
(2003) 04 CAL CK 0050
In the Calcutta High Court

Case No : Writ Petition No's. 2404 of 2002 and 258 of 2003

Sukhi India Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-04-2003

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2003) 89 ECC 847 : (2003) 156 ELT 35

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : Sen, for the Appellant; Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.

W.P. No. 2404 of 2002

1. These two applications were heard together as similar points are involved. I, however, propose to deal with W.P. No. 2404 of 2002 first.

2. By this writ application, the writ petitioners have prayed for declaration that no countervailing duty is payable by the petitioner No. 1 on the sale of articles made of plastic granules/agglomerates manufactured at their Export Processing Zone unit at Falta in the Domestic Tariff Area on the basis of Notification No. 48/2001-Central Excise, dated 10th October, 2001 and for direction upon the respondent to refund the sum of Rs. 155.64 lacs which has been collected from the petitioners by way of countervailing duty on the clearance and sale of plastic granules/agglomerates manufactured by the petitioners at their Export Processing Zone at Falta in Domestic Tariff Area.

3. The petitioner No. 1 carries on business of manufacturing reprocessed plastic agglomerates/granules falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985 and sells such finished products, inter alia, in the

Domestic Tariff Area, which is commonly known as DTA Sale in terms of the provisions of paras 9.9 and 9.10 of Chapter 9 of the Export and Import Policy, 1997-2002.

4. The petitioners allege that according to Export and Import Policy, 1997-2002 as well as that of 2002-2007, a manufacturer under the Export Processing Zone Scheme need not physically export his finished product for fulfilment of his export performance. According to such policy, the manufacturer can sell the finished product in the Domestic Tariff Area against payment in Foreign Exchange and such sale would be counted towards fulfilment of his export performance. According to the petitioners, the manufacturer is also permitted to sell a certain percentage of DTA in foreign exchange in Domestic Tariff Area subject to payment of applicable duties.

5. There is no dispute that Government of India has approved the proposal of the petitioner no. 1 for setting up of a new unit in Falta Export Processing Zone for processing plastic scrap for manufacture and export of plastic granules on the terms and conditions contained in the agreement and such unit having been set up, commercial production started therein on and from 14th July, 1999.

6. The petitioners complain that at all material times, the petitioners did not pay any additional duty of customs u/s 3 of the Customs Tariff Act, 1975, which is commonly known as countervailing duty or CVD, in view of the fact that the petitioners were not required under the law to pay such CVD. However, on or about 10th March, 2000 some official of the Directorate of Anti-Evasion Wing of the Central Excise Department visited the office of the petitioner No. 1 and seized books of account and other documents on the ground that the petitioners were removing goods without payment of excise duty in violation of Chapter V of the Central Excise Rules, 1944. Thereafter, summons were issued upon the petitioners and the petitioners duly answered all the queries. Ultimately, in the first week of June, 2000 the petitioners came across a circular bearing No. 38/2000-Cus. dated 10th May, 2000 issued by the Government of India, Ministry of Finance, Department of Revenue on the basis whereof the Central Excise authorities started demanding countervailing duty from the petitioners. Subsequently, the petitioners filed a writ application before this Court being W.P. No. 2845 of 2000, inter alia, for declaration that no countervailing duty is payable by the petitioner No. 1 on the clearance and sale of plastic granules manufactured at its Export Processing Zone Unit at Falta in the Domestic Tariff Area and also for quashing the said circular dated 10th May, 2000.

7. The aforesaid writ application was allowed by P.C. Ghosh, J. thereby quashing the aforesaid circular dated 10th May, 2000.

8. After the aforesaid order dated 16th October, 2001, passed by Ghosh, J. the respondent authorities are now demanding countervailing duty on the clearance and sale of plastic granules/agglomerates manufactured at the Export Processing Zone Unit of the petitioners at Falta in the Domestic Tariff Area on the basis of a

new notification being No. 48/01, dated 10th October, 2001.

9. It appears from the aforesaid notification dated 10th October, 2001 that in exercise of powers conferred by Sub-section (1) of Section 5A of the Central Excise Act, 1944, the Central Government, being satisfied that it was necessary in the public interest so to do, made further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 3/2001-Central Excise, dated 1st March, 2001 by inserting an explanation at the end of serial No. 73 in the entry in column (3). According to such explanation, it was clarified that nothing contained in those exemptions should apply to plastic materials reprocessed in a free trade zone and special economic zone or a hundred per cent export-oriented undertaking and brought to any other place in India.

