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UNION OF INDIA AND ORS.

v.

ALANG SHIP BREAKERS PVT. LTD., BHAVNAGAR AND ORS.

AUGUST 27, 1993

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[KULDIP SINGH AND S.C. AGRAWAL, JJ.]

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Central Excises and Salt Act, 1944—Central Excise Rules, 1944—Rule 8—Whether withdrawal of show cause notice and conformed demand notices, relating to payment of excise duty, in pursuant to consent terms of agreement between the parties, for waiver of arrears of excise duty, after payment of 25% of the duty in compliance with interim order of High Court, entitled the payer to obtain refund of the portion of duty paid—Whether communication about waiver of excise duty, related to waiver of the unpaid balance duty only.

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The respondents, are engaged in business of breaking/dismantling of old unserviceable ships. After breaking/dismantling the old vessels, they sell the metal scrap in open market. In 1985, the Central Excise authorities concerned, required the respondents to pay excise duty on the said material taking the view that dismantling or breaking the unserviceable ships constitute 'manufacture'. Notices were issued to show cause as to why excise duty under Tariff item, 25 (d) of Central Excise Tariff be not levied and collected. Respondents filed writ petition in Gujarat High Court for injunction restraining the Excise authorities from levying or collecting duty on such scrap or interfering with clearance or removal of scrap, contending that excise duty was not leviable on the scrap. The High Court

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passed interim order that respondents shall be entitled to clear the goods on payment of 25% of excise duty payable and shall execute personal bonds for payment of the balance 75% duty, if writ petition is dismissed. The question regarding refund of 25% duty paid was to abide by final direction of the Court. Thereafter, the parties arrived at agreement and filed consent terms in the High Court to the effect that the excise authorities shall not enforce personal bonds, the Government will consider appropriate reduction in excise duty after withdrawal of writ petition and the Respondents shall abide by government decision and that the Government would also evolve suitable scheme to ensure waiver of arrears of excise duty. The High Court made final order in terms of the parties consent terms and disposed

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of writ petition, without any directions about 25% of duty paid by Respon-

dents, Interim relief was vacated. Thereafter, Government of India issued notification dated August 2, 1986, under Rule 8(1) of Central Excise 1944, exempting ship scraps from excise duty. Under Secretary to Government of India, Department of Revenue sent a letter dated April 6, 1989, to Collectors concerned that it has been decided to waive duty on ship scraps for the period prior to notification dated August 2, 1986 and accordingly show cause notices and confirmed demand notices may be withdrawn. Respondents on rejection of their applications for refund of 25% of duty paid, filed writ petition in the High Court for directions to the Appellants to refund the amount with interest. The writ petition was allowed by the High Court. Union of India filed appeal against the order of the High Court. This Court allowed the appeal on consideration of contents of the consent terms of the parties, the fact that the High Court had not made any order relating to refund of the portion of duty paid, while disposing of the writ petition and that the notification dated August 2, 1986, was prospective, and not operative retrospectively, and

HELD : The letter dated April 6, 1989, is confined in scope to consent terms, which is limited to "waiver of the arrears of excise duty". It cannot be construed as referring to payment of 25% of the duty paid. Waiver of arrears of excise duty can only mean waiver of something which has not been paid. The direction to withdraw the show causes notices and confirmed demand notices, only means that no further action be taken for recovery of arrears namely 75% of excise duty and cannot be construed to mean, refund of 25% of duty paid under High Court order. [55-B-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4301-4346 of 1993.

From the Judgment and Order dated 4.12.90 of the Gujarat High Court in C.A. Nos. 5599/89, 5855/89, 5856/89, 300/90, 301/90, 302/90, 525/90 to 529/90, 531/90 to 543/90, 546/90 to 562/90, 641/90, 854/90, 2927/90, 2928/90, 2929/90.

D.N. Dwiedi, Additional Solicitor General, A.Subba Rao and D.S. Mehra for the appellants.

G.L. Sanghi, B.K. Mehta,, Mahesh Agarwal, E.C. Agrawala, Ms. Purnima Kak and H.J. Jhaveri for the respondents.

A The Judgment of the Court was delivered by :

S.C. AGRAWAL, J. Special leave granted.

We have heard learned counsel for the parties.

B Respondents (hereinafter referred to as 'the petitioners') are
engaged in the business of breaking or dismantling of old unserviceable
ships. They carry on the said business at their ship breaking yard at Alang
and Sachana in the State of Gujarat. Old ships/vessels are imported by
C Metal Scrap Trading Corporation Ltd. (for short MSTC), a canalising
agency for importing old and unserviceable ships and vessels for breaking.
Ships and vessels are allotted to the ship breakers who are registered with
MSTC. The petitioners are registered ship breakers who obtain the ships
and vessels from MSTC. After dismantling/breaking the old vessels, the
petitioners sell the metal scrap in open market. In 1985, the Central Excise
D authorities took the view that dismantling of breaking of old unserviceable
ships constitutes 'manufacture' within the meaning of Section 2(f) of the
Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act')
and the petitioners were, therefore, required to pay excise duty on the said
material and in this connection show cause notice were issued requiring
them to show cause as to why duty of excise leviable under Tariff Item
E 25(d) of the erstwhile Central Excise Tariff be not levied and collected on
the materials arising from breaking or dismantling of ships. The petitioners
filed writ petitions under Article 226 of the Constitution in the Gujarat
High Court wherein they submitted that the scrap recovered from breaking
or dismantling of old unserviceable ships was not leviable to excise duty
under the Act and they prayed for an injunction restraining the excise
F authorities from levying or collecting duty of excise on such scrap or
interfering with clearance or removal of such scrap by the said petitioners.
In the said writ petitions the Gujarat High Court had passed an interim
order on November 29, 1985 whereby it directed :

