
(2015) 08 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No. 3079 of 2014

Idea Cellular Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 124, 14, 28, 46
Customs Tariff Act, 1975 — Section 9A, 9A(8)

Citation : (2015) 323 ELT 452 : (2016) 37 GSTR 72

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Rafique Dada, Senior Advocate, Rohan Shah, Anay Bannatti and Sweta Rajan i/b. Economic Laws Practice, for the Appellant; Pradeep S. Jetly, Advocates for the Respondent

Judgement

1. By this petition under Article 226 of the Constitution of India, the petitioner is seeking a declaration that Note 3 of the Notification No. 125/2010-Cus. : MANU/CUST/0249/2010, dated 16-12-2010 is ultra vires to the Customs Act, 1962 and the Customs Tariff Act. The petitioner is also seeking to quash and set aside this Note and thereafter a Writ of Mandamus directing the respondents not to give effect to this Note and impose duty on SDH part imported as parts of non-SDH transmission equipments. The issue raised in this petition is of Anti Dumping Duty.

2. It is common ground that the present petitioner is a company incorporated under the Companies Act, 1956 and inter alia engaged in the business of providing telecom services in various circles across India. It is also a consumer of various telecom transmission equipments for use in its telecom network. The first respondent has issued the subject notification and the second respondent is the Designated Authority and rather a Directorate General of Anti-Dumping and Allied Duties. The challenge in this Writ Petition arises in the backdrop of antidumping measures evolved by the State from time to time. The dumping of

goods in India has been termed as counter productive and affects the Indian economy vitally. It causes material injury to the domestic industries and that is how in terms of Section 9A of the Customs Tariff Act read with Anti Dumping Rules, the second respondent investigates the cases of dumping of goods in India unlawfully and illegally and seeks to recover anti-dumping duty.

3. In the present case, we are concerned with the anti-dumping duty on Synchronous Digital Hierarchy transmission equipments (for short termed as "SDH" transmission equipment). In terms of certain investigation carried out and preliminary findings, a notification came to be issued recommending imposition of anti-dumping duty on SDH transmission equipments falling under Customs Tariff Sub-heading 851762 and 851770 when exported from or originating in China/Israel. In the course of the proceedings before respondent No. 2, he had proposed this anti-dumping duty and to be imposed on the components or parts imported on a stand alone basis and the parts and components used in SDH equipments having multiple usages and not having dedicated usage in SDH alone, etc. Based on the same, the impugned Notification dated 16-12-2010 was issued by Union of India. A copy of this Notification is at "Annexure A" at page 25 to the Writ Petition. That recites as to how the Notification came to be issued and in the backdrop of this development. The relevant part of the Notification reads as under:-

"Now, therefore, in exercise of the powers conferred by sub-section (1), read with sub-section (5) of Section 9A of the said Customs Tariff Act and Rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, on the basis of the aforesaid final findings of the designated authority, hereby imposes on the subject goods, the description of which is specified in column (3) of the Table below, falling under sub-heading of the First Schedule to the said Customs Tariff Act as specified in the corresponding entry in column (2), originating in the country as specified in the corresponding entry in column (4), and produced by the producers as specified in the corresponding entry in column (6), when exported from the country as specified in the corresponding entry in column (5), by the exporters as specified in the corresponding entry in column (7), and imported into India, an anti-dumping duty at the rate equal to the amount indicated in the corresponding entry in column (8), and per unit of measurement as specified in the corresponding entry in column (9)," of the said Table.