10. The writ petitioners contend that so far as the countervailing duty u/s 3 of the Customs Tariff Act, 1975 is concerned, no such additional duty of customs is payable by the petitioners in view of the notifications bearing No. 5/98-C.E., 5/99-C.E. and 6/2000-C.E., dated 2nd June, 1998, 28th February, 1999 and 1st March, 2000 respectively. According to the petitioners, under the aforesaid three notifications plastic granules which are materials falling under Chapters 39.01 to 39.14 of the Central Excise Tariff Act, 1985 and reprocessed in India out of scraps and wastes falling under Chapter 39 of the said Tariff Act are exempted from payment of excise duty. The petitioners contend that as no excise duty is payable, the question of payment of countervailing duty u/s 3 of Customs Tariff Act, 1975 could not arise.

11. Mr. Sen, the learned Counsel appearing on behalf of the petitioners has strenuously contended that by virtue of notification dated 10th October, 2001 the respondent authorities cannot impose countervailing duty on clearance and sale of plastic granules manufactured at the Export Processing Zone Unit inasmuch as, in the earlier writ application this Court has specifically held that no countervailing duty is payable by the petitioners for plastic granules/agglomerates manufactured at the Export Processing Zone Unit. Mr. Sen contends that a unit manufacturing plastic granules/agglomerates situated outside Export Processing Zone or in Non-Export-Oriented Unit manufacturing plastic granules/agglomerates are not required to pay any excise duty in view of three notifications bearing No. 5/98, 5/99 and 6/2000 mentioned above and as such, those units are also not required to pay any countervailing duty under Sub-section (1) of Section 3 of Customs Tariff Act, 1975 as Section 3(1) of the Customs Tariff Act, 1975 has no application to those units. Mr. Sen contends that such a unit will be able to sell its products at a price which is lower than that fixed the petitioners and in such an event, buyers will always be eager to buy those manufactured articles of those non-export Unit. Mr. Sen thus prays for the declarations and orders prayed for in this writ application. Mr. Sen in this connection, relied upon the decisions of Delhi High Court in the case of Monami Trading Company Pvt. Ltd. v. Union of India and Ors., of Gujarat High Court in

the case of Harish Scrap Processors Pvt. Ltd. v. Union of India and Ors., wherein it has been held that countervailing duty is not payable in respect of goods manufactured at free processing zone by virtue of the circular dated 10th May, 2000. Mr. Sen has also relied upon the decision of Supreme Court in the case of Hyderabad Industries Ltd. and Another Vs. Union of India and Others, which has been relied upon in those unreported decisions of Gujarat High Court and Delhi High Court.

12. This application has been opposed by the respondents authority by filing affidavit-in-opposition and Mr. Banerjee, the learned Counsel, appearing on behalf of the respondents has contended that the units in the free processing zone are supposed to export their entire production and for the above purpose they enjoy the benefit of duty free import procurement which are not available to other non-export oriented unit. According to Mr. Banerjee under the notification dated 10th October, 2001 it has been clarified that the benefit of exemption is not available to the units in the free processing zone. Mr. Banerjee contends that the earlier decision of Pinaki Chandra Ghosh, J. on the writ application filed by the petitioner and those of the Division Bench of Gujarat High Court and Delhi High Court are not relevant for the purpose of deciding this application in view of the fact that in those decisions, the circular dated 10th October, 2001 was not considered. Apart from the aforesaid fact, Mr. Banerjee contends that in those three decisions the Supreme Court decision in the case of Hyderabad Industries Limited vs. Union of India (supra) was taken as an authority for the proposition that countervailing duty is not applicable to a case of this nature. Mr. Banerjee contends that the aforesaid decision of Supreme Court had no relevancy in deciding the question involved in those writ applications. At any rate, Mr. Banerjee contends that there is nothing illegal in the impugned notifications explaining the position that benefit of the exemption is not applicable to a unit in the free processing zone. He thus prays for dismissal of the instant writ application.

13. The only question that falls for determination in this writ application is whether by virtue of notification dated 10th October, 2001, the petitioner No. 1 is liable to pay countervailing duty on the sale of plastic granules/agglomerates manufactured at their export processing zone at Falta, in the Domestic Tariff Area.

14. As Mr. Sen has placed strong reliance upon the decision of Supreme Court in the case of Hyderabad Industries Limited (supra) and has contended that in view of principles laid down in the said decision, countervailing duty is not payable by the petitioners and the other three decisions relied upon by Mr. Sen are also based on the aforesaid Supreme Court decision, I propose to examine the said decision at the very outset.

