
(2016) 08 SC CK 0152

In the Supreme Court Of India

Case No : Civil Appeal No. 3302 of 2008

Commissioner of Central Excise, Ahmedabad

APPELLANT

Vs

M/s Gujarat Ambuja Exports Limited

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Customs Act, 1962 — Section 112, 114A, 28AB

Citation : (2016) AIR(SCW) 3692 : (2016) AIRSC 3692 : (2016) 338 ELT 481 : (2017) 2 GCD 959 : (2016) 8 JT 5 : (2016) 4 KCCR 535 : (2016) 5 RecentApexJudgments(RAJ) 37 : (2016) 7 Scale 603 : (2016) 15 SCC 208

Hon'ble Judges : A.K. Sikri and N.V. Ramana, JJ.

Bench : Division Bench

Advocate : K. Radhakrishnan, Sr. Adv., B. Krishna Prasad, Advocates, for the Appellant; V. Lakshmikumaran, Anandh K., Ms. L. Charnaya, Aditya Bhattacharya, Hemant Bajaj, M.P. Devanath, Abhishek Anand, Advocates, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—The issue involved in the present appeal is whether the respondent/assessee is entitled to avail the benefit of Notification No. 21/2002-Cus dated 01.03.2002 read with Notification No. 66/2004-Cus dated 09.07.2004 for import of crude palm oil (non-edible grade) which is not used in the manufacture of Industrial Fatty Acid whereas the assessee is using the same for manufacturing the refined edible oil.

2. This issue has arisen in the following factual background:

The assessee is the manufacturer of refined edible oil, Vanaspati, cotton yarn, starch, cattle feed, wheat floor etc. It is registered with Kadi Division of the Central Excise. From April, 2002, the assessee engaged itself in refining of various edible oils. During the course of refining, it used to get Palm Fatty Acid Distillate as a by-product which was classified under Chapter Heading No. 38231900 and cleared it duty free claiming the benefit of Notification No.

1175/75-CE dated 30.04.1975. During the period September, 2003 to January, 2004, the assessee imported 1990.031 metric tons of crude palm oil. At that time crude palm oil having Free Fatty Acid (FFA) 20 percent, or more was eligible for concessional rate of duty under Notification No. 21/2002-Cus dated 01.03.2002. No condition was attached to avail that exemption.

3. We are not concerned with this import in the present appeal. Thereafter on 16.01.2004, Notification No. 21/2002-Cus dated 01.03.2002 was amended by Notification No. 20/2004-Cus dated 16.01.2004 wherein the words "for the manufacture of soap" were inserted in the original notification.

4. The assessee imported 8435.816 metric tons of crude palm oil (industrial grade) valued at Rs. 17,15,88,508/- and cleared the same on payment of customs duty of Rs. 3,47,95,453/- (@20% basic + 2% education cess) under Notification No. 21/2002-Cus dated 01.03.2002 read with Notification No. 66/2004-Cus dated 09.07.2004 during the period 12.09.2004 to 12.08.2005. As per the said notification, crude oil (non-edible oil) could be imported by paying customs duty @20% only when the said crude oil is to be used in the manufacture of soap or Industrial Fatty Acid. The assessee in the present case have been manufacturing refined edible oil out of the said crude oil. The assessee did not have facilities for saponification and fat splitting in their factory. The manufacturing process is one of distillation. As a result of this process, a product called "Palm Fatty Acid Distillate" emerges. The assessee after the processing of the imported 8435.816 metric tons of crude oil (non-edible grade) has manufactured 2219.895 metric tons of palm fatty acid distillate (industrial grade) i.e. approximately 25% and approximately 70% as refined palm oil.

5. Having regard to the aforesaid facts, the appellant/Revenue was of the view that the assessee was not entitled to the benefit of Notification No. 21/2002 read with Notification No. 66/2004. The Department, thus, issued show cause notice to the assessee demanding custom duty in the sum of Rs. 7,89,89,868/- under para 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 (hereinafter referred to as the "Rules") as well as interest under Section 28AB of the Customs Act, 1962 (hereinafter referred to as the "Act"). In the show cause notice the Department also proposed imposition of penalty under Section 112/114A of the Act.

