

(2017) 10 AP CK 0023
In the Andhra Pradesh High Court
Case No : 57 of 2017

The Commissioner of Customs	Vs	APPELLANT
Gayatri Timbers Private Limited		RESPONDENT

Date of Decision : 12-10-2017

Acts Referred:

Customs Act, 1962, Section 25, Section 130A - Power to grant exemption from duty - Application to High Court
Customs Tariff Act, 1975, Section 3 (5)

Citation : (2017) 10 AP CK 0023

Hon'ble Judges : V. Ramasubramanian, Abhinand Kumar Shavili

Bench : DIVISION BENCH

Advocate : Sundari R. Pisupati, K. Vijay Kumar

Final Decision : Dismissed

Judgement

1. The Revenue has come up with the above appeals under Section 130A of the Customs Act, 1962, challenging the orders of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) allowing the claims for refund made by the Assessee.
2. Heard Mrs. Sundari R. Pisupati, learned senior standing counsel for the Appellant and Mr. K. Vijay Kumar, learned counsel for the respondent-Assessee.
3. The respondent-Assessee imported timber logs under various bills of entry. The material imported by the respondent- assessee admittedly fall within the First Schedule to the Customs Tariff Act, 1975.
4. By a Notification bearing No.102/2007-Customs issued on 14-09-2007 in exercise of the powers conferred by Section 25 (1) of the Customs Act, 1962, the Government of India exempted the goods falling within the First Schedule to the Customs Tariff Act, 1975, from the whole of the additional duty of the customs leviable under Section 3 (5) of the Customs Tariff Act, 1975, when imported into

India for subsequent sale. Paragraph 2 of the said notification gave a list of conditions to be fulfilled by the importer, for availing the benefit of exemption.

5. The respondent-assessee filed claims for refund with the jurisdictional Customs Officer. All the claims made by the respondent- assessee were partially allowed by the jurisdictional Customs Officer. For easy appreciation of the extent to which the claims for refund were allowed, we are presenting in a tabular column, the details.

C.E.A.NO.

Arising out of the Order-in-Original dtd Amount of refund claimed Amount of refund sanctioned

57 of 2017 08-01-2013 Rs.4,85,325.10 ps. Rs.3,10,220.00 ps

60 of 2017 28-09-2012

Rs.3,71,000.40 ps. Rs.1,72,849.00 ps

61 of 2017 05-11-2012 Rs.5,18,367.20 ps. Rs.2,77,617.00 ps

62 of 2017 20-12-2012 Rs.9,83,594.00 ps. Rs.8,68,328.00 ps

66 of 2017 10-05-2013 Rs.8,78,126.92 ps. Rs.5,86,004.00 ps

69 of 2017 20-12-2012 Rs.7,28,970.20 ps. Rs.3,90,440.00 ps

71 of 2017 08-10-2012 Rs.3,85,709.80 ps Rs.2,15,024.00 ps

72 of 2017 17-09-2012 Rs.8,82,612.10 ps. Rs.6,58,667.00 ps

74 of 2017 24-09-2012 Rs.13,91,801.80ps Rs.9,10,318.00 ps

75 of 2017 05-11-2012 Rs.7,84,837.00 ps Rs.2,07,219.00 ps

6. The disallowance of a part of the refund claim was on two grounds viz., (1) that the timber logs imported by the respondent- assessee were not sold as such by them, but were sold locally after sawning them and cutting them into smaller sizes; and (2) that the logs cut into smaller sizes could not correlate to the items described in the import packing list.

7. Contending that the grounds of rejection were not traceable to the exemption notification and that the imported material did not lose their character merely because of being cut into smaller pieces, the respondent-assessee filed statutory appeals before the Commissioner (Appeals). The Commissioner (Appeals), dismissed all the appeals forcing the respondent-assessee to file second appeals before CESTAT. The CESTAT allowed all the appeals relying upon the decision of the Gujarat High Court in Commissioner of Customs v. Variety Lumbers Private Limited (2012 TIOL-821-HC-AHM-CUS). The Tribunal took note of the fact that as against the judgment of Gujarat High Court, Special Leave Petitions were filed and that the Supreme Court had already granted leave and issued notices, but

did not grant an interim stay of the judgment of Gujarat High Court.

