**SUPREME COURT OF INDIA**

Jaswal Neco Ltd.

Vs.

Commissioner of Customs Visakhapatnam

C.A.No.7189 of 2005

(A.K.Sikri and R.F.Nariman,JJ.,)

04.08.2015

**JUDGMENT**

**R.F.Nariman,J.,**

1. The appellant is engaged in the manufacture of pig iron. The appellant imported Low Ash Metallurgical (LAM) Coke under seven Bills of Entry, against four advance licenses without payment of basic customs duty (BCD) levied under Section 12 of the Customs Act, 1962, special customs duty (SCD) levied under Section 68 of the Finance Act, 1996, special additional duty (SAD) levied under Section 3A of Customs Tariff Act, 1975 and Anti-dumping duty (ADD) levied under Section 9A of the Customs Tariff Act, 1975 during the period June 1998 to August 1998, which were exempt from duty vide (i) Notifications No. 30/97 Cus dated 1.4.1997, (ii) Sr. No.4 of Notification No.12/97 Cus dated 1.3.97, (iii) Sr. No.3 of the Notification No.34/98-Cus dated 13.6.1998, and (iv) Notification No.41/97-Cus dated 30.4.97 respectively.

2. At the time of import, the appellant furnished a bond containing an undertaking to pay duty on imported goods cleared under Notification No.30/97 and 41/97 in the event of failure to fulfill its export obligation.

3. It is an admitted position that the appellant failed to fulfill its export obligation in the terms of the exemption notifications. The entire LAM so imported has instead been used by the appellant in its factory for the manufacture of pig iron.

4. Demand of duty of Rs.7.21 crores was sought to be raised. The break up of demand of Rs.7.21 crores is as under:

> "1. Basic Customs Duty Rs.1.01 crores
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> 2. Antidumping DutyRs.5.00 crores
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> 3. Special Customs Duty Rs.0.50 crore

4. Special Additional Duty Rs.0.66 crore

5. Cess Rs.0.02 crore

Total Rs.7.21 crores"

5. Pending final adjudication of the show cause notice by the Commissioner, the appellant duly paid the entire duty payable towards BCD, SAD and SCD after considering partial exports already made. The appellant did not make any payment towards ADD.

6. The Commissioner of Customs vide Order dated 4.11.2004 confirmed the duty demand of Rs.3.37 crores and imposed a penalty of Rupees Twenty lakhs. According to the learned Commissioner, since the appellant after issuance of the show cause notice paid duty of Rs.1,66,18,563/-, the differential duty to be paid amounted to Rs.1,70,98,510/-. Further, interest on the said amount at 24% was also held to be payable.

7. The appellant appealed to CESTAT. Vide the impugned judgment dated 18.8.2005, CESTAT partly allowed the appeal by remanding the matter to the original authority to calculate duty, interest, and penalty in accordance with the findings contained in its judgment. The basic difference between CESTAT's judgment and that of the Commissioner is that interest was reduced from 24% to 15%, but the Anti-dumping duty was increased by applying the higher rates specified by the final Notification No.69 of 2000.

8. Shri Lakshmikumaran, learned advocate for the appellant did not dispute before us that the appellant failed in its export obligations and was, therefore, not liable to be exempted so far as customs duty is concerned. He, therefore, conceded that basic customs duty and the special customs duty as well as special additional duty was payable by the appellant. However, he disputed that Anti-dumping duty was payable at all stating that the appellant was exempt under Notification No.69 of 2000. He further argued that no interest is chargeable on any of the four duties inasmuch as the bond that was furnished under Notification No.30 of 1997 did not stipulate that in the event of default, interest would become payable. Further, according to him, it is clear that the assessment in the present case is only provisional and that being the case, even if the provisions of the Customs Act are made applicable insofar as Anti-dumping duty is concerned, under the Customs Act itself there was no provision for collection of interest for the period in dispute as Section 18 was amended to include such a provision only prospectively with effect from 2006. He further argued, that in any case Anti-dumping duty could not be added for purposes of computing customs duty, special customs duty and special additional duty. Also no penalty is imposable inasmuch as nothing contumacious was done by the appellant and the export obligation could not be fulfilled only because of bonafide commercial impossibility. It is contended that nothing has been diverted to the domestic tariff area and sold in that area, and the entire imports made have been used by the appellant captively in its factory for the manufacture of pig iron. He further argued that he could not be worse off in an appeal filed only by the appellant herein to CESTAT and that on the assumption that the appellant was liable to pay

Anti-dumping duty, they should only pay the said duty at the lower rate prescribed by the Commissioner as Revenue had not appealed to the Tribunal against the Commissioner's order.

