

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2018

CORAM

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM

W.P.Nos.13656 & 13657 of 2017

M/s.Mehler Engineered Products India Pvt. Ltd
Mr.Karthikeyan Gnanasekharan
Plot No.S10 to S15, Integrated Textile Park
KIADB Industrial Area, Doddaballapur
Bangalore - 561 203 ...Petitioner in both WPs

v.

- 1 The Union of India
Rep.by its Secretary
Ministry of Finance
Department of Revenue
North Block, New Delhi - 110 001.
- 2 The Commissioner of Customs
Chennai-IV Commissionerate
Custom House, No.60 Rajaji Salai
Chennai 600 001.
- 3 The Assistant Commissioner of Customs (Group-3)
Custom House, No.60, Rajaji Salai
Chennai - 600 001. ...Respondents in both WPs
- 4 The Assistant Commissioner of Customs (Refunds)
Custom House, No.60, Rajaji Salai
Chennai - 600 001. ...4th Respondent in W.P.No.13656/2017

W.P.No.13656/2017 : Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records of the fourth respondent culminating in the issue of order-in-original No.54305/2017 dated 21.03.2017 issued from File No.S25/MAN/1077/17; S24/MAN/2818/16-Refunds and quashing the same direct the fourth respondent to grant refund of Anti Dumping Duty paid to the extent of Rs.15,63,527.90 in respect of Bills of Entry No.3324993, dated 20.11.2015, 3486309 dated 05.12.2015, 3169609, dated 05.11.2015.

W.P.No.13657/2017 : Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the third respondent culminating in the issue of order in original No.45886/2016, dated 22.03.2016 issued from File No.S.Misc.68/2016 - GR.3 and quash the same with consequential relief.

For Petitioner : Mr.S.Murugappan

For Respondents : Mr.K.S.Ramasamy
Senior Standing Counsel

COMMON ORDER

The petitioner has filed two writ petitions, viz., (i) W.P.No.13656 of 2017, wherein, the petitioner sought for issuance of Writ of Certiorari and Mandamus to quash the order-in-original dated 21.03.2017 by which, the petitioner's application for refund of anti-dumping duty paid was rejected; and (ii) in W.P.No.13657 of 2017, the petitioner has challenged the order in original dated 22.03.2016 confirming the assessment of the Bill of Entry under Chapter Heading - CTH 54022090 by including anti-dumping duty as per Customs Notification No.51/2015-Customs (ADD), dated 21.10.2015 and consequently rejecting the claim of the petitioner/importer that anti-dumping duty is not applicable for the subject goods.

2.1 The controversy in the instant case lies in a very narrow campus. The Directorate General of Anti-Dumping and Allied Duties commenced investigation concerning imports of fully oriented yarn/spin draw yarn/Flat yarn of Polyester (non-textured and non-POY) and other yarns originating in or exported from China PR, Thailand and Vietnam.

2.2 The investigation lead to issuance of the preliminary findings, which were notified by notification dated 23.01.2009. The product under consideration as stated in the preliminary finding is yarns confirming to the tariff description of Customs Heading 5402 47. This is evident from paragraph-B, sub clause 3-6 of the notification dated 23.01.2009. In the said notification, there was a recommendation for levy of anti-dumping duty in respect of items covered under Chapter Heading 5402 47.

2.3 The petitioner's case is that they are dealing with products which are classifiable under Heading 5402 2090 falling under the head 'other' and the tariff description of Customs Heading 5402 20 falling under the head 'High tenacity yarn of Polyester'.

2.4 The Central Government issued notification dated 29.09.2009 which was based on the final finding which also stated that the product under consideration are yarns confirming to the tariff description of Customs Heading 5402 47. This is evident from paragraph Nos.137 and 138 of the notification under the sub heading "I Recommendations", which gives the duty payable. Accordingly, notification No.124/09, dated 11.11.2009 was issued. Subsequently, the Directorate General of Anti-Dumping and Allied Duties took up the matter for review which is known as sunset review and notification dated 24.03.2014 was issued wherein the product under consideration was those confirming to the tariff description CH 5402 47. The notification concluded by stating that dumping and consequent injury to the domestic industry is likely to continue or reoccur in the event of cessation of anti-dumping duty on imports of subject goods from the subject countries. While issuing the said notification in the duty payable chart, chart in paragraph-266 of the notification, the customs tariff head was mentioned is as 5402. To be noted that in the preliminary finding and the final finding, customs tariff heading was mentioned as 5402 47. Whereas, the notification pursuant to the sunset review, the tariff heading was mentioned as 5402. Accordingly, the Central Government issued Notification No.51 of 2015, dated 21.10.2015, therein also, the Chapter Heading was mentioned as 5402. Thus, any goods imported, which is classifiable under Chapter Heading 5402 was liable for payment of anti-dumping duty.

