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In the Delhi High Court

Case No : Civil Writ No. 3563 of 1982

Bhartiya Plastic Udyog and another — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 07-01-1983

Acts Referred:

Citation : (1983) 5 DRJ 332 : (1983) 12 ELT 661 : (1983) RLR 261

Hon'ble Judges : Prakash Narain, J;B.N. Kirpal, J

Bench : Division Bench

Judgement

B.N. Kirpal, J.—The common question which arises for consideration in this and the connected writ petitions, which are being disposed of by this judgment, is regarding the Constitutional validity of section 3(1) of the Customs Tariff Act, 1975 (hereinafter referred to as ''the said Act'').

2.The petitioners are importers of various items from abroad. The petitioners of Civil Writ No. 3563 had imported acrylic plastic scrap. Civil Writ No. 3678 is concerned with import of ball bearings, while in C.W. Nos. 3663 and 3645 the items which are imported by the petitioners are blank video cassettes. There is no dispute regarding the validity of the import. On the goods arriving in India the petitioners filed the bills of entry. The Customs Authorities required the petitioners to pay the customs duty and, in addition thereto, have also asked the petitioners to pay duty levied u/s 3(1) of the said Act. This duty has been calculated not on the C.I.F. value of the goods but on their assessable value as arrived at in accordance with the terms of section 3(2) of the said Act.

3. As already noted above, the principal contention of the petitioners is that the provisions of section 3 of the said Act are ultra virus and, Therefore, the aforesaid duty, levied u/s 3(1), cannot be collected from the petitioners. Though other contentions were raised in the petitions, except in C.W. 3678, the only contention argued was regarding the validity of the said provision.

4. Before noting the rival contentions, it is necessary to refer to the impugned

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provision. Customs Tariff Act, 1975 was enacted with a view to consolidate and amend the law relating to customs duty. While section 2 of the said Act provides that duties of customs shall be levied under the Customs Act, 1962 at the rates which are specified in the First and the Second Schedule of the Customs Tariff Act, 1975, section 3 of the said Act imposes a levy of additional duty. The said provision reads as under :-

"3. (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 if 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.

(2) For the purpose of calculating under this section the additional duty on any imported article, where such duty is livable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of -

(i) the value of the imported article determined under sub-section (1) of the said section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article u/s 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the duty referred to in sub-section (1)."

Sub-section (1) of section 3 thus provides for the levy of a duty on an article which is imported into India in addition to the customs duty which is levied under the Customs Act, 1962. Sub-section (2), inter alia, states that the value of the imported article, on which the duty is to be levied, shall be the aggregate of the value of the imported article or the tariff value, fixed under sub-section (2) of section 14, plus any customs duty which is livable thereon and also any sum which may be chargeable under any law for the time being in force as an addition to, and in the same manner as, a duty of customs.

5. The main attack on behalf of the petitioners was directed against section 3(2) of the said Act. It was contended by Shri Sorabjee, on behalf of the petitioners,

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that the said Act has been enacted by the Parliament in exercise of its powers under Entry 83 of List I of the 7th Schedule to the Constitution of India. Under the said Entry 83, it is submitted by the learned counsel, customs or import duty can be levied only on the importation of goods. The value of goods on which the import duty can be levied is to be the value at the time and place of importation. The further submission was that, for the purposes of calculating the value of the goods, on which import duty is to be levied, the value of the goods cannot be increased by super-imposing thereon any post-importation charges. In other words, it was submitted, duty under Entry 83 of List I of the 7th Schedule cannot be levied on post-importation charges. According to the learned counsel the taxable event occurs the moment the goods, which are imported, cross into the territorial waters of India. Duty on the same can be levied on the value of the goods at that time and, it is contended, post-importation expenses cannot be taken into consideration when ad valorem duty is to be imposed on the value of the goods imported. According to the learned counsel the valuation, for the purposes of levy of duty under Entry 83, can only be importation cost and profit. It was submitted that section 3(2) contemplates the valuation of the imported articles to be the value of the import plus the customs duty and the levy u/s 3(1) is, Therefore, not only on the value of the article but also on the customs duty. According to the petitioners the customs duty, which is to be added to the value of the imported article u/s 3(2) of the said Act, is a post-importation expense and, Therefore, the Parliament could not levy import duty on the post-importation expense and consequently section 3, and section 3(2) in particular, is ultra virus the legislative power of the Parliament.

