.

8. Shri Raghavan Iyer referred to the recent judgment of the Hon'ble Andhra Pradesh High Court in the case of Sirpur Paper Mills Ltd. v Union of India and Ors. 1984 (17) E.L.T. 217, delivered on 16-7-1984.

This being a recent judgment which took into account a number of earlier judgments, no doubt, carried considerable weight. In this case the Hon'ble High Court had held as follows (para 26) : - "We unhesitatingly hold that the excise duty would arise the moment the manufacture or production of the commodity is complete irrespective of the fact that the assessment and collection is postponed to a later point of time when the said commodity is cleared or removed : the incidence for the impost being the manufacture or production of goods. If that be so, the petitioners are entitled to have the benefit of the exemption notification and so, the refund of the excess duty paid." Shri Raghavan Iyer submitted that even in this judgment Rule 9A had not been struck down but only "by-passed". Therefore, that Rule was still before us, and it was open to us to take a view regarding its interpretation, in the light of other relevant judgments.

9. Shri Raghavan Iyer submitted that no doubt excise duty was a (sic) on manufacture. This, however, was a constitutional concept, derived from the provisions of the Seventh Schedule to the Constitution. For actual assessment of duty, the terms of the statute itself, namely the Central Excises and Salt Act, would have to be taken into account. In terms of the statute-whether the Central Excises and Salt Act itself or the Rules framed there under-it was not permissible to apply for the purpose of assessment a Tariff Item or a notification which was not in existence (or in existence in an amended form). Shri Raghavan Iyer further submitted that if Rule 9 were to be ignored, on the ground that the necessary provision was incorporated in Section 3 there would be left no provision to determine

the rate of (sic) in the varying circumstances set out in that Rule.

10. Shri Raghavan Iyer submitted that under Section 3(1), the aspect relevant for levying and collecting excise duties were (a) whether they (sic) excisable goods, (b) whether they were produced or manufactured in India and (c) what was the relevant rate in the First Schedule. The point of (sic) for determination of the rate of duty came only at the time of removal (sic) the goods. Section 3 of the Act did not contain a time element, which was provided by Rule 9A, framed under the Act. The Rule could not be considered as repugnant to Section 3. Linking the rate of duty to the time of removal, would not make the tax a tax on removal. There was a clear next between the production and the removal of goods. At the time of removal the tariff item applicable would be that in force at that time.

11. From the economic angle, Shri Raghavan Iyer submitted that good which were cleared at a particular point of time should bear the same rate of duty, and this could be achieved only through Rule 9A.12. The respondents had argued (as seen from para 2 of the Order-in-Appeal) that the order of the Superintendent was faulty because according to them it would make the action of the provisions of the Finance B retrospective. According to him this was not correct, as the application the provisions of the Bill at the time of removal of the goods did not amount giving retrospective effect.

13. Shri Raghavan Iyer submitted that in the Andhra Pradesh if Court judgment in the case of Sirpur Paper Mills, the case was one where B exemption notification was rescinded (as seen from para 3 of the judgment This was not the case in the matter before us. It had been held in para 18 in the judgment that the answer to the question which fell for determination that case was found in Section 3 and not in any other Section or Rule including Rule 9A. He submitted that these observations did not take in account the pivotal role of Rule 9A. Section 3 of the Act laid down the duties of excise should be collected "in such manner as may be prescribed This clause qualified both the levy and the collection of duty. Therefore while the "contours of assessment and production" were to be within t! frame work of Section 3, the manner of levy and collection could legitimate be governed by rules in pursuance of that section. In this connection She. Raghavan Iyer referred

to para 13 of the judgment of the Hon'ble Supreme Court in the case of Union of India and Ors. v. Bombay Tyre International Ltd. (1983 E.L.T. 1896 S.C.), where it had been observed that "it is apparent therefore, that when enacting a measure to serve as a standard for assessing the levy the legislature need not contour it along lines which spell out the character of the levy itself". Earlier, in para 12 of the judgment the Supreme Court had referred with approval to the observations of the Federal Court in the Province of Madras v. Boddu Paidanna & Sons (1978 E.L.T. J 272) : "There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later." In para 12, it had been pointed out that while the levy of excise duty in our country has the status of a constitutional concept, the point of collection is located where the statute declares it will be.

14. Shri Raghavan Iyer submitted that the observations of the Andhra Pradesh High Court in the case of Sirpur Paper Mills had to be read in the light of the position set out in the Supreme Court judgment above.

The observation of the Hon'ble High Court in para 19 of the judgment that the provisions of that Rule laid down the mode and manner of assessment did not take due account of the fact that these aspects were covered by Rule 52 and that Rule 9A was confined to fixing the rate of duty.

15. Shri Raghavan Iyer then referred to the judgment of the Madhya Pradesh High Court in the case of Kirloskar Brothers Ltd. v. Union of India and Ors. (1978 E.L.T. 33). That was a case where there was initially a total exemption from duty on power-driven pumps subject to certain conditions. The total exemption was

modified with effect from 17-3-1972 and a concessional rate of duty made applicable. In that case it had been held that the goods which had been manufactured during the duty-free period were not liable for payment of duty at all. In that case there had been an appeal to the Supreme Court, which had been "dismissed on merits". Shri Raghavan Iyer submitted that there was a clear distinction between that case and the present case where the goods were dutiable both before and after the date of introduction of the Finance Bill.