Note 1. - The product under consideration will include "Synchronous Digital Hierarchy (SDH) transmission equipment, viz. STM-1, STM-4, STM-16, STM-64, STM-256 in assembled, CKD, SKD form, its assemblies and subassemblies or fitted with eventual broadband or cellular equipment. Product under consideration will also include Add Drop Multiplexers (ADM) (For SDH Application only), Multiple Add Drop Multiplexers (MADM) (For SDH Application only), and Digital Cross Connect (DXC) (For SDH Application only), Populated Circuit Boards

(For SDH Application Only) and parts or components imported as a part of equipment, so long they are imported along with the equipment or its assemblies or sub-assemblies. The Product under consideration will also include Software meant for SDH, which is an integral part of these equipments, which may be bought either as a part of the equipment or separately but the components or parts imported on a standalone basis are outside the purview of Product under Consideration

Note 2. SDH Equipment essentially transmits signals through the medium of Optical Fibre. There may be SDH equipment meant for transmission through electrical Copper Medium or Microwave Radio Medium. The SDH Equipment transmitting the data through optical fibre alone shall be subject to levy of antidumping duty.

Note 3. When SDH is imported as a part of eventual broadband or cellular equipment, the anti-dumping duty shall be payable only on the SDH portion of the imports. Similarly when eventual Broadband or Cellular equipment is imported as a part of the SDH equipment, the anti-dumping duty shall be payable only on the SDH portion of the imports.

Note 4. PDH, CWDM, DWDM, Microwave systems, GPON, DSLAM, MSAN, BITS, Routers, PTN, PDSN, SGSN, MGW, BTS, BSC, MSC, ONT, HLR, HSS and MRP being non-SDH in any of its form are outside the scope of product under consideration and therefore not subject to levy of antidumping duty.

Note 5. Microwaves Radio Terminals which could have an STM-1 interface to the SDH transmission equipment and act as a physical media to enable the connectivity between the radio and the SDH equipment are outside the purview of payment of anti-dumping duty.

2. The anti-dumping duty imposed shall be levied for a period of five years (unless revoked, superseded or amended earlier) from the date of imposition of the provisional anti dumping duty, that is, the 8th December, 2009 for the imports of the subject goods originating in or exported from, China PR and Israel and the anti-dumping duty imposed shall be payable in Indian currency.

Explanation: For the purposes of this notification, rate of exchange applicable for the purposes of calculation of such antidumping duty shall be the rate which is specified in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), issued from time to time, in exercise of the powers conferred by section 14 of the Customs Act, 1962, (52 of 1962), and the relevant date for the determination of the rate of exchange shall be the date of presentation of the bill of entry under section 46 of the said Customs Act."

It is urged before us that the petitioner had challenged the levy of antidumping duty during the course of the proceedings and aggrieved by the final findings dated 19-10-2010, an appeal was filed in the Customs, Excise and Service Tax Appellate Tribunal. It is common ground that on this appeal, an order was passed

on 11-8-2011, remanding the matter to respondent No. 2 with a direction to grant post-decisional hearing in the matter and for modification to the final findings dated 19-10-2010. Pursuant to the same, the second respondent issued new final finding on 10-2-2012 and what the petitioner reiterates is that nothing new had emerged from this exercise.

4. In the meanwhile, the Directorate of Revenue Intelligence (DRI) commenced investigation and the petitioner in paragraphs 13 to 15 of the petition has narrated the outcome of the same. The Writ Petition has been amended by introducing paragraph 15A and stating that after the present petition was served, the DRI, Mumbai has issued a Show Cause-cum-Demand Notice dated 18-12-2014. That is in terms of Section 124 read with Section 28 of the Customs Act and Section 9A(8) of the Customs Tariff Act, inter alia calling upon the petitioner to show cause as to why anti-dumping duty of Rs. 9,38,33,391/- in respect of goods which are imported as parts of non-SDH transmission equipments, should not be demanded and recovered from the petitioner alongwith interest and penalties. "Annexure E" is the copy of the Show Cause Notice. It is conceded that no order has been passed in furtherance of the said show cause notice as yet and the matter is pending.

5. However, this petition is pressed on the ground that it raises the issue of the Note and particularly indicated in the petition as being ultra vires the Customs Act, 1962 and the Customs Tariff Act. It being unconstitutional, void and of no legal effect, such a relief cannot be claimed before any forum, save and except this Court and by way of the present Writ Petition.

