(1990) 12 AP CK 0003

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 8620 and 12176 of 1989

Phipson and Co. Ltd. and Another APPELLANT

Vs

The Excise Superintendent and Others RESPONDENT

Date of Decision : 19-12-1990

Acts Referred:

Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 — Rule 10, 10(5), 10(6), 5(1)
Andhra Pradesh Excise Act, 1968 — Section 21
Constitution of India, 1950 — Article 226

Citation : (1991) 1 ALT 378 : (1991) 1 APLJ 251

Hon'ble Judges : Neeladri Rao, J

Bench : Single Bench

Advocate : T. Raghunath Reddy, for the Appellant; The Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Neeladri Rao, J.—The point for consideration in these writ petitions is whether the petitioners are entitled to the refund of the amount which was paid as countervailing duty under Rule 5 (1) (i), A. P. Foreign Liquor and Indian Liquor Rules, 1970 (for short ''Liquor Rules, 1970)'' read with Section 21, A.P. Excise Act, 1968 (for short ''Excise Act'') and import duty.

2. The petitioner in W.P. 8620/89 was given permits Nos. I.P. 2286/87 dated 4-3-1987 and I.P.B-5/3367/87 dated 15-4-1987 for importing gin and Vodka from the distillery of M/s Carew and Company Limited, Asansol, District Burdvan, West Bengal. The said petitioner contends that the above stocks were not supplied to him as no stocks were available in the distillery and they filed letters received from the Excise Officer in charge of the said distillery and also the letter from the management of the distillery and requested R-1 to refund the countervailing duty as well as the import duty he paid. The said petitioner further pleaded that he addressed another letter to R-3 on 8-12-87 stating that the West Bengal Government was not permitting export and therefore, they requested for

change of distillery and by reply dated 3-6-88, they were informed by the proceedings dated 19-4-1988 that their application was rejected as there was no provision tinder the Rules for refund of the excise duty and import fee.

3. The petitioner in W.P. 12176/89 obtained five import permits (import permits Nos. 39 to 43) dated 4-2-88 for importing Beer from M/s Lowenbrau Brewery, Faridabad, Uttar Pradesh. They imported Beer under I.P. 39 within the validitary period. When they could not receive the Beer against the remaining four permits i.e., I. Ps. 40 to 43 as the breweries could not supply the beer inspite of revalidation, they applied for change of brand and change of brewery to that of Mohan Breweries and Distillaries Ltd., Madras, contends the petitioner therein. It is further pleaded for the petitioner therein that even when Mohan Breweries and Distilleries could not supply beer under the above permits, they requested for refund of countervailing duty.

4. The countervailing duty is collected in advance even before the import permit is granted. When once the liquor is not imported, as the distillery or brewery could not supply the same, the licensee who was granted such import permit is entitled to the refund of the countervailing duty and also the import fee if paid. It was so urged for the petitioners.

5. The countervailing duty and the import fee paid shall accrue to the Government on expiry of the validity specified in the import permit if the liquor or beer is not imported as per the import permit within the validity period of the permit, or extended period of permit as per Rule 10(5) of Liquor Rules, 1970 and as such the petitioners are not entitled to the refund as prayed for, urged the learned Government Pleader.

6. As per Entry 51 in list II of the VII schedule to the Constitution of India, State Government is empowered to levy countervailing duties on the alcoholic liquors for human consumption, and Opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b), manufactured or produced elsewhere in India at the same rate or lower rates of excise duty levied on those goods manufactured or produced in the State. The A.P. State Government levied countervailing duty on Excisable article (defined u/s 2 (9), Excise Act) manufactured or produced elsewhere in India and imported into this State at such rate as may be specified in the notification (vide Section 21, Excise Act). Rule 4 of Liquor Rules, 1970 lays down that any holder of a licence for sale of Indian liquor and foreign liquor who is desirous to import the same from outside the State, shall apply to the Collector for granting issue of a import permit. Rule 5 of the above Rule enjoins that the applicant has to pay countervailing duty leviable on the liquor to be imported as per the rates in force and produce a challan in original in token of having credited to the same into the treasury, along with the application for import permit.

7. Admittedly the petitioners in both these petitions paid the countervailing duty

and the petitioner in W.P. 8620/89 also paid import fee before the import permits referred to were granted to them. But the gin, Vodka and beer as per those import permits were not supplied by the Distillery or the brewery and hence they were not imported into our State.

"Countervailing duty in its etymological sense means to counter balance; to avail against with equal force or virtue; to compensate for something or serve as an equivalent of or substitute for; (vide Black''s Law Dictionary, 4th Edition, 421).

The countervailing duties as per Entry 51 of List of the VII schedule to the Constitution of India are meant to equalise the burden on the alcoholic liquors manufactured or produced in the State. It means that it is to counter balance the duties of excise imposed on goods manufactured in the State (vide Mohan Meakin Breweries Ltd. Vs. Excise and Taxation Commr., Chandigarh and Others, . It is further held in the above judgment that countervailing duty is payable if the liquor was actually manufactured and if it left the exporting State. Thus three conditions have to be satisfied for attracting countervailing duty for importing liquor viz., (i) the liquor was manufactured or produced; (ii) it should be for human consumption and (iii) it should leave the exporting State. But in this case the stocks were not supplied to these petitioners and hence they could not import the same, though they got import permits after paying the countervailing duty, and also the import fee in case of gin and Vodka.

