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Court : Chennai

Decided On : Oct-07-1994

Reported in : 1994(48)ECC145; 1995(75)ELT478(Mad)

Judge : K.A. Swami, C.J. and ; Somasundaram, J.

Acts : Customs Act,1962 - Sections12, 25 and 25(1); Customs Tariff Act, 1975

Appeal No. : Writ Appeal Nos. 1136-37 of 1994

Appellant : WavIn India Ltd.

Respondent : Union of India

Advocate for Def. : Shri C.A. Sundaram, A.C.G.S.C.

Advocate for Pet/Ap. : Shri G. Subramaniam, ;Sr. Counsel and V. Narayanaswami, Adv.

Judgement :

K.A. Swami, C.J.

1. These two appeals are preferred against the common order dated 1-7-1994 passed by learned single Judge in Writ Petitions 12251 and 12253 of 1984.

2. The petitioner is common in both the appeals and the writ petitions. It has sought for issue of a writ in the nature of mandamus directing the 2nd respondent,

the Assistant Collector of Customs, Kandla Port, Kandla, Gujarat not to load the value of the goods of 1750 metric tonnes of PVC Resins arrived on board S. S. Vishwadharma covered by bills of lading numbers 33 to 47 and 81 to 100 dated 20-10-1984 and 22-10-1984 respectively with the customs duty for the purpose of levy of additional duty (countervailing duty) under Section 3(2)(ii) of the Customs Tariff Act, 1975. In writ petition 12253 of 1984, it has sought for a declaration to the effect that the levy of countervailing duty under Section 3(2)(ii) of the Customs Tariff Act, 1975 in respect of the goods of 1,750 M.T. of PVC Resins arrived on board S.S. Vishwadharma covered by bills of lading numbers 33 to 47 and 81 to 100 dated 20-10-1984 and 22-10-1984 respectively as ultra vires the Constitution of India and pass such other orders as may be deemed fit. In support of the aforesaid prayers, the petitioner has relied upon three Notifications dated 2-8-1976, 31-1-1979 and 11-5-1984 produced at pages 1 to 7 of the typed set of records.

3. Learned single Judge, following a decision of the Supreme Court in Khandelwal Metal & Engg. Works v. Union of India : 1985(20)ELT222(SC) has held that additional duty was not exempted under the aforesaid notifications and though the additional duty was also a customs duty, nevertheless, the aforesaid Notifications did not cover the same. Accordingly, learned single Judge has summed up his conclusion as follows :-

'To sum up thus, I hold unhesitatingly that the exemption in the case of the petitioner will remain confined to the duty as calculated on the basis of the rate in the First Schedule of the Tariff Act and shall not touch or affect the additional duty leviable under Section 3(1) of the Tariff Act. It is not necessary to dilate in the case of the petitioner on the other issues in the instant petition, for I find that they are substantially covered by a Division Bench judgment of this Court in Shriram Fibres Ltd. v. Union of India : 1994(69)ELT4(Mad) . Learned counsel for the petitioner has, however, expressed before me that the petitioner has until now proceeded only on the basis that exemption from the customs duty under the aforementioned notification, shall also extend to the additional duty, but he had not yet examined or found what is leviable as excise duty on the goods involves in the instant case and whether there is any exemption from excise duty notified for this kind of goods or not. It is obvious, if there is any exemption consciously saying about excise duty on the goods that the petitioner has imported, in case such goods are produced or manufactured or are deemed to be produced or manufactured in India, it (the petitioner) may apply to the Appropriate Authority and the Authority in his turn shall examine the same in accordance with law.'

4. Shri G. Subramaniam, learned Senior Counsel appearing for the appellant laid great stress on the aforesaid judgment of the Supreme Court and also the provisions contained in Section 3(1) and (2) of the Customs Tariff Act and the aforesaid Notification and submitted that as the additional duty is leviable under Section 12 of the Customs Act and the exemption of customs duty can be granted only under Section 25 of the Customs Act, the fact that the Notifications are issued under Section 25, would go to show that with regard to any duty whether it is additional or the customs duty being the duty of customs only, the appellant is entitled to the exemption as provided under the aforesaid Notifications. It is also further submitted that the learned single Judge is not correct in holding that the aforesaid Notification do not exempt to the extent the exemption contained therein the payment of additional duty.

