(2016) 08 DEL CK 0085

In the Delhi High Court

Case No : Writ Petition (C) No. 1268 of 2015 and CM APPL. No. 2251 of 2015

Tinna Rubber and Infrastructure Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Citation : (2016) 339 ELT 533

Hon'ble Judges : Dr. S. Muralidhar and Najmi Waziri, JJ.

Bench : Division Bench

Advocate : S/Shri V. Lakshmikumaran, Ms. Charunya Lakshmi Kumara, Abhishek Anand, Aditya Bhattacharya, Anandh K. and Yogendra Aldak, Advocates, for the Petitioners; S/Shri Anurag Ahluwalia, CGSC with Ms. Srishti Banerjee and Vaibhav Verma, Advocates, for the Respond

Final Decision : Dismissed

Judgement

1. This petition, under Article 226 of the Constitution of India, by Tinna Rubber & Infrastructure Limited questions the validity of a clarification dated 2rd January, 2015 issued by the Tax Research Unit (''TRU'') of the Department of Revenue, Ministry of Finance to the effect that there was no exemption from payment of excise duty in respect of tyre scrap cut into two to three pieces produced from used and old tyres and that, therefore, the said goods are chargeable to additional customs duty or countervailing duty (''CVD'') under Section 3(1) of the Customs Tariff Act, 1975 (CTA).

2. This is the second round of litigation. The petitioner had earlier filed W.P. (C) No. 8160 of 2014 in this Court when its representation dated 11th August, 2014 made to the Government of India protesting against the imposition of 12% CVD was not responded to. This Court disposed of the said writ petition by the following order on 2nd December, 2014 :

"Mr. Shukla appearing on behalf of respondent Nos. 1 and 2 states that he has taken instructions to the effect that the representation dated 11-8-2014 filed by the petitioner will be considered and disposed of within one month.

The learned counsel for the petitioner requests that while considering the representation, the decisions of the Supreme Court in Hyderabad Industries Ltd. v. Union of India : 1999 (108) E.L.T. 321 (S.C.) and Commissioner of Central Excise and Customs, Bhubaneswar-I v. Tata Iron and Steel Co. Ltd. : 2003 (154) E.L.T. 343 (S.C.) be also considered. We direct accordingly.

In view of the statement made by the learned counsel for the respondent Nos. 1 and 2, no further directions are necessary in this writ petition. The same stands disposed of."

3. It is pursuant to the above order that the impugned clarification was issued by the TRU on 2nd January, 2015 which in effect rejects the petitioner''s representation.

4. The petitioner states that it is one of the largest importers of used and old tyres. It is stated that it uses such used and old tyres to manufacture "crumb rubber". It is stated that when the tyres reach a stage where they can no longer be used for automobiles, they are sold to scrap dealers, who sell them to processors. It is stated that the old tyres are thereafter recycled. One beneficial way to recycle the tyre is to mix crumb rubber with bitumen to make Crumb Rubber Modified Bitumen (''CRMB''). It is stated that the roads made of CRMB have a better quality and life. It is stated that CRMB is being made worldwide by mixing radial tyre crumb. However, there is scarcity of discarded radial tyres in India as a majority of the tyres produced are cross ply and non-radial tyres. Therefore, the petitioner has to depend on imported radial tyre scrap from buses and trucks. According to the prevalent import policy, import of used and old tyres with one cut in the bead wire and import of used rubber tubes cut in two pieces is permitted without a licence from the Directorate General of Foreign Trade (''DGFT''). It is stated that this ensures that the used tyres are not put to use again with minor or major reconditioning. It is also pointed out by the petitioner that the tyres are cut into two or three pieces for ease of accommodation in the shipping vessels. The cost of transportation of tyre scrap with one cut is much higher than transportation of tyres cut into two or three pieces.

5. Referring to the CTA and the Customs Tariff Heading, it is pointed out by Mr. V. Lakshmikumaran, learned counsel for the petitioner that it is importing the aforementioned tyres cut into two-three pieces, classifying them under the Customs Tariff Heading 4004, according to which the petitioner has to pay 12% CVD. It is pointed out that CVD is payable only if identical goods manufactured domestically suffers excise duty. According to the petitioner, the cutting of old tyres into two or three pieces does not amount to manufacture and, therefore, the question of such goods being subject to CVD when imported does not arise. He placed considerable reliance on the decision of the Division Bench of this Court in Modi Rubber Limited, Modi Nagar, U.P. v. Union of India - 1987 (29) E.L.T. 502 (Del.). He submitted that it has been categorically held in the said

judgment by the Court that the cutting and punching of tyres that have been found unfit for consumption or marketing, to turn them into waste/scrap does not result in manufacture of waste material and, therefore, no duty can be levied thereon.

