

**ilac Ltd. Vs. Collector of Central Excise**

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

**Decided On :** Mar-19-1985

**Reported in :** (1985)(21)ELT532TriDel

**Appellant :** ilac Ltd.

**Respondent :** Collector of Central Excise

**Judgement :**

1. M/s. Ahmedabad Manufacturing & Calico Printing Co. Limited, Bombay, filed two appeals dated 9th March, 1981 and 31-7-1984 against the order-in-appeal No. 1364/80 and No. 1365/80, dated 20th September, 1980 passed by the Collector of Central Excise (Appeals), Bombay. The original appellants, M/s. Ahmedabad Manufacturing & Calico Printing Co.

now call themselves M/s. ILAC Limited, the name of a wholly owned subsidiary of Calico Company. We shall, therefore, deal with this appeal as an appeal by M/s. ILAC Limited.

2. The dispute arises in respect of the calcium carbide and the acetylene manufactured by M/s. ILAC Limited. The factory manufactures polyvinyl chloride resin and chlorinated solvents. During the course of the manufacture of these two commodities, certain intermediate compounds and substances are created and are consumed and used in the same factory. The first intermediate substance that comes into existence is calcium carbide. The raw materials used in the manufacture of the calcium carbide are limestone, charcoal, coke and other

materials. A second intermediate product is also created which M/s.

ILAC call an impure form of acetylene gas. After the induction of new Section 4 of the Central Excises Act, 1944, on 1-10-1975, the petitioners declared the price of the calcium carbide and the acetylene used in captive consumption. They claimed that they did so under a mistake of law or misapprehension of the legal position. After certain correspondences between the central excise and the manufacturers, two orders were passed by the Assistant Collector-one dated 20th May, 1978 and another dated 23rd May, 1978, rejecting the claim of the factory to exemption on calcium carbide and acetylene gas from payment of duty.

M/s. ILAC filed two appeals both dated 17th August, 1978 before the Collector of Central Excise (Appeals), Bombay in respect of the two orders of the Assistant Collector. The Collector passed the order dated 20th September, 1980 rejecting both appeals of the petitioners.

3. The case was heard by this Tribunal on 2-1-1985 and Dr. Kantawala argued on behalf of the appellants. He submitted that the calcium carbide used by M/s. ILAC in the manufacture of PVC resin and chlorinated solvents is not an excisable commodity under item 14AA of the central excise tariff. This item covers calcium carbide and it requires that a substance should be known as calcium carbide in the market and must conform to the Carbide of Calcium Rules, 1937, framed under the Petroleum Act, 1934. Only a product which is known and acceptable to the market as calcium carbide can be assessed to duty under this item. The calcium carbide produced by M/s. ILAC is not only an intermediate product, and therefore, is not assessable to duty, but is a product of inferior commercial purity, and is not marketable as such. It is not sold, nor is it capable of being sold in the market.

The Carbide of Calcium Rules, 1937 prohibits the sale of such inferior quality of calcium carbide; the rules even prohibit the storage and packing of calcium carbide except when done in accordance with these rules. The calcium carbide produced by ILAC is not packed or stored in accordance with the Calcium of Carbide Rules, 1937, and cannot, therefore, be deemed to be calcium carbide as known to the market. He referred to the judgment of the Calcutta High Court in the Union Carbide Company v. Assistant Collector of Central Excise, matter No.96/75

decided on 10-5-1976 1978 E.L.T. (J 180) (Cal.) in which the court held that in interpreting words in fiscal statutes which are not defined by that statute, the popular meaning attached to them by the trade should be accepted.

4. The learned counsel argued further to say that since there was no removal of the calcium carbide obtained as an intermediate product, the lower authorities should have held that they were not liable to excise duty. There was no removal of the goods but only removal from one plant to another for continuous processing, both plants being situated within the same central excise licence premises. This is not removal in accordance with the law of central excise and cannot attract central excise levy to such goods. The places in which the plants making the calcium carbide and the acetylene gas are situated are both in its factory premises; it cannot be said that there has been any removal from the factory. In accordance with rule 9 and rule 49 of the Central Excise Rules, 1944, duty cannot be levied until the goods are removed from the factory.

5. The learned counsel argued that under the Carbide of Calcium Rules, 1937, strict provisions have been made with respect to the importation, transport and storage of calcium carbide. He referred to rule 20 of these rules which provides that : 'No carbide shall be kept at any place, with or without a licence, unless it is "commercially pure", that is unless it contains no impurities which would render the gas evolved, either alone or in admixture with air, liable to ignite spontaneously.' 6. He also referred to rule 21 which allows that no licence would be required for the storage of calcium carbide in any quantity not exceeding 5 lbs. if it is kept in prescribed receptacles each containing not more than 1 lb, The learned counsel said that the rules define prescribed receptacle as- (ii) Hermetically closed at all times except when its contents are being placed within it or withdrawn from it, and (iii) bearing a stamped, embossed, painted or printed warning exhibiting in conspicuous characters "The contents of this package are liable if brought into contact with moisture, to give off a highly inflammable gas." 7. Great stress is laid in the rules on proper storage but all this relates to the commercially pure calcium carbide. It is a natural corollary of this that commercially impure carbide is not calcium carbide under the rules and is not recognisable as such. It follows, therefore, that the central excise rules and the law must recognize only such

carbide as are recognized by the Calcium of Carbide Rules, 1937. Their calcium carbide is not regulated under the Calcium of Carbide Rules because it is not commercially pure. Hence, it is not calcium carbide in the trade parlance and commercial sense and cannot be said to qualify for assessment under the Central Excise Item 14AA.8. The learned Dr. Kantawala referred to the provisions of the Indian Standards : 1040-1978 Specification for Calcium Carbide, Technical. He referred to paragraph 6.1 Packing. This standard requires the transport and storage in moisture-proof steel containers and each container shall contain 50 or 100 kgs. of calcium carbide and in paragraph 6.2 Marking each container is required to be securely sealed and marked with the following : (e) Manufacturer's name and/or his recognized trade mark, if any; and (f) Lot number to enable the batch of manufacture to be traced from records.