5. Learned counsel appearing for the respondents submits that the contents of the Notifications in question are to be strictly construed and the Government of India whenever it has exempted a particular duty, it has issued specific Notifications exempting that in the case of exemption from payment of customs duty, the Notification are issued specifically mentioning the duty of customs, that in the case of payment of additional duty of customs, the Notifications are issued specifically mentioning the additional duty of customs, that as the Notifications in question do not refer either to Section 3 of the Customs Tariff Act or to the additional duty, they only refer to the duty of customs as specified in the First Schedule with respect to the goods referred to in the Notifications, whereas the additional duty though it is the duty of customs only but the basis for calculation and levy of it being different from the customs duty as mentioned in Annexure-I to the First Schedule and as there is no reference to Annexure-I to the First Schedule in the Notifications relied upon by the appellant, learned single Judge is justified in holding that the exemption granted under the Notifications is not extendable to the additional duty

of customs. Learned counsel for the respondents has also placed before us the Notifications in which there is an exemption for payment of ...... duty having been specifically mentioned in those Notifications.

6. The relevant portions of the Notifications are as follows :-

'Notification No. 341-Cus., dated 2-8-1976 as amended by Notification No. 17-Cus., dated 16-2-1982.

NOTE - 33

Imports from Brazil, Spain, Turkey, Yugoslavia, Republic of Korea, Tunisia, Arab Republic of Egypt, Chile, Mexico, Uruguay, Peru, Paraguay, Bangladesh and Romania. - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in column (2) of the Table annexed hereto and falling under the Heading Number in the First Schedule of the Customs Tariff Act, 1975 (51 of 1975), specified in the corresponding entry in column (3) of the said Table, when imported into India from Brazil or Spain or Turkey or Yugoslavia or the Republic of Korea or Tunisia or the Arab Republic of Egypt or Chile or Mexico or Uruguay or Peru or Paraguay or Bangladesh or Romania, from so much of that portion of the standard rate of duty of customs specified in the said First Schedule with respect to the aforesaid goods read with any other notification (for the time being in force) issued with respect to such goods under sub-section (1) of Section 25 of the Customs Act, 1962 but not including the notification of the Government of India in the Department of Revenue and Banking (Revenue Wing) or in the Ministry of Finance, Department of Revenue, as the case may be, No. 341-Cus., dated the 2nd August, 1976; No. 431-Cus., dated the 1st November, 1976; No. 63-Cus., dated the 1st April, 1978; No. 21-Cus., dated the 27th January, 1979 and 191-Cus., dated the 14th August, 1981 as is specified in column (4) of the said Table :

Provided that the importer proves (in accordance with the Rules of Origin referred to in paragraph 10 of the protocol relating to Trade Negotiations among Developing Countries, signed on the 8th day of December, 1971) to the satisfaction of the proper officer of Customs that the goods in respect of which the benefit of its exemption is claimed are of the origin of Brazil or Spain or Turkey or Yugoslavia or the Republic of Korea or Tunisia or the Arab Republic of Egypt or Chile or Mexico or Uruguay or Peru or Paraguay or Bangladesh or Romania, as the case may be.

General Exemptions - Note 33/83--Sl. Description of goods Heading No. Extent ofNo. in the First TariffSchedule to the concessionCustoms TariffAct, 1975--.... ....6. Polymerisation andcopolymerisation products(for example, polyethylene,polytetrahaloethylene,polyisobutylene, polystyrene,polyvinyl chloride,polyvinyl acetate, polyvinylderivatives, polyacrylic andpolymethacrylic derivatives,cumarone-indeneresings)(i) Polyvinyl chloride 39.01/06 50 per cent ofthe standard(a) Liquid rate of duty(b) Powder and grains(c) other forms(ii) Polyvinyl acetate 39.01/06 - do -(iii) Polystyrene - do -(a) Liquid 39.01.06(b) Powder and grains(c) other forms.... ....-- Notification No. 36/83-Cus., dated 1-3-1983 as amended by Notification No. 291/83-Cus., dated 2-8-1993.