6. Mr. Lakshmikumaran also placed reliance on the decision of the Customs, Excise and Gold (Control) Appellate Tribunal (''CEGAT'') in Gujarat Reclaim & Rubber Products Ltd. v. Collector of Central Excise & Customs, Bombay - 1983 (14) E.L.T. 2401 (Tri. - Delhi), in which it was held that the crushing of waste rubber into powder does not amount to manufacture. It was held that "a simple act of crushing and powdering like this one should not in our opinion be taken to be synonymous with creation of a new product." It was found by the CEGAT that "the product keeps its original character, molecular structure, chemical identity, etc." The appeal against the said decision of the CEGAT was dismissed by the Supreme Court on 20th November, 1989 in Civil Appeal No. 4194 of 1984 inter alia observing that "the Tribunal has not only given a finding that the powder is secured by a mere process of crushing but also that the crushed product was not a new product. This is essentially a finding of fact." Likewise the decision of the CEGAT in Elgi Rubber Products Ltd. v. Collector of Central Excise, Madras - 2002 (145) E.L.T. 112 (Tri.-Del.) was also affirmed with the Supreme Court dismissing the appeal on the ground of delay and Gujarat Reclaim & Rubber Products Ltd. v. Commissioner of Central Excise, Pune - 2009 (243) E.L.T. 426 (Tri.-Mumbai).

7. Mr. Lakshmikumaran also referred to the decision in Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries - (2003) 4 SCC 184 = 2003 (153) E.L.T. 491 (S.C.) to urge that merely because old and used tyres were classified under Tariff Entry No. 4012 whereas ''waste paring and scrap of rubber (other than hard rubber) and powder and granules obtained therefrom'' was classified under Tariff Item No. 4004 with the rate of duty at 12.5% did not mean that the process by which the waste or scrap rubber was obtained from old tyres amounted to manufacture. The twin test of ''manufacture and marketability'' would still apply.

8. In reply, it is submitted by Mr. Anurag Ahluwalia, learned Standing Counsel for the Union of India that the test for determining if the cutting of old tyres into two or three pieces amounts to manufacture was to ask if the processes to which the old tyre was subjected to, resulted in transformation of the old tyre into a new product having a different identity, characteristics and use. He pointed out that the old tyre ceased to remain as such when it was subjected to the process of cutting which resulted in two or three pieces of tyres which had a distinct identity and were marketable as such.

9. Mr. Ahluwalia, pointed out Tariff Heading 4004 acknowledged that all waste, pairings and scrap of rubber including powder and granules obtained therefrom were distinct commodities obtained by subjecting old tyres to the process of cutting and, therefore, the process did amount to manufacture. He referred to the decisions in Commissioner of Central Excise, Bangalore-II v. Osnar Chemical

Pvt. Ltd. - 2012 (276) E.L.T. 162 (S.C.); CIPLA Ltd. v. Commissioner of Central Excise, Bangalore - 2008 (225) E.L.T. 403 (S.C.) and Union of India v. Delhi Cloth & General Mills Co. Ltd. - 1977 (1) E.L.T. (J199).

10. The central question that arises in this petition is whether CVD at 12% can be levied on the import of ''tyre scrap cut into two or three pieces''. For the purpose of the said question the further question that requires to be answered is whether such goods, if produced in India could be said to be ''manufacture''? In other words if old and used tyres in India are subject to the processes of cutting into two or three pieces and the cut pieces of tyres are sold in the market could it be said that there has been a manufacture of cut pieces of tyre scrap from the old tyres?

11. The facts in Modi Rubber Limited v. Union of India (supra) were that Modi Rubber Limited (''MRL'') was carrying on the business of manufacture and sale of tyres and other rubber products. The said goods were being manufactured at its factory at Modipuram. In the process of such manufacturing, a small quantity of rubber compound was rejected due to wrong mixing or overheating. MRL claimed that the rejected rubber compound was in the nature of waste. At various stages of the manufacture, some quantity of rubber cuttings emerged which were also treated as waste. The substandard and defective goods were destroyed by cutting and punching. MRL''s contention was that since there was no manufacture of the waste no excise duty was leviable thereon.

12. This Court in Modi Rubber Limited v. Union of India (supra) considered whether such waste "arising during the processing of tyres should be classifiable under Tariff Item 16-A(2) or Tariff Item 68 of the Central Excise Tariff." Inter alia the Division Bench observed :

"8. It cannot, however, be said that waste/scrap is the result of any treatment or any labour or any manipulation by the petitioner Company whereby a new and different article, emerges. At various stages of the manufacture of tyres, tubes, flaps and other rubber products which are admittedly, goods manufactured, rubber cuttings and waste is generated and comes into existence. The process whether Essential or incidental or ancillary to fall within the ambit of the expression ''manufacture'' is one which must have some relation to the manufacture of a finished product. The waste/scrap is obtained not by any process of manufacture but in the course of manufacturing process to produce the end product of tyres, tubes, flaps etc. The waste/scrap is obtained in the course of manufacture and not out of manufacture of the end product. In our opinion, it is not as a result of manufacture, because no one would produce any such degrading or even inferior thing. If the raw material of rubber compound has undergone some change in the process of manufacture so as to turn into waste or scrap, it cannot be equated with any finished product. There is a change but every change in the raw material is not manufacture. There is no transformation in case of waste/scrap of a new and different article. No one has brought into, existence a new substance having a distinctive name, character or use."

