

CASE NO.:
Appeal (civil) 863-864 of 1992

PETITIONER:
COLLECTOR OF CUSTOMS

APPELLANT

Vs.

RESPONDENT:
M/S. PRESTO INDUSTRIES

DATE OF JUDGMENT: 15/02/2001

BENCH:
B.N. Kirpal & Brijesh Kumar.

JUDGMENT:

J U D G M E N T
BRIJESH KUMAR, J.
L...I...T.....T.....T.....T.....T.....T...J

The question that falls for consideration in these appeals is as to whether or not, the respondent has been rightly given benefit of Notification No. 16/83-CE dated 11.2.1983, issued by the Central Government under Rule 8(1) of the Central Excise Rules, 1944, in regard to the payment of additional custom duty under Section 3(1) of the Customs Tariff Act, 1975, on the waste and scrap of imported Cellulose Acetate sheets.

We have heard Shri Mukul Rohtagi, learned Additional Solicitor General for the appellant and Shri V. Lakshmikumaran, learned counsel for the respondent.

The respondent, M/s. Presto Industries, is an industrial unit manufacturing combs and brushes, in Kandla Free Trade Zone, from the imported Cellulose Acetate sheets. On certain given conditions, exemption from payment of excise duty is admissible to the manufacturer in the Free Trade Zone. So far it relates to the resultant waste and scrap of the imported raw material, namely, Cellulose Acetate sheets, Customs Duty as well as additional duty is payable on the scrap being cleared for home consumption outside the Free Trade Zone. Undisputedly, on two clearances of the scrap, Custom Duty was assessed and the same was paid by the respondent. It was, however, later discovered during the audit that while assessing the liability, the respondent had been wrongly given benefit of Notification No. 16/83-CE dated 11.2.1983 and additional duty under Section 3 (1) of the Customs Tariff Act, 1975 was not levied. The duty was found to be short paid. Thus, two Demand Notices under Section 28 of the Customs Act, 1962 were issued in respect of two clearances, namely, Demand Notice No.FIZ/Cus/Demand/87-/7545/73 dated 26.6.1989 for a sum of Rs.60,480/- and Demand Notice No.FIZ/Cus/Demand/85-86/1347 dated 16.10.1989 for a sum of Rs.8870.40.

The aforesaid two demands for additional duty were

confirmed by the Assistant Collector (Custom), Kandla Free Trade Zone by order dated 22.6.1989 for a sum of Rs. 68076.40 and by order dated 16.10.1989 for a sum of Rs. 8870.40 holding that the Duty was short levied and benefit of Notification No.16/83-CE dated 11.2.1983 was wrongly made admissible to the respondent. It was also held that the waste and scrap item of Cellulose Acetate sheets was covered under Tariff Item No.15-A(1), explanation iii as provided in the foot note to Item No.15-A of the Central Excise Tariff. The exemption from payment of Central Excise Duty was held to be admissible only on fulfilment of certain conditions as contained in the Notification No.16/83-CE itself. Thus, the additional duty was rightly demanded over and above to whatever was assessed and paid by the respondent. The respondent preferred an appeal against the order of the Assistant Collector (Customs) to the Collector Customs (Appeals) who by order dated 12.3.1990 allowed the appeal holding that the benefit of Notification No.16/83-CE was admissible to the respondent. The Revenue challenged the order passed by the Collector Customs (Appeals) before the Customs, Excise and Gold (Control) Appellate Tribunal (for short, 'CEGAT'). The Tribunal dismissed the appeal by order dated 12.7.1991. Hence the appeals by the Revenue.

The Collector (Appeals) took the view that the whole Duty of Excise, leviable under Section 3 of the Central Excise Act, 1944 is exempted in respect of scrap for home consumption outside the Free Trade Zone, under Notification No.16/83-CE, therefore, no additional Duty in the nature of countervailing duty was liable to be paid. It was also found that the respondent had paid the Customs Duty on the scrap as required by Clause (b) to the Proviso to the Notification No.16/83-CE. The CEGAT upheld the order passed by the Collector of Customs (Appeals) finding that no additional duty of customs would be payable where Excise Duty is exempt under a Notification issued under Rule 8(1) of the Excise Rules 1944. It also relied upon the decision in *M.R.F. Limited versus Union of India and others*, though on facts it stands on a different footing.

