

(2012) 07 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 13813 of 2006

Gujarat Ambuja Exports Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-07-2012

Acts Referred:

Customs Act, 1962 — Section 25, 75

Customs Tariff Act, 1975 — Section 3, 3(5)

Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2013) 288 ELT 49

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

Bench : Division Bench

Advocate : Paritosh Gupta with Paresh M. Dave, for the Appellant; R.J. Oza and Ms. Ameer Yajnik, for the Respondent

Judgement

Akil Kureshi, J.—The petitioners have challenged a Circular No. 18/2006, dated 5-6-2006 issued by the Central Government. They have consequently prayed for a permanent prohibition against the respondents from levying and recovering Special Additional Customs Duty u/s 3(5) of the Customs Tariff Act, 1975 from the petitioners on their imports of Crude Palm Oil, Vanaspati Ghee and Fatty Acid imported at Kandla Port and Inland Containers Depot, at Ahmedabad (ICD). The facts may be noted at the outset.

1.1 The petitioner No. 1 is a company registered under the Companies Act 1956 and the petitioner No. 2 is its Chairman and Managing Director. The company is engaged in manufacturing various goods and is also involved in exporting such finished products to various foreign countries. For the purpose of manufacturing its goods, the petitioner-company imports raw materials, such as, Crude Palm Oil, Vanaspati Ghee and Fatty Acid.

1.2 Under the Export-Import Policy framed by the Central Government, various schemes have been framed allowing import of goods used for manufacture of export product without payment of duty. Duty Entitlement Pass Book ("DEPB" for

short) is one such scheme under which the importers, subject to certain conditions, are allowed to import goods without payment of customs duty, but against adjustments of credits lying in their account or which may have been purchased by them from other units engaged in export business.

1.3 u/s 3(5) of the Customs Tariff Act, the Central Government has the authority to levy additional duty at a rate not exceeding 4% of the value of the imported articles as may be specified in the notification on being satisfied that it is necessary to levy such duty on any imported article as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India. Section 3(5) of the Customs Tariff Act reads as under:

Section 3 - Levy of additional duty equal to excise duty, sales tax, local taxes and other charges. -

(5) 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, as the case may be, sub-section (3) or not such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent, of the value of the imported article as specified in that notification.

1.4 Ordinarily, therefore, the goods imported by the petitioners would be subjected to such additional duty leviable u/s 3(5) of the Customs Tariff Act, popularly referred to Special Additional Duty ("SAD" for short).

2. By virtue of Notification No. 20/2006, dated 1-3-2006, however, the Government of India granted exemption from payment of such SAD in certain circumstances. Portion of such notification relevant for our purpose, reads as under:

3. The case of the petitioners is that by virtue of notifications issued from time to time by the Central Government, all goods other than edible oils are exempt from payment of customs duty and additional customs duty which are imported under DEPB scheme. In case of edible oils, such exemption from payment of basic customs duty and additional customs duty is limited to 50% of the applied rates of duty. The petitioners have produced several notifications issued by the Central Government from time to time granting such exemption. We may, however refer to the last such notification in point of time. By exemption Notification No. 45/2002, dated 24-4-2002, as amended from time to time, the Central Government in exercise of powers conferred under sub-section (1) of Section 25 of the Customs Act, 1962, granted exemption from so much of additional duty leviable on the goods of description specified in column 2 of the Table annexed with such notification, from so much of the duty leviable thereon

as was in excess of the amount calculated at the rate specified in the corresponding entry in column 4 of the said Table. The notification also granted similar exemption from payment of additional duty leviable u/s 3 of the Customs Tariff Act. The Table referred to in the said notification reads as under:

4. The exemption was, however, made available subject to certain conditions which were specified in the notification itself. Such conditions were 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:

Provided that exemption from duty shall not be admissible if there is insufficient credit in the said Duty Entitlement Pass Book for debiting the duty leviable on the goods but for this exemption.

