(2011) 07 GUJ CK 0129

In the Gujarat High Court

Case No : Tax Appeals No''s. 86 to 88, 167, 678 to 715 of 2011 with Civil Applications No''s. 46 to 48, 71, 183, 184, 194 to 220 of 2011

Commissioner of Customs — APPELLANT

Vs

Variety Lumbers P. Ltd. — RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:
Customs Act, 1962 — Section 25
Customs Tariff Act, 1975 — Section 3, 3(5), 5

Citation : (2013) 19 GSTR 287

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; V.S. Nankani with H.P. Modh, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—These appeals arise out of similar factual background and involves similar legal issues. In fact, the judgment of the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT" for short) impugned in all these appeals is common. We have, therefore, heard all the appeals together and propose to dispose of them by this common order".

2. The issue being recurring in nature, we had decided to hear the appeals finally, instead of admitting and taking it up for hearing at later stage.

3. For the purpose of this judgment, the facts arising in Tax Appeal No. 86 of 2011 can be noted.

4. The Revenue has filed this appeal challenging the judgment of the CESTAT dated September 24, 2010 (Variety Lumbers P. Ltd. v. Commissioner of Customs (2013) 19 GSTR 288 (Trib.-Ahd)) raising the following questions for our consideration:

(a) Whether in the facts and circumstances of the case, transformation of the imported round logs into sawn timber in different sizes and length by the importer before subsequent sale to domestic market would vitiate the condition of subsequent sale prescribed in exemption Notification No. 102/2007-Customs, dated September 14, 2007?

(b) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in deciding issue in appeal by placing sole reliance on the decision of the Tribunal in the case of Vijirom Chem. P. Ltd. v. Commissioner of Customs reported in [2006] 199 ELT 751 (Trib.-Bang) and observing that the respondent is eligible to avail of benefit under exemption Notification No. 102/2007-Customs, dated September 14, 2007?

(c) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law by not considering the issue of interpretation of exemption notification by applying the ratio laid down by the apex court in the case of Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad,

(d) Whether the impugned order of the Tribunal, which is passed without referring to and giving its finding on all submissions and precedents pointed out by the learned Departmental representative at the time of hearing of the appeal, can be said to be passed in accordance with law?

5. The respondent, M/s. Variety Lumbers Pvt. Ltd. is an importer of timber. The respondent had imported New Zealand pine logs against the bill of entry dated January 1, 2008 and January 29, 2008 and had paid duty including the additional customs duty often referred to as special countervailing duty, ("SCVD" for short), on or around February 11, 2008. The amount of the said SCVD came to Rs. 10,42,693. On the premise that as per the exemption notification dated September 14, 2007, being Notification No. 102/2007, the respondent was entitled to claim refund of such SCVD paid upon sale of the goods in local market, the respondent filed refund claim with the Assistant Commissioner having jurisdiction over the area on or around August 11, 2008. The case of the respondent was that though under Notification No. 19/2006, dated March 1, 2006, he was liable to pay SCVD upon import of timber at the specified rate, by virtue of exemption Notification No. 102/2007, dated September 14, 2007, such duty was to be refunded to the respondent-importer selling the goods in the local market and also paying appropriate sales tax or value added tax, as the case may be. To this notification, we will make a detailed reference at a later stage.

6. The Assistant Commissioner (Refund), however, by his order-in-original dated March 7, 2009 rejected the refund claim of the petitioner. In his order, he made the following observations:

The claimant has imported New Zealand pine logs against bill of entry Nos. 223338, dated January 1, 2008 and 226984, dated January 29, 2008 and paid the duty vide TR-6 Challan No. 20145061, dated January 10, 2008 in original of TR-6 Challan for Rs. 7,81,847 and 20147998, dated February 11, 2008 in original of TR-6 Challan for Rs. 15,38,208 inclusive of four per cent. SCVD amounting to Rs. 10,42,693. The claimant had produced the copy of invoices in which they showed that the quantity as imported above is converted into sawn sizes and sold to various parties as mentioned in the worksheet produced by them.

A close look at the invoices would reveal that the goods sold have been described as imported sawn timber (wood in different sizes and length in sawn). I find that the description as mentioned is the bill of entry is New Zealand pine logs. Thus it is very much evident that the claimant has imported round logs and sold sawn timber.

