

## **M/s. Servo-Med Industries Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai**

Civil Appeal No.583 of 2005 · Supreme Court of India · 2015-05-07 · A.K. Sikri · R.F. Nariman · F2J-C-1235

### **Full judgment text**

M/s. Servo-Med Industries Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai

[Civil Appeal No.583 of 2005]

R.F. Nariman, J.

1. Between June 1995 and March 1997, the appellants purchased syringes and needles in bulk from the open market. They would then sterilize the syringes and the needles and put one syringe and one needle in an unassembled form in a printed plastic pouch. The syringe and the needle were capable of use only once and, hence, were disposable. The plastic pouches so packed were sold to an industrial customer, namely, M/s. Hoechst Marion Roussel Ltd. The pouches bore the brand name 'Behring'. The brand name 'Behring' belonged to the purchaser.

2. By a show cause notice dated 25.1.1996, the Department asked the assessee to show cause as to why the said syringes and needles, (which had already borne the payment of excise duty in the hands of their manufacturers), be made to pay excise duty again as a result of sterilization. The show cause notice alleged that sterilization brings about a change in the character of the final product, which now becomes disposable syringes and needles. Therefore, a new commodity having a different character has come into existence. In their reply to the show cause notice dated 1.10.1996, the petitioners claimed that the activity of sterilization would not amount to manufacture. They said that no new product comes into existence by merely sterilizing disposable syringes and needles which continue to be disposable syringes and needles post-sterilization. No new product, therefore, came into existence as a result of sterilization.

3. By an order dated 31.12.1997, the Assistant Commissioner Central Excise held that the process of sterilization was essential to complete manufacture before the products are sold in the market. This being so, the process of sterilization was found to be an integral and inextricable part of the manufacturing process to make the product marketable. It was further held that the process of sterilization brings about a transformation of the product by making something non- sterile sterile.

4. By his order dated 25.2.1999, the Commissioner of Central Excise (Appeals) set aside the said order, reasoning that the process of sterilization does not bring about any change in the basic structure of syringes and needles even though post-sterilization the value of the product gets enhanced. He further held that under Section 2(f) of the Central Excise Act, there is no mention of the test of integral or inextricable process and found that the wrong test had been applied to arrive at the wrong result.

5. The CESTAT in turn set aside the order of the Commissioner of Central Excise (Appeals) observing: "An Article with distinct brand name and separate end use/quality has emerged by the activity undertaken. The use/character of a 'syringe' which was brought and which emerged has changed. While the goods brought were not fit for use on Humans Medical Needles as made were not usable till sterilized. The commercial identity nature use and understanding has changed, manufacturing has taken place, excise levy is attracted."

6. Shri Lakshmikumaran, learned advocate appearing on behalf of the appellant has argued before us that the judgment of the Tribunal is wrong on first principles. The Tribunal has failed to appreciate that a disposable syringe and needle continues to be a disposable syringe and needle even after the process of sterilization and, therefore, the basic test of a new article emerging as a result of a process, being a transformation of an article into something new, which has a distinctive name, character or use is clearly absent in the present case. He cited a number of judgments to buttress his submissions.

7. Ms. Shirin Khajuria, learned counsel who appeared for the respondent, countered these submissions and said that it was clear that the articles in question could not be used commercially until a process of sterilization had been undergone. This being so, it is clear that the process of sterilization is an

important integrated and/or ancillary process without which the end product had no commercial use and, therefore, applying the said test, it is clear that the process of sterilization leads to manufacture. She cited a number of judgments which we will refer to presently.

8. Regard being had to the issue being a ticklish one; we need first to delve into a few basic principles. Distinction between manufacture and marketability

9. A duty of excise is levied on the manufacture of excisable goods. "Excisable goods" are those goods which are included in the schedules of the Central Excise Tariff Act, 1985. "Excisable goods" brings in the concept of goods that are marketable, that is goods capable of being sold in the market. On the other hand, manufacture is distinct from sale-ability. Manufacture takes place on the application of one or more processes. Each process may lead to a change in the goods, but every change does not amount to manufacture. There must be something more - there must be a transformation by which something new and different comes into being, that is, there must now emerge an article which has a distinctive name, character or use. When transformation does not take place.