The case of the assessee further is that since no Excise Duty is payable, no additional duty under Section 3(1) of the Customs Tariff Act, 1975 can be levied as additional duty could only be equal to the Excise Duty for the time being leviable on a like article if produced in India or in case it is not so produced the excise duty which would be leviable on the class or description of articles to which the imported articles belongs.

The main stress on behalf of the appellant is that the second condition as contained in the Notification No.16/83-CE has not been fulfilled hence exemption from Excise Duty would not be available to the respondent. That being the position, the additional duty as leviable is liable to be levied and paid under Section 3 (1) of the Customs Tariff Act, 1975.

Before entering into the discussion, it would be appropriate to peruse the provisions as contained under Section 3 of the Customs Tariff Act, 1975 as well as Notification No.16/83-CE issued under Rule 8 (1) of the Excise Rules, 1944. Section 3 of the Customs Tariff Act reads as under:

SECTION 3. Levy of additional duty equal to excise

uty.- (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this 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 excise 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.

Explanation.- In this section, the expression the excise duty for the time being leviable on a like article if produced or manufactured in India means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2) ..

(3) If the Central Government is satisfied that is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) ..

(5) ..

(6) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties, shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

A perusal of Section 3 (1) of the Customs Tariff Act quoted above shows that on any article imported into India, a duty in addition may be levied to be called 'additional duty equal to the excise duty for the time being leviable as may be in force on an item manufactured in India and in case it is not so manufactured, as may be leviable on the class or description of articles to which the imported article belong. It is also clear that the 'additional duty is in addition to the Customs Duty levied under Customs Act, 1962 on any article which is imported into India. The Customs Tariff Act provides for the rates at which duties of Customs are leviable under Customs Act, 1962 as specified in the two Schedules. The additional duty is in addition to what is specified in the first and second schedule of the Customs Tariff Act. It can be said that first part of Section 3 (1) of the Customs Tariff Act, 1975 is charging provision for the purposes of imposition of additional duty

and the latter part is in relation to quantification of the additional duty equal to Excise Duty. In regard to the question as to whether Section 3 (1) is a charging provision for additional duty or not, it was held by a Three Judge Bench of this Court in the case of Khandelwal Metal & Engineering Works that Section 3 (1) cannot be said to be an independent charging Section. It was held to be an extended provision of Section 12 of the Customs Act, 1962 for the purposes of additional duty. Later on however this question again came to be considered in the case of Hyderabad Industries Ltd. before a Constitution Bench of this Court and it was held that Section 3 of Customs Tariff Act is a charging provision for additional duty. It has also been held that under Section 3 of the Customs Tariff Act, the additional duty is not called a counter-vailing duty, it may though result in serving such purpose for manufacturer of such articles in India. It is to be noticed here that Sub-section (3) of Section 3 of the Customs Tariff Act makes a provision for levy of additional duty as would counter-balance the Excise Duty leviable on any raw material which may be over and above any duty levied under Sub-section (1). The said provision viz. Section 3(3) of Customs Tariff Act makes it clear that in the public interest an additional duty under Sub-section (3) can be levied as would counter-balance the excise duty. It is a provision independent of Sub-section (1) of Section 3 of the Customs Tariff Act taking care of counter balancing of Excise Duty.

