

“EXCISABILITY AND TEST OF MARKETABILITY”

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The term “Excisable Goods” as defined by Section 2(d) means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of Excise and includes salt.

In other words, the question whether a particular goods is excisable or not would depend upon the provision of the Central Excise Tariff Act, 1985 i.e.,

- Whether such article has been specified under the Schedule to the Central Excise Tariff Act, 1985,
- Whether the process done on such article to reach such article at the condition in question, amounts to manufacture in terms of relevant Chapter Notes, Section Notes of the Schedule to the Central Excise Tariff Act, 1985.
- And in case when the goods are specified in third schedule any process which involves packing or repacking of such goods in a unit container or labeling or re-labeling 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.

If there is no entry covering it in the Excise Tariff, it is not excisable, there is no question of it being exempted goods – ARVIND MILLS LTD Vs CCE 2007 (220) ELT – 980 (T). Merely because there is a tariff entry, goods does not become excisable unless manufacturing process is involved – CCE Vs WIMCO LTD 2007 (217) ELT – 3 (SC).

Marketability of item and its emergence by process of manufacture are the cumulative **test** to be satisfied to hold the **excisability** – CCE Vs ALDEC CORPORATION 2005 (188) ELT – 241 (SC); HINDUSTAN ZINC LTD Vs CCE 2005 (181) ELT 170 (SC).

TEST OF MARKETABILITY

For excitability, the well now **test** since inception, is that the goods must be marketable i.e. it may be known in the market. If it is not marketable i.e. not known in the market, then it cannot be covered under the term “goods”- *UOI V. DELHI CLOTH AND GENERAL MILLS CO. LTD. AIR 1963 SC 791; CCE V. AMBALAL SARABHAI ENTERPRISES) 1988 (35) ELT 346 (SC); CCE V. BHOR INDUS. LTD. 1988 (19) ECR 455 (SC); UNION CARBIDE INDIA LTD. V. UOI 1986 (7) ECR 217 (SC), 1986 (24) ELT 169 (SC) INDIAN CABLE CO. LTD. V. CCE 1994 (74) ELT 22 (SC) . CADILA LABORATORIES PVT LTD. Vs. CCE 2003 (152) ELT-262 (SC).*

While the Supreme Court in **PLASMAC MACHINE MANUFACTURING (P) LTD Vs. CCE 1991 (32) ECR 1 (SC) 1991 (51) ELT 161 (SC)** had expressed that for an article to be called as goods, these must be known in the market as much as these must be capable of being sold in the markets as goods. Actual sale in the market is not necessary, user in captive consumption is not determinative but the article must be capable of being sold in the market or known in the market as goods. That would be necessary.

Though actual sale is not required, the relevant and determinative fact would be that the goods in fact are capable of being marketed which must be proved by the Department by producing proper evidence. The “**marketability**” means so long as the goods are marketable, they are goods for the purpose of section 3. It is not necessary that the goods in question should be generally available in the market, even if the goods are available from only one source or from a specific market it makes no difference, so long as they are available for purchasers. The **marketability** of article does not depend upon number of purchasers, nor is the market confined to the territorial limits of the country. *A.P. STATE ELECTRICITY BOARD Vs. CCE 1994 (70) ELT- 3 (SC)*. Goods are available in the market from only one source or from a particular market, makes no difference since **test** of **marketability** will be satisfied so long as goods are available for purchasers – *FGP LTD Vs UOI 2004 (168) ELT – 289 (SC)*.

Onus to establish the **marketability** is on the Department- *CCE Vs. AMBALAL SARABHAI ENTERPRISES 1988 (35) ELT-346 (SC) BOARD OF TRUSTEES Vs CCE 2007 (216) ELT – 513 (SC); UOI Vs AHMEDABAD ELECTRICITY CO. LTD 2003 (158) ELT – 3 (SC)* but merely because of specification in tariff or described as such in the Chemical Dictionary and technical dictionary or in the Customs Draw Back Rates in different context, it could not be assumed as marketable commodity- *CCE Vs. UNITED PHOSPHORUS LTD 2000 (117) ELT -529 (SC)* unless proved otherwise.

And, the Supreme Court in the case of **INDIAN CABLE CO. LTD Vs CCE, 1994 (55) ECR 20 (SC) 1994 (74) ELT 22 (SC)** has expressed that **marketability** is a decisive **test** for durability. It only means “saleable” or “suitable for sale”, It need not be, in fact, marketed. The article should be capable of being sold or being sold to consumers in the market, as it is without any thing more. In the absence of a finding, that the goods are “marketable”, i.e. saleable or suitable for sale, it could not be said to be a goods, which may be subject to **excisability**.

