

(2016) 09 MAD CK 0064

In the Madras High Court

Case No : Writ Petition Nos. 20241, 29242, 14999-15002 and 16137 of 2005
and W.M.P. Nos. 16315, 16317, 16319, 16321 and 17474-17475 of
2005

K.M. Knitwear

APPELLANT

Vs

Cus. and C. Ex. Sett. Commission

RESPONDENT

Date of Decision : 12-09-2016

Acts Referred:

Citation : (2016) 341 ELT 554

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : Shri V. Sundareswaran, S.C, for the Respondent; Shri S.
Murugappan, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.(Common) - The petitioner, in all these Writ Petitions, has challenged the order passed by the Customs and Central Excise Settlement Commission, Additional Bench, Chennai (Settlement Commission), dated 19-11-2004. Though there are nine Writ Petitions in this batch of cases, all Writ Petitions question the common order passed by the Settlement Commission, dated 19-11-2004. The facts which are necessary for the disposal of the Writ Petitions are as follows :-

The petitioners filed individual applications for settlement of the proceedings initiated pursuant to show cause notices issued to the petitioner dated 28-5-2003, demanding differential duty in respect of lining and interlining materials imported by them claiming full exemption under Serial No. 168 of the table annexed in the Customs Notification No. 21 of 2002. The allegation in the show causes was that an indenting agent (co-applicant in all applications before the Settlement Commission) for various textile materials from abroad collected AEPC certificate and other import documents for the import of polyester lining fabrics from the various petitioners/importers at Tiruppur and cleared the

imported goods by availing concessional rate of duty under Customs Notification No. 21 of 2002, dated 1-3-2002, took delivery on behalf of the importers and diverted the imported material to the local market.

2. The allegation in the show cause is that the goods imported, availing concessional rate of duty under Customs Notification No. 21 of 2002, were not used in the manufacture of textile garments but diverted to domestic market in contravention of the said notification with an intention to evade payment of customs duty, the goods are liable for confiscation under Section 111(o) of the Customs Act, 1962, (Act) and the importers are also liable to penalty under Section 114A of the Act, equal to the amount of duty. Further the duty foregone amount along with interest is recoverable from the importer. The petitioners were called upon to show cause as to why the imported goods cleared to domestic area instead of utilising the same in manufacture of textile garments, should not be treated as liable to confiscation for non-fulfilment of the conditions subject to which the exemption was granted under Notification No. 21 of 2002, why the duty foregone should not be demanded from them under proviso to Section 28(1) of the Act and amounts already paid should not be adjusted against the said demand, why interest should not be demanded and why penalty should not be imposed.

3. On receipt of the show cause notices, the petitioners along with the indenting agent as co-applicant filed separate applications before the Settlement Commission, which were admitted on various dates, and as common issues were involved in all the applications, they were heard together. It is not in dispute that the petitioners admitted the violation committed by them in violating Condition No. 21 of the conditions contained in Notification No. 21 of 2002. The contention was that the differential duty liability mentioned in each of the show cause notices has been arrived at by taking into account, the basic customs duty as applicable plus CVD at 16% plus Special Additional Duty (SAD) at 4%. By relying on Section 3A(5) of the Customs Tariff Act, 1975, it was contended that SAD will not apply to the goods chargeable to additional duties levied under Section 3(1) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. Therefore, it was contended that the goods imported or covered by the said Additional Duty of Excise Act and SAD is not applicable to the said goods. Reliance was placed on Central Excise Notification No. 14 of 2002, dated 1-3-2002, stating that the subject goods are chargeable to excise duties at the consolidated rates at 16% and as per the first proviso below Para 1 of the notification, the said 16% is to be apportioned equally between basic duty and Additional Duty of Excise (ADE).

4. The Revenue contended that the CVD at 16% proposed in the show cause notice is on the basis of Serial No. 410 of the table below Customs Notification No. 21 of 2002 and therefore, Special Additional Duty on the subject goods is leviable.

