

**IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD**

* * *

CENTRAL EXCISE APPEAL No.41 of 2006

Between:
Saroj Chemicals (P) Ltd.

Appellant

VERSUS

The Commissioner (Appeals) and Ors.

Respondents

JUDGMENT PRONOUNCED ON: 19.03.2024

THE HON'BLE SRI JUSTICE P.SAM KOSHY

AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to see the fair copy of the Judgment? : **Yes**

P.SAM KOSHY, J

N.TUKARAMJI, J

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! Counsel for Appellant(s) : Mr. P.V.Rajasekhar

^Counsel for the Respondent(s) : Mr. B.Narayana Reddy

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> HEAD NOTE:

? Cases referred

- 1) 1998 (97) ELT
- 2) 1963 AIR 791
- 3) (1989) 4 SCC 275
- 4) AIR 2003 SC 843
- 5) 1995 SCC, SUPL. (2) 336
- 6) AIRONLINE 2006 SC 658
- 7) (1989) 2 Supreme Court Cases 439
- 8) (2005) 2 Supreme Court Cases 168
- 9) (2015) 14 Supreme Court Cases 47
- 10) (1998) 2 Supreme Court Cases 32

THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE SRI JUSTICE N.TUKARAMJI
CENTRAL EXCISE APPEAL No.41 of 2006

JUDGMENT : *(per Hon'ble Sri Justice P.SAM KOSHY)*

The instant is an appeal under Section 35(G) of the Central Excise Act, 1944 (for short 'the Act') preferred by the appellant assailing the order passed by the Customs, Excise & Service Tax Appellate Tribunal (herein referred to as 'the Tribunal') in Appeal No.E/274 & 275/2002 on 12.10.2004.

2. Heard Mr. P.V.Rajasekhar, learned counsel for the appellant and Mr. B.Narayana Reddy, learned Senior Counsel for the respondents.

3. The litigation started from an order passed by Respondent No.2/Additional Commissioner, Customs & Central Excise, Hyderabad demanding duty and penalty upon the product sold by the appellant from its unit which is operated in Hyderabad. The whole issue arose when a show cause notice dated 08.01.1999 was issued by respondent No.3/Deputy Commissioner of Central Excise, Hyderabad to the appellant alleging that the appellant is engaged in the manufacturing and selling of "Activated Bleaching Earth" and "Activated Carbon" and both these products being

excisable goods, the appellant by his conduct has suppressed material facts and information from the authorities and have also not paid requisite duty under the excise law. Therefore, the appellant is liable to pay the duty along with penalty etc. The appellant therein gave a detailed explanation and reply to the show cause notice and also produced necessary records available with them.

4. Respondent No.2 thereafter passed the Order-in-Original on 21.10.1999. In the course of passing the Order-in-Original, respondent No.2 went on to decide whether the raw material fuller's earth lumps were being subjected to undergo a process of getting crushed in job crusher and pulverized in pulveriser. Thereafter, the powder generated is heated between 200°C to 300°C in a furnace and thereafter it is packed in bags for commercial use. Whether this process and the resultant product can be classified as activated bleaching earth.

5. Respondent No.2 took into consideration the evidence led by the Director of appellant company and also the report that was obtained from IICT, Hyderabad along with the opinion of one Sri V. Ramachandra Rao, Head of Department of the Metallurgy Department in J.N. Government Polytechnic College, Ramanthapur, Hyderabad and also taking note of the evidence

which was collected from the premises of the appellant company, particularly, the invoices where the product has been sold by the appellant themselves by the name of activated bleaching earth. Respondent No.2 confirmed the demand of Rs.5,04,330/- being the duty payable and also an equivalent amount towards penalty under Section 11AC of the Act along with interest at the rate of 20% per annum. In addition, also ordered for confiscation of plant and machinery and also penalty of Rs.10,000/- upon one of the directors of the appellant company under Rule 209A of the Central Excise Rules. In the course of reaching to the said conclusion, it was held as under:

“Whenever Bentonite or Mantmorillonite or Fullers earth are heated and subjected to chemical treatment then Alumina, Iron oxide, Calcium oxide and Magnisium oxide will be converted into sulphates, but SiO₂ will become inactive. Hence the overall superficial structure changes after any chemical treatment. The acids which are added in various measures to increase the bleaching efficiency of the earth. Before thermal activation it is an absorbent medium after activation it becomes an absorbent medium. Therefore the process undertaken by the assessee amounts manufacture from which different products having different usages are coming into existence.”

