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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) 1268/2015 & CM APPL. 2251/2015**

Date of decision: May 03, 2017

TINNA RUBBER & INFRASTRUCTURE LIMITED Petitioner
Through: Mr. V. Lakshmikumaran with Mr. Abhishek
Anand, Ms. L. Charanya Lakshmikumaran,
Mr. Aditya Bhattacharya, Mr. Anand K.,
Mr. Yogendra Aldak and Mr. Victor Das,
Advocates.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr. Anurag Ahluwalia, CGSC with
Ms. Srishti Banerjee and Mr. Mayank
Mishra, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

DR. JUSTICE S. MURALIDHAR

MR. JUSTICE VIBHU BAKHRU

J U D G M E N T

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03.05.2017

Dr. S. Muralidhar J.

1. By the referral order dated 8th August 2016 of the Division Bench of this Court, the following two questions have been referred to the present larger Bench of three Judges:

(a) Whether the process to which old tyres are subject to produce two or more pieces of cut tyre is 'manufacture' within the meaning of Section 2 (f) of the Central Excise Act, 1944? and

(b) In the above context, whether the decision of this Court in ***Modi Rubber Limited v. Union of India 1987 (29) ELT 502 (Del)*** requires to be reconsidered?

Background

2. This petition, under Article 226 of the Constitution of India, by Tinna Rubber & Infrastructure Limited questions the validity of a clarification dated 2nd January 2015 issued by the Tax Research Unit ('TRU') of the Department of Revenue, Ministry of Finance to the effect that there was no exemption from payment of excise duty in respect of tyre scrap cut into two to three pieces, produced from used and old tyres, and that, therefore, the said goods are chargeable to additional customs duty or countervailing duty ('CVD') under Section 3(1) of the Customs Tariff Act, 1975 (CTA).

3. The Petitioner states that it is one of the largest importers of used and old tyres. It is stated that it uses such used and old tyres to manufacture "crumb rubber". When the tyres reach a stage where they can no longer be used for automobiles, they are sold to scrap dealers, who then sell them to processors. The old tyres are thereafter recycled. One beneficial way to recycle the tyres is to mix crumb rubber with bitumen to make Crumb Rubber Modified Bitumen ('CRMB'). It is stated that the roads made of CRMB have better quality and life. CRMB is being made worldwide by mixing radial tyre crumb. However, there is scarcity of discarded radial tyres in India as a majority of the tyres produced are cross ply and non-radial tyres. Therefore, the Petitioner has to depend on imported radial tyre scrap from buses and trucks.

4. According to the prevalent import policy, import of used and old tyres

with one cut in the bead wire and import of used rubber tubes cut in two pieces is permitted without a licence from the Directorate General of Foreign Trade ('DGFT'). This ensures that the used tyres are not put to use again with minor or major reconditioning. It is also pointed out by the Petitioner that the tyres are cut into two-three pieces for ease of accommodation in the shipping vessels. The cost of transportation of tyre scrap with one cut is much higher than transportation of tyres cut into two or three pieces.

5. This is the second round of litigation. The Petitioner had earlier made a representation to the Government of India protesting against the imposition of 12% CVD. When there was no response to the said representation, the Petitioner filed W.P. (C) No. 8160 of 2014 which was disposed of by the following order on 2nd December 2014:

"Mr Shukla appearing on behalf of respondent Nos. 1. and 2 states that he has taken instructions to the effect that the representation dated 11.08.2014 filed by the petitioner will be considered and disposed of within one month.

The learned counsel for the petitioner requests that while considering the representation, the decisions of the Supreme Court in *Hyderabad Industries Ltd. vs. Union of India*: 1999 (108) E.L.T. 321 (SC) and *Commissioner of Central Excise and Customs, Bhubaneshwar-I vs. Tata Iron and Steel Co. Ltd*:2003 (154) E.L.T. 343 (SC) be also considered. We direct accordingly.

In view of the statement made by the learned counsel for the respondent Nos. 1 and 2, no further directions are necessary in this writ petition. The same stands disposed of."

