SUPREME COURT OF INDIA

Lohia Sheet Products

Vs.

Commissioner of Customs, New Delhi

C.A.No.2411 of 2002

(Ashok Bhan and J.M.Panchal JJ.)

05.03.2008

JUDGMENT

Ashok Bhan, J.

1. The appellants have filed these appeals under Section 130-E of the Customs Act, 1962 against the Final Order No.547-548 of 2001-B dated 11th December 2001 passed by the Customs, Excise & Gold (Control) Appellate Tribunal [for short, 'the Tribunal'], New Delhi whereby the Tribunal has rejected the appeals filed by the appellants and held that the appellants had not satisfied the conditions for availing the benefit of the Notification No.8/96-CE dated 23rd July 1996 on the ground that the copper waste and scrap used by the appellants had been imported and had not been generated in the factory of production. C.A.No.2411/02.... (contd.) - 2 -

2. The issue involved in these appeals is as to whether the scrap imported by the appellants is chargeable to 'NIL' rate of additional customs duty under Section 3 of the Customs Tariff Act 1975.

3. The facts of the case, in brief, are enumerated herein below.

4. In the year 1996-97, the appellants imported copper/brass waste and scrap for use in the manufacture of handicrafts and filed bills of entry and claimed benefit under Exemption Notification No.8/96-CE dated 23rd July 1996. In order to avoid unnecessary delay and demurrage, the appellants paid the duty under protest and filed refund claim before the Asst. Commissioner, ICD, Tughlakabad.

5. Department questioned the refund claim of the appellants by issuing notice dated 10th September 1998 to show cause as to why their refund claim be not rejected as the Tariff Heading 7404.10 would be applicable to the waste which was generated during the process of production only in the factory and then used in the same factory of production for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicrafts and hence, the imported goods fall outside the purview of exemption under Central Excise Tariff Heading 7404.10. Despite the opportunity of personal hearing having been given to the appellants, no one appeared before the Asstt. C.A.No.2411/02.... (contd.) - 3 -Commissioner (Refund) who, having gone through the record and the facts of the case rejected the claim of the appellants by an order dated 15th October 1998 by observing thus:

> "The tariff heading 7404.10 exempts waste and scraps which is generated during the process of production in the factory and then used in the same factory of production for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicraft. Therefore, there is no substance and legal force in the claimant's contention that the brass/copper scrap imported by them is covered under Chapter Heading 7404.10 and is exempted from payment of CVD. Hence, the duty has been

charged and paid correctly in the case under reference and there is no question of incidence of any refund. The refund claim therefore merits rejection."

6. This finding arrived at in the order in original was confirmed by the Commissioner of Customs (Appeals) by an order dated 13th June 2001. Being aggrieved, the appellants filed appeal before the Tribunal which has been dismissed by the impugned order, holding that the condition of the notification of the Tariff Heading 7404.10 had not been satisfied by the appellants as the copper waste and scrap had been imported by the appellants from foreign country and the same had not been generated in the factory of the appellants. Hence, this appeal.

7. Relevant portion of Section 3 of the Customs Tariff Act 1975 provides as under:

"Levy of additional duty equal to excise duty.-(1) any article which is imported into India shall, in addition, C.A.No.2411/02.... (contd.)- 4 -be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being livable on a like article if produced or manufactured in India and if such excise duty on a like article is livable 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. Provided.....Explanation.- In this section, the expression "the excise duty for the time being livable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be livable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be livable on the class or description of articles to which the imported article belongs, and where such duty is livable at different rates, the highest duty."

8. In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act 1944, the Central Government, in public interest, exempted goods specified in column (3) of the Table annexed to the notification and falling within the Chapter, Heading No. or sub-heading No. of the Schedule to the Central Excise Tariff Act, 1985, specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise livable thereon which is specified in the said Schedule, as is in excess of the amount calculated 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 or as mentioned in the said column (5) and specified below the said Table. Entry 74.04 in the said Table reads thus:C.A.No.2411/02.... (contd.)- 5 - 74.04Copper waste and scrap used Nil Within the factory of production For the manufacture of unrefined Or unwrought copper, copper sheets Or circles and handicrafts.

9. Authorities below and the Tribunal have denied the relief to the appellants holding that the exemption notification is not applicable to the appellants.

10. Counsel for the appellants has contended that mere fact that the goods were imported would not make any difference; that the intention of the Legislature was to grant exemption under the notification so as to prevent duty being paid at two stages. In the present case, as the appellants have paid an amount equivalent to the excise duty at the time of import of the waste and scrap, they could not be asked to pay the countervailing duty; that if the benefit of the notification is not given to the appellants, it would mean double payment of duty which goes contrary to the law laid down by a Constitution Bench decision of this Court in the case

of *Hyderabad Industries Ltd. v. Union of India*[1] According to the counsel for the appellants the Tribunal committed an error in restricting C.A.No.2411/02.... (contd.)- 6 -the scope of the impugned notification to the copper/brass waste generated in the factory of production for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicrafts and thereby rejecting the appellants' claim for refund simply because they had imported the said waste/scrap and then used it within the factory of production for the manufacture of final product.

