

(1979) 09 BOM CK 0048

In the Bombay High Court

Case No : Misc. Petition No. 559 of 1975

Kirloskar Cummins Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-09-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 12, 12(1), 160, 20
Sea Customs Act, 1878 — Section 23
Tariff Act, 1934 — Section 2A

Citation : (1980) CENCUS 21

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Advocate : Dhanuka, for the Appellant; Manjrekar, for the Respondent

Judgement

1. The question which arises for determination in this petition relates to the proper construction of the exemption Notification No. 82-Cus., dated August 6, 1960 and the answer to the question would depend upon the determination as to whether the "countervailing duty" forms part of the customs duty.

2. A few facts which have given rise to this litigation and which are not in dispute are as follows :- The petitioners carry on business as manufacturers of diesel engines and for the aforesaid business, the petitioners utilise certain imported components. The components imported by the petitioners were liable to customs duty and such components attracted the levy under the provisions of the Customs Act read with the Indian Tariff Act at the rate of 50% ad valorem. The duty for import of complete diesel engines under the provisions of the Customs Act read with Indian Tariff Act was at the rate of 27 1/2% ad valorem and duty u/s 2A of the Indian Tariff Act 5 1/2% of the ad valorem. The duty u/s 2A of the Indian Tariff Act is known as countervailing duty. The Government of India, in exercise of the powers conferred by Section 23 of the Sea Customs Act, 1878, issued the exemption Notification on August 6, 1960 whereby component parts of machinery when imported were exempted from so much of the Customs duty

leviable thereon under the Indian Tariff Act as is in excess of the rate applicable under the Indian Tariff Act to the machinery when imported complete.

3. The petitioners have imported the components of the diesel engines between the period commencing from May, 1965 to December, 1965. The Customs authorities at Bombay granted advantage of the exemption Notification to the imports of the petitioners but took the view that expression "Customs Duty" used in the Notification meant not merely the customs duty referred to in Section 2 of the Indian Tariff Act but also the countervailing or additional duty referred to in Section 2A of the Indian Tariff Act. The petitioners were assessed accordingly at the rate of 33% ad valorem. The petitioners applied for refund of excess customs duty on diverse dates and the total refund claimed was Rs. 4,15,679.19. The claim for refund made by the petitioners was turned down by the Assistant Collector of Customs by various orders. The petitioners carried appeal but the same was dismissed by the Appellate Collector of Customs and the revisions preferred to the Central Government also met with the same fate. The petitioners are challenging the legality and validity of those orders in this petition filed under Article 226 of the Constitution of India.

4. Mr. Dhanuka, the learned Counsel appearing in support of the petition, submitted that the countervailing duty levied u/s 2A of the Indian Tariff Act is not a part of the Customs duty though it may be one akin to it. The learned Counsel submitted that the customs duty cannot be equated with countervailing duty as it is never a part and parcel of the customs duty. Mr. Dhanuka submitted that the purpose of levy of countervailing duty is completely different than the levy of customs duty and the mode of computing assessable value is also different in respect of the two duties. It was also urged that the customs duty is leviable on the act of the import, while the countervailing duty can be imposed only if certain pre-requisite conditions exist. The learned Counsel submitted that the Notification should be interpreted or construed by taking these factors into consideration and then it would be clear that the Customs authorities were in error in including the countervailing duty while giving benefit of the Notification to the petitioners.

5. Mr. Manjrekar, the learned Counsel appearing for the respondents on the other hand, submitted that the impugned Notification was issued prior to the insertion of Section 2A of the Indian Tariff Act and it is necessary to take into consideration the intention in granting such exemption. It was urged that the countervailing duty is really a part of the customs duty and both are recovered under the provisions of the Indian Tariff Act and there is a close connection or inter-relationship between the provisions of the two Acts.

