

KERALA HIGH COURT

Aluminium Industries Ltd

Vs

Union of India

O.P. No. 5049 of 1981

(M.P. Menon, J.)

07.02.1984

JUDGMENT

M.P. Menon, J.

1. The controversy is about levy of customs duty on aluminum ingots imported by the petitioner-company.

2. Duties are leviable under three heads :-

- (i) Basic duty under Section 2 of the Customs Tariff Act, 1975;
- (ii) Auxiliary duty of customs under the Finance Act;
- and (iii) Additional duty of customs under Section 3 of the Customs Tariff Act, 1975.

By a notification issued on 9-9-1980, in exercise of power under Section 25(1) of the Customs Act, 1962 Government had exempted aluminum ingots from the whole of the basic duty. Another notification had also been issued on the same day, amending an earlier notification of March, 1980, exempting aluminum ingots from auxiliary duty. As regards additional duty, the rate was 40% prior to 29-8-1980; but on that day, notification No. 176 was issued, also in exercise of power under Section 25(1), exempting additional duty in excess of 12 1/2 Per-cent.

3. On 27-3-1981 two notifications numbered as 75 and 76 were issued. The effect of the first, read with the provisions of the Finance Act, 1981 was to re-impose auxiliary duty up to 5%. and the effect of the second, rescinding the notification dated 29-8-1980, was to re-impose additional duty at 40 Per-cent.

4. Thus, effective rates of duty on imported aluminum ingots prior to 27-3-1981 and from 27-3-1981 were as follows :-

	Prior to 27-3-1981	From 27-3-1981
--	--------------------	----------------

Basic duty	Nil	Nil
Auxiliary duty	Nil	5%
Additional duty	12.5%	40%

5. The petitioner-company had placed the order for import on 11-3-1981. The vessel carrying the cargo entered the territorial waters of India, near the Cochin Port, on 25-3-1981. It was berthed inside the Cochin Harbour on 26-3-1981. Bill of entry was filed on 28-3-1981. According to the petitioner, the import was complete when the cargo reached the territorial waters of India i.e. before 27-3-1981, and the assessment of duty should have been at the rate then in force. The Department's case is that the relevant date is the date of filing the Bill of Entry i.e. 21-3-1981, and the revised rates in force from 27-3-1981 were applicable. As the rival contentions turn on the provisions of the Customs Act, 1962 it will be useful to examine some of them, in so far as they relate to imports.

6. Sub-sections (11) to (13) of Section 2 of the Act define "customs area", "customs port" and "customs station". "Dutiable goods" are defined in sub-section (14) to mean goods chargeable to duty and on which duty has not been paid. Sub-section (23) defines "import" as bringing into India from a place outside India. "Imported goods" and "importer" are defined in sub-sections (25) and (26) respectively :-

"(25) "Imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

(26) "Importer", in relation to any goods at any time between their importation and the time when they were cleared for home consumption, includes any owner or any person holding himself out to be the importer."

Sub-section (27) defines India to include the territorial waters of India. Section 12 in Chapter V of the Act, dealing with "levy of, and exemption from customs duties", reads :-

"12. Dutiable goods.- (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

Section 13 deals with duty on imported goods pilfered after unloading, and Section 14 with valuation of goods for purposes of assessment. Section 15 relates to determination of rate of duty and tariff valuation. It reads: -

"15. Date for determination of rate of duty and Tariff valuation of imported goods.- (1) The rate of duty, and Tariff valuation, if any, applicable to any imported goods, shall be

the rate and valuation in force:-

(a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under Section 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty :

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards.

(2) The provisions of this section shall not apply to baggage and goods imported by post."

Section 17 provides for assessment : when imported goods are entered under Section 46, they are to be inspected without undue delay and assessed. Omitting Sections 18 -24 which are not particularly relevant, Section 25 provides for grant of exemption from duty, in the following terms :-

"25. Power to grant exemption from duty.-(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, except generally, either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable."

Sections 29 - 43 in Chapter VI contain provisions relating to conveyances carrying imported goods. Section 30 prescribes that the person in charge of the conveyance shall, within twenty-four hours of arrival at the customs port, deliver an import manifest to the proper officer. Section 31 prohibits unloading till he grants "entry inwards to such vessel". Only goods specified in the import manifest are allowed to be unloaded, and the unloading shall be at approved places only, under Sections 32 and 33. Section 34 insists that unloading shall be under the supervision of the proper officer. Section 37 confers power on that officer to board the conveyance at any time. Sections 45 - 49 in Chapter VII deal with clearance of imported goods. Under Section 45, goods unloaded in the customs area shall remain in the custody of a person approved by the Collector till they are cleared for home consumption. Section 46 provides that the importer "shall make entry" of the goods by presenting a bill of entry, and normally, the presentation shall be at any time after delivery of import manifest. Section 47 contemplates an order permitting clearance, after the officer is satisfied that import duty is paid. Chapter IX deals with warehousing, and Section 68 in that Chapter provides for clearance of warehoused goods for home consumption.

