The Excise Superintendent and ors. Vs. Shalini Beer and Wines Rep. by Its Manager

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Court : Andhra Pradesh

Decided On : Aug-30-1991

Reported in : 1991(3)ALT292

Judge : V. Sivaraman Nair and ;M.N. Rao, JJ.

Acts : Andhra Pradesh Excise Act, 1968 - Sections 21 and 21(2); Andhra Pradesh Foreign Liquor and Indian Liquor Rules, 1970 - Rule 10

Appeal No. : Writ Appeal No. 156 of 1991

Appellant : The Excise Superintendent and ors.

Respondent : Shalini Beer and Wines Rep. by Its Manager

Advocate for Def. : T. Raghunath Reddy, Adv.

Advocate for Pet/Ap. : Govt. Pleader for Excise

Judgement :

V. Sivaraman Nair, J.

1. Respondents in W.P.No. 12176/89 are the appellants in this Appeal. The learned Single judge allowed the writ petition and directed refund of countervailing

duty and import fee by the end of February, 1991, failing which the amount was to carry interest at 9% from 1-3-1991. Appellants challenge the correctness of the above judgment.

2. The facts involved are briefly as follows: We will refer to the parties as they appeared in the writ petition.

Petitioner was holding a licence for wholesale distribution of alcoholic liquors at Karimnagar in the State. He applied for five import permits for import of U.B. Export Lager Beer from M/s. Indo Lowenbraw Breweries, Faridabad, and obtained permit Nos. 39 to 43. He could utilise only one of the permit Viz., No. 39 dt. 4-2-88 by importing 7800 BLs of beer. Since he could not import liquor under the other permits viz., 40 to 43, he applied for their extension and revalidation. Even during that period he could not import the liquor. He then applied for change of brand and Brewery. But no formal orders were issued thereafter. Petitioner had paid an amount of Rs. 93,000/ towards countervailing duty and Rs. 31,200/- towards import fee for obtaining the five permits, since his application for extension of validity of the permit was not granted, he sought recovery of the amounts collected as countervailing duty and import fee. There after on 31-8-1989 he filed W.P.No. 12176/89. The learned single judge allowed the writ petition holding that countervailing duty is leviable only on excisable goods imported into the State and naturally therefore such import duty cannot be retained by the State if import was not effected. The learned single judge hold that countervailing duty collected in advance should be refunded to the petitioner because the liquor was not imported. It was for that reason that the court directed refund of countervailing duty and import fee in regard to the import permits mentioned in the writ petition by the end of February, 1991, filing which interest at 9% was to be paid from 1-3-1991. Respondents filed the appeal on 19-12-1990 and obtained interim orders or 4-3-1991.

3. There are two aspects which fall for consideration one relating to import fee and the other relating to countervailing duty. The relevant facts are the following:-

Petitioner applied for five import permits by paying countervailing duty and import fee in advance. He had imported liquor pursuant to one of those permits.

Countervailing duty and import fee in respect of that permit was therefore duly levied and no question of refund of those amounts could have arisen for consideration before the learned single judge.

4. Countervailing duty and import fee are two different levies-one is in the nature of indirect tax and the other a licence fee. The first is relatable to import of liquor and the second is a licence fee relatable to specific services. In the absence of the taxable or chargeable event, a tax or duty may not be collected; but that does not automatically mean that the fee collected in connection with issue of permit or licence shall be refunded. It may perhaps be that if there is no correlation at all between the cost of providing services and the licence fee levied and collected, the licence fee may be called in question, but not otherwise. As a matter of fact, there were no pleadings in the writ petition challenging the levy of import fee. Petitioner seems to have proceeded on the assumption that the import fee was a part of the countervailing duty; and if there was no import, neither was leviable. The learned single judge has also proceeded on that assumption. Petitioner had no case that the cost of services which the respondents were to render in connection with the issue of the import permit was too little compared to the import fee collected, and therefore the disparity rendered the import fee illegal.

5. It is clear from the provisions of the Excise Act and the Rules that countervailing duty and import fee are totally different, and are levied under separate and independent provisions of the Act. It is hardly possible to hold that the sustainability of one depends on the other. There may be cases were the licensing authority would have laid out expenses for issue of the licence/permit and for other related services, even if the licencee would not have imported liquor. The mere fact that the licensee would not avail of the import permit would not mean that the licence fee was wrongly levied and should therefore be refunded.

