

SUPREME COURT OF INDIA

Thermax Private Limited

Vs.

Collector of Customs (Bombay) New Coustoms House

(S. Rangnathan, V.
Ramaswami, II and B.P. Jeevan Reddy JJ)

19.08.1992

JUDGMENT

RANGANATHAN, J.

These two appeals by Thermax (Pvt.) Ltd. (hereinafter referred to as 'the assessee') raise a question of interpretation of two similar notifications issued under S.8 of the Central Excises & Salt Act, 1944 ('the Act', for short).

The assessee imported goods described as "Sanyo Single Effect Chiller" from Japan for the purpose of using the same for refrigeration/air conditioning of the factories of Indian Rayon Corporation at Veraval and Nirlon Synthetics Fibre and Chemicals Ltd.. It paid the customs duty leviable thereon at the appropriate rate under the relevant entry of the customs tariff but claimed exemption from the additional duty of customs leviable under S.3(1) of the Customs Tariff Act, 1975 (C.T. Act, in short). The relevant portion of the said section reads thus:

"3. (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 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 a class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty"

(Underlining Ours)

In view of the language of the above provision, it is common ground between the parties that notifications of exemption from central excise duty issued from time to time under S.8.(1) of the Act would be applicable, in the case of imported goods, for determining the leviability of the

additional duty under S.3(1) above-mentioned. In other words, if any goods are entitled to full or partial exemption from payment of central excise under any such notification, the exemption or concession would also extend to the additional duty payable under S.3(1) of the C.T. Act, subject, of course, to the fulfillment of any conditions or requirements that may have to be complied with for availing the exemption under any particular notification.

The assessee, in the present case, cleared the imported goods after paying the customs duty as well as the additional duty (hereinafter referred to as 'CVD') but, on second thoughts, decided that it should have claimed a concession in respect of the CVD on the strength of notifications nos. 63/85 and 63/85 and 93/76 issued under S.8 of the Act. It, therefore, made applications for refund of the CVD but these were rejected by the Assistant Collector of Customs by his orders dated 25.2.85 and 30.9.85.

The assessee appealed to the Collector of Customs (Appeals) from these orders. The Collector allowed the appeal from the order dated 25.2.85 but his successor-in-office, who dealt with the appeal from the later order of 30.4.85, took a different view and dismissed the assessee's appeal. The assessee as well as the department preferred appeals from the respective order which went against them. The Tribunal accepted the department's appeal but dismissed the assessee's appeal. Hence these two appeals by the assessee.

It is common ground that customs duty is payable and has been paid on the imported goods under customs tariff item no. 84.17(1) at 40% of the value of the imported goods plus a surcharge of 25% thereon. The rate of CVD, however has to be determined on the basis of item no. 29A of the central excise tariff. It is common ground that "chillers" fall under sub-item (3) of item 29A and that the basic excise duty payable thereon was at 80% of the value of the goods under the above item read with notification 42/84-C.E. dated 1.3.84.

However, the S.8. notifications referred to earlier provide a further concession. Notification no. 93/76-C.E is relevant for the purposes of the first appeal while notification no.63/85-C.E. is relevant for the purposes of the second. The notifications are somewhat differently worded. It is, however, common ground that the two notifications are worded alike in all respects material for the purposes of the present appeals. It is therefore sufficient if the terms of notification no. 63/85 dated 17.3.85 are extracted here. It reads :

EFFECTIVE RATES

63/85-CE, Dt.17.3.1985

"Effective rates of duty on Refrigerators, Evaporative type of Coolers, Air-conditioning appliances, etc. and parts thereof prescribed.

In exercise of the powers conferred by sub-rule (1) rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods of the description specified in column (3) of the Table hereto annexed and falling under the sub-item specified in the corresponding entry in column (2) of the said Table, of Item No. 29A of the First Schedule to the Central Excises and Salt act, 1944 (1 of 1944), from so much of the duty of excise leviable thereon under the said Act at the rate specified in the corresponding entry in column (4) of the said Table subject to the conditions, if any, laid down in the corresponding entry in column (5) thereof.

