(1993) 07 CAL CK 0015

In the Calcutta High Court

Case No : Matter No. ... of 1993

Fitwell Fastner (India) Pvt. Ltd. — APPELLANT

Vs

Collector of Customs — RESPONDENT

Date of Decision : 15-07-1993

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Customs Act, 1962 — Section 12, 14, 14(1), 14(2), 25(1)
Customs Tariff Act, 1975 — Section 3

Citation : (1993) 68 ELT 50

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Sunil Chatterjee, S. Ghosh and Om Prakash Chowdhury, for the Appellant;Dutta, for the Respondent

Final Decision : Allowed

Judgement

Ruma Pal, J.—The petitioners had imported Foley Balloon Catheters. The question which has arisen for determination in this case is whether additional customs duty is payable on Foley Balloon Catheters.

2. It is the petitioners'' case that such additional duty was not payable. The petitioners'' argument is that the goods are not leviable to Excise Duty under the Central Excises and Salt Act, 1944 and as such no additional duty could be imposed u/s 3 of the Customs Act, 1962.

3. The petitioners moved this writ application on 13th May, 1993 upon notice to the respondents. In the writ petition the petitioners have challenged the refusal of the respondent authorities to exempt Foley Balloon Catheters from payment of additional duty. By an interim order I had directed the Assistant Collector of Customs to hear and dispose of the representation of the petitioners by which the petitioners had claimed relief from payment of additional duty. Consequent directions regarding the hearing were also given. Pursuant to the directions of this Court the Assistant Collector of Customs passed an order holding that the

petitioner was liable to pay additional duty.

4. The question is a pure question of law and strictly speaking there would be useful purpose served by directing the filing of affidavits. The stand of the customs authorities has been expressed in the order of the Assistant Collector.

5. In my view the reasoning of the Assistant Collector is incorrect and the stand of the authorities cannot be sustained either in principle or law.

6. Foley Balloon Catheters are admittedly classifiable under Tariff Item 9018.39 of Schedule I to the Customs Tariff Act, 1975. In the normal course, and without more, they are subject to both basic and additional Customs Duty. Under Notification No. 208-Cus. dated 22-9-1981 exemption was granted u/s 25(1) of the Customs Act, 1962 of the whole of the duty of Customs leviable under the First Schedule to the Customs Tariff Act, 1975 as well as the whole of the additional duty leviable u/s 3 of that Act various goods including diverse kinds of Life Saving Equipment. Item 22B of the List of Life Saving Equipment reads as follows :-

"22B. Ostomy Products (Appliances) for managing Colostomy, IIIeostomy, Ureterostomy, Illegal Conduit Urostomy Stoma cases such as bags, belts, adhesive seals and discs or rolls adhesive remover, skin barriers micropore surgical tapes, bag closing clamps karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, male or female urinary incontinency sets, skin gels, in parts or sets."

Item 32 of the list read as :

"32. Suction Catheters."

7. In 1984 the Central Excise and Gold (Control) Tribunal (referred to as CEGAT) in the case of 1987 (30) ELT 493 after considering the view of the Director General of Health Services, the opinion of experts in the field of urology, as well as the Medical Dictionary, came to the conclusion that foley balloon catheters were suction catheters within the meaning of Item 32 of the list of life saving equipment in Notification 208-Cus. dated 22-9-1981 and as such were wholly exempt from payment of basic as well as additional customs duty.

8. This view was followed in a number of decisions of the Tribunal [See : 1987 (27) ELT 706 1991 (55) ELT 393 as well as by the Bombay High Court [See : Mansukhlal Chhaganlal Desai, Bombay Vs. Union of India, .

9. Subsequently Notfn. 208 dated 22-8-1991 was amended. An explanation was added under the list of life saving drugs. The Explanation reads :

"Explanation. - For the purposes of this notification, the items listed under this heading shall not include Foley Balloon Catheters."

10. Therefore Foley Balloon Catheters were denied the benefit of the exemption and by virtue of the Explanation became subject to the incidence of Customs

Duty, both basic and additional which would be payable in the normal course.

