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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 8th August, 2012.

+ W.P.(C) 4541/2012

NAV DURGA ASSOCIATES Petitioner
Through Mr. Pradeep Jain, Adv.

versus

UNION OF INDIA AND ORS Respondents
Through Mr. B V Niren, CGSC with Mr. Prasouk Jain,
Adv. for R-1
Mr. Piyush Kaushik, Adv. for customs

+ W.P.(C) 4351/2012

ENDOW POWER BATTERY Petitioner
Through Mr. P K Mittal, Adv.

versus

UNION OF INDIA AND ANR Respondents
Through Mr. Neeraj Chaudhari, CGSC for R-1
Mr. Piyush Kaushik, Adv. for customs

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT,J: (OPEN COURT)

Admit.

2. With consent of counsel for the parties matter was heard finally.

3. Counsel for the respondent seeks leave to place on record the counter affidavit. Leave granted. Counter affidavit is taken on record.

4. The writ petitioners are aggrieved by the action of the respondent – Customs authorities in determining the goods imported by them as classifiable under CTH 85 06 10 00 as “complete battery cell” and subjecting them to full duty including the payment of applicable anti dumping duty, along with interest. The brief facts of the petition in W.P. (C) 4541/2012 are that the petitioner manufactures dry battery cells and had imported the following articles: -

- *Empty Zinc Tube (classifying under sub-heading 8506 90 00 of the Customs Tariff),*
- *Round paper parts (SH : 4811 90 99),*
- *Asphalt Sealing Material (SH : 6807 90 90),*
- *Carbon Rod (2803 00 90),*
- *Round Plastic Ring (SH : 3926 90 99),*
- *Metal Caps (8506 90 00),*
- *Printed Cover (4811 90 99),*
- *Plastic Packing Tube (SH : 3926 90 99),*
- *Packing Material (SH : 3926 90 99),*
- *Empty Cartons (SH : 4819 50 90),*
- *Empty Plastic Bags (SH : 3926 90 99).*

5. The petitioner claims that these articles were not dry battery cells but parts or components used for the manufacture of these dry battery cells. The petitioner (in W.P. (C) 4541/2012) imported the above articles through a Bill of entry dated 6.2.2012 along with related import documents. The petitioner in W.P. (C) 4351/2012

imported similar goods through bills of entry dated 28.3.2012. It is also stated that the applicable customs duty was paid. At that stage, the authorities are alleged to have directed the petitioner to pay the anti dumping duty and prevented the import of goods. The petitioners contend that by a notification dated 13.4.2007, the import of dry cell batteries was subjected to anti dumping duty from China at specific rates. It is stated that the said notification does not encompass the constituents and components used for the manufacture of dry cell batteries and consequently insistence on payment of anti dumping duty is without the authority of law. Ld. counsel submitted that in terms of the provisions of First Schedule of Customs Tariff Act, 1975, a special procedure has been mandated whereby a competent authority is under a duty of following the procedure, i.e. of granting hearing to the importers of suspect goods before issuing an order that ultimately culminates in a notification levying a tax which would otherwise be unauthorized.

6. Counsel submits that the methodology adopted by the respondents in this case seeking to levy anti dumping duty, by a clarification dated 16.12.2010, issued by the Central Government Board of Excise and Customs, amounts to adoption of a procedure unknown to law. Once the designated authority under the Customs Tariff Act, 1975 returns a finding after due investigation and such finding does not include a recommendation for anti dumping duty on the components or constituents of the products and dry cell batteries, it is not open to the customs authorities by application of rules to include such articles.

7. Counsel for the Customs contends in this case that the petitioners are importing nothing less than dry cell batteries. It is emphasized that each of the articles which has been imported is covered by the notification dated 13.4.2007 as an assembly of those would make a whole dry cell battery. Counsel further submitted that the process involved in putting together the raw material imported by the petitioners, is minimal

and what in effect they seek to achieve is the import of dry cell itself.

8. The Customs relies upon Rule 2(a) of the General Rules for the interpretation of the First Schedule of Customs Tariff Act, 1975 which lists out general rules for the interpretation of the Schedule. It is stated that in terms the insistence upon payment of anti dumping duty is warranted having regard to the said Rule which reads as follows:

“2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.”

9. It was argued in addition that the competent designated authority which went into the issue in depth, examined the issue of the entire process. Particular reference is made to the observations of the designated authority in its findings dated 31.1.2007 which preceded the final notification imposing anti dumping duty. Counsel for the customs also relied upon the decisions of the Supreme Court reported as ***Sharp Business Machines Pvt. Ltd., Bangalore Vs. Collector of Customs, Bangalore*** (1991) 1 SCC 154 and ***Commissioner of Customs, New Delhi Vs. Phoenix International Ltd. And Another*** (2007) 10 SCC 114.