10. When a finished product cannot conveniently be used in the form in which it happens to be, and it is required to be changed into various shapes and sizes so that it can conveniently be used, no transformation takes place if the character and the end use of the first product continue to be the same. An illustration of this principle is brought out by the judgment in CCE, New Delhi v. S.R. Tissues, 2005 (186) E.L.T. 385 (S.C.). On facts, in the said case, jumbo rolls of tissue paper were cut into various shapes and sizes so that they could be used as table napkins, facial tissues and toilet rolls. This Court held that there was no manufacture as the character and the end use of the tissue paper in the jumbo roll and the tissue paper in the table napkin, facial tissue and toilet roll remains the same.

11. Another example of when transformation does not take place is when foreign matter is removed from an article or additions are made to the article to preserve it or increase its shelf life.

12. In MMTC v. Union of India, 1983 (13) E.L.T. 1542 (S.C.), this Court dealt with the separating of wolfram ore from rock to make it usable. It was held that the process of separation and sorting out pieces of wolfram or by washing or magnetic separation would not amount to a manufacturing process. Wolfram ore does not cease to be an ore even though by the aforesaid processes it may become concentrated wolfram ore.

13. In Mineral Oil Corporation v. CCE, Kanpur, 1999 (114) E.L.T. 166 (Tribunal), the facts were that used transformer oil, which by applying processes for removal of impurities therefrom, is again made usable as transformer oil. Both before and after the said processes, transformer oil remained as transformer oil. That being so, it was held that no new and distinct commodity has come into existence consequent to the process undertaken.

The test for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognized by the trade as a new and distinct commodity. This Court dismissed the civil appeal from the aforesaid judgment. This case is instructive in that it is clear that transformer oil, in its used stage, could not be used owing to the impurities therein. Any process of rendering such article usable would not be a manufacturing process, as there is no change in the essential character of the goods which remain as transformer oil which now becomes usable.

14. In Dunlop India Ltd. v. Union of India, 1995 (75) ELT 35 (S.C.), soap treatment of grey cotton duck/canvas was held not to be a process which amounted to manufacture. The judgment states:

"3. The process has been described in the impugned order in the following words - For processing on soap treatment the party uses soaps/soap flakes which are diluted in plain water in a tank. This solution is transferred to a Soaping Machine operated by power where different colours are added. The fabrics are then dipped in the solution which is heated with steam. After the colouring treatment and soap impregnation the wet fabrics are dried up with the aid of steam on passing the fabrics through rollers fitted with the aforesaid Soaping Machine.

4. In our opinion the said process cannot be said to be one which results in changing the identity of the cloth which is subject to the said treatment and the said process does not give rise to a new product which is marketable. The said process cannot, therefore, be regarded as a manufacturing process. We find that the Central Government itself, in another matter relating to M/s. Premier Tyres Ltd. has passed an Order on 17-5-1977 (page 83 of Paper Book) wherein, it has been held that the

transformation brought about the dipping of cotton fabrics in a soap solution is not a permanent one; it is not an operation which results in the production of a new article which could be bought and sold as such in the market."

15. In *Dalmia Industries Limited v. CCE, Jaipur*, 1999 (112) E.L.T. 305 (Tribunal), different articles of feeding bottles were put together in a single pack. Thus, bottles, feeder nipples, bottle lids and plastic parts were put together in a combined pack and the product was sold in the brand name of "Milk care Designer Feeder". All these parts were put together only after sterilization by ultra violet rays. The Tribunal held that the various parts that had been put together were already finished products and packing after sterilization would not bring into existence any new product as each of the items had already come into existence as individual items. It was further held that sterilization was only to improve the hygiene of the product and that since no change occurs in the name, character or use of the product, a new product does not come into existence. This Court dismissed the civil appeal filed against the aforesaid judgment on 1.3.2005.

16. Examples of additions made to the article to preserve it or increase its shelf life are to be found in *Tungabhadra Industries Ltd. v. CTO*, (1961) 2 SCR 14 and *M/s. Maruti Suzuki India Ltd. v. CCE*, 2015 (318) E.L.T. 353 (S.C.). In the *Tungabhadra* case, it was held that hydrogenated oil continued to be groundnut oil despite there being an intermolecular change in the content of the substance of the oil due to hydrogenation. It was held that oil made from groundnut continued as such despite the hardening process of hydrogenation. In its essential character, it was held that such hydrogenated oil continued to be groundnut oil. The process of hydrogenation only increased the shelf life of the said oil.