9. Shri Radhakrishnan, learned senior counsel appearing on behalf of the revenue countered the aforesaid submissions and submitted that the exemption contained in the Anti-dumping duty Notification 69 of 2000 was only prospective and, hence Anti-dumping duty had to be paid for the relevant period. He further submitted that interest in any case was payable as Notification No.30 of 1997 independently levied a charge of interest. Further, he also supported the Commissioner's order and the Tribunal so far as the various other aspects of this appeal are concerned.

10. We have heard learned counsel for the parties. In order to appreciate the first submission of Shri Lakshmikumaran, namely, that Anti-dumping duty in the present case ought to be nil, we set out the relevant Notifications –

> "Notification: 22/98-Cus. Dated 06-May-1998 Metallurgical coke originating in or exported from China PR - Anti-dumping duty In exercise of the powers conferred by sub-section (2) of section 9A of the Customs Tariff Act, 1975 (51 of 1975), read with rule 13 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government on the basis of the preliminary findings of the designated authority, published in the Gazette of India, Extraordinary, Part I, Section 1, dated the 20th March, 1998 that there is dumping in respect of the Metallurgical coke falling under Heading No. 27.4 of the First Schedule to the said Act, and originating in or exported from China PR, hereby imposes on the said Metallurgical coke originating in or exported from China PR, and imported into India, an anti-dumping duty at the rate of one thousand eight hundred rupees per metric tonne. This notification shall have effect upto and inclusive of the 5th day of November, 1998." "Notification: 82/98/Cus. Dated 27-Oct-1998 Metallurgical coke originating in, or exported from, China PR - Anti-dumping duty - Notification No. 22/98-Cus. Rescinded In exercise of the powers conferred by sub-section (2) of section 9A of the Customs Tariff Act, 1975 (51 of 1975), read with rule 13 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government hereby rescinds the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 22/98-Customs, dated the 6th May, 1998, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide G.S.R. 243 (E), dated the 6th May, 1998." Notification: 81/98-Cus. Dated 27-Oct-1998 Metallurgical coke (Metcoke) originating in, or exported from, China PR - Anti-dumping duty
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> "Now, therefore, in exercise of the powers conferred by sub-section (1) of section 9A of the said Customs Tariff Act, read with rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, after

considering the aforesaid findings of the Designated Authority, hereby imposes on Metcoke falling under heading No. 27.4 of the First Schedule to the said Customs Tariff Act, originating in or exported from China PR and imported into India, an anti-dumping duty calculated at a rate as equivalent to the difference between Rs. 4673 and the landed value of Metcoke, per metric tonne;

2. The anti-dumping duty imposed under this notification shall be levied with effect from the date of imposition of provisional duty i.e. 6th of May, 1998."

11. The final Notification dated 27.10.1998 was challenged by the Pig Iron Manufacturers Association. By its judgment reported in *Pig Iron Manufacturers Association v. Designated Authority, Ministry of Commerce*[1] , the Tribunal passed the following order:-

"12. In the light of the above discussions and findings based on the data available on record, we pass the following orders:-

1. All imports of metcoke exported from or originating in the People's Republic of China to India be subjected to anti-dumping duties at the following rates as indicated against each exporter:-

1. China National Coal Industry : 18.35US$ 24.51US$
Import/Export (Group) Corporation. 19.22US$

2. China National Mineral Import and Export Corporation.

3. Shanxi Coal Import Export Group Corporation. (Minmetal Group). 24.95 US$ 22.69 US$

4. Ningxia Xiacheng Import & Export Corporation.

5. China North Industries Corporation.

6. Shanghai Pacific Chemicals (Group) : 19.22 US$
Corporation Ltd.

7. All other exporters. : 24.95 US$

2. Subject to these modifications, the final findings dated 27th August, 1998 of the D.A. are confirmed. The Corrigendum dated 2nd September, 1998 is set aside."