5. The Settlement Commission taking note of the fact that the petitioners

admitted the allegations contained in the show cause notice and the resultant inability for total exemption, the Settlement Commission did not go into the merits of the matter. Thus, the only issue was the quantum of duty that could be demanded. The contention was that Special Additional Duty is not leviable on the subject goods on account of Section 3A(5) of the Customs Tariff Act, 1975, as according to the said provision, Special Additional Duty is not applicable on goods on which Additional Duty of Excise is leviable. The Settlement Commission pointed out that Additional Duty namely, CVD is leviable in terms of Section 3(1) of the Customs Tariff Act and in terms of Section 3(5), the duty payable under sub-section (1), i.e., CVD is in addition to other duty leviable on the said imported goods in terms of Customs Tariff Act or any other Act and Additional Duty of Excise Act is one such other Act. Therefore, the Settlement Commission held that the imported goods ought to have been charged, Additional Duty of Excise also, which the subject show cause notice has omitted to take into account and in view of the leviability of Additional Duty of Excise, the subject goods are not chargeable with SAD in the light of Section 3A(5) of the Customs Tariff Act, as claimed by the petitioners. Therefore, the Settlement Commission directed the Revenue to work out the amount of duty leviable in the form of Customs Duty plus CVD at 16%, ADE at 8% and Cess at 0.05% on the impugned goods. Accordingly, the duty payable by each of the petitioners, taking into account the Basic Duty of Customs, CVD at 16%, ADE at 8% and Cess at 0.05% was furnished and the case was settled accordingly. In Paragraph 7 of the impugned order, the Settlement Commission has recorded that the counsel for the petitioner and the Revenue accepted that ADE was leviable at 8%. Though such appears to be the stand taken by the petitioners before the Settlement Commission, they have filed these Writ Petitions challenging the said order.

6. The learned Counsel for the Petitioner after referring to the Budget Notification, more particularly, clause (b) therein, submitted that there is an exemption from so much of the Additional Duty leviable thereon under sub-section (1) of Section 3 of the Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in Column 5 of the said table. At this stage, the relevant portion of the Budget Notification is quoted herein below :-

Budget Notifications - Customs

Effective rates of basic and additional duty for specified goods falling under chapters 1 to 99

In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2001-Customs, dated the 1st March, 2001 [G.S.R.116(E), dated the 1st March, 2001], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the

Chapter, heading or sub-heading of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India :-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table.

7. Reference was also made to Section 3 of the Customs Tariff Act and also Section 3 of the Additional Duties of Excise (Goods of Special Importance), Act, 1957, which reads as follows :-

3. Levy and Collection of Additional Duties. - (1) There shall be levied and collected [in respect of the goods described in column (3) of the First Schedule] produced or manufactured in India and on all such goods lying in stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto duties of excise at the rate or rates [specified in column (4) of the said Schedule].

(2) The duties of excise referred to in sub-section (1) in respect of the goods specified therein shall be in addition to the duties of excise chargeable on such goods under the [Central Excise Act, 1944], (1 of 1944), or any other law for the time being in force.

[(3) The provisions of the [Central Excise Act, 1944] (1 of 1944), and the rules made thereunder, including those relating to refunds, exemptions from duty, offences and penalties, shall, so far as may be, apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1).]

8. The contention of the learned Counsel for the petitioner is that in terms of Notification No. 21 of 2002, the additional duty leviable is only 16%. Under Section 3(1) of the Customs Tariff Act, the additional duty is equal to the excise duty, then the additional duty shall be calculated at the percentage of value of the imported article. Therefore, based on Section 3(1) of the Customs Tariff Act, read with Schedule of the Central Excise Tariff Act, 1985, the excise duty leviable on the subject goods is only 16%. By referring to the Additional Duty of Excise Act, it is submitted the duty levied in terms of the First Schedule of the Central Excise Tariff Act are both duties of excise only and as per the Notification No. 21 of 2002, the additional duty in case of excise duties of 16% is exempt and under law, there is no provision to demand payment of 8% equal to excise duty leviable under the ADE Act, since effective rate of additional duty of customs (equal to excise duties leviable) is only 16% and not 24%. Therefore, it is the contention that the Settlement Commission had gone beyond the notification and imposed additional duty of 8%, which is neither provided by the Notification nor under the

statute.

