(2011) 03 DEL CK 0423

In the Delhi High Court

Case No : Writ Petition (Civil) No. 7538 of 2007

G.S. Marketing Company APPELLANT

Vs

Archana Arora and Others RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 12, 25
Customs Tariff Act, 1975 — Section 3, 3(5), 3A
Finance Act, 2005 — Section 72

Citation : (2011) 03 DEL CK 0423

Hon'ble Judges : Dipak Misra, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Rajiv Nanda, Amit Jain and Rachna Saxena, for the Appellant; K.K. Ahuja, for R-1 and 2, A.S. Chandhiok, ASG and Sumeet Pushkarna, Bhagat Singh and Jitendra for R3/UOI, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, C.J.—Invoking the inherent jurisdiction of this Court under Article 226 of the Constitution of India, the Petitioner has prayed for issue of a writ of mandamus or any other writ or direction commanding the Respondents to allow the Petitioner to take refund/input tax credit on the additional custom duty imposed under Notification No. 19/2006 -CUS dated 1.3.2006 for the period between 1.3.2006 and 14.9.2006. It is apposite to mention here that that is the only prayer on the basis of which notice was issued and learned Counsel for the Petitioner has only addressed us on the said issue.

2. The brief resume of facts which are essential to be stated for appreciating the controversy is that the Petitioner is a registered dealer under Delhi Value Added Tax Act (VAT) and Central Sales Tax Act, vide TIN No. 07450307181 and is engaged in trading, i.e., import and export of paper, paper board and lamination film etc. The Central Government issued a Notification No. 19/2006 -CUS dated 1.3.2006 u/s 3(5) of the Customs Tariff Act, 1975 (for short "the 1975 Act") and

Notification No. 102/2007 -CUS dated 14.9.2007. By Notification dated 1.3.2006, the third Respondent imposed additional duty of customs (CVD) to countervail State taxes/VAT. A reference has also been made to the speech of the Finance Minister relating to the Budget session of the year 2005-06.

3. It is averred that Section 3 of the 1975 Act has been substituted w.e.f. 1.3.2005 vide Section 72 of the Finance Act, 2005 read with the declaration made under the Provisional Collection of Taxes Act, 1931 with Finance Bill, 2005. The new provision, as contended, enables the Government to impose an additional duty at a rate not exceeding 4% ad valorem to countervail the sales tax, value added tax, local taxes and other charges leviable on sale or purchase or transportation of like goods in India. The value for the purpose of the said levy would include the assessable value, basic custom duty and any sum chargeable as customs duty u/s 12 of the Customs Act, 1962 and any additional duty of custom leviable under Sub-section (1) of Section 3A of 1975 Act. Various assertions have been put forth to highlight that the circular dated 14.9.2007 issued by the Government of India, Ministry of Finance only clarifies the notification No. 19/2006 -CUS dated 1.3.2006 and, therefore, it has to have retrospective effect from 1.3.2006 and, therefore, the benefit should be available to the Petitioner. In support of the aforesaid stand, it is contended by Mr. Nanda, learned Counsel for the Petitioner that the circular dated 14.9.2007, if appreciably understood, would only convey that the factual position as it existed on 1.3.2006 has been clarified to allay any kind of apprehension in the mind of the adjudicating authority and, therefore, it has to be treated as retrospective being clarificatory in nature. To bolster the said submission, he has placed reliance on the decision in W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central Excise, Meerut, U.P.,

4. Mr. A.S. Chandhiok, learned ASG, per contra, contended that the said circular is prospective as the language would clearly so reveal and it really does not clarify any aspect as there was no previous notification or a communication or a circular or prevalent practice which can be made demonstrable from the notification dated 1.3.2006. To buttress the said submission, he has drawn inspiration from the language employed in the circular No. 6/2008 -CUS dated 28.4.2008 wherein the circular dated 14.9.2007 has been treated to be prospective in nature.

5. The heart of the matter is whether the circular dated 14.9.2007 is treated as retrospective or prospective. In this context, we may refer with profit to a three-Judge Bench decision rendered in Sri Vijayalakshmi Rice Mills, New Contractors Co. and Others Vs. State of Andhra Pradesh, wherein it has been laid down that it is a well settled recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from any prior date.

6. In the case of Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd., , the Apex Court had opined in the factual matrix therein that a particular

expression, namely, "similar laminated wood" in Heading No. 44.08 expressly includes black boards of all kinds so that the amendment in Chapter Note 5 as introduced w.e.f. 19.3.1990 and thereafter w.e.f. 1.3.1992 merely clarified and made explicit which was implicit in the heading throughout. Their Lordships opined that the amendments were obviously made to put an end to the dispute raised by the manufacturers by an express statement.