11. The argument of the petitioners is that Foley Balloon Catheters are entitled to exemption from payment of additional duty in the normal course. This argument is based on the provisions of Section 3 of the Customs Tariff Act, 1975 read with Notfn. No. 339/86-C.E., dated 11-6-1986. In my view the submission is of substance and must be accepted.

12. Section 3 of the Customs Tariff Act, 1975 provides :

"Levy of additional duty equal to excise duty. - (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 leviable on a like article if produced or manufactured in India and if such exercise 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 of articles to which the imported article belongs, and where such duty is leviable 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 leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962 (52 of 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 (52 of 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).

(3) 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 not] such additional duty as would counterbalance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rule made by the Central

Government in his behalf.

(4) In making any rules for the purposes of Sub-section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like-article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties, shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

13. This section clearly envisages that the quantum of additional duty is relatable to the amount of central excise duty payable in respect of the article for the time being. This position also appears to have been accepted by the Assistant Collector in his order dated 28-5-1993. But the Assistant Collector has erred in holding that there is no excise duty payable in respect of foley balloon catheters for the time being.

14. By Notification 339/86-C.E., dated 11-8-1986 (as subsequently amended), in exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government wholly exempted from excise duty various medical and surgical instruments. The particulars of the medical and surgical instruments have been set out on the Schedule to the notification.

15. Item 28 of the Schedule reads :

"28. Ostomy Products (Appliances) for managing Colostomy, IIIeostomy, Uraterostomy, Illegal Conduit Urostomy Stoma cases such as bags, belts, adhesive seals or discs or rolls adhesive remover, skin barriers micropore surgical tapes, bag closing clamps, karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, males or female urinary incontinency sets, skin gels, in parts or sets."

Item 39 of the Schedule reads :

"39. Suction catheters."

16. Now the language used in items 28 and 39 of the Schedule to Notification 339/86-C.E. corresponds exactly with Items 22B and 32 of the list of life saving equipment in Notification 208-Cus. There is no reason why the items used in the Excise Notification should be construed differently from the items used in the Customs notification. The conclusion of the Tribunal that Foley Balloon Catheters are Suction Catheters was a finding of fact. That the decision was rendered in the context of a Customs Notification was immaterial. The opinion of the Experts as well as medical dictionaries were taken into consideration before the Tribunal reached the conclusion. Had it not been for the Explanation inserted in

Notification 208-Cus. there can be no doubt that Foley Balloon Catheters would have continued to be exempted from duty under that notification. The Explanation was necessary to exclude what would otherwise have been covered.

17. A sister concern of the petitioner No. 1 had also imported Foley Balloon Catheters. The Assistant Collector at Madras, rejected the claim of the sister concern for exemption from payment of additional duty. An appeal was preferred and the Collector set aside the order of the Assistant Collector and held that Foley Balloon Catheters were suction Catheters and came within that description in Central Excise No. 339 of 1986 and as such were exempted from payment of additional Excise Duty. No further appeal appears to have been preferred from this decision of the Collector. It would lead to financial confusion and an arbitrary discrimination if the Customs Authorities of two cities in the same country were permitted to take such divergent views. Between the two views, the view of the Collector being of a Superior Officer should prevail.

18. It may be noted that by public notice No. 164-ITC (PN)/88-91 dated 19th September, 1989 issued by the Chief Controller of Imports and Exports in respect of the Import and Export Policy for April 1988 to March 1991 Foley Balloon Catheters have been included after the words "male and female urinary incontinency sets" (See Item 28 of Notification 339/86) and are freely importable under OGL.

19. Therefore, in spite of the exclusion of Foley Balloon Catheters from the benefit of the exemption granted under Notification 208-Cus., Foley Balloon Catheters are not liable to pay Additional Duty under the provisions of Section 3 of the Customs Tariff Act, 1975.

20. The writ application must be allowed. The order of the Assistant Collector dated 28-5-1993 passed pursuant to an interim order of the Court, is set aside. Let writs issue as prayed. There will be no order as to costs.

21. Let xerox copy of this judgment duly signed by the Assistant Registrar of this Court be given to the parties upon their undertaking to apply for the certified copy of the judgment and on payment of usual charges.