9. The learned Senior Standing Counsel appearing for the respondent submitted that before the Settlement Commission, the petitioner had conceded to the fact that ADE at 8% is leviable, apart from, Cess, after having conceded before the Commission, they have filed these Writ Petitions challenging the order passed by the Settlement Commission. Further, it is contended that the Settlement Commission had passed the order, so that the correct duty amount is applied and collected. It is further contended that under Section 3(5) of the Customs Tariff Act, the duty chargeable shall be in addition to any other duty under the Act or any other law for time being in force and therefore, the levy of ADE at 8% under the ADE Act, 1957, is proper. Further, it is contended that Notification No. 21 of 2002, dated 1-3-2002, exempts all goods from additional duty leviable under Section 3(1) of the Customs Tariff, as in excess of the rates specified in Column 5 of the table annexed to the notification and in the cases on hand, the specified rate is 16% and the said notification does not provide exemption to the duties that may be levied as per Section 3(5) of the Customs Tariff Act and as ADE imposed at 8% is under Section 3(5) of the Customs Tariff Act, the levy imposed is correct and in accordance with law. In support of his contention, learned Counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of *State of Kerala v. Attesee* reported in 1989 (72) STC 1 : 1988 (38) E.L.T. 720 (S.C.).

10. Heard Mr. S. Murugappan, learned Counsel for the petitioner and Mr. V. Sundareswaran, learned Standing Counsel for the respondent-Department and perused the materials placed on record.

11. On a perusal of the impugned order passed by the Settlement Commission, it is evident that the petitioners conceded to the fact that 8% ADE is leviable along with the Basic Customs Duty plus CVD at 16% and Cess at 0.05%. When the petitioner had accepted to the said fact and allowed the case to be settled on those terms, they would be estopped from contending that the concession so made will not be a bar to challenge the order of the Settlement Commission. Therefore, the Writ Petitions are liable to be dismissed on this ground.

12. Nevertheless as elaborate submissions were made on either side, with regard to the issue as to whether 8% ADE is leviable, this Court proceeds to decide the matter on merits. The entire case of the petitioner is pitched upon the Budget Notification referred above. By the said Notification, the Central Government exempted the goods of the description in Column 3 of the table of the First Schedule to the Customs Tariff Act, from so much of additional duty leviable thereon under sub-section (1) of Section 3 of the Customs Tariff Act as in excess of the rates specified in the corresponding entry in Column 5 of the said table. By referring to the said Budget Notification and relying on Section 3(1) of the Customs Tariff Act, it is contended that any article imported into India, shall in addition be liable to a duty referred to as additional duty equal to the excise duty for the same leviable on a like article, if produced or manufactured in India.

Further, by referring to Section 3(2), it is submitted that for the purpose of calculating under sub-section (1) of Section 3, the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article, shall, notwithstanding anything contained in Section 14 of the Customs Act, be the aggregate of the values as mentioned in clauses (i) and (ii) to the said sub-section. Therefore, it is contended that the levy and collection of additional duties in terms of the ADE Act, 1957, are duties of excise and therefore, by virtue of the Budget Notification, no more than 16% can be collected as duty. However, one important provision, which needs to be considered to examine the correctness of the contention of the petitioner is sub-section (5) of Section 3 of the Customs Tariff Act, which reads as follows :-

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four percent of the value of the imported article as specified in that notification.

Explanation. - In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, the highest such tax or, as the case may be, such charge.

13. The above provision has been made with an object of counter-balancing, the sales tax value of the article, when the same is removed to the domestic area. Therefore, when the Central Government is satisfied that in public interest to levy on any imported article, such additional duty as would counter-balance the sales tax, value added tax, local tax, or any other charges on a like article on its sale, purchase or transportation in India, it may by notification in the official gazette direct that such imported article shall in addition be liable to an additional duty at a rate not exceeding 4% of the value of the imported article as specified in that Notification. The object of the above provision is to ensure that there is no loss of revenue to the States and appears to be with an object of being compensatory in nature for the States.