(b) the whole of the additional duty of customs leviable thereon under Section 3 of the second mentioned Act.

(Notification No. 26-Cus., dated 31-1-1979)

Exemption to polymerisation and copolymerisation products, etc. imported from Brazil or Spain or Turkey or Yugoslavia or the Republic of Korea or Tunisia or the Arab Republic of Egypt or Chile or Mexico or Urguguay or Peru or Paraguay or Bangladesh or Romania - See Sl. 6 of Table to Notification No. 342-Cus., dated 2-8-1976 at Note 33 of 'General Exemptions.'

Effective rate of duty for goods falling under Heading No. 3901/06. - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 30/82-Cus., dated the 28th February, 1982 the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods, falling under Heading No. 39.01/06 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) specified in column (2) of the Table hereto annexed, when imported into India, from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in Column (3) of the said Table :-

Provided that nothing contained in this notification shall affect the exemption granted under any other notification of the Government of India for the time being in force, from the duty of customs specified in the said First Schedule in respect of the goods referred to in this notification.

TABLE--Sl. No. Description of goods Rate of duty---(1) (2) (3)---1. The following goods including mouldingpowders thereof, namely :-(i) Phenol formaldehyde resins(ii) Urea formaldehyde resins(iii) Malamine formaldehyde resins(iv) Polyster resins 50 per centad valorem(v) Epoxy resins(vi) Nylon resins(vii) Polymethyl methacrylate(viii) Polyphenylene oxide(ix) Polybutyl 1-teraphthalate(x) Polysulphones(xi) Polystyrene resins2. Polyvinyl Chloride resins 150 per centad valorem3. Omitted4. All others, except polyester chips 100 per centad valorem---

It is not necessary to reproduce the Customs Notification 127/84, dated 11th May, 1984, because the said Notification relates to auxiliary duty of customs. It is not the case of the appellant, nor it is the case of the respondents that any auxiliary duty is levied on the goods in question imported by the appellant. The wordings contained in the aforesaid two Notifications dated 2-8-1976 and 1-3-1983 both as amended would make it clear that what is exempted is the duty of customs. The relevant words in the first Notification are as follows :

'..... from so much of that portion of the standard rate of duty of customs specified in the said First Schedule with respect to the aforesaid goods read with any other Notification (for the time being in force) issued with respect to such goods under sub-section (1) of section 25 of the Customs Act, 1962, but not including the notification of the Government of India in the Department of Revenue and Banking (Revenue Wing).... as is specified in column (4) of the said Table.'

In column 4 of the Table relating to item 6, the exemption is granted to the extent of 50% of the standard rate of duty. The second Notification dated 1-3-1983 also is similarly worded. The item concerned is item 2, viz., Polyvinyl Chloride Resins. The rate of duty is mentioned 150 per cent ad valorem. The exemption is in excess of 150 per cent ad valorem.