G "..... pending hearing of the petitions, the petitioners shall be
entitled to clear the goods on payment of 25% of the Central
Excise duty payable on the goods cleared, on condition that the
petitioners shall execute personal bonds before the concerned
authority of Central Excise and Customs without any surety of
security to pay the balance of 75% of the amount of excise duty
H in dispute in the event of the petitions being dismissed..... It is

also, clarified that the question regarding refund of 25% of the duty of excise paid by the concerned petitioners pursuant to the present order shall abide by the final direction that may be issued by this Court after hearing the concerned parties on all relevant points, if ultimately the petitioners succeed in the petitions." A

During the pendency of the said writ petitions, the parties arrived at an agreement and the following consent terms bearing the signatures of the advocates for both the parties were filed in the writ petitions on May 1, 1986: B

"The petitioner herein applies for the aforesaid petition being withdrawn pursuant to the agreement reached between the parties hereto regarding levy of central excise duty on ship scrap. C

1. The respondents agree that they shall not cause enforcement of the personal bonds/security/surety executed by the petitioner in respect of 75% excise liability and allow the undertaking to be revoked. D

2. Upon withdrawal of the court case, Government would consider an appropriate amount of reduction in excise duty on ship scrap and petitioner shall abide by such decision. E

3. Government would also evolve a suitable mechanism to ensure waiver of the arrears of excise duty on ship scrap for the past period.

4. There will be no order as to costs." F

The writ petitions were disposed of by the High Court in accordance with the said consent terms on May 1, 1986, by the following order :

"The parties have filed consent terms signed by the learned counsel appearing for the respective parties in these special civil applications. The said consent terms are recorded and there will be an order in terms of the consent terms in each of these petitions. Petitions disposed of accordingly. No order as to costs. Rule discharged in each of these petitions. Interim relief will stand vacated." G H

A Thereafter on August 20, 1986, the following notification was issued :

"NOTIFICATION
NO. 386/86-CENTRAL EXCISES

B 0.5R (E) - In exercise of the powers conferred by sub- rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 146/86- Central Excises, dated the 1st March, 1986, the Central Government hereby exempts the goods, falling under heading Nos. 72.15 and 73.09 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said Schedule :

Provided that the said goods have been obtained from breaking of ships, boats and other floating structures -

- D (i) on which duty of customs leviable thereon under the first Schedule to the Customs Tariff Act, 1975 (51 of 1975) has been paid at the rate of Rs. 1400 per light displacement tonnage, or
- E (ii) imported on or before the 28th day of February, 1986, and on which appropriate additional duty leviable thereon under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) has been paid.

F Sd/-
(S.C. Jana)
Under Secretary to the Govt. of India"

G By letter No. F. No. 139/49/86-CX.4 dated April 6, 1989 sent by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs to the Collectors of Central Excise, Admedabad and Rajkot, it was directed as under :

H "2. The question of giving effect to term (3) of the consent order has been engaging the attention of the Government with a view to devising a suitable mechanism for waiving of the arrears of duty on ship-scrap for the past period. It has been decided to waive the

duty on ship-scrap leviable under erstwhile T.I. 25, or Chapter 72 or 73 of the Central Excise Tariff Act, 1975, for the period prior to the issue of notification No. 386/86-Central Excises, dated the 20th August, 1986. Accordingly, the show cause notices and the confirmed demand notices may be withdrawn in these cases."

The petitioners thereafter applied for refund of the 25% of the central excise duty paid by them in accordance with interim order passed by the High Court in the writ petitions. The said applications for refund were, however, rejected by the Assistant Collector, Central Excise in the case of some of the petitioners and in the rest of the matters no orders were passed for refund of the said amount by the Assistant Collector, Central Excise. The petitioners, therefore, filed fresh writ petitions in the Gujarat High Court whereby they prayed for issue of an appropriate writ or direction or order directing the appellants herein (respondents in the writ petitions) to refund the amounts deposited by them with interest. The said writ petitions have been allowed by a Division Bench of the Gujarat High Court by the judgment under appeal. The High Court has directed the appellants to refund the excise duty paid by the petitioners in pursuance to the interim order passed by the High Court in the earlier writ petitions. Feeling aggrieved by the said decision of the High Court, the appellants have filed these appeals.