9. The next paragraph 6.2.1 prescribes that only one graded size of the material shall be contained in each container and the size limits of such material to be clearly marked on the outside of the package.

Paragraph 6.2.2 requires the words- 10. The learned counsel said that none of these were required for their calcium carbide because their calcium carbide was not of the required standard purity and quality. Therefore, the regulations made with respect to standard calcium carbide did not apply to their calcium carbide and this was proof that it was not calcium carbide in the accepted technical and commercial sense. It is only called calcium carbide by them because it does contain calcium carbide but unless a calcium carbide is of the required purity, percentage and standard, it will not qualify to be classed as calcium carbide, and, therefore, cannot be assessed to central excise duty.

11. He reiterated that there was no manufacture of calcium carbide if we take the true meaning of the material calcium carbide since their product does not conform to any of the government standards and commercial acceptance. He also proposed that even if there was a manufacture, the product cannot be goods because they cannot be treated and no one will accept their product as calcium carbide. A calcium carbide to be classed in the category of goods must be saleable and must be offered for sale. There is none of these factors and the

category of goods will not accept their product, the purity being only about 50% and the rest mostly phosphates; the gas yield is much below the Indian Standards. The Indian Standard is a standard that tells us to call a product by a particular name. If a product can meet this standard prescribed by the Indian Standard then we call that product by that name which the standard gives it. Otherwise we will not call the product by that name even if it resembles that product and has many features of similarities. This product does not conform to the Indian Standards. The rules say that the containers should not contain more than 150 kgs.; their product goes in much larger quantities.

12. The learned counsel referred to the Central Excises Act and the section on manufacture which is in Section 2(f). He pointed out that it is not enough for a product to be a manufacture or a manufactured product. To be liable to excise duty under the Central Excises Act, it must be an excisable goods. Excisable goods are defined in Section 2(d) as goods specified in the First Schedule as being subject to a duty of excise. Even if the calcium carbide is termed manufactured goods, it is not an excisable goods because it has not come to the standard which would class it in the First Schedule of the Central Excises Act as an excisable goods. They once offered the goods to M/s Indian Oxygen who rejected it as unsuitable. This establishes that the product is not a standard calcium carbide as would be known to a buyer who wants to buy calcium carbide for his consumption.

13. He then referred to para 7 of the New Delhi High Court decision in M/s. Delhi Cloth & General Mills v. Joint Secretary, Government of India, Civil Writ No. 1358/75 decided on 16-2-1978 1978 E.L.T. (J 121) (Del.). The Court decided that the use of the expression "commercially pure" in rule 20 of the Carbide of Calcium Rules showed that even statutory rules recognize that the calcium carbide must attain the requisite degree of purity before it can be rendered commercial or marketable. Since it was not marketable, the Court said that the Calcium Carbide was not a "goods" and the product was not economical "goods" within the meaning of Section 3 of the Central Excises and Salt Act, 1944. South Bihar Sugar Mill v. Union of India, Civil Appeals Nos. 289 to 311 of 1965, etc., decided on 5-2-68 [AIR 1968 S.C. 922=1978 E.L.T. (J 336) (S.C.)]. The Hon'ble Court ruled that kiln gas

was not carbon dioxide although one of its constituents was carbon dioxide. But since it was not known as carbon dioxide it could be regarded as carbon dioxide. *Union Carbide v. Assistant Collector of Central Excise*, Matter No. 96/75 decided on 10-5-76 1978 E.L.T. (J 180) (Cal.). The court ruled that to become dutiable as one of the items mentioned in the First Schedule of the Central Excise Act, the transformation of the materials must result in making the article as one mentioned in the First Schedule of that Act.

16. This Tribunal gave a decision that to become dutiable there must be a manufacture and the burden of proving that manufacture has taken place and that the tariff entry has been satisfied are on the taxing authority [*Bhor Industries Ltd., Bombay v. Collector of Central Excise, Bombay*: Appeal No. ED(SB)(T)A. No. 1278 decided on 21-12-82 (1983 E.L.T. 179)]. Although he quoted the New Delhi High Court decision in *J.K. Cotton Spinning v. Union of India*, Civil Writ No. 1858 of 1981 decided on 11-1-1983 1983 E.L.T. 239 (Del.), the learned counsel of M/s. ILAC said that he did not want to discuss rule 9 and rule 49 and the retrospective effect given to the amendments carried out in 1982.

He, however, referred to Trade Advice 68 of 1981 by the Central Board of Excise & Customs which said that acetylene gas falling under item 14H produced in a continuous and uninterrupted process of manufacture and used captively, will not be classified under item 14H if it is impure and does not conform to the relevant ISI specifications or trade nomenclature of the commodity.