6A. Section 2 of the Customs Tariff Act, 1975 provides the duties specified in the Schedule to be levied and the rates at which duties of customs shall be levied under the Customs Act, 1962 as specified in the First and Second Schedules. Section 3 of the Act deals with levy of additional duty equal to excise duty. No doubt, as held by the Supreme Court in Khandelwal Metal & Engg. Works v. Union of India : 1985(20)ELT222(SC) , the additional duty is also a duty of customs and it is leviable under Section 12 of the Act and Section 3 of the Customs Tariff Act, 1975 only provides the measure of calculation of the additional duty, but, nevertheless, whenever there is a Notification issued giving exemption in the levy and collection of duty of customs, unless the Notification mentions the exemption as relating to additional duty with respect to Section 3 of the Customs Tariff Act and Annexure I to the First Schedule to the said Act, it is not possible to extend such exemption to the additional duty of customs, even though the additional duty is also a duty of customs and the exemption Notifications relating to [sic] statutes are to be read strictly and in the context in which they are issued. In the aforesaid decision, the Supreme Court was not called upon to pronounce as to the exemption Notification in question in that case exempted from payment of additional duty. The question considered was as to whether the additional duty was a countervailing duty and it was held that it was not a countervailing duty and it was a duty of customs, but the appellant therein did not seek a decision as to whether under the exemption Notification, it was entitled to the same benefit of exemption in respect of additional duty, as it was available to it in respect of payment of duty of customs. The said decision arose out of a Division Bench decision of the High Court of Calcutta reported in Khandelwal Metal and Engg. v. Union of India and Others : 1983ECR91D(Delhi) . In that case, two reliefs were sought. The first related to a claim that for the import made by the petitioner therein, it was only liable to pay duty of customs at the rate of 40%, because they were governed by Notification No. 97 of 26-6-1977. However, the Department contended that the duty of customs was payable at the rate of 80% because according to them, the petitioner therein was governed by the second Notification No. 156 of 16-7-1977. The other dispute related to the challenge by the petitioner therein to pay additional duty of customs at the rate of Rs. 3,300/- per metric ton. The other dispute referred to above was covered by point No. 3 raised in that decision which was as follows :-

'Is the levy and collection of additional duties of customs under Section 3 of the Customs Tariff Act, 1975 on the brass scrap imported by the Petitioner No. 1 valid ?'.

Point No. 3 was held against the petitioner therein and it was held that the levy and collection of additional duty of customs under Section 3 of the Tariff Act on the petitioner was valid. On the first point, it was held that it was the Notification No. 156 dated 16-7-1977 which governed the case. Ultimately, the writ petition was dismissed. The respondents were given the liberty to take any appropriate step as advised to realise the amount of duty from the petitioner therein in terms of the bond and or bank guarantee and to encash the same, which were furnished to them and to proceed against the petitioner in any way they deemed proper and in accordance with law. It was this judgment which was confirmed by the Supreme Court in the aforementioned case. The Supreme Court summed up the conclusions thus :-

'We may sum up our conclusions thus :-

(i) The charging section under which duties of customs are leviable is Section 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975.

(2) Additional duty which is mentioned in Section 3(1) of the Customs Tariff Act, 1975 partakes of the same character as the Customs duty since it is in addition to the duty which is leviable under Section 12 of the Customs Act, 1962, the rates for which are prescribed by Section 2 of the Tariff act, 1975. The duty mentioned in Section 3(1) of the Tariff Act, 1975 is not countervailing duty.

(3) Section 3(1) of the Tariff Act, 1975 provides a measure of the additional duty, which has to be equal to the excise duty leviable on a like article if produced or manufactured in India, as defined in the Explanation to that section. The measure of a tax or duty cannot determine its nature or character.

(4) The brass scrap which is imported into India by the appellants is liable to the levy of additional duty mentioned in Section 3(1) of the Tariff Act, 1975, because the taxable event is the import of the goods into India and not their manufacture.

(5) The duty referred to in Section 3(1) of the Tariff Act, 1975 is, therefore, leviable even if the goods imported into India are not capable of being manufactured in India or are not in fact manufactured in India.

(6) The expression 'excise duty for the time being leviable on a like article if produced or manufactured in India' which occurs in Section 3(1) of the Tariff Act, 1975 means excise duty for the time being in force which would be leviable on a like article, if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs.

(7) Even if the duty referred to in Section 3(1) of the Tariff Act, 1975 is regarded as in the nature of a countervailing duty, the brass scrap imported by the appellants would still be liable to the levy of that duty. The reason is that scrap or waste is a by-product of manufacture and is, an integral part and an inevitable incident of the manufacturing process. Brass scrap is manufactured or happens to be manufactured in India. It is well known as a marketable commodity, both of Indian

and foreign origin.................'

Thus the Supreme Court specifically ruled that brass scrap which was imported into India by the appellant, was liable to the levy of additional duty mentioned in Section 3(1) of the Customs Tariff Act, 1975, because the taxable event was the import of goods into India and not the manufacture. Accordingly, the Supreme Court dismissed the Special Leave Petition and confirmed the judgment of the High Court. Therefore, it is not possible to agree with the contention of the learned counsel for the appellant that Supreme Court in Khandelwal Metals' case : 1985(20)ELT222(SC) has ruled that once there is a Notification exemption from the customs duty leviable as per the rates prescribed under the First Schedule, such exemption would also apply or extend to the additional duty of customs, which is levied under Section 3 of the Customs Tariff Act and Annexure-I to the First Schedule.