6. The learned counsel for the petitioner elaborated his argument by referring to the various provisions of the Central Excises and Salt Act, 1944. It was contended that, as far as this Court is concerned, it has consistently taken the view that excise duty is a duty on the manufacture of the goods, and for the purposes of calculating the excise duty post-manufacturing expenses are to be excluded. According to the learned counsel, excise duty is levied under Entry 84 of List I of the 7th Schedule and, just as levying excise duty on post-manufacturing expenses would be beyond its legislative competence, similarly under Entry 83 of List I levy of import or customs duty on post-importation expenses would also be beyond the legislative competence of the Parliament.

7. On behalf of the respondents, the learned Solicitor General has contended that the impugned provisions are not beyond the legislative competence of the Parliament under Entry 83. In the alternative, it is submitted that even if under Entry 83 such a provision could not be enacted the Parliament, nevertheless, had the power under Article 248 and Entry 97 of List I to the 7th Schedule to enact such a provision.

8. This Court in the case of Hindustan Milkfood Manufacturers Limited v. Union of India and others 1980 E.L.T. 487 has taken the view that excise duty is intended to be a tax on the value of the goods reflected in the manufacturing cost, and is

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not intended to include within its purview any selling cost or selling profit. According to the learned counsel for the petitioners, this is the nature of excise duty as contemplated by Entry 84 of List I. Similarly, it was submitted, under Entry 83 the valuation for the purposes of levy of import duty can only be the importation cost, and post-importation expenses could not be taken into consideration while valuing the article for the purposes of levy of any duty as contemplated by Entry 83.

9. It is not necessary, in our opinion, to go into the question as to whether duty can be levied, in terms of Entry 83 of List I, on imported goods by adding to the value of the same any post-importation expenses. For the purposes of the present petitions we may assume that post-importation expenses cannot be so added. In our opinion however, the customs duty which is payable on the import goods, and which is taken into consideration u/s 3(2) for the purposes of valuing the imported articles for the levy of duty u/s 3(1), cannot be regarded as a post-manufacturing expense.

10. There can be no quarrel with the proposition, and indeed it is now well-settled, that the taxable event in the case of customs duty is the importation of the goods. (See In re, Sea Customs Act, S. 29(2), AIR 1963 SC 1760). The duty is essentially on the act of importation of the goods. Mr Sorabjee is right in his contention that the taxable event occurs, and the import duty becomes payable, the moment the goods enter the territorial waters of India. It is no doubt true that import duty levied under the Customs Act, 1962 may be realised only on the clearance of the goods, but it becomes subject to the levy of duty the moment the taxable event occurs, namely, when the goods cross the territorial waters into India.

11. The levy of import duty occurs simultaneous to the import of the goods. It is a levy on importation and not after importation. A post-importation expense would be an expense which is incurred after the goods have been imported into India. The customs duty levied under the Customs Act is an expense incurred on the goods being imported and is a charge at the time of importation. The customs duty under the Customs Act, in other words, is not a post-importation expense. Just as, under the Excise Act, all expenses relatable to the manufacture of goods are characterised as manufacturing expenses, similarly all expenses or charges connected with the import of the goods can legitimately be characterised as importation expenses. One such expense is the levy the goods cannot be permitted to be cleared. After all the purpose of import is to see that the imported goods join the mass of goods for domestic consumption. A post-importation expense, in other words, can only be such expense which is incurred by an importer after the import has been completed and after he has cleared the goods for home consumption. Just as under the Excise Act the post-manufacturing expenses are those which are really in the nature of selling expenses or not relatable to the manufacture of goods, similarly under the Customs Act and the Customs Tariff Act the post-importation expenses are those

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which are to be in the nature of selling expenses or not relatable to the import of goods. The import duty which is paid adds to the cost of the imported goods. It is only after the same has been paid that the importer can utilise the imported goods. Without paying the said duty, an importer cannot get physical possession of the goods imported by him. In such circumstances it is not possible to hold that the import duty which is payable is a post-importation expense. The same is an importation expense.

12. The duty u/s 3(1) is also, like the duty under the customs Act, 1962, attracted at the time when the taxable event takes place, namely, at the time when the imported goods cross the customs barrier. In our opinion the adding of the customs duty, livable under the Customs Act, 1962, to the value of the imported goods and thus arriving at the aggregate value, on which duty is livable u/s 3(1) of the Act, was clearly within the legislative competence of the Parliament under Entry 83 of List I of the 7th Schedule. Under the said entry, duty could be levied on the value of the goods imported. We have already expressed the opinion that the customs duty levied under the Customs Act, 1962 is not a post-importation charge. This being so, there can be no impediment to the customs duty being added to the value of the imported article for the purposes of determining the assessable value on which duty u/s 3(1) of the said Act can be levied.