6. It is pursuant to the above order that the impugned clarification was

issued by the TRU on 2nd January 2015 which in effect rejects the Petitioner's representation. The present writ petition was thereafter filed.

Submissions on behalf of the Petitioner

7. Mr. V. Lakshmikumaran, learned counsel for the Petitioner, states that the Petitioner was importing the used and old tyres cut into two-three pieces, and was classifying them under the Customs Tariff Heading 4004. He pointed out that the Petitioner would have to pay 12% CVD thereon only if identical goods 'manufactured domestically' is exigible to the levy of excise duty. He submits that the cutting of old tyres into two or three pieces does not and cannot be said to be 'manufacture' within the meaning of Section 2 (f) of the Central Excise Act 1944 (CE Act). Therefore, the question of such imported used and old tyres being subject to CVD does not arise.

8. Mr. Lakshmikumaran submitted that the issue stood covered in favour of the Petitioner by the decision of the Division Bench of this Court in ***Modi Rubber Limited, v. Union of India 1987 (29) ELT 502 (Del)***. He pointed out that the said decision had in fact been considered by the Supreme Court of India in ***Union of India v. Ahmedabad Electricity Co. Limited (2003) 11 SCC 129*** and had been impliedly approved by it. He also relied on the decisions in ***Collector of Central Excise v. Tata & Iron & Steel Co. Limited 2004 (165) ELT 386 (SC)***, ***Collector of Central Excise v. Indian Aluminium Co. Ltd. 2006 (203) ELT 3 (SC)***, ***Servo-Med Industries Pvt. Ltd. v. CCE, Mumbai (2015) 14 SCC 47*** and ***Collector of Central Excise v. Technoweld Industries 2003 (155) ELT 209 (SC)***.

9. Mr Lakshmikumaran also placed reliance on the decision of the Customs,

Excise and Gold Control Appellate Tribunal ('CEGAT') in ***Gujarat Reclaim & Rubber Products Ltd. v. Collector of Central Excise & Customs, Bombay 1983 (14) ELT 2401 (Tri - Delhi)***, in which it was held that the crushing of waste rubber into powder does not amount to manufacture. It was held that "a simple act of crushing and powdering like this one should not in our opinion be taken to be synonymous with creation of a new product." It was found by the CEGAT that "the product keeps its original character, molecular structure, chemical identity etc." The appeal against the said decision of the CEGAT was dismissed by the Supreme Court on 20th November 1989 in Civil Appeal No. 4194 of 1984 *inter alia* observing that "the Tribunal has not only given a finding that the powder is secured by a mere process of crushing but also that the crushed product was not a new product. This is essentially a finding of fact." Likewise the decision of the CEGAT in ***Elgi Rubber Products Ltd. v. Collector of Central Excise, Madras 2002 (145) ELT 112 (Tri - Del.)*** was also affirmed with the Supreme Court dismissing the appeal on the ground of delay. This was followed in ***Gujarat Reclaim & Rubber Products Ltd. v. Commissioner of Central Excise, Pune 2009 (243) E.L.T. 426 (Tri. - Mumbai)***.

10. Mr. Lakshmikumaran also referred to the decision in ***Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries (2003) 4 SCC 184*** to urge that merely because old and used tyres were classified under Tariff Entry No.4012 whereas 'waste paring and scrap of rubber (other than hard rubber) and powder and granules obtained therefrom' was classified under Tariff Entry No.4004 with the rate of duty at 12.5% did not mean that the process by which the waste or scrap rubber was

obtained from old tyres amounted to manufacture. The twin test of ‘manufacture and marketability’ would still apply.

Submissions on behalf of the Union of India

11. In reply, it is submitted by Mr. Anurag Ahluwalia, learned Standing Counsel for the Union of India, that the test for determining if the cutting of old tyres into two or three pieces amounts to manufacture was to ask if the processes to which the old tyre was subjected to, resulted in transformation of the old tyre into a new product having a different identity, characteristics and use. He pointed out that the old tyre ceased to remain as such when it was subjected to the process of cutting which resulted in two or three pieces of tyres which had a distinct identity and were marketable as such.

