

(1991) 05 GUJ CK 0004
In the Gujarat High Court

Case No : Special Civil Application No"s. 848 and 849 of 1981

Garden Silk Mills Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-05-1991

Acts Referred:

Customs Act, 1962 — Section 12, 15, 15(1), 49, 68
Customs Tariff Act, 1975 — Section 3(1)

Citation : (1991) 34 ECC 74 : (1991) ECR 164 : (1992) 61 ELT 393

Hon'ble Judges : J.N. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Advocate : K.S. Nanavati, for the Appellant; B.B. Naik, for the Respondent

Judgement

Ravani, J.—Since common questions of law and facts arise in these two petitions, at the request and with the consent of the learned advocates appearing for the parties, both the matters have been heard together and are being decided by this common judgment and order.

2. These two petitions are filed by two different mill companies which are engaged in manufacturing man-made fabrics out of synthetic fibres as well as continuous filament yarn. Both the petitioners import man-made yarn as well as continuous filament yarn. The petitioners have private bonded warehouse licenses under the relevant provisions of the Customs Act, 1962. Besides import duty, the petitioners are required to pay additional duty of customs under the provisions of the Customs Tariff Act, 1975. This duty is also popularly called countervailing duty. As provided u/s 3 of the Customs Tariff Act, 1975, the measure of additional duty of customs is equal to the excise duty for the time being leviable on like article if such article is produced or manufactured in India. It is an undisputed position that the petitioners were liable to pay additional duty of customs on the synthetic and filament yarn imported by them.

3. On the midnight of October 3/4, 1978, the Additional Duties of Excise (Textile & Textile Articles) Ordinance, 1978 was promulgated which was later on replaced

by Act. As per this Ordinance, additional duty of excise equal to the 10% of the amount of basic excise duty was imposed on certain textile articles with effect from October 4, 1978. During the period commencing from October 4, 1978 to October 10, 1978, the petitioner Mill Company of Spl. C.A. No. 848/81 had removed certain goods from its private bonded warehouse. Similarly petitioner Mill Company of Spl. C.A. No. 849/81 had removed certain goods between October 4, 1978 and October 27, 1978. At the time of removal of the goods, the duty levied from them did not cover the additional duty of excise imposed by the aforesaid Ordinance, probably because the goods were imported before the Ordinance come into force.

4. On November 19, 1978, the Superintendent of Customs issued two separate demand notices to the petitioner Mill companies and called upon them to pay the amount of additional duty equal to 10% of the amount of basic excise duty leviable under the Ordinance. The petitioner of Spl. C.A. No. 848/81 was called upon to pay an amount of Rs. 15,136.50 ps. while petitioner of Spl. C.A. No. 849/81 was called upon to pay an amount of Rs. 61,608.32 ps. This demand notice/letter is produced at Annexure "D" to the petition in both the petitions. The petitioners objects to the payment of the additional duty demanded from them. However, later on they paid the amount under protest.

5. According to the petitioners, the goods were already imported in India prior to the imposition of additional duty of excise by the aforesaid Ordinance. After import of goods, same were stored in private bonded warehouse. Therefore, it is contended that the additional customs duty equal to additional duty of excise imposed under the Ordinance could not have been levied from them. The petitioner of Spl. C.A. No. 848/81 has claimed refund of amount of Rs. 88,899.57 ps. while petitioner of Spl. C.A. No. 849/81 has claimed refund of Rs. 1,43,570/-. Both the petitioners have also prayed that either the amount mentioned in the prayer clause or such other amount as has been recovered from the petitioner as and by way of additional duty by reference to Ordinance No. 4 of 1978 in respect of the goods imported and stored by the petitioners in their private bonded warehouse prior to the midnight of October 3/4, 1978 be refunded to them.

6. It is an admitted position that the provisions of Section 15(1)(b) of the Customs Act, 1962 would be applicable to the case of the petitioners. The petitioners have private bonded warehouse and they have cleared the goods from the warehouse u/s 68 of the Customs Act, 1962 which provides that the importer of any warehoused goods may clear the goods for home consumption. The contention of the petitioners is that since the goods were already imported prior to the Ordinance coming into force and were already stored in their private bonded warehouse, the additional duty could not have been recovered from them. The contention cannot be accepted. In the case of *Prakash Cotton Mills (P) Ltd. Vs. B. Sen and Others*, , the question arose as to whether the amended law would be applicable to the consignments which had been received, stored and assessed to duty before the Ordinance amending the law came into force. The

Supreme Court held that Section 15 specified the date for determination of the rate of duty and tariff valuation of imported goods. After quoting the provisions of Section 15 of the Customs Act, 1962, the Supreme Court has observed as follows :-

"It is thus the clear requirement of clause (b) of sub-section (1) of Section 15 of the Act that the rate of duty, rate of exchange and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the warehoused goods are actually removed from the warehouse. A cross reference to Section 49 of the Act shows that an importer may apply to the Assistant Collector of Customs for permission to store the imported goods in a warehouse pending their clearance, and he may be permitted to do so. The other relevant provision is that contained in Section 68 of the Act which provides that the importer of any warehoused goods may clear them for "home consumption" if, inter alia, the import duty leviable on them has been paid. That is why clause (b) of sub-section (1) of Section 15 of the Act makes a reference to Section 68. It is therefore quite clear that the rate of duty, rate of exchange and tariff valuation shall be those in force on the date of actual removal of the warehoused goods from the warehouse."