6. The case set up by the Department in the said show cause notice was two fold, i.e.

(i) the Palm Fatty Acid Distillate (PFAD) manufactured by the assessee was not Industrial Fatty Acid; and

(ii) even if Palm Fatty Acid was to be taken as Industrial Fatty Acid, the benefit of the aforesaid two notifications was not available to such a product as the assessee is using the same for the manufacture of refined edible oil and Vanaspati.

7. In order to support the contention that PFAD was not Industrial Fatty Acid, the Department relied upon the following material:

(i) The Department has relied upon the test report of the Chemical Examiner, Visakhapatnam Dr. T.A. Sreenivasa Rao, which is reproduced below:

"Report : The sample is in the form of pale yellow soft solid mass. It is a by product of physical refining of palm oil. It is Palm Fatty Acid Distillate."

For arriving at the aforesaid opinion, Dr. Rao had given detailed technical report, relying, inter alia, upon the available literature and the test conducted on the said product.

(ii) A sample was also sent to Shri Narendra Kumar, Chemical Examiner, Customs House Laboratory, Kandla who has given his test report as under:

"The sample is in the form of pale cream soft mass. It has the characteristics of palm fatty acid having FFA (as palmitic acid) = 87.1% by wt & Acid value 190.87"

(iii) The Department also collected the evidence in the form of statements from various customers of the assessee including M/s Godrej Industries Ltd. and M/s Aquagel Chemicals Pvt. Ltd. These customers had deposed that the PFAD bought by them from M/s GAEL had to undergo extensive further processing before it was converted into fatty acid. Shri Murali S. Mukerjee, DGM, M/s Godrej Industries Ltd. deposed that Industrial Fatty Acids were used in soaps and industrial surfactants, personal care and cosmetics, rubber and tyres, plastic, coating and inks, textiles auxiliaries, fabric care and lubricants and greases etc. On being asked about the process involved in converting Palm Fatty Acid Distillate (PFAD) to stearic acid, he stated that firstly the Palm Fatty Acid Distillate (PFAD) was fed to oil pre-treatment plant for improvement on clarity and for removal of sediments and particles if any; the treated PFAD was then fed to fat splitting plant; in fat splitting plant, unconverted glycerides present in PFAD were converted into free fatty acids (crude fatty acid) and glycerine at a designed pressure; in the second step, crude fatty acid was hydrogenated with hydrogen in presence of nickel catalyst; in hydrogenation reaction all the double and triple bonds were converted into single bond; the hydrogen required for hydrogenation reaction was produced by steam reforming of natural gas; after hydrogenation reaction catalyst was removed by filtration in leaf type filter and colour was improved by bleaching with the activated carbon and diatomite earth in a bleacher, finally filtered and bleached hard fatty acid was homogenized and flaked as un-distilled stearic acid; in case of distilled stearic acid, hydrogenated fatty acid was distilled in distillation plant and distillate produced was homogenized and flaked as distilled stearic acid; PFAD could be used for the manufacturing of different types of fatty acid (stearic acid and fatty alcohol); PFAD could also be used for the manufacture of soaps.

To the same effect was the statement of Shri Mallikarjun G. Rane, Production Manager of M/s Aquagel Chemicals Pvt. Ltd.

8. The assessee submitted its reply/defence, refuting the averments made in the show cause notice. It relied upon the following HSN Explanatory Notes to argue that the product was in fact Industrial Fatty Acid.

"28.23 - Industrial Monocarboxylic Fatty Acids; Acid 0 From Refining; Industrial Fatty Alcohols.

Industrial monocarboxylic fatty acids; acid oils from refining... 3823.19-Other...."

