

(2001) 06 CAL CK 0004
In the Calcutta High Court
Case No : C.R. No. 9748 (W) of 1992

Durga Metal Works (P) Ltd.	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 21-06-2001

Acts Referred:

Customs Act, 1962 — Section 12, 12(1)
Customs Tariff Act, 1975 — Section 2, 3, 3(1), 3(3), 9A

Citation : (2001) 77 ECC 220 : (2001) 131 ELT 544

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : J.P. Khaitan, G.N. Ghorawat and Sandip Chowdhury, for the Appellant; N.C. Roy Chowdhury and Swapan Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—Used aluminium cans were imported by the writ petitioner vide bill of lading dated 17th August, 1982. After the said goods arrived in India, the custom authority imposed duty by virtue of Section 12 of the Customs Act, 1962 read with Sections 2 and 3 of the Customs Tariff Act, 1975 by virtue of a notification dated July 31, 1982 which has been impugned in this writ petition.

2. Two-fold challenge has been made by the writ petitioner :- (1) The additional duty levied u/s 3 of the said Act, 1975 is not tenable in view of the fact that the used aluminum cans imported by the petitioner were nothing but aluminum scraps and can not come under purview of the Section 3 of the said Act, 1975.

(2) The auxiliary duty levied by the Customs Authority in view of the change of the tariff is also not tenable and the duty should have been imposed on the date of booking of the said goods.

3. Mr. J.P. Khaitan, learned Advocate appearing for the petitioner, in his usual fairness has conceded that the second ground of challenge is no longer available

to the petitioner by virtue of the settled principles of law as laid down by the Apex Court.

That leaves us to decide only the first question raised by the writ petitioner.

To decide this question it is necessary to find out the true purport of the subject sections.

Section 12(1) of the said Act, 1962, Section 2 of the said Act and Section 3(1) of the said Act, 1975 are quoted below :-

"SECTION 12. Dutiable goods. - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the [Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

SECTION 2. Duties specified in the Schedules to be levied. - The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962) are specified in the First and Second Schedules.

SECTION 3. Levy of additional duty equal to excise duty. - (1) Any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable 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 leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description or articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

4. According to Mr. Khaitari the Explanation to Sub-section (1) of section 3 postulates that additional duty would be levied on a finished product at the rate of the excise duty payable on its manufacture in India or in case the same is not manufactured, equivalent to the excise duty paid on a like article. Since used aluminum cans are nothing but scrap and are being imported to get the raw metal after moulding (melting) is not a product within the meaning of Section 3(1) and cannot attract additional duty.

5. Drawing my attention to the relevant invoice Mr. Khaitan submitted that the goods that had imported are of NARI'S specification, talc 79 of Nari provides as follows :-

"Old Can Stock - shall consist of clean old aluminum cans decorated or clear, free

of iron dirt, liquid and/or other foreign contamination"

6. He has also drawn my attention to item 27 of the Central Excise Tariff. Item 27(a)(a) denotes "Waste and Scrap".

7. Mr. Khaitan further contended that initially the Apex Court decided the identical issue in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, by a three Bench decision. However, according to Mr. Khaitan another three bench decision in the case in Hyderabad Industries Ltd. and Another Vs. Union of India (UOI) and Others, dealt with a similar case and could not agree with the earlier three bench decision and referred the matter to a larger bench. While sending the matter to a Larger Bench the Apex Court relied on another three bench decision in the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, , unfortunately the said three bench decision in the case of Moti Laminates did not consider the Khandelwal's case. The matter was disposed of by the larger bench in the case of Hyderabad Industries Ltd. and Another Vs. Union of India and Others, . Relying on the said Larger Bench decision Mr. Khaitan contended that the Khandelwal's case has been over-ruled by the Larger Bench and following the said larger bench I should allow the writ petition.

Mr. N.C. Roy Chowdhury, Learned Advocate appearing for the revenue submitted that the analogy drawn by the petitioner with regard to the subject product is not correct in view of the specific provision made in item No. 27(a)(a) of the Tariff schedule. According to Mr. Roy Chowdhury the tariff schedule specifically provides for Aluminum Scraps. Hence, there cannot be any ambiguity for which the writ petitioner can claim exemption. According to Mr. Roy Chowdhury so long tariff item is not challenged the writ petitioner is not entitled to any relief herein.