7. The Assistant Commissioner was of the opinion that after importing timber, the respondent carried out extensive process, before selling smaller pieces thereof in the local market. He was of the opinion that the goods imported by the respondent, namely, timber was classified under Customs Tariff Heading 44.03 whereas what the respondents sold after detailed sawing and cutting was sawn wood which falls under Customs Tariff Heading 44.07. He was, therefore, of the opinion that the respondent did not fulfil the conditions of the notification for refund of SCVD. He was further of the opinion that exemption could be granted only to the importer, who had imported the goods for subsequent sale and this subsequent sale means that the goods should be sold in India in the same physical form as they were imported. On this ground, the respondent''s claim for refund came to be rejected by the Assistant Commissioner.

8. The respondent carried the issue in appeal before the Commissioner (Appeals). The Commissioner (Appeals), however, dismissed the appeal by the judgment dated December 31, 2009. The Commissioner (Appeals) also placed heavy reliance on two different Custom Tariff Heading 44.03 covering wood in rough whether or not stripped or bark or sapwood or roughly squared and Customs Tariff Heading 44.07, which would include imported sawn timbers of different sizes and length, which covered "Wood sawn or chipped lengthwise, sliced or peeled, whether or not planned, sanded or end-joined, or a thickness exceeding 6 mm.".

9. Not satisfied, the respondent approached the Tribunal against the order passed by the customs authorities. The Tribunal, by the impugned order, allowed the appeal and set aside the orders passed by the authorities below and held that from the import of the timber to its sale by the respondent in local market, no different product had resulted. The respondent was, therefore, eligible for refund of SCVD paid. In the judgment, the Tribunal referred to and relied upon the decision of the Bangalore Bench of the Tribunal in the case of Vijirom Chem Pvt. Ltd. vs. The Commissioner of Customs . The Tribunal also relied on the decision of the apex court in the case of State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, ; AIR 1985 934 (SC) . Before the Tribunal, the decision of the apex court in the case of Collector of Central Excise, Madras Vs. Kutty Flush Doors and Furniture Co. (P) Ltd., , was also cited.

10. Before recording and appreciating the rival submissions, the following statutory provisions and the notifications holding the field need to be noted:

Section 3 of the Customs Tariff Act, 1975 pertains to levy of additional duty equal to excise duty, sales tax, local tax and other charges. Sub-section(5) of section 3 empowers the Central Government to levy such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges on article on its sale, purchase or transportation in India by issuing a notification in the Official Gazette. Section 3(5) of the Customs Tariff Act reads as under:

3(5). If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent. of the value of the imported article as specified in that notification.

11. In exercise of such powers under sub-section (5) of section 3 of the Customs Tariff Act, the Central Government issued Notification No. 19/2006 dated March 1, 2006 providing for imposition of additional duty of customs at the rate of four per cent. on all goods specified under the Chapter, heading or sub-heading or tariff item of the First Schedule to the Customs Tariff Act. The notification reads as under:

G.S.R. (E).--In exercise of powers conferred by sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public interest so to do, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 19/2005-Customs, dated March 1, 2005 (number G.S.R. 117(E), dated March 1, 2005), hereby directs that ail goods specified under the Chapter, heading, sub-heading or tariff item of the First Schedule to the said Act, having regard to the sales tax, value added tax, local tax and other taxes or charges leviable on sale or purchase or transportation of like goods in India, when imported into India, shall be liable to an additional duty of customs at the rate of four per cent. ad valorem.

12. The Central Government, however, subsequently issued Notification No. 102/2007, dated September 14, 2007 granting exemption in the form of refund on such SCVD under certain circumstances and subject to fulfillment of conditions of the said exemption notification. Exemption Notification No. 102/2007, dated September 14, 2007 reads as under:

G.S.R. (E).--In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in paragraph 2 above, are fulfilled.

13. From the speech of the hon''ble Finance Minister on the Budget session for the year 1998-991 (See [1998] 231 ITR (St.) 45, 73), the purpose for which such exemption notification came to be issued, becomes clear. The relevant portion of the speech is extracted below:

In order to provide a level playing-field to the domestic industry, I propose to impose an additional non-modvatable levy of eight per cent. on imports which is approximately equal to the burden of local taxes on domestic producers. This duty should not be viewed as a protectionist measure but only as a response to a legitimate demand for a level playing-field. The new levy would not apply to crude oil, newsprint, capital goods sector under a special tariff regime or goods which are subjected to additional duties of excise in lieu of sales tax, gold and silver imported by passengers or other nominated agencies and life saving drugs that are free from customs duties. The levy would also not apply to goods which are currently exempt both from basic and additional duties of customs. Similarly, goods imported for subsequent trading have also been left out of its purview, since they bear the burden of sales tax at the time of first sale. The new levy will also not apply to inputs imported under export promotion schemes. In addition, there may be other sectors eligible for exemptions. These would be examined and if considered appropriate notified separately.