It was also submitted that there was no allegation in the show cause notice that the product PFAD is not covered by heading 28.23 of the HSN which lists Industrial Fatty Acids and, therefore, PFAD had to be considered as Industrial Fatty Acids.

9. The Adjudicating Authority considered the aforesaid respective contentions of the Revenue as well as the assessee. He, however, brushed aside the contention of the assessee based on HSN Explanatory Notes with the observations that though it was a settled principle that in the matter of tariff classification, HSN is a reliable guide and is generally to be followed but when it comes to the application of a notification, the HSN is to be consulted only for guides. In the opinion of the Adjudicating Authority, since the assessee was claiming the benefit of exemption notification it was to be examined as to whether assessee was covered by the said Notification No. 20/2002. According to him, in order to ascertain the meaning of the term "Industrial Fatty Acid", the proper test was trade parlance and the normal meaning which a knowledgeable person would attach to the term and not necessarily what is laid down in the HSN. Thereafter, the Adjudicating Authority discussed the statements of the representatives of the two customers as mentioned above, on the basis of which it was concluded that in technical and trade parlance, it cannot be said that PFAD is the same as Palm Fatty Acid and, therefore, it could not be called as an Industrial Fatty Acid. The Adjudicating Authority further held that this was supported even by HSN Explanatory Notes 28.23 wherein it states that "Industrial monocarboxylic fatty acids are generally manufactured by the saponification or hydrolysis of natural fats or oils".

10. Thereafter, the Adjudicating Authority discussed the second aspect raised in the show cause notice on the premise and presumption that PFAD is Industrial Fatty Acid. On facts, it was held that crude palm oil imported by the assessee was not used for the manufacture of Industrial Fatty Acid, as the admitted fact was that as a result of the manufacturing process of the assessee, approximately 75% of the product is refined edible oil and only 25% is PFAD (by quantity). View taken by the Adjudicating Authority was that when the notification lays down the condition that the crude palm oil must be used by Industrial Fatty Acid, it means that its use must be substantive and not nominal. In other words, at least the crude palm oil should be primarily used for the manufacture of Industrial Fatty Acid, which was admittedly not the case.

11. In nutshell, on the aforesaid basis, Adjudicating Authority confirmed the

demand raised in the show cause notice by holding that the assessee did not fulfill the conditions contained in the exemption notification.

12. The assessee preferred an appeal against the order of the Adjudicating Authority. Said appeal has been decided by the Custom Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") vide impugned judgment. A reading of the judgment of the Tribunal would reflect that it has gone by the HSN Explanatory Notes which stipulates that Industrial monocarboxylic fatty acids are "generally" manufactured by the saponification or hydrolysis of natural fats or oils. Picking up the word "generally" from the said language in HSN, the Tribunal came to the conclusion that process of saponification or hydrolysis of natural fats or oils may be a process generally employed but that was not the "only" process to obtain Industrial Fatty Acid as the expression "generally" cannot be equated with "only" or "specifically" or "exclusively". The Tribunal held that as per HSN Explanatory Notes, the fatty acids distillate are also covered by the said chapter and, therefore, benefit of the notification was available to the assessee.

Insofar as second issue raised by the Revenue in the show cause notice is concerned, the Tribunal again differed with the order of the Commissioner/Adjudicating Authority on the ground that when the notification stipulates that imported crude palm oil must be used for Industrial Fatty Acid it does not mean that yield of Industrial Fatty Acid should be to the extent of 100% and even when it was to the extent of 25% that would suffice as the notification nowhere mentions any percentage yield of Industrial Fatty Acid.

On the basis of the aforesaid reasoning, the Tribunal has allowed the appeal of the assessee and set aside the order passed by the Commissioner.

