Vetcare Organic Pvt. Ltd. Vs Cestat

Court: Madras High Court

Date of Decision: April 8, 2011

Acts Referred: Constitution of India, 1950 â€" Article 14, 265
Customs Tariff Act, 1975 â€" Section 10, 9(1), 9(2), 9(5), 9(6)

Citation: (2011) 269 ELT 444

Hon'ble Judges: P.P.S. Janarathana Raja, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: Arvind P. Datar and C. Saravanan, for the Appellant; S. Udayakumar, SCGSC, for the Respondent

Judgement

Chitra Venkataraman, J.
As against the order of 2004 (116) ECR 373 on a difference of opinion between two Members viz., the Judicial

Member, who was dissenting with the Department and the Third Member agreeing with the Department on the levy of Anti-Dumping Duty, the

Appellant/ Assessee has come up before this Court on appeal in C.M.A. No. 3727 of 2004, raising the following substantial questions of law:

1. Whether the levy of anti-dumping duty on imports made under a Quantity Base Advance Licence (QBAL) are justified especially in the light of

Notification No. 41/97-Cus., dated 30-4-1997?

2. Whether the levy of anti-dumping duty is justified in the light of the Board Circular No. 106/95-Cus., dated 11-10-1995 which grants duty

draw back and/or refund of anti-dumping duty in respect of imported inputs which were actually used in the goods exported?

3. Whether the Tribunal was justified in disposing the appeal without considering the ROM application filed by the Appellant ?

4. Whether the Tribunal was justified in dismissing the appeal solely based on para 13 of the Third Member"s order, when the Third Member

actually declined to go into the arguments raised by the Appellant on the ground that the ROM application filed by the Appellant was pending

before the Division Bench which passed the dissent order?

5. Whether the preliminary findings of the designated authority levying anti-dumping duty for the period in investigation between 1-4-1995 to 30-9-

1995 would have any relevance for the imports made during the period in dispute (28-10-1996 to 25-2-1997)?

2. Apart from the above Civil Miscellaneous Appeal, there are two Writ Petitions in the list viz., W.P. Nos. 21054 of 2001 and 12403 of 1998.

W.P. No. 12403 of 1998 was originally considered by this Court in the order dated 20-8-1999. The writ petition by the Petitioner/Appellant

herein was rejected, holding that the same was covered by the decision of this Court in W.P. No. 2486 of 1995 dated 11-8-1999. As against the

same, the Assessee preferred a writ Appeal. By order dated 9-9-2009 in W.A. No. 2077 of 1999, the order of the learned Single Judge was set

aside and the writ Petition was restored for hearing on merits. Now, the matters are before us.

3. Before going into the contentions taken by the Assessee, the facts herein have to be seen. The Assessee herein is engaged in the manufacture of

Animal Feed Supplements and Veterinary Drugs. The Assessee exported the manufactured goods under Quantity Based Advance Licence

Scheme (QBAL) under Duty Exemption Entitlement certificate Scheme, as per the exim policy. In the circumstances, the Assessee imported

Hydroxy Quinoline viz, 8 HQ on six occasions under 7 Bills and the period of import was covered between 30-12-1996 and 25-2-1997 from

People''s Republic of China for the manufacture of finished goods. The final products were imported between 15-11-1996 and 19-6-1997 and

the export obligation under the QBAL was fulfilled. Admittedly, the import was covered under the EXIM Policy for 1992-97, particularly in terms

of Paragraphs 47 and 48 of Chapter VII. In the meantime, in exercise of the powers conferred u/s 9A of the Customs Tariff Act, 1975, read with

Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules,

1995, framed under Sub-section (6) of Section 9A and Sub-section (2) of Section 9B of the Customs Tariff Act, 1975, the Designated Authority

initiated investigation proceedings on the alleged dumping of eight Hydroxy Quinoline, imported from the People''s Republic of China, based on a

complaint filed by M/s. West Bengal Pharmaceuticals and Phyto-chemical Development Corporation Ltd., Calcutta. Thus, based on the enquiry

initiated on 4-3-1996, provisional demand was made on the Assessee, calling upon the Assessee to pay anti-dumping duty in terms of Notification

No. 80/96-Cus., dated 16-10-1996 under six different orders, issued by the Ministry of Finance. The Assessee states that it was the only one

company which participated in the investigation. Aggrieved by the levy, the Assessee preferred appeals before the Commissioner (Appeals), who

confirmed the demand in respect of six bills of entry. He, however, allowed the duty exemption in respect of one bill of entry dated 30-4-1997,

made after the issue of Notification No. 41 of 1997, revoking the anti dumping duty liability and directed the Designated Authority to consider the

prayer for drawback. The Assessee preferred appeals before the CESTAT. while the Judicial Member agreed with the Assessee, on account of

the order passed withdrawing the earlier notifications, the Technical Member, however, differed. This resulted in the case being referred to a third

Member for a decision. The third Member agreed with the Technical Member. Thus, the levy was confirmed. Aggrieved by the same, the

Assessee has preferred the appeal before this Court.