17. The Appellate Collector was wrong to say that the acetylene gas, even if not conforming to the standards was excisable. Removal is a secondary factor in determining whether a product is excisable. The important deciding factor is whether the acetylene was an excisable goods or whether an excisable goods called acetylene existed for the purpose of excisability. The High Court of Bombay said in *Union Carbide v. Union of India*, Writ Petition No. 486 of 1980 decided on 9-4-1981 1982 E.L.T. 316 (Bom.) that the acetylene gas was not used for storage or for any other purpose. The gas which was a product of cracking naphtha was not an identifiable article which comes into existence to be liable to excise duty. A product like the acetylene gas produced by them in a continuous production and

was, therefore, not identifiable.

The central excise did not dispute that their acetylene was not according to IS.18. The learned counsel referred to Chapter 5 of the Carbide of Calcium Rules, 1937, and argued that it was an offence under this Chapter of the Rules if they market acetylene gas which was not according to the standard. Indian Standard 308 of 1977 lays down specifications for dissolved acetylene (gas). This standard prescribes stringent tests for acetylene and their acetylene does not meet any of these requirements and this fact is not contradicted by the central excise. Their acetylene is not an acetylene either under the rules or under the Indian Standards. The gas produced by M/s. ILAC has no cylinder which can be entered in the RG-1. The Central Excise Rules themselves require tests, packing etc. etc. Acetylene gas which conform to Indian Standards costs at least 7 times their gas. Their goods are priced on the basis of market purchase of some gas.

19. The learned Dr. Kantawala argued to say that there is no substance whatever in favour of the central excise case that their calcium carbide and acetylene were assessable or liable to pay excise duty. Not only are the goods not removed like excisable goods are removed for sale and home consumption but they did not even come up to the normal scientific, technical or commercial standards that are normal to products known by these names. Nor are they acceptable under the names by which they are called. The fact that their sub-standard goods do not come up to the normally accepted standard or purity for similar products has not been denied by the central excise themselves. Trade Advice No. 83/81 dated 24-8-81 was like the previous one and clarified that carbon dioxide gas produced in a factory would fall outside the purview of item 14H C.E.T. so long as the gas did not conform to the marketable grade as prescribed in the ISI specifications. Such a gas would be properly classifiable under item 68.

20. The various judgments that he has quoted are all in favour of saying that the goods, calcium carbide and acetylene should not be assessed to excise duty and that, therefore, the action of the central excise was wrong and needs to be set aside and the duty collected from the petitioners should be refunded.

21. The learned counsel for the department Mrs. Zutshi opened her attack by quoting the decision of the Supreme Court in Union of India v. Delhi Cloth Mills Civil Appeal No. 168 to 170/1960 decided on 12-10-1962 AIR 1963 S.C. 791 to say that there must definitively has been a manufacture because the factory calls the goods by the names calcium carbide and acetylene. Therefore, the goods must be calcium carbide and acetylene even if they were a calcium carbide and acetylene of a less pure quality. Referring to the decision of the New Delhi High Court on Delhi Cloth Mills v. Joint Secretary, Government of India, Civil Writ No. 1358/75 1978 E.L.T. (J. 121) (Delhi), the learned counsel said that the counsel for M/s ILAC had read only the head notes. A close reading of the text will reveal that the direction of the judgment was not quite what the learned counsel thought it was. The judgment refers to Section 4 of the Central Excise Act. This is a section that regulates the determination of the value of excisable goods for purposes of charging excise duty. It requires that the normal price of the goods should be the price at which such goods are "ordinarily" sold by the assessee to a buyer. Now, it may be true that in this case the calcium carbide and acetylene were not sold but this must not deceive us into thinking that it has no commercial value. The calcium carbide was used to produce acetylene and other goods. This then proved that it had value; without such value, it would not be able to produce other goods, commodities, products. The factory took the trouble to utilise it and this is enough to make it an excisable commodity. The law does not state that if a goods is not according to the Indian Standards, it will not be deemed to be a goods for assessment to duty. The relevance of Indian Standards is only when they compete with foreign standards, they will be preferred to the latter; but it does not follow that the Indian Standard will determine excisability. It may be true that in the South Bihar Sugar Mills decision, the Court decided that kiln gas was not carbon dioxide but she was unable to see the relevance of this decision because in this case the calcium carbide and the acetylene were the most important constituents in the products which was not the case with the carbon dioxide in kiln gas. The fact that the calcium carbide and acetylene were not sold, makes no difference and does not affect in any way whatever the excisability and liability to duty of the two products.

22. She called attention to Section 2(d) and Section 2(f) of the Central Excises Act and said these sub-sections when understood properly will work to the end that these two products will be seen to be excisable. Sub-section (d) speaks only of excisable goods specified in the First Schedule, not of goods specified in accordance with the Indian Standards or any standards or any other laws or rules and regulations that may be in force in the country. It is enough that a product must generally answer to the generic description contained in the Schedule for it to attract the Central Excises Act.

23. Item 14AA under which calcium carbide is assessed does not have a description as we find in item 19, Cotton Fabrics which requires that cotton should predominate by weight in the fabric or that such fabric should contain more than 40% by weight of cotton and 50% or more by weight of non-cellulose fabrics or yarn or both. Nor do we have an explanation like item 22F which requires that a manufacture under this item should have mineral fibres or yarn predominating in weight.