8. As against the orders of the CESTAT, the Appellant/ Revenue did not choose to come up immediately with the statutory appeals under Section 130 A of the Customs Act. On the contrary, the Department filed Miscellaneous Applications before the CESTAT seeking a modification of the order of the CESTAT on the short ground that the CESTAT should have directed the respondent- assessee to furnish bank guarantee at least to the extent of 50% of the amount of refund ordered by the Tribunal, as per the interim order passed by the Supreme Court in the appeals filed against the judgment of the Gujarat High Court. These applications for modifications were dismissed by the CESTAT on the ground that after the disposal of the appeals, the Tribunal had become functus officio.

9. In the meantime, the respondent-assessee filed writ petitions seeking a direction to the department to grant refund as per the orders of the CESTAT. In the writ petitions, the department took a stand that they had already filed appeals under Section 130A of the Act as against the orders of the CESTAT. But after finding that there were actually no appeals registered on the file of this Court, a Bench of this Court to which one of us (VRSJ) was a party, allowed the writ petitions and directed the refund to be made. It was recorded in the said order that the order passed by the CESTAT, had attained finality as on the date of disposal of the writ petitions and that therefore, the department had no alternative but to refund the amount.

10. Thereafter, the appellant/revenue came up with the above appeals with applications for condonation of delay. Despite stiff opposition from the respondent-assessee, this Court allowed the delay condonation applications, only in view of the fact that the matter required examination, in view of the Supreme Court granting leave to appeal against the judgment of Gujarat High Court. Thus, the above appeals got numbered and were taken up for hearing.

11. The substantial questions of law with which the appellant/ revenue has come up with the above appeals are as follows: 1. Whether the CESTAT was justified in placing reliance on Commissioner of Customs vs. M/s. Variety Lumbars Pvt. Ltd., and C.C. Kandla vs. M/s. Agrawala Timbers Pvt. Ltd., (supra) where the appellant Department had filed Appeal before the Supreme Court and the same is pending for adjudication?

2. Whether the CESTAT was justified in allowing the respondents appeal and declaring that the respondent is eligible for refund of SAD relying on the judgment in Commissioner of Customs Vs. M/s. Variety Lumbars Pvt. Ltd., and C.C. Kandla Vs. M/s. Agarwala Timbers Pvt. Ltd., without imposing any condition to protect the interests of the appellant and thereby departing from the order of the Supreme Court wherein the Supreme Court imposed a condition that the respondent should furnish bank guarantee security for half of the amount to the satisfaction of the appellant departments Assessing Officer?

12. A careful look at the above questions of law would show that the first

question of law revolves around the entitlement of the respondent-assessee to refund. The second question of law, even if answered in favour of the revenue, would still entitle the respondent- assessee to receive the refund, but after furnishing bank guarantee to the extent of 50% of the amount refunded, in the light of the interim order passed by the Supreme Court in the appeal arising out of the judgment of Gujarat High Court in Variety Lumbers Pvt. Ltd. In other words, the first question of law is the real substantial question of law into which the second question of law would get merged. Therefore, we shall first take up the first question of law. The first question of law raised by the Department is as to whether CESTAT was justified in placing reliance on the decision of the Gujarat High Court in Variety Lumbers Pvt. Ltd., especially when the appeal arising out of the same is pending adjudication before the Supreme Court.

13. Admittedly, the Supreme Court did not grant interim stay of the judgment of the Gujarat High Court in Variety Lumbers Pvt. Ltd. On the contrary, the Supreme Court directed the refund subject to the assessee furnishing bank guarantee to the tune of 50% of the amount of refund.

14. The grant of leave by the Supreme Court, as against the judgment of a High Court, does not have the effect of wiping out any principle of law laid down by the High Court. Even in cases where a stay is granted by the Supreme court, the question would depend upon whether an interim stay was granted of the operation of the judgment of the High Court or of the further proceedings pursuant to the order of the High Court. If an interim stay of operation of the judgment of the High Court is granted by the Supreme Court, then it could possibly be argued that the judgment of the High Court cannot be followed as a precedent. Even in such cases, there is no embargo upon the other High Courts to follow the reasoning adopted by the High Court whose judgment was stayed by the Supreme Court, to come to the very same conclusion.