15. The case of Hyderabad Industries Limited (supra) was decided by a Bench consisting of Five Judges on a reference made by another Bench of the Supreme Court. The said reference came up before the aforesaid Bench in the following

way.

16. The appellants before Supreme Court who used asbestos fibre as a raw material, imported the same into India. On the import so made, department sought to raise a demand of additional duty of customs u/s 3(1) of the Customs Tariff Act, 1975. The appellants represented that on a correct interpretation, no duty was payable inasmuch as asbestos fibre which was imported had not been manufactured or produced but was a natural mineral and thus no duty was leviable. The Collector, Central Excise, Hyderabad, however, took the view that asbestos fibre as processed and graded had a distinct character differing from asbestos rock and the said item was covered within Tariff Item 22(F) of the Excise Act and on the same there was a liability to pay the duty of excise. Subsequently, a demand u/s 3(10) of the said Act was raised because the imported item, namely, asbestos fibre was regarded as an article which was liable to duty of excise under the Excise Act. The appellants then filed number of writ applications before the High Court at Delhi. The main contention of the appellants was that the asbestos fibre which was imported had not been manufactured or produced, and u/s 3(1) of the Customs Tariff Act, additional duty of customs could be levied only if the article which is imported is one which is produced and manufactured in India and is liable to payment of excise duty. In other words, the submission was that the asbestos fibre had not undergone any manufacturing or other process and, therefore, no additional duty could be charged.

17. The High Court dismissed the writ application by accepting the contention of the respondent that extracting or removing asbestos fibre from the rock amounted to manufacturing process being undertaken and, therefore, excise duty was leviable and, as a result thereof, additional duty u/s 3(1) of the Tariff Act could be imposed on the import of the asbestos fibre into India.

18. Against those decisions, applications were preferred by special leave which were heard by a Bench of Three Judges. After examining the materials relied upon by High Court the said Bench ultimately held that asbestos that is so removed from parent rock is in every respect asbestos that was embedded in it. According to such Bench, no process of manufacture can be said to have been employed by the appellants nor is a new or a distinct commodity realised therefrom. It further held that what all the appellants imported was asbestos fibre that has been separated from its parent rock in the manner aforementioned.

19. An argument had been raised on behalf of the Union of India to the effect that the asbestos fibre imported by appellants was exigible to additional duty regardless of the fact that it was not produced as a result of manufacture and, consequently, not liable to excise duty. In support of such contention, reliance was placed upon the decision of the Supreme Court in the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, . After discussing the said judgment the Bench was of the view that the decision in the case of Khandelwal Metal & Engineering Works required consideration by a

Larger Bench. Pursuant to such direction, the Bench consisting of Five Judges had been constituted. Thereafter, the main question that came up for consideration before the said Bench of Five Judges was whether the decision of Khandelwal Metal & Engineering Works (supra) to the effect that additional duty of customs is leviable merely on import of article even if it is not manufactured or produced in India was correct or not. Larger Bench of Supreme Court answered the question in negative. While arriving at such conclusion, the Larger Bench held that there was no manner of doubt that additional duty which is levied u/s 3(1) of the Customs Tariff Act is independent of Customs duty which is levied u/s 12 of the Customs Act and that excise duty is leviable if the like article has undergone production or manufacture. According to the said Bench, duty under Excise Act can be levied if the article has come into existence, as a result of production or manufacture. In other words, when articles which are not produced or manufactured, cannot be subjected to levy of excise duty, then on the import of like articles no additional duty can be levied under Customs Tariff Act. The levy of additional duty being with a view to provide for counter balancing excise duty leviable, additional duty can be levied only if on a like article excise duty could be levied. The decision in Khandelwal Engineering Works case to the extent it took a contrary view and was therefore held to be incorrect proposition of law.

20. Secondly, the Larger Bench held that on asbestos fibre imported into India the appellants were not liable to pay any duty u/s 3(1) of Customs Tariff Act.

21. In the case before us the question is whether a unit reprocessing goods in Export Processing Zone is liable to pay countervailing duty u/s 3(1) of the Customs Tariff Act when similar articles reprocessed in non-export processing zone is not required to pay any excise duty. In my view, the Supreme Court decision in the aforesaid case of Hyderabad Industries Limited thus has no bearing for the purpose of deciding the dispute in question and it is rightly contended by Mr. Banerjee that the aforesaid decision of Supreme Court cannot be relied upon for the purpose of deciding the question involved herein where "reprocessing" of plastic materials at the unit is admitted.