13. Feeling aggrieved by that order, present appeal is filed by the Department. Mr. K. Radhakrishna, learned senior counsel appearing for the Department, heavily relied upon reasoning adopted by the Commissioner on the basis of which it was held that assessee was not entitled to the benefit of exemption. Neat submission made by Mr. Radhakrishna was that there was a patent error committed by the Tribunal in relying upon HSN Explanatory Notes, little realising that the matter did not pertain to classification but exemption of a notification and in order to qualify for exemption from payment of the import duty under the said notification, the focus of the Tribunal should have been as to whether the assessee has fulfilled the conditions of the said notification. He submitted that exemption notifications were to be construed very strictly and in the instant case, the assessee has failed to fulfill the conditions laid down in the notifications.

14. Mr. Lakshmikumaran, learned counsel appearing for the respondent/assessee, on the other hand, submitted that the reliance placed by the Tribunal on HSN Explanatory Notes was perfectly justified and stressed upon the reasoning that was adopted by the Tribunal in this behalf. His further submission was that there are various methods/processes that may be used to produce

Industrial Fatty Acids like hydrolysis, saponification, vacuum distillation, splitting, etc. Any of such processes may be used by an importer intending to avail the benefit under Sr. No. 30 of Notification No. 21/2002-Cus. The description for Sr. No. 30 during the relevant period did not specify any specific process to be followed by the importers, which implies that the importers were free to choose any of the different processes available. In this regard, amendment made to Notification No. 21/2002-Cus vide Notification No. 11/2006-Cus dated 01.03.2006 is important. For the first time, an entry (S. No. 30(A)) was introduced which also mentioned that the importer must have the facility for splitting of oils. He argued that it was, in a sense, built-in condition of the process (splitting of oil) that must be employed to obtain fatty acids. However, even then clause B of S. No. 30 of the Notification continued to exist as such. In other words, after the amendment, the requirement of splitting of oils, does not exist in Clause B, which is identical to Clause A prior to amendment covering the respondents. According to him, the 2006 amendment makes it clear that prior to such amendment clause (a) of Sr. No. 30 covered all the process that are possible for manufacture of Industrial Fatty Acids.

On the second issue, Mr. Lakshmikumaran again maintained the stand of the assessee which was taken before the Authorities below, namely, it is not possible to obtain 100% PFAD by distilling the crude palm oil (non-edible grade) and, therefore, due to technological necessity, the assessee could not be denied the benefit of exemption. It was also submitted that merely because the proportion of PFAD is 25%, would not mean that PFAD is a by-product. He submitted that the assessee was engaged in manufacture of PFAD and refined palm oil. PFAD is sold to soap manufacturers and refined palm oil is used to manufacture Vanaspati.

15. In addition, the learned counsel also submitted that in any case the entire demand is time barred inasmuch as Rule 8 provides for recovery of duty in cases where the goods imported are not used for intended purpose. He accepted that Rule 8 does not mention any specific time within which a show cause notice must be issued. However, his submission was that this Court in the case of *State of Punjab v. Bhatinda District Co-op Milk P. Union Ltd.*, 2007 (217) ELT 325 (SC) has held that where no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. Referring to Section 28 of the Act, he submitted that since that Section prescribes 6 months for cases where there is no collusion or willful mis-statement or suppression of facts, period of 6 months should be treated as reasonable period of limitation. On that basis, the show cause notice which was issued on 24.03.2006 for the period 12.09.2004 to 12.08.2005 was time barred, submitted the learned counsel.

16. We have considered the respective submissions of learned counsel for the parties.

17. At the outset, we would like to remark that the learned senior counsel appearing for the Revenue is right in his submission that present case is not a

case for classification of goods but relates to the admissibility of exemption notification. When the question arises as to whether exemption from tax/duty of a particular notification is available to assessee or not, the same has to be examined in terms of the said notification i.e. whether the stipulations and conditions mentioned in the said notification are fulfilled by an assessee to claim the benefit of the notification. Notification No. 21/2002 dated 01.03.2002, as amended by Notification No. 66/2004 dated 09.07.2004 is a general exemption notification which enlist number of products that are given full or partial exemption from payment of custom duty or additional duty. At Sr. No. 29 of this notification are edible oils falling under certain headings of Chapter 15. In contrast, goods mentioned at Sr. No. 30 (with which we are concerned) talks of non-edible goods having a Free Fatty Acid. The precise description of the goods which qualify for exemption from payment of custom duty is as under:

"(A) [All goods], other than edible grade, having Free Fatty Acid (FFA) 20 per cent or more and falling under heading 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514 or 1515, for the manufacture of [soaps, industrial fatty acids and fatty alcohol].