16. Shri Raghavan Iyer also submitted that there were a number of judicial decisions with reference to the parallel provisions of Section 15 of the Customs Act, 1962, in which the view had been taken that the rate of duty would depend not on the date of importation (corresponding to the date of manufacture in the case of excisable goods) but in the manner specified in Section 15 (corresponding to Rule 9A in the case of excisable goods). The application of the principle followed in those judgments would lead to the conclusion that Rule 9A should be applied for determining the rate of Central Excise duty, and would also lead to consistency in approach with reference to the two important indirect taxes. Shri Raghavan Iyer referred to the judgment of the Kerala High Court delivered on 16-10-1984 in the case of Aluminium Industries Ltd. v. Union of India and another, wherein it had been held that the rates applicable were those in force on the date on which they were determined in terms of Section 15, Customs Act, and that there was no substance in the contention that the rates had been applied retrospectively.

17. When Shri A.M. Haksar, the learned advocate for the respondents, started his reply, the Bench suggested to him that there were two relevant aspects which he might deal with in the course of his arguments. One was the effect of the provisions of the Provisional Collection of Taxes Act, 1931, in a case like the one under consideration. The other was the view taken in a number of cases relating to Section 15 of the Customs Act, as for instance the judgment of the Supreme Court in the case of Prakash Cotton Mills (P) Ltd. v. B.Sen AIR 18. Shri Haksar commenced his reply by referring to the provisions of Section 3 of the Central Excises and Salt Act. Sub-section (1) of this Section delegated only the manner of the levy and collection of duties of excise, the power to impose a duty being only with Parliament. No doubt, Rule 9A laid down the manner in which duty should be

collected.

Shri Haksar clarified that it was not his case that Rule 9A was not applicable here. Sub-rule (1) was obviously applicable. However, his submission was that on a true interpretation of this sub-rule, what it governed was only the rate of duty (the question of tariff valuation would not arise in this case) and not the classification of the goods based on their description. In other words, it was the description of the goods at the time of completion of manufacture which would determine their classification, in the light of the Tariff in force at that point of time. If between the date of manufacture and the date of removal there was a change in the rate of duty with reference to the classification which had already been determined, the revised rate would be applicable at the time of removal. However, if there was a change in the classification, such a change could not, in view of the wording of the Rule, be applied at the time of removal of the goods.

19. Shri Haksar placed reliance on the very extensive discussion contained in the advisory opinion of the Hon'ble Supreme Court in AIR 1963 S.C. 1960 (in re Sea Customs Act). He particularly referred to paras 24 and 25 of that opinion at pages 1775 and 1776 wherein it was laid down that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. Therefore, one would have to see under what entry any particular excisable goods fell at the time of manufacture.

It was only Parliament which could vary the description of the goods, and not Government by invoking any rules. Even assuming that Section 3 of the Act gave certain powers to Government in this regard. Rule 9A as it stood did not refer to the tariff description of the goods but only to the rate of duty.

20. Shri Haksar submitted that if Rule 9A were to be interpreted in the manner advocated by Shri Raghavan Iyer, anomalous and inequitable results would follow. Thus, under Rule 53, a manufacturer is required to maintain a daily stock account in a prescribed form (known as the R.G. 1). Since this is written up from day-to-day, the entries would be in accordance with the Tariff description as in force at the time of manufacture. If it were held that a different Tariff description would be applicable to the goods because of a change subsequent to the completion of

manufacture, it would mean that the accounts properly maintained would stand falsified and an innocent manufacturer would be liable to penal action. Such a result surely could not be intended.

21. Shri Raghavan Iyer had referred to the provisions of Rule 224. Shri Haksar submitted that the object of this Rule was only to ensure that a proper account of the goods manufactured was kept, and it would not justify shifting of goods already manufactured from one entry to another.

22. Shri Haksar thereafter submitted that no provision of an Act could give retrospective effect unless this was specifically provided for.

In the present case, if Tariff Item 16-B as amended were applied at the time of removal, this would amount to giving retrospective effect, which was not permissible, in the absence of a specific provision in the Finance Bill. He referred in this connection to the judgment of the Supreme Court in the case of *Income-tax Officer, Tuticprin v. T.S. Devinatha Nadar, etc.* (AIR 1968 S.C. 223). In para 6 of that judgment the Hon'ble Supreme Court had quoted with approval the observations of Halsbury that: "The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature." 23. Shri Haksar also referred to the case of *Amar Dye Chem Ltd.* This related to dyes derived from coal-tar which prior to the 1961 Budget were not excisable. In the Finance Bill of that year a new Item 14D was introduced, the Provisional Collection of Taxes Act being made applicable. There was a series of judgments in this case, the final one being that of the Bombay High Court, reported in 1980 CENCUS 242D. The question which the Bombay High Court had to decide, in pursuance of the order of the Supreme Court demanding the matter to it, was whether the goods sought to be taxed under the new item were manufactured before or after the midnight of the 28th February, 1961. The Hon'ble High Court held that it was incumbent on the respondents (the Union of India) to establish that the goods in question were manufactured after the midnight of 28-2-1961 and they had failed to do so in the result, the matter was

decided in favour of the manufacturers and against the Revenue. This would also show that the taxable event was the date of completion of manufacture. In coming to this conclusion the High Court had also taken into account a trade notice issued by the Collectorate which said that "goods will not be considered as fully manufactured unless at midnight of 28th February/1st March, 1961 they were ready for delivery". While the controversy in that case was whether in fact the goods were ready for delivery, the trade notice also showed that had they been taken as fully manufactured, they would not have been sought to be taxed. This was also the view taken by the Bombay High Court.

