(2010) 03 CAL CK 0079

In the Calcutta High Court

Case No : Writ Petition No. 748 of 2006

Atherton Engineering Co. (Pvt.) Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Citation : (2010) 2 CALLT 369 : (2010) 175 ECR 79 : (2010) 256 ELT 358

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : R.K. Chowdhury, for the Appellant;

Judgement

I.P. Mukerji, J.—This writ challenges a final order dated 2nd March 2006, passed by Customs, Excise and Service Tax Appellate Tribunal, EZB. This final order was passed by a majority of 2:1.

2. This writ application was moved before the Court on 9th June, 2006. Directions for filing affidavits were made. No affidavit in opposition is available in the record, though I find an affidavit-in-reply has been filed. This goes to point that a copy of the intended affidavit-in-opposition was served by the respondents upon the petitioner but the affidavit-in-opposition was never filed in Court. The matter appeared in my list for hearing on 25th February, 2010. At the second call the matter was heard in part and was adjourned by me to enable the respondents to appear. I directed the Counsel for the petitioner to serve a notice upon the respondents. This notice was duly served, according to the records. On the adjourned date, even at the second call none appeared for the respondents. In those circumstances I proceeded to decide the matter on the available materials.

3. The dispute arose in this way. The writ petitioner is an importer. During October 1998 to February 2001 it imported several consignments of a product called ?Artemia Cyst (Brine Shrimp eggs)?. The dispute is about classification. The petitioner described and declared this product as ?prawn feed?. On this basis

these goods were assessed by the customs provisionally by accepting a bank guarantee as security for the duty that may be finally assessed. If the goods were classified by the customs as ?prawn feed? there was duty exemption before the 1999 budget and only 5% basic duty after that.

4. The directorate of revenue intelligence intervened sometime in 1999. They said that these goods were not ?prawn feed? at all. They were to be classified differently attracting a higher rate of duty. If the goods are classified as ?prawn feed? the applicable head for charging customs tariff is 2309.90 under the Customs Tariff Act 1975. According to customs it would fall under the heading 0511.99 under the said act, and were not ?prawn feed? at all. These cysts had to be incubated in controlled temperature and oxygen and hydrated in hatcheries and after this incubation period one would get an organism known as Nauplii. These Nauplii is the food for prawn. Therefore, according to them these imported goods have to undergo some "processes" to become ?prawn feed?. Therefore, there was mis-declaration of goods and the writ petitioner would have to face the consequences of it.

5. Mr. R.K. Chowdhury for the petitioner has principally/ made the following submissions:

a) Provisional assessment was made on or about 15th April, 1999 but no final assessment was ever made.

b) The show cause notice was issued on the basis of provisional assessment.

c) This show cause notice was adjudicated on the basis of evidence at the time of provisional assessment.

d) The product imported were eggs with a live organism or embryo. This live organism or embryo upon nurturing and incubation became prawn feed. It was always prawn feed, at its infant stage and the product after nurturing and incubation was not something different from the product imported.

e) Test reports during provisional assessment are not made available. Writ petitioner did not have adequate opportunity to substantiate the contention in (d) supra.

6. Mr. R.K. Chowdhury on behalf of the petitioner has cited Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., . In that case the question before the Supreme Court was whether the assessee?s business of hatcheries was production or not for the purpose of availing of investment allowance under the Income Tax Act, 1961. In that case the Supreme Court held that the assessee did not contribute to the formation of chicks. The formation of chicks was a natural and biological process over which the assessee had no hand or control. The assessee was helping the natural and biological process of giving birth to chicks. The birth of chicks was an "event of nature".

7. He has also cited Commnr. Central Excise and Customs, Mumbai and Others

Vs. I.T.C. Ltd. and Others, which was a central excise case. He argued on the basis of that decision that liability to pay alleged short-paid duty arose only upon completion of assessment.

Discussion and reasons:

