

(1983) 04 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No's. 3025 and 3026 of 1978

Indian Leaf Tobacco Development Co. Ltd. and I.T.C. Ltd.

APPELLANT

Vs

U.O.I. and Others

RESPONDENT

Date of Decision : 30-04-1983

Acts Referred:

Customs Act, 1962 — Section 130, 20, 25, 25(2)

Citation : (1984) 16 ELT 234

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : Ashok Desai and A.N. Hidayathulla, assisted by N.S. Sivam, V.T. Arasan and Sri Ram Panchu, for the Appellant; K.N. Balasubramaniam, for the Respondent

Judgement

1. The petitioners in W.P. Nos. 3025 of 1978, are Indian Leaf Tobacco Development Co. Ltd. The prayer in W.P. Nos. 3026 of 1978 is for the

issue of a writ of certiorari to quash the show cause notice dated nil issued by the second respondent, Collector of Customs, Madras, and the

prayer in W.P. 3025 of 1978 is for the issue of a writ of prohibition restraining the respondents from taking any steps pursuant to the said show

cause notice.

2. The facts leading to the filing of W.P. 3025 and 3026 of 1978 may be briefly set out as follows : The petitioners are engaged, among others, in

the manufacture and/or curing of tobacco in India. On 31st August, 1970, the petitioners exported to the Imperial Tobacco Group Ltd., Bristol,

U.M. 3677 cases of Flue Cured Virginia Tobacco from Kakinada Port per "s.s. Clan Graham". The export was made in bond under Chapter IX

of the Central Excise Rules, 1944. Consequently, no excise duty was payable on

the same. However, the consignee rejected in all 1210 cases as being unsuitable for the manufacture of cigarettes in the United Kingdom. Therefore, they were re-shipped to India, by "s.s. Jala Vishnu". On 6th July, 1972, the petitioners addressed the Collector of Customs, Madras, explaining the circumstances under which the 1210 cases of the said tobacco were being re-imported. It was further stated that on clearance through Customs the 1210 cases of the said tobacco would be placed in Excise Bond in the petitioner's Excise Bonded Warehouse at Madras harbour. Thereafter, they were dispatched to Bangalore by road under a bond issued under Chapter VII of the Central Excise Rules, 1944, to be warehoused at Bangalore in the Excise Warehouse of I.T.C. The tobacco arrived in Madras Port on 31st July, 1972. On 11th August, 1972, the petitioners requested the Assistant Collector of Customs to release the 1210 cases. On 18th August, 1972, competent officer allowed the cases to be cleared from the transit shed to the Excise Bonded Warehouse on payment of Rs. 2239.10, as the amount of drawback of Central Excise duty on the packing materials. Thereafter, the 1210 cases of tobacco were transported to Bangalore and re-warehoused there at the Excise Bonded Warehouse of I.T.C. From time to time, the petitioners cleared the said tobacco and used it in the manufacture of cigarettes only. At the time of clearance, the petitioners paid the excise duty at the rate of Rs. 5 per kilogram under item No. 4 of the First Schedule to the Excise Act, which was the proper duty payable thereon. The petitioners paid in all a sum of Rs. 11,40,000, towards the Central Excise duty. On 1-10-1972, the Assistant Collector of Customs demanded a sum of Rs. 1,03,24,723.50 as duty allegedly short-levied on the 1210 cases of tobacco. This was on the basis that on re-importation, customs duty equivalent to Central Excise duty had not been collected. On 18th October, 1972, the petitioners informed the authorities that the 1210 cases of tobacco were warehoused at Bangalore and the appropriate excise duty payable on the said tobacco would be collected by the Excise authorities as and when the same was consumed. For nearly 2-1/2 years thereafter, nothing happened. On 7th May, 1975 the Assistant Collector of Customs, Madras, determined that a sum of Rs. 90,76,680 was payable by the petitioners as the duty equivalent to Central Excise duty which ought to have been collected at the time

of re-importation. The petitioners preferred an appeal on 4-8-1975. The appeal was dismissed. Against the Appellate Collector's order, the

petitioners preferred a revision petition before the revisional authority. The revision was also dismissed. It may be mentioned that the demand of