24. Referring to the Provisional Collection of Taxes Act, which enables the provisions of the statute to be implemented even before it is passed into law, Shri Haksar submitted that this was an exception to the general rule against the retrospectivity of statutes. Unless there was clearly a statutory (revision authorising retrospective application, it would not be legal to apply it thus.

25. Shri Haksar referred to an article in the February 1982 issue of "The Excise and Customs Reporter", bearing the title "Central Excise in Easy Lessons-Budget Day instructions" (page 11C et seq). At para 6 of this article it was stated that "unless otherwise stated in the Budget proposals, articles which become excisable for the first time on introduction of the Finance Bill will be only those articles which are in fully manufactured condition". He submitted that judicial notice could be taken of this article, which might be regarded as a kind of contemporanea expositio. When it was pointed out by the Bench that this was apparently an article by some practitioner and not an official publication, Shri Haksar submitted that we could still take notice of it.

26. Shri Haksar, therefore, submitted that, in the view propounded by him, Rule 9A would get full effect. By the same Finance Bill the rate of duty under Item 68 was raised from 8% to 10%, and this increase would, no doubt, be applicable to the goods under consideration.

However, the change in classification from Item 68 to Item 16-B would not apply to these goods.

27. It was pointed out to Shri Haksar that in the relevant clauses of the Finance Bill and the Schedule, no distinction had been made between the description and the rate of duty, whether with reference to their provisional application or their final effect. Shri Haksar submitted that the amendment only had the effect that whatever was henceforth manufactured and fell within the amended description in Item 16-B would be classifiable under that item. Whatever had already been manufactured and had attracted the charge of duty in terms of Section 3 would not be affected by the change in description.

28. The Bench drew the attention of Shri Haksar to the judgment of the Allahabad High Court in the case of Kesar Sugar Works v. Union of India and Ors. (1983 E.L.T. 285 (All.)), on which reliance had been placed by Shri Raghavan Iyer. That case related to molasses, which was liable to duty under Item 68 before 1980, but by the Finance Bill of that year was brought under a specific item, namely 15CC. The position, therefore, would be identical in material respects to that in the present case. The Hon'ble Allahabad High Court had held that duty in accordance with the new item was leviable even on goods manufactured before the date of introduction of the Finance Bill. This decision would, therefore, appear to be against the view advanced by Shri Haksar. On this Shri Haksar submitted that the Hon'ble Allahabad High Court had assumed that the taxable event was the date of removal and not the date of manufacture of the goods. He submitted that in view of the authorities cited by him, particularly the advisory opinion of the Hon'ble Supreme Court (vide para 19 above), this assumption was not correct, and since the decision in that case was based on this assumption it was also not an authority to be followed.

29. Replying to Shri Haksar, Shri Raghavan Iyer submitted that the provisions of the Provisional Collection of Taxes Act were clear.

Section 3 of the Act referred to the introduction of a Bill which "provides for the imposition or increase of a duty of customs or excise". The substance of the provision was that there should be increase in the duty leviable on a particular article. The form through which the increase was effected, whether by directly modifying the rate of duty or by modifying the description with a resulting increase

in the rate of duty, was not material. Any such change had to be given effect from the midnight of that day and this would not mount to giving retrospective effect. Since the goods had not as yet been taxed and were still in the hands of the manufacturer, assessment of those goods at the time of removal in accordance with the rate of duty then in force would not amount to retrospective application.

30. Shri Raghavan Iyer further submitted that even if it was assumed that the application of the amended rate of duty was retrospective in nature, this was still permissible by necessary implication, because Rule 9A clearly applied, and that Rule made no exception in the case of goods manufactured prior to the change. He cited the reference at page 63 of "The Law of Central Excise (Second Edition) by Taraporevala and Parikh, to the case of *Asankutty v. Assistant Collector of Central Excise*, wherein reference was made to a decision of the Kerala High Court. This was a case where vegetable non essential oils became excisable in 1956, a new item being introduced in the Finance Bill of that year, to which the Provisional Collection of Taxes Act was applied. The Court had held that the fact that the petitioner's goods were manufactured prior to 29-2-1956 was irrelevant and that the liability to duty attached the moment an item was included in the First Schedule to the Central Excises and Salt Act.

31. Shri Raghavan Iyer also referred to the judgment of the High Court of Bombay in the case of *Union of India and Ors. v. The Elphinstone Spinning & Weaving Mills Co. Ltd.* (1978 E.L.T. 680). in para 13 of the judgment it had been held that "the point of time at which we have to see whether the goods were liable to duty would be thus the date of removal of the goods from the factory or warehouse and not the date of manufacture or production, for the date when the goods were sought to be removed from the factory or warehouse they were goods of the description mentioned in one of the items in the First Schedule as being subject to a duty of excise and were goods which were manufactured or produced in India they could not be removed unless duty at the rate set-forth in the First Schedule to the Act was paid". This would also support his contention.

