(1987) 01 MAD CK 0016

In the Madras High Court

M.R.F. Limited APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 01-01-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11C
Customs Tariff Act, 1975 — Section 3(1)

Citation : (1987) 32 ELT 465

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Judgement

1. In this batch of writ petitions, the question raised relates to the liability to pay on the `natural rubber'' imported for the petitioners, additional duty

u/s 3 of the Customs Tariff Act, 51 of 1975, hereinafter referred to as the Act. Itemwise `natural rubber'' bears different names and in the present

batch of writ petitions, we are concerned with the natural rubber bearing the name `smoked sheets''. In some cases, the petitioners have paid the

additional duty through the State Trading Corporation, which was the agency for the import of this product, since the said product was a canalised

one. The State Trading Corporation, when it collected the price from the petitioners, the additional duty was part and parcel of the price paid by

the petitioners. In those cases, the petitioners have asked for refund. The petitioners also apprehending levy and collection of additional duty have

asked for writs of mandamus to forbear the respondents from so levying and collecting the additional duty in respect of imports for which such

payments were not yet made. In some of writ petitions, the petitioners have prayed for the issue of declaration that the levy of duty on `natural

rubber'' is illegal.

2. In support of the prayers in the writ petitions, Mr. Habibulla Badsha, learned counsel appearing for the petitioners in majority of the writ

petitions, followed by Mr. Uttama Reddi, learned counsel appearing for the petitioners in some of the writ petitions, would advance the following

points, which I shall deal with in seriatim.

3. Firstly, it is contended that as per Section 3(1) of the Act, there could be levy of additional duty equal to the excise duty for the time being

leviable on a like article and if no excise duty is leviable for the time being, there is no question of levy of additional duty. Learned counsel for the

petitioners would submit that the expressions `for the time being leviable'' occurring in that provision, must be construed in the light of the

explanation thereto, and if so done, there ought to be levy of excise duty in force and then only the liability to pay the additional duty would arise.

Learned counsel would submit that `natural rubber'' is not a product by any manufacturing process, so as to attract levy of excise duty, and when

levy of excise duty cannot be imposed and inforced in respect of such a product, there could not be levy of additional duty, to appreciate this

submission, it is necessary to extract Section 3. sub - section (1) and the explanation thereto as follows :-

Section 3. Levy of additional duty equal to excise duty : -

(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section, referred to as the additional duty) equal to

the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at

any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of

the imported article.''

Explanation. - In this 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.

Coming to excise duty, it is the admitted case that the first Schedule to the

Central Excises and Salt Act, 1944 does not contain any specific item

under which there could be levy of excise duty on natural rubber. The revenue wants to have recourse to the residuary Item 68. Even with

reference to recourse to the residuary Item 68, what is contended by the learned counsel for the petitioners before me is that the natural rubber

imported cannot be characterised as an excisable goods, which is being produced or manufactured. The fundamental postulate for levy of excise

duty is that there should be manufacture of the goods in question. In the affidavit filed in support of the writ petitions, the uniform stand taken is that

`natural rubber'' does not involve any element of manufacture and hence it cannot attract the levy of excise duty. In the counter affidavits, filed by

the respondents, there is no rebuttal of these specific averments made by the petitioners in their affidavits filed in support of the writ petitions.

Hence, it will be proper for this Court to accept the unrebutted case of the petitioners that obtaining natural rubber does not involve any element of

manufacture to attract the levy of excise duty. I find that the New Encyclopaedia Britannica defines `rubber natural'' in the following terms : -

Rubber natural : Rubber is produced from a wide variety of plants, especially Hevea brasilienis (family Euphorbiaceae) a tall softwood tree native

to Brazil, but also from species of Mabes, Manihot, Sapium, Ficus, and others. The milky liquid (latex) found in the inner bark and obtained by

tapping (cutting) the bark is coagulated.........the oldest and simplest technique is by smoking over a fire. For plantation rubber, the trees for which

are widely cultivated in Southest Asia, tapping is similar to the method used for wild trees, but coagulation is accomplished chemically. Note **

Coagulate to cause (a liquid) to become a soft semi - solid mass ; urdle; clot.

It is not possible to spell out from the above definition that any process of manufacture is involved in obtaining `natural rubber''. In this connection,

Mr. Habibulla Badsha, learned counsel for the petitioners, submitted that the Department, had no ambiguity in their mind that `natural rubber'' is

raw in character and he drew my attention to the exemption granted u/s 25(2) of the Customs act, 1962 on 28-3-1979, where there is a specific

reference to the acute shortage of raw rubber and the decision to exempt raw rubber from the whole of the basic and auxiliary duties of customs

leviable thereon. Mr. Habibulla Badsha, learned counsel for the petitioner, would also refer to the Tariff Advice dated 23-6-1981, issued by the

Central Board of Excise and Customs that the items of natural rubber enumerated therein, including `smoked rubber sheets'' would be outside the

purview of the Central Excise levy. These proceedings also to a very great extent support the case of the petitioners that `natural rubber'' cannot be

stated to be a product which is obtained as a result of any process of manufacture.