Rs. 90,76,680 was calculated at the rate of Rs. 40 per. kilogram as being the duty leviable on the tobacco as equivalent to the excise duty payable

on the same. Subsequently, the petitioners made a representation to the first respondent, Union of India, seeking exemption from the duty in

respect of the 1210 cases of the said tobacco u/s 25 of the Customs Act, on the ground grave harm and prejudice would be caused to them

financially and it would prejudicially affect their export performance, whereby they had earned the Indian revenue over Rs. 100 crores in foreign

currency. On the said representation, the first respondent passed an order u/s 25(2) of the Customs Act, exemption the petitioners from payment

of duty on the 1210 cases of the said tobacco and duly informed the Customs authorities by letter dated 19th March, 1977. It is, therefore, on

29th June, 1978, the petitioners received an undated show cause notice issued by the third respondent who was the Collector of Customs,

Madras. It is in these circumstances W.P. 3025 of 1978 and 3026 of 1978 have been filed.

3. I may mention that though I have used the name of the petitioners in narrating the facts, it was really Indian leaf Tobacco Development Co. Ltd.,

that had exported the tobacco in 1972 and that subsequently by an agreement dated 24th April, 1976, the I.T.C. has purchased the assets and

liabilities of the I.L.T.D. as on 31st March, 1975.

4. Mr. Ashok Desai, the learned counsel for the petitioners, in his lucid arguments before me, raised the following contentions -

1. The show cause notice is without jurisdiction in view of the order dated 19th March, 1977, passed by the first respondent Union of India, u/s

25(2) of the Customs Act.

2. The respondents are bound to give full credence to the Government order and cannot challenge their own order in these proceedings.

3. The show cause notice is barred by limitation u/s 130 read with Section 28 of the Customs Act.

4. The show cause notice itself is arbitrary, in that a reading of the show cause

notice would show that the authorities have not applied their mind at all to the relevant materials and had not even dated the notice.

On the other hand, Mr. K. N. Balasubramaniam, the learned Additional Central Government Standing Counsel, urged that the petitioners are bound by the dismissal of the revision petition by the revisional authority. The petitioners cannot take advantage of the order of exemption granted by the first respondent on 19th March, 1977. The exemption under S. 25(2) could be granted only before the levy. The show cause notice is not barred by limitation.

5. It is not disputed that the petitioners re-imported 1210 cases of unmanufactured Flue Cured Virginia Tobacco, which was earlier shipped under the Central Excise Bond to the U.K., as the Overseas buyers had rejected the cases. On re-import, the goods were passed free of duty under S.

20 of the Customs Act, which states :

(1) If goods produced or manufactured in India be imported into India after exportation therefrom, such goods shall be liable to duty and be

subject to all the conditions and restrictions, if any, to which goods of the like kind and value not so produced or manufactured are liable or

subject, on the importation thereof :

Provided that, if such importation takes place within three years after the exportation of such goods and it is shown to the satisfaction of the

Assistant Collector of Customs that the goods are the same which were exported, the goods may be admitted -

(a) in any case where at the time of exportation of the goods, drawback of any customs or excise duty levied by the Union or both was allowed,

on payment of customs duty equal to the amount of such drawback;

(b) in any case where at the time of exportation of the goods, drawback of any excise duty levied by a State was allowed, on payment of customs

duty equal to such excise duty leviable at the time and place of importation of the goods;

(c) in any case where the goods were exported in bond, without payment of -

(i) the customs duty leviable on the imported materials, if any, used in the manufacture of the goods, or

(ii) the excise duty leviable on the indigenous materials, if any, used in the

manufacture of the goods, or

(iii) the excise duty, if any, leviable on the goods, on payment of customs duty equal to the aggregate amount of all such duties calculated at the

rates prevailing at the time and place of importation of the goods;

(d) in any other case, without payment of duty.

