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**(1994) 03 MAD CK 0124**  
**In the Madras High Court**  
**Case No : Writ Petition No. 9276/84**

Mysore Petro Chemicals Ltd.

APPELLANT

Vs

Assistant Collector of Cus., Madras

RESPONDENT

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**Date of Decision :** 17-03-1994

**Acts Referred:**

Central Excise Rules, 1944 — Rule 192, 8(1)  
Customs Act, 1962 — Section 12

**Citation :** (1994) 73 ELT 33

**Hon'ble Judges :** Raju, J

**Bench :** Single Bench

**Advocate :** Shri C. Natarajan, for the Appellant; Shri S.R. Sundaram, Additional Standing Counsel, for the Respondent

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## Judgement

1. This writ petition coming on for hearing on Tuesday the 15th day of March 1994 and on this day upon perusing the petition and the affidavit filed in support thereof the order of the High Court, dated 18-9-1984 and made herein and the records relating to the order in the aforesaid prayer to the writ made by the High Court and upon hearing the arguments of Mr. C. Natarajan, Advocate for the petitioner and of Mr. S. R. Sundaram, Additional Standing Counsel on behalf of the respondents the court made the following order :-

The above writ petition has been filed under Article 226 of the constitution of India for a writ of mandamus to forbear the respondents from levying and collecting additional duty u/s 3(1) of the Customs Tariff Act, 1975, Central Act 51 of 1975 on all imports of orthoxylene by the petitioner through the port of Madras.

2. The petitioner, in the affidavit filed in support of the writ petition claims to be a company incorporated under the Companies Act, 1956. It is claimed that they have a factory at Station Road, Raichur, Karnataka State and they manufacture Phthalic Anhydride (hereinafter referred as "finished product"). For the purpose of manufacturing the above referred to finished products the petitioner require

orthoxylyene (hereinafter referred to as the "imported goods"). The imported goods which is sought to be subjected to countervailing duty, is stated to be totally exempt from excise duty in the country by virtue of a notification issued under Rule 8(1) of the Central Excise Rules, 1944 read with Section 3(3) of the Oil (Additional Duties of Excise and Customs) Act, 1958 in Notification No. 276 of 67, dated 21-12-1967. There is no serious controversy over the fact that under the said notification exemption has been granted in respect of goods falling under Tariff Item Nos. 6 to 11A of the First Schedule which would include the imported category of goods from the entire excise duty payable thereon subject to the terms and conditions stipulated therein and that it cannot be also disputed that if the goods are produced by the petitioners in India for the manufacturing activity the said goods would be totally exempt from excise duty. The petitioners claim further that they are entitled to obtain the said goods required by them free of duty for the purpose of manufacturing their finished products. It is also claimed that the imported category of goods are manufacture in India by Indian Petro Chemical Corporation Limited, Baroda and the finished products of the type manufactured by the petitioners are manufactured by five concerns, namely, (i) the petitioners, (ii) Hardillis Chemicals Limited, (iii) S.G. Chemicals and Pharmaceuticals, (iv) Ambuja Petro Chemicals Limited and (v) Thirumalai Chemicals Limited. It is also stated that the finished products of the petitioners and the above concerns are all of very important nature and was required for the purpose of paints, plasticizers, dyes, pigments etc. On the above fact situation it is claimed that on the manufacture and clearance of the imported category of goods, in this country which as stated supra, are manufactured in India only by the Indian Petro Chemical Corporation Limited, Baroda. Total exemption from excise duty will be available in so far as the above referred to five manufacturers of the finished products including the petitioner herein. It is also claimed that since the imported category of goods were in short supply in India, the import of the same from foreign countries have been permitted under open General Licence Policy.