Similarly, item 18D, jute yarn requires that jute should predominate in weight in the yarn. There are several other items which have this "predominance" test; but the item that covers calcium carbide does not have it; and we cannot import "predominance" into the determination of whether a thing is calcium carbide or not. If a product is calcium carbide and is put to uses to which calcium carbide is put, then of a certainty, the substance is nothing but calcium carbide. She referred to the High Court of Allahabad decision *Union of India v. Union Carbide-Special Appeal No. 429 of 1969 etc.* decided on 22-2-72 1978 E.L.T. (J 1) that the court decided that even if the substance is produced at an intermediate stage, and is not put in the market for sale, it would still be liable to duty. The court pronounced the test of general marketability not sound. The High Court of Calcutta decided in *Matter No. 96/75 Union Carbide v. Asstt. Collector of Central Excise 1978 E.L.T. (J 180) (Cal.)* that if a word is not defined in a fiscal statute, the popular meaning attached to it by the trade should be accepted. This, argued the learned Mrs. Zutshi, implies that if the word is defined, that is to say, the commodity is identified by a name, then one should not go to the market for enlightenment. Calcium carbide needs no definition because it is named in item 14AA, and therefore, we

do not require the help of the market to learn its identity. In the *Hemraj Goverdhandas v. Assistant Collector of Central Excise* 1978 E.L.T. (J 350) (S.C.) the Supreme Court said that there was no intendment in a taxing statute. Regard must be had only to the clear meaning of the words. There is no lack of clarity in the words 'calcium carbide' said the learned counsel. Calcium carbide is a clear meaning of the name and that is what we ought to call it and not seek for further supposed meanings in the market place to be attached to it.

24. The High Court at New Delhi said that a properzi rod was an aluminium wire rod. The court rejected the contention that in the trade they were not known as aluminium wire rods (*Aluminium Cables v. Union of India- Civil Writ Petition No.25*). She mentioned that in the *Bhor Industries Order No. 309/1983-C* dated 12-10-83, the Tribunal held that marketability cannot be carried to the extent that a specific entry in the First Schedule itself is rendered ineffective and nugatory. She said that the High Court of Bombay decision in *Miscellaneous Petition No. 922 of 1974 Indian Vegetable Products v. Union of India and Ors.* 1980 E.L.T. 704 (Bom.) the court said that once an item comes into existence with a definitive identity, the process and manufacture is complete and it cannot be said that the product is not a finished one within itself.

26. The learned Mrs. Zutshi read the 1983 decision of the New Delhi High Court which upheld the validity of the retrospective amendment of rule 9 and rule 49 of the Central Excise Rules, 1944. The terms 'issued out' and 'removed' in rule 9 and rule 49 must conform to the intention of the amended rules. She argued that so long as the goods are identifiable and capable of removal, it is enough to make them excisable. She said that an attempt was made by M/s. ILAC to sell the goods to Indian Oxygen. Even though the sale did not materialise, the goods were capable of being sold. She could not understand the argument about the absence of storage because there was no need to store these materials as they were immediately utilised in the manufacture of other goods. Storage becomes crucial when transport and storage become necessary for the purpose of future transaction and sale. Since there was neither transaction, nor sale, the factory did not have to store them. But this would not mean that the calcium carbide and the acetylene cannot be stored. She said that the decision of the New Delhi High

Court in the Civil Writ No. 1358/75- Delhi Cloth Mills v. Joint Secretary, Government of India 1978 E.L.T. (J 121) (Del.) to the effect that duty cannot be collected unless goods are removed from the factory, was overruled in 1983 by the New Delhi High Court decision in J.K. Cotton Spinning v. Union of India-Civil Writ No. 1858 of 1981 1983 E.L.T. 239 (Del.). Here the High Court said clearly the retrospective amendment of rule 9 and rule 49 according to which goods consumed within the factory of production were liable to excise duty, was valid.

The absence of packing or of suitable packing might be a contravention of the rules relating to the storage of carbide of calcium : they have no relevance to the durability to the goods under the Central Excise Act and Regulations.

27. She quoted the Central Board of Excise & Customs Tariff Advice No.25/82, dated 11-5-82 by which the Board clarified that the gas used for captive consumption within a factory would still be assessed and charged to duty under the appropriate item of the Central Excise Tariff if it can be considered to be goods taking the relevant judicial systems into account. In Binny Limited v. Superintendent of Central Excise Guindy Writ Petition No. 4586 of 1976, the High Court of Madras decided on 20th September, 1978 1979 Tax L.R. 2240 (Mad. H.C.), that whether a product was derived at an intermediate stage or was not put in the market for sale or its purity content was not the same as another form of the product would not change the matters in so far as liability to excise duty was concerned. The Tribunal held in respect of the Nirlon Synthetics Order No. 309/1983-C dated 12-10-83 that even if the caprolactum was of a lower quality it was still assessable as caprolactum regardless of its form.

28. It would be evident from the revision petition paragraph 4.G that the factory used to sell some of its calcium carbide because this paragraph said that the petitioners consumed 80% to 90% of the production of calcium carbide evidently, selling or otherwise disposing, 10% to 20% of their calcium carbide.

29. She referred to IS : 1040-1978 Specification for Calcium Carbide, Technical. This is a specification for technical grade of calcium carbide as can be seen from its scope in paragraph 1.1. In paragraph 3.1. this standard lists three qualities, namely, quality (A), quality (B) and quality (C). Quality (C) was the most inferior.

She pointed out that in Table 3, the standard lists the characteristics and requirements for all three qualities as well as the method of test which is detailed in Appendix 'C' of the Indian Standard. The standard even specifies the sieve dimension to determine the size of the grades.

This recognizes that there will be and there can be different sizes and different qualities of calcium carbide and not just one so-called commercial grade calcium carbide. Indian Standard: 308 of 1977 is similarly a specification for dissolved acetylene gas. The standard prescribes quality tests only because it recognizes that qualities will differ.