6. This order of respondent No.2 was subjected to challenge before respondent No.1/Commissioner (Appeals), Customs & Central Excise, Hyderabad, vide Order in Appeal No.152 & 153/2001(H-I)CE. Respondent No.1 also vide order dated 23.08.2001 referring to the evidence that was collected in the

course of investigation and also appreciating the entire process undertaken at the appellant company reached to the following finding of fact which for ready reference is being reproduced herein under:

FINDINGS

“(i)The appellants are procuring Fuller’s Earth lumps, a mineral clay, which is also known as Mantmorillonite or Bentonite. The Fuller’s Earth lumps are crushed in jaw crusher and the crushed material is then pulverized in the Pulverisers. This powder is heated in the furnace between 200 C to 300 C. Then it is treated with Sulphuric acid. The Fullers Earth Powder, on heating gets thermally activated and then by adjusting its pH value by the addition of Sulphuric Acid, gets powerful adsorption properties. As is evident from the invoices, the appellants are manufacturing various grades of Activated Bleaching Earths viz., SC 900, SC 200, Black, RB Grade, SC 100, SC 1500, for Castor Oil, Soya Grade, for Cotton Seed Oil SF, SSF, SC 60 etc., To given an illustration with regard to various grades of the product, Cotton Seed Oil is very darker in colour on extraction while Soya Bean Oil is lighter in colour. Thus, the decolouring agent has to have strong adsorption properties in case of Cotton Seed Oil than that of Soya Oil for decolourizing them. Hence, there is difference in the product required for usage in industries depending upon the type of oil being extracted and the requirement is fulfilled by the appellants by their different grades of Activated Bleaching Earth. In fact, the invoices describe the final product as Activated Bleaching Earth. The Activated Bleaching Earth, is processed and manufactured out of the fullers earth. Its characteristics can be manipulated so as to suit the different requirements of customers i.e. for bleaching of cotton seed oil, bleaching of soya bean oil etc., By undertaking the process of manufacture, different products having different usages come into existence.”

7. It was this order passed by respondent No.1 which was subjected to challenge before the Tribunal vide Appeal No.E/274 & 275/2002. The Tribunal also after hearing the appellant, finally

vide the impugned order dated 12.10.2004 affirmed the order passed by respondent Nos.2 and 3 and dismissed the appeal filed by the appellant holding as under and which is under challenge in the present appeal:

“6. The first issue pertains to whether or not the process carried out by the appellants amounts to manufacture. We have already described the process to which Fullers Earth is subjected. In the case of Ajanta Marble & Chemical Industry Vs CCE {1991 (53) ELT 457} the Tribunal held that crushing, grinding and sieving of lime stone to obtain powder amounts to manufacture. In the present case the Fullers Earth is subjected to more processes than in the above-cited case. There is no reason as to why the process adopted by the appellants does not amount to manufacture. In the case reported in 1998 (97) ELT, the Apex Court ruled that whether a process is that of manufacture is based on two/old list (a) a different product comes into existence or not, where the original product ceases to exist; (b) but for the said process the original product will have no use. The appellants’ product satisfies these tests. The appellants themselves sell their product as Activated Bleaching Earth to their customers for different uses in different industries. The product as manufactured by them ceases to be a Fullers Earth. Carbon and mineral substances are said to be activated when their superficial structure has been modified by appropriate treatment (with heat and chemicals etc) in order to make them suitable for certain purposes such as decolouring, gas or moisture absorption or filtering etc. The appellants’ product does these functions. Thus is an Activated Bleaching Earth classifiable under chapter heading 3802 of Central Excise Tariff Act. Further, as per the technical opinion given by experts that while Fullers Earth in its original form has absorbing characteristics after the thermal and chemical treatment it gets the characteristic being an adsorbant capable of being used for decolouring, filtering etc. When Fullers Earth is crushed its superficial form undergoes a change, thus making it an activated bleaching earth. The Ld. DR also points out the price differential between Fullers Earth in its raw form and its finished form as marketed. We therefore hold that the process to which Fullers Earth is subjected to amounts to manufacture and that in its

modified form if falls under 2802 of Central Excise Tariff Act.