6. It is argued that anti-dumping duty can be imposed in India under the provisions of Section 9A of the Customs Tariff Act, 1975. It can be imposed at the behest of Indian Manufacturers (domestic industry) when there is import of "like article" (as manufactured by the complainant domestic industry) from a specified country at a price lower than the price at which the like article is sold in that exporting country, and where such import causes injury to the domestic manufacturers. Before this duty can be imposed and recovered, it must be decided as to whether it is in relation to "like article" imported from a specified country. No anti-dumping duty recovery proceedings can be brought qua a product not manufactured by the domestic industry. The import of the "like article" from the specified country must be dumped namely sold in that country at a higher price than the sale price in India. There must be material injury to the domestic industry and that such duty cannot be levied and imposed in respect of any item that the Indian complainant industry itself imports from the relevant exporting jurisdiction. In the present case, it is clear that the parts and components of SDH are themselves imported by the complainant industry from China, but are routed through Thailand for some minimal work, to avoid this provision of antidumping law.

7. Therefore, anti-dumping duty cannot be imposed and recovered unless there is a specific satisfaction that the product under consideration is actually

manufactured by domestic industry or else there will be no injury caused. The petitioner is sought to be proceeded against, though it is manufacturing only SDH equipment (configuration of which is mentioned specifically in the petition.). Note 3 as it is interpreted by the Revenue, operates in a different area and field and entirely different equipments and products in respect of which there is no grievance made by any Indian manufacturer and in respect of which there is no anti-dumping duty liable to be imposed. That equipment and product cannot be subjected to such duty by reading this Note 3 as is sought to be read and interpreted. It cannot be the basis for imposition and recovery of anti-dumping duty. It cannot be recovered by holding that the said part is a SDH portion of import. Even if the goods are not subjected to anti-dumping duty, if it has an SDH portion or any part of an SDH, that is subject to anti-dumping duty, is the conclusion of the Revenue and in proceeding against the petitioner. Therefore, this basis contradicts or creates contradiction within the Note and with other Notes below the Notification and reproduced above. A specific contention is that if the components or parts of SDH imported are on standalone basis, they are outside the purview of the product under consideration. It is submitted that if such components and parts of SDH are imported as parts of a product which is not subject to anti-dumping duty, such components or parts of SDH cannot be brought to suffer any anti-dumping duty. Therefore, it is urged that Note 3 is ultra vires the Customs Act and the Customs Tariff Act.

8. Our attention has been invited by Mr. Dada, learned Senior Advocate appearing on behalf of the petitioner to this Notification and the Show Cause Notice. He would submit that if Note 3 is construed and in the manner suggested by the Revenue, then, same would be clearly inconsistent and contradictory to the prior Notes and particularly "Note 1". That stipulates not levying any such duty on the components or parts of SDH imported on standalone basis. Then, the components or parts of SDH should not be suffered anti-dumping duty. However, without the pre-condition being satisfied, the Note is being incorporated by the Revenue to the detriment of the petitioner's interest, is the submission. It is, then, urged that even if the petitioner was to raise such contentions before the Adjudicating Authority and in further proceedings before the Tribunal, each one of them is a creature of the Customs Act and, therefore, would not be in a position to deal with the arguments particularly on vires or illegality or validity of the Notification itself. They would not be in a position to strike down any part of the Notification or the Note or part of such Note 3. In the circumstances, this Court should entertain this Writ Petition.