(underline supplied2 by us)

14. The facts are similar in all the appeals. They are not being recorded separately. Suffice it to say that under similar circumstances, the refund claim of all the importers of timber came to be rejected by the customs authorities, upon which they approached the CESTAT which by the impugned common judgment, allowed all such appeals.

15. On the basis of facts noted above, and the materials on record, the counsel for both the sides made detailed submissions before us for final disposal of the appeals.

16. The learned counsel Mr. R.J. Oza submitted that the respondents imported raw logs of wood which is classified under Customs Tariff Heading 44.03. In turn what was sold by the respondents in the market was sawn pieces of wood, which is classified differently under Customs Tariff Heading 44.07. He submitted that on account of this change that the product underwent since its import and before its sale in the local market, the essential condition of the exemption notification dated September 14, 2007 that the importer has imported goods into India for subsequent sale, is not satisfied. He submitted that the refund claim was, therefore, rightly rejected by the customs authorities.

17. Referring to the decision of the Bangalore Bench of the Tribunal in the case of Vijirom Chem Pvt. Ltd. vs. The Commissioner of Customs , the counsel submitted that the same was rendered in the background of earlier notification, which was not applicable in the present set of facts in any case. In that case what the importers had done after importing the product, was to repack it before selling, which is vitally different from the process undertaken in the present set of cases.

18. The counsel also relied on the decision of the apex court in the case of State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, to contend that the denial of exemption to the respondents would not amount to double taxation.

19. The counsel also sought to suggest that the decision of the apex court in Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad, would not apply in the facts of the present case. He drew our attention to paragraph 18 of the decision, wherein the apex court observed that the principle that in the case of ambiguity in a taxing statute, the same should be construed in favour of the assessee, cannot be applied in the case of exemption notification, which is required to be viewed strictly.

20. The counsel reiterated that the identity of the goods since its import before sale in the local market having changed, the exemption notification would not apply as vital conditions therein were not satisfied.

21. On the other hand, Shri V.S. Nankani appearing with Shri H.P. Modh for the respondent in all the appeals, supported the view of the Tribunal contending that the respondent satisfied all the conditions of exemption notification dated September 14, 2007. Heavy reliance was placed on the Budget speech of the hon''ble Finance Minister to contend that the whole purpose of levying SCVD is to nullify the effect of the sales tax or any other local tax, which a local sale and purchase of similar commodity would bear when the same product is being imported into the country. He submitted that the respondents imported timber in its raw form. Before selling all that was done was scaling and cutting such timber in small pieces. The product itself never underwent any fundamental change. No manufacturing activity was carried out. Denying refund and, thereby, excluding the respondents from the purview of exemption notification would result in a situation where they would bear not only SCVD but also have to bear the burden of the local taxes.

22. The counsel submitted that the process undertaken by the respondents on the raw timber imported before its sale in the local market would not amount to manufacturing activity. Heavy reliance was placed on the decision of the apex court in the case of State of Maharashtra Vs. M/s. Shiv Datt and Sons, etc., . Reliance was also placed in this regard on the decision of the Kamataka High Court in the case of Y. Moideen Kunhi and Others Vs. Collector of Central Excise, Bangalore and Others, , wherein it was held that conversion of timber logs into small sizes, planks, beams, etc., by sawing does not amount to manufacturing of goods.

23. The counsel submitted that having imported timber from abroad, the respondents had to cut them into small pieces since RTO Rules would not permit them to transport such timber which is longer than 40 feet. He submitted that the respondents, therefore, had no choice but to cut the imported timber into small pieces. Simply because such item is covered under Customs Tariff Heading 4407 for the purpose of customs duty as compared to Tariff Heading 4403 covering timber, would not, by itself, mean that the conditions of exemption notification were not fulfilled.

24. The counsel further submitted that in all sale of goods by the respondents in local market, sales tax or VAT, as applicable, was paid. The Department, therefore, cannot thereafter insist on retaining SCVD by denying refund.

