Hyderabad Industries Ltd.And Anr vs Union Of India And Ors on 11 May, 1999

Author: B.N.Kirpal

Bench: S.P.Bharucha, B.N.Kirpal, S.Rajendra Babu, S.S.M.Quadri, M.B.Shah

CASE NO.:
Appeal (civil) 1354 of 1980

PETITIONER:
HYDERABAD INDUSTRIES LTD.AND ANR.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 11/05/1999

BENCH:
S.P.BHARUCHA & B.N.KIRPAL & S.RAJENDRA BABU & S.S.M.QUADRI & M.B.SHAH

JUDGMENT:

JUDGMENT DELIVERED BY:

B.N.KIRPAL, J.

Levy of additional duty of customs under Section 3 (1) of the Customs Act, 1975 on import of asbestos fibre is challenged by the appellants in these appeals by special leave.

The appellants, who use asbestos fibre as a raw material, imported the same into India. We are in these cases concerned with the imports made prior to the year 1986. On the import so made the department sought to raise a demand of additional duty of customs under Section 3 (1) of the said Act. The appellants represented that on a correct interpretation no duty was payable inasmuch as asbestos fibre which was imported had not been manufactured or produced but was a natural mineral and thus no duty was leviable. The Collector, Central Excise, Hyderabad, however, issued a trade notice on 3rd August, 1997 taking the view that asbestos fibre as processed and graded had a distinct character differing from asbestos rock and the said item was covered within Tariff Item 22 (F) of the Excise Act and on the same there was a liability to pay the duty of excise. The Government of India and the Ministry of Finance also informed the appellants, namely, Hyderabad Asbestos Cement Products vide Ministry of Finances letter dated 17th August, 1997 that the process by which the asbestos fibre was obtained was a process of manufacture and the said item correctly

> fell within Tariff Item 22 (F) of the 1st Schedule to the Excise Act. The consequence of this was that the demand under Section 3 (1) of the said Act was raised because the imported item, namely, asbestos fibre was regarded as an article which was liable to duty of excise under the Excise Act.
>
> The appellants then filed various writ petitions before the High Court of Delhi. The main contention of the appellants was that the asbestos fibre which was imported had not been manufactured or produced and, under Section 3 (1) of the Customs Tariff Act, additional duty of customs could be levied only if the article which is imported is one which is produced and manufactured in India and is liable to payment of excise duty. The submission was that asbestos fibre had not undergone any manufacturing or other process and, therefore, no additional duty could be charged.

The High Court dismissed the writ petitions by accepting the contention of the respondents that extracting or removing the asbestos fibre from the rock amounted to manufacturing process being undertaken and, therefore, excise duty was leviable and, as a result thereof, additional duty under Section 3(1) of the Tariff Act could be imposed on the import of the asbestos fibre into India.

These appeals by special leave were first heard by a Bench of three Judges. After examining the material relied upon by the High Court and also by referring to Encyclopedia of Natural Chemical Analysis, Vol.II and Brussels Nomenclature the bench in its decision reported as Hyderabad Industries Ltd. and Another Versus Union of India and Others [(1995) 5 Supreme Court Cases 338] at page 342 observed as follows:

> We are satisfied upon the material placed before us, as indicated in the judgment under appeal quoted above, that all that the appellants in Civil Appeal No.1354 of 1980 do is to separate the asbestos fibre from the rock in which it is embedded by manual and mechanical means. The asbestos that is so removed from the parent rock is in every respect the asbestos that was embedded in it. No process of manufacture can be said to have been employed by the appellants nor is a new or a distinct commodity realised therefrom.
>
> The bench also referred to the judgment of this Court in Minerals and Metals Trading Corpn. Of India Ltd. Vs. Union of India [(1972) 2 SCC 620] and Moti Laminators (P) Ltd. Vs. CCE [(1995) 3 SCC 23] and held as follows:
>
> Assuming that Tariff Item 22-F, when it refers to asbestos fibre and yarn, covers asbestos fibre that has been separated from its parent rock in the manner aforementioned, such asbestos fibre is not the result of a process of manufacture, it is not a new and commercially identifiable article and it is, therefore, not liable to excise duty.

What all the appellants import is, it is not disputed, asbestos fibre that has been separated from its parent rock in the manner aforementioned.

An argument had been raised on behalf of the Union of India to the effect that the asbestos fibre imported by the appellant was exigible to additional duty regardless of the fact that it was not produced as a result of manufacture and, therefore, not exigible to excise duty. In support of this contention reliance was placed on this Courts judgment in Khandelwal Metal & Engineering Works Vs. Union of India [(1985) 3 SCC 620]. After discussing the said judgment the Bench was of the view that the decision in the case of Khandelwal Metal & Engineering Works required consideration by a larger bench. It is pursuant to this direction that this Bench has been constituted.