[iv] the said Duty Entitlement Pass Book shall be valid for twelve months from the date of issue or such extended period as may be granted by the Licensing Authority for import and export only, at the port of registration which shall be one of the sea ports at Mumbai, Kolkata, Cochin, Kandla, Mangalore, Marmagoa, Chennai, Nhava Sheva, Paradeep, Tuticorin, Visakhapatnam, Kakinada, Magdalla, Sikka, Pipavav, Dahej, Mundra, Nagapattinam, Okha, Dharamtar, Jamnagar and Muldwarka or any of the airports at Ahmedabad, Bangalore, Mumbai, Kolkata, Coimbatore, Delhi, Jaipur, Varanasi, Srinagar, Trivandrum, Hyderabad, Chennai, Bhubaneswar, Nagpur and Cochin or any of the Inland Container Depots at Bangalore, Coimbatore, Delhi, Gauhati, Kanpur, Pimpri (Pune), Pitampur (Indore), Moradabad, Ludhiana, Hyderabad, Nagpur, Agra, Faridabad, Jaipur, Guntur, Varanasi, Jodhpur, Salem, Tirupur, Singanallur, Waluj, Surat, Malanpur, Nasik, Rudrapur (Nainital), Kota, Udaipur, Daulatabad (Wanjarwadi and Maliwada), Dighi (Pune), Vadodara, Ahmedabad, Bhiwadi, Madurai, Jalandhar, Meerut, Bhilwara, Pondichery, Garhi Harsaru, Bhatinda, Dappar (Dera Bassi), Chheharata (Amritsar), Karur, Miraj, Rewari, Bhusawal, Jamshedpur, Surajpur and Dadri or through the Land Customs Station at Ranaghat, Singhabad, Raxaul, Jogbani, Nautanva (Sonauli), Petrapole and Mehandipur:

Provided that where the expiry of the Duty Entitlement Pass Book falls before the last day of the month, such Duty Entitlement Pass Book shall be deemed to be valid till the last day of the said month:

Provided further that the Commissioner of Customs may, by special order and subject to such conditions as may be specified by him, permit imports and exports from any other sea port, airport, inland container depot or through a

land customs station:

Provided also that in respect of Duty Entitlement Pass Book issued against supplied to a unit in Special Economic Zone (SEZ), this condition shall apply for the purpose of permitting import of goods.

[v] where the importer does not claim exemption from the additional duty of customs leviable u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), he shall be deemed not to have availed the exemption from the duty specified in the First Schedule to the said Customs Tariff Act for the purpose of calculation of the said additional duty of customs.

[vi] where benefit of exemption from duty is claimed by a person, who is not a Duty Entitlement Pass Book holder, such benefit shall be permissible only against specific amount of credit transferred by a Duty Entitlement Pass Book holder to such person.

5. Counsel for the petitioners submitted that by virtue of the exemption Notification No. 20/2006, the goods imported by the petitioners were exempt from payment of SAD since by virtue of exemption Notification No. 45/2002, such goods being imported under DEFB scheme were exempt from payment of basic as well as additional duty of customs. Counsel submitted that despite such clear rule position, the respondents have been insisting on collecting such SAD from the petitioners which was wholly unauthorized.

5.1 Counsel pointed out that the respondents have issued Circular No. 18/2006, dated 5-6-2006 wherein it is provided that such countervailing duty in the form of SAD would be payable by the importer on the imports made under the DEPB scheme. In the said circular, it has been provided as under:

3. In so far as export promotion schemes like DEPB, Target Plus, Served from India, DFCE and Vishesh Krishi and Gram Udyog Yojana are concerned, the exemption from basic customs duty and additional duty (CVD) is available subject to a condition that the element of these duties is debited in the Duty Scrips/Entitlement Certificates issued under these Schemes. Further, there is no specific exemption of the said 4% special CVD allowed either in the Foreign Trade Policy or in the customs Notification issued under all these schemes. Therefore, when goods are imported under any of these schemes, the exemption from duties in terms of the respective customs notifications shall only be available if the element of 4% special CVD is debited in the duty scrips/entitlement certificates. In this connection, attention is invited to Ministry's Circular No. 5/2005-Cus., dated 31-1-2005 whereunder it was clarified that even though imports under these schemes are governed by an exemption notification, the fact remains that in case of such imports, the customs duties are required to be debited in the duty entitlement certificates issued under these schemes. In the case of import of goods under DFRC scheme, the element of 4% CVD shall be payable because, the Notification grants exemption from basic duty only.

5.2 Counsel pointed out that the circular makes a reference to the Ministry Circular No. 5/2005, dated 31-1-2005 which pertains to payment of Education Cess on the imports being made by an importer under the DEPB scheme, which circular this Court has quashed in the judgment dated 21-6-2012 passed in Special Civil Application No. 11635 of 2005.

5.3 Counsel relied on our said judgment dated 21-6-2012 and pointed out that this Court had examined at length the nature of the DEPB scheme and the legality of the respondents' action of collecting Education Cess on imports being made under such scheme.