8. The goods are classified according to their description, in the schedules appended to the said Act. This classification is made because according to the Act different kinds of goods are exigible to different rates of duty. A particular use of the goods may also be suggested in the classification so as to determine the rate of duty charged. Any person who makes an estimation of duty chargeable has to first classify the goods properly. If a particular use of a product is indicated whether that use can be had of that particular imported product has also to be seen. Essentially, classification of goods reflects the policy of the legislature as to the amount of duty to be charged for particular goods. In interpreting this classification one should not take a very pedantic or bureaucratic approach. Sometimes the description of the goods mentioned in the tariff schedule is plain and simple. If the ordinary meaning of the words of description is taken, the description covers certain goods only. No second interpretation is required if particular goods fulfill or do not fulfill that particular description. But sometimes the description of the goods is such that the purpose of the legislature has to be ascertained. As in the case of statutory interpretation if a plain and ordinary meaning of the words provides complete meaning of a statute or a part of it recourse need not be taken to other aids. Similarly in the case of classification of goods if the plain and simple meaning of the words can classify the goods the goods have to be classified accordingly. But sometimes the classification of the goods permits an investigation into the purpose of the legislature in fixing a duty for particular goods as well the purpose for which the goods are used. In this particular case we are concerned with the interpretation of the words ?prawn feed.? What is to be considered here is the use of the product. One has to see whether it can be used as such product. I do not think it really matters if a product undergoes some change after importation till the time it is actually used provided it remains the same product and it is used for the purpose specified in the classification. For example, if mangoes were classified as a product, I think if raw mangoes were imported and subsequently by some process there was a change in the condition, i.e. ripeness the product would still be classified as mango. This is because the essential nature and character of the product remains the same. In this case it is essential to determine whether the nature and character of the product remains the same.

9. Here, the contention of the writ petitioner is that these imported cysts contained little organisms or embryos which later became larva that prawns feed on. From this cystic stage this little organism is nurtured and incubated till it grows and attains proper form and shape to be fed to prawns. Therefore, according to them the nature and character of this product is not changed by nurturing or incubation. The product remains the same.

10. The imported product was desired to be classified by the importer under the heading 2309 which includes products used as animal feed. According to them prawn feed fitted the description. According to the customs this products was classifiable under the heading 0511.99 which refers to other products in the category of non edible animal products.

11. The tribunal has passed this decision, based on the decision, with regard to importation of Brine Shrimp eggs of the Mumbai Bench of the same tribunal in 2001 (74) ECC 217 The tribunal has drawn further support from the order of the Supreme Court dated 04.04.2002 dismissing the civil appeal against the order of Mumbai Bench to the tribunal. The order of the Supreme Court as reproduced by the tribunal reads:

We have heard the learned Counsel for the appellant. We find no merit in the appeal. The civil appeal is dismissed with costs.

12. It should be remembered that the above decision of the Supreme Court is the final decision on the particular consignment in issue between the parties involved in that litigation. I do not read that Supreme Court decision as an authority for the proposition that any product imported and declared as Brine Shrimp eggs would necessarily have to be classified in the ?other category? under the heading 0511 for reasons given by me below.

13. It is the categorical case of the writ petitioner that these goods which were imported by them were fertilised eggs. They contained embryos or little organisms enclosed within the cysts, which upon incubation in controlled temperature and hydration would become larvae which could be used as prawn feed, it is submitted.

14. If there is an embryo within the egg, then there is a living organism within it. Upon such incubation the living organism merely grows, it does not change its nature and character. If there is no embryo within the eggs then there is no living organism and these eggs cannot be used as prawn feed.

15. I am of the opinion that if an embryo is within an egg and it is subsequently incubated in controlled temperature and under hydration, the larvae which are subsequently born do not assume the character of any different product but remain in nature and characteristics the same product or organism which is within the egg. Therefore, if the eggs did contain an embryo they could be classified as feeding materials for prawns and ought to have been so classified. These embryos may not be proper prawn feed at the time of importation but could become so, after incubation. Refusing to classify the product as prawn feed on this basis is not reasonable. In deducing the above principle I have taken a lot of guidance from the case of Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., .

16. Therefore, in the circumstances there has to be a factual enquiry which has not been done.

17. I do not agree with the submissions of Mr. R.K. Chowdhury that the order of the Commissioner could not have been passed without assessment. In my opinion, such an order is in the nature of an assessment. But nevertheless, such order has been passed without making available the test report of the provisional assessment to the writ petitioner or by considering any material, whether from the seller?s invoice or other materials available from the seller or elsewhere, regarding the exact nature of the goods. The pointed fact of enquiry should have been whether the imported goods contained an embryo or a live organism. This factual enquiry ought to have been made upon notice to the writ petitioner and after giving them an opportunity to counter the evidence of the revenue and to produce his own evidence in support of his contention.

18. For those reasons, the order of the tribunal dated 02.03.2006 as well as the order or the Commissioner dated 06.11.2002 are set aside. The Commissioner of Customs (Airport and Administration) is directed to rehear and re-decide the matter in accordance with the above observations within a period of 12 weeks from the communication of this order. The writ application is allowed.

19. Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

20. All parties to act on a signed photocopy of the operative portion of the judgment/order passed by me on 10.03.2010.