2.5 The petitioner effected transaction during the said period and the petitioner's request to permit clearance of the goods without remittance of anti-dumping duty was not accepted and the bills of entry were assessed levying anti-dumping duty. The petitioner questioned the same by contending that they were importing high tenacity polyester yarn from China and anti-dumping duty is not applicable for the said product and requested for passing a speaking order. Pursuant to the said request, the order dated 22.03.2016 has been passed, rejecting the petitioner's claim. This order is impugned in W.P.No.13657 of 2017.

2.6 The Central Government, by Notification No.5/2016-Cus. (ADD), dated 22.02.2016, notified that in the notification dated 21.10.2015 in the table in column (2) for the entry "5402", wherever it occurs, the entry "5402 47" shall be substituted. Thus, the notification issued pursuant to the sunset review notified the product classifiable under Chapter Heading 5402 47. Based on the said notification, the petitioner requested for refund of the anti-dumping duty due to the notification change, which has been rejected by order dated 21.03.2017. This order is impugned in W.P.No.13656 of 2017.

3. The issue which falls for consideration is with regard to effect of Notification No.5 of 2016-Cus.(ADD), dated 22.02.2016 as to whether it is clarificatory in nature and if so retrospective or whether it is prospective.

4. Heard Mr.S.Murugappan, learned counsel appearing for the petitioner and Mr.K.S.Ramasamy, learned Senior Standing Counsel, appearing for the respondents.

5.1 Mr.S.Murugappan contended that both in the preliminary finding and in the final finding and in the notification issued by the Central Government consequent upon those finding, the tariff heading was mentioned as 5402 47. However, at the time when the notification was issued pursuant to sunset review, the tariff heading stood changed to 5402, covering all products, which could not have been done in the sunset review. The scope of the notification issued, pursuant to the final findings cannot go beyond what has been stipulated in Notification No.18 of 2014. Thus, it is contended that inclusion of entry 5402 is without jurisdiction.

5.2 It is further contended that Notification No.51 of 2015, dated 21.10.2015 has substituted the Entry as "5402 47" and therefore, it is retrospective and the petitioner is entitled for refund of anti-dumping duty paid by them and consequently, the order-in-original dated 21.03.2017 is liable to be set aside.

6.1 Mr.K.S.Ramasamy, learned Senior Standing Counsel appearing for the respondents after elaborately referring to the factual position submitted that a perusal of the sunset review notification dated 24.03.2014 shows that the investigation is in respect of imports of all fully drawn or fully oriented Yarn/Spin Draw Yarn of Polyester (non textured and non POY) falling under the heading 5402 originating from Peoples Republic of China, Thailand and Vietnam.

6.2 In para 3 of the said sunset Review Notification, it is clearly mentioned that the product under consideration is classified under the category "Manmade Filaments" in Chapter 54 of the Customs Tariff Act and further under 5402 47 as per Customs classification. However, Customs classification is indicative only and is in no way binding on the scope of the present investigation. In the final findings notification dated 29.09.2009 under Part B-Product under consideration and like Articles, para 4 states that the product in commercial market parlance is generally known as "Fully Drawn Yarn". The goods imported by the appellant were tested by the Textile Committee and was reported to be "Fully Drawn Yarn of Polyester-high Tenacity Polyester Industrial Yarn".

6.3 Further, the Principal Notification No.51/2015-Cus(ADD) was issued on 21.10.2015 and the amendment to that notification was given vide Notification No.05/2016-Cus(ADD) on 22.02.2016. As per the Principles of Statutory Interpretation, it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. The High Court of Punjab and Haryana has held in the case of Rajesh Bindal and Harinder Singh JJ vs. Joint Director General of Foreign trade, Ludhiana vide para 27 as follows:-

"It is well settled that no action taken under a statue can have retrospective effect in the absence of a specific provision in the statue conferring such power".

In the subject case the amendment to the Notification No.51/2015-Cus(ADD) was given vide Notification No.05/2016-Cus(ADD) on 22.06.2016 but without any specific provision for retrospective effect. Hence for all purpose the amendment shall have only prospective effect and the Notifications comes into effect from the date of publishing in the Gazattee of India i.e., from 22.02.2016. As the subject Bills of Entry for which the refund claims are filed, are all dated prior to 22.02.2016 and hence the amendment will not be applicable to these Bills of Entry.

