
(2015) 10 SC CK 0016
In the Supreme Court Of India
Case No : Civil Appeal No. 3327 of 2007

Commissioner of Customs (Import), Mumbai	APPELLANT
Vs	
Dilip Kumar	RESPONDENT

Date of Decision : 08-10-2015

Acts Referred:

Citation : (2015) 325 ELT 815

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : S/Shri Alok Yadav, Somnath Shukla, Udit Jain and Praveen Kumar, Advocates, for the Respondent; S/Shri Yashank Adhyaru, Senior Advocate, Sanjai Kumar Pathak, Ms. Binu Tamta, Rajiv Singh, Aviral Kashyap and B. Krishna Prasad, Advocates, for the Appellant

Final Decision : Allowed

Judgement

1. The issue raised in the present appeal is whether Vitamin E-50 is classifiable under Chapter 2309.00 as "Prawn Feed" and therefore eligible for the benefit of partial exemption from duty under Notification No. 20/99, dated 28-2-1999.

2. On 28-2-1999, the respondent imported a consignment of Vitamin E-50 powder (Feed Grade) and filed Bill of Entry No. 8207, dated 19-8-1999 for clearance of the same, claiming benefit of concessional rate of duty at 5 per cent under the aforesaid Notification No. 20/99 at Serial No. 20 which reads as follows : -

S. No.

Chapter or Heading No. or sub-heading No.

Description of goods

Standard rate

Additional duty rate

Condition No.

20.

2309.90

Prawn feed

5%

-

-

3. The Order-in-Original reasoned :

"Thus from the above, it is unambiguously clear that item under import cannot be considered as "Prawn Feed" to claim the benefit under notification no. 20/99. In this regard the importers, have relied upon Hon"ble Supreme Court judgment in Sun Export Case [1997 (93) E.L.T. 641 (Supreme Court)] wherein it was held that Animal Food supplement such as Premix of AD3 (Feed Grade) which are generally added to animal feed are also covered by the generic term "Animal Feed". I have carefully gone through the above referred judgment of Hon"ble Supreme Court. The dispute in this case was whether goods such as pre-mixed Vitamin AD3 etc. are Animal Feed are classifiable under Chapter 23 and thus eligible for exemption under Notification 234/82. The Hon"ble Supreme Court in very clear terms has laid down that animal feed supplement or animal feed concentrate are covered by the generic term "Animal Feed" and thus are eligible for exemption under notification 234/82-C.E. In view of above decisions of Hon"ble Supreme Court, I find that chemical ingredients such as Vitamin E which are imported on same carrier such as Silica Maize etc., and are used for manufacture of "Animal Feed" are to be considered as Animal Feed supplement and hence should be considered Animal Feed for the purpose of Animal Feed supplement and hence should be considered Animal Feed for the purpose of classification under CTH 23 of Customs Tariff. However, as far as benefit of Notification 20/99 (CUS) is concerned, the benefit of notification is available to "Prawn Feed" only and not to "Animal Feed" as was the case under notification no. 234/82-C.E. "Animal Feed" is a generic term and may include "Prawn Feed", Poultry Feed, Cattle Feed and feed supplements as held by the Hon"ble Supreme Court in the above noted case. Whereas the benefit of notification No. 20/99 is available to "Prawn Feed" which is a restrictive terms unlike the terms "Animal Feed". Various High Courts and the Hon"ble Supreme Court in their various judgments has laid down that there should be strict interpretation of the notification. Hon"ble Supreme Court's judgment in M/s. Rajasthan Spinning and Weaving Mills Limited v. Collector, 1995 (77) E.L.T. 474 (S.C.) is worth mentioning here wherein it is laid down that, "Liberal construction which enlarge the term and scope of notification is not permissible". As discussed in foregoing paras and as admitted by the importers themselves the items imported are not "Prawn Feed" as such but are only ingredients/constituents for Animal Feed. In

view of the findings above, it is very clear that items imported under above said B/E viz., Vitamin E 50 Feed grade is ingredients for manufacture of "Prawn Feed"/ Animal Feed, and by no stretch of imagination can be considered as "Prawn Feed" as such and thus not eligible for benefit of concessional rate of duty under notification No. 20/99.

In view of above finding I order that benefit of notification No. 20/99 is not available to items imported under B/E No. 8207, dated 19-8-1999 and the same should be assessed at standard rate of duty as applicable under Chapter Heading 2390 of CTH. However, in view of the Department's SLP pending in Hon'ble Supreme Court on the identical issue, the assessment be made on provisional basis in the manner indicated above."