4. Leaving aside the proceedings before the Tribunal for a moment immediately after the preliminary proceedings, the Assessee filed a reply on 4-

10-1996, reiterating its stand and pleaded for dropping the proceedings. By Notification No. 27/97-Cus., dated 1-4-1997, the Designated

Authority continued the imposition of anti-dumping duty, it is stated that under Rule 13 of the Anti-Dumping Rules, 1995, the Central Government

can levy provisional duty only based on the preliminary findings of the Designated Authority. As per second proviso to the said Rule, the

provisional duty could remain in force for a period of six months, which could be extended by nine months. The Designated Authority has to

complete the investigation within a period of one year and give its finding or within the extended period of six months, as contemplated under Rule

14 of the Anti-Dumping Rules. It is seen that the first Respondent issued Notification No. 41/97-Cus., dated 30-4-1997 and modified the earlier

notification. As per the modified Notification, imports made under the advanced licence were brought outside the purview of anti-dumping. Thus

Notification No. 41/97 dated 30-4-1997 agreed with the contention of the Assessee.

5. It is seen from the facts presented before this Court that on the decision taken to impose anti-dumping duty, the Assessee preferred Review

Petitions. After re-considering the entire case, under Notification No. 5/2001-Cus., dated 22-1-2001, the Government rescinded the earlier

notifications on the ground that there was no injury to the domestic market on the import of eight Hydroxy Quinoline from the People''s Republic of

China. However, while rescinding the earlier notifications, Notification No. 5/2001 dated 22-1-2001 protected the action already taken or omitted

to be done before such rescission. Aggrieved by the latter portion of the Notification, the Petitioner has preferred W.P. No. 21054 of 2001,

contending that once a finding had come that there was no liability to pay anti-dumping duty, there being no violation of the Anti-Dumping laws, the

question of retaining the duty levied, did not arise. The Petitioner contends that Notification No. 5/2001, containing a saving clause that things done

or omitted to be done before such rescission, is contrary to the provisions of Anti-Dumping Rules, and in particular, to Rule 21(3). The Petitioner

contends that in terms of Rule 13 of the Anti-Dumping Rules, the provisional duty could remain for a period of six months, which may be extended

for a further period as provided for under Rule 14 of the Anti-Dumping Rules. The Notification containing the saving clause is contrary to the

provisions of the Act and violative of Article 265 of the Constitution of India.

6. On notice, the Revenue has filed a counter in the writ petition, supporting the Notification, that the Petitioner had projected the case on a

wrongful assumption that their case is covered by Section 18(4) of the Customs Tariff Act and Rule 21(3) of the Customs Tariff (Determination of

Injury) Rules, when the withdrawal is conditional, the Petitioner is not entitled to refund of the duty levied. The withdrawal of anti-dumping duty

with effect from 22-1-2001 would, in no way, affect the levy and collection of anti-dumping duty and the earlier notifications. So too, any duty not

levied or short-levied would be recoverable as per the Notifications, which were ruling the field till 2001. In the circumstances, the question of

refund or dropping of the proceedings, did not arise.

7. It is also seen that the Petitioner has also challenged the applicability and levy of anti-dumping duty before this Court in W.P. No. 12403 of

1998.

8. Learned Senior Counsel appearing for the Appellant/Assessee pointed out that going by the Exim Policy 1992-97, when the imports are under

actual user''s licence and the Assessee had already performed its export obligation, the question of levying any duty under anti-dumping laws, does

not arise, when the policy makers are contemplating exemption from duty on performance of the obligations under the Exim Policy, the benefit of

such exemption policy has to be maintained. Throughout the period of policy of licence validity, unless and until the Licensing Authority or the

Customs Authority alleged any violation either as to the policy conditions or to the provisions of the Customs Act, the question of denying the

benefit of the exim Policy did not arise. In short, learned Senior Counsel submitted that the provisions of the anti-dumping laws have no relevance

to the compliance of the obligation under the actual user''s licence. In the last clearance under the bill of entry dated 30-4-1997, the Revenue itself

exempted the Assessee from the provisions of the anti-dumping laws, there being no violation. Going by the fact that the entire import was under

one licence, one cannot divide the imports as one prior to the Notification of the year 2001 and post 2001. Since the import is a continuous

process under the actual user''s licence granted to the Assessee, the Revenue is not justified in levying anti-dumping duty.