6. The Sea Customs Act, 1878 was enacted to consolidate and amend the law relating to the levy of Sea Customs duties. Section 20 of the Act is the charging Section and it provides that the customs duty shall be levied at such rates as may be prescribed by or under any law for the time being in force on goods imported or exported by sea into or from any customs-port from or to any

foreign port. The duties were levied under the provisions of the Indian Tariff Act, 1934. Section 2 of the Indian Tariff Act provides that there shall be levied and collected in every port the duties specified in the First and Second Schedules. The First Schedule refers to the Import Tariff and the various items are grouped together in this Schedule. Item No. 72 refers to Machinery and provides for levy of duty at certain per cent ad valorem. Item No. 73(22) refers to a kind of machinery i.e. Internal Combustion Engines, all sorts and it provides that the duty leviable is at the rate provided for the machinery plus the excise duty for the time being leviable on like articles if produced or manufactured in India. The idea of levying additional duty known as countervailing duty is that the manufacturer of the same category of goods in India ought not to suffer unfair competition from outsiders. In order to balance economy and trade, the countervailing duty was levied, so that if the manufacturers in India are obliged to pay excise duty, then persons importing similar or same articles from abroad should also be compelled to pay countervailing duty so that both the manufacturers in India and the importers are put on a par. Tariff Item No. 75(11) refers to the component parts of diesel engines and as indicated earlier, the duty was payable at 50% of the ad valorem. The Indian Tariff Act was amended on February 2, 1963 by Amendment Act 3 of 1963 and Section 2A was inserted. Section 2A reads as follows :-

"2A. Levy of countervailing duty : Any article which is imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India.

Exp : In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

(2) The customs duty referred to in sub-section (1) shall be in addition to any duty imposed under this Act or under any law for the time being in force."

The Government of India enacted the Customs Act, 1962 on December 13, 1962 to consolidate and amend the law relating to customs and the Sea Customs Act, 1878 was repealed by the provisions of Section 160 of the Customs Act. Section 12 of the Customs Act is a charging section and Section 12(1) reads as under :-

"(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934, or any other law for the time being in force, on goods imported into, or exported from, India."

It is clear that the customs duty leviable would be at such rates as specified under the Indian Tariff Act and that makes it clear that the Customs Act and the

Indian Tariff Act are interlaced and are closely connected with the act of Import.

7. With this background, it is necessary to consider the submission of Mr. Dhanuka that while constructing the exemption Notification, the Customs Authorities should exclude from consideration the countervailing duty payable on the import of complete machinery. The submission of the learned Counsel is that the petitioners are entitled to claim exemption from so much of the customs duty as is in excess of the rates applicable to the complete machinery and, therefore, the duty leviable on component parts should be at the rate of 27 1/2% of the ad valorem. Mr. Dhanuka submitted that the duty levied on the component parts was at the rate of 33% and the assessment was made by taking into account the countervailing duty of 5 1/2 % on the completed machinery. The question which requires determination is whether the customs duty and the countervailing duty on the completed machinery are distinct and different or the customs duty would also include the countervailing duty. In my judgment, the submission of the learned Counsel that the customs duty would not include the countervailing duty is not correct. The provisions of Section 12 of the Customs Act provide that the duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act. Prior to 1963, Section 2 of the Indian Tariff Act provided for the rates of duties as set out in Schedule I to that Act. That impost was known as customs duty and that also included the countervailing duty which was levied in addition to the customs duty. After 1963, by insertion of Section 2A in the Indian Tariff Act in stead of the countervailing duty being included in the Schedule it was levied by a substantive section in the Indian Tariff Act. Section 2A makes it clear that any article which is imported into India shall be liable to customs duty equal to excise duty for the time being leviable on a like article if produced or manufactured in India. Sub-section (2) of Section 2A provided that the customs duty referred to in sub-section (1) shall be in addition to any duty imposed under the Indian Tariff Act or under any law for the time being in force. The plain reading of this Section 2A leaves no manner of doubt that the countervailing duty is also a part of the customs duty. The cumulative effect of the provisions of the Customs Act and the Indian Tariff Act is that both the customs duty and the countervailing duty are two branches of the taxation on import of goods. The countervailing duty is an impost which is closely connected with import. The levy is connected with import and is not a direct tax on the goods but on the act of import itself. The Supreme Court in Special Reference No. 1 of 1962 reported in AIR 1963 Supreme Court 1760 has observed as follows :-

"... in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves."

Such being the characteristic of a countervailing duty, it can be safely said that it is really a part or limb of the customs duty itself and not a duty which is distinct

or different from the customs duty.

