(1988) 07 OHC CK 0019

In the Orissa High Court

Case No : O.J. Case No. 1848 of 1988

Indian Charge Chrome Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 27-07-1988

Acts Referred:

Customs Act, 1962 — Section 25(1)
Customs Tariff Act, 1975 — Section 3

Citation : (1992) 60 ELT 191

Hon'ble Judges : G.B. Patnaik, J;A.K. Padhi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—The short question for consideration in this writ application is whether the coal which is imported by the petitioner for generation of electricity in his captive power plant is exempted from levy of basic and additional duties of customs under the notification of the Government for 100% Export-oriented undertakings No. 13/81-Cus., dated 9-2-1981, since electricity generated out of the captive power plant has to be used for the purpose of manufacture of charge-chrome to be exported out of India.

2. The short facts necessary for the aforesaid determination are that the petitioner has set up a plant for manufacture of charge-chrome at Choudwar in the district of Cuttack within the State of Orissa and it has also an existing plant at Theruballi where ferro-chrome is being produced. The Government of India in the Department of Commerce issued a resolution declaring that in order to bridge the increasing deficit in the balance of trade and running down of exchange reserves, it has become necessary to step up the growth of export and accordingly Government have decided to implement a scheme to facilitate the setting up of 100% export oriented units and such units are entitled to certain concessions to enable them to meet the rigours of foreign demand in terms of pricing, quality precision, etc. According to the said resolution, a 100% export

oriented unit would imply an industrial unit offering for export its entire production excluding permitted levels of rejects. It further stipulated that the intending entrepreneur should make applications to the Secretariat for Industrial Approvals, Ministry of Industry, Department of Industrial Development, in the relevant form which would be considered by a Board and if the unit is approved by the Board, then the terms and conditions embodied in the said resolution would apply. One of the concessions that is provided under the said resolution in respect of such units is that import of capital goods, component, raw materials, spares, consumables, office equipments, material handling equipments, such as fork-lifts, over-head cranes including construction materials shall be exempt from import duty. The Central Government in exercise of powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962, issued a notification exempting the capital goods, raw materials, components, etc. as described in the Schedule to the said notification imported by 100% export oriented undertakings from levy of basic and additional duties of custom subject to prescribed conditions. This notification is commonly called "100% export oriented undertakings 13/81-Cus., dated 9-2-1981" and has been annexed as Annexure-6 to the writ petition. According to the said notification, the goods specified in the table when imported into India for the purpose of manufacture of articles for export out of India or for being used in connection with the production or packaging of goods for export out of India by 100% export oriented undertakings approved by the Board of Approvals, are exempted from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (Act 51 of 1975) and the additional duty, if any, leviable thereon u/s 3 of the Customs Tariff Act, 1975, subject to the conditions prescribed therein. The case of the petitioner, in brief, is that the petitioner has its export oriented undertaking duly approved by the Board of Choudwar and Theruballi producing charge-chrome and ferro-chrome and further has its own captive power plant for generation of electricity to be used in the two aforesaid export oriented undertakings of the petitioner and consequently, the coal imported from outside to be used in turn is necessary for the manufacture of charge-chrome and/or ferro-chrome must be held to be either "raw materials" described in Item No. 2 of the table, or "consumables required for manufacture of goods" described in Item No. 5 of the table to the Notification 13/81 (Annexure-6) so as to be entitled to the exemption from levy of duty of customs and additional duty as contained in the said notification.

3. According to the petitioner''s case, the Government of India in the Department of Industrial Development, Ministry of Industry, pursuant to the petitioner''s application for setting up of a 100% export oriented undertaking for the manufacture of high-carbon ferro-chrome/charge-chrome issued an Industrial Licence under the Industries (Development & Regulation) Act, 1951, for the establishment of the said 100% export oriented undertaking in Tehsil Talcher, District of Dhenkanal, in the State of Orissa. It was clearly stated therein that all concessions/facilities which are available to 100% export oriented undertakings

would be available to the petitioner''s undertaking in question. Government further indicated that the approved 100% export oriented undertakings could import their requirements of capital goods under the open general licence as per the Import Policy for 1982-83 and no special approval was required to be issued in that regard. As the industry in question required constant energy for the purpose of the manufacture of charge-chrome and ferro-chrome and as there has been constant shortage of electricity within the State of Orissa, the petitioner made an application to the Government of India, Ministry of Industry, in the Department of Industrial Development to permit the petitioner to have a captive power plant of its own so that the energy generated from the said captive power plant can be consumed in the petitioner''s 100% export oriented undertaking. The Government of India approved the petitioner''s proposal for setting up of the captive power plant. In the letter of the Government of India dated 26th of November, 1984, addressed to M/s. Indian Charge Chrome Limited, it was indicated that Government of India decided to permit the petitioner to import the captive power generation equipment as capital goods for the 100% export oriented unit to be set up at Choudwar, Orissa, for the manufacture of charge-chrome covered by Letter of Intent No. LI. 783(82)/E.O.36(82)-Comp., dated 22-10-1982. It was also stated in the aforesaid letter that the approval would be subject to the Central Board of Excise & Customs allowing either bonding or duty free import of the captive power generation equipment under the 100% export oriented scheme, after seeking required relation at the appropriate level. The petitioner asserts in the writ application that its scheme of having a factory for production of charge-chrome and a captive power plant for generating electricity is a composite scheme in which electricity is the raw material for the manufacturing unit to produce charge-chrome and therefore, the coal which is a raw material for the captive power plant for the generation of electricity would also be covered by the Notification No. 13/81-Cus., dated 9-2-1981 (Annexure-6) and the Customs authorities committed gross error of law in intimating that the consignment of coal that has been imported by the petitioner was not entitled to the exemption under the scheme meant for export oriented undertaking. It has been further asserted in the writ petition that by virtue of the orders of the Hon''ble Supreme Court, the power generating equipment imported as capital goods for the captive power plant have been allowed to be brought in by the Customs authorities free of import duty and, therefore, it is contended that there is no reason why the said facilities should not also be afforded in respect of coal which is a raw material for the captive power plant for generation of electricity.