6. We do not find any discussion with specific reference to the difference in the nature of fee which has to have some relation to the services rendered. The exact correlation between cost of the services rendered and the amount of fee collected may not be necessary, in view of the decisions of the Supreme Court in Sreenivasa General Traders v. State of AP., : [1983]3SCR843 . Municipal

Corporation of Delhi v. Mohammad Yasin, : [1983]142ITR737(SC) , Southern Pharmaceuticals and Chemicals v. State of Kerala, AIR 1981 SC 1063. In the present case no effort at all has been made to challenge the levy of import-fee or to make out either that no services were rendered or that the cost of such services were grossly disproportionate to the licence fee collected.

7. We are however, in agreement with the learned single judge that Section 21 (2) of the Act authorises levy of countervailing duty only on excisable articles manufactured or produced elsewhere in India and imported into the state.

8. Excise duty and countervailing duty are chargeable under Section 21 to 23 of the A.P. Excise Act Section 21 (2) provides that -

'The Government, may by notification, levy a countervailing duty on any excisable article manufactured or produced elsewhere in India and imported into the State at such rate as may be specified in the notification, which may not exceed the rates of excise duty on similar excisable articles levied under Sub-section (1)'.

Different rates of excise duty and countervailing duty for different kinds of articles as also different modes of levying duties are specified by other provisions in the Act. Licences and permits are dealt with in Chapter VI of the A.P. Excise Act, 1958. Section 28 provides for fulfilment of conditions for licences and for payment of fee, periods of validity and restrictions and conditions for issue of licences and permits. We do not find anything in Section 21 which indicates that even in the absence of actual import into the State of excisable goods manufactured or produced elsewhere in India, the revenue is entitled to retain the countervailing duty.

9. Countervailing duty is an impost corresponding to excise duty. Excise duty is levied on excisable articles manufactured or produced within the State. In case of import of such goods which are manufactured and produced outside the state but imported into the State, countervailing duty is imposed to counter-balance the excise duty. This has got different features viz., the impost on the excisable goods which are manufactured or produced inside the state and those produced or manufactured outside the State are broadly similar. The revenue levies duty on the

excisable articles almost at the same rates whether it be manufactured or produced inside the State or imported from elsewhere into the State. The consumer has to pay an almost uniform price for the excisable goods irrespective of the place where it was manufactured or produced. The State Government collects almost the same rate of duty from excisable goods which are consumed or sold within the State irrespective of its origin. The question for our consideration is whether countervailing duty is relatable to the import of excisable goods which are manufactured or produced elsewhere in India. The learned single judge answered in the affirmative. The revenue demurs.

10. Learned Government Pleader relied on certain observation contained in the Judgment in M.M. Breweries v. E & T Commissioner, : AIR 1976 SC2020 In that case the excise duty was levied on quantity of liquor which was permitted for import, but the actual import was less than the permitted quantity. Levy of duty relatable to the difference in quantity was challenged for the reasons that countervailing duty was payable only on the liquor which was actually imported. The difference was in excess of wastage allowable under the rules. The importer contended that he was liable to pay duty only in respect of the liquor which was actually imported and not the quantity which could have been imported. On these facts the importer raised a contention that the Revenue could impose duty only if liquor was consumed in its territory and only to the extent of such consumption.

11. Repelling that contention, the Supreme Court observed-

'What is material is whether permits were obtained for import from Uttar Pradesh of alcoholic liquor meant for human consumption and the quantity shown in the permits left Utter Pradesh. In the present case, the liquor for which permits were obtained by the appellant was admittedly in existence and was meant for human consumption and did leave the appellant's distilleries in Uttar Pradesh for being transported to its Warehouse in Chandigarh at its own risk and responsibility. It is also not denied on behalf of the appellant that the portion of the liquor which exceeded the permissible limit of wastage did not reach the appellant's Warehouse and was not found therein and the shortage remained unaccounted for. It is thus evident that duty is not sought to be charged on an excisable article

which was not in existence, as contended on behalf of the appellant but is sought to be charged in liquor which was actually manufactured and left Uttar Pradesh but was found short beyond the permissible limit and no reasonable explanation was tendered by the appellant in respect thereof.'

It is important to note that the Supreme Court observed that countervailing duty was leviable only in cases where the excisable goods were in existence and were meant for human consumption and had moved from the manufacturer or producer into the State which levied countervailing duty. Countervailing duty is relatable to the actual import of excisable goods produced or manufactured elsewhere. In the absence of actual import of excisable goods, the revenue is not entitled to collect any countervailing duty.