6. It is also admitted that at the time of re-import, the petitioners paid the drawback amount on the packing materials. On 11th August, 1972, the

petitioners informed the Assistant Collector of Customs that the 1210 cases of unmanufactured returned Indian stripped tobacco ex. s.s

"Jalavishnu" would be cleared by them to their warehouse in the Madras Harbour with the permission of the Superintendent of Central Excise,

Madras, on obtaining Customs' "Pass Order". It was further stated that the Central Excise, Certificate showing that these cases have been

removed and re-warehoused in their Private Bonded warehouse in the Harbour premises would be furnished. It was on the basis of this, the release

was ordered. Thereafter, the petitioners sent the certificate in original issued by the Inspector of Central Excise, MOR, Royapuram Range, Madras

1, stating that the above consignment has been re-warehoused in the petitioners' Private Excise Bonded warehouse in the Harbour premises. This

was done on the TP 2 permit issued by the Central Excise authorities. It is equally not in dispute that these cases were subsequently dispatched to

the Excise Bonded Warehouse at Bangalore by lorries and duly re-warehoused at the end as per the Excise rules. This is also proved by the

certificate issued by the Inspector of Central Excise, Fraser Town, Bangalore on 1st August, 1975. The certificate further says that the said 1210

cases were withdrawn from warehouses and laid down for the manufacture of cigarettes between 13th September, 1972 and 9th August, 1973 on

payment of proper rates of duty.

7. Notwithstanding the above, on 1st October, 1972, the Assistant Collector of Customs, Madras, issued a show cause notice to the petitioners to

show cause why a sum of Rs. 1,03,24,723.50 should not be recovered from them. The petitioners submitted an explanation, but without success.

The Assistant Collector ultimately determined that a sum of Rs. 90,76,680, was payable by the petitioners. The petitioners preferred an appeal

setting out all the facts. However, the appeal was dismissed by the Appellate

Collector of Customs by his order dated 29th April 1976. The appellate authority did not dispute any of the facts stated by the petitioners. On the other hand the appellate authority observed that the petitioners have been misled by the Customs House itself in adopting a wrong procedure, which involved non-payment of duty on, re-import, but that would not absolve the petitioners of the legal liability under S. 20 of the Customs Act. The appellate authority also did not dispute the fact that the petitioners had paid excise duty, which was leviable at the time of import, but, however, stated that it would be open to the petitioners to seek appropriate remedy under Central Excises and Salt Act, 1944, for refund of the excise duty paid on the tobacco utilised for subsequent manufacture of cigarettes. It may be mentioned here that it was not disputed that the entire quantity of the tobacco was used for the manufacture of cigarettes, on payment of the appropriate excise duty. A contention was raised on behalf of the petitioners that the petitioners in any event would be liable to pay duty only at the rate of Rs. 5.50 per kilogram, and not at the rate of Rs. 40 per kilogram. This was answered by the appellate authority stating that at the time of import, there was no definite evidence to the effect that the goods would be used in the manufacture of cigarettes only, and that as flue cured tobacco also finds use in the manufacture of smoking mixtures for pipe and cigarettes, the highest rate of Rs. 40 per kilogram would prevail. The further revision was also dismissed by the order dated 20th October, 1976. The revisional authority did not also dispute the fact stated by the petitioners regarding the re-importation of 1210 cases of tobacco, their being permitted to be cleared from the port with the permission of the Customs authorities and warehoused in their bonded warehouse at Madras, their being subsequently transported to Bangalore and stored in the bonded warehouse and their being used fully in the manufacture of cigarettes on payment of appropriate excise duty. However, the revisional authority observed thus :-

The Government of India observe that transport of the goods under a TP 2, and the re-warehousing and subsequent use in the manufacture of cigarettes was for the compliance with excise and not Customs formalities or procedure. A Customs duty was payable on the goods at the time of clearance through the docks and not after clearance from the warehouse licensed

under the Excise Law and subsequent manufacture of cigarettes

from the tobacco so re-imported. The Customs department is not normally concerned with post-clearance operations though the tobacco was

originally intended for use and said to have been used in the Bangalore factory in the manufacture of cigarettes. The petitioners could not deny

theoretically that the tobacco re-imported could be used for the manufacture of smoking mixture for pipes and cigarettes.

In view of this, the revisional authority dismissed the revision petition.

