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Plastic Processors Vs. Union of India (Uoi)

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Court : Delhi

Decided On : Sep-12-2000

Reported in : 2000(72)ECC588; 2002(143)ELT521(Del)

Judge : Arijit Pasayat, C.J. and; D.K. Jain, J.

Acts : Customs Tariff Act, 1975 - Sections 3; Constitution of India - Article 226

Appeal No. : C.W.P. Nos. 2890, 3007 and 3049 of 2000 and C.M. No. 4428, 4597 and 4665 of 2000

Appellant : Plastic Processors

Respondent : Union of India (Uoi)

Advocate for Def. : Jayant Bhusan, Adv.

Advocate for Pet/Ap. : V. Lakshmikumaran and; Shekhar Vyas, Advs

Judgement :
ORDER

Arijit Pasayat, C.J.

1. In these three writ petitions challenge is to the legality of circular dated 10th May, 2000 issued by the Government of India, Ministry of Finance, Department of Revenue. The same is purported to have issued to clarify doubt which has been raised regarding levy of Additional Duty of Customs (CVD) on Domestic Tariff Area

(in short DTA) sale of reprocessed plastic agglomerates/granules (reprocessed out of plastic scrap) by Export Oriented Units (in short EOU)/Export Processing Zone (in short EPZ) units. Doubts were entertained in respect of the Notification No. 5/98-CE., dated 2nd June, 1998, 5/99-CE., dated 28th February, 1999 and 6/2000-CE., dated 1st March, 2000. In Paragraph 3 of the circular it was inter alias stated as follows :

'In so far as levy of additional duty of customs (CVD) on imports of reprocessed plastic materials viz., plastic granules/agglomerates, is concerned, condition (1) above will not be satisfied because the reprocessing has not been done in India. Thus, in case of normal imports of reprocessed plastic materials, the importers/domestic manufacturers are liable to pay, among other duties, additional duty for customs (CVD). It, thereforee, follows that no CVD exemption will be available when reprocessed plastic materials are cleared in Domestic Tariff Area (DTA) by EOU's and EPZ units. In other words the plastic processor EOU's /EPZ units are liable to pay, among other duties, excise duty equivalent to CVD payable on imported reprocessed plastic materials (e.g. plastic granules/agglomerates) in respect of their DTA clearances of such materials/goods.'

2. Petitioners are EOU's located in NOIDA EPZ, engaged in manufacture of plastic granules out of plastic scrap. Stand of the petitioners in each case is that view expressed by the authorities in the aforesaid circular is clearly untenable. In the counter affidavits filed it has been stated that scheme of EPZ/EOU has been formulated by Government of India to boost exports and provide international competitive environment to the exporting units. Under the scheme supplies from EPZ units into DTA despite being supplies within India have to be considered as import into India. Likewise supplies from one EOU to another EPZ unit has been defined as 'deemed export'. The zones in spite of being located in India have been deemed to be enclaves outside India. Accordingly special provisions have been made in Central Excise Act, 1944 (in short the Act) and Customs Act, 1962 (in short Customs Act), amongst these special provisions is the first proviso to Section 3(1) of the Act.

3. In order to appreciate rival submissions a few factual aspects have to be noted. Petitioners are paying duty in respect of the goods sold in DTA. They are also paying additional duty which is known as CVD under Section 3 of the Customs Tariff Act, 1975 (in short Tariff Act), which is equivalent of the Excise duty for the time being livable on a like article if produced or manufactured in India. Seriall number 63 of Exemption Notification No. 66, which is relevant for the present dispute, reads as follows :

'63.39.01 to 39.14Plastic materials reprocessed in India out of

the scrap or the waste of goods falling within

Chapters 39, 54, 55, 56, 59, 64, 84, 85, 86,

87, 90, 91, 92, 93, 94, 95 and 96'

Section 3 of the Central Excise Act, 1944 which is pressed into service by the parties reads as follows :

'Section 3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured :

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India

shall be an amount equal to the aggregate of the duties of customs which would be livable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to

their value; the value of such excisable goods shall, notwithstanding anything contained in any other provisions of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).'

Reference may also be made to sub-section (1) of Section 3 of the Tariff Act along with the Explanationn which reads as follows :

'Section 3. Levy of additional duty equal to excise duty. - (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being livable on a like article if produced or manufactured in India and if such excise duty on a like article is livable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation. - In this section, the expression 'the excise duty for the time being livable on a like article if produced or manufactured in India' means the excise duty for the time being in force which would be livable on a like article produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be livable on the class or description of articles to which the imported article belongs, and where such duty is livable at different rates, the highest duty.