17. Similarly in the *Maruti Suzuki* case, it was held that bumpers and grills of motor vehicles continue to be the same commodity after ED coating which would increase the shelf life of the said bumpers and grills and provide anti rust treatment to the same. No new commodity known to the market as such had come into being merely on account of the value addition of the ED coating. Retaining of essential character test.

18. In *M/s. Satnam Overseas Ltd. v. Commissioner of Central Excise, New Delhi* (Civil Appeal No.8958 of 2003), it was held that as the essential character of the product had not changed, there would be no manufacture. In that case, the product was a combination of raw rice, dehydrated vegetables and spices in the name of rice and spice. It was held that the said product in its primary and essential character was sold in the market as rice only, despite the addition of dehydrated vegetables and certain spices.

Further, the rice remained in raw form and in order to make it edible it had to be cooked like any other cereal. As we have already seen, the same test was applied in *Tungabhadra* case (supra) and in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers*, (1980) 3 SCR 1271. In that case, the process undertaken was to remove the inedible portions of Pineapple together with its outer cover and then slice such Pineapple and can the same after adding sugar as a preservative. It is important to note that the cans were sealed under high temperature and then put into boiling water for sterilization.

It was held that there was no manufacture inasmuch as the essential character of the Pineapple had not changed. The Court said: "Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change.

But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct Article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed Article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."

19. Interestingly, a line was drawn between cases in which the essential character had changed and those in which no such change had taken place in the following terms:

"5. A large number of cases has been placed before us by the parties, and in each of them the same principle has been applied: Does the processing of the original commodity bring into existence a commercially different and distinct article? Some of the cases where it was held by this Court that a different commercial article had come into existence include *Anwarkhan Mehboob Co. v. The State of Bombay and Ors.* (where raw tobacco was manufactured into bidi patti), *A. Hajee Abdul Shukoor and Co. v. The State of Madras* (raw hides and skins constituted a different commodity from dressed hides and skins with different physical properties),

*The State of Madras v. Swasthik Tobacco Factory* (raw tobacco manufactured into chewing tobacco) and *Ganesh Trading Co. Karnal v. State of Haryana and Anr.*, (paddy dehusked into rice). On the other side, cases where this Court has held that although the original commodity has undergone a degree of processing it has not lost its original identity include *Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer, Kurnool* (where hydrogenated groundnut oil was regarded as groundnut oil) and *Commissioner of Sales Tax, U.P., Lucknow v. Harbiles Rai and sons* (where bristles plucked from pigs, boiled, washed with soap and other chemicals and sorted out in bundles according to their size and colour were regarded as remaining the same commercial commodity, pigs bristles)." Test of no commercial user without further process

20. In *Brakes India Ltd. v. Superintendent of Central Excise*, (1997) 10 SCC 717, the commodity in question was brake lining blanks. It was held on facts that such blanks could not be used as brake linings by themselves without the processes of drilling, trimming and chamfering. It was in this situation that the test laid down was that if by adopting a particular process a transformation takes place which makes the product have a character and use of its own which it did not bear earlier, then such process would amount to manufacture irrespective of whether there was a single process or several processes.

21. Similarly in *Union of India v. J.G. Glass*, 1998 (97) E.L.T. 5 (S.C.), this Court held that plain bottles are themselves commercial commodities which can be sold and used as such. By the process of printing names or logos on the said bottles, the basic character of the commodity does not change, they continue to be bottles. The Court said: "16. On an analysis of the aforesaid rulings, a two-fold test emerges for deciding whether the process is that of "manufacture".

First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether, the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process. In the present case, the plain bottles are themselves commercial commodities and can be sold and used as such. By the process of printing names or logos on the bottles, the basic character of the commodity does not change. They continue to be bottles. It cannot be said that but for the process of printing, the bottles will serve no purpose or are of no commercial use."

