HIGH COURT OF GUJARAT (*D.B.*)

AHMEDABAD ELECTRICITY COMPANY LIMITED
Versus
UNION OF INDIA

Date of Decision: 04 April 2000

Citation: 2000 LawSuit(Guj) 243

Hon'ble Judges: R K Abichandani, D H Waghela

Eq. Citations: 2001 131 ELT 535, 2001 74 ECC 296

Case Type: Special Civil Application

Case No: 1966 of 1999, 9538 of 1999

Subject: Customs, Excise

Acts Referred:
Customs Act, 1962 Sec 12
Central Excise Act, 1944 Sec 6, Sec 37B, Sec 2(f), Sec 2(d), Sec 3
Central Excise Rules, 1944 R 43(1), R 174
Customs Tariff Act, 1975 Sec 3(1)
Central Excise Tariff Act, 1985 Sec 2(d)

Advocates: Rakesh Gupta, Uday Joshi, Devang Nanavati Associates, Pavan Godiawala, Asim Pandya, M R Shah, Akshaya H Mehta

Cases Cited in (+): 5
Cases Referred in (+): 9

[1] Both these petitions raise common questions and have been argued together. The petitioners have challenged the Circular issued by the Central Board of Excise and Customs on 7.4.1998 and the consequential Trade Notice No. 36/98 dated 22.5.1998 issued by the office of the Commissioner of Central Excise and Customs, Ahmedabad, by which it was clarified that "coal-ash (cinder)" is an excisable commodity classifiable under sub-heading No. 26.21.00 of the Central Excise Tariff Act, 1985 and chargeable to appropriate rate of duty. According to the Board coal-ash (cinder) was specified in the Schedule to the Central Excise Tariff Act, 1985 and this read with Section 2(d) of that Act rendered coal-ash (cinder) as "excisable goods". The Board was also of the opinion that the commodity satisfied the test of marketability and had a distinct

commercial identity known to the trade. Admittedly, the expression "coal ash" and the word "cinder" were used as synonyms by the Board.

[2] According to the petitioners of Special Civil Application No. 1966/99, the petitioner No.1 - Ahmedabad Electricity Company Limited is engaged in the business of generation, transmission and distribution of electric power and has, for that purpose, an electric power station at Sabarmati. For generating electric power, boilers are used and they are fired by using coal as a primary fuel. In Stoker Fired Boiler coal which is fed is not fully burnt but residue and waste in the form of partly burnt coal, commonly known as "Cinder" remains. In other type of boilers which are now being used by the Company, coal is pulverized and fine powder thereof is fed to the boiler and what comes into existence is only 'fly-ash' having carbon contents and no cinder comes into existence. There is however, no controversy regarding 'fly-ash' and the present dispute in the petition relates only to cinder. According to the petitioner company, it has been generating electric power since more than 85 years and using coal as a fuel in the boilers but it was never informed in the past that it was manufacturing cinder. However, for the first time on 8.6.1998, the Superintendent of Central Excise directed the petitioner Electricity Company to give the clearance value of cinder, alleging that it was noticed that the company was manufacturing "coal-ash (cinder)" and clearing the same without payment of duty. It is the petitioners' case that cinder obtained during the course of generation of electric power by use of coal in the boilers was not excisable goods and no excise duty was payable thereon. According to the petitioners, it was already held by the Customs, Excise & Gold (Control) Appellate Tribunal, time and again, that cinder obtained by burning of coal in boilers did not constitute manufacture of an excisable commodity even when it is sold for a price. These decisions are referred to in the petition and it is pointed out that the decision in Messrs Swadeshi Cotton Mills Ltd. Vs. C.C.E, rendered by the Tribunal, following its earlier orders and holding that cinder was not excisable, was upheld by the Hon'ble Supreme Court on 17.4.1995 when Civil Appeal No. 4022 of 1989 filed by the Collector of Central Excise was dismissed. It is also stated that similar decision by the Tribunal in Messrs Mafatlal Fine Spinning & Mfg. Company Ltd. Vs. Collector, holding that obtaining cinder while burning coal in the boilers in a factory does not constitute a process of manufacture and that cinder was not dutiable, was also upheld by the Hon'ble Supreme Court by dismissing Civil Appeal No. 11551 of 1995 on 3.1.1996, which was preferred against that decision. The case of the petitioners is that the orders of the Tribunal holding that cinder was not excisable, were binding on the Department and therefore, a clarificatory circular could not have been issued contrary to the decisions of the Tribunal, which held that cinder was not excisable goods. The case of the petitioners further is that even if cinder were to be treated as excisable goods, then the same can at the best be classified under heading No. 27.01 of the Schedule to the

Tariff Act, whereunder the rate of duty was "nil"; and therefore also, no duty was chargeable on cinder.