12. The next question is whether the Revenue can refuse refund of countervailing duty which it had collected in advance on import of excisable goods when import of excisable goods did not take place. True it is that there is no provisions in the Excise Act or the Rules for refund. But can the Revenue fall back upon absence of such provisions and retain the amounts which were collected only as a duty of excise even after it was found that the dutiable event did not take place. We are clear in our minds that the learned single judge was correct in holding that the amount which the State had collected as countervailing duty is refundable since it has no rights to retain the amounts when once it was found that excisable goods had not been imported.

13. Government Pleader made an attempt to justify the retention of the amounts on the basis of Rule 10 of the A.P. Foreign Liquor and Indian Liquor Rules, 1970. He referred particularly to Sub-rules (5) and (6) to the following effect:-

'10(5): Where the import of liquor Beer is not made within the validity of the import permit or within the extended period of the permit under Sub-rule (3) or Revised import permit obtained under Sub-rule (4) the countervailing duty and the import fee paid shall accrue to the Government on expiry of the validity specified in the import permit'.

'(6): The countervailing duty and the import fee once paid shall not be refunded in any case'. Government Pleader submitted that these conditions must be read into the permit in Form F.L. 1-A issued pursuant to the application in Form F.L.-1 which contain a declaration to the effect that-'I have gone through the provisions of the Andhra Pradesh Excise Act, 1968, and the rules and I am bound by the provisions'.

He also referred us to the counterpart agreement which also contained the same provision.

14. We are however, not persuaded by the submission, because Rule 10 as it stands at present was introduced only by G.O.Ms.No. 282 dt. 11-4-1988. Pre-existing Rule 10 was omitted by Memo Dt. 15-9-1978. During the period between those two dates, there was no Rule 10 in the above rules. Therefore, the Rule 10 as it stands at present could not be read into the permit which was issued on 4-2-1988. It is true that the permit was revalidated on 15-4-1988 and 18-6-1988 after Rule 10 was enacted. It is not clear from the pleadings whether these revalidations were made on the basis of a fresh application in Form F.L-1 and a counter-part agreement which was executed afresh. Unless these facts are pleaded and proved, it is difficult to assume that the applicant had agreed to the incorporation of Rule 10 as part of the permit conditions or that he agreed to be bound by the rule which was not in existence at the time when he first applied for the permits.

15. We are of the opinion that the amount of counter-vailing duty which was collected in advance was liable to be refunded if the dutiable event viz., import of excisable goods into the State had not taken place. As we noticed above, countervailing duty is 'one to put on imports that are bountyfed to give home-goods an equal chance' (Concise Oxford Dictionary). The absence of import of excisable goods into the state will naturally invalidate the impost That view is supported by the decisions in Kalyani Stores v. State of Orissa, : [1966]1SCR865 , M.M. Breweries Limited. v. Excise and Taxation commissioner (4 supra). Shroff and Company v. Municipal Corporation of Greater Bombay, 1989 (1) SCC 347.

16. We are also satisfied that the petitioner paid the duty in advance under the honest impression that he was bound to do so because of the provisions of law.

Once the impost is found to be unsustainable on facts because the import of excisable goods had not taken place, there was no occasion for counter-balancing the burden so as to give the home made excisable goods a chance. The duty thus becomes a levy not supported by authority of law.

17. In the facts and circumstances of the present case, we are of the opinion that the amounts collected as countervailing duty became refundable as rightly held by the learned single judge, because the goods in respect of which duty was paid were not imported. We also note that no question of limitation can apply in the instand case, since the petitioner who had remitted the countervailing duty in February, 1988 had filed the writ petition on 31-8-1989 after unsuccessful efforts to obtain refund from the appellants.

18. In the result, we dismiss the appeal subject to the modification that the amount liable to be refunded is only the countervailing duty paid in respect of import permit Nos. 40 to 43 and not in respect of permit No. 39. We also make it clear that the appellants are not bound to refund any part of the import fee for the reason that there was no specific pleading nor any proof that the appellants had not expended the amount for rendering any service in the nature of add pro quo in respect of the fee which the respondent had paid. The countervailing duty in respect of the four permits has to be refunded within a period not exceeding one month from the date of receipt of a copy (Sick) judgment. If the same is not paid within the above period, interest shall be paid (Sick) rate of 9% till the date of such repayment as ordered by the learned single judge.

Advocates fee Rs. 500/-.