30. The learned counsel for M/s. ILAC replied that excisability must rest only on the fact that the goods are excisable. The learned counsel for the department has made a laborious discussion on grades but he would like to point out that the quality of calcium carbide is specified only because the goods are made in India. In paragraph 0.2, the Committee of the Indian Standard expressed the hope that the manufacturers would be able to improve the quality of the materials so that quality (B) could be removed from the standard. But the learned counsel for the department has not proved that M/s. ILAC's calcium carbide is of the quality that the central excise tariff recognizes as calcium carbide. Until she does, the commodity should stay outside excisability as calcium carbide. The learned counsel for the department says that the Carbide of Calcium Rules were meant only for safety of operation and storage but this is not a correct appreciation of those rules. They are meant to enforce quality also because good quality calcium carbide can be a source of danger. A commercially pure calcium carbide is a chemically pure calcium carbide. The tariff advice issued by the Board were issued after recognizing that several judgments have been given by the High Courts that commercial use and practice must be taken into account by the central excise authorities and it reflects the desire of the Board that commercial practice and trade understanding should be given proper weight. The decision in the Indian Vegetable Products case of the Bombay High Court and of the Ahmedabad High Court in the Union Carbide case were in respect of the things which were goods and recognizable as goods. In their case the products were not goods and were, therefore, not marketable, and in fact, marketability does not arise.

31. The main ground on which M/s. ILAC's case rests is that their goods, the calcium carbide and acetylene were of such inferior qualities that they were not marketed, were not marketable, and therefore would not form goods and for these reasons were not excisable under the Central Excise Act because the Act and its tariff recognize only commercially pure or commercial grade goods. By this the learned counsel for M/s. ILAC means that if a product does not conform to the accepted standards of that product, it would not be an excisable goods under the Central Excise Act and, till then, would not attract liability to excise duty. He drew support from the fact that they do not observe any of the precautions enjoined on makers of calcium carbide and acetylene by the rules framed for these purposes such as the Carbide of Calcium Rules, 1937 which were framed under the Petroleum Act, 1934 and which provided a number of steps to be taken by a manufacturer of these things and for their proper storage. Both calcium carbide and acetylene are very dangerous substances and great fire risks unless stored properly and in a manner that will prevent their coming into contact with substances that are capable of starting the dangerous reactions which leads to explosion or fire. He quoted a large number of court judgments also which he said supported his arguments. Since it is a matter of whether the calcium carbide and the acetylene as produced in M/s. ILAC's factory are capable of being brought within the central excise coverage, we shall first deal with the court cases which, the learned Dr. Kantawala says, prohibit his goods being considered excisable.

32. The first judgment we will discuss is the Indian Vegetable Products v. Union of India (Misc. Petition No. 922 of 1974)-1980 E.L.T. 704 (Bom.). By this decision, the High Court of Bombay wrote in paragraph 8 that the vegetable tallow must be held to be a finished excisable goods although it did not agree that every excisable goods is a finished excisable goods. The learned counsel for the department argued that this would support her case that an excisable goods need not be what is understood as a finished excisable goods. A product in a crude stage or raw stage, if it generally answers to the description of that name, can still be an excisable goods under that name even though it still lacked finishing. The learned counsel for M/s. ILAC argued that the New Delhi High Court ruled in Civil Writ No. 1358/75 1978 E.L.T. (J 121) (Del.) that unless the goods were removed from the factory they could not be subjected to excise duty, according to rule 9 and rule 49.

This decision, however, was overruled by the same High Court in Civil Writ No. 1858 of 1981 M/s. J.K. Cotton Spinning 1983 E.L.T. 239 (Del.) holding that in view of the retrospective amendment by Section 51 of the Finance Act, 1982, all goods captively consumed in the factory of production would be liable to duty even in the past. This decision effectively neutralizes other decisions to the contrary. It was argued by the learned counsel for M/s. ILAC that their goods was not of the required standard of commodity and commercial quality and that it was not marketable for that reason and had not been marketed. This contention, however, is countered by the decision of the Madras High Court in Writ Petition No. 4586 of 1976 M/s. Binny Limited, Madras 1979 Tax L.R. 2240 in which the High Court ruled that even if the product was derived at an intermediate stage or had not been put in the market for sale or its purity was not the same as another form of the same product obtained by further processing, would not change matters in any way as far as excise liability was concerned. In Special Appeal No. 429 of 1969 Union Carbide of India Limited, 1978 E.L.T. (J 1) the High Court at Allahabad said that general marketability was not relevant for the purpose of excise levy. The goods could have a very limited and specialized market but this would make no impact on the legal position, meaning their liability to excise duty. In the same judgment the Hon'ble Court said that the fact that the particular substance produced at an intermediate stage was not put in the market for sale would not make any difference and would not be material so far as its liability to duty was concerned.

33. In judgment 1978 E.L.T. J 121, the Delhi High Court held in paragraph 7 that the product, meaning calcium carbide, was not capable of being sold since it had not attained the purity required of a marketable calcium carbide required by the Calcium Carbide Rules of 1937.