4. Against the said order, an appeal filed to the Commissioner of Customs was successful and the Commissioner of Customs relying upon the decision in "Sun Export Corporation, Bombay v. Collector of Customs, Bombay and Another" [1997 (6) SCC 564 = 1997 (93) E.L.T. 641 (S.C.)] allowed the appeal in favour of the assessee.

5. The Department carried a further appeal to Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") which by the impugned judgment dated 5-12-2005 dismissed the Department's appeal also relying upon the self same judgment.

6. Shri Yashank Adhyaru, learned senior counsel appearing on behalf of the Revenue, relied upon a later two Judges Bench judgment of this Court in "Collector of Central Excise, Guntur v. Surendra Cotton Oil Mills & Fert. Co. [2001 (127) E.L.T. 3 (S.C.)] in which the earlier three Judge Bench judgment in Sun Export Corporation's case was referred to and distinguished as follows : -

"7. The situation however, is not the same in the instant matter. In the case of Sun Exports Corporation (supra), it was "animal feed" and "animal feed supplements" and by reason of the exemption notification for animal feed, this Court came to a definite conclusion that animal feed includes animal feed supplements and as such M/s. Sun Exports Corporation was declared to be entitled to refund under the relevant exemption notification. The brief facts as appears from the decision (at page 565) leading to these appeals are as follows :

"The appellant Corporation imported six consignments of goods [Pre-mix of Vitamin AD-3 Mix (feed grade)] at Bombay and seven consignments of similar goods at Calcutta. These consignments were assessed to duty under the heading 29.01/45(17) of the Customs Tariff Act, 1975 read with Item 68 of the Central Excise Tariff Act, 1985. The Corporation paid the duty. Later on, it claimed refund of the duty paid as countervailing duty contending inter alia that the goods imported were classifiable under Item 23.01/07 as "Animal Feed" and as per Notification No. 234/82-C.E., dated 1-11-1982, those goods were exempted from levy of duty. Accordingly, applications were filed for refund of the countervailing duty/additional duty paid on such imports. The Assistant Collector (Refunds)

concerned rejected the claim of the appellant holding that the goods imported were assessable to duty under the heading 29.01/45(17) of the then prevailing First Schedule to the Customs Tariff Act read with Item 68 of the Central Excise Tariff and therefore, the Exemption Notification dated 1-11-1982 was of no avail to the Corporation.

3. Aggrieved by the rejection of refund applications the appellant preferred separate appeals one set before Collector of Customs (Appeals), Bombay and another set before Collector of Customs (Appeals), Calcutta. The appellant authority at Bombay accepted the claim of the appellant and granted the relief holding that the goods imported were in the nature of "Animal Feed Additives" and as such fall under the heading 23.01.07. However, the appellate authority at Calcutta rejected the claim of the appellant and dismissed the appeal accepting the view of Assistant Collector (Refunds)."

8. It is on this factual backdrop this Court in paragraph 14 of the report observed as below :

"14. We have carefully gone through the minority and the majority views of the Tribunal. We find that Shri K. Gopal Hegde who has dealt with the issue in extenso, has taken note of the ratio laid down by the Bombay and Gujarat High Courts as well as a subsequent decision of the Tribunal itself in CCE v. Punjab Bone Mills [1988 (38) E.L.T. 389 (Tribunal) (Appeal No. 615/85-C with E/Cros/64/1988-C)] for coming to a conclusion that the goods imported by the appellants are eligible for exemption under Notification No. 234/82. However, this view was the minority view and, therefore, the exemption claimed by the appellant was denied. The majority view, it appears, was influenced by the fact that a decision of the Tribunal in Aries Agro-Vet Industries (P) Ltd. v. CCE [1984 (16) E.L.T. 467 (Tribunal)] taking a similar view, was challenged by filing Civil Appeal No. 17 of 1984 and that was dismissed at the admission stage. It must be noted that presumably the amendment to Exemption Notification No. 234/82 by a subsequent Notification No. 6/84-C.E., dated 15-2-1984 was not before the Court for consideration. The majority view also failed to take note of the subsequent amendment to the main exemption notification as well as the effect of the amendment as noticed by the Bombay High Court in Glindia Ltd. Case [1988 (36) E.L.T. 479 (Bom.)]. Since we have already extracted in extenso the decision of the Bombay High Court, we do not think it necessary to repeat the same."