8. In reply Mr. Khaitan submitted that simply because the aluminum scrap has been mentioned in the tariff schedule does not attract duty unless and until it complies with the requisites mentioned in Section 3(1) of the Tariff Act read with the Explanation given therein. In furtherance of his reply Mr. Khaitan also contended that in Khandelwal's case as well as in the case of Hyderabad Industries copper scrap and asbestos fibre were the subject products, those two products are also mentioned in the tariff schedule. Even then the Apex Court has gone into those questions. Hence, the contention of the respondent is not tenable.

9. To decide this question may I now try to find out the law laid down by the Apex Court In Khandelwal's case the Apex Court was of the view that the charging section being Section 12 does not contemplate any manufacture. According to the Apex Court Section 3 of the Tariff Act is only the measure of duty leviable on the imported article and does not determine the nature of the duty. Section 3 of the Customs Tariff Act does not require that the imported article should be such as be capable of being produced or manufactured in India. According to the Apex Court concept of manufacture is totally irrelevant and

accordingly the levy of additional duty on the imported article cannot be challenged. The Apex Court also gave logic in support of such finding. According to Apex Court since indigenous brass scrap which comes out in the process of manufacture has an established market in India and the imported brass scrap should also suffer additional duty equivalent to the excise duty payable for indigenous brass scrap avoid unhealthy competition. In the said judgment it was observed

"The argument that the articles imported by the appellants have been reduced to scrap by reason of damage, wear and tear, is quite irrelevant. The true test is as to what is the description of the articles imported. If the articles are brass scrap, the limited inquiry which has to be made is whether brass scrap can come into being during the process of manufacture. If the answer is in the affirmative, the imported brass scrap will be chargeable to additional duty in accordance with Section 3(1) of the Tariff Act."

The three bench decision in Hyderabad Industries observed that since the asbestos fibre is removed from the parent rock and no process of manufacture can be said to have been employed, it is not liable to excise duty. However, since it has felt some difficulty in construing the Explanation to Section 3(1) of the Tariff Act it referred the issue to the Larger Bench.

10. The Larger Bench in effect upheld the finding of the three bench decision in Hyderabad Industries. Kirpal J. speaking for the larger bench inter alia observed as follows :-

"The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured". The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India."

"There are different types of customs duty levied under different Acts or rules. Some of them are; (a) a duty of customs chargeable u/s 12 of the Customs Act, 1962; (b) the duty in question, namely, u/s 3(1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients u/s 3(3) of the Customs Tariff Act; and (d) duty chargeable u/s 9A of the Customs Tariff Act 1975. Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax u/s 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not

necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act".

"We hasten to add that we are not over-ruling the Khandelwal Metal & Engineering Works case in its entirety because the Court also held in that case that brass scrap was in any case an item which was manufactured and, therefore, excise duty was leviable. We have not examined, in the present cases, whether brass scrap can or cannot be regarded as a manufactured item for that question does not arise in the present cases."

Shah, J. has observed as follows :-

"I agree with the reasons recorded for holding that the ratio laid down in the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India, does not appear to be correct and also with the proposed final order."

11. From the aforesaid observations it clearly appears to me that the Larger Bench has over-ruled the Khandelwal's case in part to the extent which dealt with the question that the additional duty is also levied even if the product is not manufactured. On the other question the Larger Bench made it expressly clear that the Khandelwal's case is not over-ruled by the Larger Bench because in Khandelwal case it was held that brass scrap was in any case an item which was manufactured and therefore excise duty was leviable. The Apex Court also made it clear that whether brass scrap can or cannot be regarded as a manufactured item for that question did not arise in the said case. If such is the decision, in my view, the Khandelwal case is equally applicable in the present facts and circumstances of this case. Whether the aluminum scrap can or cannot be manufactured, cannot be said to have been decided by the Larger Bench. The Larger Bench dealt with the asbestos fibre which is extracted from the rock and admittedly involving no process of manufacture. Hence, in my view, applying the analogy of Khandelwal case even to the extent which has not been over-ruled by the Larger Bench in the instant case, the contention of writ petitioner in the present case is bound to be held as not tenable.

12. In the result this writ petition fails and is hereby dismissed. The rule nisi issued by this court on 1st October, 1982 is discharged. The writ petitioner is directed to pay the duties as demanded by the Customs Authority within a period of six weeks from the date and in default the Customs Authority will be at liberty to invoke the bank guarantee furnished by the writ petitioner in favour of the Collector of Customs in terms of the said interim order dated October 1, 1982. Similarly the bond executed in favour of the Collector of Customs can also be invoked by the Customs Authority in case of default.

13. Since this writ petition involves interpretation of the three bench decision and the five judges' bench decision of the Apex Court I suo moto grant stay of operation of this order for a period of fortnight from date.