12. Pursuant to the Tribunal's judgment, the Central Government issued a Notification dated 26.5.2000 as follows:-

"Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 9A read with sub-section (6) of Section 3 of the said Customs Tariff Act and sub-section

(1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 81/98- Customs, dated the 27th October, 1998 [ G.S.R. 644 (E), dated the 27th October, 1998], except as respects things done or omitted to be done before such supersession, the Central Government hereby imposes on Metcoke falling under heading No. 27.04 of the First Schedule to the said Customs Tariff Act, originating in, or exported from, China PR and imported into India, by the exporters mentioned in column (2) of the Table hereto annexed, an anti-dumping duty of an amount equivalent to the rate indicated in column (3) of the said Table, converted into Indian currency with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46 of the said Customs Act, 1962 (52 of 1962)."

| Sr.No. | Name of the Exporter | Rate per metric tone |
|---|---|---|
| | (1) (2) (3) | |
| 1. | China National Coal Industry Import/Export (Group) Corporation | US$ 18.35 |
| | China National Mineral Import and Export Corporation. | US$ 24.51 |
| | Shanxi Coal Import Export Group Corporation. (Minmetal Group) | US$ 19.22 |
| | Ningxia Xiacheng Import & Export Corporation | US$ 24.95 |
| | China North Industries Corporation | US$ 22.69 |
| | Shanghai Pacific Chemicals (Group) | US$ 19.22 |
| | All other exporters. | US$ 24.95 |

Nothing contained in this notification shall apply to imports of Metcoke by a manufacturer of pig iron or steel using a blast furnace if he follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996."

13. The bone of contention in the present appeal is the last paragraph of this Notification.

14. It is clear that under Rule 20(2)(a) of the Customs Tariff (Identification, Assessment And Collection of Antidumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995, where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or threat of injury and the further finding that the effect of imports in the absence of provisional duty would have led to injury, the Anti-dumping duty may be levied from the date of imposition of provisional duty. In the present case, therefore, it will be noticed that the final Notification dated 27.10.1998 is said to come into force from the date of the first Notification dated 6.5.1998 imposing provisional duty in the present case. It is clear that as the final Notification dated 27.10.1998 has been superseded by the Notification dated 19.5.2000, the appellant would have had to pay Anti-dumping duty at the

rate of US$ 24.95 per metric tonne as indisputably it falls within Item No.7 of the said Notification.

15. It will be noticed that the exception carved out in the Notification dated 19.5.2000 was pursuant to a minutes of meeting dated 25.11.1999 by the Secretary (Steel) and representatives of Mini Blast Furnace producers of Metallurgical Coke. These minutes of meeting state as follows:-

> "The Representatives of IMCOM (Indian Metallurgical Coke Manufacturers Association) said that IMCOM represents both the petitioners i.e. M/s. BLA Industries and Industries and Commerce Association in the anti dumping duty petition against import of metcoke of Chinese origin. They explained that while anti dumping duty was essential for the survival of the domestic coke producers, the blast furnaces have never been their principal customers and it was not their intention to harm the blast furnaces industry.
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> 5. After detailed deliberations it was agreed between Indian Metallurgical Coke Manufacturers Association (IMCOM) and Association of Indian Mini Blast Furnaces (AIM) that the blast furnace units were not the principal market that the domestic coke producers cater to. The market to which the domestic coke producers cater to companies ferrous and non-ferrous foundries, ferro alloys producers, soda ash producers, zinc usmelting units some other chemical units and various SSI units.
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> 6. Since the imposition of the anti dumping duty the blast furnace units had to resort to import from expensive sources like Russia, Japan etc. In view of this it was suggested by the AIM that the blast furnace units could be exempted from paying ADD on import of metallurgical coke of Chinese origin, provided this import is for actual use by the blast furnace units. The list of blast furnace units which will be covered by this exemption is also enclosed.
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> 7. Considering the financial difficulty of the members of AIM, IMCOM agreed that they have no objection if the government exempts the blast furnace industry from the purview of the anti-dumping duty. Metcoke will be imported under OGL with Actual user Conditions for blast furnace industry without ADD. IMCOM reiterated that while the continuation of the ADD on metcoke of Chinese origin is vital for the survival of the indigenous coke manufacturers they also agreed that the exemption of the blast furnace units from ADD was vital for their survival."

