IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3474 OF 1989

1. M/s. Apar Limited,
a Company incorporated under the
Companies Act, 1956 having its office
at Special Oil Refinery Division,
Mahul, Trombay, Bombay- 400 074.

2. Himatlal Narottam Shah,
Financial Controller of the
Petitioner No.1 having his office
at Special Oil Refinery Division,
Mahul, Trombay, Bombay- 400 074. … Petitioners.

V/s.

1. Union of India through Ministry of
Law, Justice and Company affairs,
Aayakar Bhavan, 2nd floor,
New Marine Lines, Bombay- 400 020.

2. The Collector of Customs having his
office at New Customs House,
Ballard Estate, Bombay- 400 038.

3. The Assistant Collector of Customs,
having his office at New Customs House,
Ballard Estate, Bombay- 400 038. … Respondents.

Mr.K.R.Bulchandani, Advocate with Mr.Avik Sarkar and Mr.Amit Nikam i/b. Kamal and Co. for the petitioners.

None for the respondents.

[As Smt.Vibha V. Kankanwadi, J is sitting at Aurangabad Bench, signed judgment is pronounced by A.S.Oka, J as per Rule 296(iii) Chapter XX of the Bombay High Court (Original Side) Rules.]

CORAM : A.S.OKA & SMT.VIBHA V. KANKANWADI, JJ.
RESERVED ON : 21st July 2017.
PRONOUNCED ON : 12th October 2017.

JUDGMENT : (Per A.S.Oka, J)

A limited controversy is involved in this petition. The first petitioner is a company. The second petitioner is an officer of the first petitioner- company. The first petitioner is carrying on business of manufacturing and distribution of transformers which are used in distribution of electricity. During the course of business, the first petitioner imported transformer oil which is used as raw material in the manufacture of transformers. The transformer oil is being imported under valid import licences.

2. An order was placed by the first petitioner for supply of 1,000 MT of transformer oil. Invoice dated 23rd October 1989 was issued. The goods arrived at Mumbai under the Bill of Lading dated 23rd October 1989. A copy of the Bill of Entry for warehousing dated 23rd November 1989 is annexed to the petition. The first petitioner paid basic custom duty and auxiliary duty. In addition, additional duty under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (for short "the said Act of 1975") was assessed at Rs.1,000/- per KL and additional duty under sub-section (3) of section 3 of the said Act of 1975 was assessed at Rs.900/-

per KL. The contention is that the petitioners are liable to pay additional duty leviable under sub-section (1) of section 3. Reliance is placed by the petitioners on the notification no.75/84 C.E. dated 1st March 1984 under which exemption was granted to the goods specified in Column-2 of the table annexed to the said notification from so much of the duty of excise leviable under the Central Excise and Salt Act,1944 (now Central Excise Act, 1944), at the rate specified in the said schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in Column-3 of the said table, subject to the intended use or the conditions, if any, laid down in the corresponding entry in column-4 of the table.

3. The submission is that the transformer oil has been exempted under the said notification and, therefore, the additional duty under sub-section (1) of section 3 of the said Act of 1975 is not payable. The petitioners made a representation dated 30th November 1989 to the Collector of Customs, Mumbai in which it is stated that in view of interim order dated 22nd December 1988 passed in Writ Petition No.3806/1988, the goods be cleared subject to first petitioner furnishing bank guarantee of 50% of the differential duty and bond for the balance amount.

4. The prayer in this petition under Article 226 of the Constitution of India is for quashing and setting aside the order of assessment at Exh.C to the extent to which the additional duty is made payable under sub-section (1) of section 3 of the said Act of 1975.

5. There is an affidavit-in-reply filed by Shri A.M.Sahay, Deputy Collector of Customs. It is contended in the said affidavit that the first petitioner is not entitled to seek benefits of notification dated 1st March 1984 as the first petitioner is not involved in manufacture of transformer oil. It is contended that the first petitioner can have the benefit of the said notification only if it is a manufacture of transformer oil.

6. The learned counsel appearing for the petitioners submitted that if there is an exemption available to the goods manufactured in India from the payment of excise duty, on import of such goods, additional duty under sub-section (1) of section 3 of the said Act of 1975 is not payable. He submitted that the intention of the Legislature is to protect indigenous manufacturers of like goods. He pointed out that the first petitioner has no issue regarding payment of additional duty under sub-section (3) of section 3. He submitted that as the transformer oil attracts exemption, the additional duty under sub-section (1) of section 3 is not payable.

7. We have given careful consideration to the submissions. Section 3 of the said Act of 1975 reads thus:

> "**3. Levy of additional duty equal to excise duty.-** (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) <u>equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported</u>

<u>article shall be so liable shall be calculated at that percentage of the value of the imported article</u>.

Explanation. - In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating under this section, the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of -

(i) the value of the imported article determined under sub-section (1) of the said Section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under Section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, [but not including that duty referred to in sub-section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is

leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962 (52 of 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 this section as they apply in relation to the duties leviable under that Act."

The Apex Court had an occasion to interpret sub-section (1) of section 3 of the said Act of 1975 in the case of ***Khandelwal Metal & Engineering Works v. Union of India***[1]. The Apex Court held that the additional duty referred in sections 2 and 3 of the Act of 1975 is not a countervailing duty.