14. In the case of *Attesee* (supra), the Hon'ble Supreme Court was considering the principles of interpretation of legislation by incorporation or reference. In a case arising under the Kerala General Sales Tax Act, 1963, which granted

exemption from sales tax of goods specified in third schedule to the said Act, the question was whether in respect of the relevant assessment years, the exemption given to cotton fabrics should be restricted to cotton fabrics as defined in the Central Excises and Salt Act, 1944, or whether it would also cover goods falling under the said definition after its amendment in 1969.

15. The Central Sales Tax Act under Section 14 declared certain goods to be of special importance interstate trade or commerce and the definition of the goods related to the Central Excise Act, 1944 and at about the same time, the Parliament also enacted the Additional Duty of Excise Act, 1957, with an object to impose Additional Duties of Excise in replacement of Sales Tax by the Union and the States on certain items and to distribute the net proceeds of taxes except for proceeds attributable to Union Territories, to the States. While deciding the question, reference was made to Article 268 of the Constitution of India, which imposed certain restrictions on the legislative powers of the State in the matter of levy of Sales Tax on sales taking place outside the State, sales in the course of import or export, sales in the course of interstate trade or commerce and sales of declared goods. After referring to the relevant provisions, it was pointed out that levy of Sales Tax on declared goods, should not be at a rate exceeding 2 per cent or be levied at more than one point in a State and as these restrictions resultant in loss of revenue to the State, it was considered expedient to compensate the State for the loss of Sales Tax incurred by them and thus, the object of amendment to Section 15 of Act 31 of 1958, was explained. At this juncture, it would be beneficial to take note of the observations made in Paragraph 6 of the judgment :-

These restrictions clearly entailed loss of revenue to the States and it was considered expedient and desirable to compensate the States for the proportionate loss of sales tax incurred by them. Thus, even before Section 15 was brought into force, the Central Government decided to pass an Act to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution recommended by the Second Finance Commission in its report dated September 30, 1957. This proposal to levy additional duties of excise on certain special goods was a part and parcel of an integrated scheme under which sales tax levied at different rates by the States on certain goods was ultimately substituted by the levy of additional duties of excise on such goods and the States were compensated by payment of a part of the net proceeds of the said additional levy on such goods. That this clearly was the genesis and object of the 1957 Act also appears from its objects and reasons set out earlier. Some of the items liable to excise duty were picked out from the Schedule to the 1944 Act. They were listed among the declared goods of section 14 of the C.S.T. Act and also made liable to additional excise duty under the 1957 Act. A perusal of the lists under these three enactments shows that out of the items listed in the Schedule to the 1944 Act, sugar, tobacco, cotton fabrics, rayon or artificial fabrics and woollen fabrics were categorised as declared goods

and subjected to additional excise duty.

16. As rightly pointed out by the learned Standing counsel for the Revenue, the additional duty leviable and the power to levy the Additional Duty of Excise is traceable to sub-section (5) of Section 3 of the Customs Tariff Act, 1975, (referred supra), which gives power to the Government to levy such additional duty as would counter-balance the sales tax on a like article on its sale in India.

17. Admittedly, the goods which were imported by the petitioner were meant to be used for manufacture and the petitioners availed the benefit of the exemption notification. This condition having been violated and the goods having been cleared to the domestic area and the petitioner having accepted their mistake, the additional duty of excise is leviable in terms of sub-section (5) of Section 3 of the Customs Tariff Act. The exemption which is sought to be granted by the Budget Notification pertains to the duty leviable under sub-section (1) of Section 3 of the Customs Tariff Act and there is no reference to the additional duty of excise leviable in terms of sub-section (5), the object of which has not only been elucidated in the statutory provision, and explained by the Hon'ble Supreme Court in the case of *Attensee* (supra).

18. Thus, apart from the fact that the petitioner has already accepted before the Settlement Commission regarding the leviability of the additional duty of excise at 8% was definitely not entitled to go back on such submission and in the light of the above discussions, even on merits, the petitioner has not made out any case for interfering with the order passed by the Settlement Commission.

19. In the result, the Writ Petitions fail and they are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.