9. While it is true that the decision in Sun Exports Corporation's case (supra) delved into animal feed but by reason of the factual situation as noticed above, the same is clearly distinguishable and, in fact, does not lend any assistance in the matter in issue."

7. According to the learned counsel, on a parity of reasoning, since the Sun Export Corporation's case had been distinguished in Surendra Cotton Oil Mills's case and on facts, the judgment of this Court in Surendra Cotton Oil Mills's case

was, according to the learned counsel, in his favour, it is clear, therefore, that a prawn feed supplement with the imported product Vitamin E-50, as such would not fall within the expression "Prawn Feed". He further argued that it is clear from a catena of decisions that an exemption Notification is to be strictly construed and if prawn feed supplements are not, in fact, included, they cannot be included by inference. He also argued that Sun Export Corporation's judgment is liable to be distinguished on the ground that the Bombay High Court judgment which was affirmed by this Court dealt with a later amendment to the exemption Notification in that case, which amendment was held to be clarificatory in nature, and therefore, would have expanded the entry to include supplements as was held by this Court in Sun Export Corporation's case.

8. Mr. Somnath Shukla, learned counsel appearing on behalf of the assessee, submitted before us that his case was covered on all counts by Sun Export Corporation's judgment inasmuch as "animal feed" was held to include animal feed supplement as well and that therefore, in the present case, prawn feed supplement would be included within the expression "Prawn Feed". He further added that Surendra Cotton Oil Mills's case, the later judgment of this Court, was on a completely different set of facts and merely distinguished the Sun Export Corporation's judgment. As his case falls directly and immediately within the ratio of the Sun Export Corporation's case and not within Surendra Cotton Oil Mills's case, he argued before us, that there was, therefore, nothing wrong with the CESTAT's judgment.

9. Having heard learned counsel for both the sides, we feel that Shri Somnath Shukla reliance upon the Sun Export Corporation's judgment is correct. In that judgment, the exemption Notification read as follows : -

"9. The relevant Exemption Notification No. 234/82, dated 1-11-1982 read as follows :

Exemption to certain specified goods. - In exercise of the powers conferred by sub-rule (I) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 104/82-Central Excise, dated the 28th February, 1982, the Central Government hereby exempts goods of the description specified in the Schedule hereto annexed and falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of excise leviable thereon under Section 3 of the said Act.

* * *

10. Animal feed including compound livestock feed."

10. This notification was later amended to include animal feed supplements and animal feed concentrates. On a reading of the fact situation in that judgment, it is clear that it was only the earlier Notification within which the assessee had to fit his case. This court in arriving at the conclusion that the assessee must

succeed held : -

"12. Now, the question is whether the "animal feed supplement" would fall under the exemption notification dated 1-11-1982. As noticed earlier similar question was considered by the Bombay High Court and the learned Judge expressed the view as follows :

"..The preparations in question are used to supplement animal feed. Sometimes animal feed or poultry feed is already fortified with these vitamins when sold. Sometimes, however, farmers prefer to add the vitamins either to animal feed or to poultry feed separately. These products strengthen the nutritional quality of animal feeds. Thus, for example, items like Bournvita or Complan also add nutrients to milk. But they are not for that reason, medicines. In a general sense every kind of nourishment strengthens the body against ailment. But such nourishment cannot be considered as a medicine or a drug. The two products are also known in the trade as animal feed supplements and they are sold by the suppliers of animal feed.

* * *

It is next contended by the respondent that even if the two products fall under Tariff Item 68 the benefit of the Exemption Notification No. 55 of 1975 cannot be given to these products because these products are not animal feeds. They are merely animal feed supplements. This exemption notification has been amended by another notification No. 6 of 1984 dated 15th February, 1984 as a result of which the item "animal feed including compound livestock feed" is now substituted by "animal feed including compound livestock feed, animal feed supplements and animal feed concentrates". After the coming into force of this notification, the petitioners have been given the benefit of full exemption. The only question is whether prior to this notification, the petitioners are entitled to exemption under the original Notification No. 55 of 1975.