[3] The petitioner Messrs Sayaji Industries Limited has filed Special Civil Application No. 9538 of 1999, as its Division dealing in Maize products is engaged in the business of manufacture of various goods like Starch, Glucose, Dextrose etc. In the factory of the petitioner company, boilers for generating steam are used in the process of manufacturing their final products. The company uses coal as a fuel for firing such boilers for generating steam. After the coal is so burnt in the boilers, it leaves a residue known as "coal-ash or cinder", which is known in vernacular as "Kolsi" or "Bhuki". According to the petitioner, cinder just arises as a result of burning of coal in a boiler and cannot be described as excisable goods produced or manufactured by the petitioner. This petitioner has also referred to various decisions of the CEGAT, holding that cinder was not a manufactured commodity and it being only a waste or residue, it was not chargeable to excise duty. This petitioner also challenges the circular issued by the Board and the consequential Trade Notice by which cinder is treated as an excisable commodity under heading No. 26.21 of the Schedule to the Central Excise Tariff Act. Over and above its challenge against the circular and the trade notice, this petitioner challenges the show cause notices at Annexure "D" collectively to this petition, issued by the Supdt. of Central Excise, on the basis of the clarification issued by the Board in the impugned circular and the trade notice.

[4] The learned Counsel for the petitioners contended that cinder obtained by burning of coal in boilers during the process of generating power or manufacture of starch and other maize products, does not constitute manufacture or production of an excisable commodity. It was contended that no new commodity other than coal can be said to have been manufactured or produced by the process of burning coal in the boilers as a fuel. It was argued that the CEGAT had already decided that cinder did not constitute manufacture of excisable commodity and therefore, the Board could not have issued a clarification which had the effect of nullifying the decisions of the Tribunal, which have been upheld by the Supreme Court. It was also contended that even if cinder was to be treated as an excisable commodity, it may fall under heading No. 27.01, which refers to "coal; briquettes, ovoids and similar solid fuels manufactured from coal" for which rate of duty is "nil". It was also contended that the Rules for the interpretation of the Schedule to the Central Excise Tariff Act, which are contained in that Schedule lay down that the heading which provides the most specific description should be preferred to the headings providing a more general description and that when the goods cannot be classified by reference to Rule 3(a) or 3(b) of the Rules for interpretation, then they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration. Goods which cannot be classified in

accordance with the Rules of Interpretation, shall be classified under the heading appropriate to the goods to which they are most akin. On this basis, it was contended that cinder cannot be classified as "ash".

3.1 The learned Counsel for the petitioners in support of their submissions, relied upon the following decisions:- (a) Union of India Vs. Indian Aluminium Company Limited, reported in 1995 (77) ELT 268 (S.C) was cited for its proposition that it was not possible to consider aluminium dross and skimmings as "goods" or as a commercial and marketable commodity, since they are merely refuse or ashes given out in the course of manufacture, in the process of removing impurities from the raw material and that such waste and scrap was prime metal in its own right. The decision was rendered in context of Tariff Item 27 "waste and scrap of aluminium", which was exigible to excise duty and under which the explanation provided that 'waste and scrap' means waste and scrap metal fit only for the recovery of metal by remelting or for use in the manufacture of chemicals, but does not include sludge, dross, scalings, skimmings, ash and other residues. In paragraph 13 of its judgement, the Court held that it was not possible to accept the contention that aluminium dross and skimmings are "goods" or marketable commodity which can be subjected to the levy of excise. It was observed that undoubtedly, aluminium dross and skimmings do arise during the process of manufacture, but these are nothing but waste or rubbish which are thrown out in the course of manufacture. The Supreme Court held that everything which is sold is not necessarily a marketable commodity as known to the commerce and which, it may be worth while trading.

(B) Indichem Vs. Union of India, reported in 1996 (88) ELT 35 (Guj.), was relied upon in support of the contention that the Central Board of Excise and Customs cannot issue a Circular under Section 37B of the Central Excise Act, which has the effect of rendering the decision of the Tribunal nugatory.