22. Similarly in *Sterling Foods v. State of Karnataka*, (1986) 26 ELT 3 (S.C.), raw shrimps/prawns/lobsters after various processes became fit for human consumption. Prior to such processing, they could not be used as articles of food. However, the aforesaid processes did not lead to a finding that there was manufacture inasmuch as shrimps/prawns/lobsters identity continued as such even after the aforesaid processes.

23. In *Crane Betel Nut Powder Works v. Commissioner*, 2007 (210) E.L.T. 171 (S.C.), whole betel nuts could not be consumed by human beings. It is only after a process of cutting them into smaller pieces and sweetening them with oil that they become fit for human consumption. It was held that the aforesaid process would not amount to manufacture as betel nuts continued to be the same even after the aforesaid process resulting in no transformation of the commodity in question.

24. It is important to understand the correct ratio of the judgment in the *J.G.Glass* case. This judgment does not hold that merely by application of the second test without more manufacture comes into being. The Court was at pains to point out that a twofold test had emerged for deciding whether the process is that of manufacture. The first test is extremely important - that by a process, a different commercial commodity must come into existence as a result of the identity of the original commodity ceasing to exist.

The second test, namely that the commodity which was already in existence will serve no purpose but for a certain process must be understood in its true perspective. It is only when a different and/or

finished product comes into existence as a result of a process which makes the said product commercially usable that the second test laid down in the judgment leads to manufacture.

Thus understood, this judgment does not lead to the result that merely because the unsterilized syringe and needle is of no commercial use without sterilization, the process of sterilization which would make it commercially usable would result in the sterilization process being a process which would amount to manufacture.

If the original commodity i.e. syringes and needles continue as such post-sterilization, the second test would not lead to the conclusion that the process of sterilization is a process which leads to manufacture. This is because, in all cases, there has first to be a transformation in the original article which transformation brings about a distinctive or different use in the article. The test of integrated process without which manufacture would be impossible or commercially inexpedient.

25. It is at this point that the decision contained in *Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works*, (1991) 4 SCC 473 needs explanation. This Court was concerned with the language of a certain notification which read as follows: "In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all goods falling under Item 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) in or in relation to the manufacture of which no process is ordinarily carried on with the aid of power, from whole of the duty of excise leviable thereon." It was held:

"13. Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to (sic that the) manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture.

Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. 15. In *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO* [(1965) 1 SCR 900 : AIR 1965 SC 1310 : (1965) 16 STC 563], this Court in construing the expression 'in the manufacture of goods' held thus: (SCR pp. 906-07) "But there is no warrant for limiting the meaning of the expression 'in the manufacture of goods' to the process of production of goods only. The expression 'in the manufacture' takes in within its compass, all processes which are directly related to the actual production."

16. The Court further held thus: (SCR p. 905) "The expression 'in the manufacture of goods' would normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression 'in the manufacture of goods'."

21. The transfer of raw material to the reacting vessel is a preliminary operation but it is part of a continuous process but for which the manufacture would be impossible. The handling of the raw materials for the purpose of such transfer is then integrally connected with the process of manufacture. The handling for the purpose of transfer may be manual or mechanical but if power is used for such operation, it cannot be denied that an activity has been carried on with the aid of power in the manufacturing process.

The use of diesel pump sets to fill the pans with brine is an activity with the aid of power and that activity is in relation to the manufacture. It is not correct to say that the process of manufacture starts only when evaporation starts. The preliminary steps like pumping brine and filling the salt pans form integral part of the manufacturing process even though the change in the raw material commences only when evaporation takes place. The preliminary activity cannot be disintegrated from the rest of the operations in the whole process of manufacture. Similarly, when coke and lime are taken to the platform in definite proportions for the purpose of mixing, such operation is a step in the manufacturing process.

It precedes the feeding of the mixture into the kiln where the burning takes place. The whole process is an integrated one consisting of the lifting of the raw materials to the platform mixing coke and lime and then feeding into the kiln and burning. These operations are so interrelated that without any one

of these operations manufacturing process is impossible to be completed. Therefore, if power is used in any one of these operations or any one of the operations is carried on with the aid of power, it is a case where in or in relation to the manufacture the process is carried on with the aid of power.