9. Learned Senior Counsel pointed out that the contemplation of the Government under the exim Policy was to encourage export to earn better

foreign exchange for the State; that on performance of an export obligation, the Assessee was entitled to refund of duty paid on the export of

goods.

10. Learned Senior Counsel pointed out that given the object of the exim Policy, the licence granted to the Assessee and in the background of the

review notification that there is no dumping of goods into the country, the latter portion of Notification No. 5/2001 dated 22-1-2001, preserving

those acts done, or protecting the rights of the Government to do, cannot survive under any of the provisions of the Anti-Dumping Laws. Thus, the

latter portion in Notification No. 5/2001 dated 22-1-2001 goes against the very scheme of the anti-dumping laws; hence, beyond the purview of

the Government to preserve any such authority. Thus, when the anti-dumping provisions are not available herein, on facts, the Notification

preserving such authority is contrary to Article 14 of the Constitution of India. Hence, the Notification, to that extent, is liable to be quashed.

11. Per contra, learned Standing counsel appearing for the Revenue pointed out that Notification No. 5/2001 dated 22-1-2001 has only a

prospective effect, in that, it seeks to preserve all acts done, apart from preserving the right of the Government, to take action in such of those acts

in those cases, where there was an omission to levy duty. It must be pointed out herein that the learned Standing Counsel fairly brought to the

notice of this Court the decision of the Tribunal in the case of 2007 (118) ECC 23 wherein, the Tribunal had accepted the plea of the Assessee

based on Notification No. 25/04-Cus., dated 22-1-2004 that the words ""except as respects things done or omitted to be done before such

rescission"" cannot authorise or preserve the imposition of antidumping duty. The Tribunal further pointed out that on a similar issue, the Chennai

Customs have granted refund order, which has been accepted by the Department that the Notification could not protect acts, which are done in

imposition of anti-dumping duty, etc.

12. We agree with the submission of the learned Senior Counsel appearing for the Appellant/Assessee in respect of his submission on the vires of

the portion of Notification No. 5/2001, dated 22-1-2001, in so far as it seeks to preserve the levy imposed as well as to reserve the authority to

touch cases, which were omitted to be brought under levy as violative of the provisions of antidumping laws as well as Article 265 of the

Constitution of India. Once on factual findings, the Government found that there was no dumping of materials from the People"s Republic of China

in the local market and hence, the anti-dumping laws could not be invoked, the question of preserving any such authority to impose duty under the

anti-dumping laws, does not arise.

13. A reading of Rule 18 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for

Determination of Injury), Rules 1995 (hereinafter referred to as the ""Rules"") shows that once the Designated Authority arrived at a finding under

Rule 17 of the Rules by a Notification in the Official Gazette, the Government could authorise imposition of anti-dumping duty as determined under

Rule 17 of the Rules. Rule 18(4) of the Rules states that if the final finding of the Designated Authority is negative, i.e., there was no dumping of any

materials and hence there was no basis for imposition for anti-dumping duty, the Central Government has to withdraw the provisional duty imposed

within 45 days of the publication of the final finding by the Designated Authority, under Rule 17 of the Rules. A reading of the above Rules leaves

no manner of doubt that on the finding thus given by the Designated Authority, the State cannot proceed further to preserve any order or reserve

any jurisdiction on an authority, to protect any act done, either provisionally or otherwise or confer authority to assume jurisdiction to make a fresh

levy.

14. In this regard, Rule 19 assumes significance. It states that any provisional duty imposed under Rule 13 of the Rules and anti-dumping duty

imposed under Rule 18 of the Rules, shall be on a non-discriminatory basis and applicable to all imports of such articles from whatever sources

found dumped. Thus, on a reading of Rules 17, 18 and 19 of the Rules, it is clear that the assumption of authority to levy anti-dumping duty, rests

on a positive finding on dumping, which is injurious to the local market, and that, once the finding is otherwise, the question of either maintaining a

levy or imposing a fresh one, does not arise. In other words, the question of assuming jurisdiction in such cases would be contrary to not only the

provisions of the Act, but would also be in violation of the Constitutional mandate. Thus going by the above-said provisions, it is clear that the latter

portion of the Notification, preserving the rights of the Government in respect of the duty imposed or to impose duty in cases where it was omitted

to be done before the rescission of the earlier notification under Notification No. 5/2001 dated 22-1-2001, is contrary to the Scheme of the Anti-

dumping laws and violative of Articles 14 and 265 of the Constitution of India.