7. The petitioner's case, in the background of the above provisions, is this. Import means bringing to India. India includes its territorial waters. Import of goods is thus complete when the ship reaches the territorial waters. Chargeability to customs duty arises the moment import is complete in that form, as the taxable event occurs at that point of time. Section 12 of the Act

which imposes the charge provides that the rate of the levy shall be as specified in the Customs Tariff Act. Section 15(1)(a) of the Customs Act no doubt lays down that the rate applicable shall be the rate and valuation in force on the date on which a bill of entry is presented under Section 46; but that date (i.e. the date of presenting the bill of entry) can be taken into account only when the "rate" mentioned in Section 12 is applicable. When there is an exemption from duty, granted under Section 25, there is no applicable rate, no "chargeability" under Section 12. and when there is no chargeability at the time goods are brought into India, the quantification provisions of Section 15 cannot apply. A distinction has to be maintained between chargeability under Section 12, and quantification under Section 15. When the aluminum ingots in question reached the territorial waters of India on the 25th or 26th of March, 1981 their import was complete, and as an exemption was available at that point of time, the quantification under Section 15 could only be with reference to the reduced or exempted rate then in force.

8. I must confess that the final step in the above process of reasoning is somewhat elusive, though a Division Bench of the Bombay High Court, in *Shawhney v. Sylvania*¹ had emphasized the distinction between chargeability and quantification, and taken the view

"that there is nothing in any of the provisions to indicate that the chargeability in respect of any levy of customs duty is postponed until a bill of entry is presented."

Shawhney's case was however explained by the same High Court in a subsequent decision reported in *Synthetics and Chemicals Ltd. v. Coutinho and Ors*², and it was clarified that the principle could apply only to cases where a total exemption was available at the time the vessel reached the territorial waters The Court said :-

"In order that any commodity should be made to pay duty, the primary or basic requirement, according to us, is that on the date of importation it must be chargeable to duty. The primary fact to be remembered is that if on the date of importation there was total exemption, which means that the Entry was not there, then they were not liable to pay any duty whatsoever on imports."

Cases of partial exemption were separately examined, and the following was added :-

"There may be other cases where on the date of importation the goods are liable to duty. It must mean that they are chargeable to duty. At what rate must they be actually taxed on the date of removal . As an illustration, suppose a Notification exempts certain goods from payment of a part of duty or whereby the duty payable is reduced to 27} percent, If such a Notification comes to be withdrawn or ceases to have operation on the date on which the goods are actually removed from the warehouse, what would be the effect . Should these goods pay 27 1/2% or 60%, which is the normal tariff rate. We have to answer in favour of determination of the rate of 60 per cent the reason being that the

¹1975 Bom. L.R. 380

²1981 E.L.T. 414

goods were not totally exempt. Once they are chargeable to duty on importation-the rate

being irrelevant-the rate prevalent on the date of actual clearance will apply under Section 15(1)(b)."

and in *Sundaram Textiles v. Asst. Collector*³, the Madras High Court followed the above view with the following observations :-

".....where there was chargeability the question would be as to what is the relevant date for determining the rate of duty. At the risk of repetition I have to state only when the rate of duty, if any, is applicable to imported goods, Section 15 will come into play; where the goods are exempted on the date of import into territorial waters of India, there was no rate at which duty could be levied even as per charge under Section 12, and consequently Section 15 will have no application whatever."

9. Explained as above, the approach in the three decisions is easy enough to understand. It is somewhat like this. The charge is created by Section 12. But the Section also says that the rate of the charge is to be found in the Customs Tariff Act or other law in force. Therefore, if there is no rate prevalent under the Tariff Act or any other law on the material date, no question of quantification under Section 15 arises. The material date is the date on which the conveyance enters the territorial waters of India. If at that time there is a total exemption from duty, there is no charge or rate at all, and in such a case, Section 15 will not apply.

10. But the petitioner's contention is unsustainable, even if the above view is applied to the facts on hand. Aluminums ingots were not totally exempt from duty at the time when the vessel reached Cochin on the 25th or 26th of March, 1981. There was a rate applicable at that time. It was 12 1/2% in the case of additional duty payable under Section 3 of the Customs Tariff Act. The notification dated 27-3-1981 only increased the rate to 40%. On the authority of Synthetics and Chemicals (1981 E.L.T. 414) and Sundaram Textiles (1983 E.L.T. 909), therefore, duty at 40% was payable in view of the fact that the bill of entry was presented on 28-3-1981. It is difficult to see how the principles of the aforesaid decisions could be pressed into service to contend that a partial exemption should be equated to a total exemption.

