(1989) 11 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No''s. 2399 of 1984, 1148 of 1985 and 1664 of 1985

Indian Dyestuff Industries Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-11-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 140(2), 8
Central Excises and Salt Act, 1944 — Section 3, 3(1)
Customs Act, 1962 — Section 25(1)

Citation : (1991) ECR 771 : (1990) 47 ELT 325

Hon'ble Judges : S.N. Variava, J

Bench : Single Bench

Judgement

1. By consent of the parties all these Petitions were called out and heard together. The facts being common, they are all disposed off by this Judgment.

2. By these Petitions, the Petitioners are seeking to quash and/or set side the levy of additional duty in respect of consignments of Orthoxylene imported by the Petitioners. The Petitioners claim exemption from payment of additional duty by reason of Notification No. 276/67, dated 1st December 1967. The relevant portion of this Notification reads as follows :-

"In exercise of the power conferred by sub-rule (i) of Rule 8 of the Central Excise Rules, 1944, the Central Govt. hereby exempts the excisable goods falling under Items 6 to 11A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) produced in any premises (other than the premises wherein refining of crude petroleum or shale or blending of non-duty paid petroleum products is carried on) declared under sub-rule (2) of Rule 140 of the Central Excise Rules, 1944 to be a refinery, and -

(a) Utilised in the refinery in which the said excisable goods are produced, for the manufacture of other goods or as fuel for such manufacture (excluding fuel used for any internal combustion engine) or both;

(b) allowed to escape in the atmosphere by flare system or otherwise; or

(c) cleared to another factory outside the refinery in accordance with the procedure set out in Chapter X of the Central Excise Rules, 1944 for use in the manufacture of any of the commodities specified in the Schedule hereto annexed otherwise than as fuel, from the whole of the duty of excise leviable thereon u/s 3 of the Central Excises and Salt Act, 1944 (1 of 1944) :

Provided that any of the excisable goods having its flushing point below seventy-six degrees of Fahrenheit''s thermometer and not less then 7% by volume of which distils above 215 degree C, and cleared under this clause for use as industrial fuel (but not as fuel for internal combustion engine) shall be exempt from so much of the leviable thereon as is an excess of -

(a) Rs. 103.43 per Kilolitre at fifteen degrees of centigrade thermometer in the case of goods falling under Item Nos. 6,7,8 and 9 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1994); and

(b) Rs. 98.50 per Kilometer at 15 degree C in the case of goods falling under Item Nos. 10 to 11A of the aforesaid First Schedule :

Provided further the nothing contained in this notification shall apply to excisable goods, falling under Item No. 9 of the aforesaid First Schedule, having its flashing point below seventy-six degrees of Fahrenheit''s thermometer and not less then 7% by volume of which distils above 215 degree C.

SCHEDULE

.... 3. Chemicals."

3. The Respondents contend that the exemption given by the Notification was conditional not only upon the raw material being manufactured in a refinery declared to be such under the Central Excise Rules, but also upon the raw material being utilised in one of the three ways specified in the Notification.

4. The Petitioners rely upon a Division Bench Judgment of this Court in the case of Century Enka Limited and others Vs. Union of India and Two others, . In this case it was held that the Petitioners therein were entitled to the benefit of an identical notification. In this case if was held that additional duty cannot be levied on an article imported into India, if such article, when manufactured in India, is exempt from the payment of excise duty. It is also futile to urge, as the Customs authorities had there done, that an exemption notification issued under the Central Excise Act would have no bearing to determine the liability to pay additional duty under the Customs Tariff Act. The Judgment further proceeds to consider the submission made on behalf of the Customs authorities that the exemption notification there concerned provided for the exemption only on a certain condition. The Division Bench observed that it was true that the raw material was exempt from the payment of excise duty provided it was used in the manufacture of the stated finished product. The petitioners had averred that

the material imported was to be used in their factory for such manufacture. The Customs authorities had not field any affidavit in reply. The correspondence between the parties left no doubt that the Customs authorities did not dispute the accuracy of the statement. In the circumstances, the Division Bench was satisfied that the conditions mentioned in the exemption notification were satisfied.

5. Reliance was also placed upon an unreported Judgment dated 27th November, 1984 of this Court in Write Petition No. 660 of 1981. This was a case dealing with the same Notification and in respect of the same product. The Learned Judge held in favour of the Petitioners in view of the Division Bench Judgment cited above. However, whilst making the Petition absolute, the Learned Judge observed as follows :-

"I am bound by and follow the decision of the Division Bench, but I must very respectfully place on record my disagreement with the latter part thereof. Where a notification grants exemption from levy of excise duty subject to the fulfilment of one or more conditions, the "like article .. .. .. manufactured in India" is given exemption from excise duty only provided it fulfils the conditions mentioned in the notification. Even under such a notification excise duty is, ordinarily, leviable upon that like article manufactured in India. u/s 3 of the Customs Tariff Act, therefore, the imported article must attract additional duty."