12. Mr. Ahluwalia submitted that Tariff Entry No. 4004 acknowledged that all waste, pairings and scrap of rubber including powder and granules obtained therefrom were distinct commodities obtained by subjecting old tyres to the process of cutting. Therefore, the process of cutting the old tyres did amount to manufacture. He referred to the decisions in ***Commissioner of Central Excise, Bangalore-II v. Osnar Chemical Pvt. Ltd.*** 2012 (276) ELT 162 (SC); ***CIPLA Ltd. v. Commissioner of Central Excise, Bangalore*** 2008 (225) ELT 403 (S.C.) and ***Union of India v. Delhi Cloth & General Mills Co. Ltd.*** 1977 ELT (J 199). He also referred to the decision in ***Cipla Limited v. Commissioner of Central Excise, Bangalore*** 2008 (225) ELT 403 (SC).

The central issue

13. The central question that arises in this petition is whether CVD at 12% can be levied on the import of ‘tyre scrap cut into two or three pieces’.

Incidental to it, the further question that requires to be answered is whether such goods, if produced in India could be said to be ‘manufacture’ within the meaning of Section 2 (f) of the CE Act? In other words if old and used tyres in India are subject to the processes of cutting into two or three pieces and the cut pieces of tyres are marketable could it be said that there has been a manufacture of cut pieces of tyre scrap from the old tyres?

14. As pointed out by the Supreme Court in ***Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries*** (*supra*) it requires to be examined whether the twin test of manufacture and marketability are satisfied. In particular, as pointed out in ***Commissioner of Central Excise, Bangalore-II v. Osnar Chemical Pvt. Ltd.*** (*supra*), it would be required to be examined if in producing cut pieces of tyres from old tyres there is transformation of a product into a new product “having a different identity, characteristics and use”.

15. It must be noted that when this case was argued before the Division Bench, it was not pointed out by counsel on either side that the decision of the Division Bench of this Court in ***Modi Rubber Limited, Modi Nagar, U.P. v. Union of India*** (*supra*) had impliedly been approved by a three Judge Bench of the Supreme Court of India in ***Union of India v. Ahmedabad Electricity Co. Limited*** (*supra*). This led the Division Bench to pass the order dated 8th August 2016 referring the case to the larger Bench with the second of the two questions referred being whether the decision of this Court in ***Modi Rubber Limited v. Union of India*** (*supra*) required reconsideration. That is the question which is, therefore, taken up for

consideration first.

The decision in Modi Rubber Limited

16.1 The facts in ***Modi Rubber Limited v. Union of India*** (*supra*) were that Modi Rubber Limited ('MRL') was carrying on the business of manufacture and sale of tyres and other rubber products. The said goods were being manufactured at its factory at Modipuram. In the process of such manufacturing, a small quantity of rubber compound was rejected due to wrong mixing or overheating. In other words, tyres were being manufactured and as a part of that process waste or scrap was generated by cutting and punching the defective tyres. MRL claimed that the rejected rubber compound was in the nature of waste. At various stages of the manufacture, some quantity of rubber cuttings emerged which were also treated as waste. The substandard and defective goods were destroyed by cutting and punching. MRL's contention was that since there was no manufacture of the waste, no excise duty was leviable thereon.

16.2 This Court in ***Modi Rubber Limited v. Union of India*** (*supra*) considered whether such waste "arising during the processing of tyres should be classifiable under Tariff item 16-A(2) or 68 of the Central Excise Tariff." *Inter alia* the Division Bench observed:

"8. It cannot, however, be said that waste/scrap is the result of any treatment or any labour or any manipulation by the petitioner Company whereby a new and different article, emerges. At various stages of the manufacture of tyres, tubes, flaps and other rubber products which are admittedly, goods manufactured, rubber cuttings and waste is generated and comes into existence. The process whether essential or incidental or ancillary to fall within the ambit of the expression 'manufacture' is one which must have some relation to the

manufacture of a finished product. The waste/scrap is obtained not by any process of manufacture but in the course of manufacturing process to produce the end product of tyres, tubes, flaps etc. The waste/scrap is obtained in the course of manufacture and not out of manufacture of the end product. In our opinion, it is not as a result of manufacture, because no one would produce any such degrading or even inferior thing. If the raw material of rubber compound has undergone some change in the process of manufacture so as to turn into waste or scrap, it cannot be equated with any finished product. There is a change but every change in the raw material is not manufacture. There is no transformation in case of waste/scrap of a new and different article. No one has brought into existence a new substance having a distinctive name, character or use.”