7. In view of the aforesaid settled legal position, the petitioners cannot claim that the additional customs duty having reference to the Ordinance promulgated on October 3/4, 1978 could not have been levied from them. It is an undisputed position that the goods were removed from the warehouse after the Ordinance came into force on October 4, 1978. Therefore, the Customs authorities were rights in taking the view that the rate of duty applicable to the imported goods had to be determined according to the law which was prevalent on the date they were actually removed from the warehouse.

8. It may be noted that in case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, , the Supreme Court has cleared the misconception flowing from the popular notion regarding countervailing duty. It is explained and clarified that the charging section under which duties of customs are leviable is Section 12 of the Customs Act, 1962 read with Section 3(1) of the Customs Tariff Act, 1975. It is further observed that additional duty which is mentioned in Section 3(1) of the Customs Tariff Act, 1975 partakes the same character as that of the customs duty since it is in addition to the duty which is leviable u/s 12 of the Customs Act, 1962. Section 3(1) of the Tariff Act, 1975 provides a measure of the additional duty which has to be equal to the excise duty leviable on a like article if produced or manufactured in India.

9. If decisions of the Supreme Court in the case of Prakash Cotton Mills and in the case of Khandelwal (supra) are read together, it becomes obvious that in cases where goods are stored in private bonded warehouse, the rate of customs duty leviable would be the rate prevailing on the date of actual removal of the goods for home consumption from the private bonded warehouse. Confusion arises because in Section 3(1) of the Customs Tariff Act, 1975, the measure of

additional customs duty is made referable to excise duty leviable on the like articles produced or manufactured in India. Simply because the quantum of the additional customs duty is related to the excise duty, it does not cease to be customs duty. Once it becomes clear (and now it is so made clear by Supreme Court in the case of Khandelwal (*supra*) that what is levied is additional customs duty and not excise duty, the only question which needs to be answered is, what is the rate of customs duty prevailing on the date of actual removal of the goods from the private bonded warehouse ? As per the law laid down by the Supreme Court in the case of Prakash Cotton Mills (*supra*) customs duty is to be levied and collected at the rate prevailing on the date of removal of the goods from the private bonded warehouse. In view of this position, additional customs duty levied and collected from the petitioners is in accordance with law.

10. The learned counsel for the petitioners submitted that the provisions of the Additional Duties of Excise (Textile & Textile Articles) Ordinance, 1978 cannot be applied for determination of the rate of additional customs duty to the goods already imported and stored in warehouse. It is argued that if such interpretation is given it would amount to giving retrospective operation to the provisions of the Ordinance. The argument cannot be accepted for the simple reason that the additional duty of customs is not imposed by the Ordinance. On account of the provisions of Section 3(1) of the Customs Tariff Act, 1975, read with the provisions of the Ordinance there is change in the rate of additional duty of customs or it may be that the additional duty of customs is sought to be levied or collected for the first time on account of the Ordinance, coming into force. But then the relevant date for levy of customs duty is the date on which the goods are actually removed from the private bonded warehouse for home consumption. When the goods are actually removed from the private bonded warehouse, it is not the additional duty of excise, or countervailing duty as is popularly called, is sought to be levied on the goods actually removed from the private bonded warehouse. What is being levied is additional duty of customs, rate of which is related to the additional duty of excise imposed by the Ordinance. In view of the judgment of the Supreme Court in the case of Prakash Cotton Mills (*supra*), the rate of customs duty applicable would be as prevailing on the date of actual removal of the goods from the private bonded warehouse. Therefore this argument is also required to be rejected.

11. The learned counsel for the petitioners submitted that if the aforesaid interpretation is given, it would amount to giving retrospective operation to the provisions of the Additional Duties on Excise (Textile & Textile Articles) Ordinance, 1978. There is misconception with regard to the meaning of the term "retrospective". In the judgment delivered in Spl. C.A. No. 2887 of 1980 pronounced on April 29, 1991, reported in 1992 (58) E.L.T. 9 (Guj.), this misconception has been cleared. A manufacturer has no right to say that because his goods have been manufactured in past, the same cannot be taxed in future. Relying on the decision of the Supreme Court in the case of D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another, , it is held therein

that even if additional excise duty is levied on the goods already manufactured but not assessed and cleared at the time of Ordinance coming into force, the provisions of the Ordinance cannot be said to be retrospective. Therein it is held that a manufacturer cannot say that the goods manufactured by him shall not be subjected to excise duty after they are manufactured. If such imposition retains the essential characteristics of excise duty, there is nothing in law to say that the imposition of excise duty on goods already manufactured any right of the manufacturer is adversely affected or impaired. Moreover, if the tax is levied and collected at the stage of removal of the goods, no new obligation or disability is attached in respect of any earlier transaction or consideration. For the same reasons this argument also fails.

12. No other contention is raised.

13. There is no substance in the petitions and hence both the petitions are rejected. Rule discharged.