

(2004) 10 CAL CK 0002
In the Calcutta High Court
Case No : Writ Petition No. 1475 of 2003

Nikhil Kumar

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 15-10-2004

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Customs Tariff Act, 1975 — Section 3(1), 3(A), 3A(5)

Citation : (2005) 127 ECR 164 : (2005) 187 ELT 6

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mehta, for the Appellant; Malay Singh, for the Respondent

Final Decision : Dismissed

Judgement

Kalyan Jyoti Sengupta, J.—The Court : By this application the writ petitioner has asked for refund of a sum of Rs. 2,05,178/- being the amount of special additional duty under the provision of decision 3A(5) of the Customs Tariff Act, 1975.

2. The short fact of the case is as follows :

The petitioners in between April 2003 and May 2003 imported four consignments of PU leather from Republic of China (formerly Taiwan). Under the provision of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (hereinafter referred to as the said Act) the said goods are chargeable to additional duty. However, rate of duty levied is nil as such the said additional duty is not realizable, as unconditional exemption has been granted in respect of these goods. Ordinarily special additional duty equal to sales tax is charged on import of certain goods u/s 3(A) of the Customs Tariff Act. However, Sub-section 5 of Section 3A of the said Tariff Act excludes all the goods which is chargeable to duty under the said Act. The said leather goods though no duty is realized, is nonetheless chargeable to duty. Therefore, the said goods should be excluded

under the provisions of Sub-section 5 of Section 3A of the Tariff Act. Consequently duty already paid is liable to be refunded. The respondent on the strength of the aforesaid impugned notice being No. 35/2002-Customs, dated 27th June, 2002, has sought to levy and in fact had levied Special Additional Duty u/s 3A of the Tariff Act at the rate equal to Sales Tax on the said goods, holding the benefit under Sub-section 5 of Section 3A of the said Act is not available to nil rate of duty. After payment as aforesaid the petitioners made representations, contending that the aforesaid Special Additional Duty is not payable, it enjoys exemption. According to the petitioners chargeability has nothing to do with the levy and/or collection. The levy of "nil rate" is also one of the chargeable events.

3. On 16th of July 2003, when the petitioners submitted bill of entries in respect of fresh import of the aforesaid goods, the petitioners refused to pay the same on the plea that the charging and levy of Special Additional Duty is wholly illegal and contrary to the provision of Section 3A of the said Act. However, the Commissioner of Customs has refused to release the goods without the payment being made.

4. At the ad interim stage the petitioner was given liberty by the Court to pay Special Additional Duty to get the goods released and in the event such payment is made it would be absolutely without prejudice. No affidavit in opposition has been filed in this matter though on several occasions direction for filing was given and even extension was granted to file affidavit in opposition.

5. Mr. Mehta learned Advocate appearing for the petitioner contends that the impugned circular has been issued upon absolute misconstruction and misreading of the judgment of the Supreme Court. According to him, going by the provision of Sub-section 5 of Section 3A of the said Tariff Act, the goods imported by the petitioner is not subjected to the Special Additional Duty being actually levied though the additional duty under the said Act is chargeable. According to him there is difference between the words "chargeability," "levy" and "actual collection". It is the legislative function to declare the goods are subject to duty being charged. The function of the executive authority is to levy and collect such duty. The "nil rate" is also levy. In other words, simply because the nil rate is specified in the matter of chargeability it cannot be said the goods are not charged duty. In support of his argument he has relied on the following decisions of the Supreme Court :

Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc., , 2002 (139) E.L.T. 3 (S.C.)

6. Therefore, he submits that the aforesaid Board Circular shall be declared to be invalid and illegal firstly, and secondly the duty paid by his client shall be refunded.

7. Mr. Malay Singh, learned Advocate appearing for the Revenue on the other hand submits that upon proper reading of Sub-section 5 of Section 3A of the said

Act it will appear that the intention of the legislature is to grant exemption in those cases where no duty is levied or collected. According to him if no duty is levied and collected it is really no chargeability. The Board has followed the Supreme Court decision correctly while issuing circular and the respondent authorities have rightly realized and collected Special Additional Duty. In support of his submission he has referred to the decisions of the Supreme Court reported in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, and Commissioner of C. Ex. Vs. Josts Engineering Co. Ltd., . So he submits that the writ petition is liable to be dismissed.

8. From the above it will appear the pivotal issue involved in this case is whether the Circular of the Board questioned here, has been issued contrary to the provision of Sub-section 5 of Section 3A of the said Tariff Act or not. The impugned Circular was issued purporting to rely on the judgment of the Constitutional Bench of the Apex Court rendered in case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, . So it is apposite to examine the exact ratio of this judgment. In my view this judgment was rendered on the fact that fresh re-rollable scrap for which the appropriate amount of excise duty had already been paid, was exempted from excise duty being charged in the event the same were used in any manufacturing process. The same nature of imported scrap was sought to be granted exemption contending that "nil duty" is also the duty inasmuch as by a notification it was declared that the Customs duty for import of such raw materials was not liable to be levied. This contention however, was not accepted by the Hon"ble Apex Court and it was held that the phrase used "appropriate amount of duty" and "has already been paid" were interpreted as actual payment and not a notional payment nor "nil payment". It was held in that context that "no payment" or "nil payment" cannot be within the purview of the aforesaid exemption.

9. In this case the petitioner has been enjoying exemption from payment of duty under Sub-section 1 of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, though the same is chargeable. According to Mr. Mehta the learned Counsel for the petitioner, when under the law these goods are chargeable to additional duty under 1957 Act irrespective of fact of levy or collection his client is entitled to get exemption under Sub-section 5 of Section 3A of the Tariff Act.

10. The judgment rendered in case of Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc., the Supreme Court has held amongst others that "nil rate of duty" is also "rate of duty". It is no doubt that the "nil rate of duty" is also leviable. It is equally correct as rightly submitted by Mr. Singh that there is difference inter se the events of levy, assessment, collection and chargeability, as observed by the Hon"ble Supreme Court in case of Assistant Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd. reported in 1978 (2) E.L.T. (J 416). In order to grant exemption in this case under Sub-section 5 of Section 3A of the Tariff

Act, I think the levy of Additional Duty under Sub-section 1 of Section 3 of Additional Duties of Excise is sine qua non. Admittedly, the aforesaid goods is chargeable to additional duties and such duty may be levied and realized at various rates. In this case levy must be a levy in realistic sense, not in notional sense, in other words collectable duty. The whole intention of inserting the Sub-section 5 is to relieve an importer from the hardships in making payment twice over again. Sub-section 5 of Section 3A of the Tariff Act is an independent and in addition to what is otherwise payable. I am unable to accept the argument of Mr. Mehta that "nil duty" is to be accepted as being additional duties levied for the purpose of exemption.

11. Therefore the interpretation given by the Board by applying the Dhiren Chemicals case is appropriate and just. If this interpretation is given otherwise while applying the apparent and literal meaning, then the petitioner would unjustly be enriched. Therefore, I do not find any force in the submission of Mr. Mehta. As such this application is dismissed.

12. No order as to costs.