And lastly, the Apex Court in the case of **UOI Vs INDIAN ALUMINIUM CO. LTD. 1995 (58) ECR 612 (SC)** has reiterated that **marketability** is a question of fact to be decided in the facts of each case and held that it may be possible to recover something from a particular thing, they can, therefore, be sold but that does not make them a marketable commodity. In other words, everything, which is sold, is not necessarily a marketable commodity as known to the commercial world and which, it may be worthwhile to trade in. Since **marketability test** is essentially a question of fact – **HINDUSTAN ZINC LTD Vs CCE 2005 (181) ELT – 170 (SC)** and for the same, there must be some serious attempt to go to market and collect proper evidences, but it cannot be established on basis of mere stability. Sufficient proof that product is commercially known is required – **GUJARAT NARMADA VALLEY FERT. CO. LTD Vs. CCE 2005 (184) ELT 128 (SC)** which could not be viewed through a hawker's eye – **MAHINDRA & MAHINDRA LTD Vs CCE 2005 (190) ELT 301 (T-LB)** unless the product is capable of being marketed and is known to those who are in the market as having an identity as a distinct identifiable commodity that the article is subject to excise duty. Fact that articles fall within schedule, not make them marketable. Actual sale is not necessary but article must be capable of being sold in market or known in market as goods – **GUJARAT NARMADA VALLEY FERT. CO. LTD. Vs CCE 2005 (184) ELT – 128 (SC)**. And to prove it, actual purchase and sale, or fact of their being marketed or their general availability in market is not required to be proved- **MAHINDRA & MAHINDRA LTD. Vs. CCE 2005 (190) ELT 301 (T- LB)**.

Article not eligible to tax only because of having salable value. **CCE Vs. JINDAL ALUMINIUM CO LTD 2006 (203) ELT – 3 (SC)**. Mention of an item in an exemption notification is not determinative of its **excisability**. **NEWSHARROCK MILLS Vs. CCE 2006 (202) ELT – 192 (T- LB)**; **INDORE WIRE CO. LTD Vs. UOI 2006 (203) ELT – 179 (SC)**. Mere listing of an item in the Schedule to the Central Excise Tariff Act is not sufficient to make it excisable - **UOI Vs. AHMEDABAD ELECTRICITY CO. LTD. 2003 (158) ELT – 3 (SC)**. Mere mention of item in ISI is also not sufficient – **TATA IRON & STEEL CO. LTD. Vs. UOI 2004 (164) ELT – 372 (SC)**.

Once **marketability** of an article is established, the fact that it is not actually sold but is entirely consumed captively or that it is sold only to one or two buyers has no relevance. However, mere manufacturing activity by itself, does not prove **marketability**. Inter unit transfer of an item does not prove its **marketability**. Product produced must be a distinct commodity known in common parlance to commercial community for the purpose of buying and selling- **CIPLA LTD Vs. CCE 2008 (225) ELT-403 (SC)**.

Accordingly, articles like storage units, running counters, wall and kitchen units normally not capable to remove without cannibalizing, are not furniture and not excisable goods- **CRAFT INTERIORS PVT LTD Vs. CCE 2006 (203) ELT-529 (SC)**. Small quantity of goods removed and used for mandatory quality control **test** and is destroyed during such **test** cannot be considered as amounting to removal and as such not excisable goods- **CCE Vs. TARCO CABLE CO LTD 2001 (127) ELT- A49 (SC)**. Intellectual property or information technology being an intangible assets is once put on a paper, cassette, diskettes or any other thing to supply the same, are excisable goods just like drawings,

designs, manuals and technical materials- ASSOCIATED CEMENT COMPANIES LTD Vs. CCE 2001 (128) ELT -21 (SC).

Removal of unfinished unrefined goods because of marketable goods is liable to duty at the time of removal from the factory- UOI Vs. DELHI CLOTH & GENERAL MILLS CO LTD 1997 Vs. J.G. GLASS INDUSTRIES LTD 1998 (97) ELT 5 (SC), subsequent processing of refining/ finishing has no relevance merely because of adding the value, but ultimately subject to the concerned Chapter Notes/ Section Notes of the Tariff Heading.

Since a plant & machinery (being an immovable property) can not be said as marketable, so, is not treated as an excisable goods- because of attached to earth – **TRIVENI ENGINEERING & INDUS LTD. Vs. CCE 2000 (120) ELT 273 (SC)** [in the same case Supreme Court has admitted the assembly operation as amounting to manufacture] but in light of the **marketability** concept it was held the plant and machinery assembled at site is not excisable goods- CCE Vs. VIRDI BROTHERS 2007 (207) ELT 321 (SC)..

