

(2008) 06 MAD CK 0110

In the Madras High Court

Case No : Writ Petition No's. 19287 of 1996 and 5128 of 1997 and W.P.M.P. No. 10572 of 2004 in Writ Petition No. 19287 of 1996

The Waterbase Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3

Citation : (2008) 121 ECC 9 : (2008) 157 ECR 9

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Thiagarajan, SC for S.A. Rajan, for the Appellant; J. Madanagopal, SCGSC, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—Heard the arguments of the learned Counsel for the parties and perused the records.

2. The prayer in W.P. No. 19287 of 1996 is for a direction to the second respondent not to invoke 51 Bank Guarantees furnished by the

petitioner between 04.02.1994 and 21.12.1994 for the purpose of clearing items of import which were raw materials, components, consumables,

packing materials, drawing samples and prototypes related to 100% export oriented activity carried on by the petitioners pursuant to the letter of

indent issued by the first respondent.

3. In W.P. No. 5128 of 1997, the prayer is for refund of Rs. 11,42,191, which was given as a bank guarantee for the purpose mentioned in the

earlier writ petition.

4. Mr. R. Thiagarajan, learned Senior Counsel appearing for the petitioners

submitted that the Government of India exempted goods specified in Notification No. 13 / Customs _ 81 dated 09.02.1981 when imported into India for the purpose of manufacture of articles for export out of India or for being used in connection with the production or packaging of goods for export out of India by 100% export oriented undertaking as approved by the Board. The table appended to the Notification included 12 described goods which included raw materials also.

5. Subsequently, the said Notification was amended by Notification No. 188 / Customs - 93 dated 27.12.1993 when imported to India for the use in an integrated aquaculture farm in connection with its operational requirement of the aquaculture farm and for export of aquaculture products produced therefrom by 100% export oriented undertaking approved by the Board. In that notification, the table furnished six items of goods eligible for exemption from payment of duty of excise.

6. Apart from these items, in paragraph 5 of the said notification, a non-obstante clause was also provided which is as follows:

notwithstanding anything contained in this notification the exemption contained herewith shall also apply to those goods which on importation into

India are used for the purposes of production of aquaculture products within hundred per cent export-oriented undertakings approved by the said

Board of Approvals for hundred per cent export-oriented undertakings and such products (including rejects, waste and scrap material arising in the

course of production) even if not exported out of India, are allowed to be sold in India, under and in accordance with the Export and Import

Policy, April 1992, March 1997, published under the Ministry of Commerce Public Notice No. 1-ITC(PN)/92-97, dated the 31st March 1992,

as amended from time to time, and in such quantity and subject to such other limitations and conditions as may be specified in this behalf by the

Development Commissioner, on payment of duty of excise leviable on such articles u/s 3 of the Central Excises and Salt Act, 1944 (1 of 1944).

7. Once again, by a Notification No. 196/94, similar exemption was given. In paragraph 9, it is stated as follows:

(i) the notification No. 188-Customs/93 dated the 27th December 1993 of the Government of India in the Ministry of Finance, Department of

Revenue is hereby rescinded.

(ii) Notwithstanding such rescission, anything done or action taken under the notification so rescinded shall be deemed to have been done or taken

under the corresponding provisions of this notification.

8. The petitioner established a factory at Ananthapuram for producing culture of prawns with 100% export oriented. It commenced production

during June / July 1993. The factory was confined to bonded area under the control of the Central Excise, Nellore (AP). Therefore, the goods

produced can be taken out only with the written permission of the Central Excise authorities. When the petitioner wanted to rely upon the 1981

Notification for importing certain goods, the respondent authorities placed reliance upon the 1993 Notification for importing the raw materials,

components, consumables, packaging materials, drawing samples and prototypes demanded bank guarantee to the extent of 20% of the Customs

Duty. When it was pointed out that the 1993 Notification did not make any change in the earlier 1981 Notification in the description of the goods

found in the table appended to the Notification and further, paragraph 5 provides for a non-obstante clause and there is no doubt about the

exemption available to the imported goods, they submitted that the subsequent Notification No. 196/94 rescinded the 1993 Notification and,

therefore, throughout, they are eligible for exemption for the goods imported by them in connection with their business. However, the respondents

did not agree to the same and wanted to interpret the 1993 notification as if there was a change in the 1981 Notification. According to the

respondents under the 1993 Notification, duty on raw materials was not allowed and the benefit of 1993 Notification was not available to them

and since the bank guarantees furnished by the petitioners were encashed, they have no case and are liable for the duty.

