A COLLECTOR' CENTRAL EXCISE, BOMBAY

v.

M/S. S.D. FINE CHEMICALS PVT. LTD.

MARCH 30, 1995

B [B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.]

Central Excises and Salt Act, 1944:

Section 2(f)—'Manufacture'—Meaning and scope of expression—Held
C *definition is expansive.*

Assessee manufacturing Chemicals and fine chemicals—Undertaking process of distillation and recrystallisation—Exemption from duty on the ground that process undertaken was not manufacture—Rejection of claim—Appeal—Tribunal—Difference of opinion between two Members—Reference
D *to third Member—Disposal of issue by third—Member in a cryptic manner—On Revenue's appeal matter remitted to third Member for fresh opinion.*

The respondent was manufacturing laboratory chemicals and fine chemicals by employing the process of distillation and recrystallisation. It claimed exemption from excise duty, under Notification No. 77 of 1983
E **dated March 1, 1983, on the ground that the process under-taken by it does not amount to manufacture. The Assistant Collector allowed the exemption but on appeal the Collector held that the respondent was liable to pay duty because the process undertaken by it amounted to manufacture inasmuch as a new commodity emerges out of the adopted process. On**
F **further appeal there was a difference of opinion between two Members of the Customs, Excise and Gold Control Appellate Tribunal. Member (Technical) held that the process undertaken by the respondent was merely for improving the quality of purity of the chemicals and does not amount to manufacture; even after purification, the chemicals are known by the very same name and that there was no change in the chemical formula even**
G **after purification. On the other hand Member (Judicial) took a contrary view and held that the process undertaken by the respondent was not a simple process and that the said process brings in a transformation which will change the name, character and use making the goods excisable. In view of this difference of opinion the matter was referred to a third**
H **Member who held in favour of the respondent-manufacturer. However he**

did not deal with the several aspects dealt with in the opinions of the two differing members. He did not also indicate whether he agreed or disagreed with the findings recorded by the Member (Judicial). A

Against the decision of the Tribunal, Revenue preferred an appeal to this Court.

B

Remitting the matter for fresh opinion of the third Member of the Tribunal, this Court

HELD: 1. The definition of the expression 'manufacture' under Section 2(f) of the Act is not confined to the natural meaning of the expression 'manufacture' but is an expansive definition. Certain processes, which may not have otherwise 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. Though the principles enunciated are clear, it is their application that present difficulties and it does not help to draw "any sharp or intrinsic distinction between 'processing' and 'manufacture', "which would only result in an oversimplification of both and tends to blur their interdependence in cases such as the present one". It would also be not right to try to restrict the sweep of the definition with reference to Entry 84 List I of the seventh Schedule to the Constitution. Since the constitutionality of the said definition has been repeatedly upheld with reference to both Entries 84 and 97 of List I, the definition must be understood in terms it is couched. It should also be remembered that the question whether a particular process does or does not amount to 'manufacture' as defined under section 2(f) is always a question of fact to be determined in the facts of a given case. One of the main tests evolved is whether on account of the processes employed or applied by the assessee, the commodity so obtained is no longer regarded as the original commodity but is, instead, recognised a a distinct and new article that has emerged as a result of the processes. [93-F to H, 94-A to C]

C D E F G

Union of India v. *Delhi Cloth and General Mills,* [1963] Suppl. 1 SCR 586; *South Bihar Sugar Mills Ltd. and Anr. Etc.* v. *Union of India and Anr.,* [1968] 3 SCR 21; *Empire Industries Ltd. and Ors.* v. *Union of India and Ors.,* H

A **[1985] 3 SCC 314;** *M/s. Ujagar Prints and Ors.* **v.** *Union of India and Ors.*, **[1989] 3 SCC 488;** *M/s. Tungabhadra Industries Ltd.* **v.** *Commercial Tax Officer, Kumool,* **[1961] 2 SCR 14;***Union of India* **v.** *H.S. Dhillon,* **[1971] 2 SCC 779;** *Collector of Central Excise, Madras* **v.** *M/s. Kutty Flush Doors and Furniture Co. (P) Ltd.,* **[1988] Suppl. SCC 239 and** *Collector of Central Excise, Jaipur* **v.** *Rajasthan State Chemical Works, Deedwana, Rajasthan,* B **[1991] 4 SCC 473, referred to.**

2. In the instant case the third Member of the Tribunal has not dealt with the case in a full and proper manner and has disposed of the issue in a cryptic manner. Therefore, the matter is remitted for his fresh opinion C **which he shall do within six months from the date of this judgment and then transmit his opinion to this Court soon after rendering it. [94-D, E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2532 (NM) of 1992.

