

(1981) 04 BOM CK 0055

Bombay High Court

Case No: Writ Petition No. 486 of 1980

Union Carbide India
Ltd. and others

APPELLANT

Vs

Union of India and
others

RESPONDENT

Date of Decision: April 9, 1981

Acts Referred:

- Central Excise Rules, 1944 - Rule 173G, 49, 9

Citation: (1981) 1 ECR 396 : (1982) 10 ELT 316

Hon'ble Judges: M.L. Pendse, J

Bench: Single Bench

Judgement

1. The Petitioners have Petrochemical Company at Chembur, Bombay, where they manufacture low density polyethylene and various chemicals. The petitioners also manufacture acetylene black which is chargeable under Central Excise Tariff Item 64. Acetylene black is manufactured by the petitioners in a continuous, integrated and uninterrupted process by a stream of production using naphtha or another stream using calcium carbide and both continuing to produce acetylene black. In one continuous stream naphtha is thermally cracked in furnaces for production of ethylene and its ultimate conversion into low density polyethylene. During the continuous process of cracking of naphtha, several gases including acetylene gas are released. The petitioners have annexed Ex. "A" which a flow chart showing the manufacturing process of acetylene black.

2. "Acetylene gas" was brought under the Central Excise Tariff Item No. 14H(vi) with effect from June 18, 1977 and attracted excise duty at the rate of 12% ad valorem. The ad valorem rates have varied from time to time. The Excise Department classified the acetylene gas obtained in the petitioner's factory under Tariff Item No. 11A and totally exempted from payment of duty till December 21, 1967 under Notification No. 276/67. On June 22, 1977 the petitioners filed a classification list

before the Central Excise Authorities showing acetylene gas as an excisable commodity and the list was approved on July 6, 1967. Before that date on July 1, 1977 the petitioners informed the Excise department that the acetylene gas which comes into existence in the uninterrupted process of manufacture of acetylene black is not liable for excise duty under Tariff Item No. 14H(vi).

3. On April 27, 1978, the petitioners filed a fresh classification list before the Excise authorities classifying acetylene gas as a non-excisable product. The petitioners also supplied reasons in support of the claim that the product was non-excisable. On August 7, 1978, the petitioners received a show cause notice from 2nd respondent stating that the gas manufactured by the petitioners was not exempt from duty and the refund claim made by the petitioners for Rs. 6,17,255.91 was liable to be rejected. After hearing the petitioners the 2nd respondent by his order dated October 18, 1978 rejected the claim for refund of the excise duty. The copy of the order is annexed as Ex. "L" to the petition. The petitioners received a further show cause notice on January 16, 1979 to show cause as to why the classification List filed by the petitioners showing acetylene gas as a non-excisable product should not be rejected. The classification list filed by the petitioners was rejected by an order dated May 29, 1979 after the petitioners filed their reply.

4. The petitioners carried two appeals before respondent No. 4 against the orders passed by the 2nd respondent and the 3rd respondent and the copies of which are annexed as Ex. "L" and Ex. "O" to the petition. The respondent No. 4 by his order dated November 6, 1979 dismissed the appeal holding that the acetylene gas manufactured in the process of manufacture of acetylene black was liable to excise duty. The petitioners have thereafter filed the present petition in this Court under Article 226 of the Constitution of India for quashing the orders annexed as Exs. "L", "O" and "R" to the petition and for refund of Rs. 26,53,643.67 being the amount of excise duty collected from the petitioners for the period commencing from June 10, 1977 to March 31, 1980.

5. Shri Desai, the learned counsel appearing in support of the petition, has raised three submissions to challenge the legality of the orders. Shri Desai submits that the acetylene gas was an intermediate product in a continuous, integrated and uninterrupted process of manufacture of acetylene black and as such the acetylene gas cannot be termed as a manufactured goods attracting the duty under Tariff Item No. 14H(vi). The second submission is that the acetylene gas was not "goods" within the meaning of Central Excises and Salt Act, 1944. The third submission is that the petitioners did not remove the said acetylene gas within the meaning of Rules 9 and 49 of the Central Excise Rules to attract the duty.

6. In answer to the petition, the respondents have filed the return sworn of December 5, 1980 by Shri Mohinder Singh Badhan, Assistant Collector of Central Excise. The respondents did not dispute that the acetylene gas was an intermediate product in a continuous integrated and uninterrupted process of manufacture of

acetylene gas. According to the respondents though the plant of the petitioner is a composite plant, since the acetylene gas is removed from one section of the plant to another section of the same plant, such transfer would be covered by Rule 9 of the Central Excise Rules. The respondents also claimed that the acetylene gas is an excisable goods and the petitioners cannot escape liability by claiming that it was not a marketable commodity unless it underwent a further process of manufacture. In my judgment, the petitioners are entitled to succeed on the first submission urged by Shri Desai and it is not necessary to determine the correctness of the remaining two submissions in the present proceedings.