15. At this juncture, we feel, it would be appropriate to extract the portion of Notification No. 5/2001-Cus., dated 22-1-2001, complained of by

the Assessee, which reads as follows:

Now, therefore, in exercise of powers conferred by Sub-section (1), read with Sub-section (5) of Section 9A of the said Customs Tariff Act, the

Central Government hereby rescinds the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 27/97-

Customs, dated 1st April 1997, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide G.S.R. 190(E), dated the

1st April, 1997, excepts as respects things done or omitted to be done before such rescission.

16. Given the scheme of anti-dumping laws and the facts found on the preliminary imposition made on a prima facie view, it is no doubt true that a

provisional demand was made on the Assessee. The said demand was challenged by the Assessee. Unsuccessful before the various Authorities,

the Assessee filed a Review Petition before the Designated Authority. On consideration of the materials, the Designated Authority gave the findings

in favour of the Assessee by passing Notification No. 5/2001 dated 22-1-2001, that there was no anti-dumping. Once those findings as regards

anti-dumping remained unchallenged in any manner by the Revenue, as already pointed out, the next consequence would be applying Rule 18(4) of

the Rules, instead of doing so, Notification No. 5/2001-Cus., dated 22-1-2001 travelled beyond what is contemplated under the provisions of

Antidumping laws, not only to preserve the action taken to levy duty, but also to preserve the authority to take action in cases where there was an

omission to impose duty. As already pointed out, such reservation of authority goes against the very scheme of the Anti dumping laws. In the

circumstances, we have no hesitation in agreeing with the learned Senior Counsel appearing for the Appellant that the levy, as such, cannot be

made in the light of the findings given in Notification No. 5/2001 dated 22-1-2001.

17. In the light of the decision thus arrived at, we do not think that it is necessary for us to consider the other issues raised, particularly with

reference to the compliance of the actual user licence conditions and the duty exemption scheme, vis-a-vis, the anti dumping laws. Since the entire

action is based on Notification No. 5/2001 dated 22-1-2001, we feel that it is suffice that the other issues need not be gone into herein.

18. It must be noted herein that the purpose of introducing the EXIM policy is to accelerate the economic growth to derive maximum benefits from

the expanding global market opportunities. In giving a stimulus to sustain the economic growth, the Government thought it fit to provide access to

essential raw materials, intermediates, components, consumables and capital goods required for promoting production. The object of this policy,

hence, could be achieved only through the co-ordinated efforts of all the Departments of the Government, in general. As enunciated in the Policy,

given the objective as stated above, the various Wings of the Government must act with a shared vision and commitment to facilitate better export

promotion. The latter portion of the Notification, which is under challenge before this Court, clearly demands the attention of the Respondents to

the policy of the Government, to give a full thrust to it and not to whittle it down on any assumed interest in the name of implementing the Anti-

Dumping Laws. Hence the import of raw materials for export under QBAL Scheme cannot be subjected to anti-dumping duty.

19. In the light of the decision that we have taken in the writ Petition challenging the latter portion of the Notification, we allow writ Petition No.

21504 of 2001 and declare that Notification No. 5/2001-Cus., dated 22-1-2001, issued by the first Respondent, in so far as it purports to save

things done or omitted to be done before such rescission, is ultra vires Sections 9A, 9AA, 9B and 10 of the Customs Tariff Act, 1975, Article 265

of the Constitution of India and Rules 13, 17, 18(4) and 21(3) of the Customs Tariff (Identification Assessment and Collection of Anti-Dumping

Duty on Dumped Articles and for Determination of Injury) Rules, 1995, in so far as the Petitioner is concerned.

20. In the light of the order passed in Writ Petition No. 21504 of 2001, the order of the Tribunal is set aside. Hence C.M.A. No. 3727 of 2004

stands allowed. In the light of the order passed in W.P. No. 21504 of 2001 and C.M.A. No. 3727 of 2004, no separate order need be passed to

consider the challenge made in W.P. No. 12403 of 1998. Accordingly, W.P. No. 12403 of 1998 stands closed. No costs.