
(1993) 07 BOM CK 0049
In the Bombay High Court
Case No : Writ Petition No. 405 of 1984

National Rayon Corporation Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-07-1993

Acts Referred:

Customs Act, 1962 — Section 129D

Citation : (1993) 49 ECR 34 : (1993) 68 ELT 282

Hon'ble Judges : M.L. Pendse, J;A.P. Shah, J

Bench : Division Bench

Advocate : Shri D.D. Madon, instructed by M/s Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; Shri Manoj Sanklecha, for the Respondent

Judgement

Pendse, J.—The petitioners imported Caprolactum between September 1979 and February 1980. The bills of entry were lodged between January 17, 1980 and March 27 1980. The Central Government had issued notification dated March 16, 1976 in exercise of powers conferred by sub-rule (1) of Rule 8 of Central Excise Rules exempting Caprolactum falling under Sub-item 2 of Item No, 14AA of the First Schedule to the Central Excises and Salt Act, 1944 from so much of the duty of excise leviable thereon in excess of 25% ad valorem. Another notification dated December 4, 1979 was issued providing exemption to Caprolactum manufactured from Benzene (derived from raw naphtha) on which the appropriate amount of duty of excise was already paid from so much of the duty of excise leviable on such Caprolactum as was in excess of 23% ad valorem. It is the claim of the petitioners that under mistake, the duty was paid by ignoring exemption notification dated December 4, 1979 at the rate of 25% ad valorem.

2. On March 3, 1980 and July 8, 1980, the petitioners filed revision application of excise duty of 2% paid in respect of imports effected from September 1970 to February 1980. The refund applications were rejected by Assistant Collector of Customs on August 11, 1980. The petitioners thereupon preferred appeals and the appellate authority by order dated December 10, 1980 allowed the appeals

holding that the recovery of duty at the rate of 25% ad valorem was erroneous and the petitioners produce a requisite proof before the Assistant Collector. It is not in dispute that the petitioners produced the requisite proof and the duty of refund demanded by the petitioners was paid on August 11, 1981.

During the pendency of the revision applications filed by the petitioners, on May 29, 1980 the Superintendent, Customs and Central Excise served show-cause notice upon the petitioners in respect of alleged short levy of duty of Rs. 42,67,815.46. The notice claims that the duty was short levied for the period between December 4, 1979 and April 22, 1980. The notice claims that differential duty is recoverable at 25% ad valorem and special countervailing duty at 5% of 25% and the petitioners were called upon to explain why short-levy of duty should not be recovered. Pending the disposal of the show-cause notice, the Collector of Appeals by order dated December 10, 1980 held that the duty payable by the petitioners was only 23% in accordance with exemption notification dated December 4, 1979. In pursuance of the order of the appellate authority, the show-cause notice issued by Superintendent, Customs and Central Excise on May 29, 1980 was withdrawn by Assistant Collector of Central Excise by order dated July 29, 1982.

3. On October 11, 1982, the provisions of Customs Act, 1962 were amended and sub-section (4) of Section 129D was introduced conferring power upon the Collector of Central Excise to call for papers from any subordinate officer and determine whether an appeal is required to be filed. In exercise of powers, the Collector of Central Excise of Central Excise by order dated April 7, 1983, a copy of which is annexed as Exh. 'Q' to the petition, directed the Assistant Collector of Central Excise to make an application to Collector of Customs (Appeals) for examining and setting aside the order dated July 29, 1982 passed by the Assistant Collector withdrawing show-cause notice dated May 29, 1980. The order passed by the Collector of Customs recites that the withdrawal of demand was without recording proper reasons and findings and based upon order of the Collector of Customs in appeals in a similar case regulating countervailing duty on Caprolactum. The Collector of Customs observed that notification dated December 4, 1979 is not attracted because imported Caprolactum could not have been manufactured from Benzene on which duty of excise was paid. The order passed by Collector of Central Excise in exercise of powers under sub-section (4) of Section 129D of Customs Act is under challenge in this petition filed under Article 226 of the Constitution.

4. Shri Madon, learned counsel appearing on behalf of the petitioners submitted that exercise of powers by collector of Customs is irregular and uncalled for. The learned counsel urged that he demand notice dated May 29, 1980 was issued by the Superintendent, Customs and Central Excise even while the refund applications filed by the petitioners were pending before the Assistant Collector. After the rejection of the refund applications, the Collector of Customs (Appeals) allowed the appeals on December 10, 1980 and in pursuance of that order,

refund was actually paid on August 11, 1981. The learned counsel urged that the order of the appellate authority directing refund had become final not having been appealed against and refund being paid in pursuance of the order. Shri Madon submits and in our judgment very rightly that the order withdrawing demand show cause notice was passed on July 29, 1982 in view of the finality to the order passed by the Collector of Customs (Appeals) in respect of payment of refund. It was contended that once the refund applications were allowed on the ground that the liability of the petitioners was to pay duty at the rate of 23% ad valorem then the question of short levy of duty can never arise and the action of the Collector of Customs in directing the Assistant Collector to file an appeal against the order of withdrawal of demand notice is entirely redundant. The submission is correct and deserves acceptance.

Shri Sanklecha, learned counsel appearing on behalf of the department, could not dispute that the order dated December 10, 1980 passed by Collector of Customs (Appeals) had acquired finality and it is not now open for the department to claim that in spite of that order, there was short levied duty in respect of import made by the petitioners. In view of this undisputed position, no purpose would be served by Collector of Customs directing the Assistant Collector to file an appeal for setting aside the order of withdrawal of demand notice dated May 29, 1980. For this reason, the order of the Collector of Central Excise is required to be set aside. We wish to make it clear that we are not expressing any opinion on the merits of the reasons furnished by the Collector of Central Excise for reopening the order withdrawing demand notice.

5. Accordingly, petition succeeds and impugned order dated April 7, 1983 is set aside. The appeal preferred by the Assistant Collector in pursuance of the order which is now set aside will also automatically fail. In the circumstances of the case, there will be no order as to costs.