

## **M/S. Sneh Enterprises vs Commnr. Of Customs, New Delhi on 8 September, 2006**

**Author: S.B. Sinha**

**Bench: S.B. Sinha, Dalveer Bhandari**

CASE NO.:

Appeal (civil) 706 of 2005

PETITIONER:

M/s. Sneh Enterprises

RESPONDENT:

Commnr. of Customs, New Delhi

DATE OF JUDGMENT: 08/09/2006

BENCH:

S.B. Sinha & Dalveer Bhandari

JUDGMENT:

**J U D G M E N T** S.B. Sinha, J.

Sealed maintenance free lead acid batteries manufactured in Taiwan for being used in Uninterrupted Power Supply (UPS) were imported by the appellant at Mumbai on 16.4.2002. The goods were trans-shipped from Mumbai to Delhi. The Bill of Entry, however, was filed by the appellant with the customs authorities at Delhi on 22.5.2002.

Anti-dumping duty, indisputably, can be levied on issuance of a notification by the Central Government in terms of Section 9A of the Customs Tariff Act, 1975 (for short, 'the Act'). The said provision reads thus :

"9A. Anti-dumping duty.- (1) Where any article is exported from any country or territory (hereafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such articles into India, the Central Government may, by notification in the Official Gazette, impose, -

(a) if the articles is not otherwise chargeable with duty under the provisions of this Act, a duty; or

(b) if the article is otherwise so chargeable, an additional duty, not exceeding the margin of dumping in relation to such article;"

The Central Government, in exercise of its power thereunder, issued a notification on 22.5.2002 on lead acid batteries, originating in or exported, inter alia<sup>8</sup> from Taiwan, Singapore and Hong Kong. The respondents, relying on or on the basis of the said notification directed payment of anti-dumping duty on the said imported goods by the appellant.

The contention of the appellant, inter alia, is that the said notification dated 22.5.2002 being not retrospective in operation the impugned order was wholly unsustainable. It was urged that the taxable event having occurred on the day of importation of goods, i.e., on 16.4.2002, no anti-dumping duty, admittedly brought in force by reason of the said notification dated 22.5.2002, was applicable. The said contention of the appellant, however, was rejected by the respondent, and affirmed by the Customs, Excise and Service Tax Appellate Tribunal by reason of the impugned order, stating :

"It is thus settled law that the import is completed only when the goods are to cross the Customs barriers and that is the time when the import duty has to be paid and not on the date when goods had landed in India. Under Section 9A of the Customs Tariff Act, anti- dumping duty is imposable upon importation of the goods. The import is completed only when the goods are to cross the customs barrier. In the present matter on the date of crossing the customs barrier, the anti-dumping duty was leviable in terms of Notification No.55/2002- Cus and, therefore, anti-dumping duty under Section 9A of the Customs Tariff Act is payable by the Appellants. The decision of the tribunal in the case of Suja Rubber Industries is not applicable as it has been passed per incuriam the judgment of the Supreme Court in Kiran Spinning and Garden Silk Mills. Thus, the ratio of the decision in Fenner India Ltd., is also not applicable."

Mr. P.C. Jain, learned counsel appearing on behalf of the appellant would submit that in view of the fact that Section 9A is an enabling provision and the notification thereunder having been issued on 22.5.2002, the provisions of Section 15A of the Customs Act could not have been invoked in the instant case, particularly, in view of the fact that Sub-Section (8) of Section 9A was introduced in the year 2004 by reason of Finance (No.2) Act, 2004.

Mr. K.P. Pathak, learned Additional Solicitor General, however, would submit that in view of the judgment of this Court in Kiran Spinning Mills vs. Collector of Customs [1993 (113) ELT 753 (S.C.)], the taxable event must be held to be the day when the goods crossed the customs barrier and not on the day when the goods landed in India or entered its territorial waters.

Customs Tariff Act, 1975 was enacted to consolidate and amend the law relating to custom duties. Section 2 of the said Act provides for the rates at which the custom duty should be levied under the Customs Act, 1962 as specified in the First and Second Schedules. Imposition of anti- dumping duty, however, is not a part of the duty, which can be levied under the Customs Act.

Customs Duties under the Customs Act would include additional duty under the Customs Tariff Act. Additional duty can be levied in terms of Section 3 of the said Act. For computation of additional

duty, in terms of Sub-Section (6) of Section 3, the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties, shall so far as may be, apply to the duty chargeable under the said section shall apply as they apply in relation to the duties leviable under that Act. Sub-Section (6) of Section 3 of 1975 Act, therefore, provides for incorporation by reference the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, as applicable in relation to the additional duty framed thereunder.

Section 9A was inserted in the year 1985. It contains an enabling provision. The said provision envisages that the duty would be imposable if, in the opinion of the Central Government, the value of the goods is less than its normal value. Normal value has been defined in Explanation (b) to Section 9A to mean :

"(b) "normal value", in relation to an article, means

(i) The comparable price in the ordinary course of trade for the said article or like article when meant for consumption in the exporting country or territory as determined under sub-section (2); or

(ii) where such comparable price cannot be ascertained because of the particular market situation or for any other reason, such value shall be either (A) the highest comparable price for the said article or like article from the exporting country or territory to any third country in the ordinary course of trade as determined under sub-section (2); or (B) the cost of production of the said article or like article in the country of origin along with reasonable addition for selling and any other cost, and for profits, as determined under sub-section (2)."

Sub-section (8) of Section 9A was introduced by Finance Act, 2004. Prior thereto, the statute did not contemplate application of the provisions of the Customs Act and the rules and regulations made thereunder. By Section 76 of the Finance (No.2) Act, 2004, indisputably, Sub-Section (8) was inserted stating the provisions of the Customs Act would be applicable "relating to, the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences and penalties" in respect of anti-dumping duty.