25. Having thus heard learned advocates for the parties and having perused the documents on record, the short question that calls for our consideration is whether the respondents fulfilled all the conditions of exemption notification dated September 14, 2007 or not. As already noted by a notification dated March 1, 2006, the Central Government levied SCVD on all imported goods covered

under different Chapters, headings or sub-headings of the Customs Tariff Act at the rate of four per cent. ad valorem. Subsequently, however, by issuing the exemption notification dated September 14, 2007, it was decided that in certain cases such SCVD would be refunded to the importers. Such conditions were that when such goods were imported into India for subsequent sale, the whole of the additional duty of customs leviable thereon, would be refunded provided the following specific conditions were fulfilled:

(a) Importer of the said goods shall pay all duties including the additional duty of customs leviable thereon as applicable at the time of importation of the goods.

(b) Importer, while issuing the invoices for sale of the said goods, should indicate that no credit of additional duty of customs levied under sub-section (3) of section 5 of the Customs Tariff Act, shall be admissible.

(c) Importer shall file a claim of refund of such additional duty paid on imported goods with the jurisdictional customs officer.

(d) Importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be.

(e) Importer is also required to provide copies of relevant documents, such as document evidencing payment of the said additional duty, invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed and documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

26. On behalf of the Department much stress is placed on the wordings used in the notification that the exemption would be available when goods are imported into India for subsequent sale. In the conditions required to be fulfilled also it is provided that the importer shall pay on sale of the said goods, appropriate sales tax, valued added tax, etc.

27. It was therefore, the contention of the Department that to be able to get benefit of the exemption notification the importer must sell in the local market, the goods imported in the same condition and any change in the nature of the goods would disentitle the importer from seeking exemption from the SCVD paid,

28. We are of the opinion that whether the conditions are to be satisfied or not, has to be viewed from attending facts and circumstances of the case. The words "when imported into India for subsequent sale" or "the sale of said goods", cannot be seen in isolation. It is not in dispute that except for the abovementioned objection of the Department, all other conditions specified in the exemption notification, have been fulfilled by the respondents. It is also not in dispute that the proper documents were filed and that the goods were imported after paying the SCVD, upon which ultimately the goods were sold in the local market and sales tax or VAT, as applicable, was also paid.

29. The question of fulfilling the condition of sale of the imported goods in the

local market in the same condition, at the time of its import has to be seen in the light of the two crucial factors.

30. Firstly, as held by the Karnataka High Court, the process of cutting timber into small pieces or sawing does not amount to manufacturing process. As already noted, in the case of Y. Moideen Kunhi and Others Vs. Collector of Central Excise, Bangalore and Others, , the Kamataka High Court concluded that in order to attract levy as "excisable goods" under the Central Excise Act, the goods must satisfy that they are a result of a manufacture. Applying the various tests of the terms manufacture, the court observed that timber even when sawn and converted into logs of smaller sizes, does not undergo any manufacturing process.

31. In the case of State of Maharashtra Vs. M/s. Shiv Datt and Sons, etc., , the apex court observed that the definition of the term "manufacture" should not be widely interpreted. In the case on hand, the apex court held the dealer entitled to concession on resale of recharge batteries holding that the process of recharging dry batteries purchased would not amount to manufacturing process.

32. In the case of State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, also the apex court made certain observations which are useful for our purpose, which may be reproduced as under (page 266):

On turning to various dictionaries, we find that the dictionary meaning largely coincides with the statutory meaning of the word ''timber''. While discussing the question of the subject-matter of the impugned provisions we have set out the definition of the word ''timber'' contained in the Webster Collegiate Dictionary occurring in the passage from the judgment of Vivian Bose, J., in Shantabai Vs. State of Bombay and Others, . The relevant meanings of the term ''timber'' given in the Shorter Oxford Dictionary, Third Edition are ''building material generally; wood used for the building of houses, ships, etc., or for the use of the carpenter, joiner or other artisan''. This definition also states that the word is ''applied to the wood of growing trees capable of being used for structural purposes; hence collectively to the trees themselves''. Amongst the meanings given in the Concise Oxford Dictionary, Sixth Edition, are ''wood prepared for building, carpentry, etc.; trees suitable for this; woods, forests, piece of wood, beam''. One of the meanings of the word ''timber'' given in Webster''s Third New International Dictionary, is ''wood used for or suitable for building (as a house or boat or for carpentry or joinery''. A ''log'' according to the Shorter Oxford English Dictionary means ''a bulky mass of wood; now usually an unhewn portion of a felled tree, or a length cut off for firewood'' and according to the Concise Oxford Dictionary it means ''unhewn piece of felled tree, or similar rough mass of wood especially cut for firewood''. Thus, logs will be nothing more than wood cut up or sawn and would be timber.