6.4 It is further submitted that the above writ petitions should not be entertained by this court as the petitioner has appeal remedy and there is no question of law involved in these writ petitions and therefore, the petitioner should avail an appeal remedy available under the Customs Act, 1962.

7. The result of the writ petitions would depend upon the interpretation to the Notification No.5 of 2016, dated 22.02.2016 as to whether it is prospective or retrospective.

8. To be noted that the notification uses the word 'substituted'. The word 'substituted' has been used to mean that wherever in the notification dated 21.10.2015, the Entry 5402 occurs, it shall be substituted with Entry 5402 47.

9.1 The Hon'ble Supreme Court in the case of Zile Singh v. State of Haryana reported in 2004 (8) SCC 1 laid down four factors which are relevant to answer the question as to whether the legislature had sufficiently expressed that intention given in the statute retrospectivity they being (a) general scope and purview of the statute; (b) the remedy sought to be applied (c) the former state of the law; and (d) what it was the legislature contemplated. This decision has been followed in the case of Commissioner of Income Tax I, Ahmedabad v. Gold Coin Health Food Private Limited reported in 2008(9) SCC 622.

9.2 Thus, the court while deciding whether a statute is clarificatory or declaratory has to consider the same by taking note of the above mentioned four factors. In the absence of retrospective operation having been expressly given the courts are entitled to construe the provision and answer the question whether the legislature had an intention to give the statute retrospective operation.

9.3 More or less an identical question came up for consideration before the High Court of Karnataka in Commissioner of Central Excise and Sales Tax Bangalore v. Fosroc Chemicals (India) Pvt. Limited reported in 2015(318) ELT 240 (Kar), the Court took note of the decision of the Hon'ble Supreme Court in Shanmarao V.Parulekar v. The District Magistrate, Thana, Bombay and others reported in AIR 1952 SC 324 which dealt with the scope of substitution of a provision by way of amendment held as under:-

"When a subsequent Act amends an earlier one in such a way as to incorporate itself or a part of itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words has been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all".

9.4 In Shyam Sunder & Others v. Ram Kumar & Another reported in AIR 2001 SC 2472, the Hon'ble Supreme Court while dealing with the question whether a substituted provision necessarily mean the amended provision is retrospective in nature, held as follows:-

"A substituted section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted section in an Act."

9.5 In the case of Government of India v. Indian Tobacco Association reported in 2005(187 E.L.t. 162 (SC) while dealing with the exemption notification which was issued by way of substitution, it was held as follows:-

"15. The word 'substitute' ordinarily would mean 'to put (one) in place of another' or 'to replace'. In Black's Law Dictionary, Fifth Edition at page 1281, the word 'substitute' has been defined to mean 'to put in the place of another person or thing' or 'to exchange'. In Collins English Dictionary, the word 'substitute' has been defined to mean to serve or cause to serve in place of another person or thing; 'to replace (an atom or group in a molecule) with (another atom or group); or 'a person or thing that serves in

place of another, such as a player in a game who takes the place of an injured colleague'.

16. By reason of the aforementioned amendment no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby.

17. There cannot furthermore be any doubt whatsoever that when a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally consumed."

10. The legal principles deducible from the above decisions is that if subsequent Act amends an earlier one in such a way as it incorporate itself or a part of itself into the earlier, the act must be construed as 'retrospective'. This is so, because, the word "substituted" would mean 'to put one in the place of another' or 'to replace'. Thus, on account of such substitution whatever consequences which have to follow would naturally be applicable to the assessee by such substitution. Thus, notification dated 22.02.2016 in Notification No.51 of 2016-Cus(ADD) having substituted Entry 5402 47 in the notification dated 21.10.2015 bearing Notification No.51 of 2015, it would mean that the Entry in the Notification dated 21.10.2015 shall be 5402 47 for all purpose and it shall be so with effect from 21.10.2015.

11. The learned counsel for the Revenue vehemently contended that the product classification is indicative only and is in no way binding on the anti-dumping duty investigation. In the instant case, the question of considering this submission does not arise, in the light of the Notification No.5 of 2016, dated 22.02.2016, which clearly states that it is a notification issued in substitution of the earlier notification. Therefore, the proper of reading Notification No.51 of 2015, dated 21.10.2015 is to read the Entry as 5402 47.