Sub-Section (1) of Section 15 of the Customs Act, 1962 reads as under :

"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;"

The anti-dumping duty, as noticed hereinbefore, does not attract the provisions of the Customs Act. If the provision of law is incorporated by reference, it was obligatory on the part of the Parliament to say so. Such a provision was brought for the first time in the year 2004. The doctrine of incorporation by reference is, therefore, not attracted. In Principles of Statutory Interpretation by Justice G.P. Singh, Tenth Edition 2006, at pp.294-295, the law is stated in the following terms :

"When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provision so incorporated become part and parcel of the later Act as if they had been "bodily transposed into it".

The effect of incorporation is admirably stated by LORD ESHER, M.R.: "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it." The result is to constitute the later Act along with the incorporated provisions of the earlier Act, an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act."

The question was considered at some details by a Three Judge Bench of this Court in Nagpur Improvement Trust etc. vs. Vasantrao & Ors. [(2002) 7 SCC 657], opining :

"..... The law on the subject is well settled. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitutes an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, where in a later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally well settled that the question whether a former statute is merely referred to or cited in a later statute, or whether it is wholly or partially incorporated therein, is a question of construction."

The said decision has been followed in *Kanak (SMT) & Anr. vs. U.P. Avas Evam Vikas Parishad & Ors.* [(2003) 7 SCC 693].

The Tribunal unfortunately did not address itself on the said question. It, inter alia, relied upon *Kiran Spinning Mills (supra)*, wherein the provisions of Sub-Section (6) of Section 3 of the Customs Tariff Act was attracted.

We are herein not dealing with a case of additional duty of excise. In *Kiran Spinning Mills (supra)*, only because Sub-Section (6) of Section 3 was held to be attracted in that case, additional excise duty was held to be payable on the date when the Bill of Exchange was filed.

Section 9A of the Customs Tariff Act clearly states that imposition of anti-dumping duty on dumped articles is required to be determined "upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article". Quantum of additional duty, therefore, was required to be determined when the goods have been imported and is subject for clearance. Such is not the case here.

In *Surana Steels Pvt. Ltd. etc. vs. Dy. Commissioner of Income Tax & Ors. etc.* [(1999) 4 SCC 306], it is stated :

"Section 115-J explanation clause (iv), is a piece of legislation by incorporation. Dealing with the subject, Justice G.P. Singh states in *Principles of Statutory Interpretation* (7th Edn., 1999) "Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it'. The effect of incorporation is admirably stated by LORD ESHER, M.R.: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it.' (p.233) Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN : 'When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act.'" (p.244)"

Anti-dumping duty would be payable in respect of the goods which have already entered Indian Territory and are warehoused.

In this case, goods were cleared by the Customs Authorities without imposing any anti-dumping duty. It was at a later date the duties were sought to be imposed, wherefor a show cause notice was issued. A Judgment, as is well known, is the authority for the proposition which it decides and not what can logically be deduced from. Kiran Spinning Mills (*supra*) does not militate against a contention of the appellant. It, in fact, supports its contention. The question as to when import of goods is complete would depend upon contract between the parties and/or statute governing the field. It is not a part of common law that the import of the goods would be deemed to have been completed only when it passes the customs barrier. Such a provision had been made for achieving definite purposes, i.e., for the purpose of calculating customs duty.

In absence of a statute, the contract between the parties would not be superceded. Sub-Section 6 of Section 3 or Sub-Section 8 of Section 9A of Customs Tariff Act was enacted to achieve a specific purpose. Its operation is limited from the date it came into force. It cannot be applied with retrospective effect. Unless there exists a statutory interdict, common law principle would apply which would mean that import would be complete when the goods enter the territories of the country. Taxable event in terms of the notification issued under Section 9A of the Act is on importation of the good and not when the same passes the customs barrier. The goods in question landed at Mumbai. They were trans-shipped to Delhi. They were, however, cleared at Delhi. The goods might have passed the customs barrier on the day on which the Bill of Entry was filed by the appellant for the purpose of Customs Act. But such importation of goods, in terms of the provisions of the Customs Act, was meant only for computation of duty thereunder and not for any other purpose. In other words, a situation contemplated under one statute cannot, in absence of any express or clear intendment, be made to apply or be given effect to while applying the provisions of another statute.

It is a trite law that while interpreting the statute, the courts not only may take into consideration the purpose for which the same had been enacted, but also the mischief it seeks to suppress. Evidently, with a view to suppress the mischief, if any, Section 26 of the Finance Act, 2004, was brought into the statute book. It cannot, therefore, by no stretch of imagination be held that the Parliament intended to apply the provisions of Section 15 of the Customs Act in Section 9A of the Customs Tariff Act, prior to 2004.

While dealing with a taxing provision, the principle of 'Strict Interpretation' should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the Court ordinarily would interpret the provisions in favour of a tax-payer and against the Revenue.

The notification dated 22.5.2002, on its face value, is prospective in operation and not retrospective. It, in no uncertain terms, states that Central Government thereby may impose duty only, *inter alia*, on lead acid batteries originated from the countries specified therein and imported into India. The proviso appended to the notification provides for a clue in the sense that by reason thereof no duty was to be imposed on industrial lead acid batteries manufactured by the manufacturers named therein. The anti-dumping duty imposed thereby was to remain effective only for a limited period,

i.e., upto 21st November, 2002.

For the aforementioned reasons, the impugned judgment cannot be sustained, which is accordingly set aside. The appeal is allowed. No costs.