7. The appellants were found to be describing their product as Fullers Earth thereby avoiding payment of appropriate duty. The period involved is 1994-95 to 1997-98. We hold that duty is payable as demanded involving larger period of limitation as the appellants contravened Central Excise Rules with an intent to evade payment of duty. We agree with the Commissioner (Appeals)'s order in so far as penalty and interest is concerned under Section 11AC and 11AB. Penalty and interest under these Sections can be imposed and demanded only for the clearances effective after 28/09/1996. We observe that confiscation of plant and machinery is not called for in a case of this type. We therefore, set aside the confiscation. Penalty imposed on the Director of the company under Rule 209A 209A is set aside."

8. The following substantial questions of law were formulated while preferring the present appeal:

- 1.** Whether the process undertaken by the appellant amounts to manufacture or not when read with note 2 of the Chapter 25 of the Section V of the Central Excise Tariff Act, 1985?
- 2.** Whether the products dealt by the appellants classified under heading 25.05 or 38.02 of Central Excise Tariff Act in view of the explanatory notes of HSN?
- 3.** Whether the Raw Material in question (fuller's earth – a natural mineral clay) is also known as bentonite or motmorillanite or not in the view of respondents own experts opinion differs with?
- 4.** Whether it is justified to invoke the proviso to section 11A of the act to bring in the extended period of limitation to five years instead of six months in view of all the records of the appellants are transparent, clear and open for inspection nor suppression of records or otherwise and in particular not disputed and admitted the same by the department/respondents?
- 5.** Whether it is justified to club all the years together when the appellants are entitled for the benefit of general exemption granted under law for each preceding year being a SSI unit?

Of the said questions of law framed, learned counsel for the appellant primarily made his contentions on question Nos.1, 2 and 4.

9. Now for better understanding of the aforesaid questions of law, in the factual backdrop what is necessary to take note is the definition of manufacture as is defined under Section 2(f) of the Act, which again for ready reference is reproduced herein under:

“(f) “manufacture” includes any process,—

- 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 First Schedule] as amounting to [manufacture; or]
- (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]

and the word “manufacturer” shall be construed accordingly and shall include not only a person who employer hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]”

10. Likewise, in order to answer the question whether the respondents were justified in invoking the provisions of Section 11A for the extended period of limitation, it would be relevant to take note of the contents of Section 11A(1), particularly clause (a) of Section 11A(1) both of which are reproduced herein under:

“11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, –

(a) the Central Excise Officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;”

11. Learned counsel for the appellant raised the following contentions challenging the orders passed by respondent Nos.1 and 2 which were affirmed by the Tribunal:

11.2 According to the learned counsel for the appellant, fuller’s earth is exempted and classified as item No.2505 and the relevant Chapter 25 of Section V (Mineral Products) of the Central Excise Tariff Act, 1985, speaks about the process of certain things in this regard, when such particular items are subjected to chemical treatment and heating shall still qualify for exemption as explained in the explanatory notes forming part of the Excise Tariff Act.

11.3 It was contended by the learned counsel for the appellant that the records which the appellant had produced before the respondents clearly show that the fuller’s earth is procured by the appellant from the suppliers of the quarries leased out by the State

Government by agreements and that the goods in question is only fuller's earth and nothing else.

11.4 It was further the contention of the learned counsel for the appellant that for enhancing the quality of the goods as exempted by law, no other new product is manufactured or emerged as alleged by the respondents to attract excise duty.

11.5 It was also submitted that there is no change in the super structure to quantify the goods to be excisable nor the assessing authorities ever drawn samples to prove their case except alleging that the process of the appellant is amounting to manufacture but never attempted to prove the same to bring home the liability except on illogical and imaginary conclusions of unauthorized persons.

11.6 According to the learned counsel for the appellant, the expert has also stated that the fuller's earth is different from bentonite or motmorillanite but the assessing authority including respondent No.2 have found from nowhere and equated fuller's earth with bentonite and concluded that both are the same which is in fact contradicting their own experts scientific opinion.

11.7 The further ground of learned counsel for the appellant was that respondent Nos.1 and 2 have arrived at a biased conclusive finding that the appellant is manufacturing activated bleaching

earth and activated carbon without any legal basis for the same based on alleged report given in some other matter by one Mr. Nazir Ali who was a consultant to some competitor of this appellant.

11.8 It was also contended by the learned counsel for the appellant that the authorities concerned have failed to appreciate the independent report and analysis obtained by the appellant from reputed government scientific research organization i.e. Indian Institute of Chemical Technology which had clearly opined that the appellant do not have required capable plant and machinery to manufacture activated bleaching earth for activated carbon.

