COLLECTOR OF CUSTOMS, BANGALORE

v.

WESTERN INDIA PLYWOOD MFG. CO. LTD. AND ANR.

OCTOBER 26, 1989

[S. RANGANATHAN AND KULDIP SINGH, JJ.]

Customs Tariff Act, 1975: Schedule Heading No. 44.01 and Notification No. 126 of 1984—Timber imported from country specified in Notifications under Section 25 of Customs Act, 1962 exempted from effective basic duty—Rate of auxiliary duty—Determination of.

Under Heading No. 44.01 of Schedule to the Customs Tariff Act, 1975, timber was chargeable to customs duty (basic effective duty) at 60%. However, under a Notification issued by the Government under Section 25(1) of the Customs Act, 1962, timber imported from certain countries was exempted, but an additional duty (auxiliary duty) was payable on such imports in terms of Notification No. 265 dated 1.12.1982 and its successor Notifications No. 53 of 1983 and 126 of 1984.

The assessee imported logs of timber from an exempted country, and as it was not liable to pay the basic duty, it cleared the goods by paying the auxiliary duty at 40%, with reference to the effective basic duty at 60%, as prescribed under Notification No. 126 of 1984. Subsequently, however, the assessee felt that it should have paid an auxiliary duty of only 30%, and not 40% since no basic effective duty was payable on the goods imported. It, therefore, applied to the respondent for refund of the excess duty paid by it. This claim was rejected by the Assistant Collector. On appeal, the Collector of Customs (Appeals) held that the assessee was entitled to the refund claimed. This order was confirmed by the Customs Excise and Gold (Control) Appellate Tribunal (CEGAT), on the view that the explanation would come into operation only if there was more than one notification granting concession or exemption, in respect of basic duty, providing for different rates in respect of articles imported from different countries. Hence, the appeals by the Department.

Allowing the appeals, this Court,

HELD: 1. The Tribunal has erred in its interpretation of the Notification No. 126 of 1984. The assessee's case is clearly covered by

A the explanation in the notification. The auxiliary duty paid by the assssee was perfectly in order and its refund applications are not maintainable. [783D, 785E]

2.1 The notification and the explanation make it clear that the auxiliary duty has to be paid with reference to each article based on the B effective basic duty applicable to such article in terms of the First Schedule read with any relevant notification under Section 25. [785D]

2.2 No doubt, the main part of Notification No. 126 of 1984 provides for auxiliary duty at 40% where rate of effective basic duty is 60% or above i.e. rates set out in First Schedule read with any relevant C notification and at 30% where such effective rate is nil or less than 60%. However, the explanation to the notification has made an inroad into this simple rule by providing that where two or more effective basic rates are applicable in respect of any article, and the differentiation in rates is referable to the country of origin, then the auxiliary duty payable will be the higher of the two, or highest of the rates. [783E-G]

D

2.3 In the instant case, when timber is imported from the countries specified in the notification or notifications under Section 25(1), the rate of basic duty is *nil*, but if the goods are imported from other countries, the notification does not apply and a basic duty of 60% would be leviable under the entry in the First Schedule. Thus, when the E rates specified in the First Schedule are read along with the relevant notifications, it is found that the effective basic duty is leviable on it at two rates and this differentiation in rates is attributable to the country of origin in regard to the import. Hence, the explanation squarely comes into operation and the auxiliary duty will have to be paid by reference to the higher of the two rates of the effective basic duty, F namely, 60%. [783G-H; 784A]

2.4 The differentiation referred to in the explanation need not arise on account of the existence of more than one notification, altering the basic duty set out in the Schedule. It does not matter whether the difference in the rates is because the First Schedule applies in certain G cases and a concession notification in other cases. If there is no notification the rate specified in the First Schedule has to be taken into account for purpose of the notification in question. [784D-E]

2.5 A person will have to pay an auxiliary duty even though the effective basic duty is *nil*. That is the clear intention of the statutory H instrument and the explanation is based on good reason. It is equitable

that all importers should pay the additional duty at the same rate and that they should have no advantage or disadvantage *inter se*. A grant of concession in the matter of auxiliary duty as well would result in widening the gulf between one importer and another and also that between such an importer and the local trader. [784F; 785A]

CIVIL APPELLATE JURISDICTION: Civil Appeals No. 2644-2648 of 1987.