6. On the other hand, learned counsel Ms. Amee Yajnik for the respondents opposed the petition. She relied on the affidavit in-reply filed by the respondents. She contended that in case of imports made under the DEPB scheme, there is no total exemption from payment of customs duty. Such scheme is, thus, vitally different from other duty exemption schemes. Under the DEPB scheme, the importer pays customs duty in the form of adjustments of DEPB credits. Instead of paying the duty in cash, he surrenders DEPB credits lying in the DEPB scrip.

7. Having, thus, heard the learned counsel for the parties, we find that under exemption Notification No. 20/2006, the Government of India has granted exemption from payment of SAD on import of "all goods which are exempt from the whole of the duty of customs leviable thereon or in case of which "Free" or "Nil" rates of duty of customs are specified"....."and which are also exempt from the whole of additional duty of customs leviable thereon under sub-section (1) of Section 3 of the said Act, or on which no amount of the said additional duties of customs is payable for any reason.".

8. The short question that falls for consideration is whether on the import of goods made by the petitioner under DEPB scheme, whole of basic customs duty and additional duty of customs exempt. If answer to this question is in the affirmative, the petitioners' claim for exemption from payment of SAD also will have to be accepted. If the answer to such a question is in the negative, the petitioners cannot avoid payment of SAD on imports of such goods.

9. Before proceeding further, we may recall that under exemption Notification No. 46/2002, edible oils have been granted exemption from payment of basic and additional duty of customs only to the extent of 50% of the rates applied. Thus, such exemption is not for the whole of the duty of customs and additional duty. In that view of the matter, on the imports of edible oils, the condition of exemption Notification No. 20/2006 would not be satisfied. We may recall that to avail exemption from payment of SAD under said notification, what is required is exemption from the whole of the duty of customs and the additional duty of customs, unless of course "free" or "Nil" rates of duties are specified for such duties on such products. When the exemption is not total but only partial, such condition would not be satisfied. In that view of the matter, the petitioners cannot claim exemption from payment of SAD on the imports of edible oils.

10. With respect to goods other than edible oils, under Notification No. 45/2002, there is total exemption from payment of basic as well as additional customs duty on import made under DEPB scheme. Such exemption, of course, is conditional. The stand of the respondents has been that there is no exemption from payment of customs duty, but that the importer pays such duties by surrendering credit lying in the scrip.

11. In context of liability of an importer to pay Education Cess on goods imported under DEFB scheme, we had occasion to examine the nature of DEPB scheme, as also the contention of the revenue that under such scheme, the customs duty is not waived. In the process, we had also examined the legality of a circular dated 31-1-2005 issued by the Government of India clarifying such position. We had come to the conclusion that the exemption notification operates in such a manner that on the imports made by an importer under DEPB scheme, there was either total or partial exemption from payment of customs duty. In the process, we had quashed the circular of the Government dated 31-1-2005. We notice this because in the impugned circular dated 5-6-2006, to clarify that the petitioners cannot claim exemption from payment of SAD, it is the earlier circular dated 31-1-2005 which has been referred to and relied upon. Essentially, assertions of the Revenue in both circulars, that is, earlier circular dated 31-1-2005 and the impugned circular dated 5-6-2006 are common. Our decision dated 21-6-2012 would, therefore, squarely apply in the present case.

12. In our judgment dated 21-6-2012, we had stated as under:

10. 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.

11. 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.

12. 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 neutralize the incidence of customs duty on the import component of the export product. Such neutralization 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.

13. 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 80-IB. They belong to the category of ancillary profits of such undertakings.

14. 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.

15. 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.

16. 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 neutralize 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 utilizing 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.

17. 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 License 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 neutralize the incidence of customs duty on the import component of the export product. It further provides that such neutralization shall be provided by way of grant of duty credit against the export product.

18. 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 neutralize 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.

19. 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 84 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. We may note that in cases of Advance License 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 Licenses 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 fulfilment 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.

26. Respondents, however, have contended that Education Cess is not exempt under Notification No. 5/2002 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.

27. 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 84 of the Finance Act, 2004 and is hereby quashed and set aside.

28. 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.

29. 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.

13. Under the circumstances, we are of the opinion that the stand of the respondents that on goods other than edible oils when imported under DEPB scheme, SAD is leviable is not legally sustainable. To that extent, the petition must succeed. The impugned circular to the extent it is in conflict with our above opinion, would stand invalidated.

14. Before closing, we may record that the petitioners have been clearing their goods during the pendency of this petition by paying SAD. Our declaration, therefore, shall apply in future imports. We reiterate that on any goods whenever the customs duty or additional duty is not fully exempt when imported under DEPB scheme, the entire amount of SAD would have to be paid by the importer. With above direction, the petition stands disposed of. Rule is made absolute to the aforesaid extent, There shall be no order as to costs.