4. The opposite parties have filed a counter affidavit sworn to by the Assistant Collector, Central Excise and Customs. The main stand taken in the counter affidavit is that coal cannot be considered to be a raw material or "consumables required for manufacture of goods" for the export oriented undertaking of the petitioner, namely the factories for manufacture of charge-chrome and ferro-chrome and, therefore, it will not come within any of the goods described in the

table attached to the notification entitled for exemption in case of 100% export oriented undertakings commonly called the Notification 13/81-Cus., dated 9-2-1981. It has, however, been categorically stated in paragraph 7 of the counter affidavit that the capital goods and allied power generating equipments for the captive power plant have been cleared out free in favour of the petitioner in consonance with the order of the Hon''ble Supreme Court.

5. In the context of the rival stands as noted above, the question which arises for consideration is whether the captive power plant set up by the petitioner at Choudwar can be said to be a 100% export oriented undertaking and even if the same is held not to be an export oriented undertaking but in view of the fact that power is an essential requirement for manufacture of charge-chrome and the power to be generated in the captive power plant has to be consumed for the manufacture of charge-chrome, whether the coal that is being imported for generation of power in the captive power plant would also be construed to be either a raw material or consumables required for manufacture of goods in respect of the 100% export oriented undertaking of the petitioner, namely, the factory for manufacture of charge-chrome/ferro-chrome.

6. As has been stated earlier, the resolution of the Government of India issued by the Ministry of Commerce, which has been annexed as Annexure-4 to the writ petition, clearly indicates that a 100% export oriented unit would imply an industrial unit offering for export its entire production excluding permitted levels of rejects and such a unit being approved by the Board pursuant to the application made by the entrepreneur. This being the scheme of the Government of India and the energy sought to be generated by the petitioner in the captive power plant not being meant for export and such a unit not having been approved by the Board to be a 100% export oriented unit will not be governed by the notification (Annexure-4) and the answer to the question, therefore, must be in the negative.

7. The next important question for consideration is whether the charge-chrome factory having been approved by the Board to be a 100% export oriented undertaking and the petitioner''s generation of energy in the captive power plant being essentially meant for the production of the charge-chrome, the raw material like coal required for generation of energy whether can be considered to be a raw material required for the purpose of manufacture of charge-chrome so as to be entitled to the exemption under Notification 13/81-Cus., dated 9-2-1981. In this connection, Mr. Mohanty for the petitioner strongly relies upon the fact that the Supreme Court of India permitted import of equipment required for the captive power plant free of duty and the Customs authorities have also cleared those goods duty free thereby Notification 13/81-Cus., dated 9-2-1981. According to Mr. Mohanty, there is no wholesome reason for denying that concession to "coal" which is admittedly being imported to be used in the captive power plant. I am unable to accept this contention of the learned counsel for the petitioner. Since I have already held while answering the first question that the

captive power plant cannot be held to be a "100% export oriented undertaking", and, in fact, has not been so approved by the Board, the raw materials required for the said plant will not be entitled to the concessions and exemptions provided under Notification 13/81-Cus., dated 9-2-1981. The Customs authorities cleared the equipment imported for the captive power generation plant free of duty because the Government of India in the Ministry of Industry while permitting the petitioner to set up a captive power plant had clearly held :-"...Government of India have decided to permit you to import the captive power generation equipment as capital goods for the 100% Export Oriented Unit to be set up at Choudwar (Orissa) for the manufacture of charge-chrome...".

In view of this specific decision of the Government of India, authorising import of captive power generation equipment as capital goods for the 100% export oriented unit, import of such equipment came squarely within item No. 1 of the table to the Notification 13/81-Cus., dated 9-2-1981 and thereby was entitled to the exemption from levy of duty of customs and additional duty as contained in the said notification. But, however, integrated the scheme may be and however extended meaning to the expression "raw materials and consumables required for manufacture of goods" covered under Items 2 and 5 of the table to the Notification 13/81-Cus., dated 9-2-1981 we may give, the coal imported for generation of power in the captive power plant of the petitioner which itself is not a 100% export oriented unit, can be construed to be covered by "raw materials" and/or "consumables required for manufacture of goods" for the 100% export oriented undertaking of the petitioner set up for manufacture of charge-chrome. In other words, the coal sought to be utilised for the purpose of generating electricity which in turn has to be utilised for the purpose of manufacture of charge-chrome cannot be construed to be a raw material or even consumables required for manufacture of charge-chrome and accordingly the Notification 13/81-Cus., dated 9-2-1981 will not have only application for the import of the coal in question. In this view of the import of the coal in question. In this view of the matter, we do not find any infirmity in the letter of the Additional Collector of Customs and Central Excise (annexed as Annexure-2 to the writ petition) or the letter of the Collector of Central Excise and Customs (annexed as Annexure-3).

8. In the result, this writ application fails and is hereby dismissed, but in the circumstances, without any order as to costs.