25. Thus "processing" may be an intermediate stage in manufacture and until some change has taken place and the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been manufactured. That does not, however, mean that any operation in the course of such process is not in relation to the manufacture. While interpreting the same exemption notification in *Standard Fireworks Industries v. Collector of Central Excise* [(1987) 1 SCC 600 : 1987 SCC (Tax) 138 : (1987) 28 ELT 56], it was held that manufacture of fireworks requires cutting of steel wires and the treatment of papers and, therefore, it is a process for manufacture of goods in question. The notification purports to allow exemption from duty only when in relation to the manufacture of goods no process is ordinarily carried on with the aid of power. It was observed that cutting of steel wires or the treatment of the papers is a process for the manufacture of goods in question.

26. We are, therefore, of the view that if any operation in the course of manufacture is so integrally connected with the further operations which result in the emergence of manufactured goods and such operation is carried on with the aid of power, the process in or in relation to the manufacture must be deemed to be one carried on with the aid of power. In this view of the matter, we are unable to accept the contention that since the pumping of the brine into the salt pans or the lifting of coke and limestone with the aid of power does not bring about any change in the raw material, the case is not taken out of the notification. The exemption under the notification is not available in these cases.

Accordingly, we allow these appeals. In the facts and circumstances of the case, we make no order as to costs."

26. It is clear that the said judgment does not deal with manufacture alone. It deals with various processes carried on without the aid of power in relation to manufacture. The Court's ultimate holding was that the use of diesel pump sets to fill pans with brine is an activity which occurred with the aid of power and is in relation to manufacture. That is why it held that the process of manufacture of common salt from brine in salt pans is an integrated one whose operations are so inter-related that without any one of these operations the manufacturing process could not be completed. If, therefore, any one of several processes in relation to manufacture is carried on with the aid of power, the exemption under the notification would not apply.

It was in that context that this Court held that where any particular process is so integrally connected with the ultimate production of goods that but for that process, the manufacture of such goods would be impossible or commercial inexpedient. Two things need to be noticed here. One is that what is spoken about is raw material which is subjected to several processes after which a final manufactured product emerges and two that the test of integral connection of a particular process with the ultimate production of goods that but for such process manufacture of goods would become impossible or commercially inexpedient was applied in the context of a process being in relation to manufacture.

Conclusion:

27. The case law discussed above falls into four neat categories.

(1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.

(2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.

(3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the *Brakes India* case and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.

(4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place.

28. The instant case falls within the first category aforementioned. This is a case of manufacture of disposable syringes and needles which are used for medical purposes. These syringes and needles, like in the J.G. Glass case and unlike the Brakes India case, are finished or complete in themselves. They can be used or sold for medical purposes in the form in which they are. The fact that medically speaking they are only used after sterilization would not bring this case within the ratio of the Brakes India case. All articles used medically in, let us say, surgical operations, must of necessity first be sterilized.

29. The Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Fourth Edition by Benjamin F. Miller and Claire Brackman Keane defines 'sterilization' as follows: "In sterilizing objects or substances, the high resistance of bacterial spore cells must be taken into account. Most dangerous bacteria are destroyed at a temperature of 50° to 60°C (122° to 140°F). Therefore, pasteurization of a fluid, which is the application of heat at about 60°C, destroys disease-causing bacteria. However, temperatures almost twice as high are usually required to destroy the spore cells.

The discovery that heat, in the form of flame, steam, or hot water, kills bacteria made possible the advances of modern surgery, which is based on freedom from microorganisms, or asepsis, and prevention of contamination. Sterilization of all equipment used during an operation, and of anything that in any way may touch the operative area, is carried out scrupulously in hospitals. Physicians and nurses wear sterile clothing. Instruments are sterilized by boiling, by chemical antiseptics, or by autoclaving.

In a physician's office needles for injections and any instruments used for treatment of wounds or other surgical procedures are also carefully sterilized, and other aseptic techniques are observed." In the Oxford Dictionary of Nursing, 'sterilization' is defined as: "the process by which all types of micro-organisms (including spores) are destroyed. This is achieved by the use of heat, radiation, chemicals, or filtration."

30. The added process of sterilization does not mean that such articles are not complete articles in themselves or that the process of sterilization produces a transformation in the original articles leading to new articles known to the market as such. A surgical equipment such as a knife continues to be a surgical knife even after sterilization. If the Department were right, every time such instruments are sterilized, the same surgical instrument is brought forth again and again by way of manufacture and excisable duty is chargeable on the same. This would lead to an absurd result and fly in the face of common sense [1].

