

(2012) 06 GUJ CK 0050

In the Gujarat High Court

Case No : Special Civil Application No. 11635 of 2005

Gujarat Ambuja Exports Ltd.

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 21-06-2012

Acts Referred:

Customs Act, 1962 — Section 12, 25, 75
Customs Tariff Act, 1975 — Section 8B, 8C, 9, 9A
Finance (No. 2) Act, 2004 — Section 81, 81, 82, 83, 83
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2013) 289 ELT 273

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave with Paritosh Gupta, for the Appellant; Amar D. Mithani and Ms. Amee Yajnik, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—The petitioners have, in this petition, challenged the legality and validity of Circular No. 5/2005-Cus., dated 31-1-2005 (hereinafter referred to as "the impugned circular"). The petitioners have also prayed for quashing demand notices dated 24-3-2005 and 28-3-2005 as at Annexure "H" collectively issued by the respondents seeking to recover Education Cess from the petitioners on the customs duty payable on the goods imported by the petitioners. The petitioners have further prayed for permanent prohibition against the respondents from charging any amount of Education Cess on the imports made by the petitioners under the Duty Entitlement Pass-book Scheme (hereinafter to be referred to as "the DEPB scheme"). The petition arises in the following factual background. The petitioner No. 1 is a company registered under the Companies Act. The petitioner No. 2 is its Chairman and Managing Director. The petitioners are engaged in manufacturing various goods and also exporting such goods to various countries. To encourage exports, the Government of India has been framing several schemes, all in different forms granting duty exemption to the

exporters. The petitioners have been availing of the DEPB scheme with respect to which, exemption from payment of import duty is granted at the specified rates for the specified commodities under Notification No. 45/2002-Cus., dated 22-4-2002 (hereinafter to be referred to as the exemption Notification No. 45/2002).

2. In the Union Budget of the year 2004-05, the Central Government imposed a levy of education cess as surcharge for the purpose of fulfilling the commitment of the Government to provide and finance quality basic education. To collect such cess, provisions were made in the Finance Act, 2004 wherein particularly Sections 81 to 851 pertained to education cess.

3. Such education cess is to be levied at 2% calculated on the aggregate of the duties of customs which are levied and collected by the Central Government. It is the case of the petitioners that when an importer such as the petitioners imports any goods and avails the benefits under the DEPB scheme, in essence, he does not pay any customs duty and in that view of the matter, is also not liable to pay education cess at the prescribed rate. The case of the petitioners is that in case of imports made under other export benefits schemes for example, Advance Licence Scheme, no education cess is demanded on the premise that when no customs duty is being paid by the importer, education cess would not apply. The petitioners contend that the DEPB scheme is no different from other similar export incentive schemes and, therefore, the respondents cannot levy education cess on the imports made under the DEPB scheme. This contention of the petitioners is based mainly on the premise that the goods imported under the DEPB scheme by virtue of exemption Notification No. 45/2002, carry "nil" rate of customs duty and additional duty. Under such exemption notification, edible oil, however, attracted 50% of the normal customs duty and additional duty. In other words, the exemption in case of import of edible oil was limited to 50% of the customs duty and additional duty payable otherwise. The petitioners agree that in such a case, when 50% of the duty is being paid by the importer, education cess calculated on such component, would be attracted. The petitioners point out that the respondents are insisting on collecting full amount of education cess on the imports made under the DEPB scheme whether the exemption for imported goods from payment of customs duty is total or partial.

4. The petitioners pointed out that the Government of India in the impugned Circular No. 5/2005 clarified that in case of the imports made under the DEPB scheme, the education cess at the rate of 2% would also be debited from the DEPB scrip. It is this circular that the petitioners have challenged in the present petition. Since on the basis of this circular, the Assistant Commissioner of Customs, Kandla issued two demand notices dated 24-3-2005 and 28-3-2005 demanding education cess at Rs. 17,61,733/- and Rs. 2,17,785/- respectively, the petitioners have also challenged such demand notices contending that such demands have been raised without any previous adjudication. The petitioners have, therefore, prayed for quashing such recovery notices and further prayed

that the respondents be prevented permanently from raising any such demand.

5. The respondents have appeared and filed two affidavits. Their stand as emerging from such affidavits is that DEPB scheme is an export incentive scheme which is vitally different from other schemes. Under DEPB scheme, the duty upon import of goods is not fully exempt but the exporter has an option of reducing his liability by utilising the credit in the DEPB scrips. It is further the case of the respondents that the exemption provided in a DEPB scheme is conditional and in essence what is being done is adjustment of the credits in the passbook of the importer in lieu of actual payment of the customs duty. The respondents have also drawn a distinction that unlike other schemes, credits in a DEPB scheme are freely transferable.