9. Mr. R. Thiagarajan, learned Senior Counsel for the petitioner contended that from 1981 to 1994, there is no change in the policy of the Central

Government and it is the authorities who are giving an artificial meaning to the 1993 Notification. He relied upon paragraph 5 of the 1993

Notification as well as the 1994 Notification. The contention of the learned Senior Counsel was that the 1994 Notification uses the word "rescind"

means to abrogate or to annul or to cancel as given by the Law Lexicon.

10. He also placed reliance upon the judgment of the Supreme Court in Johnson

and Johnson Ltd. Vs. Commissioner of Central Excise, Aurangabad, and placed reliance upon the following passage found in paragraph 10 of the judgment.

Para 10: Mr Subba Rao contended that needle by itself could have fallen within Item 90.18 as an appliance but the needle along with the suturing material could not be said to be a surgical appliance and would not be attracted (sic covered) by the said item because suturing material stood specifically covered by Note 3 of Chapter 30 and would, therefore, fall within Entry 3005, namely, pharmaceutical goods not elsewhere specified and would be attracted by the residuary clause in Item 3005.90. We find it difficult to accept the contention urged on behalf of the Revenue. If the needle by itself fell within Entry 90.18 as a surgical appliance we find it difficult to conclude that if suturing material is affixed thereto, it ceases to be a surgical appliance and would fall within the term suturing material in Note 3 of Chapter 30. Suturing material by itself may have attracted that item but the composite item comprising the needle as well as the suturing material appended thereto could not fall within the expression suturing material and would not be outside the expression surgical appliances. At the relevant point of time these two were separately dealt with, needle simpliciter falling within the Entry 90.18 and suturing material simpliciter falling within Clause (a) of Note 3 of Chapter 30 and consequently under Item 3005.90. But when the suturing material and the needle form an integrated single item used for surgical purposes it would not be proper to adopt a narrow construction to place it under the heading of suturing material removing it from the broader terminology of surgical appliance under Item 90.18. It was possibly for this reason that by the subsequent notifications the position was made clear and the ambiguity was removed. We are, therefore, of the opinion that the items produced by the appellant Company would fall within Entry 90.18 as the terminology surgical appliances has a broader compass than the terminology suturing appliances of Chapter 30 of the Excise Tariff. As far as the decision in Jain Engineering is concerned, the facts show that the notification provided that the article specified in the table annexed to the notification and falling under Heading 84.06 were exempt from payment of certain portion of customs duty. The table not only mentions internal combustion piston engines forming the

subject-matter of Heading 84.06 but also mentions _parts thereof_. It was construed that the notification intended to grant exemption to the parts also. The Court, therefore, turned down the Revenues contention that the notification was inapplicable to parts of the excisable item manufactured by the appellant. The Tribunal extracted para 7 of the judgment but merely stated that in the facts of the case the ratio was not applicable. We are afraid that the Tribunal failed to come to grips with the question. The submission was that the notification not only intended to grant exemption to internal combustion piston engines but also to parts thereof and once this intention was clear it was unreasonable to take a narrow view of the notification and to refuse to extend the benefit to the manufacturer. In the instant case also, we are of the opinion that the intention of the authorities was to grant exemption to certain life-saving and sight-saving articles manufactured in the country and once this intention is clear from the subsequent notifications issued u/s 5-A of the Act of 1995, we do not see any reason why we should take a narrow view to confine the two items produced by the appellants to Entry 3005.90 rather than place them in the wider connotation of surgical appliances in Entry 90.18 of Chapter 90.

11. The contentions raised by the learned Counsel is well-founded. Even though in the counter affidavit dated 21.10.2002 filed by the respondents, it is stated that Notification No. 196 of 1994 is not retrospective, that argument is not correct because the purpose of the said notification is to rescind the 1993 Notification. Even otherwise, paragraph 5 of the 1994 Notification provides for a non-obstante clause by which the raw materials are liable for exemption by the said Notification. An harmonious reading of all the Notifications will show that the petitioners are entitled for exemption for the period in question.

12. In view of the same, the writ petitions will stand allowed and the respondents are directed to refund the amount encashed by invoking the bank guarantees furnished by the petitioner for import of the consignment in question covered by the two writ petitions. However, there will be no order as to costs. Connected Miscellaneous Petition is closed.