34. A judgment delivered by the High Court at Allahabad - Union of India v. Union Carbide 1978 E.L.T. J 1, held that a thing would nonetheless be goods even if it does not have a market where it can be easily bought or sold. The fact that a product may not be known to the general public or to the traders in general will not change the position, and the court held that the test of general marketability did not appear to be sound. In paragraph 18, the High Court said that the Supreme

Court in the Delhi Cloth Mills case AIR 1963 S.C. 791 held that because a particular substance produced at an intermediate stage is not put in the market for sale would not make any difference and would be immaterial for its liability to duty. Excise duty was a duty on manufacture and production of goods and not on sale, held the court. It noted that to be goods, an article need not be marketed and that marketability is not an essential ingredient in the meaning of the terms material and articles. *Union Carbide Company v. Assistant Collector of Central Excise* 1978 E.L.T. (J 180) held in paragraph 8 of the judgment that the question whether rough rolled zinc prepared or produced by the petitioners in the process of producing zinc callots could be considered to be manufacture of excisable goods mentioned under item 26B had to be judged in the light of the definition of manufacture under section 2(f) of the Act, the provision of Section 3 and the meaning to be given to sheets and strips in item 26B(2) of the First Schedule of the Act. Excise was a tax on the production and manufacture of excisable goods; the taxable event was the manufacture or production of the goods. It was not necessary to attract duty that the goods should be sold; if excisable goods are produced or manufactured that is sufficient to attract duty. Whether the goods were consumed, sold or not used thereafter is wholly irrelevant. In paragraph 10, the Hon'ble Court discussed certain decisions of the Supreme Court. One decision discussed was *Union of India v. Ramlal Mansukhrai*, AIR 1971 S.C. 2333 where the Supreme Court decided an appeal from a High Court decision in a suit where the question arose whether billets of copper alloys, namely, kansi and brass rolled into circles in some form or the other and in different sizes were liable to excise duty under item 26A(2). It could not be said, according to the Supreme Court, that only trimmed circles could be considered as circles and as finished products. Even uncut circles were circles as envisaged by the item. The rolling of billets into circles was a process in the course of completion of a manufactured product as contemplated by Section 2(f). There was no dispute that rolled billets of copper alloys were circles in some form or other and in different sizes. The contention was that uncut circles could not be held as circles as mentioned in the item. The Supreme Court found that the contention was unacceptable in view of the description of the goods in item 26A of the First Schedule to the Act. The Supreme Court found on evidence that uncut circles were certainly one form of circle. The Supreme Court

was further of the opinion that the contention that uncut circles could not form one form of circles could not be accepted because in that case there was no evidence that in commercial community uncut circles were not known as circles.

36. This was a decision in which the High Court ruled that rough rolled zinc would be assessable to duty as sheets and strips notwithstanding the roughness. This was a decision delivered by Justice Sabyasachi Mukharji, who has since become a Justice of the Supreme Court. There is no evidence in this case before us either that the calcium carbide produced by M/s. ILAC is not known as calcium carbide in the commercial community.

37. The High Court of Madras in Commissioner of Co-operation of Madras v. Assistant Collector of Central Excise-1978 E.L.T. J 653, ruled that there cannot be any distinction between the manufacture of goods for sale and the manufacture of goods for one's own purposes other than sale, under the Central Excise Act. It quoted a passage from Supreme Court judgment AIR 1962 SC 1006, M/s Chottabhai v. Union of India which runs : "In our view, a duty of excise is a tax levy on home produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them. The duty in the present case satisfied this test, and therefore, it is unnecessary to seek other grounds for sustaining the validity of tax." 38. One of the things that was pressed on behalf of the petitioners was that the manufacture of excisable goods by a person without any commercial motive would not come under the definition of manufacture, and therefore, no excise duty was leviable on such goods under section 3. The High Court said it was unable to accept this stand. We have to bear in mind that goods may be unmarketable for various reasons; one is that they are meant to be used by the manufacturer himself, and another that they are not marketable since they are not of the requisite standard or quality. The various court rulings we have seen only go by the fact that an excisable product has been produced and that the quality of such a goods would not affect its marketability. In South Bihar Sugar Mills v. Union of India-1978 E.L.T. J 336, a very significant sentence appears in paragraph 15 thus : "The fact that the gas so generated has

carbon dioxide below 99 per cent and does not conform to the specification of the Indian Standard Institution also would not matter for the gas may be sub-standard, provided what is produced is carbon dioxide." 40. The Supreme Court wrote this after saying that "the duty was on manufacture and not on sale" and that "the mere fact that the kiln gas generated by these concerns is not actually sold would not make any difference." The court ruled that the gas generated was kiln gas and not carbon dioxide as known to those who deal in it or who use it. And so, not being carbon dioxide, it would not attract duty under item 14H.[This item covered carbon dioxide]. The South Bihar Mills etc. claimed, let it be noted, that the gas was not carbon dioxide as its carbon dioxide was less than 99 per cent and the Indian Standard laid down a carbon dioxide content of at least 99 per cent.

41. In the case before us, the calcium carbide is said to be of a low purity or quality. But there is no claim, and there can be none that it is not calcium carbide. It was used as calcium carbide, and M/s. ILAC the firm who used it, used it as calcium carbide and called it calcium carbide. They even tried to sell it once but, for reasons we have not been told, the deal fell through. They do not say that they tried to sell something that was not calcium carbide. Evidently, the offer was of calcium carbide. Perhaps the price was not right or may be the delivery was not what the customer wanted. Whatever the reason for the failure of the deal, M/s. ILAC tried to sell calcium carbide. They would not have tried to sell as calcium carbide another gas, say, ammonia or carbon dioxide. The words of the Supreme Court are very significant and full of meaning. If the gas produced was carbon dioxide then that was what the gas was even if it did not meet the Indian Standards specification of 99% CO<sub>2</sub> content. A sub-standard carbon dioxide would still be carbon dioxide as long as it was carbon dioxide.