6. The Petitioners also reply upon the Judgments in the cases of Garware Nylons Ltd. Vs. Government of India and another, , Pan Asia Commercial Enterprises and another Vs. Union of India and another, and Dhoot Compack Pvt. Ltd. Vs. Union of India, . All these are also Judgments of Single Judges who follow the Division Bench Judgment in Century Enka''s case.

7. Mr. Bulchandani has however pointed out that thereafter in the case of Ashok Traders Vs. Union of India and another, , this question was again considered by a Division Bench of this Court. The Same Learned Judge who had earlier delivered the Judgment in Century Enka''s case now stated as follows :-

"..... Shri Bulchandani, learned Counsel appearing on behalf of the Respondents, did not dispute the principal laid down by the decision of the Division Bench of this Court in the case of Century Enka, but submitted that the advantage of the notification is available to the imported goods provided the conditions set out in the notification are complied with. Shri Bulchandani submitted that though it is not in dispute that the imported goods are manufactured from raw naptha or any chemical derived therefrom, the other condition that "on which the appropriate amount of duty of excise has been paid" is not satisfied nor indeed can be satisfied in respect of the imported goods, and therefore, the advantage of the notification is not available. We find merit in the submission advanced by Shri Bulchandani. The advantage of the notification dated December 4, 1979 is available provided both the conditions, are satisfied, the conditions being that the goods are imported from raw naptha and on which the appropriate amount of excise duty has already been paid. It is obvious that the imported goods cannot satisfy the second condition, because the payment of excise duty on raw naptha can never arise in respect of imported goods. Dr. Kantawala had to concede that the second condition of payment of excise duty on raw naptha is not fulfilled in respect of the imported goods, but urged that the said condition has no application in the case of the imported goods. It is impossible to accede to the submission of the learned counsel. It is futile to suggest that advantage under the exemption notification should be made available even though the conditions required for securing advantage are not complied with. The suggestion that only those conditions would be satisfied which are possible of satisfaction is only required to be stated to be rejected. A tax-prayer, who desires to take advantage of the exemption must bring his case within the four corners of the exemption notification. Acceding to the submission of Dr. Kantawala would lead to atrocious results as the importer would get advantage over the local manufactures, inasmuch as the importers without satisfying the conditions would claim advantage, while the same would be denied to the local manufactures. It is, therefore impossible to accept the submission of Dr. Kantawala that even satisfaction of one condition would entitle the importer to take advantage of the exemption notification. Dr. Kantawala urged that in the case of Century Enka the advantage of notification was made available to the importer, but the submission overlooks that the condition prescribed under the said notification concerning that case was satisfied, by the importer, the condition being that the entire material imported would be used in the factory of the petitioners for manufacture of nylon yarn. The Revenue did not dispute in the case of ''Century Enka'' that the condition was not satisfied, and therefore, the advantage of notification was given to the importer. Dr. Kantawala then relied upon the decision of one of us (Pendse J.) reported in Pan Asia Commercial Enterprises and another Vs. Union of India and another, where notification dated December 4, 1979 and its impact on the payment of countervailing duty in respect of the imported goods came up for consideration. The Petitioners relied upon the decision of the Division Bench in the case of Century Enka, and the learned counsel appearing on behalf of the Department did not dispute that the claim of the petitioners is covered by the decision. It is undoubtedly true that it was contended on behalf of the Department that the second condition of payment of excise duty in respect of the imported goods was not satisfied but the contention was turned down on the ground that there was no material brought on record in the return in support of the submission. We are afraid that the decision of the Single Judge is not correct. Even though the material was not brought on record to establish that excise duty was not paid on the raw material in respect of the imported article, that fact could have been assumed without any proof. It is impossible to imagine a case where in respect of raw naptha used for manufacture of H.D.P. in a foreign country, excise duty payable under the Indian law could have been levied and paid. It is therefore obvious that the decision of the Single Judge in Pan Asia Commercial Enterprise''s case is not correct and we overrule the same. In our judgment, as the condition of payment of excise duty on raw naptha could never be satisfied in the case of imported HDP, the advantage of the exemption notification dated December 4, 1979 is not available...."

In view of this Judgment it is clear that before an Exemption Notification can be availed of all the conditions laid down therein must be fulfilled. The case of the Pan Asia Commercial Enterprises (Supra) has now been overruled.

8. Mr. Kotwal has however argued that two Division Benches of our Court have taken contrary views. He submits that under these circumstances, this Court should refer this question to a Larger Bench for consideration. In my view, two Benches of this Court have not taken different views. In the case of Century Enka, the question whether all conditions have to be fulfilled is not dealt with because the case proceeded on the footing that all the conditions were fulfilled. It is only in the case of Ashok Traders that it has been held that all conditions must be fulfilled. Under these circumstances, I do not see any necessity for referring this matter to a Larger Bench.

9. Admittedly, in respect of items which are imported the third condition laid down in the Notification cannot be satisfied, Under these circumstances, it would have to be held that the Petitioners are not entitled to the benefit of this Notification.

10. Mr. Kotwal next argued that in any event Notification No. 89/82, dated 25th March, 1982 would be applicable to the Petitioners. The said Notification reads as follows :

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Govt., being satisfied that it is necessary in the public interest so to do, hereby exempts all the goods covered by the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from so much of the additional duty leviable thereon u/s 3 of the second mentioned Act, as is in excess of the duty of excise for the time being leviable on like goods produced or manufactured in any place outside a free trade zone in India.