15. In cases where an interim stay is granted by the Supreme Court only in respect of further proceedings, the principle of law laid down by the High Court does not get automatically suspended. In cases where no stay is granted by the Supreme Court, the Tribunal is entitled to follow the judgment of the High Court that is under appeal.

16. In the case on hand, the Supreme Court did not grant either a stay of operation of the judgment or a stay of further proceedings pursuant to the judgment of the Gujarat High Court. Therefore, the Tribunal was bound to follow the judgment of the Gujarat High Court and the first question of law has to be answered in favour of the respondent-assessee.

17. Despite our above conclusion on first question of law, we would also go into the more fundamental question, to test the genuineness of the grievance of the appellant/revenue. The grievance of the appellant/revenue is that a person not entitled to the benefit of exemption notification, cannot walk away with a refund. According to the appellant/revenue, the department was fair enough to order

refund of a portion of the claim, wherever the jurisdictional Customs Officer noted that the imported timber logs were sold as such in the local market without being cut into smaller sizes and wherever they matched with the description contained in the packing list. The claim of the department is that an importer is not entitled to exemption, if the imported material was converted into something else and if the goods sold locally do not match the description contained in the packing list.

18. But, unfortunately, for the appellant/revenue, the requirement to sell the imported goods as such in the local market, is not one of the conditions stipulated in the exemption notification. It will be useful to extract the exemption notification dated 14-09-2007 as follows: In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of Section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

19. It is not indicated anywhere in the notification extracted above, that the

imported goods should be sold as such, so as to qualify for exemption. All that the notification says is that the imported goods should be sold locally and that the conditions stipulated in para- 2 should be fulfilled.

20. As rightly observed by the Gujarat High Court, the timber logs imported by any one, when cut into smaller logs, do not lose the character of being timber logs. More over, the size of timber logs that could be imported in huge ships, will be so large that they cannot be transported locally in trucks on roads. What the department had done, is to read one more condition into the exemption notification, which is not found in the notification itself.

21. Mrs. Sundari R. Pisupati, learned senior standing counsel placed heavy reliance upon a Circular bearing No.15/2010-Customs, dated 29-6-2010, wherein the Government imposed certain conditions in order to prevent fraudulent claims by unscrupulous importers. Paragraphs 2 to 4 of the said circular read as follows:
2. Instances have come to notice of the Board where some importers of timber logs have undertaken certain processes and subsequently sold sawn or cut logs after payment of VAT. These importers are claiming the refund of 4% SAD paid at the time of importation of goods in terms of Notification No.102/2007-Customs dated 14.09.2007. As per the said Notification, refund of SAD is available only in case the imported goods are subsequently sold on payment of VAT, without carrying out any process. However, at the time of claiming refund of 4% SAD, these importers have manipulated the facts by showing that goods sold were imported timber logs only and not sawn or cut logs. In terms of the classification of the First Schedule to Customs Tariff Act, 1975, round logs/round squares are classified under the heading 4403 wherein the sawn woods are classified separately under the heading 4407. Thus, there is distinct classification for the imported and the final products that are sold in the market on which VAT is paid. Hence, since the goods imported and subsequently sold were different goods falling under different tariff headings, the benefit of Notification No.102/2007-Customs dated 14.09.2007 by way of refund of 4% SAD is not available to importers.

3. In certain other cases, refund claims have been filed with the department wherein forged documents were submitted for availing the refund envisaged in the notification No.102/2007-Customs dated 14.09.2007. In such cases, it is reported that the importers were preparing duplicate set of invoices of the same serial number. Scrutiny of these two sets of invoices establishes that the invoice submitted to the department shows description of goods as Malaysian round logs whereas the invoices obtained from the buyer shows the description of goods as Imported timber. The other difference is that in the invoice submitted to the department the quantity of goods in number/pieces are not mentioned whereas in the invoices of the buyer the quantity in number/pieces is clearly mentioned. This fact of preparing duplicate invoices is further substantiated by the other documents such as related transit passes and lorry receipt. These importers are thus defrauding the government revenue by resorting to this modus operandi of

submitting the forged documents for claiming refund fraudulently.