42. We say likewise. The calcium carbide may be sub-standard or may not meet Indian Standards specification but it was calcium carbide and was used as calcium carbide. Therefore, it must be treated under the excise law as calcium carbide with all the consequences that follow.

43. The 1978 E.L.T. J 121 judgment of the Delhi High Court contained significant observations of the Hon'ble Court. It observed that there was a separate chapter of

the Carbide of Calcium Rules and that within the rules, the calcium carbide which did not comply with the requirements of Chapter 3 of the rules as to its marketability can nevertheless be used for the generation of acetylene gas. Calcium carbide is used as an intermediate product or material which may not be otherwise marketable for the generation of acetylene gas. These words should be marked very carefully. In the previous paragraph, the court said the expression "commercially pure" in rule 20 of the Carbide of Calcium Rules, 1937, showed that even statutory rules recognize that the calcium carbide must attain the requisite degree of purity before it can be rendered commercial or marketable. This, said the court, lent substance to the view that calcium carbide was not goods unless it was marketable. It is, therefore, evident that the Court went by the lack of commercial purity of the calcium carbide and hence its unmarketability, to pronounce that the calcium carbide was not goods.

Therefore, if it had been marketable it would have been goods.

44. Against this, we have the observations of the Supreme Court. In AIR 1962 S.C. 1006 it ruled excise duty was unrelated and not dependent on any commercial transaction in the goods. From this we deduce that the absence of commercial transaction in M/s. ILAC calcium carbide would not detract from its liability to excise duty. And again, in the 1978 E.L.T. J 336 judgment, the Supreme Court pronounced very categorically that a carbon dioxide of lower specifications than the Indian Standard could still be carbon dioxide if it is carbon dioxide. Taking these two judgments together we will have to hold that the calcium carbide obtained by M/s. ILAC in their factory and which they used in the manufacture of other products must be subjected to central excise duty under the central excise laws as calcium carbide.

45. A letter dated 2-2-1985 came from M/s. Calico informing us of a judgment of the Bombay High Court in Writ Petition No. 486/80 and of the dismissal by the Supreme Court of the special leave petition. The contentions before the High Court were similar to the ones we have discussed in the preceding paragraphs concerning the judgment in 1978 E.L.T. J 121. The Supreme Court dismissal of the special leave petition, however, does not appear to have been on the merits or

how the merits weighed with the Hon'ble Court and so we are unable to examine it, It is seen from paras 5 and 6 of the report at 1982 E.L.T.316 that the Bombay High Court did not consider and decide the question whether acetylene gas produced in a continuous, integrated and uninterrupted process of manufacture was "goods" within the meaning of the Central Excises and Salt Act, 1944. It is thus clear that this question could not have been adjudicated upon by the Supreme Court.

46. From the above judgments, it will not be possible for us to hold with the learned Dr. Kantawala and to rule that non-marketability or the fact that the goods was not marketed whether for its lack of quality, purity or any other reason would immunise it from excise.

There are too many judgments which say that as long as a thing was capable of being called by that name, even if it did not have the standard or accepted purity, it would still be called by that name and would have to undergo excise. There are as many judgments which have ruled that non-removal outside the factory would not make any difference to the excisability of the goods. On this point we have the amendment to Rule 9 and Rule 49 that effectively settles the dispute and makes all excisable intermediate goods, even when used for captive consumption, liable to duty. We, therefore, have no difficulty in considering the goods to be liable to excise duty.

47. The learned Counsel for M/s. ILAC argued extensively on the technical characters of the goods to show that they are not capable of being considered to be what they are called. He relied on the Carbide of Calcium Rules, 1937, and said that these rules provide stringent regulations in respect of the manufacture, storage, transport and use of the Carbide of Calcium. He referred to Rule 20 and said that this rule concerns itself with the storage of commercially pure carbide of calcium. Storage of carbide of calcium which was not commercially pure was prohibited. In other words, the rules do not recognize as calcium carbide anything that does not answer the test of commercial purity of calcium carbide. Even the means of storage has been prescribed; no carbide of calcium can be stored except in hermetically sealed metal receptacle. The same provisions also prohibit

the use of copper in the composition of the metal receptacle. The rules have gone to great lengths to ensure that not only is calcium carbide stored properly in safe places but even goes in detail into the components of the receptacle in which calcium carbide is stored. The rules make elaborate and detailed provisions with respect to the transport of calcium carbide, the quantity to be stored at a time etc. These can be ignored only at great risk. The same rules make provision in Chapter 5 about the manufacture of acetylene gas which is also a dangerous fire risk.

48. The learned Counsel relied equally heavily on the two standards IS : 1040-1978 in respect of calcium carbide and IS : 308-1977 in respect of dissolved acetylene (gas). He drew attention to the fact that these two standards list in detail, the quality, the testing, packing and marking that must be done in the handling of these goods. He emphasized repeatedly that M/s. ILAC does not have to regulate its production of the goods in accordance with any of these prescriptions. They do not observe the storage rules for calcium carbide and acetylene as are required under the Carbide of Calcium Rules because their goods would not be recognized as being goods of those names even though they may call them so. Their products cannot meet any of the stipulations of the Indian Standards. These Indian Standards are prescribed to bring uniformity in the manufacture of goods so that people in the trade and commerce know that they are receiving goods of a certain technical quality and are not cheated by being sold sub-standard goods even if they answer to the names in a general way. There is nothing to show that any of the authorities under the Carbide of Calcium Rules have required them to take up licences to store or to transport or to move their carbide and acetylene according to the laws in force. That is because the authorities who know what their factory is doing, do not consider that they are producing goods of the name by which they are called.