If a surgical instrument is being used five times a day, it cannot be said that the same instrument has suffered a process which amounts to manufacture in which case excise duty would be liable to be paid on such instruments five times over on any given day of use. Further, what is to be remembered here is that the disposable syringe and needle in question is a finished product in itself. Sterilization does not lead to any value addition in the said product.

All that the process of sterilization does is to remove bacteria which settles on the syringe's and needle's surface, which process does not bring about a transformation of the said articles into something new and different. Such process of removal of foreign matters from a product complete in itself would not amount to manufacture but would only be a process which is for the more convenient use of the said product. In fact, no transformation of the original articles into different articles at all takes place. Neither the character nor the end use of the syringe and needle has changed post-sterilization. The syringe and needle retains its essential character as such even after sterilization.

31. Ms. Shirin Khajuria then cited a few other judgments. The judgment in Laminated Packings (P) Ltd. v. CCE, 1990 (49) ELT 326 held:

"4. Lamination, indisputably by the well settled principles of excise law, amounts to 'manufacture'. This question, in our opinion, is settled by the decisions of this Court. Reference may be made to the decision of this Court in Empire Industries Ltd. v. Union of India [(1985) 3 SCC 314: 1985 SCC (Tax) 416] . Reference may also be made to the decision of this Court in CCE v. Krishna Carbon Paper Co. [(1989) 1 SCC 150: 1989 SCC (Tax) 42: (1988) 37 ELT 480] We are, therefore, of the opinion that by process of lamination of kraft paper with polyethylene different goods come into being. Laminated kraft paper is distinct, separate and different goods known in the market as such from the kraft paper.

5. Counsel for the appellant sought to contend that the kraft paper was duty paid goods and there was no change in the essential characteristic or the user of the paper after lamination. The fact that the duty has been paid on the kraft paper is irrelevant for consideration of the issue before us. If duty has been paid, then benefit or credit for the duty paid would be available to the appellant under Rule 56-A of the Central Excise Rules, 1944.

6. The further contention urged on behalf of the appellant that the goods belong to the same entry is also not relevant because even if the goods belong to the same entry, the goods are different identifiable goods, known as such in the market. If that is so, the manufacture occurs and if manufacture takes place, it is dutiable. 'Manufacture' is bringing into being goods as known in the excise laws, that is to say, known in the market having distinct, separate and identifiable function. On this score, in our opinion, there is sufficient evidence. If that is the position, then the appellant was liable to pay duty. We are, therefore, clearly of the opinion that the order of the CEGAT impugned in this appeal does not contain any error. The appeal, therefore, fails and is accordingly dismissed."

32. This judgment again does not take us any further. It was found on the evidence led in that case that laminated kraft paper is a distinct and separate product known in the market as such and is apart from kraft paper.

33. CCE, Meerut, v. Kapri International (P) Ltd., (2002) 4 SCC 710, is a judgment in which cotton fabrics from a running length were cut into pieces which formed new articles like bed sheets, bed spreads and table clothes. On facts there, it was held that new commodities had emerged which had a definite commercial identity in the market and that the raw material (that is cotton fabrics) having suffered payment of excise duty would make no difference to the finished products also being liable for payment of excise duty.

34. Judged therefore from the view point of the law discussed in this judgment, it is clear that the cryptic judgment dated 18.6.2004 has not applied the law correctly. The appeal is allowed and the impugned judgment is hereby set aside.

.....J. (A.K. Sikri)

.....J. (R.F. Nariman)

New Delhi;

May 7, 2015

[1] The expression "Flies in the face of common sense" is taken from an interesting judgment of the House of Lords reported in R v. Secretary of State for the Home Department, (1995) 2 All ER 244. Lord Browne Wilkinson was faced with an argument that Section 171 of the Criminal Justice Act of 1988 vests in the Secretary of State a discretion for bringing into force certain sections of the said Act. It was argued that the Secretary of State had an absolute and unfettered discretion to bring in or not to bring in the said Sections. This argument was rejected stating that it was not only constitutionally dangerous but also flies in the face of common sense (at page 253).

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