7. Shri Desai submitted that it is not in dispute that acetylene gas was intermediate product in the continuous, integrated and uninterrupted process of manufacture of acetylene gas. Both the authorities below have recorded a finding to that effect and have also noted that the gas produced in the factory is consumed entirely for captive use. Shri Desai submits that as the acetylene gas was an intermediate product in an uninterrupted process of manufacture, it is not liable for excise duty. From the flow chart annexed as Ex. "A" to the petition, it is obvious that the acetylene gas is one of the several gases which are released by cracking of naphtha. The flow chart would indicate that the acetylene gas passes through the pipe before acetylene black is manufactured. It is not in dispute that the petitioners are neither using the said acetylene gas for any other purpose or for storage. From these admitted facts, it is obvious that the acetylene gas which is a product of cracking of naphtha is not an identifiable article which comes into existence for attracting the excise duty.

8. Shri Desai placed reliance upon the decision of the Division Bench of this Court in Miscellaneous Petition No. 491 of 1974 - Nirlon Synthetics v. Auditor decided on April 30, 1978 and claimed that it has been held that the expression "removal from place or premises" in rule 49, read with rule 9, could not be equated with removal from equipment, plant, machinery or parts thereof such as, vessel, pipe or tube. The Division Bench observed that unless there was removal or issuing out of the article from the factory premises, excise duty was not attracted. The learned counsel also relied upon the decision of the Division Bench of this Court in the case of Oudh Sugar Mills Ltd. v. Union of India and another reported in 1980 E L T 327. The Division Bench was considering the question whether the vegetable oil manufactured as a component to be converted into a final product as a result of the continuous integrated process of manufacture in a composite mill would be liable to excise duty because there is removal as contemplated by rule 9 read with rule 49 of the Central Excise Rules. The Division Bench concluded that where a component is converted into a final product as a result of continuous, integrated process of manufacture, such component would not be liable to excise duty even if such component attract excise duty as an independent manufactured article. The two decisions relied upon by the learned counsel entirely support his case.

9. Shri Desai also relied upon the decision of the Delhi High Court in the case of *The Delhi Cloth & General Mills Co. Ltd. and another v. The Joint Secretary, Government of India & another* reported in 1978 Excise Law Times 121 and the decision of the Division Bench of the Delhi High Court decided on September 16, 1980 in Civil Writ No. 664 of 1972. The Division Bench of the Delhi High Court was considering the question as to whether excise duty is leviable in respect of a product which emerges at an intermediate stage in a continuous uninterrupted and integrated process of manufacture and came to the conclusion that such duty is not leviable unless there is a removal either for the purpose of sale or for the purpose of consumption. Shri Justice Ranganathan, speaking for the Bench, referred to large number of authorities and accepted the claim of the petitioners that no excise duty was leviable in respect of a product which emerges at an intermediate stage in a continuous uninterrupted process of manufacture. I am, in respectful agreement with the decisions cited by the learned counsel. In the present case, there is no dispute that the acetylene gas is an intermediate product in a continuous integrated and uninterrupted process of manufacture of acetylene black and as such the product of acetylene gas is not liable to payment of excise duty.

10. Shri Sethna, the learned counsel appearing on behalf of the respondents, submits that the two decisions of the Division Bench of this Court would have no application to the facts of the present case as these decisions were recorded with reference to the rules which were prevalent prior to May, 1968. Shri Sethna urges that Rule 173-G of the Central Excise Rules, 1944 was enacted after May, 1968 and that rule deals with payment of duty on the goods consumed within the factory during continuous process. Rule 173-G of the Central Excise rules makes reference to the duty due on the goods consumed within the factory in a continuous process. Shri Sethna submits that after the enactment of this rule, the principle laid down in the two earlier Division Bench decisions of this Court would have no application. The submission is not correct. Rule 173-G of the Central Excise Rules refers to the duty on the goods consumed within the factory in a continuous process but the rule has no reference to an intermediate product in a continuous integrated and uninterrupted process of manufacture. Various intermediate products come into existence in a continuous and interrupted process but if such intermediate products are part and parcel of the uninterrupted process of manufacture of final item, then such intermediate products are not liable for duty. It is not in dispute that the acetylene gas which is an intermediate product was consumed within the factory in a continuous and uninterrupted process of manufacture of acetylene black. The contention of Shri Sethna cannot be accepted because what Rule 173-G provides is for consumption of goods within the factory in a continuous process but does not cover the consumption of intermediate products in the factory in a continuous uninterrupted process. The intermediate products, if not consumed in an uninterrupted process of manufacture of final product then it is possible that Rule 173-G may attract, though I must add that I am not expressing any final opinion, on

that point. In my judgment, Rule 173-G would have no application in case of coming into existence of an intermediate product in a continuous integrated and uninterrupted process of manufacture of final product. The petitioners are entitled to succeed on this count. The conclusion of the authorities that the petitioners have manufactured acetylene gas attracting the duty under Tariff Item No. 14H(vi) is entirely incorrect and the petitioners are entitled to the relief. As the petitioners succeed on the first contention, it is not necessary to deal with the two other submissions urged by Shri Desai in support of the petition.

11. Accordingly, the petition succeeds and the rule is made absolute in terms of prayers (a), (b)(i) and (b)(ii) save and except that the petitioners would not be entitled to claim any amount of interest on the amount of refund of excise duty. The respondents shall refund the excise duty within period of one month from today. In the circumstances of the case, there will be no order as to costs.