49. The error in the appellants' case is that they have confused the provisions of the Carbide of Calcium Rules as enforcement of a qualitative uniformity on products named therein. The rules are not designed for this. Calcium carbide is a dangerous chemical because it give off an inflammable vapour on contact with moisture. This inflammable gas-acetylene-is very much easier to ignite than petrol

vapour. Acetylene is also capable of forming an explosive mixture with air over wider limits than petrol. It is said that the explosive limits of petroleum vapour and air are between 1 1/2% to 6% of the mixture.

For acetylene, the explosive limit is from about 2% to about 82%. Thus, a petrol-air mixture containing more than 6% petrol is too rich to explode whereas with acetylene an explosion can occur with a concentration as thin as 2% and as rich as 80%. This is sufficient to show the dangerous behaviour of acetylene, a gas given off by calcium carbide. It is, therefore, not surprising that elaborate precautions have to be taken in the movement, storage, manufacture of these two dangerous substances.

50. The reference in Rule 20 to commercially pure calcium carbide appears to have been misunderstood. Below is the text of the rule- 'No carbide shall be kept at any place, with or without a licence, unless it is "commercially pure", that is unless it contains no impurities which would render the gas evolved, either alone or in admixture with air, liable to ignite spontaneously.' 51. This is not a requirement about commercial purity but it is a safety precaution. Impurities such as phosphorous and silicon in the calcium carbide can give rise to the formation spontaneously of inflammable gas. The aim of the rule is to ensure that only commercially pure, that is to say, carbide free from impurities such as phosphorous and silicon are stored, the storage of commercially impure calcium carbide being prohibited and the risks of explosion or fire thus eliminated or reduced. This rule is therefore no help to M/s.

ILAC's case.

52. In the chapter on the manufacture of acetylene gas, the rules deals with construction of apparatus, efficiency, temperature and pressure in the apparatus and such other things. There is nowhere any word that an acetylene gas like the one produced by M/s. ILAC is not an acetylene gas. It may be true that M/s. ILAC do not have to observe the rules and regulations under the Carbide of Calcium Rules, 1937 for the storage, production and transport etc. etc. of their calcium carbide and acetylene. But we are not in a position to make any finding on this as we do not know the facts and circumstances of why they do not follow the rules.

Perhaps, they have been exempted from the operation of the rules : but that is a matter best answered by the authorities concerned, like the Inspector of Explosives.

53. M/s. ILAC similarly have misunderstood the provisions of the Indian Standards. The Indian Standards are only specifications on what a quality, that is, a desirable quality, should be. We would like to quote a note appearing under paragraph 6.2.3 of Indian Standard : 1040-1978- "The use of the ISI Certification Mark is governed by the provisions of the Indian Standards Institution (Certification Marks) Act and the Rules and Regulations made thereunder. The ISI Mark on products covered by an Indian Standard conveys the assurance that they have been produced to comply with the requirements of that standard under a well-defined system of inspection, testing and quality control which is devised and supervised by ISI and operated by the producer.

ISI marked products are also continuously checked by ISI for conformity to that standard as a further safeguard. Details of conditions under which a licence for the use of the ISI Certification Mark may be granted to manufacturers or processors, may be obtained from the Indian Standards Institution." 54. The same note appears under paragraph 3.2.1 of IS : 308-1977. It is obvious that ISI certification is not a regulation of quality but only a certificate of quality. Those manufacturers who conform to the standards are licensed to use the ISI Certification Mark and that mark is a guarantee of the quality of the products. A product which does not carry any ISI mark may be viewed with suspicion by the customer even though it may be as good as, if not better than, a product which carries the mark. Whatever it is, the ISI mark seeks not to regulate quality and is not meant to say that goods not marked with the ISI are not goods of that name. It is interesting to note that in IS : 1040-1978 analysis are prescribed in Table 1 to determine sizes. Table 2 specifies the minimum gas yield from 1 kg. of the material of the different graded sizes. Table 3 gives the testing specifications for the acetylene gas evolved from the calcium carbide as well as the methods of tests. One of the characteristics for which the gas is tested is phosphorous compound, a substance whose presence in the gas could spell danger.

55. If the calcium carbide and acetylene produced by M/s. ILAC do not meet the Indian Standards, specifications, it only shows that they are not of this quality. But that is not to say that their products are not calcium carbide or acetylene. There is no dispute by M/s. ILAC that these two products are put to the uses to which calcium carbide and acetylene are put. We see that the calcium carbide is used for evolving acetylene gas. If it was not calcium carbide, we cannot understand how it is able to evolve acetylene. The acetylene is further used in the manufacture of PVC and chlorinated solvents. If it is not acetylene, we do not understand how it achieves these results. The two products are not of the quality that will compare with commercial or standard qualities. But we are not able to see why that should make any difference to their excisability. The only grounds given by M/s. ILAC Limited for resisting excise liability is that the goods were not treated, were not marketable, were not pure enough to be classed as standard goods of the same names. But goods can be of various qualities and purity even among standard goods marketed; many are of sub-standard qualities and wear out after a much shorter use than others of the same description. Can one say that those were not goods of that description and were not excisable? We at least would not say so, and would not accept any statement to that effect.

56. There is neither law nor technical justifications for holding that the two substances were not excisable. We think that the lower authorities were correct in what they did. We can see no reason to interfere and so we reject both these appeals.

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