

**THE HIGH COURT OF MEGHALAYA AT  
SHILLONG**

**: ORDER :**

**WRIT PETITION NO. 308 OF 2016**

**Border Trade & Chamber of Commerce, Moreh Town.**

**Versus**

**Union of India and Others**

**Date of Order                      ::                      23.02.2017**

**HON'BLE THE CHIEF JUSTICE SHRI DINESH MAHESHWARI**

**HON'BLE SHRI JUSTICE VED PRAKASH VAISH**

Ms. P. Sikdar, for the petitioner.

Shri N. Mozika, for the respondents.

**AFR      BY THE COURT: (per Hon'ble the Chief Justice) (Oral)**

The petitioner, said to be an Association of the persons engaged in export and import trade with Myanmar through Moreh Land Custom Station (Manipur), had filed this writ petition on 13.10.2016 seeking to question the directions issued by the Commissioner of Custom (Preventive), North Eastern Region, Shillong (respondent No.2), as contained in the letter dated 06.10.2016 (Annexure-6), whereby the members of the petitioner-Association were directed to furnish Bank Guarantee to the tune of 40% of the duty allegedly leviable in relation to the import of Areca Nuts/Betel Nuts.

In view of the subsequent event where the respondents have issued an amendment notification on 27.01.2017 in relation to the goods in question and in view of the contentions urged, the only question now calling for determination in the present matter is as to whether the

amendment notification dated 27.01.2017 is prospective in operation or could have any retrospective operation? Hence, in the given set of facts and circumstances, only a brief reference to the background aspects would suffice.

It has been the contention on behalf of the petitioner that the import of Areca Nuts (Betel Nuts), falling under Customs Harmonized System Code (HS Code) No. 08028010 and 08028020 of Customs Tariff Act, 1975, from Myanmar attracted Nil rate of Basic Customs Duty ('BCD') under Notification No. 96/2008-Customs, dated 13.08.2008 (as amended), without any condition; and accordingly, import was allowed by the respondents until first week of the month of September, 2016 but thereafter, the respondent No. 2 directed without any authority of law, that Bank Guarantee to the tune of 40% of the normal duty for import of the said goods be furnished. The relevant contents of the impugned communication dated 06.10.2016 (Annexure-6) had been as under:-

*"At the outset, it may be pointed out that the import of Areca Nuts/Betel Nuts has not been suspended at Moreh LCS. Areca Nuts/Betel Nuts were cleared at Nil BCD. However on re-examination of the issue by the Central Board of Excise & Customs it was pointed out that Betel Nuts attract 40% BCD in terms of entry at Sl. No. 14 of Notification No. 96/2008-Cus dated 13.08.08 (as amended). Accordingly instructions were issued to levy/collect 40% BCD on Areca Nut/Betel Nut. However as the matter is pending with the Board for a final decision, revised instructions have been issued to the field formations to allow clearance of Areca Nuts/Betel Nuts provisionally at Nil Basic Customs Duty alongwith submission of Bank Guarantee for the differential duty i.e. 40% {rate of duty applicable in terms of Appendix I of Notification No. 96/2008-Cus dated 13.08.08 (as amended)}."*

The petitioner has pointed out that the respondent No. 2 had earlier issued the clarifications/directions dated 20.01.2016, to the effect that the import of Areca Nuts (Betel Nuts) under HS Code No. 08028010 and 08028020 attracted Nil rate of BCD under the said Notification No. 96/2008-Customs dated 13.08.2008 (as amended) without imposing any

condition. According to the petitioner, there was no change of facts or law; and all of a sudden, a different interpretation of the said exemption Notification with regard to Areca Nuts (Betel Nuts) under HS Code 08028010 and 08028020 was entirely illegal, unjustified and unwarranted.

Initially, the respondents had submitted in their counter affidavit that under the said Notification No. 96/2008-Customs dated 13.08.2008 (as amended), the goods falling under the First Schedule to the Customs Tariff Act, 1975, other than those specified in Appendix I and Appendix II appended hereto, were exempted from whole of the duty of customs as specified in the First Schedule to the Customs Tariff Act, 1975; and, as the said Notification did not list HS Code 080280 or any of the sub-classifications in Appendix I or Appendix II, going by its contents, exemption had earlier been allowed on the imports of such goods. However, according to the respondents, the Central Board of Excise and Customs ('the Board') took a view that an entry "Betel Nut", which was eligible to tariff concession of 60% of duty (thus chargeable duty being 40%) occurred in Appendix I of the Notification No. 96/2008-Customs dated 13.08.2008 (as amended), all the imports of Areca Nuts (Betel Nuts) from Myanmar were to be assessed while granting tariff concession to the extent as mentioned alongside the said entry.