TABLE

----- Sl. | Sub | Description | Rate | Condition No. | Item |

| |

| No. | | |

1. | 2. | 3. | 4. | 5.

1. | (1) | Refrigerators and | |

| | other refrigerating | |

| | appliances- | |

| | (i) Water-coolers | Nil |

| | (ii) Domestic | Twenty |

| | refrigerators of | five per |

| | capacity not exceeding | cent ad |

| | 165 litres | valorem. |

| | (iii) Others | Fifty per |

2. | (2) | Evaporative type of | cent ad | If- | | coolers | valorem | (i) the said

3. | (2) | Air conditioners and | Thirty pe | goods are so | | and other airconditio | rcent ad | used; | | ning
appliances | valorem | (ii) the said | | including package type | Twenty- | goods are not | | airconditioners;
| five per | resold within | | split unit aircondi- | cent ad | a period of | | tioners, the cooling | valorem. |
five years | | or room unit and | | from the

| | condensing unit there- | |

| | fore required for use | |

| | in any of the follow- | |

| | ing namely :- | |

----- 949

----- Sl. | Sub | Description | Rate | Condition No. | Item | |

|

[No. | |]

----- | (i) Computer Rooms. | date of in- | (ii) Research
and Devel- | stallation and | opment Laboratories. | (iii) the | (iii) Animal Houses. | | procedure |
(iv) Telephone Exchanges | specified | (v) Broadcasting Studios | in Chapter | (vi) Trawlers. | | X
of the | (vii) Dams. | | Central

| (viii) Mines and Tunnels | Excise Rules, | (ix) Thermal or hydel | | 1944, is | | power stations. | |
followed. | (x) Technical Building | |

| of Military Engineering | |

| Services and Mobile Tro- | |

| po and Mobile Radar Unit | |

| under the Ministry of | |

| Defence. | |

| (xi) Any hospital run by | |

| Central Government, State | |

| Government or a Local | |

| Authority. | |

| (xii) Any hospital run | |

| by a Public Charitable | |

| Institution, the income | |

| from which is exempt | |

| under sub-section (22A) | |

| of section 10 of the | |

| Income Tax Act, 1961 | |

| (43 of 1961). | |

| (xiii) Any factory. | |

|(xiv) Electricity load ||

|despatch centres. ||

|(xv) Indian Naval Ships ||

4. |(3) |Parts of refrigerating || |and airconditioning |Eight || |appliances and machinery|per cent || |all sorts, the following|ad valorem | |namely:- ||

----- 950

----- Sl. |Sub | Description | Rate | Condition No. |Item| ||

[No. || |

----- |(i) Cooling coils or ev-| |

|aporator. ||

|(ii) Compressor ||

|(iii) Condenser. ||

|(iv) Thermostat. ||

|(v) Cooling unit (exclu-| |

|ding the room unit of ||

|split unit air-condition| |

|er), and in the case of ||

|absorption types of ||

|refrigerators in which ||

|there is no ||

|compressor, heater ||

|including burners and ||

|baffles in a karosene ||

|operated absorption type| |

|refrigerator. ||

|(vi) Starting relay |

|controls (including |

|expansion valve and |

|solenoid valves) and |

|pressure switches. |

|(vii)Overload protection|

|/thermal rely. |

|(vii) Cabinet. |

5. |(3)Parts of refrigerating | |and air-conditioning ap-|

|pliances and machinery, | Nil | |all sorts, other than |

|those specified inS.No.4|

|above. |

6. |(3) Parts of refrigerating |Twenty |If- |machinery as specified |five per |(i) the said | |in S.No.4
above and |cent ad |parts are used |required for use in a |valorem. |in the said |cold storage for
storage|cold storage; |and preservation of the |and |food stuffs specified in|(ii)the |paragraph 3
of the Cold |procedure |Storage Order,1964 dated|specified in |the 3rd September, 1964 |
Chapter X of | |the Central

| |Excise Rules,

| |1944 is fol-

| |lowed.