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“10. Rule 49 of the Central Excise Rules, 1944 (hereinafter referred to as the Rules), provides for duty chargeable only on removal of the goods from the factory premises or from an approved place of storage. Payment of duty in respect of excisable goods is made when they are about to be issued out of the place or premises specified. Under second proviso to Rule 49, the proper officer may not demand duty due on any goods claimed by the manufacturer as unfit for consumption or marketing. The excisable goods lying in the licensed premises and found unfit for consumption or for marketing can be destroyed without payment of duty leviable thereon subject to the prior permission and fulfilment of such conditions as may be imposed by the Collector. For claiming remission of duty on such goods, a procedure has been laid down in Chapter 42 of the Central Excise Law Guide. Separate procedure has been prescribed under other statutory provisions for the destruction or disposal of waste, refusal or unsaleable material arising out of goods brought under Rule 56A or under Chapter X or under Rule 173-K, 137-N and 173-P. The list showing the excisable commodities and the manner and method of their Destruction has been specified in para 42.07. In case of Tariff Item No. 16 i.e. Tyres it is "by cutting and punching". If under the Rules, the remission is granted on the goods found unfit for consumption or for marketing on destruction in the manner and

method prescribed then there is no warrant to levy duty of excise on the tyres, tubes and flaps which are found unfit for consumption or for marketing by the petitioner himself. After such goods have come into existence during the process of manufacture, then the only method employed by the petitioner himself is of destruction “by cutting and punching” to turn it into waste/scrap. There is no event of manufacture of waste matter and thus no duty can be levied thereon.

11. It is the common case that waste/scrap are capable of fetching some sale price but that cannot be the criterion for the event of manufacture. There are several commodities mentioned in the said para 42.07. Manner and method of destruction in case of each Tariff Item given there is different. In some cases it is by burning, in others, it is by cutting or breaking into small pieces. The ash by burning or small pieces may have a market value. It is sold as a waste product like rubbish undesired and unwanted with a view to get rid of it. It is no argument that it fetches some money that it cannot be considered as waste. These days waste matter is put to a lot of use by recycling or other treatment, but there is no event of manufacture of waste within the meaning of the Act. It is also not the department's case that they have classified all the destroyed items of Para 42.07 as "goods" liable to excise duty under Tariff Item 68 of C.E.T. There is no reason as to why the destroyed tyres by cutting and punching be treated as "goods" manufactured.”

The Ahmedabad Electricity Co. Ltd. case

17.1. The above decision of this Court was referred to and impliedly approved by the Supreme Court in ***Union of India v. Ahmedabad Electricity Co. Ltd.*** (*supra*). The question that arose for consideration before the Supreme Court was whether the ‘cinder’ - which was a waste that emerged from burning of coal in boilers - was an excisable commodity subject to levy of excise duty under Entry 26.21 to the First Schedule to the Central Excise Tariff Act (‘CET Act’)? It was *inter alia* contended by the Union of India that an item mentioned in the Schedule to the CET Act *per se*

becomes excisable. It was contended that the charging provision was Section 3 of the Central Excises and Salt Act 1944 (CE Act) and therefore, both the tests were satisfied.

17.2 The first question before the Supreme Court which was answered against the Revenue was “whether inclusion of an item in the entries to the First Schedule to the Tariff Act *per se* makes the item exigible to excise duty?” It was explained that the words “excisable goods” occurring in Section 3 of the CE Act have been quantified by the words “which are produced or manufactured in India.” Relying on the decision in **Hyderabad Industries Limited v. Union of India (1995) 5 SCC 338** and **Moti Laminates (P) Limited v. CCE, Ahmedabad (1995) 3 SCC 23** it was held that there was no merit in the argument that simply because a particular item was mentioned in the First Schedule, it becomes exigible to excise duty.