Even while admitting that no amendment to the principal notification had been carried out, the respondent maintained that in view of some degree of confusion as to the quantum of duty leviable, instructions were issued to allow imports at Nil rate of BCD, but with furnishing of Bank Guarantees so as to protect the interest of revenue. The respondents had further submitted that the Bank Guarantees would

be subject to encashment, if 40% duty was found leviable on the imported items in question and if not, the same would be released; and, as the goods were proposed to be assessed provisionally, and differential duty could be estimated, Bank Guarantees were sought to be obtained in terms of para 6 (b) of CBEC Circular No. 38/16-Cus dated 22.08.2016.

During the pendency of this writ petition, it was given out before the Court that the issue concerning amendment/clarification of the principal notification in relation to the goods in question was pending before the Central Board of Excise and Customs; and now, it is submitted that ultimately, the Government has issued a notification dated 27.01.2017 substituting Entry No.14 in Appendix-I to the notification dated 13.08.2008. In the changed scenario, it is an admitted position that the only question now calling for determination is as to whether this notification dated 27.01.2017 shall have prospective operation from the date of issuance or could apply retrospectively?

For ready reference, we may take note of the contents of the notification dated 27.01.2017 as under:-

*“[TO BE PUBLISHED IN THE GAZETTE OF INDIA,  
EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (1)]*

*GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)*

***Notification  
No.02/2017-Customs***

*New Delhi, dated the 27<sup>th</sup> January, 2017*

*G.S.R. (E). – In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendment in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No.96/2008-Customs, dated the 13<sup>th</sup> August,*

2008 published vide number G.S.R. 590 (E), dated the 13<sup>th</sup> August, 2008, namely:-

In the said notification, in APPENDIX-I, in the TABLE, for serial number 14 and the entries relating thereto, the following serial number and entries shall be substituted namely:-

(1)	(2)	(3)	(4)
14	080280	All goods	60%

F.No.354/189/2005-TRU (Vol-II)

(Anurag Sehgal)  
Under Secretary to the Government of India

*Note: The principal notification no.96/2008-Customs, dated the 13<sup>th</sup> August, 2008 was published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide number G.S.R. 590 (E), dated the 13<sup>th</sup> August, 2008 and was last amended by notification No.67/2016-Customs, dated the 31<sup>st</sup> December, 2016, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide number G.S.R. 1198 (E) dated the 31<sup>st</sup> December, 2016.”*

It is submitted by the learned counsel for the petitioner Ms. P Sikdar that the said notification dated 27.01.2017 is obviously prospective in operation for being that of amendment by the Central Government in exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (‘the Act of 1962’); and the same is neither retrospective or clarificatory in nature. Learned counsel for the petitioner, with reference to the provisions contained in Section 25 of the Act of 1962 and while relying on the decisions of the Hon’ble Apex Court in **Commissioner of Customs, Bangalore v. Spice Telecom: 2006 (203) E.L.T. 538 (SC); M/s Pankaj Jain Agencies v. Union of India and ors: 1994 (72) E.L.T. 805 (S.C.); and Union of India and ors v. Ganesh Das Bhojraj: 2000 (116) E.L.T. 431 (SC)** has empathically argued that in the absence of any other stipulation and with operation of the plain provisions of law, the said notification dated 27.01.2017 shall

only be prospective in operation and hence, cannot be applied to the imports already made before the date i.e., 27.01.2017.

Per contra, learned counsel for the respondents Mr. N Mozika has attempted his best to argue that the notification dated 27.01.2017 could be applied to the previous imports also and could be construed retrospective in operation with the submissions that the same is essentially an explanatory one and is clarificatory in nature. Learned counsel has referred to and relied upon the decision of the Hon'ble Apex Court in ***CIT v. Gold Coin Health Food (P) Ltd.: (2008) 9 SCC 622***.

Having given thoughtful consideration to the entire matter and having examined the record, we have no hesitation in rejecting the suggestions made on behalf of the respondents and in upholding the contentions urged on behalf of the petitioner.

The notification dated 27.01.2017 is specifically that of an amendment of Appendix-I to the principal notification dated 13.08.2008 and thereby, the entry at serial number 14 has been substituted. There is not a whisper or even a remotest suggestion in any manner in the said notification that the same would be applicable from any date anterior to the date of issuance i.e., 27.01.2017.