In the case of the petitioners themselves namely Glaxo Laboratories (India) Ltd. v. State of Gujarat, the Gujarat High Court was required to consider whether certain vitamin products including Vitablend WM Forte which were used for supplementing cattle and poultry feed should be classified as "cattle feed" within the meaning of Entry 21 of Schedule I of the Gujarat Sales Tax Act, 1969 or "poultry feed" within the meaning of Entry 22 of Schedule I of that Act. The Gujarat High Court has held that the terms "cattle feed" and "poultry feed" must include not only that food which is supplied to domestic animals or birds as an essential ration for the maintenance of life but also that feed which is supplied over and above the maintenance requirements for growth or fattening and for production purposes such as for reproduction, for production of milk, eggs, meat, etc., or for efficient output of work. The same reasoning would apply to the present case also. These products are also fed to animals or poultry to give them better nourishment. They would, therefore, qualify as "animal feeds".

It was submitted by the respondents that the subsequent amendment expressly

refers to "animal feed supplements". This suggests that animal feed supplements were not previously included in the exemption notification. This reasoning must be rejected. The amendment appears to be clarificatory in nature. For example, the amendment now expressly refers also to animal feed concentrates which were not expressly referred to earlier. It cannot be said that animal feed concentrates are not animal feed. In the same manner products which supplement animal feed and are generally added to animal feed are also covered by the generic term "animal feed".

13. We are in agreement with the above view expressed by the Bombay High Court. No doubt it was contended on behalf of the Revenue that the contrary view taken by the Tribunal has been challenged in this Court which was rejected in limine at the admission stage. We do not think that dismissal at the admission stage can be relied upon as a binding precedent. Even assuming that there are two views possible, it is well settled that one favourable to the assessee in matters of taxation has to be preferred."

11. We have serious doubts as to whether the Bombay High Court judgment affirmed in Sun Export Corporation's case is correct. First and foremost, it is clear that the subsequent exemption Notification largely expanded the first Notification which referred only to animal feeds and nothing else. That being the case, it would be difficult to say that a large number of other categories which have subsequently been added would be clarificatory and therefore, retrospective. Further, we also feel that in view of the catena of judgments of this Court which have held that an exemption Notification has to be strictly construed (that is, if the person claiming exemption does not fall strictly within the letter of the Notification, he cannot claim exemption), have also been ignored by this Court in Sun Export Corporation's case in Paragraph 13 thereof. Apart from this, the view of this Court in Paragraph 13 that it is well-settled that if two views are possible, one favourable to the assessee in matters of taxation has to be preferred is unexceptionable. However, this Court was not concerned in that case with the charging Section of a taxation statute. It was concerned with the interpretation of an Exemption Notification which, as has been stated above, would require the exactly opposite test to be fulfilled.

12. We also find that in the subsequent judgment of this Court, Surendra Cotton Oil Mills's case, this Court has distinguished the Sun Export Corporation's case and held that it dealt with "animal feed" which was large enough to include "animal feed supplements" whereas the facts of Surendra Cotton Oil Mills's case showed that ingredients of animal feed could not be held to be included in "animal feed".

13. In our opinion, this Court did not adequately deal with why Sun Exports Corporation's case which is a binding decision of a three Judges Bench should not be followed, apart from a specious distinction between "ingredients" and "supplements" which is logically speaking a distinction without a difference.

14. It also remains to deal with a judgment of three Judges" Bench in Collector of Central Excise, Bangalore v. Tetragon Chemie (P) Ltd. [(2002) 10 SCC 331 = 2001 (132) E.L.T. 525 (S.C.)]. In this judgment, the question that arose for consideration again relates to vitamins that were mixed with animal feed as animal feed supplements. The entries that were relied on in that case read as follows : -

"Entry 2302.00 reads as follows :

"2302.00. Preparation of a kind used in animal feeding, including dog and cat food"

The rate of duty for this is nil.

Entry 2936.00 reads as follows :

The rate of duty prescribed is 15% for the vitamins."

15. Faced with an entry which spoke of preparation of a kind used in animal feeding including dog and cat food, this Court came to the conclusion that animal feed supplements were rightly includible in such entry as they were obviously preparations of a kind used in animal feed. We may only add that we have referred to this judgment for the sake of completeness. We feel that this judgment does not have direct relevance to the facts of this case as the entry that this Court was concerned with in that case was large enough to take within its ken animal feed supplements.

16. This being the unsatisfactory state of the law as it stands today, we feel that this matter should be placed before Hon"ble the Chief Justice of India to constitute an appropriate Bench to resolve the doubts pointed out by us in the body of this Order.

17. Ordered accordingly.