32. Shri Raghavan Iyer also referred to the judgment of the Supreme Court in the case of *J.K Steel Ltd. v. Union of India and Ors.*-(1978 E.L.T. (J 355)-ECR C 281

S.C.). At para 48 of the judgment there is a quotation from Halsbury's Laws of England to the effect that where the statute provides that subordinate legislation is to have effect as if enacted in the statute such legislation may be referred for the purpose of construing a provision in the statute itself. (Since there is no such provision in Section 38 of the Act, this argument is not very relevant). He submitted that Rule 9A in no way conflicts with Section 33. On Shri Haksar's argument based on Rule 53 (vide para 20 above), Shri Raghavan Iyer submitted that in the R.G 1 account only the physical description of the goods had to be entered, and not necessarily the tariff description. The physical description would not undergo change with a change in the tariff. The tariff description was required only with reference to the provisions of Rule 173B, relating to the filing of classification lists, and Sub-rule (4) of that Rule specifically provided for filing a fresh list or an amendment, when there was an amendment to the First Schedule whether it related to a change in the description or in the item or sub-item number. [Shri Haksar intervened to say that in the RG 1 account the rate of duty and the amount of duty had to be entered, as would be seen from Sub-rule (1) (g) of Rule 53].

34. We have carefully considered the submissions from both sides on the very interesting question which has been raised in this appeal. The facts are not in dispute. The goods were excisable under [tern 68. at the time of completion of manufacture (referred to for convenience as "(he time of manufacture"), they were classifiable under Item 68 and were not exempt from duty; at the time of removal from the factory the goods were excisable, classifiable under Item 16B (as amended), and not exempt from duty. The question is whether their tariff classification for the purpose of levy and collection of duty should be determined by the tariff as it stood at the time of manufacture or as it stood at the time of removal.

35. As seen from what has been stated above, detailed arguments were addressed by both sides, and several authorities relied upon. We observe that there can be a number of different situations, based on two variables. One is the point of time, i.e. whether the time of completion of manufacture or the time of removal. The other variable is the nature of duty liability : whether not excisable,

excisable but fully exempt and excisable but not exempt (goods partially exempt are considered as "not exempt"). The various judgments which were relied upon cover one or other of the situations which would arise from combinations of the two variables. Naturally, some of these are more frequent and more important than the others. The situations which are covered by the cases cited and are relevant to the present issue appear to be the following : (i) Goods excisable but fully exempt at the time of manufacture, and excisable and not exempt at the time of removal ; (ii) Goods excisable and not exempt at the time of manufacture, and excisable and not exempt at the time of removal (there being only a variation in the quantum of exemption (iii) Goods not excisable at the time of manufacture and excisable and not exempt at the time of removal; and (iv) Goods excisable and not exempt at the time of manufacture and excisable (under a different tariff entry) and not exempt at the time of removal.

We shall now refer briefly to the cases relating to each of these situations and also to cases relating to the parallel provisions in Section 15 of the Customs Act.

36. The first situation is covered by the judgment of (sic) Madhya Pradesh High Court in the case of Kirloskar Brothers Ltd. v. Union of India and Ors. (1978 E.L.T. 33). This case has been referred to in para 15 above. (For convenience we are referring to this as "the first judgment" and to the subsequent judgment rejecting the petition for a certificate of fitness for leave to appeal to the Supreme Court, and reported in 1978 E.L.T. 690 MP, as "the second judgment"). In the first judgment a Division Bench of the Madhya Pradesh High Court held that the liability for tax, namely, the excise duty, would arise no sooner the manufacture or production is completed and it is immaterial as to what machinery may be devised by the Central Government under the rule-making powers for recovery of a tax. The point of recovery or any restriction on removal will not be the determining factor for grant of exemption in respect of goods manufactured during the duty-free period.

In that view, the contention of the manufacturers was upheld. A petition was made to the same Division Bench of the Madhya Pradesh High Court for a certificate of fitness for leave to appeal to the Supreme Court. In the second judgment the said Division Bench refused a certificate of fitness for leave to appeal to the Supreme

Court (1978 E.L.T. 690). Thereafter, an application for special leave was made to the Supreme Court, of which the result was that the Supreme Court "dismissed the SLP on merits".

37. The second situation was before the Hon'ble Madhya Pradesh High Court in the case of Shree Synthetics Ltd., Ujjain v Union of India and Ors. 1982 E.L.T. 97 M.P. In that case, the goods were excisable throughout but there was a partial exemption at the time of manufacture, which was modified, so that a higher rate was prevailing on the date of removal. There was a change in the statutory rate also, but this does not affect the discussion). In that case, the Hon'ble High Court held that Rule 9A was valid and was rightly applied with reference to the rate of duty prevailing on the date of removal. The attention of the High Court was drawn to the decisions of the same High Court and of the Supreme Court in the case of Kirloskar Brothers to which reference has been made above. The Court distinguished the case before it from that of Kirloskar Brothers, in the following terms: "When an application for leave to appeal to the Supreme Court was made, the Division Bench rejected the leave application by a speaking order which is reported as Union of India v. Kirloskar Brothers-1978 E.L.T. (J 690). It appears that at the time of hearing the leave application the attention of the Court was drawn to Rule 9-A and the decision of the Supreme Court in Orient Paper Mills v. Union of India -AIR 1967 S.C. 1564. After referring to them the Court observed : "There can be no doubt that as laid down by their Lordships, the rate would be as existing at the time of removal".