8. Rule 5(1) (i), Liquor Rules, 1970 reads as under :

"(1) On receipt of an application in Form FL. 1, the Collector may after such enquiry as he may consider necessary and or. being satisfied that there is no objection to issue import permit applied for issue the permit, subject to the following conditions namely :

(i) That the applicant has paid and produced the challan in original in token of having credited into the Government treasury the countervailing duty leviable on the liquor to be imported, at the rates in force".

Thus it lays down that countervailing duty payable in regard to the liquor to be imported even before grant of permit. Section 21 (2), Excise Act reads as under:-

"(21) (2) The Government may, by notification, levy a countervailing duty on any excisable article manufactured or produced elsewhere in India and imported into the State (...) at such rate as may be specified in the notification, which may not exceed the rates of excise duty on similar excisable articles levied under Sub-section (1)."

Hence the countervailing duty is leviable on excise article manufactured or produced elsewhere in India and imported into the State.

9. So the duty is payable only if the excisable article manufactured or produced elsewhere in India, is imported into the State.

10. The underscored portion suggests that the levy is only on import but not on

mere application for grant of permit for importing excisable article manufactured or produced elsewhere in India into the State. Section 21 (2), Excise Act imposes levy on import. Rule 5 (1), Liquor Rules, 1970 enjoins that the said duty is payable even before the import permit is granted. In R.C. Jall Vs. Union of India (UOI), it is held that the excise duty is primarily duly on manufacturing or production; but stage of collection is different.

11. It is observed in R.C. Jail v. Union of India (2 supra) that subject always to the legislative compliance of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the import, i.e.. it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. In that case the Rule provides for the recovery of excise duly on the coal produced, by the Railway administration from the consignor along with the freight if it is prepaid and from the consignee if the freight is payable by the consignee. It was held that the duty is levied on production of the coal and for the sake of convenience, the Rules laid down that it may be collected from the consignor or consignee as the case may be and it still continues to be an excise duty payable on production of the coal. It was observed that as the producer passes off the excise duty to the purchaser, the collection of the excise duty from the purchaser cannot be held as otherwise than the collection of excise duty.

12. The A.P. State Government had the power to levy countervailing duty in regard to the liquor to be imported into the A.P. State. There cannot be any levy of countervailing duty, if there is no import. Thus the levy is on import. Of course the entries in the lists in III schedule of the Constitution of India have to be widely interpreted to include matters which are ancillary or incidental or subsidiary to the matters referred to in the entries. But when the power is to impose levy of excise duty or countervailing duty on manufacture or production, or import or export as the case may be, it cannot be held that it had the power to impose the excise duty, countervailing duty on the mere application to manufacture/produce or import/export or on mere grant of licence for manufacture/production or import/export.

13. In M.M. Breweries v. E. & T. Commissioner (1 supra), the scope of Rule 9 of Punjab Bonded Warehouse Rules, 1957 was considered. That Rule provides that if the wastage exceeds the prescribed limits, the licensee shall be liable to pay duty at the prescribed rate as if the wastage in excess of the prescribed limit had actually been removed from the warehouse. It was contended that as the liquor was not in existence at all, the Rule providing for collection of countervailing duty in such a case is invalid. But it was held that it was only regulatory in nature and it was meant to guard against perpetration of fraud or deception on the revenue.

14. Rule 10(5), Liquor Rules, 1970 relied upon for the respondent was incorporated as per G.O.Ms. 284, Revenue (E) Department, dated 11-4-88 published in A.P. Gazette dated 13-4-1988. But the countervailing duty and the

import fee in this case were paid and the relevant import permits were also granted even before the said rule was inserted. There is nothing to indicate that it is retrospective. So it should be held as prospective. So far disposal of these Writ Petitions, there is no need to consider about the validity of the said Rule. Hence in this order, I am not adverting to the contentions raised for challenging the validity of the said Rule.

15. Thus by the date of the relevant permits in favour of the petitioner, there was no provision for forfeiting the amounts paid by way of countervailing duty and import fee paid for obtaining import permits, when they were not imported. Of course there was also no provision for refund of the same if the liquor is not imported. But it is manifest from Section 21, Excise Act that the impost of countervailing duty is only on import but not on mere application to import or on grant of permit for import. For the sake of convenience, countervailing duty is collected even before permit is granted. Thus it is a case of collection even before import. But when once the liquor is not imported, there is no question of levy of countervailing duty. It follows that the duty so collected has to be refunded for it was collected only as countervailing duty on import and as it is not imported. Hence I find that the petitioners are entitled to the countervailing duty paid in regard to the import permits referred to under which the gin, Vodka, and Beer were not imported. For the same reason, the petitioners in W.P. Nos. 8620/89 and 12176/89 are entitled to the refund of import fee also.

16. There is no specific provision for refund of the amounts claimed in these writ petitions. Probably for the said reason, the respondents had not ordered refund. Hence it is not just and proper to direct the respondents to pay interest if it is going to be paid within the time to be specified.

17. In the result the respondents are directed to refund the countervailing duty and import fee in regard to the import permits referred to, to the petitioner in W P. 8620/89 by the end of February, 1991 failing which it carries interest at 9% from 1-3-1991.

18. In the result, the respondents are directed to refund the countervailing duty and import fee in regard to import permits mentioned in W.P. 12176/89 to the petitioner therein by the end of February, 1991 failing which, it carries interest at 9% from 1-3-91.

19. The writ petitions are accordingly allowed. No costs. Advocate''s Rs. 350/- in each.