4. It is apprehended that above mentioned modus operandi may have all India ramifications and may be prevalent in other field formations and are not limited only to a few cases. In view of the above, all field formations are directed to be alert and vigilant to ensure that unscrupulous importers do not avail fraudulent refunds of 4% SAD in terms of Notification No.102/2007-Customs dated 14.09.2007 by resorting to the above mentioned modus operandi.

22. On the basis of the above circular, it is contended by the learned senior standing counsel for the department that the moment the imported goods undergo some change, they would lose the benefit of the exemption notification, since the goods originally imported may fall under one classification while those that are obtained after a process, may fall under a different classification. In the case of the assessee itself, the round and square logs of wood come under classification Heading 4403, whereas sawn wood falls under classification Heading 4407. Therefore, it is contended by the learned senior standing counsel for the department that the moment the imported goods are subjected to some process, they would go out of the purview of the exemption notification.

23. But, we do not agree. It is not the case of the department that goods falling under one classification are entitled to exemption and the goods falling under another classification are not entitled to exemption. What is claimed is only the refund of the special additional duty. The special additional duty is payable on the goods that fall under the First Schedule to the Customs Tariff Act 1975, in terms of Section 3 (5) of the Act. The fact that the imported logs fall under the First Schedule to the said Act and the fact that as a consequence special additional duty was paid and the importer became entitled to refund, are all not denied. It is not the case of the department that round/square logs falling under Heading 4403 alone are entitled to exemption and that sawn woods falling under Heading 4407 are not entitled to exemption. Both of them fall under the First Schedule. Therefore, the argument sought to be advanced is completely meaningless.

24. As a matter of fact, Circular No.15/2010, dated 29-06-2010 has virtually amended the exemption notification. It is needless to point out that by a Circular or executive fiat, an exemption notification issued in exercise of the statutory power, cannot be amended. Hence, the reliance placed upon the circular is unfounded.

25. The next argument of the learned senior standing counsel for the department is that no claim for refund can be allowed, if there was a mismatch between the description contained in the packing list and the description of goods sold locally. But the explanation given by the assessee is that the moment huge wooden logs that arrived in ships are cut into smaller sizes, the description contained in the original packing list will lose its efficacy.

26. A closer examination of this issue would show that the fears expressed by the department are illusory. There are only two possible scenarios, after the

timber logs are imported into India. The first is that after import, the logs are cut into smaller sizes and sold in entirety. The second scenario is that only a part of the logs of smaller sizes are sold. In either of these two scenarios, what can be claimed by the importer is only the refund of the duty actually paid on the import. No importer can claim refund of special additional duty that was not paid by him. No importer can claim refund of SAD (special additional duty) paid on the imported logs, by showing the sale of locally purchased wood logs. This is in view of the fact that the imported timber logs may have to be sold in any case in the local market. If the Government of India wanted the importers of timber not to have the benefit of the exemption notification, if they indulged in the sale of smaller pieces, the Government could have said so in the notification itself.

27. Once it is clear that by making a mismatch between the description contained in the original packing list and the description of the goods locally sold, an importer may not be able to claim refund of more than what was paid, then it would follow as a natural corollary that the second objection of the department is merely weaved out of imagination. Hence, even on merits, we find that the ultimate conclusion reached by the Gujarat High Court in Variety Lumbers Pvt. Ltd., appears to be the probable view.

28. In fact, we have chosen to go into the merits, despite the department not raising the aforesaid two issues as substantial questions of law before us. This was just to ensure that the assessee does not walk away with a payment that they are not entitled to.

29. We should also add that today the department is not even entitled to raise the first substantial question of law before us. If the department wanted to raise the first substantial question of law, they should have come up with the appeals under Section 130A of the Act immediately after the CESTAT disposed of the appeals, but the department did not do so. On the contrary, they moved the Tribunal with Miscellaneous Applications for modification. What was prayed for in the Miscellaneous Applications for modification was only to impose a condition that the assessee should furnish bank guarantee for 50% of the amount of refund. It is only after the Miscellaneous Applications were dismissed by the Tribunal that the department has chosen to come up with the substantial appeals as against the original order of the Tribunal.