Sh. C.S. Vaidyanathan, the learned Additional Solicitor General, sought to contend that the High Court was right in coming to the conclusion that the separation of asbestos fibre from the parent rock was as a result of process of manufacture and, therefore, excise duty was leviable and even if it was not manufactured or produced excise duty was leviable under Tariff Item 22 F. The aforesaid question had been considered at length and decided against the revenue in this very case when it was heard by the Three Judge Bench in the reported decision referred to hereinabove. The conclusion which was arrived at was that separation of asbestos fibre from the parent rock was not the result of process of manufacture and was not a new and commercially viable article and was not, therefore, liable to excise duty. The question regarding the exigibility of asbestos fibre to excise duty under Tariff Item 22-F thus stands concluded by the said decision. The Union of India cannot be allowed to re-agitate the question which already stands decided. What has been referred to this bench is whether the decision in the case of Khandelwal Engineering requires reconsideration. This is the only aspect of the case to which we have to address ourselves. In doing so we proceed on the basis that it stands concluded that the asbestos fibre which was imported had not undergone any process of manufacture and was not liable to excise duty.

Chapter V of the Customs Act, 1962 deals with levy of and exemption from customs duty. Section 12 which is contained in this Chapter reads as follows:

SECTION 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 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

[(2) The provisions of such-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.] The Customs Tariff Act, 1975 was enacted so as to consolidate and amend the law relating to customs duty. Sections 2 and 3 of the said Act read as follows: 2. Duties specified in the Schedules to be levied - The rates at which duties of

customs shall be levied under the Customs Act, 1962 (25 of 1962), are specified in the First and Second Schedules.

3. Levy of additional duty equal to excise duty - (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation - In this section, the expression the excise duty for the time being leviable on a like article if produced or manufactured in India means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

(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 aggreage 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, but nor including the duty referred to in sub-section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw-materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The 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.

(6) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating todraw-backs, refunds and exemption 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.

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 leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable 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 leviable on a like article if produced or manufactured in India. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable 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 or manufactured in India.

The words if produced or manufactured in India does 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 Thermax Private Limited Vs. Collector of Customs, Bombay [(1992) 4 SCC 440 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 leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. 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 leviable 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 leviable thereon.

Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to Customs Tariff Act 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under Customs Act 1962 are those which are specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act 1975. In other words for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.

On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is not relatable to the First and the Second Schedule of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub- section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

There are different types of customs duty levied under different acts or rules. Some of them are; (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962; (b) the duty in question, namely, under Section 3 (1) of the Customs Tariff Act; c additional duty levied on raw-materials, components and ingredients under Section 3 (3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2 A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to clauses to the Customs Tariff Bill 1975 with regard to clause 3 it was stated that Clause 3 provides for the levy of additional duty on an imported article to counter-balance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2-A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India. Apart from the plain language of the Customs Tariff Act, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the Tariff Act 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India.

In the case of Khandelwal Metal & Engineering Works the applicability of Section 3 (1) of the Customs Tariff Act arose in connection with the import of brass scrap. The contention of the importers was that no additional duty could be levied because imported brass scrap which consisted of damaged articles like taps and pipes was not manufactured in India or elsewhere. It was

submitted that additional duty of customs under Section 3 (1) could be levied only if the article which was imported into India was manufactured or produced here. Dealing with this contention this Court held that the charging Section was Section 12 of the Customs Act and not Section 3(1) of the Tariff Act. At page 627 it observed that The levy specified in Section 3(1) of the Tariff Act is a supplementary levy, in enhancement of the levy charged by Section 12 of the Customs Act and with a different base constituting the measure of the impost. In other words, the scheme embodied in Section 12 is amplified by what is provided in Section 3(1). The customs duty charged under Section 12 is extended by an additional duty confined to imported articles in the measure set forth in Section 3(1). Thus, the additional duty which is mentioned in Section 3 (1) of the Tariff Act is not in the nature of the countervailing duty. At page 628 it held that We are unable to accept the argument of the appellants that Section 3(1) of the Tariff Act is an independent, charging section or that, the additional duty which it speaks of is not a duty of customs but is a countervailing duty. After referring to the explanation to Section 3 (1) the Bench at page 630 held that These provisions leave no doubt that the duty referred to in Section 3(1) of the Tariff Act does not bear any nexus with the nature and quality of the goods imported into India. On this aspect the Court then concluded by observing at page 630 that For these reasons, we must reject the argument of Mr. Sorabjee and of the other learned counsel for the appellants that Section 3(1) of the Tariff Act is not attracted because, the damaged articles, which are in the nature of brass scrap, are outside the scope of that since, such articles are not and cannot be produced or manufactured. The basis of this conclusion, therefore, was that additional duty was a customs duty, Section 12 of the Customs Act being the charging section, which was leviable on the import of goods into India and it had no nexus with the nature and quality of goods so imported. Another reason which was given by the Bench while upholding the levy was that the brass scrap which was imported was a bye-product and was, therefore, in any case a manufactured product.