16. On reading these minutes it becomes clear that Anti-dumping duties that had been imposed upon the Blast Furnace Industry had an adverse impact upon the industry and that the intention of levying an Anti-dumping duty was not to harm their interests. Paragraphs 6 and 7 of the said minutes in particular seem to suggest that the exemption that was contemplated by the minutes of such Blast Furnace units was something that could take place only in the future.

17. Quite apart from this, it is clear that no exception was carved out before 19.5.2000 in favour of Blast Furnace Manufacturers either when the provisional Anti-dumping duty was first imposed or when the final Notification dated 27.10.1998 was issued. It is clear that the last part of the Notification dated 19.5.2000 creating an exception in favour of persons like the appellant has no reference to the earlier proceedings in the case and is obviously intended to apply only prospectively. This is also clear from the language used in the said clause - 'nothing contained in the Notification "shall apply to imports" .... Using a Blast Furnace "if he follows" the procedure set out in the Customs "import of goods at concessional rate of duty for manufacture of excisable goods" Rules, 1996'. The language of the aforesaid clause applies only in futuro and we are afraid that Shri Lakshmikumaran's first argument must, therefore, fail.

18. However, Shri Lakshmikumaran is on firmer ground when he submitted before us that the Commissioner has held that the appellant is liable to pay Anti-dumping duty only under the Notification dated 27.10.1998. The rate prescribed in the said Notification is lesser than the rate that would apply under the Notification dated 19.5.2000. As there was no appeal by the revenue against this finding of the Commissioner, the Tribunal could not have enhanced the rate at which the appellant would have to pay Anti-dumping duty in the appellant's own appeal. The appellant cannot be worse off by reason of filing an appeal. To this limited extent, the appellant succeeds and the Tribunal's order is set aside. The appellant will have to pay Anti-dumping duty calculated at the rates specified only in Notification No. 81/98 dated 27.10.1998.

19. It was argued by Shri Lakshmikumaran that the appellant was not liable to pay interest on any of the customs duties for which it was held liable by the Commissioner's order. He referred us to Notification No.30 of 1997, the relevant part of which reads as follows:

> "In exercise of the powers conferred by sub-section
>
> (1) of section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India, against an Advance Licence with Actual User Condition in terms of para 7.4 of the Export & Import Policy 1997-2002 notified by the Government of India in the Ministry of Commerce vide Notification No.1/1997-2002 dated the 31st March, 1997 (hereinafter referred to as the said licence), from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon under Section 3 of the said Customs Tariff Act, subject to the following conditions namely:-
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> (i) xxx xxx
>
> (ii) That the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Assistant Commissioner of Customs binding himself to pay on

demand an amount equal to the duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with, together with interest at the rate of twenty-four percent per annum from the date of clearance of the said materials."

20. A reading of this Notification makes it clear that interest at the rate of 24% per annum is only liable to be paid if at the time of clearance of the imported materials the importer executes a bond in which such interest is stated to be payable. We have been shown the bond executed in the present case. It says nothing about any interest that is payable in case the conditions of the Notification No.30 of 1997 are not met. On this short ground alone, it is clear that no interest is payable on any of the customs duties that are due from the appellant.

21. It was also argued by Shri Lakshmikumaran that Section 101 of the Finance Act, 2009 has been given a retrospective application with effect from 1.1.1995. Section 9A sub-section (8) as substituted with effect from 1.1.1995 reads as follows:-

"(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to date of determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as maybe, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

22. Even though the Customs Act would necessarily become attracted to Section 9A of the Customs Tariff Act insofar as Anti-dumping duty is concerned, learned counsel further submitted that the Customs Act itself contained no provision for levy of interest until 13.7.2006. Section 18(3) was added only with effect from 13.7.2006 and reads as follows:-

"(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under Section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof."