We may now advert to the Notification No.16/83-CE to find out whether conditions laid in Clause (b) of the Proviso of the said Notification has been fulfilled or not. The Notification No.16/83-CE provides as under:-

Kandla Free Trade Zone

In exercise of the powers conferred by sub- rule (1) of rule 8 of the Central Excise Rules, 1944 the Central Government hereby exempts scrap or waste material arising in the course of production or manufacture of any goods in the Kandla Free Trade Zone, from the whole of the duty of excise leviable thereon under section 3 of the Central Excise and Salt Act, 1944 (1 of 1944):

Provided that:-

(a) such scrap or waste material is out of any goods brought into the said zone from a place outside India, and

(b) such scrap or waste material is cleared for home consumption outside the said zone on payment of duties of customs leviable thereon under any law for the time being in force."

The whole of the excise duty leviable under the Central Excise & Salt Act, 1944 is liable to be exempted, on scrap or waste arising in the course of manufacture of any goods in the Kandla Free Trade Zone, which is imported from outside India and it is cleared for home consumption outside the zone on payment of duties of customs leviable thereon under any law for the time being in force.. So far condition provided under clause (a) of the proviso there is no dispute. But as it relates to fulfilment of Clause (b) to proviso, it is in dispute. Admittedly additional duty leviable under Section 3(1) of the Customs Tariff Act has

not been paid. Their case is that basic customs duty has been paid which fulfils the requirement. The Notification however requires payment of duties of customs under any law for the time being in force. The additional duty leviable under Sub-section (1) of Section 3 of the Customs Tariff Act is not described or called as counter-vailing duty as observed in the case of Hyderabad Industries (supra) as well as in the case of Khandelwal Metal & Engineering Works (supra) despite the purpose whichever it may serve. There is a specific provision under Sub-section (3) of Section 3 of the Customs Tariff Act, 1975, quoted earlier, providing for levy of additional duty, whether on such item additional duty under Sub-section (1) of Section 3 is leviable or not, to counter-balance the Excise Duty. The clause (b) to the proviso to the Notification 16/83-CE provides for clearance of all duties of customs leviable under any law for the time being in force. It does not confine to payment of customs duty leviable under the Customs Act, 1962 alone. Therefore, additional duty levied under Section 3(1) of Customs Tariff Act shall also have to be cleared before claiming benefit under Notification No.16/83-CE. In the case of Hyderabad Industries Ltd. (supra), in paragraph 14 of the Judgment, it is held that there are different types of Customs Duty levied under different Acts or Rules. It includes Duty under Section 3(1) of the Customs Tariff Act. The para 14 is quoted below:-

14. There are different types of customs duties levied under different Acts or Rules. Some of them are:

(a) a duty of customs chargeable under Section 12 of the Customs Act, 1962;

(b) the duty in question, namely, under Section 3(1) of the Customs Tariff Act;

(c) additional duty levied on raw materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and

(d) duty chargeable under Section 9-A of the Customs Tariff Act, 1975.

The Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

Since it is found that the respondent did not pay the additional duty as leviable under Sub-section (1) of Section 3 of the Customs Tariff Act, 1975, it failed to comply with the condition as contained in Clause (b) to the proviso to the Notification No.16/83-CE dated 11.2.1983. The onus of proof of fulfilment of condition subject to which an exemption may be admissible lies on the assessee or upon a party claiming benefit under the Notification as also held in the case of Motiram Tolaram and another. So far the question of construing an exemption Notification is concerned, such Notifications are to be strictly construed. Where a condition precedent is not fulfilled before claiming any exemption, such benefit would not be admissible.

In the result it is found that due to non-payment of additional duty as prescribed under Section 3(1) of Customs Tariff Act, the respondent would not be entitled for the benefit of exemption from Excise Duty under Notification No.16/83-CE. It was wrongly made admissible to the respondent.

In view of what has been discussed above, the appeals are allowed and the orders passed by the Collector of Customs (Appeals) and CEGAT are set aside and the order passed by the Assistant Collector of Customs are restored. There would, however, be no order as to costs.

(B.N. Kirpal)
(Brijesh Kumar)

New Delhi
February 15, 2001

1987 (32) E.L.T. 465 (Madras) AIR 1985 SC 1211

1999) 5 SCC 15 (1999) 6 SCC 375 1