1 1985 (20) ELT 220 (SC)

It was held that these two sections are not charging sections and the charging section is section 12 of the Customs Act. In paragraphs- 7 and 8 of the said judgment, the Apex Court has held thus:

> 7. There is no substance in this argument. In the first place, as we have indicated earlier, Sections 2 and 3(1) of the Tariff Act are not charging sections. The charging section is Section 12 of the Customs Act under which, duty is leviable on the taxable event of export of goods from India or the import of goods into India, which is relatable to Entry No. 83 in List I of the Seventh Schedule to the Constitution : "Duties of Customs including export duties". <u>The taxable event is not the manufacture of the goods. Under Section 3(1) of the Tariff Act, "the excise duty for the time being leviable on a like article if produced or manufactured in India" is only the measure of the duty leviable on the imported article. Section 3(1) does not require that the imported article should be such as to be capable of being produced or manufactured in India. The assumption has to be that an article imported into India can be produced or manufactured in India and upon that basis, the duty has to be determined under Section 3(1)</u>.
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> 8. Any doubt on this point is resolved by the Explanation to Section 3(1) of the Tariff Act. The Explanation furnishes a dictionary for the interpretation of Section 3(1) and provides a clue to its understanding. The Explanation provides in so many words that the expression "excise duty for the time being leviable on a like article if produced or manufactured in India" means "the excise duty for the time being in force *which would be leviable on a like article if produced or manufactured in India*" (emphasis supplied). <u>The Explanation even goes further and provides that if a like article is not so produced or</u>

> manufactured, then, the duty leviable means the duty which would be leviable on the class or description of articles to which the imported article belongs. These provisions leave no doubt that the duty referred to in Section 3(1) of the Tariff Act does not bear any nexus which the nature and quality of the goods imported into India.
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> (underlines added)

What is important is that the Apex Court has held that sub-section (1) of section 3 of the said Act of 1975 does not require that the imported article should be such which is capable of being produced or manufactured in India. The assumption has to be that the article imported into India can be manufactured in India and upon that basis, the duty has to be determined under sub-section (1) of section 3 of the said Act of 1975. If like article is not produced or manufactured in India, the duty levied within the meaning of sub-section (1) of section 3 would mean the duty which would be leviable on the class or description of the articles to which the imported article belongs. The levy under sub-section (1) of section 3 is permissible, provided the imported article is liable to excise duty if manufactured in India.

8. Therefore, if goods of class-A are imported and if excise duty is not payable on the goods manufactured in India of that class, there is no question of levy of additional duty under sub-section (1) of section 3.

9. A perusal of the affidavit-in-reply filed by Shri A.M.Sahai shows that it is not disputed that exemption notification dated 1st March

1984 will apply to the transformer oil imported by the first petitioner. The contention is that as the first petitioner is not manufacturing transformer oil in India, the exemption is not applicable.

10. As observed earlier, the additional duty under sub-section (1) of section 3 is payable on the imported article provided the article of that category manufactured in India attracts payment of excise duty. By reason of exemption, if the like article manufactured in India is not liable for levy of excise duty, additional duty under sub-section (1) of section 3 will not be payable on import of such article.

11. It is necessary to peruse objects and reasons of section 3 of the said Act of 1975. In paragraph- 4 of the decision in the case of Khandelwal Metals (supra), the Apex Court has dealt with objects and reasons. Paragraph- 4 of the said judgment reads thus:

> "4. ….. ….. ….. ….. ….. ….. …..
> Counsel for the appellants rely strongly on the 'Objects and Reasons' of Section 3 of the Tariff Act in support of their contention that the said section is a charging section and imposes a countervailing duty. The Statement of Objects and Reasons says :
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> > "Clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India."

> This Statement lends *prima facie* support to the contention of the appellants but, in the absence of any ambiguity in the wording of Section 3(1), we cannot treat the additional duty referred to therein as countervailing duty. Nor, indeed, can we regard that provision as a charging section merely because the Statement says that Section 3 "provides for the levy". The Statement of Objects and Reasons errs in being common to Sub-sections (1) and (3) of Section 3. It is more apposite to sub-section (3) though, even there, it may not be correct to say that it is a charging provision. Sub-section (3) confers power on the Central Government, in public interest, to levy on any imported article "such additional duty as would counterbalance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article", whether on such article, duty is leviable under sub-section (1) or not. Since we are not concerned directly with sub-section (3), we will not pronounce upon its meaning and implications.

12. The provision of section 3 is basically enacted to safeguard the interests of the manufactures in India. In fact, the provision for levy of additional duty on the imported articles is to counterbalance the excise duty leviable on like articles made indigenously. As the additional duty is to counterbalance and to safeguard the interests of the manufactures in India, if the manufactures in India are not liable to pay duty on the goods of the like category, then on import of such goods the additional duty under sub-section (1) of section 3 of the said Act of 1975 cannot be levied for the reason that so far as Indian manufactures are concerned, the goods are exempted.

13. In the circumstances, prayer (a) deserves to be granted inasmuch as in the reply the fact that like goods manufactured in India are exempted under the notification is accepted. It is not the case made out that the conditions imposed in the exemption notification are not satisfied. Only contention is that the first petitioner is disentitled to claim exemption as it is not manufacturing the goods in India.

Accordingly, we pass the following order:

O R D E R

Rule is made absolute in terms of prayer clause (a) of the petition. The bank guarantee furnished by the petitioner be cancelled and returned. No costs.

(VIBHA V. KANKANWADI, J.) (A.S.OKA, J.)