

Sneh Enterprises Vs. Cc

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Overruled by : Sneh Enterprises vs. Commnr. of Customs, New Delhi
Dated:08.09.2006

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-07-2004

Reported in : (2004)(97)ECC249

Judge : S Kang, Vice, A T V.K.

Appellant : Sneh Enterprises

Respondent : Cc

Judgement :

1. The issue involved in this appeal, filed by the M/s. Sneh Enterprises, is whether Anti-Dumping Duty is imposable on goods imported by them.

2. Shri P.C. Jain, learned Advocate, submitted that the Appellants imported 'sealed maintenance free batteries' of Taiwan origin to be used in "UPS" on 16.4.2002 at Mumbai from where the goods were transhipped to the I.C.D., Tuglaqabad, New Delhi; that IGM was filed on 22.4.2002; that they filed Bill of Entry on 22.5.2002; that the Central Government has also imposed Anti-Dumping duty on lead acid batteries (Industrial) by issuing Notification No. 55/2002-Cus dated 22.5.2002; that the Anti-Dumping duty is not applicable as the impugned goods had been imported into India much earlier on 22.4.2002; that the Tribunal in the case of CC, Chennai v. Suja Rubber Industries, 2002 (82) ECC 146 (T) : 2002 (142) ELT 586

(Tri) has held that on a clear reading of Section 9A of the Customs Tariff Act, "it indicates that the duty has to be determined when the goods have been imported and are subject for clearance, while those which have already entered Indian territory and are warehoused have not been determined for anti-dumping and the notification does not indicate that it will have retrospective applicability." The learned Advocate contended that the said decision is squarely applicable in the present matter and the Notification imposing anti-dumping duty issued on a certain date would be applicable to goods imported on or after that date; that the decisions of the Supreme Court in *Kiran Spinning Mills v. CC*, 1999 (66) ECC 570 (SC) : 1999 (113) ELT 753 (SC) and *Garden Silk Mills Ltd. v. CC*, 1999 (113) ELT 358 (SC) regarding taxable event and drawing inference therefrom are erroneous in the face of two direct decisions of the Tribunal in the case of *Suja Rubber Industries supra*, and *Indo-Rama Synthetics v. CCE*, 3. The learned Advocate, further, submitted that the provisions of Section 15 of the Customs Act regarding 'date for determination of rate of duty' are not applicable for the purpose of levying anti-dumping duty since as per Sub-section (8) of Section 9A of the Customs Tariff Act makes the provisions of Customs Act "relating to non-levy, short levy, refunds and appeals" only applicable to the anti-dumping duty; that as such Section 15 of the Customs Act is not attracted; that the provisions of Section 15 will be applicable only with effect from 10.9.2004 as Sub-section (8) of Section 9A of the Customs Tariff Act has been amended by Section 76 of the Finance (No. 2) Act, 2004; that by this amendment, provisions of Customs Act "relating to, the date for determination of rate of duty, non-levy, short-levy, refunds, interest, appeals offences and penalties" will be applicable in respect of anti-dumping duty. He mentioned that by this amendment, it is apparent that provisions of Section 15 of the Customs Act, were not applicable to anti-dumping duty prior to the amendment.

4. The learned Counsel also contended that the lead-acid batteries in question are not industrial batteries; that the fact that impugned batteries are to be used in UPS which is no doubt an "industrial" product would not make them industrial; that the word "industrial" would refer to a battery which is used in an industry or in an industrial establishment as distinct from "industrial products"; that thus, Notification No. 55/2002-Cus is not applicable to the imported batteries which are to be used

in UPS. Finally, he contended that the element of counter valuing duty is not includible in the assessable value of the goods for the purpose of levying anti-dumping duty. He relied upon the decision of the Tribunal in the case of Shivalaya Trading Corporation v. CC, New Delhi, 5. Countering the arguments, Shri S.M. Tata, learned SDR, submitted that as per Section 9A of the Customs Tariff Act, the imposition of Anti-dumping duty has to be determined when the goods have been imported; that the Supreme Court in the case of Garden Silk Mills Ltd., supra, has held that the "import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the Customs barriers and the bill of entry for home consumption is filed"; that the Supreme Court in Kiran Spinning Mills case, supra, has also decided the question relating to 'taxable event'; that it has been held by the Supreme Court that "the taxable even is the import of goods within the Customs barriers. In other words, the taxable event course when the Customs barrier is crossed". The learned SDR, thus, contended that as the goods were cleared on or after 22.5.2002, after the imposition of the anti-dumping duty, the goods in question are chargeable to anti-dumping duty. Regarding the question as to whether batteries in question are "industrial", learned SDR mentioned that this aspect was not disputed by the Appellants before the lower Authorities and accordingly the Appellants cannot raise this plea for the first time before the Appellate Tribunal. He relied upon the decision in the case of Haryana Acrylic Mfg. Co. P. Ltd. v. CCE, New Delhi, 2001 (130) ELT 562 (T) wherein it has been held by the Tribunal that the plea, not raised before the Commissioner, "cannot be heard.... at this late stage". Reliance has also been placed on the following decisions: (i) Union of India v. Chemical Process Equipments P. Ltd., 1992 (59) ELT 377 (Bom) wherein Bombay High Court has held that "it is not permissible to raise fresh contention which requires examination of several disputed questions of facts for the first time in appeal." (ii) I.T.C. Ltd. v. Union of India, 1991 (53) ELT 234, wherein the Supreme Court has held that "the disputed questions of fact sought to be raised cannot be urged in the Appeal Court for the first time". Hindustan Lever Ltd. v. CCE, Chandigarh, 2001 (138) ELT 31 (P&H) wherein the Punjab and Haryana High Court has held that when plea has not been raised