6. On the basis of such facts, the learned counsel for the petitioners submitted that the respondents have committed a grave error in issuing the impugned circular clarifying that education cess on the prescribed rate would be debited from the DEPB scrip of an importer. He submitted that when there is no customs duty payable on the imports made under the DEPB scheme, the question of charging education cess does not arise.

6.1 The counsel submitted that the DEPB scheme is no different from other export incentive schemes. On the imports made under such other schemes, no education cess is being collected on the premise that the importer does not pay any customs duty. The counsel submitted that on the same analogy, even on the imports made under the DEPB scheme, education cess cannot be levied.

6.2 The counsel further pointed out that on the imports made under the DEPB scheme, no Modvat credit was being permitted. This would, according to the counsel, further go to show that no customs duty is being collected on the imports made under the DEPB scheme.

6.3 With respect to demand notices, the counsel submitted that such notices were issued without any previous adjudication. No show-cause notice or hearing was granted to the petitioners. The duty demand pertains to earlier period of which the assessments were made and finalised. Without reopening such assessments or atleast without issuing the show-cause notice for alleged unpaid duty, straightaway no recovery notice could have been issued.

6.4 In support of his contentions, the counsel relied on the decision of Customs Excise and Service Tax Appellate Tribunal ("CESTAT" for short) in the case of 2005 (188) ELT 449 wherein an identical question came up for consideration. The Tribunal took the view that on the imports made under the DEPB scheme, when total exemption from payment of customs duty is granted to such goods, no education cess can be levied.

6.5 The counsel also relied on the decision of the Tribunal in the case of 2010 (259) ELT 547 wherein the Tribunal followed the ratio in the decision in the case of Reliance Industries Ltd. (supra).

6.6 The counsel also relied on the decision of a Larger Bench of the Tribunal in the case of 2004 (97) ECC 753 wherein it was held that mere debit in DEPB passbook is not sufficient for eligibility of Modvat credit availed on the strength of Bill of Entry where the importer availed of benefit of exemption notification exempting payment of customs duty.

7. On the other hand, learned counsel Ms. Amee Yajnik for the respondents opposed the petition contending that DEPB scheme is vitally different from other export incentive schemes. Under the DEPB scheme, the credit in the DEPB passbook is adjusted to the extent of customs duty liability. In that view of the matter, customs duty cannot be stated to have been exempt but is adjusted against the credit lying in the scrips. The counsel further pointed out that DEPB scrips are also freely transferable. On these grounds, the counsel contended that payment of education cess at the prescribed rate was justified.

8. Having thus heard the learned counsel for the parties and having perused the documents on record, we may notice that education cess was introduced in the year 2004-05 by enacting Sections 81 to 851 in the Finance Act, 2004. These provisions are included in Chapter VI titled "Education Cess". Section 81 which is the charging section provides inter alia that there shall be levied and collected, in accordance with the provisions of this Chapter, as surcharge for the purposes of the Union, a cess called the Education Cess to fulfil commitment of the Government to provide and finance universalised quality basic education. Section 83 pertains to levy of education cess on the specified goods manufactured or produced in India. Section 84 which is relevant for our purpose pertains to education cess to be levied in case of specified goods at the rate of 2% calculated on the aggregate of duties of customs which are levied and collected by the Central Government. Section 84 reads as under:-

84. (1) The Education Cess levied u/s 81, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be a duty of customs (in this section referred to as the Education Cess on imported goods), at the rate of two per cent., calculated on the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), u/s 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including-

(a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act, 1975.

(b) the countervailing duty referred to in section 9 of the Customs Tariff Act, 1975;

(c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act, 1975; and

(d) the Education Cess on imported goods.

(2) The Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force.

(3) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the Customs Act, 1962 or the rules of the regulations, as the case may be.

9. From the above provision, it can be seen that education cess is to be collected on the customs duty levied and collected by the Central Government at the rate of 2% on such duty. In the present case, therefore, it would be important to ascertain whether on the imports made under DEPB scheme, it can be stated that the Central Government is levying and collecting duties of customs.

10. In order to be able to do so, we would have to appreciate the nature of the DEPB scheme. The DEPB scheme is a part of Exim Policy of the Government of India formulated u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992. The policy outlines the objectives including to accelerate the country's transition to globally oriented vibrant economy with a view to derive maximum benefits from expanding global market opportunities and to stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capital goods required for augmenting production.

11. Chapter 7 of the Export and Import Policy pertains to duty exemption schemes. Various duty remission schemes framed by the Government enables post export replenishment/remission of duty on the inputs used in the export production. Duty Entitlement Passbook Scheme is one such duty remission schemes. The object of DEPB scheme is to neutralise the incidence of customs duty on the import component of the export product. Such neutralisation is provided by way of grant of duty credit against export product. In such a scheme, an exporter may apply for credit, as a specified percentage of FOB value of exports made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade. The duty credit under the scheme would be calculated by taking into account the deemed import component of an export product as per the SION norms and the basic customs duty payable on such deemed imports.