13. There is another way of looking at the problem. What is the pith and substance of the impugned levy ? This can best be understood by an illustration. Supposing the value of the goods imported is Rs. 1000/- and the customs duty payable thereon is Rs. 100/- and the rate of the impugned levy, we may assume to be 10 per cent, then u/s 3 of the Tariff Act the Additional tax of 10 per cent will be calculated on Rs. 1100/-. (Rs. 1000/- being the value of the goods plus Rs. 100/- being the customs duty thereon). This charge of 10 per cent, to put it differently, can be split into two portions the first portion is a charge of 10 per cent on the value of the goods, namely on Rs. 1000/- and the second portion is 10 per cent on the customs duty of Rs. 100/-. It cannot be disputed that, under Entry 83, the Parliament was and is empowered to increase the rate of customs duty. In effect, Therefore, in the aforesaid illustration, it can be said that there has been an increase of customs duty by 10 per cent. The levy of 10 per cent on the element of customs duty, namely on Rs. 100/-, can easily be regarded as being a surcharge on customs duty. It is true that in the case of customs duty surcharge may not be livable under Article 271 of the Constitution, because the surcharge referred to therein can only be with regard to those duties or taxes which are specified under Articles 269 and 270 of the Constitution of India. Nevertheless, as held by the Supreme Court in H.H. Shri Vishwesha Thirtha Swamiar and Others Vs. The State of Mysore and Another, , a surcharge is nothing more than an additional tax of the same nature on which the surcharge is imposed. In the aforesaid case land revenue was payable and surcharge on the lands was sought to be imposed on the land revenue. The question arose whether the State Legislature had competence to levy the surcharge. The

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contention of the petitioners therein was that surcharge was nothing more than a tax on land revenue. Repelling this contention, it was observed by the Supreme Court as follows :-

"It seems to us that the surcharge fell squarely within Entry 45. The legislation is but an enhancement of the land revenue by imposition of surcharge and it cannot be called a tax on land revenue, as contended by the learned counsel for the appellant. It is a common practice among the Indian Legislatures to impose surcharge on existing tax. Even Article 271 of the Constitution speaks of a surcharge for the purpose of the Union being levied by way of increase in the duties or taxes mentioned in Article 269 and Article 270."

Similarly, in the present case also, the impugned levy is nothing more than additional customs duty on the principal value of the goods imported plus a surcharge on the customs duty livable thereon. The impugned levy is, Therefore, a levy of customs duty and of the nature as contemplated by Entry 83 of List I of the 7th Schedule of the Constitution.

14. Even if it be assumed that the impugned levy u/s 3 of the said Act is a duty on post-importation charge the impugned legislation cannot still be held to be invalid. The contention of the petitioners is that customs duty, as contemplated by the said Entry 83, can only be a duty on the import of the goods but the impugned duty is also a levy on post-import charges and, as such is beyond the legislative competence of the Parliament. It was submitted that the impugned levy is essentially relatable to Entry 83, and it must conform to the inherent limitations and requirements of the nature and character of the duty or tax in the Entry to which it relates. The duty u/s 3(1), it was submitted, is a type of customs duty and, in order to be valid, it can be enacted only in terms of Entry 83 and be of that type.

15. We are unable to agree with the aforesaid submissions. By virtue of the provisions of Articles 246 to 248 and of the Lists in the 7th Schedule, the Parliament and Stage Legislatures can legislate regarding any matter under the sun, provided that any such legislation does not conflict with the fundamental rights. As far as the Parliament is concerned, as provided by Article 248 of the Constitution, it has the exclusive power to make any law in respect of any matter which does not fall in the State List of Concurrent List. Sub-Article (2) of Article 248 gives the Parliament the express power of enacting laws for the imposition of taxes not mentioned in either the Concurrent or the State List. The Lists in the 7th Schedule demarcate the field of legislature. The power to legislate is contained in Article 246 and 248 of the Constitution. In this regard, the Supreme Court in a recent decision in the case of S. P. Mittal v. Union of India and Others, Writ Petition No. 5879 of 1980 observed as follows :-

"It may be pointed out at the very outset that the function of the Lists is not to confer powers. They merely demarcate the legislative fields. The entries in the three Lists are only legislative heads or fields of legislation and the power to

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legislate is given to appropriate legislature by Articles 245 and 248 of the Constitution."