[5] The learned Standing Counsel for the respondent authorities argued that the question involved was whether cinder was a byproduct generated in the process of manufacturing electricity and maize products in the case of these two petitioners. The Counsel argued that cinder being coal-ash, would be covered by Heading No. 26.21 of the Tariff, namely "other slag and ash including seaweed ash (kelp)". He pointed out that cinder was exempted earlier by Notification dated 10.2.1996 at serial No. 18, which pre-supposes that it was an excisable commodity. He also argued that the decisions of the Tribunal were rendered with reference to the earlier Tariff Item No.68, which was a residuary item and they did not apply to the specific Tariff Item of "other slag and ash including seaweed ash (kelp)" covered by Heading No. 26.21. He contended that the impugned circular only removes the doubt and clarifies that cinder

was an excisable commodity classifiable under the said heading No. 26.21. The Counsel submitted that in view of the definition of the word "manufacture", which included the process for manufacture, cinder being unburnt part of coal which came into existence in the process of generating electricity and maize products in case of these petitioners, it was in the nature of a byproduct. Since it was marketable commodity, it was liable to excise duty under heading No. 26.21. He argued that to ascertain whether the product was marketable or not, there was a triple test, to be applied, namely, that there should be manufacture, that the goods should fall in some entry of the Schedule to the Tariff Act and that the product should be marketable. He submitted that all these three tests are satisfied in case of cinder. He also argued that the petitions were premature and the petitioners could have availed of the remedies under the Act.

5.1 In support of his contentions, the learned Standing Counsel referred to the following decisions:- (i) Khandelwal Metal & Engineering Works & anr. Vs. Union of India, reported in 1985 (20) ELT 222 (S.C), was referred for the proposition that the production of waste and scrap is a necessary incident of the manufacturing process and that they are the byproduct of manufacturing process. It was held that 'intention' is not the gist of the manufacturing process. The Supreme Court held that sub-standard goods which are produced during the process of manufacture may have to be disposed of as 'rejects' or as 'scrap' but still they are the products of the manufacturing process.

In context of this decision, it may be noted that in Hyderabad Industries Ltd. and another Vs. Union of India, reported in AIR 1999 S.C 1847, Khandelwal Metal & Engineering Works' case (supra) came to be considered in paragraphs 16 and 17 of the judgement and it was held that the decision in Khandelwal Metal & Engineering Works to the effect that additional duty of customs is leviable merely on the import of the article even if it was not manufactured or produced in India, does not appear to be correct inasmuch as the said conclusion is based on the premises that Section 12 of the Customs Act, and not Section 3(1) of the Customs Tariff Act, was the charging Section. The Supreme Court in Hyderabad Industries Ltd.'s case held that on the asbestos fibre imported into India, the appellants were not liable to pay any duty under Section 3 of the Customs Tariff Act.

(Ii) The Collector of Central Excise, Bombay Vs. S.D.Fine Chemicals Pvt.Ltd., reported in 1995 (77) ELT 49 (S.C) was cited in order to point out that the Supreme Court, in context of Section 2(f) of the Excise Act, defining word "manufacture" held that manufacture under Section 2(f) of the Act is not confined to its natural meaning of the expression "manufacture", but is an expansive definition. Certain processes which may have otherwise not amounted to

manufacture, are also brought within the purview of and placed within the ambit of the said definition by the Parliament. Not only processes which are incidental and ancillary to the completion of manufactured product, but also those processes as are specified in relation to any goods in the section or chapter notes of the Schedule to the Central Excise Tariff Act, 1985 are also brought within the ambit of the definition. The Supreme Court also held that whether a process amounts to manufacture is a question of fact and one of the main tests in that is after application of any particular process the commodity is no longer regarded as the original commodity but is instead recognized as distinct and new article.

(Iii) Reliance was placed on the decision in Laminated Packings (P) Ltd. Vs. Collector of Central Excise, reported in 1990 (49) ELT 326 (S.C.), in which it was held by the Hon'ble Supreme Court that lamination amounts to manufacture. The question involved was whether the lamination of duty paid Kraft paper with polyethylene resulting in polyethylene laminated Kraft paper, would amount to 'manufacture' and excisable under law or not. It was held that the laminated Kraft paper is distinct, separate and different goods known in the market as such from the Kraft paper and therefore, it is liable to excise duty.

(Iv) Decision of the Madras High Court in Seshasayee Paper & Boards Ltd. Vs. Collector of C.Ex., Madras, reported in 1987 (28) ELT 258 (Mad.) was cited to show that causticising lime sludge manufactured out of paper as a waste was held to be an excisable item under the residuary entry 68, which was liable to duty under Section 3 of the Excise Act. The Madras High Court had, in the process, relied upon the decision in Khandelwal's case (supra).