From the Judgment and Order dated 7.5.1987 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, in Order No. 377 to 381/1987-D in Appeal Nos. CD/SA/A Nos. 2451, 1989 to 1991 & 1992/86-D.

V.C. Mahajan R.P. Srivastava and P. Parmeswaran for the Appellant.

T.A. Ramachandran and Mrs. J. Ramachandran for the Respondents.

The Judgment of the Court was delivered by

RANGANATHAN, J. These are four appeals by the Collector of Customs in the cases of M/s. Western India Plywood Mfg. Co. Ltd. and Kanara Wood & Plywood Industries Ltd. (hereinafter referred to as 'the assessee'). A very short common point is involved in these appeals.

The assessee imported logs of timber from Burma. Under the Customs Tariff Act, 1975, timber is chargeable to customs duty at 60%. (This we shall call the basic customs duty.) The relevant entry in the Schedule to the Customs Tariff Act is under heading No. 44.01 which includes "wood and timber".

The Government had, however, issued a notification under section 25(1) of the Customs Act exempting timber imported from certain countries of which Burma is one. The result was that the basic customs duty payable by the assessee in respect of its imports—we shall call this the effective basic duty—was *nil*. The assessee, however, was liable to pay an additional duty of customs in respect of its imports. This additional duty may be referred to as the auxiliary duty of customs. The levy of this duty is governed by the terms of notification No. 265 dated 8.12.1982 and its successor notifications Nos. 59 of 1983 and 126 of 1984.

The last of these reads as follows:

TABLE

S. No. (1)	*Description of goods* (2)	*Rate* (3)
1	Goods in respect of which the rate of duty of customs specified in the said First Schedule, read with any relevant notification of the Government of India for the time being in force is 60 per cent *ad valorem* or more.	Forty ★ per cent of the value of the goods as determined in accordance with the provisions of Section 14 of the Customs Act, 1962 (52 of 1962).
2.	Goods in respect of which the rate of duty of customs specified in the said First Schedule, read with any relevant notification of the Government of India for the time being in force is nil or less than 60 per cent *ad valorem*.	Thirty ★ per cent of the value of goods as determined in accordance with the provisions of Section 14 of the Customs Act, 1962. (52 of 1962)

★ These percentage are 30% and 20% in the notification of 1982 and 35% and 25% in the notification of 1983. The terms of the notifications are otherwise identical.

Explanation: For the purpose of Sl. Nos. 1 and 2 in the above Table, the expression "the rate of duty of customs specified in the said First Schedule, read with any relevant notification of the Government of India for the time being in force", in relation to any article liable to two or more different rates of duty by reason of the country of origin of that article, means that rate of duty which is the highest of those rates."

The assessee cleared the goods by paying an auxiliary duty at

40%. Subsequently, however, the assessee seems to have felt that its case falls under S. No. 2 of the above notification and that it should have paid an auxiliary duty of only 30% and not 40%. It, therefore, applied to the respondent for a refund of the excess duty allegedly paid by it. This claim was rejected by the Assistant Collector. However, on appeal, the Collector of Customs (Appeals) held that the assessee was entitled to the refund claimed and this order has also been confirmed by the Customs, Excise and Gold Control (Appellate) Tribunal (CEGAT). The Collector of Customs has preferred these appeals.

The order of the Tribunal in the appeals preferred by the present respondent was a very short order in which the Tribunal followed its earlier decision in the case of M/s. Indian Plywood Company Limited, Bombay. We have been taken through the decision of the Tribunal in the said case which is reported in (1987) 29 ELT page 559. We have, therefore, had the benefit of the full reasoning of the Tribunal for reaching its conclusion.

We are of opinion that the Tribunal has erred in its interpretation of the notification set out above and that the assessee's case is clearly covered by the explanation in the notification. It is true that the main part of the notification provides for an auxiliary duty at 40% in cases where the effective rate of basic duty (i.e. the rates set out in the First Schedule read with any relevant notification) is 60% or above and an auxiliary duty at 30% in cases where such effective basic rate is *nil* or less than 60%. If the notification had stopped here, the assessee would have been perfectly within its rights to claim that the auxiliary duty payable by it would only be 30% because the effective basic rate in its case is *nil*.