The Court, however, made a distinction where duty was imposed for the first time after manufacture by saying : "The question will be different where the charging section, namely, Section 3 of the Act is to be considered to ascertain as to at what point of time excise duty is payable when the impost is made for the first time." As in that case, the goods were wholly exempt on the date of manufacture, it was held that they would not be subjected to duty even though they were not exempt on the date of removal. Special leave was applied for by the Union of India in that case which was refused. By order passed on 1st September, 1977, the Supreme Court "dismissed the SLP on merits". The learned counsel for the petitioner argues that the view taken by this Court in Kirloskar Brothers' case must be taken to have

been approved by the Supreme Court as the SLP was dismissed on merits. The order of the Supreme Court does not give any reasons. The words "dismissed the SLP on merits" are too vague for declaration of any law under Article 141 of the Constitution.

Moreover, as pointed out by us earlier, this Court when refusing leave to appeal to the Supreme Court made a distinction and held Rule 9-A to be not applicable because the goods in that case were wholly exempt on the date of manufacture. In the Court's opinion in that case, if goods are liable to excise duty both on the date of manufacture and on the date of removal, then only the rate of duty applicable would be that prevailing on the date of removal but if the goods are wholly exempt on the date of manufacture they would not be liable to excise duty even if before the date of removal the exemption is withdrawn. All that we need say here is that Kirloskar Brothers' case is distinguishable on facts and the decision in that case must be confined to its own facts. In the case before us, the goods were exigible to excise duty both on the date of manufacture and on the date of removal. They were never wholly exempt. The exemptions were only partial in that the rate of duty as fixed by Tariff Item No. 18 of the First Schedule was reduced from time to time by notifications issued under Rule 8. As the goods were never wholly exempt, Kirloskar Brothers' case has no application here." 38. A similar case was the subject of the decision of the Andhra Pradesh High Court in the case of Sirpur Paper Mills Ltd. v. Union of India and Ors. 1984 (17) E.L.T. 217 AP (vide para 8 above). The High Court took into account the judgments of the Madhya Pradesh High Court in the cases of Kirloskar Brothers and also Shree Synthetics. It held that the answer was to be found in Section 3 and not in Rule 9A and held that the petitioners were entitled to the benefit of the exemption notification as in force at the time of manufacture. The Court also, evidently with reference to the observations of the Madhya Pradesh High Court in the Shree Synthetics case, observed as follows : "Likewise, the contention in regard to the dismissal of the S.C.L.P. on merits by the Supreme Court passed on September 1, 1977 against the aforesaid judgment of the Madhya Pradesh High Court in Kirloskar's case, it should not be taken to be really a decision on merits, also merits no consideration, as it is fairly settled by now that when the Court records its order as dismissal on merits, it must be taken to have been a decision on merits." 39. The third situation

has been covered by the judgment of the Kerala High Court in the case of Assankutty V. Assistant Collector of Central Excise, referred to in para 30 above. In that case, although the goods were not excisable at the time of manufacture, it was held that they would be liable to duty as applicable at the time of removal. However, as against this, there is the case of Amar Dye Chem Ltd. (vide para 23 above). In that case, a new tariff item was introduced. Certain goods were sought to be assessed to duty by the Central Excise authorities at the time of their removal (after the introduction of the new item). It was ultimately held by the Bombay High Court that it was incumbent on the excise authorities to establish that the goods were manufactured after the midnight of 28-2-1961 (that is, when the new item had become applicable) and that they had failed to do so, and accordingly the matter was decided in favour of the manufacturers. We have seen the judgment of the Supreme Court 1978 E.L.T. (J 429) remanding the matter to the Bombay High Court. It is a brief judgment in which the stress is on the question whether the process of manufacture of the goods could have been said to have been completed before the midnight of the 28th February, 1961. Since the material on the record was not sufficient to enable the Supreme Court to come to a conclusion one way or the other, the matter was remanded back to the Bombay High Court to enable both parties to produce evidence on the disputed questions and decide the matter accordingly. Apparently, before the Supreme Court, it was accepted or assumed by both parties that where the process of manufacture was completed before the date of imposition of the duty, that duty would not apply to the goods. However, even though this question was not argued, it could be said that there is the authority of the Supreme Court to the effect that in such a case, where duty is newly levied, it would not apply to goods already manufactured.

40. We now come to the fourth situation, which is the one before us in the present case. The same situation was before the Hon'ble Allahabad High Court in the case of Kesar Sugar Works (vide para 28 above). As already stated, that case was identical in material respects to the present case. When this was mentioned to Shri Haksar, he had submitted that the Hon'ble Allahabad High Court had, in reaching its conclusion, assumed that the taxable event was the date of removal and not the date of manufacture of the goods. He was apparently reading from the headnote to the judgment as reported in one journal, where the High Court is

reported as having held as follows : "It is true that excise duty is on the manufacture or production of goods but the above rules leave no room for doubt that it is leviable at the time of removal of goods from the place of manufacture and not with reference to the manufacture of excisable goods. Thus, the taxable event is the date of removal and not the date of manufacture of goods." We find, however, that there is no such observation or assumption in the judgment that the taxable event is the date of removal and not the date of manufacture of goods. What has been observed by the High Court is as follows : "These rules leave 110 room for doubt that excise duty is leviable not with reference to the date of manufacture of the excisable goods but at the time and at the rate on the date of removal of goods from the place of manufacture or from the approved place of storage.