3. Admittedly on every goods imported into this country generally speaking three types of duties become payable namely, (1) Customs duty u/s 12 of the Customs Act, 1962, (2) Auxiliary duty and (3) Additional duty or countervailing duty, as has been always called and imposed u/s 3 of the Tariff Act, 1975. The grievance of the petitioner which necessitated the filing of the writ petition was said to be the import of the goods which was at that point of time under Shipment through the vessel SS STOLT TEMPLAR under Bill of Lading No. 1 dated 5-8-1984 being shipped from Brazil, under invoice, No. CD 17988 of Thadak Gestion S.A. According to the petitioner, in view of the limited storage capacity at Bombay, the petitioner directed the unloading of cargo for discharge at Madras in the terminal of Thirumalai Chemicals Limited and expecting the said ship to be berthed in the port of Madras by 5-9-1984 or immediately thereafter. The petitioner filed a letter dated 1-9-1984 disclosing the details of import and also requesting the respondents to forbear from levying the countervailing duty on the import of the

said goods. The interim orders obtained in similar matters from various courts prohibiting such collection was said to have been brought to the notice of the authorities. It is claimed that the petitioners were informed that unless specific orders of this court was also obtained, the question of clearing the goods without pre-payment of countervailing duty cannot be complied with. Hence the above writ petition.

4. Along with the writ petition the petitioner filed WMP. No. 14914 of 1984 praying for injunction forbearing the respondents from collecting the additional duty u/s 3(1) of the Customs Tariff Act, 1975 and though initially interim injunction was granted on 18-9-1984 by a subsequent order dated 18-3-1987 this court made absolute the interim orders subject to the condition of the petitioners furnishing a bank guarantee in respect of the additional duty as and when the consignments are cleared and keep the said bank guarantees alive periodically by renewing the same till the disposal of the writ petition. The learned counsel of the petitioner represents that this procedures has been meticulously adopted all along during the pendency of the writ petition.

5. Though the petitions have raised several grounds of challenge, Mr. C. Natarajan, learned counsel appearing for the petitioners, at the time of argument confined his challenge to the main and only submission that the petitioners cannot be saddled with liability in respect of additional duty u/s 3 of the Customs Tariff Act, 1975 in respect of the category of goods in question imported from outside the country in view of the exemption notification comprised in No. 276 of 67 dated 21-12-1967 to which a reference has been made earlier. While elaborating the said plea, the learned counsel submitted that the import and utilisation of the imported goods in the manufacturing process of the petitioners for manufacturing their finished products referred to supra would entitle the petitioners to the benefit of the exemption notification dated 21-12-1967 as amended from time to time had the petitioners purchased the goods locally in view of the grant of exemption from excise duty under the notification dated 21-12-1967. The learned counsel relied upon a series of judgments of different courts in support of such a claim and a reference to the same would be made at the appropriate stage.

6. Per contra, the learned counsel appearing for the respondents contended drawing inference from the decision of a Division Bench of the Karnataka High Court reported in Mysore Petrochemicals Ltd. Vs. Union of India, and also relying upon some other decisions in support of the claim that the exemption granted under the notification dated 21-12-1967 pertaining to the excise duty cannot ensure to the benefit of the petitioners herein in respect of the additional duty under the Customs Tariff Act, 1975.

7. I have carefully considered the submissions of the learned counsel appearing on either side. The claim of the learned counsel for the petitioners is based on the very scope and purport of Section 3 of the customs Tariff Act, 1975 as interpreted by the various decisions relied upon by the learned counsel for the