23. It is clear that on the facts of the present case the provisional assessment had been made in 1998 and the final assessment only on 4.11.2004 by the Commissioner. Both these dates being prior to 13.7.2006, Shri Lakshmikumaran is right and no interest is chargeable under Section 18 of the Customs Act, for the period in question.

24. In *Commissioner of Customs (Preventive) v. Goyal Traders*[2], the Gujarat High Court has held as under:-

"17. In the present case, we find that prior to introduction of sub-section (3) of Section 18 of the Act in the present form, there was no liability to pay interest on difference between finally assessed duty and provisionally assessed duty upon payment of which the assessee may have cleared the goods. It was only with effect

from 13.7.2006 that such charging provision was introduced in the statute. Upon introduction therefor such provision created interest liability for the first time w.e.f. 13.7.2006. In absence of any indication in the statute itself either specifically or by necessary implication giving retrospective effect to such a statutory provision, we are of the opinion that the same cannot be applied to cases of provisional assessment which took place prior to the said date. Any such application would in our view amount to retrospective operation of the law."

We respectfully agree with the aforesaid view. In addition, it is clear that this Court has held that the levying of interest can only be by a substantive provision (See*: J.K. Synthetics Ltd. v. Commercial Taxes Officer*[3], at paragraph 16), thereby making it clear that such levy can only be prospective.

25. Further, in *India Carbon Ltd. v. State of Assam*[4] , this Court held:-

"11. Section 9(2-A) makes applicable to the assessment, re-assessment, collection and enforcement of Central sales tax the provisions relating to offences and penalties contained in the State Acts as if the Central sales tax was a State sales tax. But Section 9(2-A) makes no reference to interest.

12. There is no substantive provision in the Central Act requiring the payment of interest on Central sales tax. There is, therefore, no substantive provision in the Central Act which obliges the assessee to pay interest on delayed payments of Central sales tax.

13. Now, the words "charging or payment of interest" in Section 9(2) occur in what may be called the latter part thereof. Section 9(2) authorises the sales tax authorities of a State to assess, reassess, collect and enforce payment of the Central sales tax payable by a dealer as if it was payable under the State Act; this is the first part of Section 9(2). By the second part thereof, these authorities are empowered to exercise the powers they have under the State Act and the provisions of the State Act, including provisions relating to charging and payment of interest, apply accordingly. Having regard to what has been said in the case of Khemka & Co., it must be held that the substantive law that the States' sales tax authorities must apply is the Central Act. In such application, for procedural purposes alone, the provisions of the State Act are available. The provision relating to interest in the latter part of Section 9(2) can be employed by the States' sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States' sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon.

14. The requirement of the 1st respondent's sales tax authorities that the appellants should pay interest at the rate of 24% p.a. on delayed payment of Central sales tax

under the provisions of Section 35(A) of the State Act must, therefore, be held to be bad in law."

26. Given the aforesaid, it is clear that no interest is chargeable on any of the customs duties that are payable on the facts of the present case.

27. It now remains to consider whether Anti-dumping duty can be included in calculating special customs duty and special additional duty.

28. Special customs duty is levied under Section 68 of the Finance Act No.2 of 1996, which reads as follows:-

> "68. Special duties of customs. - (1) In the case of goods mentioned in the First Schedule to the Customs Tariff Act, or in that Schedule, as amended from time to time, there shall be levied and collected as a special duty of customs, an amount equal to two per cent of the value of the goods as determined in accordance with the provisions of section 14 of the Customs Act.
>
> (2) Sub-section (1) shall cease to have effect after the 31st day of March, 1999, and upon such cesser, section 6 of the General Clauses Act, 1897) shall apply as if the said sub-section had been repealed by the Central Act.
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> (3) The special duties of customs referred to in sub-section (12) shall be in addition to any duties of customs chargeable on such goods under the Customs Act or any other law for the time being in force.
>
> (4) The provisions of the Customs Act and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation to the levy and collection of the special duties of customs leviable under this section in respect of any gods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations, as the case may be."