Thus, the duty is linked in point of time to the date of removal and not to the date of manufacture." Thus, it would not be correct to say that the Hon'ble Allahabad High Court had gone contrary to the advisory opinion of the Supreme Court which held that the taxable event is the manufacture of goods. On the other hand, the High Court had fully taken into account the judgments of the Supreme Court in the case of McDowell & Co. v. Commercial Tax Officer (AIR 1977 S.C. 1459) and A.B. Abdul Kadir and Ors. v. State of Kerala (AIR 1976 S.C. 182), which cases themselves refer to leading cases decided earlier.

41. In the Kesar Sugar Works case, the Allahabad High Court held that duty would be leviable in accordance with the new item even on goods manufactured earlier.

42. There are also some decisions of the Tribunal itself on some of the above situations. These decisions were taken after considering the various authorities which were cited. In its Order No. C-7/1985, dated, 31-12-1984 in the case of Messrs Control Ltd., Calcutta, where the situation was identical to that in the Kirloskar Brothers case (in respect of a commodity which though excisable was, at the time of manufacture, totally exempt from duty through an exemption notification), the Bench held by a majority judgment that no duty could be demanded, even though the goods were cleared subsequent to the withdrawal of the notification. (It is our impression that in some other similar cases other

Beaches of the Tribunal might have taken the opposite view, following other authorities, but it is not necessary here to detail those cases). In its Order No. C-502/84, dated 31-7-1984, in the case of Indian Cork Mills Ltd., Bombay 1984 (18) E.L.T. 606, where the situation was similar to that in the Kesar Sugar Works case and the case before us, the Tribunal followed the judgment in the case of Kesar Sugar Works and the Bombay High Court judgment in the case of Elphinstone Spinning and Weaving Mills Co. Ltd. (1978 E.L.T. 680) and held that duty was leviable in accordance with the amended item.

43. Reference was also made to a number of decisions on the parallel provisions of Section 15, Customs Act. One was the judgment of the Supreme Court in the case of Prakash Cotton Mills (AIR 1979 S C. 675).

In that case, the Supreme Court held that the rate of duty applicable to the imported goods had to be determined according to the law which was prevalent on the date they were actually removed from the warehouse, namely, the amended Sections 14 and 15 of the Customs Act.

We may also refer to another judgment, which although not cited before us, has come to be well-known. This is the judgment of the Delhi High Court in the case of Jain Shudh Vanaspati Ltd. and Anr. v. Union of India and Anr. (1984) 1 ECC 49. In this judgment, the Hon'ble High Court, after a very detailed discussion, held that the calculation for the purpose of rate of duty must be done with reference to the date mentioned in Section 15 in various circumstances; and that under the Customs Act the incidence of chargeability to duty arises under Section 15 itself, and the same cannot be treated as a mere machinery provision for effectuating the assessment. There are also a number of other judgments to the same effect, differentiating the date of importation or the date of entry into the territorial waters from the date of filing of the bill of entry (or other date as mentioned in Section 15), and holding that it is the latter date which determines the rate of duty.

44. In the above discussion, we have indicated the different types of situation which can arise, and the decisions available with reference to the respective situations. The various judgments which have been referred to above contain very detailed reasoning for the conclusions reached, and we would not venture to

comment on the reasoning of the Hon'ble High Courts. What we have to observe is that different conclusions have been reached with reference to different situations (and sometimes even with reference to the same situation). It might be objected that the same conclusion should be reached in all the situations, but we do not think this objection would be valid. It is axiomatic that the law can apply differently to different situations, and that distinctions can legitimately be drawn between one situation and another. Indeed, in the Shree Synthetics case (vide para 37 above), the Division Bench of the Madhya Pradesh High Court, headed by the Hon'ble Chief Justice of that High Court, after taking note of the decision of the same High Court in the Kirloskar Brothers case, and of the fact that the SLP in that regard had been dismissed on merits, considered that the Kirloskar Brothers case was distinguishable on facts and the decision in that case must be confined to its own facts.

We are in respectful agreement with the Madhya Pradesh High Court that, in considering the effect of the various judgments, it is necessary to take into account the situations to which they are applicable, and to draw distinctions wherever such distinctions are justified. It is on the basis of distinctions between relevant factors that we have set out in para 35 above four different situations. We have also set out the judicial decisions relating to each situation. The situation before us is squarely covered by the judgment of the Allahabad High Court in the case of Kesar Sugar Works, and no contrary decision relating to such a case has been brought to our notice.