8. It may be seen from the above that the appellate as well as the revisional authorities were satisfied that the Customs authorities alone released

the goods after collecting the drawback duty and the goods on such release were warehoused both at Madras and Bangalore in bonded

warehouses and were fully utilised in the manufacture of cigarettes on payment of appropriate excise duty. Notwithstanding the above, on the

technical plea that the Customs authorities were concerned with the procedure to be followed under S. 20 of the Customs Act, and not concerned

with what the Central Excise authorities did, and further the Customs authorities were concerned not with the fact as to what really happened to the

tobacco re-imported, but what could have been done as on the date of the re-importation, the petitioners were asked to pay a sum of Rs.

90,76,680. It is in these circumstances, the petitioners had made a representation to the Union of India for exemption u/s 25(2) of the Customs

Act.

9. It is in the above circumstances, on 19th March, 1977, the Government of India, Department of Revenue and Banking (Revenue Wing) New

Delhi passed an order in F. No. 355/111/77-Cus. I, to the following effect -

I am directed to say that in exercise of the powers conferred by S. 25(2) of the Customs Act, 1962 (52 of 1962), the Central Government being

satisfied that it is necessary in the public interest so to do, hereby exempts unmanufactured tobacco re-imported by Messrs Indian leaf Tobacco

Development Co. Ltd., Madras, as detailed above, from the payment of the whole of the duty of Customs leviable thereon.

The order clearly gave the subject as :-

Subject : Re-import of 1210 cases of unmanufactured tobacco ex. s.s. Jalavishnu - Bill of entry No. D. 1007, dated 18-8-1972, G.M. No.

436/72, L. No. 265, dated 7-7-1972 - Enforcement Order No. S-30/3319/72-Gr. I, dated 7-5-1975 of Assistant Collector of Customs, Madras

- Request for exemption - Regarding.

10. This was followed by the letter No. S. 30/3319/72-Gr, I., dated 12/16 April, 1977, sent by the Assistant Collector of Customs, Madras, to

the petitioners, wherein it is stated as follows -

The demand (enforced) for extra duty made in this office letter of even number, dated 7th May, 1975 is hereby withdrawn. The document

forwarded by you is returned herewith.

11. The above order, dated 19th March, 1977, has been passed by the first respondent in exercise of the power conferred u/s 25(2) of the

Customs Act. Section 25(2) reads as follows -

If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the

payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

Pursuant to this order, the demand of Rs. 90,76,680 made by the Collector of Customs, on 7th May, 1975 was withdrawn by the Assistant

Collector of Customs on 12th April, 1977. The learned Standing Counsel did not argue that the order passed u/s 25(2) by the first respondent on

19th March, 1977 was passed on any mistaken assumption of facts. It was not disputed that the order, dated 19th March, 1977, was passed by

the first respondent, Union of India, after taking into account all the relevant facts and circumstances, viz., right from the date of re-importation of

1210 cases of unmanufactured tobacco "s.s. Jalavishnu". The only argument that was advanced by the learned Standing Counsel was that the first

respondent could not have passed any such order after the revision petition filed by the petitioner had been dismissed. Strangely, the learned

Standing Counsel argued that after dismissing the revision petition, the first respondent could not have granted an exemption u/s 25(2) could be

exercised only before the levying of the customs duty, and not in a case where customs duty has been levied and the appeal and revision filed by

the petitioners had dismissed. Much emphasis was laid by the learned Standing Counsel on the word "leviable" found in S. 25(2). I am unable to

accept the submissions of the learned Standing Counsel.

12. Section 25(2) does not put any restriction on the Central Government as to the time at which it should grant exemption. Exemption could be granted under circumstances of an exceptional nature even before levy is made or after the levy, but before the recovery of the amount. Even in a case where Customs duty has been collected, it will certainly be open to the Central Government, in exercise of its powers under S. 25(2) to grant exemption and refund the levy. I am, therefore, unable to hold that when once demand of Rs. 90,76,680 made against the petitioners by the Collector of Customs had become final by the dismissal of the revision petition filed by the petitioners by the revisional authority, the Central Government has no power to grant exemption under S. 25(2).