11.9 The additional ground that the learned counsel for the appellant had raised was that the products even after subjected to wash with chemicals and exposed to heat, neither their characteristics changed nor the usage by just some people (including the appellant) lending or calling it with different name, doubtless, all the more it shall remain the same good as evidenced from the report of the Council of Scientific and Industrial Research Unit (IICT).

11.10 It was also the contention of the learned counsel for the appellant that the products in question before this Court emerged as no different products, neither the original product (fuller's

earth/chair fines) ceased to exist now but for the said process, the original products have no use. It was strongly contended that it is universally known that the fuller's earth is a natural absorbent and can be used as it is without any treatment.

11.11 According to the learned counsel for the appellant, the respondents failed to appreciate that the appellant had not suppressed any information or evidence as alleged. Instead the appellant had produced all the invoices, registers and books before the assessing authority which were not disputed and this can be evidenced from the respondents own notice and impugned orders passed and the explanation of the appellant by word of mouth and letter about the process involved in the goods dealt by them to the authorities concerned and be evidenced from respondents own orders and records.

11.12 Lastly, it was contended that there was no sufficient material available with the respondents for invoking proviso to Section 11A so far as the extended period of limitation being invoked and the same is unjustified and barred by limitation under law. So also the imposition of penalty under Section 11AB of the Act and interest under Section 11AC of the Act were not justified and untenable.

12. Learned counsel for the appellant in support of his contentions had relied upon the following decisions:

1) Union of India & Ors. Etc. v. J.G. Glass Industries Ltd. Etc.¹

2) Union of India v. Delhi Cloth & General Mills²

3) Padmini Products v. Collector of Central Excise, Bangalore³

4) Easland Combines Coimbatore v. Collector of Central Excise Coimbatore⁴

5) Collector, Central Excise v. M/s. S.D. Fine Chemicals Pvt. Ltd⁵

6) M/s. Quinn India Ltd. v. Commissioner of Central Excise, Hyderabad⁶

13. Per contra, learned Senior Counsel for the respondents contended that an appeal under Section 35G can only be entertained by the High Court in the event of there being a substantial question of law made out and not otherwise. According to the learned Senior Counsel, since there is a concurrent finding of fact given by two statutory authorities and the Tribunal, it amounts to a finding of fact which has been accepted and concurred by two of the appellate forums. In the given factual backdrop, there is hardly any scope of interference left for this Court in the instant appeal and therefore deserves to be rejected.

¹ 1998 (97) ELT

² 1963 AIR 791

³ (1989) 4 SCC 275

⁴ AIR 2003 SC 843

⁵ 1995 SCC, SUPL. (2) 336

⁶ AIRONLINE 2006 SC 658

14. It was contended by the learned Senior Counsel that the Assessing Officer at the first instance and the appellate authority subsequently has elaborately and extensively dealing with the process undertaken at the appellant company and taking into consideration the details in the invoices prepared in the course of sale of the product coupled with admitted factual matrix so far as the entire process undertaken by the appellant company has arrived at the findings. Further, none of the grounds raised by the learned counsel for the appellant can be said to be a substantial question of law. Rather, it is a pure finding of fact and for this reason also the appeal deserves to be rejected.

15. Coming to the facts of the case, the learned Senior Counsel highlighted the fact that no doubt the raw material used by the appellant is fuller's earth, however, the said fuller's earth lumps is put under certain chemical process like jaw crushing of the lumps and making powder of it. Secondly, heating the said product at the range of 200°C to 300°C and the product being washed/mixed with chemicals and acids so as to manufacture different grades of activated bleaching earth. The entire process undertaken would bring the final product as a manufactured product in terms of the definition of manufacture under Section 2(f) of the Act.

16. Learned Senior Counsel in support his contentions had relied upon the following decisions:

1) **M/s. Jaishri Engineering Co. (P) Ltd. v. Collector of Central Excise, Bombay**⁷

2) **Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara**⁸

3) **Servo-Med Industries Private Limited v. Commissioner of Central Excise, Mumbai**⁹

4) **Union of India and Others v. J.G. Glass Industries Ltd. and Others**¹⁰

17. The Hon'ble Supreme Court in the case of **Union of India & Ors. Etc** (supra) dealing with the definition of manufacture and deciding an issue whether a process is that of manufacture or not, held that substantially there needs to be two tests which need to be examined. Those are:

a) A different product comes into existence or not where the original product ceases to exist.

b) But for the said process, the original product will have no use.