D From the Judgment and Order dated 25.6.1991 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in A. No. EA. No. 1566 of 1987-C.

Dr. R.R. Misra, Ashok K. Srivastava and V.K. Verma for the Appellant.

E

V. Laxmi Kumaran and S. Muralidhar for the Respondents.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. In this appeal preferred by the Collector, F Central Excise, Bombay under Section 35(L) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'), the question is whether the distillation and recrystallisation carried out by the respondent amounts to 'manufacture'? The respondent, M/s. S.D. Fine Chemical Pvt. Ltd., are engaged in the manufacturing of laboratory chemicals and fine chemicals. They also undertake repacking and purification of laboratory and fine G chemicals. In the classification list filed by them on April 1, 1983, they claimed that the process of purification and distillation undertaken by them does not amount to process of manufacture and accordingly, claimed exemption from duty in respect of such goods under Notification No. 77 of 1983 dated March 1, 1983. The Assistant Collector agreed with the H respondent but his order was revised by the Collector (Appeals) who held

that the processes undertaken by the respondent do amount to manufacture. Inasmuch as a new commodity known to the market emerges as a result of such processes, he held, they are liable to excise duty. The respondent filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi which was heard in the first instance by a Bench of two Members. The Member (Technical) agreed with the respondent. He held that the process undertaken by the respondent is merely for improving the quality or purity of the chemicals and does not amount to manufacture. He observed that even after purification, the chemicals are known by the very same name and that there was no change in the chemical formula even after purification. The simple process of distillation and recrystallisation of the chemicals does not amount to manufacture for the purposes of the Act, he held. The Member (Judicial) however, took a contrary view. He was of the opinion that the process undertaken by the respondent is not a simple process and that the said process "brings in a transformation which will change the name, character and use". The Member (Judicial) further observed, "the ordinary chemicals cannot be used in laboratory without it undergoing purification. They are traded in different commercial name and has altogether different use. So long as the trade recognises it as a different commodity and its uses are different, the item has to be recognised as a different goods and became excisable goods". In view of the difference of opinion between the two Members, the matter was referred to a third Member. The third Member held in favour of the respondent- manufacturer on the following reasoning:

> "As can be gathered, the key test is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity. In my view in the instant case this test has not been satisfied as the chemicals prior to the two processes concerned herein continues to remain the same after being subjected to the processes, admittedly with only a change in increase in purity. The commodity retains its identity substantially through the processing stage. Therefore, it cannot be said to have been manufactured."

It would be evident from the opinion of the third Member that he did not deal with the several aspects dealt with in the opinions of the two differing members. He did not also indicate whether he agrees or disagrees with the findings recorded by the Member (Judicial), viz., that after the

A processes undertaken by the respondent, the chemicals bear a different chemical name and have an altogether different use. The third Member did not also deal with the holding of the Member (Judicial) that after the processes undertaken by the respondent, the chemical became a different commercial commodity.

B The expression 'manufacture' is defined in clause (f) of Section 2 of the Act. The definition, as substituted by Finance Act (No. 25) of 1975, with effect from March 1, 1975 reads thus:

> "'manufacture' includes any process,-
>
> C (i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, D 1985 as amounting to manufacture,
>
> and the word 'manufacture' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own ac- E count."

The definition is thus an inclusive definition. The purpose of the definition is to include certain processes and activities within the ambit of the said definition which may not otherwise amount to manufacture, as F ordinarily understood. This inclusion is in addition to the normal meaning and context of the expression 'manufacture'. The said expression has been the subject matter of several decisions of this Court to which a brief reference is necessary to bring out the principles enunciated therein. In *Union of India* v. *Delhi Cloth and General Mills,* [1963] Suppl. 1 SCR 586 the revenue wanted to levy a duty upon 'refined oil' which was obtained by G the respondent-manufacturer at an intermediate stage of production of vanaspati. The respondent cleansed the oil purchased by him by applying certain processes and thus obtained 'refined oil'. But the respondent did not apply the process of deodorisation before hydrogenating the refined oil. The case of the Revenue was that even non-deodorised refined ground- H nut/til oil is 'refined oil' as known to the consumers and the commercial