17.3 The second question was whether the item in question, i.e., Cinder, satisfied the twin tests of being ‘manufactured in India’ and ‘marketability’? In paras 27 and 28 it was concluded as under:

“27. In the case in hand also, coal which leads to production of cinder is not used as a raw material for the end product. It is being used only for ancillary purpose, that is, as a fuel. Therefore, irrespective of the fact whether any manufacture is involved in the production of cinder it should be held to be out of the tax net for the reason that it is not a raw material for the end product.

28. In producing ‘cinder’ there is no manufacturing process involved. Coal is simply burnt as fuel to produce steam. Coal is not tampered with, manipulated or transformed into the end product. For purposes of manufacture the raw material should ultimately get a new identity by virtue of the manufacturing process either on its own or in

conjunction or combination with other raw materials. Since coal is not a raw material for the end product in all the cases before us, the question of getting a new identity as an end product due to manufacturing process does not arise.”

17.4 In arriving at the above conclusion, the Supreme Court referred to its earlier decisions in **Ujagar Prints (II) v. Union of India (1989) 3 SCC 488**, **CCE v. Technoweld Industries (supra)**, **CCE v. Rajasthan State Chemical Works (1991) 4 SCC 473** and **CCE v. Ballarpur Industries Limited (1989) 4 SCC 566**. It was categorically held:

*“Burning of coal for purposes of producing steam cannot be said to be a manufacturing activity. Therefore, neither ash nor cinder can be said to be products of a manufacturing process. From burning coal when you get either cinder or ash, it cannot be said that a new product had emerged. Cinder remains coal. In fact, the Department has itself described it as unburnt part of coal in the grounds of appeal in CAs Nos. 2168-69 of 2001 in **Ahmedabad Electricity Supply Co Case**. Cinder is not a new product. After correctly describing cinder as unburnt part of coal, the Revenue cannot equate it to ash simply to somehow bring it within Entry 26.21 of the Tariff Act.”*

17.5 The Supreme Court also referred to its decision in **CCE v. Markfed Vanaspati and Allied Industries (supra)** where excise duty was sought to be levied on ‘spent earth’ which resulted from the treatment of fatty substances. It was held that the ‘spent earth’ remained ‘earth’ even after processing though its capacity to absorb was reduced. No excise duty was leviable on ‘spent earth’.

17.6 The Court in **Union of India v. Ahmedabad Electricity Co. Ltd. (supra)** proceeded to discuss the decision of this Court in **Modi Rubber Limited v. Union of India (supra)** as under:

“34. In **Modi Rubber Limited v. Union of India** it was held that waste/scrap obtained not by any process of manufacture but in the course of manufacturing the end product was not exigible to excise duty. This was a case of manufacture of tyres, tubes etc. In the course of manufacturing process to produce the end product i.e., tyres, tubes, flaps etc. Waste was obtained in the shape of cuttings. It was held that this was not exigible to tax even though the waste may have some saleable value. The essential reason for this was that there was no transformation in the case of waste/scrap to a new and different article. No new substance having a distinct name, character and use was brought about. Manufacturing process involved treatment, labour or manipulation by the manufacturer resulting in a new and different article. It requires a deliberate skilful manipulation of the inputs or the new materials. This was not so in case of scrap.”

17.7 Next the Supreme Court in **Union of India v. Ahmedabad Electricity Co. Ltd.** (supra) proceeded to discuss the decision of **Union of India v. Indian Aluminium Co. Limited 1995 Supp (2) SCC 465** and observed as under:

“Aluminium dross contains an amount of metal from which they come but they lack not only metal body but also metal strength, formability and character. Such dross and skimmings are distinct from scrap which is a metal of good quality. Dross and skimmings though obtained during process of manufacture were held to be not exigible to excise duty at the relevant time. Since the dross and skimmings were sold in the market it was argued that they were a marketable commodity and should be subject to levy of excise duty. The court observed that these were nothing but waste or rubbish which is thrown up in the course of manufacture. This judgment also answers the argument of the learned counsel for the appellant based on **Khandelwal Metal's** case (Supra) wherein brass scrap produced during manufacturing of brass goods was considered to be liable to excise. In the present case cinder though sold for small price cannot be said to be a marketable commodity in the sense the word "marketable" is understood. Due to sheer necessity cinder has to be removed from the place where it occurs because unless removed it

will keep on accumulating which in turn lead to loss of precious space.”