petitioners in support thereof. In *Saigal Industries Vs. Central Board of Excise and Customs and Another*, Justice V. Ramaswami as the learned Judge then was, had an occasion to deal with the liability of an importer to pay the countervailing duty under the Indian Tariff Act, 1934. While construing Section 2A of the Customs Tariff Act, 1934, the learned Judge held that in order to attract the liability for payment of countervailing duty, an excise duty shall be leviable on a like article if produced or manufactured in India, no countervailing duty would be payable. In *Century Enka Limited and others Vs. Union of India and Two others*, , a Division Bench of the Bombay High Court had an occasion to deal with the question of levying countervailing duty u/s 3(1) of the Customs Tariff Act, 1975 in respect of a commodity imported from outside the country which commodity stood exempt from payment of excise duty if manufactured and sold inside the country. While holding that the additional duty contemplated for levy u/s 3 of the Customs Tariff Act, 1975 is not, in any manner, different from the countervailing duty the Division Bench expressed the view that the countervailing duty cannot be levied on an article imported into India if such an article manufactured in India is exempt from payment of excise duty. The Division Bench also expressed the view that the provisions of Section 3 to that extent have to be read in conjunction with the provisions of the Central Excise Act and the Rules made there under. In *M.R.F. Limited Vs. Union of India and Others*, ] Nainar Sundaram, J., as the learned Judge then was, had an occasion to consider a similar issue. The learned Judge also expressed the view, placing reliance upon the ratio of the division reported in *Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others*, of the Supreme Court that if no excise duty is in force and could be levied on the category of goods imported, if produced or manufactured in India then there is no question of levy of additional duty u/s 3(1) of the Act. A learned Single Judge of the Bombay High Court (Shri S. P. Bharucha, J. as the learned Judge then was) in a decision reported in *Hordillia Chemicals Ltd. v. Union of India* 1987 31 E.L.T. 651 (Bom) also took the same view placing reliance upon the earlier Division Bench judgment as also his own earlier view and held that on a plain reading of Section 3 of the Customs Tariff Act, 1975, it would be made clear that the Additional duty u/s 3 cannot be levied on an article imported into India, if such article manufactured in India is exempt from the payment of Excise duty. A learned Single Judge of this Court (Govindasamy, J) in an unreported decision dated 20-9-1991 in W.P. Nos. 9933 and 4798 of 1983 followed the earlier decisions referred to supra and allowed a similar claim in respect of another industry by name *Thirumalai Chemicals Limited*, Ranipet.

8. In addition to placing reliance upon the above decision, the learned counsel for the petitioner placed strong reliance on the decision of the Supreme Court, reported in *Thermax Private Limited Vs. The Collector of Customs (Bombay)*, New Customs House, and also contended that the view expressed to the contra by the Karnataka High Court in the decision reported in *Mysore Petrochemicals Ltd. Vs. Union of India*, can no longer be said to be laying down the correct

position of law. In the decision of the Supreme Court, while analysing the character and the purport of levy u/s 3(1) of the Customs Tariff Act, 1975, in respect of an identical nature of claims though in the context of an importer who has sold the goods to a manufacturer unlike the present case in which the importer himself happened to be the manufacturer, the court took note of the exemption notification and held that there is nothing in the scheme of the Act or the Rules under which the exemption is granted, which makes it inapplicable to the importer of the goods and held as hereunder :-

"It will at once be seen that there is nothing in the scheme of the rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, a use which qualifies for the concession under the S. 8 notifications. The types of use specified in the concession notified could be of any kind and even in the notification under our consideration, they are many and varied, in respect of items falling under S. Nos. 3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question is an "Industrial Process" in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at nil rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfills the requirements of Rule 192. Since the concession under Rule 192 turns only on the nature and use to which the goods are put by the user or purchaser thereof and on whether he has gone through the procedure outlined in chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person using the goods is entitled to the remission, the importer will be entitled to say that the C.V.D. should only be the amount of concessional duty and, if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assessee could not get refund because the procedure of Chapter X of the rules is inapplicable to importers as such".

9. The decisions relied upon by the respondents may be now adverted to for consideration. Strong reliance was placed as noticed earlier on the decision of the