community. The respondent's case, however, was that the 'refined oil' as known to the consumers and the commercial community is necessarily the deodorised refined oil. After referring to the material produced by both the parties, this Court upheld the respondent's contention and held that "without deodorisation, the oil is not 'refined oil' as is known to the consumers and the commercial community". This Court further held "that the raw oil purchased by the respondent for the purpose of manufacture of vanaspati does not become at any stage 'refined oil' as is known to the consumers and the commercial community". For this reason, it was held that refined oil obtained by the respondent at stage anterior to hydrogenation is not 'vegetable non-essential oil' or by 'all sorts' in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power within the meaning of Item 12 of the Ist Schedule to the Act. So far as legal position is concerned, this Court stated it in the following words:

> "Excise duty is on the manufacture of goods and not on the sale. Mr. Pathak is therefore right in his contention that the fact that the substance produced by them at an intermediate stage is not put in the market would not make any difference. If from the raw material has been brought into existence a new substance by the application of processes one or more of which are with the aid of power and that substance is the same as "refined oil" as known to the market an excise duty may be leviable under Item 23 (the present item 12)".

The Court then dealt with the next argument of the appellant- Union of India that even if it is held that the respondent did not manufacture 'refined oil' as known to the market, even so they must be held to manufacture some kind of 'non-essential vegetable oil' within the meaning of Item 23. This Court rejected the said argument with reference to the meaning of the expressions "manufacture" and "goods", in the following words:

> "The word "manufacture" used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance, however, minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26 from an American Judgment. The

A passage runs thus:-

'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must
B emerge having a distinctive name, character or use'."

The Court then referred to and dealt with the meaning of expression 'goods' occurring in Section 3 and observed thus:

C "These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold.

This consideration of the meaning of the word "goods" provides strong support for the view that "manufacture" which is liable to
D excise duty under the Central Excise and Salt act, 1944 must be the 'bringing into existence of a new substance known to the market'. "But", says the learned counsel, "look at the definition of "manufacture" in the definition clause of the act and you will find that "manufacture" is defined thus: 'Manufacture' includes any process incidental or ancillary to the completion of a manufactured
E product. [S.2(f)]."

We are unable to agree with the learned counsel that by inserting this definition of the word "manufacture" in S.2(f) the legislature intended to equate "processing" to "manufacture" and intended to
F make mere "processing" as distinct from "manufacture" in the same sense of bringing into existence of a new substance known to the market, liable to duty. The sole purpose of inserting this definition is to make it clear that at certain places in the Act the word 'manufacture' has been used to mean a process incidental to the manufacture of the article. Thus in the very item under which the
G excise duty is claimed in these cases, we find the words: "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power." The definition of 'manufacture' as in S.2(f) puts it beyond any possibility of controversy that if power is used for any of the numerous processes that are required
H to turn the raw material into a finished article known to the market

the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available. It is only with this limited purpose that the legislature, in our opinion, inserted this definition of the word 'manufacture' in the definition section and not with a view to make the mere "processing" of goods as liable to excise duty." A B

In *South Bihar Sugar Mills Ltd. & Anr. Etc.* v. *Union of India & Anr.*, [1968] 3 SCR 21, the above interpretation was affirmed.

In *Empire Industries Ltd. & Ors.* v. *Union of India & Ors.*, [1985] 3 SCC 314 the question arose whether the process of bleaching, dyeing, printing of grey cloth amounts to 'manufacture' as defined in the Act. It may not be necessary to set out the reasoning in this case inasmuch as the very same question was considered later by a Constitution Bench of this Court in *M/s. Ujagar Prints & Ors.* v. *Union of India & Ors.*, [1989] 3 SCC 488. We will, therefore, refer to the reasoning in *Ujagar Prints*. The facts in *Ujagar Prints* were these: the customers supplied the grey fabric to the appellant who carried out operations of bleaching, dyeing, printing, glazing, shrink-proofing etc. against payment of processing charges. The ownership of the cloth rested with the customers who got these processes done to their specifications from the appellant on payment of processing charges. The question was whether the appellant can be said to have undertaken 'manufacture' as defined in the Act. M.N. Venkatachaliah, J., as the then learned Judge was, dealt with several decisions of this Court including those referred to above as well as the decisions rendered by this Court under different Sales Tax enactments including *M/s Tungabhadra Industries Ltd.* v. *Commercial Tax Officer, Kurnool,* [1961] 2 SCR 14 and enunciated the principle in the following words: C D E F

"The prevalent and generally accepted test to ascertain that there is "manufacture" is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. The principles are clear. But difficulties arise in their application in individual cases. There might be borderline cases where either G H

A conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between 'processing' and 'manufacture', we are afraid, results in an oversimplification of both and tends to blur their interdependence in cases such as the present one."