7. In W.P.I.L. Ltd. (supra), a submission was put forth by the Appellant therein that there was a policy by which power driven pumps as well as parts thereof had been exempted from payment of excise duty since 1978 and that it was the consistent practice of the department and the policy had never been changed. It was also proponed that there was no change of policy even in 1994. The Government rescinded several notifications and issued a consolidated notification by exempting items that were not made subject matter of payment of excise duty. The said submissions were resisted by the learned Counsel for the Union of India and it was urged that the demand made was legal and justified. A contention was canvassed that the notification was not a clarificatory one. The Apex Court referred to the notifications and came to hold as follows:

13. The contention of the Appellant, in our opinion, therefore, is well-founded that both power driven pumps as well as parts of power driven pumps used for manufacturing of pumps within the factory were exempted from payment of excise duty. We are also satisfied that notifications were rescinded and consolidated notification was issued on March 1, 1994 with a view to reduce number of notifications. No demand hence could have been made against the Appellant in respect of parts of power driven pumps by issuing show cause notices. The submission of the Appellant is well-founded that the Government was satisfied about the policy which was in vogue not to impose excise duty on parts of power driven pumps used in the factory promises for manufacture of power driven pumps and to clarify the position, the subsequent notification dated April 25, 1994 was issued. This is also clear if one reads at both the notifications Nos. 46/94, dated March 1, 1994 and 56/94, dated April 25, 1994....

8. The present factual matrix is to be tested on the touchstone of the aforesaid enunciation of law, namely, unless a notification expressly states to be retrospective, it is to be treated prospective and secondly, if it is a clarificatory notification, it is to be given the retrospective or retroactive status. Mr. Nanda, learned Counsel for the Petitioner, to bolster his submission that the circular is retroactive, has referred to the speech of the Finance Minister for the Budget session of the year 2005-06. The relevant part of the speech which has been reproduced in the petition reads as under:

133. Honourable Members would recall that last year I had taken the power to impose a CVD on all imports to compensate for State level taxes. This levy was applied only to imports of ITA bound items and their inputs, except IT software. After the introduction of VAT in most States, I have received representations from trade and industry that this levy should be extended to all imports. The

argument is persuasive, and I propose to impose a CVD of 4 per cent on all imports with a few exceptions. Full credit of this duty will be allowed to manufacturers of excisable goods.

9. On the basis of the said speech, as contended, the circular dated 1.3.2006 came into force. For the sake of completeness, we think it appropriate to reproduce the relevant part of it:

Goods specified u/s 3(5) of the Customs Tariff Act. - In exercise of the powers conferred by Sub-section (5) 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 the 1st March, 2005 [number G.S.R. 117(E), dated the 1st March, 2005], hereby directs that all goods specified under the Chapter, heading, sub-hearing 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.

10. On a perusal of the same, it is clear as crystal the Central Government in supersession of the notification of the Government of India, Ministry of Finance, Department of Revenue No. 19/2005-Customs dated 1.3.2005 directed that all goods specified under the Chapter, heading, sub-hearing 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. Thus, there was an imposition of tax on import. The notification dated 14.9.2007 has been issued in exercise of powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 laying a postulate that the Central Government on being satisfied that it is necessary in the public interest to exempt the goods, falling within the first schedule of the 1975 Act, when imported into India for subsequent sale form the whole of the additional duty of customs leviable thereon under Sub-section (5) of Section 3 of the 1975 Act subject to fulfilling of certain conditions precedent. The said notification is an exemption notification. The earlier notification did not deal with exemption. There was no prevalent practice exempting the goods. A further circular has been brought into existence on 28.4.2008 which lays down the procedure to be adopted for refund of 4% additional duty of customs in pursuance of the Notification No. 102/2007 -Customs dated 14.9.2007. Clause 7.1 of the said Circular reads as follows:

As regards the other doubt expressed by certain field formations on the effective date of the operation of refund scheme, it is stated that the said notification No. 102/2007 -Customs was issued on 14.9.2007. Accordingly, it is clarified that only those cases where 4% CVD was paid on or subsequent to 14.9.2007, will qualify for refunds under this scheme subject to fulfillment of prescribed conditions.

11. On a perusal of the language employed there, it is manifest that the said circular dated 14.9.2007 is prospective in nature. What is submitted by Mr. Nanda is that the circular dated 14.9.2007 has to be read regard being had to the earlier notification dated 1.3.2006 and it is to be treated as retrospective the same being clarificatory in nature. In our considered opinion in the absence of anything being there in the earlier notification or any prevalent practice or any recognition, it is difficult to construe that what was implied earlier had become express by the later circular or it had become incumbent or necessitous to issue a circular. As has been indicated earlier, the first notification pertained to imposition of certain taxes whereas the circular dated 14.9.2007 dealt with exemption. There is a clear cut distinction between the two. Thus understood, we are unable to accept the submission of Mr. Nanda and accordingly the same stands repelled.

12. In the ultimate analysis, we do not perceive any merit in this writ petition and, accordingly, the same stands dismissed without any order as to costs.