45. It would appropriate here to refer to the effect of the Supreme Court order in the Kirloskar Brothers case. The course of events in that case has been set out in para 37 above. In the subsequent judgment in the Shree Synthetics case (vide para 37 above), the Division Bench of the Madhya Pradesh had observed that the order of the Supreme Court did not give any reasons and that the words "dismissed the SLP on merits" were too vague for the declaration of any law under Article 141. In the Sirpur Paper Mills case (vide para 38 above), the Andhra Pradesh High Court has observed that (although detailed reasons were not recorded by the Supreme Court) the Supreme Court's decision must be taken to have been a decision on merits. In other words, the Supreme Court must be held

as having endorsed the reasoning contained in the judgment of the High Court. Thus, the Madhya Pradesh High Court and the Andhra Pradesh High Court have adopted somewhat different approaches to the effect of the order of the Supreme Court. However, it appears to us that, so far as the present case is concerned, this difference in approach is really not material. From the passage in the Madhya Pradesh High Court judgment in the Shree Synthetics case which has been reproduced in para 37 above, it will be seen that the High Court had recognised a distinction between the situation covered by the Kirloskar Brothers judgment and that in the Shree Synthetics case, and held that the judgment in the Kirloskar Brothers case, even though approved by the Supreme Court, had no application to the Shree Synthetics case. We would like to stress that the scope, for distinction was not newly introduced by the Division Bench which decided the Shree Synthetics case, but was found by them in the second order of the Division Bench in the Kirloskar Brothers case. One particular distinction contained in the second judgment of the Division Bench in the Kirloskar Brothers case and quoted by the Division Bench in the Shree Synthetics case is found in the sentence "the question will be different where the charging section, namely Section 3 of the Act, is to be considered to ascertain as to at what point of time excise duty is payable when the impost is made for the first time". There are further observations in the Division Bench judgment in the Kirloskar Brothers case which are of relevance to the present case. For convenience, we are reproducing below para 5 of that judgment: "The learned counsel for the petitioner further invited attention to the provision of Section 4 of the Act as also to Rules 9, 9A, 49 and Rule 224(2) of the Central Excise Rules, 1944. We may observe that the said rules relate to time and manner of payment of duty. It is, no doubt, true that the rules provide for payment of duty at the rate prevailing on the date of removal of the goods. As such, there can be no doubt that so far as the rate is concerned, the one prevailing on the date of removal of the goods from the godowns will be relevant. But the liability for payment of excise duty cannot be determined with reference to Section 4 of the Act or the Rules framed thereunder, where exemption has for the first time been revoked and an article is subject to excise duty with effect from a particular date. Excise duty being a tax on production or manufacture, the liability for tax will arise at the time the production or manufacture is completed and not at the time the

goods are removed from the godowns by the producer or the manufacturer, of course, if that liability under Section 3 be established, then the matter relating to rate will be governed by the provisions of Section 4 of the Act and the relevant rules pertaining thereto. In view of this position, we do not think that the present case is a fit one for a certificate of fitness for leave to appeal to the Supreme Court, as, in our opinion, no substantial question of law of general importance is involved in this case." It will be seen that reference has been made above to applicable rules including Rule 9A ; it has been observed that the relevant rate will be the one prevailing on the date of removal of the goods; and that if liability under Section 3 is established, then the matter relating to rate will be governed by the provisions of Section 4 of the Act and the relevant rules pertaining thereto. The last-quoted observation would clearly indicate that where liability to duty under Section 3 is established as having existed at the time of manufacture, the actual rate of duty will be at the rate prevailing on the date of removal of the goods, in terms of the, relevant rules including- Rule 9 A. This is quite consistent with the view taken in the Kesar Sugar Works judgment and with' the stand of the Revenue in the present case. It goes against the stand of the respondents in this case because if in terms of Section 3 the liability to duty as well as the rate of duty is held to be established once for all at the time of manufacture, the references to the rate being the rate prevailing on the date of removal would be superfluous.

46. What emerges clearly from a study of the Kirloskar Brothers judgments is that in the first decision in this case, there was a categorical view that the liability for tax would arise no sooner the manufacture or production is completed, and the point of recovery or any restriction on removal would not be the determining factor for grant of exemption in respect of goods, manufactured during the duty-free period. In the second judgment dealing with the petition for a certificate of fitness, the observations made in the first judgment were amplified and explained as discussed above. It is relevant to note that both judgments were delivered by the same Bench headed by the then Chief Justice of the Madhya Pradesh High Court and therefore, must be taken as complementary to each other. Therefore, when the Supreme Court dismissed the special leave petition on merits without recording reasons, it can certainly be taken that it approved the reasoning of the High Court : but it would not be justified to hold that the Supreme Court approved

the reasoning only as expressed in the first judgment and not the explanation or elaboration as contained in the second judgment which, as we have mentioned, was also delivered by the learned Chief Justice who delivered the first judgment. Therefore, a close study of the judgment in the Kirloskar Brothers case would confirm the view that while the Supreme Court had upheld the finding of the High Court in the situation covered by that case, it had also left open the position in regard to other situations.

(i) There are a number of situations which can be distinguished and where the position in law would be different; (ii) The order of the Supreme Court in the Kirloskar Brothers case should be taken as applicable to the situation in that case, other cases having to be considered on their own merits ; (iii) The order of the Supreme Court in the Amur Dye Chem case was on the basis of the assumed or admitted position in that case, and the situation there was different from that in the present case ; (iv) The decisions in the Prakash Cotton Mills case and the Jain Shudh Vanaspati case on the parallel provision in Section 15 of the Customs Act are in line with the decisions in the Shree Synthetics case and the Kesar Sugar Works case ; and (v) The situation in the present case is squarely covered by the judgment of the Allahabad High Court in the Kesar Sugar Works case.