10. It is evident from the above discussion that the narrow dispute in this case is whether the petitioners are correct in contending, as they do, that anti dumping duty is not recoverable from them in respect of the products which they have imported from the People's Republic of China. These products, listed in the earlier part of this judgment, are used for manufacture of dry cell batteries. The petitioner has in some detail described the process of manufacture of the dry cell batteries in para 8 to 10 of the writ petition. The petitioner also contends that the notification in this case was silent as to the levying of anti dumping duty on components or constituents of dry cell

batteries. The petitioner derives strength by referring to the Customs' Notification no.65/03 dated 4.4.2003 where anti dumping duty was levied on 'steel tapes' and 'parts and components of steel tapes' as well as notification No.132/2009-Cus dated 8.12.2009 imposing anti dumping duty on complete Synchronous Digital Hierarchy (SDH) equipment including CKD/SKD and including its parts and components which have dedicated use for the equipment.

11. At this stage it would be useful to extract the notification in question which reads as follows: -

"Now, therefore, in exercise of the powers conferred by sub-sections (1) and (5) of section 9A of the Customs Tariff Act, 1975 read with rules 18 and 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, after considering the aforesaid final findings of the designated authority, read with the amendment dated the 29th March, 2007, hereby imposes on the subject goods, the description of which is specified in column (3) of the Table below, falling under heading of the First Schedule to the said Customs Tariff Act as specified in the corresponding entry in column (2), the specification of which is specified in column (4) of the said Table, originating in the countries as specified in the corresponding entry in column (5), exported from the country as specified in the corresponding entry in column (6), and produced by the producers as specified in the corresponding entry in column (7), exported by the exporters as specified in the corresponding entry in column (8), imported into India, an anti-dumping duty which shall be equal to difference between the amount mentioned in the corresponding entry in column (9) in the currency as specified in the corresponding entry in column (11) and as per unit of measurement as specified in the corresponding entry in column (10), of the said Table, and the landed value of such imported goods in like currency and like unit of measurement.

Table

Sl.No.	Heading	Description of goods	Specification	Country of Origin	Country of Export	Producer	Exporter	Amount (US \$)	Unit of measurement	Currency
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
1	8506	Dry Cell Batteries	Zinc Carbon Pencil batteries, R6, AA, UM3, etc	China	China	Any producer	Any exporter	54.59	1000 pieces	USD

2	8506	Dry Cell Batteries	Zinc Carbon Pencil batteries, R6, AA, UM3, etc	Any country other than China	China	Any producer	Any exporter	54.59	1000 pieces	USD
3	8506	Dry Cell Batteries	Zinc Carbon Pencil batteries, R6, AA, UM3, etc	China	Any country other than China	Any producer	Any exporter	54.59	1000 pieces	USD

2. This notification shall be effective for a period of five years (unless revoked, superseded or amended earlier) and the anti-dumping duty shall be paid in Indian Currency.”

12. It is evident that facially the notification does not direct payment of anti dumping duty on parts of components of dry cells. In this connection the question is whether the respondent is correct in its argument that the rules of interpretation embodied in Rule 2(a) of the General Rules in the First Schedule of Customs Tariff Act, 1975 covers a situation like the present one. It is in this context that the customs had relied upon the ruling in ***Sharp Business Machines Pvt. Ltd., Bangalore*** (supra) and ***Phoenix International Ltd. And Another*** (supra). In ***Sharp Business Machines Pvt. Ltd., Bangalore*** (supra), the Supreme Court had to grapple with a situation where the company was seeking to clandestinely import the prohibited articles i.e. photocopier. The company in that case adopted a subterfuge. It is evident from the following extract: -

“The company had tried to practice a fraud in defeating the import policy itself. The intention and purpose of the import policy was to give incentive and encouragement to the new entrepreneurs establishing small scale industries and in the first phase to import 62 per cent of the components of the copiers and the balance of 38per cent was to be manufactured by them indigenously. According to the import policy this percentage of 62 per cent was to be reduced in the subsequent years. The import policy was not meant for such entrepreneurs who instead of importing 62 per cent of the components, imported 100 per cent of the components of a fully finished and complete goods manufactured by a foreign country. It is an admitted position that fully finished plain paper copiers were a prohibited item for import and thus the device adopted by the company in the present case was a complete fraud on

the import policy itself. Apart from the above circumstances in our view the Tribunal was not right in setting aside the finding of the adjudicating authority and in taking the view that one has to look into the respective licence and not to the fact that if all the consignments covered by all the bills of entry assembled together, there will be a full and complete machinery.”

13. In ***Phoenix International Ltd.*** (supra), the mode adopted by the importer, to escape higher levy of customs duty on import of shoes, was to pass off the independently imported components of shoes through two separate sister companies in their unfinished form i.e. shoes uppers for one concern and shoe soles to another concern. The question posed by the Supreme Court was as follows: -

“2. The question of law that arises for determination in these civil appeals is: -

Whether shoe uppers, outer soles, insoles and sock liners imported by M/s. Phoenix Industries Ltd. (PIND) in the same container could be clubbed so that it could be considered as import of the shoe itself in semi knocked down (SKD) condition? Whether the importer was guilty of mis-declaration when the importer declared SKD goods as components.”