8. Mr. Dhanuka submitted that the purpose of levy of countervailing duty is to equalise the burden on imported goods and on goods manufactured or produced in the country. The nature and character of the countervailing duty is set out in paragraph 8 of the judgment in the case of McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, and the Supreme Court in that case has reiterated its earlier view in the case of Kalyani Stores Vs. The State of Orissa and Others, . It was observed that as the expression "countervailing duties" has not been defined, it has to be determined with reference to etymological sense. In its etymological sense, it means to counter-balance and the levy is made to counter-balance the duties of excise imposed on goods manufactured in the country. The Supreme Court in Mc Dowell & Company's case quoted with approval a passage from its earlier judgment in the case of Mohan Meakin Breweries Ltd. Vs. Excise and Taxation Commr., Chandigarh and Others, where the Supreme Court was concerned with the question of countervailing duty levied in respect of interstate trade. In view of this judgment, there can hardly be any dispute as regards the nature or purpose of the levy of countervailing duty. Mr. Dhanuka submitted that the countervailing duty is distinct and different from customs duty because the customs duty is levied on the import of the goods, while the countervailing duty can be recovered provided certain condition precedents are in existence. It is urged that the countervailing duty can be levied provided the goods imported are also actually produced or manufactured in the country and excise duty is levied on such act of production or manufacture. It is undoubtedly true that those are the conditions which must be prevalent before the countervailing duty is levied but in the present case, I am not called upon to determine the validity or the legality of levy of countervailing duty. It may be that the two duties are recovered in different circumstances and the mode of computing the assessable value for the two duties is different but that would not enable the petitioners to claim that countervailing duty is not a part of the customs duty. In both kinds of duties, the impost is on the act of the import and not on the goods itself and viewed in this background, it is clear that the Customs authorities have properly interpreted the exemption Notification.

9. Mr. Dhanuka, in this connection, relied upon the decision of the learned Single Judge of the Madras High Court in Writ Petitions Nos. 1575 to 1577 of 1965 decided on March 14, 1968. The question which came for consideration before the learned Judge was whether the surcharge levied on the customs duty can also be made applicable to the countervailing duty. The surcharge was levied u/s 23(1) of the Finance Act, but the proviso to that section clearly provided that the countervailing duty u/s 2A of the Indian Tariff Act was exempted from the surcharge. In spite of this clear position, the department insisted on recovering surcharge on the countervailing duty and the learned Judge came to the conclusion that such recovery was wholly illegal while determining this question, the learned Judge made the observations that the two kinds of duties, viz.

Customs duty and the countervailing duty are separate and distinct. In my judgment, the observation made by the learned Judge was, with respect to a stray observation not required for the determination of the question which came up for consideration. The reliance on this decision by the learned Counsel is inappropriate. Mr. Dhanuka also relied upon another decision of the learned Single Judge of the Madras High Court in Writ Petition No. 198 of 1969 decided on December 2, 1970. The principal question which came for consideration before the learned Judge was whether the levy of countervailing duty u/s 2A was legal or amounted to tax on tax. The learned Judge repelled the contention holding that the duty was lawful and the contention that such duty does not attract Entry 83 in List I of the Constitution even assuming to be correct, still the Parliament has power to levy the impost under Entry 97 of List I which is of residuary nature. Certain observations in this judgment really go contrary to the submission of Mr. Dhanuka and the learned Judge did proceed on the basis that the customs duty and the countervailing duty are part and parcel of the same impost and was not distinct and separate. In my judgment, the submission of Mr. Dhanuka that the two duties are distinct and separate is not correct and cannot be entertained. It was also submitted that Section 2A was amended by Finance Act, 1963 and the amended provision also establishes that the nature and kind of duty differ. Mr. Manjrekar is right in his contention that Section 12 provides for levy of duty as provided under the Indian Tariff Act and it is not permissible to split out the duty under Sections 2 and 2A into different categories.

10. There is one more aspect of the matter which cannot be overlooked. The question as to whether the countervailing duty can be taken into account while interpreting the scope and ambit of exemption Notification has been carefully considered by the Customs authorities and the order of the appellate authority and the revisional authority cannot be said to be perverse or the view taken by them cannot be construed as unsustainable. It is now well-settled that it is for the Officer appointed under the Act to determine the question, whether an article attracts duty, the rate of duty and the applicability of exemption and unless their orders suffer from serious infirmities, the same cannot be disturbed in the exercise of writ jurisdiction. In my judgment, the three authorities below have come to a correct conclusion and the view taken by them is in consonance with the rules of interpretation and the provisions of the statute. In such circumstances, it is not permissible to disturb the same.

11. Accordingly, the petition fails and the rule is discharged with costs.