12. In case of Liberty India Vs. Commissioner of Income Tax, the Apex Court traced the nature of DEPB benefits and made following observations:-

DEPB is an incentive. It is given under the Duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object behind DEPB is to

neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as a percentage of the FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by the DGFT for import of raw materials, components etc., DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per basic customs duty and special additional duty payable on such deemed exports. Therefore, in our view, DEPB/Duty drawback are incentives which flow from the schemes framed by Central Government or from section 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business u/s 80IB. They belong to the category of ancillary profits of such undertakings.

13. Section 25 of the Customs Act, 1962 empowers the Central Government to grant exemption from duty. Sub-section (1) of Section 25 in particular provides that if the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally, either absolutely or subject to such conditions as may be specified in the notification, goods of any specified description from the whole or any part of the duty of customs leviable.

14. In exercise of powers u/s 25 of the Customs Act, 1962, the Government of India vide its exemption Notification No. 45/2002, granted total exemption from payment of customs duty and additional duty on goods other than edible oils on imports being made under DEPB scheme subject to certain conditions. Such exemption on edible oils, however, was limited to 50% of the standard rate of duty applied as also 50% of the additional duty. Such conditions relevant for our purpose read as under:-

(i) that the importer has been issued a Duty Entitlement Pass Book by the Licensing Authority in terms of paragraph 4.3 of the Export and Import Policy;

(ii) the importer has been permitted credit entries in the said Duty Entitlement Pass Book by the Licensing Authority at the rates notified by the Government of India in the Ministry of Commerce for the products exported;

(iii) the said Duty Entitlement Pass Book is produced before the proper officer of Customs for debit of the duties leviable on the goods but for exemption contained herein:

15. From the nature of DEPB scheme and the exemption granted to imports made under such scheme, it can be seen that the very purpose is to neutralise the import duty component on the imported goods used for production of export items. Such object is achieved through the DEPB scheme under which the exporter is given the facility of utilising the credits in the DEPB scrips for the purpose of adjustment against the customs duty liability on the goods imported for the ultimate purpose of export on value addition.

16. We may recall that Chapter 7 of the Export import Policy pertains to duty exemption/remission schemes. Para 7.1 thereof provides that the duty exemption scheme enables import of inputs required for export production. The duty remission scheme enables post export replenishment/remission of duty on inputs used in the export product. Such remission schemes include Advance Licence Scheme and Duty Free Replenishment Certificate Scheme as also the Duty Entitlement Passbook Scheme. Para 7.14 of said Chapter 7 of the Export Import Policy pertains to Duty Entitlement Passbook Scheme. It states at the outset that for the exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The object of DEPB scheme is to neutralise the incidence of customs duty on the import component of the export product. It further provides that such neutralisation shall be provided by way of grant of duty credit against the export product.

17. From the nature of DEPB scheme noted above and the exemption from payment of customs duty on imports made under such scheme, it can be gathered that the very purpose of granting such exemption is to neutralise the customs duty, on the import component of the export product. In essence, the Government of India grants duty remission at prescribed rates on the imports made under such a scheme.

18. It can thus not be denied that for the imports made under the DEPB scheme, there is total or partial, as the case may be, exemption in payment of customs duty. At the relevant time, for the goods other than edible oil, such exemption was total. For edible oil, such exemption was to the extent of 50% of the customs duty and additional duty payable. In essence, therefore, for imports made under the DEPB scheme, of course, subject to the conditions specified in the exemption notification, the customs duty was exempt. Merely because the conditions provided for adjustment of credit in the DEPB scrips, it cannot be stated that either there was no exemption from payment of customs duty or that the Central Government was levying and collecting customs duty from the importers in form of adjustment of credit in the DEPB scrips. We may recall that such credits are given at specified rates on the basis of SION norms primarily taking into account deemed import contents of an export product and the basic customs duty payable on such deemed imports. Thus through such adjustments on the DEPB scrips at the time of further imports, customs duty component is sought to be neutralised. The view expressed by the Tribunal in the case of Reliance Industries Ltd. (*supra*) appeals to us. In the said decision, the Tribunal taking note of the provisions contained in Section 81 and 841 of the Finance Act, 2004 held that the impugned Circular No. 5/2005 is not legally sustainable. The Tribunal held that crediting and debiting of entries in the passbook is a matter of procedure and convenience and in essence, the Notification No. 45/2002 provides for full exemption from payment of customs duty.