12. Thus, for the above reasons it is held that the Notification No.5 of 2016, dated 22.02.2016 being substitutive in nature is held to be retrospective.

13. The learned counsel for the Revenue submitted that the writ petitions should not be entertained and the petitioner should be relegated to avail the alternative remedy as no question of law involved.

14. Since the court has been called upon to adjudicate the effect of the notification, there is substantial question of law involved and therefore, the court deems it proper not to relegate the petitioner to avail the appeal remedy as the

scope of interpretation of the notification as to whether it is retrospective or not by an appellate authority is very limited.

15. For the above reasons, Writ Petition No.13656 of 2017 is allowed and the respondent is directed to consider and sanction refund claim made by the petitioner as expeditiously as possible, preferably, within a period of three months from the date of receipt of a copy of this order.

16. For the reasons set out and the findings rendered in the preceding paragraph, the order-in-original dated 22.03.2010 is held to be not sustainable. Accordingly, the same is set aside. Consequently, it is held that the petitioner, who has imported products classifiable under Chapter Heading - CTH 5402 2090, is not liable for payment of anti-dumping duty on the subject goods. In the result Writ Petition No.13657 of 2017 is allowed. No costs.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

Rj

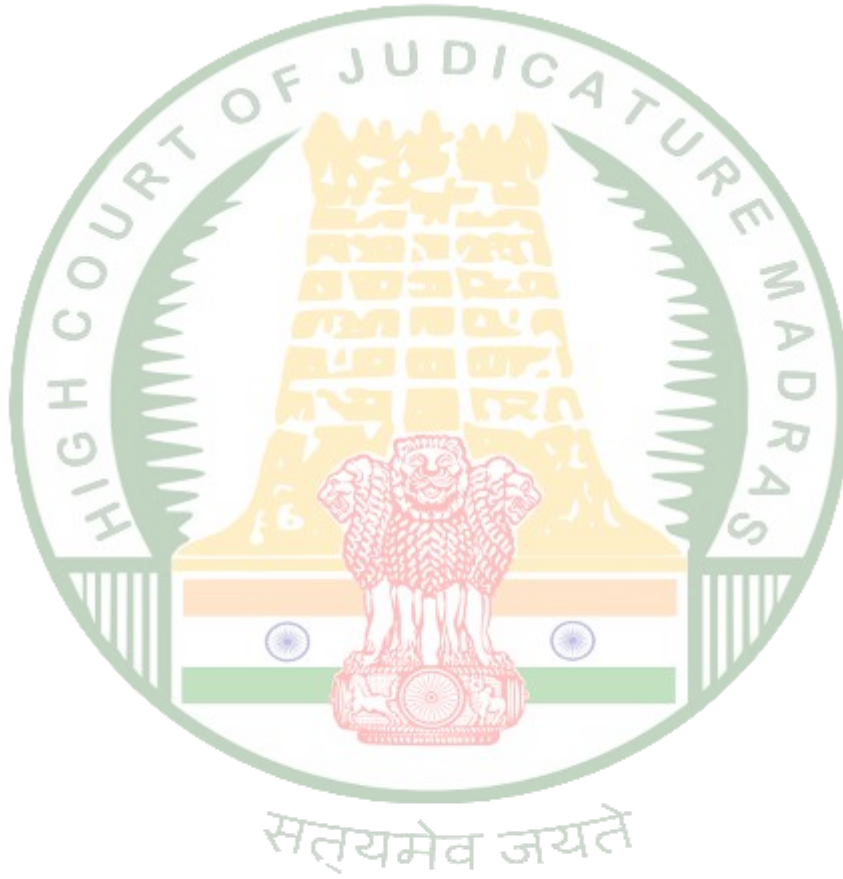
To

- 1 The Secretary
Ministry of Finance
Department of Revenue
North Block, New Delhi - 110 001.
- 2 The Commissioner of Customs
Chennai-IV Commissionerate
Custom House, No.60 Rajaji Salai
Chennai 600 001.
- 3 The Assistant Commissioner of Customs (Group-3)
Custom House, No.60, Rajaji Salai
Chennai - 600 001.
- 4 The Assistant Commissioner of Customs (Refunds)
Custom House, No.60 , Rajaji Salai
Chennai - 600 001.

+1 CC to Mr.K.S.Ramasamy, Advocate sr 39000 & 39001.
+1 CC to Mr. Murugappan, Advocate sr 38987.

W.P.Nos.13656 & 13657 of 2017

SP(03/07/2018)



WEB COPY