16. Reference may also be usefully made to the following observations from a majority judgment in the case of Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, :-

"It seems to us that the function of Article 246(1) read with Entries 1 - 96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words "any other matter" occurring in Entry 97, List I to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words "any other matter" has to be used because Entry 97, List I follows Entries 1 - 96, List I. It is true that the field of legislation is demarcated by Entries 1 - 96, List I, but demarcation does not mean that if Entry 97, List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is : Is the matter sought to be legislated included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III : No question has to be asked about List I. If the answer is in negative then it follows that Parliament has power to make laws with respect to that matter or tax."

17. The learned counsel for the petitioners sought to distinguish this case by contending that there may be a tax which squarely falls in one of the Entries in List I, while some of the provisions of the statute may be inconsistent with or ultra virus the Entry under which such tax falls, and in such a case the dictum in H. S. Dhillon''s case will not apply. We are unable to agree with this submission. The aforesaid observations of the Supreme Court are clear and unequivocal. A law which contains various provisions, some of which fall under one of the Entries in List I and some of which do not, would still be a valid law enacted by the Parliament in exercise of its powers under Article 248 and Entry 97 so long as that law does not impinge on any of the fundamental rights or does not transgress the legislative power of the State Legislature. Article 248, and sub-Article (2) in particular, clearly gives the Parliament legislative competence to enact the impugned law. It was also submitted by the learned counsel that Dhillon''s case is possibly being re-considered by a large Bench of the Supreme Court. As far as this Court is concerned, the law enunciated by the Supreme Court in Dhillon''s case is binding and it is not open to the petitioners to contend that the same should be disregarded by us.

18. The Parliament, while enacting, makes no reference to any Entry in any of the Lists. Any law made may fall under several Entries and the same would be legislatively valid. It will be immaterial as to what nomenclature is given to a duty or tax which is imposed by an enactment. Merely because the impugned

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duty is labelled as a customs duty or an import duty does not necessary mean that it must have all the characteristics of a customs duty as alleged to be envisaged by Entry 83. There is nothing in the Constitution which prevents the Parliament from exercising its jurisdiction under Article 248 of the Constitution and Entry 97 of List I of the 7th Schedule and imposing a tax or duty on tax. It may be that the impugned levy is not the type of customs duty as envisaged by Entry 83, but then it can be regarded as a sort of non-descript tax, which for convenience sake is called customs duty, and is imposed on the aggregate value of the goods in the manner calculated u/s 3(2) of the Act. Such a levy, in our opinion, would be within the legislative competence of the Parliament. The Solicitor General, in this regard, rightly placed strong reliance on a Supreme Court decision in the case of Jullunder Rubber Goods Manufacturers'' Association Vs. The Union of India (UOI) and Another, . In that case the validity of the levy of rubber cess imposed u/s 12 of the Rubber Act, 1947 was challenged. The petitioners therein were manufacturers of chappals but were stated to use about 15 to 20 per cent of rubber in the process of their manufacture, while the rest of the material used by them consisted of various other articles. The cess u/s 12 of the said Act was sought to be recovered from them. This recovery was challenged and the following submission was raised before the Supreme Court :-

"The contention raised on behalf of the appellant-association is that under Entry 84 of List I in the Seventh Schedule to the Constitution the duties can be levied on goods manufactured or produced in India. Excise duty, it is pointed out, can be levied only on the actual producers and manufacturers of rubber but in the very nature of such duty it could not be imposed on users or consumers of that commodity. It is suggested that sub-section (1) of Section 12 is the charging section and sub-section (2) provides for the machinery for levy and collection of tax. But sub-section (2) cannot alter the substantive provision in the charging sub-section (1) and since the Parliament has employed the words "duty of excise" which have well understood meaning the incidence of tax would fall only on the actual producers. Once the incidence of tax was shifted to the users the tax would cease to be one which would fall within Entry 84."

This contention was repelled by the Supreme Court and it was observed as follows :-

"It seems to us that if the provisions of Entry 97 in List I in the 7th Schedule as also the provisions of Article 248 of the Constitution are kept in view the Parliament would have legislative competence even with regard to the imposition of a tax which does not fall within Entry 84. It will be a kind of non-descript tax which has been given the nomenclature of a duty of excise. Counsel for the appellant-association quite properly has not challenged this position but has merely sought to lay emphasis on sub-section (1) being the charging section. We find it difficult to endorse the reading of sub-section (1) and sub-section (2) of section 12 in isolation. Not only the statute but also the section have to be read as a whole and together and in our judgment whatever be the nature of duty

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Parliament would undoubtedly have legislative competence under Entry 97 of List I in the Seventh Schedule read with Article 248 of the Constitution."