Explanation - For the purposes of this notification, "free trade zone" has the same meaning an in Explanation 2 to sub-section (1) of Section 3 of the Central Excise and Salt Act, 1944 (1 of 1944) as inserted by Clause 46 of the Finance Bill, 1982, which clause has, by virtue of the declaration made in the said Bill under the provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law."

He submits that on the admitted facts of this case, the Notification No. 276/67, dated 21st December 1967 would be applicable to Indian Petro Chemicals Corporation Ltd. (I.P.C.L). He submits that I.P.C.L. is the only body in India which manufactures Orthoxylene. He submits that as a result of Notification No. 276/67 I.P.C.L. does not pay any excise duty. He submits that under Notification No. 89, the excise duty in respect of the goods imported in India are exempt from so much of the additional duty leviable u/s 3 as is in excess of duty for the time being leviable on like goods, produced or manufactured in any place outside the free trade zone in India. He submits that, therefore, all differences between what I.P.C.L. pays and the rates mentioned in the First Schedule are exempt. He submits that as "P.C.L." does not pay any excise at all, the Petitioners are entitled to an exemption of the entire amount.

11. It must be submitted that at first flush this seems a very attractive argument. However, if the Explanatory Note to this notification is looked at, it becomes clear that his Notification has been issued merely for the purposes of meeting the situation arising as a result of there being two rates of excise duty leviable on excise goods produced and manufactured in India outside "a free trade zone" and in "a free trade zone". The Explanatory Note reads as follows :-

EXPLANATORY MEMORANDUM TO THE GOVERNMENT OF INDIA MINISTRY OF FINANCE (DEPARTMENT OF REVENUE) NOTIFICATION NO. 89-CUSTOMS, DATED THE 25TH MARCH, 1982.

With the insertion of proviso to sub-section (1) of Section 3 of the Central Excises and Salt Act, 1944, through the Finance Bill, 1982, two rates of excise duty are now leviable on excisable goods produced or manufactured in India. Under the main sub-section (1) of Section 3, ibid, excise duty at the rates set forth in the First Schedule to the said Act is leviable on excisable goods produced or manufactured in any place outside a Free Trade Zone and in India. On excisable goods produced or manufactured in a Free Trade Zone and brought into the Domestic Tariff Area, excise duty in leviable as per the proviso to the sub-section (1) of Section 3, as inserted through the Finance Bill, 1982.

2. In terms of Section 3(1) of the Customs Tariff Act, 1975 where excise duty is leviable at different rates, of the additional customs duty is to be charged at the highest rate on the goods imported into India. Since in most of the cases excise duty leviable on the goods produced in a Free Trade Zone and brought into the Domestic Tariff Area will be higher then the excise duty leviable on the goods produced outside the zone in India, the additional duty on the goods imported from abroad would become leviable at the rates as per the proviso to Section 3(1) of the Central Excises and Salt Act and not at the rate at which excise duty is leviable under the main sub-section (1) of Section 3 ibid prior to the Finance Bill, 1982, Notification No. 89-Customs, dated 25th March, 1982 has been issued with a view to maintaining the existing position.

3. This exemption has no revenue implications."

Whilst the instances set out in the affidavit dated 17th November, 1989 may not be fully apposite Notification No. 89/82 can have no application to the facts of this case. In my view to hold otherwise would create an anomalous situation, inasmuch as the Petitioners would not be entitled to the benefit of main Notification No. 276/67, yet they would indirectly get the same benefits through this Notification. Whilst it has no bearing on the decision, it must however be noted that this Notification. Whilst it has no bearing on the decision, it must however be noted that this notification has been in existence since 1982. For all these years the Petitioners themselves did not think that this notification was applicable to them. It was only at the stage of arguments that the Petition was amended and reliance placed on it. No doubt it is the ingenuity of Counsel which has sought to make this notification applicable to the Petitioners.

12. Relying upon the authorities in the cases of State of Madhya Pradesh Vs. Abdeali, and Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, . Mr. Kotwal has submitted that the statement of objects and reasons cannot be used for the purposes of interpreting and/or cutting down the scope of the Notification. He submits that the Notification clearly covers the Petitioner''s case and reliefs cannot be refused on the basis of the Explanatory Statement. I am unable to accept this contention. The question here is not of interpretation of the Notification. What this Court is concerned with is the applicability of the Notification. For this purpose the object and purpose of the exemption must be kept in mind. The object of this Notification is clearly indicated by the Explanatory statement. To accept Mr. Kotwal''s submission would be to apply the Notification to a situation to which the framers never intended it to apply. It will thus have to be held that the Petitioners are not entitled to claim exemption under this Notification.

Under the circumstances, the Petitions stand dismissed. There will be no order as to costs.

13. At the request of Mr. Kotwal, interim orders to continue for a period of six weeks from today, on the condition that the Bank Guarantee/s be kept alive till such time as the interim order continues to operate.