29. Similarly, special additional duty is levied under Section 3A of the Customs Tariff Act inserted by the Finance Act of 1998. Section 3A reads as under:-

> "Special additional duty.- (1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the special additional duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India:

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

Explanation.- In this sub-section, the expression "maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India" means the maximum sales-tax, local tax, other charges for the time being in force, which shall be leviable on a like article, if sold or purchased in India, or if a like article is not so sold or purchased which shall be leviable on the class or description of articles to which the imported article belongs.

(2) For the purpose of calculating under this section the special additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 or section 3 of this Act, be the aggregate of –

(i) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be;

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the special additional duty referred to in sub-section (1); and

(iii) the additional duty of customs chargeable on that article under section 3 of this Act.

(3) Th
e duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(4) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating to refunds and exemptions 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.

(5) Nothing contained in this section shall apply to any article, which is chargeable to additional duties levied under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957)."

30. Section 3(2) of the Customs Tariff Act as it stood at the relevant time reads as under:

"(2) For the purpose of calculating under this section, the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the

Customs Act, 1962 (52 of 1962), be the aggregate of- (i) The value of the imported article determined under sub-section (1) of the said Section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) Any duty of customs chargeable on that article under Section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs"

31. Similarly, Section 3A(2) dealing with special additional duty as it stood at the relevant time reads as under:-

"(2) For the purpose of calculating under this section the special additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 or section 3 of this Act, be the aggregate of –

(i) The value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section
(2)of that section, as the case may be;

(ii) Any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs; and

(iii) The additional duty of customs chargeable on that article under section 3 of this Act."

32. It will be noticed that additional duty and special additional duty would include "any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs". What has been contended before us is that these words would refer only to a surcharge provision and not to a provision which levies an independent duty, as the relevant words are "an addition" and not "in addition". This argument has considerable force. For example, the Finance Act of 1963 made a distinction between a surcharge on duties of customs and a regulatory duty of customs. Sections 23 and 24 of the said Act are set out hereinbelow:-

"23. Surcharge on duties of customs.

(1)In the case of goods chargeable with a duty of customs which is specified in the First Schedule to the Tariff Act as amended by this Act or any subsequent Act of Parliament, or in that Schedule read with any notification of the Central Government for the time being in force, there shall be levied and collected as an addition to, and in the same manner as, the total amount so chargeable, a sum equal to 10 per cent of

such amount: Provided that in computing the total amount so chargeable, any duty chargeable under Section 2A of the Tariff Act or Section 24 of this Act shall not be included. (2)Sub-section(1) shall cease to have effect after the 31st day of March, 1964 except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897 shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

24.Regulatory duty of customs.

(1)There shall be levied and collected, with effect from such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, on all goods mentioned in the First Schedule to the Tariff Act as amended by this Act or any subsequent Act of Parliament, a regulatory duty of customs which shall be –

(a) twenty-five per cent of the rate, if any, specified in the said First Schedule read with any notification issued under Section 3A or sub-section (1) of Section 4 of the Tariff Act; or

(b) ten per cent of the value of the goods as determined in accordance with the provisions of Section 14 of the Customs Act, 1962 whichever is higher:

Provided that different dates may be specified by the Central Government for different kinds of goods. (2) Sub-section (1) shall cease to have effect after the 31st day of March, 1964 except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897 shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The duty of customs leviable under this section in respect of any goods referred to in sub-section (1) shall be in addition to any other duty of customs chargeable on such goods under the Customs Act, 1962.

(4) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the regulatory duty of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations.

(5) Every notification issued under sub-section (1)shall, as soon as may be after it is issued, be placed before each House of Parliament."

33.It will be noticed that the very words "as an addition to, and in the same manner as" used in Section 3(2) and 3A(2) of the Customs Tariff Act have been used in Section 23 of the Finance Act of 1963 when what was sought to be levied was only a surcharge. By way of contrast, Section 24(3) when it levies a different duty - a regulatory duty of customs - uses

the expression "in addition". It is clear, therefore, that what is referred to in Section 3(2) and 3A(2) is only a surcharge or an additional duty of customs. The words "in the same manner" also point to the same conclusion. It is clear on a reading of the Customs Tariff (Identification, Assessment And Collection of Antidumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995, that Anti-dumping duty apart from being a separate levy from a levy of customs duty is also levied in a completely different manner from that of customs duty.