4. Secondly, learned counsel for the petitioners would submit that there were notifications issued under sub - rule (1) of Rule 8 of the Central

Excise Rules, 1944, exempting all goods falling under Item 68 of the First Schedule to the Central Excises and Salt Act, 1944, and manufactured

in any premises other than in a factory, from the whole of the duty of excise leviable thereon; and assuming that `natural rubber'' could be brought

within the purview of the residuary Item 68; yet, in view of the exemption notifications, there was and there could be no levy of excise duty thereon

and when there was no levy of excise duty, then there could not be levy of additional duty under the Act. In answer, Mr. P. Narasimhan, Senior

Standing Counsel for the Central Government, appearing for the Union of India, and the Revenue, would submit that the exemptions regarding

excise duty could not be of any avail to the petitioners, with regard to liability for additional duty, because exemptions did not obliterate the factum

of the goods being amenable and liable or excise duty and exemptions only suspended such levy and the proper test to be applied is whether the

goods are apparently leviable with duty under the Excise law; and not whether they stand exempted for the time being under the cover of

notification. This submission cannot be accepted if I take note of certain principles discussed by the Supreme Court in Khandelwal Metal and

Engineering Works and Another Vs. Union of India (UOI) and Others, . The Supreme Court observed that Section 3(1) of the Act provides a

measure of the additional duty which has to be `equal to the excise duty'' leviable on a like article if produced or manufactured in India, as defined

in the Explanation to that section, and the explanation furnishes a dictionary for the interpretation of Section 3(1) and provides a clue to its

understanding. The Supreme Court further observed that the explanation provides in so many words that the expression `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''. Hence, there must be an excise duty for the time being in force and which is leviable on the

goods ; then only there could be the levy of additional duty u/s 3(1) of the Act. If no excise duty is in force and could be levied on the goods, then

there is no question of the levy of additional duty u/s 3(1) of the Act. When there is no excise duty in force and leviable on the goods, by virtue of

the exemption notifications, it is not possible to bring in a fiction that the goods is amenable and liable for levy of excise duty and the exemption

notification have only suspended such levy and on that basis there could be levy of additional duty u/s 3(1) of the Act. When the very measure for

the additional duty is not available, it would be doing violence to the express language and implications of Section 3(1) and the explanation thereto,

as construed by the Supreme Court, to work out the additional levy on the fictional basis. Hence, I have to eschew the submission of the learned

Senior Central Government Standing Counsel that even if the levy could not be made under Excise Law on account of the exemption notifications,

yet the levy must be stated to be attracted and by that fiction the additional duty should be levied under the Act.

5. Thirdly, learned counsel for the petitioners, would contended that the basic customs duty itself was exempted u/s 25(2) of the Customs Act,

1962 and in such a case, there is no question of levy and collection of additional duty u/s 3(1) of the Act. The notification u/s 25(2) of the Customs

Act, 1962, relied on by the learned counsel for the petitioners for the relevant period, did not cover in specific terms, the additional duty under the

Act. It is not possible to imply something into the notification u/s 25(2) of the Act, which is not expressed therein, to say that it also covered the

additional duty. Such is also the view of this Court in its earlier pronouncement. In this view, I am not able to accept this line of thinking projected

by the learned counsel for the petitioners.

6. Fourthly, learned counsel for the petitioners would submit that there was a notification u/s 11C of the Central Excises and Salt Act, 1944,

whereunder there is an unambiguous declaration that there was no levy under the Excise Law for the specified items of `natural rubber'' including `smoked rubber sheets'' during the period commencing from 1-3- 1975 to 7-7-1983, and if this is taken note of, it must be held that there was no

levy under the Excise Law for the time being in force so as to attract the additional duty under the Act. This submission could be tackled on to the

second line of submission made by the learned counsel for the petitioners. The notification u/s 11C of the Central Excises and Salt Act, 1944, pre -

supposes a practice prevalent whereby though duty of excise was leviable, was not being levied; and in that contingency the Central Government

by notification has directed the payment of the whole of the duty of excise to be dispensed with. This notification supports the case of the

petitioners that there was in fact no levy and collection of duty of excise for the periods in question. In the light of the above discussion, I have to

sustain the case of the petitioner that no additional duty can be levied and collected from the petitioners in respect of `natural rubber'' imported by

the State Trading Corporation and allotted to the petitioners through the said Corporation. The ultimate burden of paying the additional duty has

either been passed on to the petitioners by the State Trading Corporation or being sought to be passed on to them. In view of that these writ

petitions are allowed in the following terms : -

(1) In respect of cases where there had already been levy and collection of duty in respect of the `natural rubber'' imported by the State Trading

Corporation and allotted to the petitioners, the additional duty shall be refunded to the petitioners by the Union of India, represented by the

Assistant Collector of Customs, Madras.

(2) In cases where the levy and collection of such additional duty is sought to be enforced, the Union of India through the Assistant Collector of

Customs, Madras is restrained from making such levy and collection in respect of the concerned goods.

I make no order as to costs.

7. Coming to W. P. Nos. 1642 and 1643 of 1983, Mr. M. Uttama Reddi, learned counsel for the petitioners, submits that there was, in fact, a

notification u/s 25(2) of the Customs Act, 1962, exempting the levy and collection of the Customs duty and the additional duty in respect of

`natural rubber'' of the quantity of 400 tonnes. There is no dispute about the same. If so, by the very force of the notification u/s 25(2) of the

Customs Act, there could not be levy and collection of additional duty on this quantity. With reference to the residue, the principle discussed above

will govern and these writ petitions are allowed as prayed for. No costs. I am told that some of the petitioners have furnished Bank guarantees to

cover the proposed levy. In view of the fact that the writ petitions have been allowed as above, the Bank guarantees, if they are still alive, shall

stand cancelled.