The aforesaid observations are clearly applicable to the present case. Even if it be assumed that the impugned levy is not of the type contemplated by Entry 83 of List I of the 7th Schedule, nevertheless, the Parliament did have the power under Article 248 and Entry 97 of List I to enact the impugned provision, especially when the petitioners have not been able to show that the impugned levy falls under any of the Entries of the List II or III of the 7th Schedule.

19. It was next contended by the petitioners that the landing charges incurred could not be included in arriving at the value of the goods, for the purposes of the levy of the impugned duty. The submission was that landing charges are in the nature of post-import expenses and there can be no levy on that. Apart from the fact that we have held that the impugned provision has been validly enacted, by virtue of the Parliament''s legislative power under Article 248 and Entry 97, the question in issue is no longer rest integra. This Court in the case of M/s. Super Traders v. Union of India and others, Civil Writ No. 2131 of 1982, decided on 23rd September, 1982 - 1983 E.L.T. 258 has repelled such a contention after holding that the landing charges are not post-importation expenses. In view of the aforesaid decision the submission of the petitioners must fail.

20. In Civil Writ No. 3678 of 1982 there is also challenge to the decision taken by the Directorate General of Technical Development and contained in its letter dated 19/22nd October, 1982. By Customs Notification No. 175/81-Cus., dated 25th July, 1981 the components required for the manufacture of heavy commercial vehicles, medium commercial vehicles etc. were exempted from some portion of the excise duty livable under the First Schedule to the Customs Tariff Act, 1975 as well as from the whole of the additional duty livable u/s 3 of the said Act. This exemption was available subject to three conditions being fulfilled .These conditions were as follows :-

"(i) the exemption contained herein shall be applicable only to those components and the goods other than basic raw materials required for the manufacture of such components which are covered by lists certified both by the Industrial Adviser or Additional Industrial Adviser of the Directorate General of Technical Development of the Ministry of Industry and the Development of Heavy Industry;

(ii) the importer should produce evidence to the Assistant Collect of Customs at the time of clearance of the components or the goods that they have a programme duly approved by the Ministry of Industry and the Industrial Adviser or Additional Industrial Adviser of the Directorate General of Technical Development of the Ministry of Industry for the manufacture of such motor vehicles for the transport of persons, goods or materials or of tractors or for the manufacture of components for such vehicles, as the case may be; and

(iii) the importer shall, within such period as the Assistant Collector of Customs may specify in this behalf, produce a certificate from the Industrial Adviser or

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Additional Industrial Adviser of the Directorate General of Technical Development of the Ministry of Industry to the effect that the imported components or the goods have been used in the manufacture of motor vehicles for the transport of persons, goods or materials or of tractors, or for the manufacture of such components which have been supplied to the manufacturers engaged in the production of heavy commercial motor vehicles, medium commercial motor vehicles or light commercial motor vehicles or of tractors, as the case may be."

21. The petitioners imported ball bearings of different sizes on behalf of an Export House. The petitioners themselves are not manufacturers of any components in which the ball bearings are used. Nevertheless, on 12-10-1982 the petitioners applied to the Development Officer (Transportation Directorate), Directorate General of Technical Development, New Delhi for the approval of the programme for the manufacture of components to be used in the vehicles mentioned in the said notification. In the application it was, inter alia, stated that ball bearings which are imported would be sold to actual users and as they will ultimately be used in the manufacture of heavy, medium and light motor vehicles and tractors, Therefore, they were entitled to the benefit of the aforesaid Customs Notification and were liable to pay lesser amount of customs duty.

22. By letter dated 19/22nd October, 1982, the Assistant Industrial Adviser, Directorate General of Technical Development informed the petitioners that the benefit of the aforesaid Customs Notification was applicable to the original equipment manufacturers, as also to the ancillary manufacturers, but since the petitioners did not come under any of these categories, Therefore the necessary approval could not be given by the said Directorate. This decision is sought to be challenged in the present petition. In our opinion no fault can be found with the aforesaid reasoning of the Assistant Industrial Adviser. The mere reading of the conditions contained in the aforesaid Customs Notification show that the manufacture of the components, in which the imported article is to be used, is to be by the importer himself and those manufactured components are to be used in the vehicles. In other words, the benefit of the said Customs Notification is available to the actual users and not to an Export House, like the petitioners, who may be importing for sale to actual users. The programme of manufacture which has to be approved by the Industrial Adviser of the Directorate General of Technical Development is to be the programme of the actual user importer and not of any one else. As admittedly the petitioners are not the manufacturers they were not entitled to avail of the benefit of the said Customs Notification.

23. For the aforesaid reasons the writ petitions are dismissed with costs. Counsel''s fee Rs. 1000/- per with petition.

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