17.8 The decision of the Supreme Court ultimately hinged on its conclusion that “cinder does not satisfy the test of being manufactured in India.” It was added that even if the said commodity was saleable "it does not make any difference."

17.9 There can be no manner of doubt that by referring to the decision of **Modi Rubber Limited v. Union of India** (*supra*) and thereafter coming to the conclusion that cinder was not 'manufactured', the Supreme Court in **Union of India v. Ahmedabad Electricity Co. Limited** (*supra*) impliedly approved the decision of this Court in **Modi Rubber Limited v. Union of India** (*supra*). Thus the second question posed before this Bench requires to be answered in the negative.

Is the cutting of old tyres into two or more pieces, manufacture?

18. The above discussion should also suffice to answer in the negative the first question referred to this Bench, viz., whether the process to which used or old tyres are subject to produce two or more pieces of cut tyre is ‘manufacture’ within the meaning of Section 2 (f) of the CE Act? Nevertheless, the Court proceeds to discuss the other decisions referred to by both counsel in order that a comprehensive survey of the relevant case law is undertaken.

19. In **CCE v. Tata Iron & Steel Co. Ltd** (*supra*) a three Judge Bench of the Supreme Court was considering the excisability of zinc dross, flux skimming and zinc scallings arising as by-product during galvanisation of

steel sheets. Following the decisions in *Union of India v. Delhi Cloth and General Mills Company Limited* AIR 1963 SC 791 and *Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries* (*supra*) the Supreme Court in *CCE v. Tata Iron & Steel Co. Ltd* (*supra*) disagreed with the Department that zinc dross, flux skimming and zinc scallings are 'manufacture' within the meaning of Section 2 (f) of the CE Act and hence excisable.

20.1 In *Commissioner of Central Excise v. Indian Aluminium Co. Limited* 2006 (203) ELT 3 (SC), one more attempt was made by the Department to get the Supreme Court to hold that zinc dross, flux skimming and zinc scallings are goods and excisable. It was sought to be contended that the decisions in *Union of India v. Indian Aluminium Co Ltd.* (*supra*) and consequently *CCE v. Tata Iron and Steel Co. Limited* (*supra*) did not lay down good law. It was contended that since the value of dross was much more than the value of the aluminium itself, it would come within the purview of the term 'goods'.

20.2 Negating the above contentions, the Supreme Court held that "an article is not exigible to tax only because it may have some saleable value." Further, the dross no longer answered the description of "waste and scrap" in view of the changes made in the Tariff. It was, however, well-settled that even if some percentage of the metal was found in the dross, that would not, in the absence of something more in the entry, make it an excisable article. It was further held that "the term 'manufacture' implies a change. Every change, however, is not a manufacture. Every change of an article may be

the result of treatment, labour and manipulation. But manufacture would imply something more. There must be a transformation; a new and different article must emerge having a distinctive name, character or use.”

21. The legal position was reiterated in ***Commissioner of Central Excise, Lucknow v. WIMCO Limited 2007 (217) ELT 3 (SC)*** which arose in the context of waste, scrap and parings of paper and paperboard generated during manufacture of printed paperboard boxes. It was held that though the impugned items were classifiable under sub-heading 4702.90 of the Central Excise Tariff Act, and were dutiable, that by itself could not make them excisable unless ‘manufacture’ was involved.

22.1 In ***Servo-Med Industries Private Limited v. Commissioner of Central Excise, Mumbai (supra)*** the question that arose for consideration before the Supreme Court was whether syringes and needles (which had already borne excise duty in the hands of their manufacturers) could again be made exigible to excise duty as a result of their sterilisation by the Appellant to remove bacteria.

