
(2015) 03 SC CK 0146

In the Supreme Court Of India

Case No : Civil Appeal Nos. 9440 of 2003 and 1623 of 2009

SRF Ltd. and Others

APPELLANT

Vs

Commissioner of Customs and Others

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

CENVAT (Credit) Rules, 2002 — Rule 11, Rule 3
Customs Act, 1962 — Section 12

Citation : (2015) 318 ELT 607 : (2015) 50 GST 445 : (2016) 36 GSTR 270

Hon'ble Judges : A.K. Sikri, J; Rohinton Fali Nariman, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In both these appeals, identical question of law has come up for consideration. For sake of convenience, we will take note of the facts appearing in Civil Appeal No. 9440 of 2003.

2. The Appellant herein had imported Nylon Filament Yarn of 210 deniers falling under Chapter 54 of the Customs Tariff. The Appellant claimed nil rate of additional duty of customs by relying on exemption in terms of Serial No. 122 of Notification No. 6/2002-CE dated 01.03.2002. The Deputy Commissioner of Customs passed orders dated 12.04.2002 holding that the Appellant was not entitled for exemption from payment of additional duty/Countervailing Duty (CVD) since it was not fulfilling condition No. 20 of the aforesaid Notification. The Commissioner (Appeals) confirmed the aforesaid order of the Deputy Commissioner and dismissed the appeal of the Appellant vide orders dated 12.09.2002. In further appeal to the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT"), even the CEGAT has affirmed the order of the authorities below and dismissed the appeal.

3. Entry/Serial No. 122 in the Notification No. 6/2002 reads as under-

S. No.

Chapter or heading No. or sub-heading No.

Description of goods

Rate under the First Schedule

Rate under the Second Schedule

Condition No.

122

5402.10

Nylon filament yarn or polypropylene multifilament yarn of 210 deniers with tolerance of 6 or per cent.

Nil

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20

5402.41

5402.49

5402.51

5402.59

5402.61

5402.69

4. As per the aforesaid entry, the rate of duty is nil. Condition No. 20 of this Notification, which was relied upon by the authorities below in denying the exemption from payment of CVD, is to the following effect:

20. If no credit Under Rule 3 or Rule 11 of the CENVAT Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods.

5. The aforesaid condition is to the effect that the importer should not have availed credit Under Rule 3 or Rule 11 of the CENVAT Credit Rules, 2002, in respect of the capital goods used for the manufacture of these goods.

6. In the present case, admitted position is that no such CENVAT credit is availed by the Appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the Appellant, no such credit is admissible under the CENVAT Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the CENVAT Rules is not admissible to the Appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of " Ashok Traders

Vs. Union of India and another, (1988) 15 ECC 372 : (1987) 32 ELT 262 , wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw nephtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.

7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this Court in *Thermax Private Limited Vs. The Collector of Customs (Bombay)*, New Customs House, AIR 1993 SC 1339 : (1993) 42 ECC 1 : (1992) 42 ECR 422 : (1992) 61 ELT 352 : (1992) 5 JT 281 : (1992) 2 SCALE 212 : (1992) 4 SCC 440 : (1992) 3 SCR 943 which was affirmed by the Constitution Bench in the case of *Hyderabad Industries Ltd. and Another Vs. Union of India and Others*, AIR 1999 SC 1847 : (1999) 108 ELT 321 : (1999) 4 JT 95 : (1999) 3 SCALE 564(2) : (1999) 3 SCALE 564 : (1999) 5 SCC 15 : (1999) SCC 15 Supp : (1999) 3 SCR 471 : (1999) AIRSCW 1449 : (1999) 5 Supreme 528 .

8. In a recent judgment pronounced by this very Bench in the case of "*AIDEK Tourism Services Private Limited v. Commissioner of Customs, New Delhi*" (Civil Appeal No. 2616 of 2001), the principle which was laid down in *Thermax Private Limited* and *Hyderabad Industries Limited* was summarised in the following manner:

15. The ratio of the aforesaid judgment in *Thermax Private Limited* (supra) was relied upon by this Court in *Hyderabad Industries Ltd.* (supra) while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the Assessee herein. In that case, the court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable Under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable Under Section 3(1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where "a like article is not so produced or manufactured". The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words "if produced or manufactured in India" do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of attracting additional duty Under Section 3 on the import of a

manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon.

(Emphasis supplied)

9. We are of the opinion that on the facts of these cases, these appeals are squarely covered by the aforesaid judgments. We accordingly hold that Appellants were entitled to exemption from payment of CVD in terms of Notification No. 6/02. The appeals are allowed and the demand of CVD raised by the Respondents-authorities is set aside.