

(1996) 06 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 4079 of 1987

Vijay Kumar Bhatia (Huf)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-06-1996

Acts Referred:

Citation : (1997) 68 ECR 407 : (1997) 91 ELT 574

Hon'ble Judges : P.S. Patankar, J;M.B. Shah, J

Bench : Division Bench

Advocate : Shri P.A. Sawant, instructed by Gagrath and Co, for the Appellant; Shri M.I. Sethna, H.V. Mehta, Shri G.V. Rege and Shri Ashokan, for the Respondent

Judgement

P.S. Patankar, J.—The Petitioners imported cloves from Columbo, Ceylon in March, 1983 and filed Bs/E. It is the case of the petitioners that cloves are covered by Chapter 9 of the Customs Tariff Act, 1975 and are subject to duty under Heading 9.04/10 at a rate of Rs. 60/- per Kg. and it is standard rate of duty. By Notification No. 431/CUS dated 1st November, 1976, as amended, the 1st Respondent exempted, inter alia, cloves, when imported into India from Bangladesh or the Republic of Korea or Sri Lanka, from that portion of the duty of customs specified in the First Schedule as was in excess of the rate specified in the corresponding entry in column 4 of the said table. Therefore, according to the petitioners the rate of duty of Customs was calculated at the rate of Rs. 20/- per Kg. less 7.1/2%. The petitioners paid accordingly. But doubt was raised by some importers relating to interpretation of the words "Rs. 20/- per kg. less 7.5%" as to whether the 7.5% was to be treated as 7.5% of Rs. 20/- or 7.5% of ad valorem i.e. of the assessable value, CEGAT in CD Appeal No. 463/1985 (D) - The Collector of Customs, Madras v. M/s. Cortland Exports, Madras, held on 30.9.1985, that preferential rate of duty on cloves in terms of Notification No. 431/Cus. dated 1.11.1976 was Rs. 20/- per Kg. less 7.5% ad valorem was the correct view. Petitioners came to know about this and they filed application before the Respondent No. 3 on 6th June, 1987 for refund of Rs. 7721.62/- ps.

as the amounts were collected by Respondent in excess and unlawfully. But application was not decided and hence this petition was filed on 28th November, 1987.

2. The petitioners submit that the limitation prescribed by the Customs Act will not apply where the duty has been paid under a mistake of law or the duty has been recovered without the authority of law. This is disputed by Id. Counsel for Respondents who contended that the refund applications were barred by time as they were filed beyond 6 months in view of Section 27 of Customs Act, 1962.

3. It is not possible to accept the contention of Id. Advocate for petitioners. The Division Bench of this Court in Writ Petition No. 1656/87 and others decided on 6th/7th March, 1996 (Pfizer Ltd. & Ors.) 1996 ECR 155 (Bom.) considered the question whether refund of excise duty paid because of erroneous interpretation of Tariff Item or exemption Notification or ignorance of such Notification, despite the fact that such applications were filed before the authority beyond the prescribed period of six months as provided u/s 11-B of the Central Excises & Salt Act, 1944 can be granted or not. It was held that it cannot be granted, since 20th September, 1991 in view of amending Act 40 of 1991, Section 27 of Customs Act is *pari materia* same as Section 11-B of the Central Excises & Salt Act, 1944.

4. It was *inter alia* held by the Division Bench in Pfizer Ltd. & Ors. case that for getting benefit of the exemption Notification it is for the assessee to establish that the goods manufactured by him come within the ambit of the said exemption Notification. Further, it is also held that it is for the assessee to establish that the conditions which are stipulated in the exemption Notification are complied with by him and there is no question of any liberal construction to extend the terms and the scope of the exemption Notification, as the Notification is required to be strictly construed and the assessee has to bring himself within the ambit of a Notification.

5. It was further held that :

"24. The petitioners' claim would clearly be barred by delay and laches as it was the duty of the assessee to approach and apply to the authority for grant of exemption by showing that the petitioners were satisfying all the conditions precedent and have followed the procedure prescribed therein.

25. It is to be borne in mind that issuance of an exemption Notification in respect of a particular item does not render that item non-excisable. It only enables the manufacturer to claim exemption on the conditions specified therein being satisfied. *Re : Vee Kayan Industries, Batala Vs. Collector of Central Excise, Chandigarh, .* So the levy and payment of excise duty in such cases are under the provisions of the law and cannot be said to be without authority of law or illegal.

26. Further, the Assistant Collector has rightly refused to consider the said

application for refund as it was filed beyond the period prescribed u/s 11B of the Act. This aspect is also covered by the decision of the Supreme Court in the case of Paros Electronics (P) Ltd. Vs. Union of India and Another, . In that case, while dealing with the applications u/s 27 of the Customs Act, 1962 the Court held that in the proceeding which emanated for levy of duty the order became final and without having that order set aside by a competent Court there would be no question of grant of refund, merely on the ground that in some other case a different view was taken, even if the payment is made under mistake of law. As long as the order which became final stands, the authority cannot grant refund. The Court further held that if the application is u/s 27 of the Customs Act, then the authority, being a creation of the statute, must act within the ambit of that provision and if the application is delayed he has no alternative but to reject it as barred by limitation."

6. Further the question is also concluded by recent decision rendered by Supreme Court in case of Union of India and Another Vs. Kirloskar Pneumatic Company Limited, , wherein the Court after considering the provisions of Section 27(3) and (4) of the Customs Act, 1962 has held that it is not permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. It is held that power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law.

7. In this view of the matter, this petition is dismissed.

8. Rule discharged. No order as to costs.