22.2 The Supreme Court revisited the question of applicability of the 'two-fold test'. The first part of the test involved ascertaining what the 'essential character' of the product that emerged through the process was. It was explained:

"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 end use of the first product continue to be the same."

22.3 Reference was made to the decision in ***CCE-I v. S.R. Tissues Pvt. Ltd. (2005) 6 SCC 310*** where "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 etc." This Court held that there was no manufacture as the character and 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. Another example of when "transformation does not take place" was "when foreign matter is removed from an article or additions are made to the article to preserve or increase its shelf life." In this context it was noticed that in ***Tungabhadra Industries Ltd. v. CTO AIR 1961 SC 412*** 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."

22.4 The second part of the two-fold test was the 'commercial user test'. This was: "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 process."

22.5 After discussing several earlier decisions including ***Brakes India Limited v. Superintendent of Central Excise (1997) 10 SCC 717*** and ***Union of India v. J.G. Glass Industries Limited (1998) 2 SCC 32***, the legal position was summarized by the Supreme Court as under:

“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.”

22.6 Ultimately, it was held that the case before the Supreme Court fell under category (1) above. It was explained:

“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.”

23. Turning to the case at hand, the products we are concerned with are used tyres and tubes. It is only when the old and used tyres and tubes reach a stage where they can no longer be used for automobiles that they are sold as scrap to dealers who in turn sell them to processors. The recycling process involves mixing crumb rubber with bitumen to make CRMB. Worldwide CRMB is made by mixing radial tyre crumb. Since Indian tyres are cross-ply and non-radial, the Petitioner imports as scrap the used radial tyres and tubes of buses and trucks. The prevalent import policy permits the import of used and old tyres and tubes with one cut in the bead wire and used rubber tubes cut in two pieces without a DGFT licence. These cut pieces of used tyres cannot be re-used as tyres by reconditioning them. The cutting of the used and old tyres and tubes into two or three pieces facilitates their accommodation in the ships that transport them. It lowers the cost of transportation.

24. The case at hand can be said to fall under category (2) identified in ***Servo-Med Industries (P) Limited v. CCE (supra)*** i.e. "the goods remain ***essentially*** the same" even after they are cut into two or three pieces. There can be no manufacture since "the original article continues as such despite the said process and the changes brought about by the said process."

25. Even where an entire unit is set up for the purposes of converting old and used tyres into pieces of cut tyres, the essential character remains the same. Used tyres and tubes remain as such even after they are cut into

pieces. They do not undergo any transformation so as to amount to 'manufacture' within the meaning of Section 2 (f) of the CE Act. Further, in terms of the settled legal position as explained in the above decisions, the mere classification of old and used tyres under Tariff Entry No. 4012 or Tariff Item No. 4004 with the rate of duty at 12.5% would not mean that the process by which the scrap rubber was obtained from old tyres amounted to manufacture. With the first limb of the 'two-fold' test, i.e. 'manufacture', not being satisfied, the question of examining whether they become excisable as a result of their marketability does not arise.

Answers to the questions

26. The questions referred to hereinabove are accordingly answered as under:

- (a) The process to which old tyres are subject to produce two or more pieces of cut tyre is not 'manufacture' within the meaning of Section 2 (f) of the CE Act.
- (b) The decision of this Court in ***Modi Rubber Limited v. Union of India*** (*supra*) does not require to be reconsidered.

Conclusion

27. In view of the clear legal position, the stand of the TRU of the Department of Revenue in its clarification dated 2nd January 2015 that there was no exemption from payment of excise duty in respect of tyre scrap cut into two to three pieces produced from used and old tyres and that, therefore, the said goods are chargeable to additional customs duty or CVD under Section 3 (1) of the CTA, is unsustainable in law. The said

decision/clarification is hereby set aside. It is declared that the imposition of 12% CVD under Section 3 (1) of the CTA on cut pieces of used tyres and used tubes is unlawful and *ultra vires* the CTA.

28. The writ petition is accordingly allowed but, in the facts and circumstances of the case, with no orders as to costs. The application is disposed of.

MAY 03, 2017

Rm



S. MURALIDHAR, J

S. RAVINDRA BHAT, J

VIBHU BAKHRU, J