11. As against this, counsel for the respondent contended that the phrase, 'within the factory of production' pre-supposes that only that waste and scrap is exempted from payment of duty which is generated and then used within the factory of production and since in the present case the waste and/or scrap had been imported from abroad, it cannot be said that it is being used in the factory of production.

12. Counsel for the parties has been heard.

13. Admitted facts are that the appellants had imported copper/brass waste and/or scrap. They had used the imported waste and scrap in the manufacture of handicrafts; had paid duty on the imported copper waste and scrap. The only dispute is whether they are required to pay countervailing duty under Section 3(1) of the Customs Tariff Act.

14. The explanation to the sub-section (1) of Section 3 clarifies the expression, "the excise duty for the time being livable on a like article if produced or manufactured in India" C.A.No.2411/02.... (contd.)- 7 -used in the said Section that excise duty which would be livable on a like article if produced or manufactured in India. It further clarifies that if a like article is not so produced or manufactured which in turn clarifies that for the purpose of levy of additional duty actual production or manufacture of like article is not necessary.

15. Entry 74.04 can be divided into three parts, viz., (i) copper waste and scrap; (ii) used within the factory of production; and (iii) for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicrafts. The sum and substance of the entry, in our opinion, is that if a manufacturer uses copper waste and scrap within the factory of production for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicrafts, then it would be entitled to the exemption under the impugned notification. In the present case, the appellants satisfy all the three conditions as they had used the copper/brass waste and/or scrap within the factory of production, and for the manufacture of handicrafts. The entry nowhere uses the word 'generated' or 'imported'. The condition that only that scrap would be entitled to exemption which has been generated in the factory of production is, therefore, unwarranted and unsustainable. The word, 'within' occurs after the word, 'used'. The assessing authority as well as the Tribunal has arrived at the finding C.A.No.2411/02.... (contd.)- 8 -that only that scrap/waste of copper would be entitled to the exemption which had been generated in the same factory because of the word, 'within' used in the heading 74.04. According to them, the word, 'within' pre-supposes that the copper waste and scrap was generated in the same factory. We are unable to read the entry in the manner as suggested by the Revenue.

16. The test laid down by the Tribunal that the benefit of the notification/tariff heading would be admissible to only that copper waste and scrap which is generated in the factory of

production and not the imported waste and scrap, is not supported either by the text of the exemption notification, heading 74.04 or any other authority.

17. This *Court in the case of Thermax Pvt. Ltd. v. Commissioner of Customs*[2] has held that 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 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 was an importer and not a manufacturer. In other words, this Court stated in specific terms that one has 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. The decision of the Tribunal C.A.No.2411/02.... (contd.)- 9 -that the assesses could not get a refund because the procedure of Chapter X of the Rules is inapplicable to importers as such was held to be wrong. It was further held that the benefit of the exemption or concession should be granted wherever the intended use of the material can be established by the importer or by other evidence. In the present case, it is a matter of fact that duty was paid by the appellant at the time of import of waste or scrap. Mere fact that the goods were imported would not make any difference. The intention behind the grant of exemption under the notification was to prevent the duty being paid at two stages. In the present case, an amount equivalent to the excise duty had been paid by the appellants at the time of import on the waste and scrap. If the benefit of the notification is not given to the appellants it would mean double payment of duty which goes contrary to the law laid down by the decision of the Constitution Bench of this Court in the case of Hyderabad Industries Ltd. (supra). This Court in the said judgment held as under:

> "Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty livable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is livable at a rate equal to the excise duty for the time being livable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being livable on a like article if produced or manufactured in India".

18. The explanation to Section 3 has two limbs. The C.A.No.2411/02.... (contd.) - 10 - first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being livable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured". The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced of (sic) manufactured in India.

19. The words "if produced or manufactured in India" do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or

produced article the actual manufacture or production of a like article in India is not necessary. As observed by *this Court in Thermal Private Limited v. Collector of Customs, Bombay*[3] at page 452-453 that Section 3(1) of the Customs Tariff Act "specifically mandates that the CVD will be equal to the excise duty for the time being livable 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." To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is livable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was livable thereon.

20. For the reasons stated above, we accept these appeals, C.A.No.2411/02.... (contd.) 11 -set aside the order of the Tribunal as well as that of the authorities below and it is held that the appellants would be entitled to the benefit of the exemption notification no.8/96-CE dated 23th July 1996 and consequently to the refund of the duty already paid in accordance with law. No costs.

[1]*(1999)108 ELT 0321 SC*

[2]*(1992) 61 ELT 0352 SC*

[3]*199261 E.L.T. 0352 S.C1992 4 SCC 0440*