18. However, the moment it is crushed and converted into a powder and the powder thereafter undergoes a process of heating and mixing with chemicals and acids brings out an altogether

⁷ (1989) 2 Supreme Court Cases 439

⁸ (2005) 2 Supreme Court Cases 168

⁹ (2015) 14 Supreme Court Cases 47

¹⁰ (1998) 2 Supreme Court Cases 32

different product depending upon the percentage of chemicals and acids put to crush fuller's earth and when the entire process is undertaken, the product generated is what is known as activated bleaching earth.

19. If we look into the order passed by respondent No.2, particularly, on examining the aforesaid two tests as has been envisaged by the Hon'ble Supreme Court in the case of **Union of India & Ors. Etc.** (supra), for ready reference the relevant portion of the Order-in-Original dealing with the said issue is reproduced herein under:

“In the instant case the name of the product manufactured by the assessee is “Activated Bleaching Earth” and “Activated Carbon”, this is also as per the certificate issued by the Industries Department, Government of Andhra Pradesh. The customers are also placing orders for “Activated Bleaching Earth” and “Activated Carbon” and the assessee is clearing the same as per the requirement of the customers through his invoices. The fullers earth being a natural mineral clay possess some characteristics. The fullers earth in raw state contains moisture and has no decolourising power and this when used as such, will act as an absorbent medium. While the new product manufactured by the assessee i.e., “Activated Bleaching Earth” which is produced by thermal activation of fullers earth and by adjusting pH value by addition of sulphuric acid gets powerful absorption properties. The chemical treatment is necessary to make the constituents neutral so that they do not participate in the reaction since they have powerful adsorption properties during filtration of oils. The character of the finished goods is entirely different from that of fullers earth. The end use of the product required for usage in Industries depending upon the type of oil being extracted is fulfilled by the assessees by their different grades of activated bleaching earths. They are clearing the goods to different customers by

mentioning the product “Activated Bleaching Earth” and “Activated Carbon” in their invoices.”

20. From the finding of fact given by the authority passing the Order-in-Original, what is established is that though fuller’s earth is the raw material which is subsequently converted into an “Activated Bleaching Earth” or an “Activated Carbon” through a mechanical process which includes a chemical treatment after crushing the fuller’s earth lumps altering the clay into powder and by increasing its bleaching potential. The very purpose of subjecting the fuller’s earth clay to chemical treatment in a mechanical manner is to alter the nature of the product. Further, the bleaching ability is enhanced by way of mechanical and chemical process and the filtration rate of the product also gets enhanced and becomes faster.

21. Another fact which stands established is that the raw material fuller’s earth in itself cannot be used for those purposes which it is subsequently used after the mechanical chemical process is undertaken. Yet another fact which is established from the pleadings is that the use of the Activated Bleaching Earth cannot be achieved if fuller’s earth is used as it is without the chemical treatment and the mechanical process which includes the heating process etc. The mechanical process which fuller’s earth is subjected to is to increase its bleaching performance and filtration

properties and the product is also tailor made as per the specifications required by the client as per use at their plants.

22. If we look into the process of manufacturing Activated Bleaching Earth, it would reveal that there are various stages with precision which has to be undertaken so as to ensure enhanced performance. The bleaching earth has a set of advanced formula of different combinations and it is applied by the manufacturer by using the production technology to manufacture different grades of Activated Bleaching Earth. All these process put together alters the fuller's earth clay into an Activated Bleaching Earth giving it the properties that increases its bleaching potential. Moreover, as has been discussed in the preceding paragraphs, it is also an admitted factual position that the appellant have been marketing as "Activated Bleaching Earth" with different chemical combinations as per the requirement of the market and nowhere did the appellant sold the product with an invoice of the product being nothing else but fuller's earth clay.

23. In view of the aforesaid categorical finding of facts, we are of the considered opinion that the finding so arrived at by respondent No.2 which stands affirmed by yet another detailed reasoned order passed by respondent No.1, both of which again subjected to test before the Tribunal and the Tribunal also giving specific reasons in

the course of affirming the orders passed by respondent Nos.1 and 2. We do not find any substantial merit in the arguments advanced by the learned counsel for the appellant calling for an interference to the findings given by the Tribunal.

24. The appeal thus being devoid of merits, deserves to be and is accordingly rejected. However, there shall be no order as to costs. As a sequel, miscellaneous applications pending if any, shall stand closed.

P.SAM KOSHY, J

N.TUKARAMJI, J

Date: 19.03.2024

Note: LR Copy to be marked.
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