7. We also receive support to our view from a Full Bench decision of the Bombay High Court in Apar Private Ltd. v. Union of India : 1985(22)ELT644(Bom) in which one of the questions considered was whether the countervailing or additional duty payable under Section 2A of the Indian Tariff Act, 1934 or under Section 3 of the Customs Tariff Act, 1975, was customs duty referred to in the charging section, viz., Section 12 of the Customs Act, 1962 and if so it was exempted on exemption of basic customs duty. It was held that it was also a customs duty levied under Section 12 of the Customs Act, but it was not exempted in the absence of specific exemption from the additional duty. It was held thus :

'When exemption is granted by the Central Government under Section 25(1) of the Customs Act, that can operate only in respect of such duty as is specifically mentioned in the particular notification. A notification under Section 25(1) exempting goods from levy of basic customs duty cannot by itself exempt such goods from the levy of countervailing duty or additional duty leviable under the Tariff Act or the Customs Tariff Act, 1975. Merely because goods are exempted from levy of basic customs duty leviable under Section 12 of the Customs Act, it does not follow that they are also exempt from levy of countervailing duty or additional duty, nor does exemption from levy of countervailing duty or additional duty, wholly or partially, result in exemption of the goods from the levy of basic customs duty, wholly or partially. As exemption granted from the levy of basic customs duty under Section 25(1) read with Section 12 of the Customs Act does not by itself operate as exemption from the levy of countervailing duty or additional duty under the Tariff Act or the Customs Tariff Act, goods imported, even though exempted from basic customs duty, may still be subject to the levy of additional duty under the respective enactments and they would be so subject unless and until they are specifically exempted by the Competent Authority in exercise of the powers vested under those respective enactments from such additional duty.'

Therefore, we are clearly of the view that the Notification relied upon do not refer to any such additional customs duty as such they cannot be construed as extending exemption to additional customs duty.

8. Learned counsel for the respondents placed reliance on a decision of the Supreme Court in Thermax Pvt. Ltd. v. Collector of Customs (Bombay) : 1992(61)ELT352(SC) . It may be pointed out that in the said decision, the question of the nature raised in the instant case was not raised, therefore, we find it difficult to apply the said decision.

9. In Modi Rubber Ltd. v. Union of India and Others : 1983(12)ELT24(Del) , it was specifically pointed out that the scope, effect and the operation of the Notification dealing with the exemption has to be judged by the words employed in exemption notification, therefore the Court cannot aid the Competent Authority by adding to or by amending or by construction making up the deficiencies in the language by going into the object, which the Authority had in mind. It was also further held that the words used in the said Notification must be construed in their ordinary and natural meaning and as such, the exemption dependent on the duty of excise on the manufacture or production of goods in the said case, which was termed as the basic duty of excise or special duty of excise or additional duty or auxiliary duty, to the extent indicated would be the sum total of the duty of excise leviable under all statutory provisions. Therefore, the decision turned upon the words contained in the said Notification. Hence, we find it difficult to hold that the said decision against the appellant in any manner.

10. In Government of India v. Madras Aluminium Co. Ltd., Coimbatore : 1981(8)ELT892(Mad) , a Division Bench of this Court held that :

'The regulatory duty is in the form of surcharge on the excise duty and should be treated as part of the excise duty, therefore the duty leviable and referred to in the Notification dated 24-5-1971 takes within it, the regulatory duty and the additional regulatory duty leviable. In other words exemption notification will apply not only to the basic duty payable but also to regulatory duty.'

It may be pointed out that the decision turned upon the wordings contained in the Notification. Therefore, it is not possible to apply the same to the present cases.

10A. For the reasons stated above, the appeals are dismissed. However, there will be no order as to costs. The C.M.P. is also dismissed.