A question which remains is whether beams, rafters and planks would also be logs or timber. The Shorter Oxford English Dictionary defines ''beam'', inter alia, as ''a larger piece of squared timber, long in proportion to its breadth and thickness'' and the Concise Oxford Dictionary defines it as a ''long piece of squared timber supported at both ends, used in houses, ships, etc.'' and according to Webster''s Third New International Dictionary, it means ''a long piece of heavy often squared timber suitable for use in house construction''. A beam is thus timber sawn in a particular way. ''Rafter'' as shown by the Shorter Oxford English Dictionary is nothing but ''one of the beams which give slope and form to a roof, and bear the outer covering of slates, tiles, thatch, etc.'' The Concise Oxford Dictionary and Webster''s New International Dictionary define ''rafter'' in very much the same way; the first defines it as ''one of the sloping beams forming framework of a roof and the second as ''one of the often sloping beams that support a roof. Rafter would also, therefore, be timber or log put to a particular use. A ''plank'' is defined in Shorter Oxford English Dictionary as ''a long flat piece of smoothed timber, thicker than a board, specially a length of timber sawn to a thickness of from two to six inches, a width of nine inches or more, and eight feet or upwards in the length''. According to the Concise Oxford Dictionary it is a ''long wide piece of timber, a few inches thick'' and according to Webster''s Third New International Dictionary, it is ''a heavy thick board that in technical specifications usually has a thickness of two to four inches and a width of at least eight inches''. The exact thickness and width of a plank may be of importance in technical specifications but in ordinary parlance planks would be flattened and smoothed timber. Such flatness and smoothness can only be achieved by using a saw and other implements required for that purpose. The same would be the case when timber is rounded or shaped. The statutory definitions of timber extracted above read along with the meaning of the word ''timber'' given in different dictionaries would show that the conclusion reached by the Madhya Pradesh High Court in Mohanlal Vishram Vs. Commissioner of Sales Tax, and by the Andhra Pradesh High Court in G. Ramaswamy and Others Vs. The State of Andhra Pradesh and Others, is more germane to our purpose than the two Orissa cases neither of which has referred to the statutory definition of the word ''timber'' in the relevant statutes. The observation of the Orissa High Court in the case of Krupasindhu Sahu and Sons Vs. State of Orissa, that timber in common parlance in Orissa takes within its ambit only long and big sized logs of wood ordinarily used in house construction as beams and pillars but not when timber is converted into planks, rafters and other wood products like tables and chairs cannot, therefore, be said to be correct so far as planks and rafters are concerned. In our opinion, planks and rafters would also be timber.

The result is that sales of dressed or sized logs by the respondent-firm having already been assessed to sales tax, the sales to the first respondent-firm of timber by the State Government from which logs were made by the respondent-firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers assuming without deciding that the retrospectively substituted definition of ''dealer'' in clause (c) of section 2 of the Orissa Sales Tax Act, 1947, is valid.

33. From the above, it can be seen that though, at the time of import, the respondents brought into the country, raw logs or timber, and before selling it in the open market in India, cut them into smaller pieces by sawing, no new product, in our view, came into existence. Identity of the article did not undergo any fundamental change so as to conclude that what was imported by the respondent-importers was different from the item which ultimately was sold by them in the local market.

34. Second significant factor, which attracts our attention is that as stated by the counsel for the respondents, they were, under the law, obliged to reduce the length of the timber before its transport. The RTO authorities would not permit transportation of the timber which is longer than 40 feet. It is an undisputed position that the respondents imported the goods after paying SCVD. At the time of its sale in the local market, they also paid local taxes such as sales tax or the value added tax as may be applicable. Before transportation of timber, they were required to reduce its size since the RTO rules did not permit transportation of logs longer than 40 feet. If only for cutting length of the logs, which were in excess of 40 feet sawing operations were carried out and after some cleaning and scaring was done, timber logs of smaller pieces were sold, we do not see how respondents can be stated to have breached any of the conditions of the exemption notification dated September 14, 2007.

Under the circumstances, we do not find any error in the view of the Tribunal. The appeals are, therefore, dismissed.

In the view of the dismissal of the main appeals, the civil applications for stay do not survive and the same are also dismissed.

2 (End of judgment) Here printed in italics