The relevant provisions as contained in Sub-sections (1) to (5) of Section 25 of the Act of 1962 could be taken note of as under:-

***“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, exempt 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.***

*(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.*

*(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.*

*(4) Every notification issued under sub-section (1) [or sub-section (2A)] shall,—*

*(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;*

*(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.*

*(5) Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.*

*..... ”*

Thus, as per Sub-section (2A) of Section 25 *ibid.*, if any explanation was to be inserted in the notification for the purpose of clarifying the scope and applicability, the same was required to be issued within one year of the date of issuance of the principal notification. Obviously, the notification as issued on 27.01.2017 is not the one issued under Sub-section (2A) of Section 25 of the Act of 1962. Moreover, the notification itself clearly states that the same has been issued in exercise of the powers conferred by Sub-Section (1) of Section 25 of the Act of 1962 for the purpose of amendment of the principal

notification dated 13.08.2008. In the notification dated 27.01.2017, nothing has otherwise been provided as regards the date of its enforcement. Therefore, it remains beyond the pale of doubt that its operation would be governed by Clause (a) of Sub-section (4) of Section 25; and, accordingly, it has come into force on the date of issuance and not before.

The decision sought to be relied upon by the learned counsel for the respondent has no application whatsoever to the present case. The aforesaid decision in *Gold Coin Health Food (P) Ltd.* (supra) related to an amendment of Explanation-4(a) to Section 271 of the Income Tax Act, 1961, as made by the Finance Act, 2002. The principal provisions as contained in Section 271 of the Income Tax Act, 1961, inter alia, provided for penalty in case of concealment of particulars of income or furnishing inaccurate particulars; and the quantum of penalty was specified with reference to “the amount of tax sought to be evaded” on such concealment or inaccurate particulars. In that regard, Clause (a) of Explanation 4, as earlier existing, explained the expression “the amount of tax sought to be evaded” to mean the tax that would have been chargeable on the income in respect of which particulars had been concealed or inaccurate particulars had been furnished, had such income been the total income. The question arose in the context of not only the cases where, upon addition of the concealed income, a loss returned, after assessment, became positive income but also where the addition of concealed income only reduced the returned loss and finally, the assessed income was nevertheless a loss or a minus figure. By way of amendment of Explanation 4(a), the position was made clear that penalty under Section 271(1)(c)(iii) would be leviable even in cases



where the final assessed income was that of loss. That was for the reason that even in such a case, the tax sought to be evaded would be the tax chargeable on concealed income, as if it were the total income. In the given context, the Hon'ble Supreme Court held that the said Explanation 4 to Section 271(1)(c) was clarificatory and was not substantive in nature. The Hon'ble Supreme Court has pointed out that an explanatory enactment is generally passed to supply an obvious omission and to clear up the doubts; and if a statute is curative or merely declaratory of the existing laws, the same would have retrospective effect.

The aforesaid decision relating to the income tax and that too amendment of an explanation so as to bring about more clarity on the meaning assigned to a particular expression does not have any application to the present case for the simple reason that herein, the notification in question is substantive in nature, specifying the rate of exemption of duty on a particular category of goods. Thus, the notification in question, which has been issued under Section 25(1) of the Act of 1962 would be only prospective in operation. Moreover, in view of the unambiguous provisions contained in Clause (a) of Section 25(4) of the Act of 1962, and there being no stipulation to the contrary in the notification dated 27.01.2017, there is no room for any doubt that this notification is only prospective in operation. The decisions relied upon by the learned counsel for the petitioner make the position further clear that in the absence of any express provision contained in the notification, ordinarily, it cannot be presumed that the same is retrospective in nature. Thus, we have no hesitation in holding that the notification dated 27.01.2017 is prospective in operation. It follows as a natural

consequence that this notification would have operation only on the transactions from its date and not on the previous transactions.

It follows, as a necessary corollary to what has been discussed hereinabove, that the impugned communication dated 06.10.2016 (Annexure-6 to the writ petition) and the order as issued by the respondents dated 05.10.2016 (Annexure-4 to the counter affidavit) are now rendered redundant and ineffective. Obviously, no other adjudication is called for and the respondents are expected to clear the goods in question without further delay.

Accordingly and in view of the above, this writ petition is allowed to the extent and in the manner that the impugned communication dated 06.10.2016 (Annexure 6 to the writ petition) and the order dated 05.10.2016 (Annexure 4 to the counter affidavit) are held redundant and ineffective. Further, it is held that the goods falling under the principal HS Code No. 080280 shall be subject to the rate of duty provided in Notification No. 2/2017 – CUSTOMS, dated 27.01.2017 from the date of issuance of this notification. The respondents shall now clear the goods in question in accordance with law and at the earliest. No costs.

**JUDGE**

**CHIEF JUSTICE**

*Sylvana*

*Item No. 1*