The learned Additional Solicitor General has raised two contentions before us : (i) in the consent terms there is no reference to the refund of the amount of 25% of the excise duty which had been paid by the petitioners during the pendency of the writ petitions and the High Court was, therefore, not justified in directing refund of the said amount; and (ii) the petitioners have passed on the excise duty deposited by them to the consumer/purchaser of the scrap and the refund of excise duty would result in unjust enrichment of the petitioners which is impermissible.

We have already set out the consent terms on the basis of which the earlier writ petitions filed by the petitioners herein were disposed of by the High Court. In paragraph 1 of the said consent terms the appellants (respondents in the writ petitions) had agreed not to enforce the personal bonds/ security/surety executed by the petitioners in respect of 75% excise liability and allow the undertaking to be revoked. In paragraph 2, it was agreed that upon withdrawal of the writ petitions, the Government would consider an appropriate amount of reduction in excise duty on ship scrap

- A and the petitioners shall abide by such decision. In paragraph 3, it was agreed that the Government would also evolve a suitable mechanism to ensure waiver of the arrears of excise duty on ship scrap for the past period. In none of the clauses of the said consent terms was there any reference to the refund of 25% of the duty of central excise that was paid by the petitioners in pursuance of the interim order passed by the High Court.
- B It may be recalled that in the interim order dated November 29, 1985 it was specifically stated that the question regarding refund of 25% of the duty of excise paid by the concerned petitioners would abide by the final direction that may be issued after hearing the concerned parties on all relevant points, if ultimately the petitioners succeed in the petitions. The
- C interim order thus postulated a specific direction by the High Court with regard to refund of 25% of the duty of excise paid in pursuance of the interim order. The order dated May 1, 1986 passed by the High Court disposing of the writ petitions in terms of the consent terms is completely silent on the question of refund of 25% of the duty of excise paid by the petitioners. This would mean that while disposing of the writ petitions the
- D High Court did not give any direction with regard to refund of 25% of the duty of excise paid by the petitioners in pursuance of the interim order passed by the High Court.

- The notification dated August 20, 1986 was issued in accordance with paragraph 2 of the consent terms. By the said notification, the Central Government exempted the goods falling under heading Nos. 72.15 and 73.09 of the Schedule to the Central Excise Tariff Act, 1985 from the whole of the duty of excise leviable thereon which is specified in the said Schedule subject to the conditions laid down in the proviso. The said notification is prospective in nature and operates for the future with effect from August 20, 1986. It does not relate to the period anterior to the date of the said notification. The said notification has, therefore, no bearing on the matter of refund of 25% of the duty of excise deposited by the petitioners.

- The only other document is the letter dated April 6, 1989 from the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue addressed to the Collectors of Central Excise, Ahmedabad and Rajkot. The said letter appears to have been issued in pursuance of paragraph 3 of the consent terms wherein the Government had agreed to evolve a suitable mechanism to ensure waiver of arrears of excise duty on ship scrap for the past period. The High Court has construed the said letter to mean that the entire excise duty including 25%

that was paid in pursuance of the interim order had been waived by the Government and in this context the High Court has laid emphasis on the words "accordingly show cause notices and confirmed demand notices may be withdrawn in these cases" in paragraph 2 of the said letter. We are unable to agree with this interpretation of the letter dated April 6, 1989 by the High Court. In our opinion the letter dated April 6, 1989 is confined in its scope to the matter referred to paragraph 3 of the consent terms. The said paragraph is confined to "*waiver of the arrears of excise duty*". At the time when the consent terms were agreed upon by the parties the only arrears of excise duty were the balance amount of 75% of duty of excise, the recovery of which had been stayed by the High Court. Paragraph 3 of the consent terms was thus related only to the waiver of the liability in respect of the said 75% of the duty of excise. 25% duty of excise, which had already been paid by the petitioners in pursuance of the interim order, could not be treated as part of the arrears of excise duty and, therefore, neither paragraph 3 of the consent terms nor the letter dated April 6, 1989 can be construed as referring to the payment of 25% of duty of excise made by the petitioners in pursuance of the interim order passed by the High Court. The expression "*waiver of the arrears of excise duty*" can only mean waiver of something which has not been paid and is payable. The direction to withdraw the show cause notices and the confirmed demand notices in the letter dated April 6, 1989, only means that no further action be taken for the recovery of the arrears, namely, 75% of duty of excise. The said withdrawal cannot be construed to mean that 25% of duty of excise which had been deposited by the petitioners in pursuance of the interim order of the High Court is required to be refunded.

In that view of the matter, we are unable to uphold the direction given by the High Court for refund of 25% of the duty of central excise deposited by the petitioners in pursuance of the interim order passed by the High Court in the earlier writ petitioners. Since the first contention urged by the learned Additional Solicitor General merits acceptance we do not consider it necessary to go into the second contention urged by him.

The appeals are, therefore, allowed, the judgment and order of the High Court of Gujarat dated December 4, 1990 is set aside and the writ petitions filed by the respondents-petitioners are dismissed. There is no orders as to costs.

I.S.G.

Appeals allowed.