The decision in Khandewal Metal & Engineering Works case to the effect that additional duty of customs is leviable merely on the import of the article even if it is not manufactured or produced in India does not appear to be correct inasmuch as the said conclusion is based on the premise that Section 12 of the Customs Act, and not Section 3(1) of the Tariff Act, is the charging section. As we have already observed on a correct interpretation of the relevant provisions of the two acts there can be no manner of doubt that additional duty which is levied under Section 3(1) of the Tariff Act is independent of the customs duty which is levied under Section 12 of the Customs Act. Secondly, it has been held by the Three Judge Bench in this case that excise duty is leviable if the article has undergone production or manufacture. The observation in Khandelwal Metal & Engineering Works case which seems to suggest that even if no process of manufacture or production has taken place the imported articles can still be subjected to the levy of additional duty does not appear to be correct inasmuch as the measure for levy of additional duty is the quantum of excise duty leviable on a similar article under the Excise Act. Duty under the Excise Act can be levied, as has been held earlier, if the article has come into existence as a result of production or manufacture. In other words when articles which are not produced or manufactured cannot be subjected to levy of excise duty then on the import of like articles no additional duty can be levied under the Customs Tariff Act. The levy of additional duty being with a view to provide for counter balancing the excise duty leviable, we are clearly of the opinion that additional duty can be levied only if on a like article excise duty could be levied. The decision in Khandelwal Engineering Works case to the extent it takes a

contrary view, does not appear to lay down the correct law. Sh. Vaidyanathan contended that this Court should be reluctant to reconsider a judgment which has held the field for a long time, but in our opinion public interest requires that law be correctly interpretted more so in a taxing statute where the ultimate burden may fall on the common man. We hasten to add that we are not over-ruling the Khandelwal Metal & Engineering Works case in its entirety because the Court also held in that case that brass scrap was in any case an item which was manufactured and, therefore, excise duty was leviable. We have not examined, in the present cases, whether brass scrap can or cannot be regarded as a manufactured item for that question does not arise in the present cases.

As a result of the aforesaid discussion it follows that on the asbestos fibre imported into India the appellants were not liable to pay any duty under Section 3 of the Customs Tariff Act. The High Court, therefore, erred in discussing the writ petitions filed by the appellants.

What relief is to be granted in these appeals is then the question. It was contended on behalf of the respondents that the duty demanded under Section 3 of the Customs Tariff Act must have been added in working out the selling price of the ultimate product in which the imported fibre was used and applying the principle of unjust enrichment not only no refund of duty paid should be ordered but the appellants should pay an amount equal to the extent of duty realised by them which they had passed on to their customers. The learned counsels for the appellants submitted that the principle of unjust enrichment has no application in the present case where the duty was on the raw material and not on the finished product. This apart, it was submitted, there is nothing on record to show that this duty was ultimately included in the selling price of the manufactured goods.

During the pendency of these appeals interim orders were passed as a result of which some amount of additional duty was paid by the appellants, approximately fifty percent of the demand raised, and in respect of the balance amount bank guarantees were furnished. In the absence of any material on record we do not propose to decide whether the principle of unjust enrichment is applicable in these cases. Normally with the appeals being allowed the consequence of refund of additional duty paid follows. In these appeals, however, we have held that the decision in Khandelwal Metal & Engineering Works case does not lay down the correct law as indicated in this judgment. Having come to this conclusion about fourteen years after the decision in Khandelwal Metal & Engineering Works case was rendered it would not be equitable to require the refund of additional duty paid into the public exchequer. At the same time the appellants having succeeded in these appeals cannot be asked to pay an additional amount towards the illegal demand.

We, accordingly, allow these appeals with the result that the writ petitions filed by the appellants stand allowed. The demand of additional duty from the appellants is quashed but the respondents shall not be liable to refund any additional duty realised so far from the appellants. The parties will bear their own costs.