13. The order of exemption granted by the first respondent is just and equitable on the facts and circumstances of the case. As already pointed out, after the goods were cleared from the custody of the Customs authorities and taken to the bonded warehouse of the petitioners in Madras and from there to Bangalore, the entire quantity of tobacco was admittedly utilised for the manufacture of cigarettes. Before such utilisation, admittedly, the proper excise duty payable was paid by the petitioners. Consequently, the petitioners would have been put to great hardship if they had been asked to pay duty at the rate of Rs. 40 per kg. under the provisions of the Customs Act on the hypothesis that at the time of importation, the tobacco was capable of being used in the manufacture of smoking mixture for pipes and cigarettes. But that has not been done in this case. In fact, the appellate authority, as I have stated earlier, took notice of this, but has stated that the Customs authorities were not concerned with what was done by the Excise authorities, and that the petitioners could pay the Customs duty and ask for refund from the Excise authorities. When both the Central Excise department and the Customs department from different limbs of the first respondent, the first respondent acted properly in taking all facts and circumstances into consideration and granting exemption under S. 25(2).

14. Further, as rightly pointed out by Mr. Ashok Desai, having passed an order under S. 25(2), it would not be open for the Government to go before the court and say that the order was without jurisdiction. In this connection, I may refer to the judgment of the Supreme Court in C.A. Nos.

1561 and 1562 of 1966 (The State of Assam and another v. Raghava Rajagopala shari) decided on 6th October, 1967. The writ petition was

filed by one Raghava Rajagopalachari for a declaration that he continued to be in service of the Government of Assam from 13th May, 1947 to

29th June, 1953. There, on behalf of the State of Assam, an order passed by the State Government on 23rd July, 1953, continuing the services of

the petitioner after the date of superannuation, was attacked as bad in view of the ruling of the Supreme Court in State of Assam and Others Vs.

Padma Ram Borah, . In that context, the Supreme Court observed as follows -

But, we are unable to appreciate how he is entitled to raise this point. The right has brought to challenge this order. No such petition, even if it be

competent, was filed by the State itself. The respondent to a writ petition cannot be allowed to attack its own order as a respondent.

15. The principle laid down by the Supreme Court applies to this case as well. The Union of India, first respondent herein, is equally bound by the

order, dated 19th March, 1977 by which it granted exemption. Similarly, the Collector of Customs, Madras, the second respondent, who acted

on the basis of the order passed by the Union of India on 19th March, 1977 and withdrew the demand for extra duty made in his office letter

dated 7th May, 1975, is equally bound by the said order.

16. Apart from this, it is surprising that the show cause notice does not make any reference to the order dated 19th March, 1977. It merely states

that the demand issued for the short collected duty was subsequently withdrawn by the Assistant Collector of Customs, Appraising Gr. I, on 12th

April, 1977. Without referring to the order, dated 19th March, 1977, the show cause notice merely states that the Collector of Customs proposed

to review the case. So long as the order dated 19th March, 1977 stands and the order dated 12th April, 1977 is only consequential on the former

order, unless the former order is set aside, there cannot be any question of the latter order being reviewed.

17. Further, I am of the view that there cannot be any review of the order dated 19th March, 1977, passed under S. 25(2) of the Act. It is now

settled law that a statutory authority has no inherent power of reviewing its own order. The Act or the Rules made thereunder do not confer any

power upon the first respondent to review the order passed u/s 25(2). Once the

second respondent has passed an order on 12th April, 1977, withdrawing the demand, it is not open to him to review that order which is merely dependent and consequential upon the order dated 19th March, 1977. I, therefore, hold that the show cause notice issued is without jurisdiction and is liable to be quashed.

18. In view of the fact that I have come to the conclusion that the show cause notice is without jurisdiction in view of the order or exemption granted by the first respondent u/s 25(2) of the Customs Act, it is unnecessary for me to deal with the other contentions raised by Mr. Ashok

Desai for the petitioners.

19. In the result, the show cause notice issued by the second respondent is quashed. W.P. Nos. 3025 and 3026 of 1978 are allowed. There will be no order as to costs.