However, the explanation has made an inroad into this simple rule. It has provided that where there are two (or more) effective basic rates applicable in respect of any article and the differentiation in rates is attributable to the country of origin of the goods imported, then the auxiliary duty payable will be the higher of the two (or the highest of the) rates. In the present case, when timber is imported from Burma and the other countries specified in the notification or notifications under section 25(1), the rate of basic duty is *nil* but if the goods are imported from other countries, the notification does not apply and a basic duty of 60% would be leviable under the entry in the First Schedule. The result, therefore, is that when we read the rates specified in the First Schedule along with the relevant notifications in respect of a particular article, namely, timber, we find that the effec-

A tive basic duty is leviable on it at two rates and this differentiation in rates is attributable to the country of origin in regard to the import. Hence the explanation squarely comes into operation and the assessee will have to pay auxiliary duty by reference to the higher of the two rates of the effective basic duty, namely, 60%.

B The contention on behalf of the respondent—and this is also the view taken by the Tribunal—appears to be that the explanation comes into operation only if there is more than one notification granting concession or exemption in respect of basic duty providing for different rates in respect of articles imported from different countries. We are unable to see any warrant for reading any such restriction into the terms of the explanation. As we see it, the terms of the explanation are C perfectly clear. It is this: that if, in respect of any article, there are two or more effective basic duties in operation and the difference is referrable to the country from which the article is imported, then the highest of the effective rates will govern the levy of auxiliary duty. It does not matter whether the difference in the rates is because the First D Schedule applies in certain cases and a concession notification applies in other cases. Clearly, the use of the words "rate ..... specified in the First Schedule, read with *any* relevant notification" does not necessarily require that there should be such a notification; they mean: "the rates specified in the First schedule read with the relevant notification, *if any*". If there is no notification the rate specified in the First E Schedule has obviously to be taken into account for purpose of the notification we are now concerned with. It is, therefore, not necessary that the differentiation referred to in the explanation should arise on account of the existence of more than one notification altering the basic duty set out in the Schedule.

F Sri Ramachandran contended that the construction sought to be placed by us would lead to this anomaly that a person will have to pay an auxiliary duty even though the effective basic duty is *nil*. This argument is without force for two reasons. In the first place that is the direct result of the explanation and, therefore, if that is the clear intention of the statutory instrument, the anomaly cannot be helped. The G second and perhaps more appropriate answer to Sri Ramachandran's contention is that the explanation is based on good reason. It will be seen that in a case of this type as well as in cases governed by more than one notification, which make a distinction in the rate of duty based on the country of origin, there will be different importers importing goods but paying basic duty at different rates. The intention H of the statute could well be that while for purposes of basic duty a

differentiation in rates may be justified depending upon the country of origin that consideration would be totally irrelevant in the context of auxiliary duty. In the context of auxiliary duty, it is equitable that all importers should pay the additional duty at the same rate and that they should have no advantage or disadvantage *inter se*. A grant of concession in the matter of auxiliary duty as well would result in widening the gulf between one importer and another and also that between such an importer and the local trader. The provision, therefore, seems to have been deliberately enacted to achieve this result which is not really an anomaly as described by Sri Ramachandran.

Sri Ramachandran sought to make same point on the use of the word 'article' in the notification. We do not, however, see any significance in the use of this word which has any relevance to the point at issue. The word 'article' is used because though a number of articles may be included in one item in the First Schedule, the relevant notification may not govern all of them and it may be restricted only to some out of the many articles mentioned in the Schedule. The notification and the explanation, therefore, make it clear that the auxiliary duty has to be calculated with reference to each article based on the effective basic rates of duty applicable to such article in terms of the Frist Schedule read with any relevant notification under section 25.

For the reasons mentioned above, we are of opinion that the auxiliary duty paid by the assessee was prefectly in order and that its refund applications are not maintainable. We, therefore, set aside the order of the Tribunal and the Collector (Appeals) and restore the order of the Assistant Collector refusing refund to the assessee. The appeals are, therefore, allowed. In the circumstances of the case, we make no order as to costs.

N.P.V. Appeals allowed.