9. On the other hand Mr. Jetly, learned Counsel appearing on behalf of the respondents-Revenue submits that in the affidavit in reply it is clearly indicated as to how the petition is misconceived. The petitioner does not wish to appear before the Adjudicating Authority and answer and reply the allegations in the show cause notice by facing the adjudication itself. The petitioner wants to short-circuit it and when it is aware that in the earlier round before the Tribunal it had raised similar contentions. The Tribunal accepted them and, then, remanded the

case for de novo consideration. Thereafter an order has been passed. However, no steps were taken by the petitioner to impugn the Notification or any Note therein, and only on receipt of this show cause notice that it has raised such challenge. Rather the petitioner could have brought the challenge before the show cause notice was issued and received. In the present case, it is clear that a delegated piece of legislation like the impugned notification can be challenged only when it is contrary to parent enactment or it is violative of the Constitution of India. The present Notification does not suffer from any of these vices. Reliance is placed by Mr. Jetly on the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. He submits that neither validity of these Rules nor the power to impose an Anti-Dumping duty has been challenged. It is only the Notification and that too Note below the same which is challenged. In any event, it is nothing but an interpretation of the Notification and the Notes, placed by the petitioner. The petitioner has ample opportunity to raise all contentions and support their interpretation during the course of adjudication. At this stage, this Court should not express any opinion on the vires of the Note and strike down the same. The matter having been brought at the stage of show cause notice, the petition is premature and must be dismissed.

10. We have considered the contentions of both sides. After perusing the petition and all the annexures thereto, so also the affidavit in reply, we are of the opinion that presently it is not necessary to consider the larger question or wider issue of vires of the Note and below the impugned Notification.

11. From a reading of the petition, the grounds therein and equally considering the oral arguments on behalf of the petitioner summarized in the brief note handed in, we are of the opinion that the matter at this stage is more of interpretation of the subject Notification and the Notes below the same. The petitioner is primarily raising the issue of construction and interpretation of the Notes and the Notification as a whole. The petitioner has placed their version and interpretation on the Notification and the Notes below the same. The impugned Note 3 is also sought to be interpreted by them and in the backdrop of a larger picture. The petitioner urges that anti-dumping duty cannot be imposed and recovered unless all pre-conditions are satisfied. Secondly, the equipment as a whole comprises of several parts and components and has to be viewed accordingly. If the components and parts themselves are imported on standalone basis, then, the same are out of the purview of this duty, is equally its interpretation. This is a matter which involves the acceptance or otherwise version or interpretation of the petitioner and in relation to the duty, its levy, imposition and the cases in which same cannot be levied, imposed and recovered. That is how the petitioner intends to meet the allegations in the show cause notice and which is yet to be adjudicated. We are of the opinion that in the event such an interpretation placed by the petitioner and presently controverted by the respondents, is not accepted and orders adverse to the interest of the

petitioner are passed in the adjudication proceedings, then, in challenging the same, appropriate contentions can be raised by the petitioner on the interpretation of the Notification and the Notes below the same and construction thereof. Similarly, if the version of the respondent is accepted and adverse to the interest of the petitioner which indicates that the Note is being not construed and interpreted as suggested by the petitioner and the respondents' interpretation and construction thereof makes the Note wholly illegal or beyond the powers conferred on the Authorities under the Customs Act and the Customs Tariff Act in the opinion of the petitioner, then, the challenge to the vires and illegality of the Note 3 as raised presently, can be brought again and in appropriate proceedings including before this Court.

12. We are of the view that it is not necessary to express any opinion on the rival contentions. More so, when Mr. Jetly, on instructions, assures that the Authority adjudicating the show cause notice will pass an order by application of independent mind, uninfluenced by the version placed in the affidavit filed by Dr. Sumit Garg, Assistant Director of B-Cell, Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai.

13. In the above circumstances, we clarify that the issue of vires of the Notification is kept alive and not determined or decided by this order and in this Writ Petition. It can be raised once again and in the circumstances narrated above. We clarify that we have not expressed any opinion on the rival contentions with regard to construction of Notes below the Notification and the Notification as well. The Adjudicating Authority shall pass an order on merits and in accordance with law, after hearing the petitioner and uninfluenced by the stand taken in the affidavit in reply in the present petition. All contentions and version equally of the respondents are kept open. The Writ Petition is disposed of in the above terms.