before the lower Authorities, the High Court "cannot allow it to make out a new case and start proceeding afresh." 6. The learned SDR, finally, contended that the provisions of Section 15 of the Customs Act are applicable as the said provision applies to "any imported goods"; that it is not in dispute that the impugned goods are imported goods. Reliance has been placed on the decision in the case of *Supreme Woollen Mills Ltd. v. CC, Nhava Shew*. Mumbai, 2004 (95) ECC 654 (T) : 2004 (167) ELT 439 (T). In reply, the learned Advocate again referred to the decision of the Tribunal in the case of *Suja Rubber Industries* and contended that this being the specified decision on the subject should be followed and relied upon the decision of the Supreme Court in the case of *Fenner India Ltd. v. CCE*, 2004 (95) ECC 238 (SC) : 2004 (167) ELT 18 (SC).

7.1 We have considered the submissions of both the sides. Section of the Customs Tariff Act empowers the Central Government to impose an anti-dumping duty upon the importation of the goods into India if any goods is exported from any country or territory to India at less than its normal value. The Central Government has issued Notification No.55/2002 Cus dated 22.5.2002 in exercise of the powers conferred by Section 9A imposing anti-dumping duty on lead acid batteries originating in, or exported from, inter alia, Taiwan. It is the contention of the Appellants that as the goods in question were imported by them on 16.4.2002, when no anti-dumping duty was imposable on the impugned goods, they are not liable to pay anti-dumping duty at the time of clearance of goods on or after 22.5.2002 since the act of importation was over in April, 2002 itself. This contention of the learned Advocate is not acceptable in terms of the judgments of the Supreme Court in the case of *Kiran Spinning Mills and Garden Silk Mills Ltd.*, supra. In the case of *Kiran Spinning Mills*, the appellants had, between 4.4.77 and 20.9.78, imported acrylic polyester fibre which were placed in the bonded warehouse after they had landed in India. On 3.10.78, the Additional Duty of Excise become leviable on the polyester fibre under the Additional Duty of Excise (Textiles and Textile Articles) Ordinance, 1978. The Appellants cleared the goods imported by them after 4.10.1978. The Appellants challenged the levy of Additional Duty of Excise on the ground that at the time when the goods were imported into India, the Ordinance had not been promulgated and no additional duty of excise was payable on like articles. The Apex Court did not find any merit in the argument

by holding as under : "..... this Court has held in Sea Customs Act - 1964 (3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country. Admittedly this was done after 4th October, 1978. As on that day when the goods were so removed additional duty of excise under the said Ordinance was payable on goods manufactured after 4th October, 1978. We are unable to accept the contention of Mr. Ramachandaran that what has to be seen is whether additional duty of excise was payable at the time when the goods landed in India or, as he strenuously contended, they had crossed into the territorial waters. Import being complete, when the goods entered the territorial waters is the contention which has already been rejected by this Court in C.A. Nos. 1257-58 of 1987 (Union of India and Ors. v. Apar Private Ltd, and Ors.) decided on 22nd July, 1999, 1999 (65) ECC 727 (SC) : 1999 (112) ELT 3 (SC). The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid and that is what has been termed by this Court in IN RE: The Bill to amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excise Act, 1944 (1964) 3 SCR 787 at page 823) Sea Customs Case as being the taxable event. The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had handed in India or had entered the territorial waters. We find that on the date of the taxable event the additional duty of excise was leviable under the said Ordinance and, therefore, additional duty under Section 3 of the Tariff Act was rightly demanded from the appellants." 7.2 The similar views have been expressed by the Supreme Court in Garden Silk Mills Ltd. The Court has held that "the import of goods into India would commence when the same cross into the territorial water but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the Customs barriers and the bill of entry for home consumption is filed." 8. It is thus settled law that the import is completed only when the goods are to cross the Customs barriers and that is the time when the import duty has to be paid and not on the

date when goods had landed in India. Under Section 9A of the Customs Tariff Act, anti-dumping duty is imposable upon impartation of the goods. The import is completed only when the goods are to cross the customs barrier. In the present matter on the date of crossing the customs barrier, the anti-dumping duty was leviable in terms of Notification No. 55/2002 Cus and, therefore, anti-dumping duty under Section 9A of the Customs Tariff Act is payable by the Appellants. The decision of the Tribunal in the case of Suja Rubber Industries is not applicable as it has been passed per incuriam the judgments of the Supreme Court in Kiran Spinning and Garden Silk Mills, Thus, the ratio of the decision in Fenner India Ltd., is also not applicable. We also agree with the learned SDR that the Appellants cannot raise the plea that the impugned batteries are not industrial type batteries for the first time before the Appellate Tribunal. The Adjudicating Authority has given a specific finding in the Order-in-Original No. 22/2002 dated 6.8.2002 that "The importer has not disputed the fact that the goods imported by them were covered in the Notification." The learned Advocate has also not controverted the same.

Thus, following the decisions in the case of ITC Ltd., Chemical Process Equipments and Industrial Lever Ltd., relied upon by the learned SDR, we hold that the anti-dumping duty is imposable on the impugned goods.

We, however, agree with the learned Advocate that the Additional Customs Duty and/or Special Additional Duty is not includible in the assessable value for the purpose of charging anti-dumping duty as this is in addition to any other duty imposed under the Customs Tariff Act or any other law for the time being in Force and in absence of any specific provision for inclusion of such duty in the assessable value as is the case in respect of Additional Customs duty levied under Section 3 of the Customs Tariff Act. We, therefore, remand the matter to the jurisdictional Adjudicating Authority to recompute the amount of duty which would be payable by the Appellants. The appeal is disposed of in the above terms.