34.We may add, that after 2002, Sections 3(2) and 3A(2) have been amended with effect from 1.3.2002 so as to expressly not include Anti-dumping duty. The amended Section 3(2) reads as follows:-

> "(2) For the purpose of calculating under this section, the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act 1962 (52 of 1962), be the aggregate of –
>
> (1) The value of the imported article determined under sub-section (1) of the said Section 14 or the tariff value of such article fixed under sub-section
>
> (2) of that section, as the case may be; and
>
> (ii)any duty of customs chargeable on that article under Section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include –
>
> (a) the special additional duty referred to in section 3A;
>
> (b) the safeguard duty referred to in sections 8B and 8C;
>
> (c) the countervailing duty referred to in section 9;
>
> (d) the anti-dumping duty referred to in section 9A; and
>
> (e) the duty referred to in sub-section (1)"

The amended Section 3A(2) reads as follows:-

> "(2) For the purpose of calculating under this section the special additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 or section 3 of this Act, be the aggregate of -

(i) The value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section

(2)of that section, as the case may be;

(ii) Any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include-

(a) the safeguard duty referred to in sections 8B and 8C;

(b) the countervailing duty referred to in section 9;

(c) the anti-dumping duty referred to in section 9A;

(d) the special additional duty referred to in sub-section (1); and

(iii) the additional duty of customs chargeable on that article under section 3 of this Act."

35. The relevant budget circulars of the Finance Bill 2002 and 2003 respectively read as follows:-

"Miscellaneous

1. Doubts have been expressed about the method of computing the additional duty of customs (CVD) under section 3 of the Customs Tariff Act, 1975. The doubt raised is on the point that whether anti-dumping duty, safeguard duty and other duties etc. should be taken into account while computing the CVD. In this regard, it is clarified that for computing the CVD, only the value of the imported article as determined under section 14 of the Customs Act, 1962, including the landing charges, if any and the basic customs duty chargeable at the rates specified in the First Schedule to the said Customs Tariff Act (read with any notification for the time being in force in respect of the basic customs duty) needs to be taken into account. Other duties such as anti-dumping duty, safeguard duty, etc. should not be taken into account."

"In the explanatory notes for the last year's budget it was clarified that for computing the CVD, only the value of imported article as determined under section 14 of the Customs Act, 1962, including the landing charges, if any and the basic customs duty chargeable at the rates specified in the First Schedule to the Customs Tariff Act (read with any notification for the time being in force in respect of the basic customs duty) needs to be taken into account. Other duties such as anti-dumping duty, safeguard duty, etc. should not be taken into account. A view has been expressed that section 3A

of the Customs Tariff Act does not permit such interpretation. To place the matter beyond doubt, it is proposed to amend section 3 and section 3A of the Customs Tariff Act so as to make it very clear that for computation of additional duty of customs, only the c.i.f. price, landing charges and basic customs duty will be included. Similarly for determining special additional duty of customs (SAD), only the c.i.f. price, landing charges, basic customs duty and the additional duty of customs will be included. Other duties such as anti-dumping duty safeguard duty, etc. shall not be taken into account. This amendment will have effect from 1.3.2002."

36. Though it is stated that the object of the amendment is to clarify and set at rest doubts, it is not necessary to decide whether this amendment is clarificatory and, therefore, retrospective in view of what has already been held by us above.

37. As far as penalty is concerned, we feel that the appellant before us has not diverted goods meant for export to the domestic tariff area. We are satisfied that market considerations made it difficult, if not impossible, for the appellant to fulfill its export obligations and are, therefore, of the view that the penalty imposed in the present case ought to be set aside.

38. The appeal is, accordingly, allowed in the aforesaid terms and the judgment of CESTAT is set aside.

[1]*(2000) (116) ELT 67 (Tribunal)*
[2]*(2014) 302 ELT 0529*
[3]*(1994) 4 SCC 0276*
[4]*(1997) 6 SCC 0479*