Division Bench of Karnataka High Court reported in Mysore Petrochemicals Ltd. Vs. Union of India, . No doubt the said decision was rendered on a writ petition filed before the Karnataka High Court by the very petitioner in the present case. The learned Judges of the Division Bench of the Karnataka High Court have chosen to by-pass some of the decisions relied upon for the petitioner before me by choosing to place reliance upon the decision in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, and conclude ultimately that the exemption given to a manufacturer of a product from excise duty under the Central Excise Rules read with Central Excise Act should be considered to be exemption available for the beneficiaries of the exemption notification and cannot be extended further to others who are not covered by the notification and to levy imposed under a different enactment and consequently, the petitioner could not absolve of his liability under the Act. It may be noticed even at this stage that the passages quoted and relied upon in paragraph 11 of the decision of Division Bench of the Karnataka High Court has relevance only in understanding the nature of the additional duty and the Apex Court was really not concerned in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, with an issue or a problem of the nature which directly arose before the learned Judges of the Division Bench of the Karnataka High Court or in this case before me. The decision reported in B.S. Kamath and Co. and Ors Vs. Union of India and Others, of a Division Bench of the Karnataka High Court relied upon by the respondents can be of no assistance to the stand taken for the petitioners in this case. Even a cursory perusal of the reported judgment would go to show that the petitioners in the said case sought to press into service the exemption granted in respect of the excise duty as enuring to their benefit to avoid the basic customs duty leviable under the provisions of the Customs Act, 1962 and not a claim relating to the levy of countervailing duty or additional duty as it is claim relating to the levy of countervailing duty or additional duty as it is called leviable u/s 3(1) of the Customs Tariff Act, 1975. The further decision relied upon for the respondents reported in Union of India (UOI) and Others Vs. Modi Rubber Ltd., , in my view is also wholly inappropriate. In the said decision the Apex court was concerned with the interpretation of the expression "duty of excise" in an exemption notification and their Lordships of the Supreme Court have held that the notification issued under the provisions of the section of the Central Excises and Salt Act, 1944 and Central Excise Rules, 1944, covered only excise duty levied under the Act and the expression "duty of excise" does not cover special duty of excise levied under various Finance Bills and Acts or additional duty of excise levied under Additional Duties of Excise (goods of Special Importance) Act, 1957. The said decision provides no Assistance in adjudicating upon the issue raised in the present case.

10. As noticed earlier, three learned Judges of this Court sitting singly and the learned single judge as well as the Division Bench of the Bombay High Court have taken identical views categorically holding that if no excise duty is in force and could be levied if an article is produced or manufactured in India, there is no

scope for levying additional duty or countervailing duty u/s 3(1) of the Customs Tariff Act, 1975 when identical article is imported and therefore the additional duty u/s 3 cannot be levied on such an article imported in to India, if such article manufactured in India is exempt from payment of excise duty. In my view, the same is the ratio of the decision of the Apex Court in the decision reported in *Thermax Private Limited Vs. The Collector of Customs (Bombay), New Customs House*, . On a careful reading of the various decisions placed before me for my consideration, I am in entire agreement with view taken by the learned single judges of this Court earlier and the view of the Bombay High Court which is in conformity with the ratio of the decision of the Supreme Court reported in *Thermax Private Limited Vs. The Collector of Customs (Bombay), New Customs House*, . Consequently I am unable to persuade myself to subscribe to the view taken by the Division Bench of the Karnataka High Court in the decision reported in *Mysore Petrochemicals Ltd. Vs. Union of India*, which as noticed earlier, and, in my view, run directly contrary to the subsequent pronouncement of the Supreme Court in *Thermax Private Limited Vs. The Collector of Customs (Bombay), New Customs House*, . For the reasons stated above, the petitioner is entitled to succeed and their imports of the product Orthoxylene cannot be subjected to levy of Additional duty u/s 3(1) of the Customs Tariff Act, 1975 so long as the identical or same product stood exempt from excise duty under any exemption notification issued under the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder, when locally manufactured and sold. The learned counsel for the petitioner represents that the goods have been permitted to be cleared provisionally from time to time by furnishing bank guarantees and that the liability of the petitioner has to be finally assessed. In the light of the view taken by me and the relief granted. I direct the respondent to finally assess the liability of the petitioner in respect of the imports effected through the Port at Madras in accordance with the declaration of law in this order within three months from this date and the validity of the bank guarantees furnished under the orders of this court would enure till such time permitted by this Court as above. No costs.