The Supreme Court held that the subterfuge was not permissible and the Customs’ department’s decision that the components were classifiable as ‘shoes’ was lawful. Its holding is as follows: -

“32. In the present case, the Department has alleged that a device was evolved by the importer showing import of shoe uppers by PIL whereas outer soles, insoles and sock liners imported by PIND. A subterfuge was, therefore, created to show that two independent companies had imported separate parts of the footwear in order to bypass Para 156(A) of the EXIM Policy, 1992-97. Under the said paragraph, importation of synthetic shoes in SKD condition could only be made against specific import licence. PIL was aware of the restrictions. It was the only real importer of all the four items. PIL had funded PIND with interest free loans running into Rs.18 crores (approximately). PIND was the factory of PIL (see the DEEC certificate).

33. *When there is an allegation of subterfuge, the court has to examine the circumstances surrounding the import to ascertain whether the importer had entered into fictitious arrangement to evade customs duty. The intention behind the act of importation has to be probed. In this case, the most clinching circumstance is that there is manufacture of the finished products, namely, "synthetic shoe" for domestic and export markets. PIL manufactured export quality synthetic shoes on their own account whereas those sold in the domestic market by PIND was also manufactured by PIL for PIND."*

14. If one sees the above rulings of the Supreme Court it is evident that in both the cases the importer was adopting strategies or devises to get around the customs prohibitions and from importation of certain goods and in certain cases payment of higher duty. If Rule 2(a) has to be understood in the light of those observations and furthermore in its own terms, what it really suggests that if an incomplete or unfinished article has the characteristic of a complete article that would be treated as such. In this case, the customs authorities no doubt rely upon para 13 of the order of the designated authority; the same reads as follows: -

"13. As per claims of the Association, a number of producers in the unorganized sector also produce the subject goods and the individual size of these producers is too small. Production of these produces in unorganized sector was estimated by the domestic industry in the region of 5% of the production in the organized sector. The Authority notes that none of the producers in the unorganized sector have responded to the Authority and no published information is available with regard to production by these entities. It is also not known whether these entities undertake complete production activities, or are producing the product from semi-finished stage. Investigations at the premises of the domestic industry has shown that production of pre-mix powder is the basic manufacturing activity and once the pre-mix powder is prepared, production of the subject goods is just an assembly like operation. Therefore, it could not be established that these producers in the unorganized sector should indeed be considered as "producers" for the purpose of the present investigations. However, the Authority notes that regardless of whether or not their production is considered, production by the participating companies is significantly

higher than 50% and it account about 85 % of Indian production, even if production by these unorganized sector units is considered as eligible production.”

15. However, in the same recommendations the designated authority further recorded as follows: -

“E.2 EXAMINATION BY THE AUTHORITY

16. The argument raised by the domestic industry was examined and it is noted that the anti dumping duty has been imposed on imports of dry cell batteries and not against pre-mix powder. It is further noted that scope of the product under consideration can neither be extended to import of pre-mix powder nor the volume and value of imports of pre-mix powder can be used for the purpose of determination of dumping of subject goods from China.

17. As regards imports from third countries, Authority reiterates its established practice that the anti dumping duties are recommended on the product under consideration originating in the subject country, regardless of the country of export and in that situation even if the Chinese origin batteries are exported from third countries, the same will be subject to anti dumping duties levied on that product. As regards the possible circumvention of the product raised by the domestic industry, it is noted that the aggrieved parties may raise their concern before appropriate Authority, since AD Rules does not cover circumvention proceedings in the course of anti dumping investigations.”

16. The Customs’ argument about applicability of Rule 2(a) has to be seen in the context of a complete reading of the findings of the designated authority. Para 16 of these findings extracted above categorically states that the investigation and recommendation for anti dumping duty did not extend to import of dry cell pre-mix power. Apparently, the reason for this is obvious; the anti dumping investigation by the authorities and the findings of the designated authority were in the context of damage or injury by depressed pricing of goods i.e. dry cell batteries imported from China. Those goods were whole dry cells. The designated authority advisedly did not

enter into any investigation as to the components and the likelihood of injury by importation of such components from China. Had such an exercise been undertaken and recommendations made to the concerned authority, the notification would have followed the same route. This Court is also alive to the fact that previous notifications which have extended anti dumping duty to components and constituents had explicitly said so. (Refer Customs notification No.65/03 dated 4.4.2003 and Notification No.132/2009-Cus dated 8.12.2009). Had the authorities intended that dry cell battery components of the kind imported by the petitioners in this case ought to be subjected to anti dumping duty, (which is discriminatory in nature) that intention would have been expressed in the notification. Its absence renders the clarification made by the Central Board of Excise and Customs dated 6.12.2010 relied upon by the customs in this case, without authority of law. The petitions therefore have to succeed; the respondents are directed to process the writ petitioners' cases for release of their goods without insisting on payment of anti dumping duty as demanded. The writ petitions are allowed in the above terms. No costs.

S. RAVINDRA BHAT, J.

R.V.EASWAR, J.

AUGUST 08, 2012

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