----- 951

----- Sl. |Sub | Description | Rate | Condition No. |Item| |

[No. | |

7. |(3)Parts of refrigerating |Twenty fiv|If- |appliances and machinery|e percent |(i) the said |of
the description speci|ad valorem|parts are so |fied in S.No.4 above and|used;and |required for use
in the | |(ii) the | manufacture of- |procedure | |(a)refrigerating vans, |specified in |including

wagons for | |Chapter X of | |transport of perishables| |the Central | |food and dairy products;| |Excise Rules, | |(b)ships, including | |1944 is | |frigates where provision| |

| |is made for the preser- | |

| |vation of perishable | |

| |goods in transport. | |

8. | (3)|Parts of refrigerating |Twenty five|If- | |and air-conditioning app|eper cent |(i)the said | |liances and machinery of|ad valorem|parts are so | |the description specifie| |used;and | |d in S.No.4 above and | |(ii)the | |required for use in refr| |procedure | |igerating or air-conditi| |specified in | |ng appliances or machine| |Chapter X of | |ry conditioning applianc| |Central | |es or machinery in any | |Excise Rules, | |of the following,namely:- |1944 is | | | |followed.

| |(i) Computer Rooms. | |

| |(ii)Research and Devel- | |

| |opment Laboratories. | |

| |(iii) Animal Houses. | |

| |(iv)Telephone Exchanges. | |

| |(v) Broadcasting Studios | |

| |(vi) Trawlers. | |

| |(vii) Dams. | |

| |(viii) Mines and Tunnels | |

----- 952

----- Sl. |Sub | Description | Rate | Condition No. |Item| | |

|No. | | |

----- | |(ix)

Thermal or hydel | |

| |power stations. | |

| |(x) Technical Building | |

| | of Military Engineering | |

|| Services and Mobile ||

|| Tropo and Mobile Radar ||

|| Unit under the Ministry ||

|| of Defence. ||

|| (xi) Any hospital run by ||

|| the Central Government, ||

|| State Government or a ||

|| Local Authority. ||

|| (xii) Any hospital run ||

|| by a Public Charitable ||

|| Institution, the income ||

|| from which is exempt ||

|| under sub-section (22A) ||

|| of section 10 of the ||

|| Income Tax Act, 1961 ||

|| (43 of 1961). ||

|| (xiii) Any factory. ||

|| (xiv) Electricity load ||

|| despatch centres. ||

|| (xv) Indian Naval Ships. ||

9. | Compressors used in the | Nil | If such use is | manufacture of water | elsewhere than | coolers. |
| in the factory | | of production

|| | of the said

|| | compressors

|| | then procedure

|||prescribed

|||under Chapter

|||X of the

|||Central Excise

|||Rules, 1944 is

|||is followed.

----- 953

It will be seen that the goods set out in the notification are mostly exigible to excise duty at the concessional rate of 25% ad valorem provided that they fulfill the conditions set out in column (5) of the above table. It is again common ground that the item of goods presently in question is one of those mentioned in S.NO.8, sub-item no. (3) of the notification and that it also conforms to the description of the said item as set out in column (3) of the above table. Turning to column (5), it requires the fulfillment of two conditions to enable the assessee to get the concession :

(i) that the said parts should be so used i.e. used in refrigerating or air-conditioning appliances or machinery in any one of the places set out as items (i) to (xv) column (3) against item 8(3); and (ii) that the procedure specified in Chapter X of the Central EXcise Rules, 1944 is followed. Here parties are agreed that the chillers imported by the assessee are used in a factory-wide item (xiii) - and that, therefore the first of these conditions has been fulfilled.