(B) [All goods], other than edible grade, having Free Fatty Acid (FFA) 20 per cent or more and falling under heading 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514 or 1515."

18. In order to qualify for exemption, the goods should meet the following criteria:

(i) First requirement is that such goods should be other than edible grade which means this entry exempts non-edible goods.

(ii) Second condition is that such goods should be having Free Fatty Acid 20% or more falling under chapter heading mentioned therein which includes 1511.

(iii) Such goods should be used for the manufacture of soaps, industrial fatty acids and fatty alcohol.

(iv) This entry further stipulates that it has to satisfy Condition No. 5 mentioned in Annexure to the said notification. Condition No. 5 reads as under:

"5. If the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996."

19. In the instant case, crude palm oil which was imported was used for making edible products like refined oil/Vanaspati. In the process of said manufacture, 25% of fatty (palm) was produced and 75% was oil which was edible. Thus, when the main manufacturing activity relates to edible product which is 75%. If in the process 25% of fatty (palm) emerges as a by-product it cannot be said that first requirement of exemption notification is satisfied in the instant case. Even if Industrial Fatty Acid is to be treated as separate manufacturing activity

and it is non-edible, the same is only to the extent of 25%. That, according to us, would not satisfy the requirement of the exemption notification in question.

20. We are in agreement with the reasoning adopted by the Commissioner that HSN Explanatory Notes, in case where exemption notification was to be construed, would only serve as guide and is not used to interpret the same. Even here, we find that the HSN in question categorically mentions the product which are included by the said heading and specifically mentions "fatty acid distillate" as under:

"Fatty acid distillate, obtained from fats and oils which have been subjected to vacuum distillation in the presence of steam as part of a refining process. Fatty acid distillate is characterised by a high free fatty acid (ffa) content."

21. It, thus, categorically stipulates that Fatty Acid Distillate is characterised by high free fatty acid which cannot be 25%. So the by-product is rightly discarded by the Commissioner as not coming within the nomenclature of PFAD. Contrary reasons which are given by the Tribunal, thus, do not appeal to this Court. In this view of the matter, reliance on subsequent notification of 2006 is of no relevance.

22. Insofar as contention of the assessee that the impugned notification is time barred, it is difficult to accept the same in the facts of the present case. At the outset, we have to keep in mind Rule 8 of the Rules which does not prescribe any period of limitation. No doubt, in such an eventuality, as held by this Court in Bhatinda District Co-op Milk P. Union Ltd. (supra), the show cause notice has to be issued within a reasonable period. However, for this purpose, provisions of Section 28 cannot be resorted to to state that it has to be within a period of 6 months. The question has to be decided keeping in view the facts of each case and to examine whether the period in question is reasonable or not. In the instant case, we find that it is only through intelligence collected by DRI, Gandhidharn Regional Unit that it came to be revealed that the assessee had imported crude palm oil but it had no facility in manufacturing soap/Industrial Fatty Acid and was using the said imported crude palm oil for making edible products like refined oil/Vanaspati. At the time of import, the importer only gives declaration. It is the actual use, which event takes place much after the import, from where it can be gathered as to where the import is made for the purpose for which it was done. As soon as the aforesaid information was gathered by DRI, show cause notice was issued. Therefore, we are of the opinion that show cause notice had been issued within a reasonable period and it cannot be treated as time barred.

23. For the foregoing reasons, we allow this appeal with cost thereby setting aside the order of the Tribunal and restoring the order passed by the Commissioner/Adjudicating Authority.