B The learned Judge then dealt with argument that if the expression 'manufacture' defined under Section 2(f) of the Act is understood in a broad sense to include processes, which in truth do not amount to manufacture, the definition and the very Act would fall outside Entry 84 of List-I of the Seventh Schedule to the Constitution. The learned Judge C rejected the argument holding "at all events, even if the impost on process is not one under entry 84, List I, but is an impost on "processing" distinct from "manufacture" the levy could yet be supported by entry 97, List-I even without the aid of the wider principle recognised and adopted in *Dhillon Case.*" The learned Judge then referred to the principle of the decision in D *Union of India* v. *H.S. Dhillon,* [1971] 2 S.C.C. 779 and observed:

"So far as the exclusive competence of the Union Parliament to legislate is concerned all that is necessary is to find out whether the particular topic of legislation is in List II of List III. If it is not, it is not necessary to go any further or search for the field in List E I. Union Parliament has exclusive power to legislate upon that topic or field. Of course, it has concurrent power also in respect of the subjects in List III."

In *Collector of Central Excise, Madras* v. *M/s. Kutty Flush Doors and* F *Furniture Co. (P) Ltd.,* [1988] Suppl. S.C.C. 239, this Court observed, after referring to the principle of *Delhi Cloth and General Mills* (supra) and *South Bihar Sugar Mills* (supra), to the following effect:

"This principle is well-settled. This is a question of fact depending upon the relevant material whether as a result of activity, new and G different article emerges having a distinct name, character and use."

On the meaning of expression "process", the following statement in the decision of this Court in *Collector of Central Excise, Jaipur* v. *Rajasthan* H *State Chemical Works, Deedwana, Rajasthan,* [1991] 4 SCC 473 is relevant:

"The natural meaning of the word 'process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject-matter in order to transform or reduce it to a certain stage. According to Oxford Dictionary one of the meaning of the word 'process' is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result." The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture."

The question in the decision was whether the respondent was entitled to the benefit of a particular exemption notification but that question in turn raised the question what is 'manufacture' and what is 'process'? The Bench (S. Ranganathan, Fathima Beevi and N.D. Ojha, JJ.) expressed the aforesaid opinion.

The decisions aforesaid make it clear that the definition of the expression 'manufacture' under Section 2(f) of the Act is not confined to the natural meaning of the expression 'manufacture' but is an expansive definition. Certain processes, which may not have otherwise 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. As has been repeatedly observed by the Court, though the principles enunciated are clear, it is their application that presents difficulties and it does not help to draw "any sharp or intrinsic distinction between 'processing' and

A 'manufacture', "which would only result in an oversimplification of both and tends to blur their interdependence in cases such as the present one" *(Ujagar Prints)*. It would also be not right, as pointed out in *Ujagar Prints* to try to restrict the sweep of the definition with reference to Entry 84 List-I of the seventh Schedule to the Constitution. Since the constitutionality of the said definition has been repeatedly upheld with reference to both B Entries 84 and 97 of List-I (*Empire Industries* and *Ujagar Prints*), the definition must be understood in terms it is couched. It should also be remembered that the question whether a particular process does or does not amount to 'manufacture' as defined under Section 2(f) is always a question of fact to be determined in the facts of a given case applying the C principles enunciated by this Court. One of the main tests envolved by this Court is whether on account of the processes employed or applied by the assessee, the commodity so obtained is no longer regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes (*Ujagar Prints*).

D Now coming to the facts of the case before us, it is clear from the perusal of the opinion of the third Member of the Tribunal that he has not dealt with the case in a full and proper manner and has disposed of the issue in a cryptic manner. It has, therefore, become necessary to remit the matter for the fresh opinion of the third Member of the Tribunal. The third E Member shall not hear the parties and render his opinion afresh on the question referred to him. He shall do so within six months from this date. He shall transmit his opinion to this Court soon after rendering it.

If the third Member, Jyoti Balasundaram, who heard the matter is not available, the Chairman of the Tribunal shall specify another Member F for hearing this matter.

List the appeal after receipt of the finding/opinion from the Tribunal.

T.N.A. Petition disposed of.