11. As there is no decision of this Court or of the Supreme Court to bind me, I would venture to suggest that a different approach is possible in the case of total exemption also. The charge under Section 12 is on 'imported goods'. Though the Section uses the expression "goods imported into India" Sections 13, 15, 17 and many other relevant provisions show that the legislative intention is to impose customs duty on "imported goods", as defined in Section 2(25). Under the definition clause, the goods retain the character of imported goods till they are cleared for home consumption under Section 46 or 68. The provisions of Section 12 would, therefore, continue to apply to them until they are cleared. Even if they were totally exempt from duty at the time they entered the territorial waters, a rate of duty could still fasten on them under Section 12, so long as they retain the character of imported goods, if an appropriate notification is issued in the meanwhile. and if a rate becomes applicable at any time

³1983 E.L.T. 909

before clearance, that will be a rate for the purposes of Section 12, the determination of which will have to be done under Section 15. In other words, the circumstance that there was no duty at the point of time when the vessel entered the territorial waters, does not altogether take the goods

from out of the provisions of Section 12; the charge under the Section can arise and operate as a "rate" at any time after such entry and before the goods are cleared.

12. It is not easy to imagine that the policy of the Act is to impose a duty on the mere act of bringing goods into the territorial waters of India, without regard to the question whether they are unloaded cleared and allowed to become part of the mass of the goods within the country. Chargeability cannot be considered in isolation or in the abstract, without reference to the goods on which the charge falls, and the importer who has to meet the charge. "Importer" as defined in Section 2(26), is the owner of the goods, and continues to be the importer in relation to them till they are cleared for home consumption; and "dutiable goods" are goods chargeable to duty till such time as duties are paid. The heading of Section 12 shows that besides creating the charge, the Section also attempts to identify the class of goods which are dutiable. 'India' is defined to include territorial waters for the purpose of imparting the character of "imported goods" to the cargo carried by a conveyance, even before it is berthed in the harbour and starts unloading, so that the prescriptions of Section 30 regarding delivery of import manifest, of Section 31 regarding unloading and of Section 37 regarding inspection, to mention only some of the provisions of Chapter VI, could be effectively enforced. The inclusive definition in Section 2(27) is not designed to pin-point the only point of time at which chargeability under Section 12 could attach to the goods; at the most, the definition specifies only the earliest point of time from which the goods could be treated as dutiable. It does not preclude a charge being imposed at any subsequent point of time, so long as the goods continue to be "imported goods" for the purposes of Section 12.

13. The distinction between the nature of a tax and its measure, or between the taxing event and the machinery for collection, has again been emphasised by the Supreme Court in its recent decision in *Union of India and Ors. v. Bombay Tyre International*⁴, while dealing with excise duty leviable under the Central Excises and Salt Act. It has been categorically held that though a duty of excise is an impost on manufacture, certain heads of post-manufacturing expenses can also be included in the assessment of the duty if the statute postpones assessment to a later point of time. The court said : -

".....while the levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronise with the completion of the manufacturing process.....the point of collection will be located where the statute declares it will be"

* * *

".....the levy of a tax is defined by its nature, while the measure of a tax may be assessed by its own standard."

* * *

⁴1983 ELT 1896 (S.C)

".....when enacting a measure to serve as a standard for assessing the levy, the legislature need not contour it along lines which spell out the character of the levy itself."

Applying the above principles, it is possible to say that though the taxing event under the Customs Act, 1962 occurs when the goods arrive in the territorial waters, collection of the charge is postponed to the time when the bill of entry is presented. and if the charge attaches to the

goods at any time before such presentation, by reason of the fact that the goods retain the character of imported goods, the circumstance that there was an exemption at an earlier point of time would be immaterial.

14. Again, as pointed out by Sukumaran J. in *Shri Ramalinga Mills v. Asst. Collector*⁵, the concept of the charge attaching to the goods the moment they reach the territorial waters of India breaks down when, as happens on some occasions, the vessel enters the waters and then sails away, without unloading goods in a customs port. Import duty is aimed at the goods brought from abroad and allowed to mix with local goods, and in that view, undue importance cannot be attached to the mere arrival of a vessel in the territorial waters, notwithstanding the definitions in Section 2(23) and 2(27).

15. Section 13 of the Act also furnishes some clue. The Section provides that in respect of imported goods pilfered after unloading and before clearance, the importer shall not be liable to pay duty. The idea is clearly not to tax everything that reach the territorial waters, but only those goods which reach the mainstream of trade within the country.

16. Another question that arises is whether an exemption granted under Section 25(1) will have the effect of taking the goods out of the class of dutiable goods, or placing them beyond the reach of Section 12. It is possible to think that an exemption only suspends or eclipses chargeability, which can revive the moment it is lifted. Alternatively, exemption can also be construed as chargeability at nil rate, if "rate" in Section 12 is the whole basis for chargeability.

17. The writ petition is, therefore, dismissed, but without any order as to costs.
Dismissed.

⁵1982 KLJ 314