These assessee's claim for concession has, however, been rejected not on the ground that the second of the above conditions has not been fulfilled but on the broader ground that the procedure of Chapter X is designed to facilitate clearances only for the purposes of central excise and that the said procedure cannot be fulfilled at all in the case of an importer. In other words, the view was that the second condition was such that it was attracted only for purposes of central excise and could not at all be invoked to claim a concession in CVD. It is the correctness or otherwise of this conclusion that has to be determined in these appeals. This takes us to a consideration of the provisions of Chapter X of the Central Excise Rules, 1944. This Chapter provides for a "remission of (central excise) duty on goods used for special industrial purposes". Rule 192 is the principal rule in this Chapter which reads thus: "Rule 192. - Application for concession - Where the Central Government has, by notification under rule 8 sanctioned the remission by duty on excisable goods other than salt, used in a specified industrial process any person wishing to obtain remission of duty on such goods, shall make application to the Collector in the proper Form stating the estimated annual quantity of the excisable goods required and the purpose for and the manner in which it is intended to use them and declaring that the goods will be used for such purpose and in such manner. If the Collector is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue, and if he is satisfied, either by personal inspection or by that of an officer subordinate to him that the premises are suitable and contain a secure store- room suitable for the storage of the goods, and if the applicant agrees to bear the cost of such establishment as the Collector may consider necessary for supervising operation his premises for the purposes of this Chapter, the

Collector may grant the application, and the applicant shall then enter into a bond in the proper Form with a surety or sufficient security, in such amount and under such conditions as the Collector approves. Where, for this purpose, it is necessary for the application along with the proof for payment of licence fee and shall then be granted a licence is the proper Form. The concession shall, unless renewed by the Collector, cease on the Expiry of the Licence.

Provided that, in the event of death, insolvency or insufficiency of the surety, or where the amount of the bond is inadequate, the Collector may, in his discretion, demand a fresh bond: and may, if the security furnished for a bond is not adequate, demand additional security".

Rules 193 to 196-BB make provisions for proper packing and transport of the goods in question to the premises of the applicant, their storage in a distinct and separate place under the control of the applicant, the maintenance of proper accounts in respect thereof, controls over their transfer and movement and finally regarding the disposal of such goods where they are found to be in surplus or defective or damaged and even of the refuse resulting from their use in the specified industrial process. It is unnecessary to go into the details of these provisions for our present purposes. Though the latter part of Rule 192 also enables an applicant where necessary, to obtain a licence in Form L-6 and also prescribes a form of application (Form AL-6) for grant of duty concession on goods purchased for the process of manufacture during the period of currency of the licence, the opening words of the rule are very wide and general. The benefit of Chapter X will no doubt generally be claimed by manufacturer in which event he will have to make the application, get the licence and give the assurances, bond or guarantee required by the rules but it can also be claimed by other persons. The language of the rule applies to any person, not necessarily manufacturer, wishing to obtain remission of duty sanctioned by a notification under rule 8 on excisable goods in a specified industrial process. The industrial processes specified in Column (2) are also not very complicated or elaborate in every case. Even a purchase by a person for use of the part in question in a factory could be covered by the scope of Column (2). Such a person has only to make an application setting out the quantity of goods required as well as the manner and purpose of their use and give a declaration that they will be used for the specified purpose. Thereupon the Collector, if satisfied that the concession can be granted without danger to the revenue may grant the application subject to the conditions set out in the section. He may grant a licence in Form L-6 in appropriate cases and, in others, direct the grant of a certificate in Form CT-2. The possession of the licence or the production of the CT-2 certificate enables the applicant to secure the necessary concession. It will at once be seen that there is nothing in the scheme of the rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, as use which qualifies for the concession under the S.8 notifications. The types of use specified in the concessions notified could be of any kind and, even in the notifications under our consideration, they are many and varied. In respect of items, falling under S.Nos. 3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question in an "industrial process" in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at nil rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfills the requirements of Rule 192. Since the

concession under Rule 192 turns only on the nature and use to which the goods are put by the user or purchaser thereof and on whether he has gone through the procedure outlined in Chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by S.3(1) of C.E.T. Act which specifically mandates that the CAV will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person to the using the goods is entitled to the remission, the importer will be entitled to say that the CVD should only be the amount of concessional duty and, if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assessee could not get a refund because the procedure of Chapter X of the rules is inapplicable to importers as such.