(V) State of Gujarat Vs. Raipur Manufacturing Co.Ltd., reported in AIR 1967 S.C 1066, which was a decision in context of the Bombay Sales Tax Act, was cited to point out that in paragraph 10 of the judgement, it was held by the Supreme Court that cinder i.e. "kolsi", would be appropriately regarded as a subsidiary product in the course of manufacture, because it results from coal which remains unburnt. It was held that when such subsidiary product is turned out in the factory regularly and continuously and is being sold from time to time, an intention to carry on business in "kolsi" may be reasonably attributed to the company.

(Vi) Oudh Sugar Mills Ltd. Vs. Union of India and ors. reported in 1982 ELT 937 (All.) was cited for its proposition that any byproduct or intermediatory product will be covered by the word 'production' in Section 3 of the Central Excise Act and that Section 3 of the Act does not concern itself with the marketability or saleability, consumption or storage of goods, and since duty is on "goods" as and where it is manufactured or produced, it becomes liable to duty.

[6] Section 3 of the Central Excise Act, 1944, inter-alia, provides for levy and collection of excise duty on all the excisable goods, which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985. The word "manufacture", unless there is anything repugnant in the subject or context, as defined in Section 2(f) of the Excise Act, includes any process incidental or ancillary to the completion of a manufactured product; and which is specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Tariff Act, as amounting to manufacture and the word "manufacturer" shall be construed accordingly. Section 6 of the Excise Act, inter-alia, lays down that any prescribed person who is engaged in the production or manufacture or any process of production or manufacture of any specified goods included in the Schedule to the Central Excise Tariff Act, shall get himself registered in the prescribed manner. The Central Government is, by Section 37(1)(v) empowered to make Rules, inter-alia, to regulate the production or manufacture, or any process of the production or manufacture of any excisable goods or of any component parts or ingredients or components thereof. Under Rule 43(1) of the Central Excise Rules, every manufacturer who intends to manufacture excisable goods for the first time shall, before commencing operations, give notice in writing to the Commissioner and shall specify therein, the nature of raw-materials which he intends to use and whenever there is change in the nature of raw-material used, to give prior notice in writing of the new material to be used.

[7] The Ahmedabad Electricity Company intended to produce electricity while Messrs Sayaji Industries Ltd. in its Maize Products Division intended to manufacture starch, glucose etc. Therefore, the question would be whether the goods they intended to produce and manufacture, namely electricity and starch or other maize products are excisable goods as defined in Section 2(d) of the Excise Act, specified in Second Schedule to the Tariff Act, as being subject to a duty of excise. In the process of their production and manufacturing activity, these companies use coal in the boilers for heating purposes. Use of coal just for heating purposes in their activity of production or manufacture cannot be said to be for producing 'other ash' within the meaning of sub-head 26.21. Even if coal is substituted by any other heating element or agent, the manufacture or production of the respective petitioners will still be electricity and starch. Cinder would only be a residue of the burnt-up coal which cannot fall under sub-heading 26.21 of the Schedule. As held by the Supreme Court in Indian Aluminium's case (supra), mere refuse or ashes which are given out in the course of manufacture cannot be considered as 'goods' or as a commercial or marketable commodity and that everything which is sold is not necessarily a marketable commodity.

[8] When any process or manufacture is undertaken for completion of the manufactured product, then even if the manufactured product is not yet completed, such process shall be deemed to be "manufacture" in view of the inclusive definition of word "manufacture" in Section 2(f) of the Excise Act. The word "manufacturer" is to be construed accordingly. Therefore, when the process for manufacture is undertaken for completion of a manufactured product, such manufacturer will be obliged to comply with the requirements of the statutory provisions as for example applying for registration under Rule 174 of the Central Excise Rules and it will not be a defence for him to contend that he is not a manufacturer because the product is not yet manufactured and only the process of manufacture was being undertaken. The process of use of coal for producing or manufacturing the products in the instant two cases is not a process for producing or manufacturing coal-ash (cinder). The residue in form of cinder is only a residual waste of the consumed coal.

[9] Cinder as per its dictionary meaning is a residue of coal or wood etc. that has stopped giving off flames, but still has combustible matter in it. Coal is used as a fuel and in the manufacture of gas, tar etc. When used as fuel it may leave cinder as residue. Use of coal by entrepreneurs as a medium of fuel for manufacture or production of the innumerable variety of goods would not make them all, to their bewilderment, manufacturers of ash.