22. The three other decisions viz. the decision of Pinaki Chandra Ghosh, J. in the earlier writ application and the division bench decisions in the case of Gujarat High Court and in the case of Delhi High Court referred to earlier had no occasion to consider the explanation added by the impugned notification. In all those cases the courts were considering the earlier notification dated 10th May, 2001. By the circular dated 10th May, 2001 it was pointed out that in order to get exemption, two conditions should be fulfilled, (a) reprocessing of plastic scrap material should be done in India, and (b) plastic scrap or waste should be of the goods falling within Chapters 39, 54, 55, 56, 59, 64, 84, 85, 86, 87, 90, 91, 92, 95 and 96 of the Customs Tariff. By the said circular, it was pointed out that Condition No. (a) had not been satisfied as the reprocessing had not been done in India and the Assistant Commissioners were directed to review the cases and recover the short-levy. In those cases, the petitioners had their units within the

free processing zone or export processing zone and in all those decisions it was held that those free processing zones were within territorial limits of India and the Courts turned down the argument that those free trading zones did not form part of this country. Accordingly, such notification was quashed by the Courts.

23. In the case before us, we are concerned with a subsequent notification by which explanation had been added by clarifying that for clearance and sale of plastic granules/agglomerates reprocessed in export processing zone, no exemption will be granted if those are removed to other part of India.

24. There is no dispute that the petitioner No. 1 having a unit in free trade zone gets some benefits as it appears from the terms of agreement. A unit which is manufacturing similar type of material in non-free trade zone cannot be equated with the unit belonging to the petitioners. Some special privileges are given to the petitioners by virtue of the agreement with the Union of India. If the Union of India decides not to extend the privileges which are granted in favour of units situated in non-free trade zone to those having seats in free trade zone, such action cannot be said to be unreasonable. The petitioners cannot contend that they will get not only the benefits conferred upon them by virtue of being a unit in free trade zone but should also be given some additional benefit which are conferred upon other units established in non-free trade zone. Those units are not getting the special benefit of importation which the petitioners enjoy. The clarification mentioned in the impugned notification, at the same time in no way, violates any of the provisions of the other statutes. It is rightly pointed out by Mr. Banerjee that Section 5A of the Central Excise Act specifically provides that unless specifically mentioned in any notification no exemption should apply to excisable goods which are produced or manufactured in a free trade zone and brought to any other place in India. Articles manufactured in a free trade zone cannot be classified in the same category with those produced and manufactured in a non-free trade zone.

25. As pointed out by the Supreme Court in the case of Hyderabad Industries Limited (supra), Section 3(1) of the Customs Tariff Act is the charging section for countervailing duty and additional duty levied u/s 3(1) of the said Act is independent of customs duty which is levied u/s 12 of Customs Act. Such duty can be charged only if an article has undergone production or manufacture. In the instant case, the imported plastic granules/agglomerates have undergone manufacture and such manufacturing process has been done in the free trade zone. According to Section 3 of the Customs Tariff Act, 1975 any article which is imported into India shall, in addition, be liable to a duty (in the said section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such exercise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article. There is no dispute that in exercise of power conferred u/s 5A of the Central Excise Act, 1944, the Central

Government can by notification grant necessary exemption and in the process can also add explanation (see Section 21 of the General Clauses Act, 1897). By way of addition of the explanation through the impugned notification, it is clarified that exemption given to plastic material reprocessed in India should not apply if such materials are reprocessed in free trade zone and brought to any other place in India. There is no dispute that in the absence of such exemption, those reprocessed materials are liable to excise duty. The Central Government has the right to give benefit to a particular type of unit and can deny such exemption to another unit not similarly circumstanced. The petitioners cannot allege violation of Article 14 of the Constitution of India because they are not similarly circumstanced with other units situated in non-free trade zone who do not get the special privilege of import of raw materials. If the Central Government decides not to grant similar exemption to a unit which has been given special privilege in the matter of import of raw material for the purpose of promoting export, there is nothing illegal in such action.

26. I thus find no reason to pass any order on this writ application. The writ petitioners have failed to show infringement of any of their legal or fundamental right as pointed out earlier.

27. In the facts and circumstances there will be, however, no order as to costs.

W.P. No. 258 of 2003 :

28. In view of my findings in the above writ application, this application is also dismissed on the aforesaid reasons.

There will be, however, no order as to costs.