Since, the definition of the term “manufacture” given in sec. 2(f) of the Central Excise Act, 1944 has been replaced by sec .4 of the Central Excise Tariff Act, 1985. The existing Chapters of Central Excise Tariff Act, 1985 have been governed by relevant Chapters Notes and Section Notes. The term “removal” in terms of Rule 4 and 5 of the Central Excise Rules, 2002 is a legal fiction. Section Note of Sec. XVI read with Section Note 3 &4 and heading No. 84.19 assumes “plant” as an excisable commodity in terms of sec. 2(d) and 2(f) of the Act, 1944. But because of, the **test of marketability**, the CBEC Circular No. 53/2/98-CX dt. 2/4/1998 (100) ELT T10 issued under section 27B, provides a great degree of relief to the assessee. While applying the order No. 58/1/2002 CX dt 15/1/2002 (139) ELT – T 34 decision of **TREVINI ENGINEERING & INDUS LTD. Vs. CCE 2000 (120) ELT 273 (SC)**, it could be concluded that:-

In case of piece by piece assembly/ installation, involving equipments, pipes, tubes, insulation ducting etc.) if the goods have been converted into an immovable property which could not be moved to the market as such then assembly shall not amount to manufacture. (for Ch.84, 85)

Several goods like storage tanks, etc. having the height which could not be removed as such to the market and the dismantling creates waste & scrap then such storage tanks & other goods shall not be subject to levy.

Assembly / Fabrication of complete system creating a new commodity which is specified in the tariff and which is capable of being bought to the market for sale or purchases but temporarily installed for effective use shall be dutiable as per respective tariff headings as prescribed.

Duty on Waste & Scrap:

For the same, there are 3 points:

- Whether it is an excisable goods in terms of the relevant Chapter Notes or Section Notes;

- Whether it is arise during the course of manufacturing process;

- Whether it is marketable, if not then it is not called as an excisable commodity. Mere fetching a nominal value has no relevance.

Any waste and scrap arising from manufacture or mechanical working of input / raw materials (i.e. due to manufacturing process) are only liable to duty [HINDALCO INDUSTRIES LTD Vs. CCE 2002 (144) ELT- 339 (T)] provided that the same shall be marketable. Mere scrap arising than dismantling of buildings, repair of machinery etc, are not liable to duty- HINDUSTAN PETROLEUM CORPORATION LTD Vs. CCE 2002 (144) ELT- 555 (T), NATIONAL WINDE Vs. CCE 2002 (147) ELT- 463 (T). However, scrap generated in workshop used for maintenance of plant other than old part or scrap generated by dismantling of used machinery shall be liable to pay duty- BUDHEWAL CO-OP. SUGAR MILLS LTD Vs. CCE 2002 (141) ELT- 490 (T) but subject to fulfillment of other condition. However packing materials of inputs/ raw materials arised could not be treated to be waste arising out of processing of the input for which credit has been taken- CCE Vs. WEST COAST INDUSTRIAL GASES LTD 2003 (155) ELT- 11 (SC).

In other Words, the waste and scrap arise out of capital goods on which no credit has been availed, shall not be dutiable – SOUTHERN AGRIFURANE INDUSTRIES LTD Vs. CCE 2003 (158) ELT- 323 (T), provided that no CENVAT Credit on such capital goods was taken- KESORAM RAYON Vs. CCE 2003 (162) ELT- 620 (T).

If any waste is not marketable, the same shall not be dutiable **CCE Vs. INDIAN TUBE Co. LTD 1955 (77) ELT 21 (SC); UOI Vs. INDIAN ALUMINIUM Co. ltd 1995 (58) ECR 612 (SC)**. For example refuse, rubbish and ashes thrown up in the course of manufacture are not goods even if they may fetch some prices- CCE Vs. TATA IRON & STEELS CO LTD 2004 (165) ELT- 386 (SC). If the resultant waste (after process of a waste) is same having almost identical chemical and physical properties resultant waste could not be said as manufactured waste **INDIAN ORGANIG CHEMICALS LTD Vs. CCE 1996 (88) ELT 644 (SC)**.

Waste and scrap is dutiable only when it is a manufactured product and not otherwise- ELPHINSTONE METAL ROLLING MILLS Vs. CCE 2004 (167) ELT -481 (SC).

A by-product is something of value of produced in making main product or a substance obtained in the course of a specific process, but not its primary object. If it is not marketable (although sold in market for few occasions), the same not be dutiable – **GUJARAT STATE FERTILIZERS CO. LTD Vs. CCE 1997 (90) ELT 149 (T)**. for example, by-product obtained during the course of processing of rice in the rice mill, not fit for human consumption does not fall within the ambit of definition of “vegetable oil contained in sec. 3 (h) of National Oil Seeds and vegetable oil Development Board Act – **A. P. RICE BRAN SOLVENT EXTRACTORS ASSOCIATION Vs. UOI 1998 (103) ELT 481 (SC)**.

And waste parings and scrap arising manufacture of exempted goods are exempt from the Whole of the Duty of excise Vide Notf. No. 89/95 CE dt. 18-05-1995, provided that in such factory, any other excisable goods (other than exempted goods) shall not be manufactured – see also E.P. ELECTROPRESSINGS PVT LTD Vs. CCE 2002 (140) ELT- 230 (T).

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