Learned counsel for the assessee however contended that, even if the conclusion of the Tribunal that the procedure of Chapter X of the rules cannot be complied with in such cases is correct, the exemption under the notification cannot be denied. He relied, in support of this submission on a letter of the Central Board of Excise & Customs (F.No.332/65/86 TRV dated 27.7.87) the relevant portion of which runs as under :

"The Board is of the view that it would legally not be correct to levy additional (counter-valing) duty is actually payable in respect of such goods when manufactured in India (sic). It follows therefore, that when there is no excise duty, there can be no additional (counter-valing) duty. The conditions in the relevant Central Excise Notifications that in respect of use of the material elsewhere than in the factory of manufacture, the procedure set out in Chapter X of the Central Excise Rules should be followed is condition relating to procedural requirement which obviously cannot be satisfied by the imported goods.

In view of the above, it would not be correct to deny the benefit of exemption notification to imported goods only because the procedural condition in the notification is not satisfied by the imported goods. It has therefore, been decided that wherever the intended use of the material can be established by the importer who may be the manufacturer of chemicals or from other evidence, the benefit of exemption under the exemption notification should not be denied to imported goods only because the procedural condition of following Chapter X procedure is not complied with." It will be seen that this letter also proceeds on the same view as that of the Tribunal that Chapter X procedure cannot be satisfied in the case of imported goods. This is at variance with the interpretation which we have placed on rule 192. We, however, agree with the observation of the Board that the benefit of exemption or concession should be granted wherever the intended use of the material can be established by the importer or by other evidence. This conclusion however does not entitle the assessee to the concession claimed in both these appeals. Its entitlement will depend on whether the purchaser is the holder of an L-6 licence (or C.T.-2 certificate) or not.

The tribunal has pointed out that the goods were supplied by the assessee to Indian Rayon Corporation and M/s Nirlon Synthetics Fibre and Chemicals, Ltd., of which the latter was the holder of L-6 licence. The position in regard to the former is not known. The grant of concession in respect of the former by the Collector (Appeals) in the first appeal is, therefore, correct and is upheld. So far as the other appeal is concerned, the assessee produced no material to show that the "beneficiary" factory was eligible for the concession under rule 192. The benefit of such concession to the assessee must therefor be held to have been rightly denied in that appeal.

Shri A.K. Ganguly, on behalf of the Revenue, raises a contention that, even assuming that the goods fulfill the conditions of the notification referred to earlier, the CVD rate applicable would be 80% by virtue of the Explanation to S.3(1) of the C.E.T. Act. He submits that the goods imported by the assessee are "parts of refrigerating and air-conditioning equipment". They are chargeable at different rates of duty accordingly as they fall under item with serial no.4 (80%) or that with serial no. 5 (Nil) or that with serial no. 6 (20%) or that with serial no 7 & 8 (25%). In such a situation, he says, the provisions of the Explanation to S.3(1) are attracted and hence the assessee will be liable to duty at the highest rate of 80% we are loth to permit the Department to raise at this stage a fresh contention not taken before the Tribunal or earlier. That apart, we do not think it is well-founded. It is no doubt true that Item 29A of the Schedule to the C.E. Act is very wide and covers various articles. The notification also deals with various categories of articles falling under that item. But there has been no dispute at any stage that the goods we are concerned with fall under item with serial 8(3) of the notification. So far as this category of goods is concerned, there is only one rate of duty mentioned in the notification. The fact that certain other parts of refrigerating and air-conditioning appliances and machinery may fall under item with S.No.4(3) or elsewhere cannot attract the higher duty the goods presently under consideration. The Explanation to the notification is applicable only where goods of exactly the same description attract different rates of duty. See, in this connection, the decisions on analogous provision in Collector of Customs v. Western Indian Plywood Manufacturing Co. Ltd. and Collector of Customs v. Hansur Plywood Works, [1989] Suppl. 2 S.C.C. 515 and 520. We therefore, reject this contention. For the reasons stated above, we allow C.A. 4693/90 treating it as the appeal arising out of the order passed by the Tribunal from the order of the Collector of Customs dated 16.4.85. C.A. 4694/90 will however stand dismissed but, in the circumstances, without costs. G.N. C.A. 4693/90 allowed,

C.A. 4694/90 dismissed.

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