9.1 The meaning of the word "coal" in the OXFORD English Dictionary is, inter-alia, given as under:- 1. A piece of carbon glowing without flame. 2. A piece of burnt wood, etc. that still retains sufficient carbon to be capable of further combustion without flame; a charred remnant; a cinder. 9.2 The meaning of word "cinder" in the same dictionary is, inter-alia, given as under:- The residue of a combustible substance, esp. coal, after it has ceased to flame, and so also, after it has ceased to burn.

9.3 In WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY of the English Language, the meaning of word "coal" is, inter-alia, given as under:- 1. A black or dark brown combustible mineral substance consisting of carbonised vegetable matter, used as a fuel. 2. A piece of glowing, or burned wood or other combustible substance. 9.4 In the same dictionary, the word "cinder" is described as a burned-out or partially burned piece of coal, wood, etc.

[10] A very incongruous situation would arise, if cinder is to be classified under the heading 26.21 of the Schedule to the Central Excise Tariff Act, as "other ash". Coal by itself as also briquettes, which means blocks made of compressed coal dust used as fuel are subject to "nil" rate of duty under the heading No. 27.01 of the Schedule to the Tariff Act. However, when coal is burnt, the cinder that is left behind would become

subject to excise duty, if treated as "other ash" under the heading No. 26.21 of the Schedule. This result is not warranted from the plain and harmonious reading of the entries and could not have been contemplated by the legislature. Again if cinder is to be treated as coal being its residue, it would not be subject to any duty in view of heading 27.01 of the Schedule to the Tariff Act, prescribing "nil" rate of duty for coal. Chapter 26 deals with ores, slag and ash while Chapter 27 deals with mineral fuels, mineral oils etc. Therefore, if cinder was to be made excisable, it would have found its place more appropriately in Chapter 27 which contains the entry of coal, rather than in Chapter 26 which covers 'metal ores, slag and ash'.

[11] An attempt to cover cinder under the residuary entry 68 under the repealed law had failed on the anvil of adjudication by the Tribunal, which was upheld by the Supreme Court. This admitted fact can be gathered from the averments made in para 4 of Civil Application No. 1517 of 2000, sworn by the Deputy Commissioner on 13.1.2000, which reads as under:

> "Before the introduction of the Central Excise Tariff Act, the Excise Department sought to levy excise duty on Coal-Ash (Cinder) by taking recourse of Entry No.68 to the old Schedule attached to the Central Excise Act. In certain cases, the levy of excise of Coal-Ash (Cinder) was challenged and in some cases the Tribunal held that Coal-Ash (Cinder) is merely unburnt coal and it is in the nature of waste or residue and therefore, it cannot be said to be an excisable commodity and hence, no excise can be levied on the said product. Thus, the said decisions are rendered with reference to the old Tariff Item No.68 which has no bearing with the situation prevailing today on account of coming into force of the Central Excise Tariff Act, 1985 under which specific heading is there for this product, Coal-Ash Cinder."

[12] The assertion in the impugned Circular that there is a specific heading to cover coal-ash/cinder is incorrect. There is no specific heading of cinder either in Chapter 26 or in Chapter 27 of the Schedule to the Tariff Act. Chapter 26 relates to "ores, slag and ash". Heading 26.21 reads "other slag and ash, including seaweed-ash (kelp)." Cinder is clearly not "other ash" under heading No. 26.21 because it is residue of coal distinguishable from mere ash. The residuary tariff item 68 which included "all other goods not elsewhere specified" in the earlier Schedule did not include cinder as held by the CEGAT and confirmed by the Hon'ble Supreme Court, and its exemption was therefore redundant and could not by its withdrawal make cinder to be an excisable commodity under the heading No.26.21 when it was judicially held to be only a residue or waste and not a manufactured commodity.

[13] Cinder remaining from the coal that is burnt by being used as fuel may be a marketable commodity, but it would not be excisable goods produced or manufactured

by the petitioners within the meaning of "other ash" in sub-heading No. 26.21 of the Schedule to the Tariff Act, and hence the impugned Circular and Trade Notice classifying it under heading No. 26.21 are arbitrary, illegal and not warranted by the provisions of the said Excise Act and the Excise Tariff Act. The impugned Circular and the Trade Notice are therefore, hereby set aside. The show cause notices issued pursuant to such Circular also fall to the ground. Rule is made absolute accordingly in each of these two petitions with no order as to costs.