Following that judgment, the stand taken by the Revenue in this case would be correct in law and consequently the appeal deserves to be allowed. Having come to this conclusion on a very careful study of the case law, it may not be necessary for us to go further. However, we still think it would be useful to refer to some of the other aspects which were argued before us.

48. One of these was the argument of Shri Haksar (vide para 22 above) that the view advanced by the Revenue would involve the retrospective application of law. We would observe that, if it is held that Rule 9A applies, the question of retrospectivity does not arise, because that Rule itself fixes the relevant point of time which determines the rate of duty as the time of removal. Shri Haksar did not contend that Rule 9A was not valid or that it was not applicable (though he had his own explanation as to the scope of its application). Once Rule 9A is held as valid and applicable, the question of retrospectivity really should not arise.

49. We shall, however, examine the matter on the basis that the application of Rule 9 A in a case like the present could have an element of retrospectivity. Even in the quotation from Halsbury relied upon by Shri Haksar it is laid down that retrospective effect could be given to a provision if by express words or necessary implication it appears that this was the intention of the legislature. This is where the effect of the declaration under the Provisional Collection of Taxes Act comes in.

50. Sections 3 and 4(1) of the Provisional Collection of Taxes Act read as under : "3. Power to make declaration under this Act : Where a Bill, to be introduced in Parliament on behalf of Government, provides for the imposition or increase of a duty of customs or excise, the Central Government may cause to be inserted in the Bill a declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under this Act.

4. Effect of declaration under this Act and duration thereof-(1) A declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced." "Amendment of the First Schedule-The First Schedule to the Central Excises Act shall be amended in the manner specified in the Third Schedule." There was appended to the Bill a declaration under the Provisional Collection of Taxes Act which read as under : "It is hereby declared that it is expedient in the public interest that the provisions of clauses 33, 44, 45, 46, 47, 49, 50, 51, 52 and 53 of this Bill shall have immediate effect under the Provisional Collection of Taxes Act, 1931 (16 of 1931)." "In the First Schedule to the Central Excises Act, -* * * * * (xv) for Item No. 16B, the following Item shall be substituted namely :-"16B. Wood and Articles of Wood, Thirty per cent The Following, Namely :- ad valorem.

[The detailed description of the Item follows, but is not reproduced as it is not necessary for the purpose of this discussion].

51. The combined effect of the above provisions was that the amendment to Item 16B had the force of law from the midnight of the 2/th February, J982. It appears to us that, even if the application of the amended provision to goods manufactured

earlier and cleared after 27-2-1982 could be considered as having an element of retrospectivity, it could still be held that by virtue of the provision in the Provisional Collection of Taxes Act and the further specific provisions in the Finance Bill, that effect was the specific intention of the legislation.

52. We may now advert to the argument of Shri Haksar (vide para 26), namely that, in the matter of application of Rule 9A, a distinction should be made between the rate of duty and the description. Since the same Finance Bill raised the rate of duty on Item 68 from 8% to 10%, and this provision also had immediate effect under the Provisional Collection of Taxes Act, Shri Haksar had conceded that the increased rate of duty under Item 68 as in force at the time of removal would be applicable to the goods in question, even though they had been manufactured earlier. He, however, contended that the changed description of Item 16B, which brought these goods within the scope of that Item, would not be applicable. We are unable to see any justification for drawing such a distinction in the matter of application of Rule 9A or of the provisions of the Finance Bill. Shri Haksar had laid stress on the fact that Rule 9A refers to the rate of duty and not to the description. But this obviously is because what finally determines an assessment is the rate of duty : the description is only an intermediate step, a signpost so to speak, which points out the correct rate of duty. This in our view is why Rule 9A refers only to the rate of duty. We have already seen that the Fifth Schedule to the Bill did not make any distinction between the description and the rate of duty. Both were covered in one clause. Nor did the declaration under the Provisional Collection of Taxes Act make or justify any such distinction. Further, as pointed out by Shri Raghavan Iyer, the substance of the change with reference to any particular goods was in the rate of duty, and it was not material whether this change was effected by amending the rate or the description. We do not, therefore, think that the distinction between the description and the rate of duty, which Shri Haksar sought to draw, in the matter of application of Rule 9A, can be sustained. Indeed, after conceding that Rule 9A would apply, at least so far as the rate of duty is concerned, the respondents cannot with any force contend that the effect of a change in description should be ignored.

53. We have covered all the salient arguments put forward by both sides. We do not consider it necessary to refer specifically to some of the other arguments put forward by Shri Raghavan Iyer, which would only go to reinforce our conclusions; or to discuss some minor points advanced by Shri Haksar such as that based on the article contained in a journal (vide para 25 above), or on the unlikely possibility of a manufacturer's accounts being held to stand retrospectively falsified (vide para 20 above), as these would not affect the conclusions reached.

54. In the result, we hold that the Order-in-Appeal No. 331-CE/IND/83, dated 22-6-1984 of the Collector of Central Excise (Appeals), New Delhi, was not correct and in accordance with law. We accordingly allow the appeal, set aside the Order of the Collector of Central Excise (Appeals) and restore the Order C. No. CEX-20/Misc/16-B/82/197, dated 12-3-1982 of the Superintendent of Central Excise, Range IV, Bhopal.

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