19. We may also recall that the Larger Bench of the Tribunal in the case of Essar Steel Ltd. (*supra*) held that mere entry in the DEPB book is not sufficient for

eligibility of Modvat credit availed on the strength of Bill of Entry where the importer had availed of benefit of the exemption from payment of customs duty. This would further go to show that while no customs duty is paid, there would be no question of availing Modvat credit on such duty.

20. We may notice that vide circular dated 8-7-2004, the Ministry of Finance, in a question whether goods that are fully exempt from excise/customs duty or are cleared without payment of such duty would be subject to education cess, clarified that the education cess is leviable at the rate of 2% of the aggregate of the duties of excise/customs levied and collected. If goods are fully exempted from excise duty or customs duty or are chargeable to nil rate of duty or are cleared without payment of duty under specified procedure such as clearance bond, there is no collection of duty and, therefore, no education cess would be leviable on such clearances.

21. In view of such clarification by the Government and in view of our conclusions hereinabove that against an import made under the DEPB scheme, of the goods which are fully exempt from payment of customs duty and therefore no customs duty is levied and collected, the education cess at the prescribed rate also cannot be levied.

22. We are not unmindful of the decision of Madras High Court in the case of Tanfac Industries Ltd. Vs. The Assistant Commissioner of Customs, Customs Division, . In the said case, in the background of interest on warehoused goods where such demand of interest on goods cleared beyond 90 days arose, the Division Bench of the High Court came to the conclusion that on the imports under DEPB scheme, the importers pay duty not by cash but by way of credit and, therefore, the goods cleared under DEPB scheme cannot be treated as exempted goods. It can only be treated as duty-paid goods.

23. With respect, we are unable to concur with such a view. Firstly, in the said decision, the question of levy of education cess was not involved. More particularly in our view, the exemption Notification No. 45/2002 is issued under the exercise of powers u/s 25 of the Customs Act, 1962. Such notification grants total exemption from payment of customs duty and additional duty on all goods other than edible oils which are imported under DEPB scheme. It is, of course, subject to conditions specified in the notification itself. Such conditions require adjustment of the credit in the DEPB scrip against the customs duty liability. However, such adjustment is only procedural in nature. As noted earlier, para 7.14 of the Export Import Policy clearly provided that the exporter who does not desire to go through the licensing route would have an optional facility of being governed under the DEPB scheme.

24. We may note that in cases of Advance Licence Schemes under which imports are being made and which are exempt from customs duty under various notifications issued by the Central Government u/s 25 of the Customs Act, 1962, no education cess is demanded by the respondents. In fact, the impugned

notification itself is sufficiently clear and records that imports against Advanced Licences are exempt from all duties of customs and therefore, it follows that education cess at 2% is not leviable on such imports. In case of DEPB, however, a distinction is sought to be drawn on the premise that though the importers are governed by exemption notification, the fact remains that in case of such imports, the duty is debited from DEPB scrip. To our mind, such distinction is not valid. The clarificatory circular itself refers to the imports made under the DEPB scheme being covered under exemption notification. Such exemption is, of course, subject to fulfillment of certain conditions. One of the conditions includes that of adjustment of credit in the DEPB scrip. This, however, is merely procedural in nature and would not change the nature of benefit from one being of exemption.

25. Respondents, however, have contended that Education Cess is not exempt under Notification No. 45/2002 and the importer therefore cannot pay the same on imports made under the DEPB scheme. We may recall that under the impugned clarificatory circular, Government has provided that such Education Cess will also be adjusted against credit in the DEPB scrip. If Education Cess is not part of the exemption as contended by the respondents, how can it be adjusted against the credit in DEPB scrip by enforcing the condition of the Exemption Notification? This to our mind is a legal fallacy.

26. Under the circumstances, the impugned circular insofar as it pertains to DEPB scrip, is held to be invalid and contrary to Section 81 read with Section 841 of the Finance Act, 2004 and is hereby quashed and set aside.

27. The impugned duty demands, were even otherwise made without issuing any show-cause notice or adjudication. Even on such grounds, the notices are liable to be quashed. We hereby do so.

28. Before closing, however, we would like to clarify two aspects. Firstly, with respect to those items whose imports under DEPB scheme enjoy only partial exemption from payment of customs duty, it is an admitted position on part of the petitioner that education cess would be leviable on such portion of customs duty as is not exempt. The second aspect is that while admitting this petition, a Division Bench of this court had directed that the demands to impugned notices were raised without any adjudication. In the affidavit-in-reply filed by the respondents, it is stated that such notices have now been issued. It is open for the respondents to proceed further with the hearing of such notices and come to a conclusion in accordance with law of course bearing in mind the conclusions that we have arrived at in this petition. In the result, the petition is allowed in part. Rule made absolute accordingly. No costs.

1. This Reference seems to Sections 91 to 95 -
Editor.