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"10. Rule 49 of the Central Excise Rules, 1944 (hereinafter referred to as the Rule), provides for duty chargeable only on removal of the goods from the factory premises or from an approved place of storage. Payment of duty in respect of excisable goods is made when they are about to be issued out of the place or premises specified. Under second proviso to Rule 49, the proper officer may not demand duty due on any goods claimed by the manufacturer as unfit for consumption or marketing. The excisable goods lying in the licensed premises and found unfit for consumption or for marketing can be destroyed without payment of duty leviable thereon subject to the prior permission and fulfilment of such conditions as may be imposed by the Collector. For claiming remission of duty on such goods, a procedure has been laid down in Chapter 42 of the Central Excise Law Guide. Separate procedure has been prescribed under other statutory provisions for the destruction or disposal of waste, refusal or unsaleable material arising out of goods brought under Rule 56A or under Chapter X or under Rules 173K, 137N and 173P. The list showing the excisable commodities and the manner and method of their Destruction has been specified in para 42.07. In case of Tariff Item No. 16 i.e. Tyres it is "by cutting and punching". If under the Rules, the remission is granted on the goods found unfit for consumption or for marketing on destruction in the manner and method prescribed then there is no warrant to levy duty of excise on the tyres, tubes and flaps which are found unfit for consumption or for marketing by the petitioner himself. After such goods have come into existence during the process of manufacture, then the only method employed by the petitioner himself is of destruction "by cutting and punching" to turn it into waste/scrap. There is no event of manufacture of waste matter and thus no duty can be levied thereon.

11. It is the common case that waste/scrap are capable of fetching some sale price but that cannot be the criterion for the event of manufacture. There are several commodities mentioned in the said para 42.07. Manner and method of destruction in case of each Tariff Item given there is different. In some case it is by burning, in others, it is by cutting or breaking into small piece. The ash by burning or small piece may have a market value. It is sold as a waste product like rubbish undesired and unwanted with a view to get rid of it. It is no argument that it fetches some money that it cannot be considered as waste. These days waste matter is put to a lot of use by recycling or other treatment, but there is no event of manufacture of waste within the meaning of the Act. It is also not the department''s case that they have classified all the destroyed items of Para 42.07 as "goods" liable to excise duty under Tariff Item 68 of C.E.T. There is no reason as to why the destroyed tyres by cutting and punching be treated as "goods" manufactured."

13. In Modi Rubber Limited v. Union of India (supra), tyres were being manufactured and as a part of that process waste or scrap was generated by

cutting and punching the defective tyre. As far as the present case is concerned, the starting point would be the old tyre. They are subject to the process of cutting or splitting or paring and that results in two or three pieces of cut tyre. When the issue is examined from the point of view of a recycling Industry it is conceivable that an entire unit could be set up for the purposes of converting old and used tyres into pieces of cut tyres which could no longer be used in automobiles but which are marketable and are, in fact, sold for being used in road laying, etc. The question that would then arise is whether in such an instance it could be said that there is no ''manufacture''. Although the decision in Modi Rubber Limited v. Union of India (supra) does not directly address the above issue, it appears that in Para 11 of the decision the Court was conscious of waste matter being put to use by recycling or other use. The Court observed "but there is no event of manufacture of waste within the meaning of the Act."

14. This Court is of the view that the entire aspect of recycling of used tyres to generate cut pieces of tyres, which are marketable as such, requires to be examined for determining if the process by which such cut tyres are generated amounts to manufacture. While it cannot be presumed that there was manufacture merely because cut pieces of rubber are classifiable under Tariff Heading 4004, nevertheless as pointed out by the Supreme Court in Commissioner of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Industries (supra) it requires to be examined whether the twin test of manufacture and marketability are satisfied. In particular, as pointed out in Commissioner of Central Excise, Bangalore-II v. Osnar Chemical Pvt. Ltd. (supra), it would be required to be examined if in producing cut pieces of tyres from old tyres there is transformation of a product into a new product "having a different identity, characteristics and use". The issues arising in the present case not having directly arisen before the Court in Modi Rubber Limited v. Union of India (supra), and the Tariff Heading 4004 not in vogue at the time, the observations in that decision touching on the aspect of recycling of waste tyres cannot be said to be conclusive.

15. In the circumstances the Court is of the view that the decision in Modi Rubber Limited v. Union of India (supra) requires to be reconsidered by a Larger Bench. The issues referred for consideration by the Larger Bench are :

(a) Whether the process to which old tyres are subject to produce two or more pieces of cut tyre is ''manufacture'' within the meaning of Section 2(f) of the Central Excise Act, 1944? and

(b) In the above context, whether the decision of this Court in Modi Rubber Limited v. Union of India - 1987 (29) E.L.T. 502 (Del.) requires to be reconsidered?

16. The answer to the above questions will in turn determine if CVD can be levied on the cut tyre pieces imported by the petitioner.

17. The petition be placed before Hon''ble the Chief Justice for appropriate orders

for listing it before a Larger Bench on 9th September, 2016 at 2.15 pm for consideration of the questions referred to in Para 15 above.