Section 5A of the Central Excise Act, 1944 which appears to be the pivotal position around which stand of the respondents revolves reads as follows :

'Section 5A. Power to grant exemption from duty of excise. - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the official gazette, exempt generally either absolutely or subject to such conditions (to be fulfillled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise livable thereon :

Provided, that unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation- - In this proviso, 'free trade zone' and 'hundred per cent export-oriented undertaking' shall have the same meaning as in Explanationn 2 to sub-section (1) of Section 3.'

4. On a reading of Section 3 of the Tariff Act it is clear that articles if imported into India will attract duty equal to the Excise duty for the time being livable on a like article if produced or manufactured in India. The purpose of such prescription appears to be that no importer is placed at a more advantageous position vis-a-vis another, more particularly in respect of producers of scrap articles in India, if they are like in nature to those which are being imported into India. The intention is implicit in the language of Section 3 of the Tariff Act. More relevant is the Explanationn which provides that Excise duty for the time being in force which is livable on like article if produced or manufactured in India or if a like article is not so produced or manufactured, which would be livable on the class of description of articles to which the imported articles belong and where such duty is livable at different rates, the highest duty. It is to be noted that there is no question of exemption of excise duty on the goods manufactured in the Free Trade Zone or EPZ or manufactured in other parts of India as no exemption is granted to payment of duty under Section 5A of the Act.

5. Learned Counsel for the petitioner stated that no exemption in reality is being claimed from payment of Excise duty but what is challenged is the liability to pay CVD under Section 3 of the Tariff Act, in view of the fact that such goods manufactured in India are not liable to pay any Excise duty. It is not disputed by learned Counsel for the respondents that on like article there is no Excise duty, may be because of exemption. On a reading of the impugned circular, however, it appears that respondents are of the view that two conditions must be fulfillled i.e. (a) reprocessing must have been done in India and (b) goods must have been manufactured from scraps So far as the second condition is concerned there is no dispute that petitioners are engaged in reprocessing imported plastic scraps and

out of it the goods falling under Chapter 39.01 to 39.14 are produced. The circular proceeds on the basis that if processing is not done in India the petitioners are called upon to pay duty under the circular.

6. It would be relevant to take note of decisions of the Apex Court in Hyderabad Industries Ltd. v U.O.I. - : 1999(108)ELT321(SC) and in The max Private limited v. Collector of Customs (Bombay) - : 1992(61)ELT352(SC) . In Paragraph 11 of the Hyderabad Industries case (supra) it was observed as under :

'The words 'if produced or manufactured in India' does not mean that the like article should be actually produced or manufactured in India. As per the Explanationn if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1),' that such article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in The max Private Limited v. Collector of Customs, Bombay : 1992(61)ELT352(SC) that Section 3(1) of the Customs Tariff Act 'specifically mandates that the CVD will be equal to the excise duty for the time being livable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event' To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is livable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was livable thereon.'

7. Again, in Paragraph 15, it was observed as follows :

'The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2A of the Tariff Act, 1934 provided for levy of countervailing duty. This Section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being livable on a like article if

produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill, 1975 with regard to clause 3 it was stated that 'Clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty livable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India'. Apart from the plain language of the Customs Tariff Act, 1975, even the .notes to clauses show the legislative intent of providing for a charging section in the Tariff Act, 1975 for enabling the levy of additional duty to be equal to the amount of excise duty livable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance the excise duty livable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India.'

8. As observed in the aforesaid quoted portions by the Apex Court, for the purpose of attracting additional duty under Section 3 of the Tariff Act, on the import of a manufactured or produced article, the actual manufacture or production of a like article in India is not necessary. Said provision specifically mandates that CVD will be equal to the excise duty for the time being livable on a like article if produced or manufactured in India. This position was also elaborated in Thermax Private Limited case (supra).

9. In essence, what has to be imagined is that importer had manufactured the goods in India and then the amount of excise duty that he would have called upon to pay in that event has to be determined.

10. In view of the above discussion, the inevitable conclusion is that the impugned circular is not in accordance with law, direction contained in it to make assessment in a particular fashion only is indefensible. In the result, impugned Circular No.

38/2000-Cus., dated 10th May, 2000' is quashed to the extent it imposes the liability of CVD.

11. The writ petitions are allowed to the extent indicated.

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