30. Let us assume for a minute that the Miscellaneous Applications filed by the Department were allowed by the Tribunal and the original order of the Tribunal passed in the appeals modified. In such an event, the department could not have challenged, the original order of the Tribunal, on the principle of waiver. Therefore, we could have dismissed all these appeals on the first substantial question of law, as not maintainable, in view of the department going before the Tribunal with a limited grievance. However, we chose to take the bull by its horns.

31. In fine, the first substantial question of law is answered against the appellant/revenue.

32. The second question of law raised by the appellant is as to whether the Tribunal could have granted refund without imposing a condition, as imposed by the Supreme Court in the appeals arising out of the decision of the Gujarat High Court in Variety Lumbers Pvt. Ltd.

33. The brief interim order passed by the Supreme Court on 24-11-2011 while granting leave to the Commissioner of Customs in Variety Lumbers, reads as follows: In the meanwhile, the claims of the respondents for refund of Special Countervailing Duty, shall be processed by the Assessing Officer and the amount so due to them shall be refunded within four weeks from today, subject to the respondents furnishing bank guarantees for half of the amount to be refunded, to the satisfaction of the Assessing Officer. The guarantees shall be kept alive till disposal of these appeals. The quantum of payment of interest to the successful party shall be considered at the time of final disposal of the appeals.

34. As rightly contended by Mr. K. Vijay Kumar, learned counsel for the respondent-assessee, the interim order of the Supreme Court extracted above, is dated 24-11-2011. The orders-in-original were passed in all these appeals, on 08-01-2013, 28-09-2012, 05-11-2012, 20-12-2012, 10-05-2013, 20-12-2012, 08-10-2012, 17-09-2012, 24-09-2012 and 05-11-2012.

35. In other words, the orders-in-original, out of which all the present appeals arise, were passed long after the interim order of the Supreme Court dated 24-11-2011. Therefore, the Jurisdictional Customs Officer, instead of showing great valour in challenging the ratio laid down by the Gujarat High Court, could have simply allowed all the refund claims with a brief order to the effect that the refund claims are allowed (i) subject to the outcome of the appeal before the Supreme Court and (ii) subject to the further condition that a bank guarantee is furnished for half of the amount claimed as refund. The Original Authority did not adopt such a course of action, despite having the benefit of the interim order of the Supreme Court passed in Variety Lumbers Pvt. Ltd. Even the Commissioner (Appeals) did not take recourse to such an option. Therefore, today the department cannot find fault with the CESTAT not passing a similar order as passed by the Supreme Court in Variety Lumbers Pvt. Ltd., especially when the Original Authority as well as the Appellate Authority themselves did not choose to follow the interim order of the Supreme Court.

36. As a matter of fact, if the adjudicating authority had passed orders-in-original incorporating the same conditions as found in the interim order of the Supreme Court in Variety Lumbers Pvt. Ltd., incorporating a condition that the refund was ordered subject to the outcome of the decision before the Supreme Court, the department would have been better off. If the original authority had passed such an order, the department would have become entitled to recover the amount of refund, in the event of their success before the Supreme Court in Variety Lumbers Pvt. Ltd. The department let go this opportunity and invited an order on merits from the Tribunal. After suffering an order on merits from the Tribunal and without challenging the same, the department went before the

Tribunal requesting them to incorporate the conditions as found in the interim order of the Supreme court. This is why the Tribunal rejected the Miscellaneous Applications.

37. Even if the Tribunal had allowed the Miscellaneous Applications, the department could not have achieved anything, in the event of their success before the Supreme Court. Unless the department itself had ordered refund subject to the outcome of the appeal before the Supreme Court, the department could not have achieved anything merely by making the Tribunal incorporate a condition for furnishing of bank guarantee to the extent of 50%. Therefore, the Tribunal was right in rejecting the Miscellaneous Applications and hence, the second substantial of law is answered against the appellant/revenue. As a consequence, all the appeals are dismissed. No costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.