

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present:

The Hon'ble Justice Debasish Kar Gupta

W. P. No.1466 of 2004

Ruia Cotex Ltd., & Anr.,
versus
Director General of Foreign Trade & Ors.,

For Petitioner : Mr. Bhaskar Sen, Sr. Adv.,
Mr. Shyamal Sarkar,
Mr. Deepak Jain,

For the Respondent : Mr. Malay Kr. Singh.

Judgment On : 25-08-2009.

This writ application is filed assailing the order dated July 30, 2003 passed by the respondent no.4 rejecting the representation of the petitioner company with regard to the benefit of exemption of "Textile Machinery" imported by it under licence No.0.2500213 dated August 10, 1999 from whole of the duty of Customs Leviable thereon.

The backdrop of this case in a nutshell is as under:-

The Oriental Cotex Ltd. imported three machines from Thies GmbH & Co., Lindauer Dornier GmbH & Calator Ruckh AB. According to the petitioners, they were entitled to avail of Export Promotion Capital Goods Scheme (herein after referred to as the EPCG Scheme) on account of the aforesaid import. At that point of time the EPCG Scheme provided for a duty of Customs @ 10% ad valorem. The petitioner applied to the respondent authorities for grant of

licence to import capital goods on January 1999. It was approved by the EPCG committee by a communication dated February 18, 1999.

Before the aforesaid company availed of the benefit of 10% duty of customs scheme in April 1999, the government had introduced a 0% duty of customs scheme with effect from April 1, 1999. The benefit of the above scheme was made available for the period from April 1, 1999 to March 31, 2000. But no notification was issued to that effect in exercise of powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962.

The above company approached the respondent authority for granting licence to import capital goods to avail of 0% duty of customs duty. Such prayer was not granted by the respondent authority. However, 10% EPCG licence was granted in favour of the above company. Consequent upon the merger of the above company with Ruia Cotex Ltd. & Anr., the petitioner company approached the respondent authority to pass an order in its favour assuring that licence would be deemed to have been issued under 0% duty of customs scheme for the purpose of refunding payment of 10% customs duty to the petitioner company after publication of the customs notification to give effect to the Exim export-import policy of importing capital goods @ 0% duty of customs. Such prayer was rejected by the authority. The petitioner company availed of the opportunity of clearing the consignments under the 10% duty of customs scheme on protest.

The petitioner filed an application under article 226 of the constitution of India bearing W.P. no.2386 of 2001 which was disposed of on September 13, 2002 with a direction upon the respondent authority to consider the case of the petitioners for refunding the 10% duty of customs which had been paid by them. Pursuant thereto the impugned order dated July 30, 2003 was passed by the respondent no.4 rejecting prayer of the petitioner.

It is submitted by Mr. Bhaskar Sen, learned senior Advocate appearing for the petitioners, that the petitioner company imported the textile machines under reference on the strength of licence under EPCG Scheme. Admittedly, the Government introduced the policy of 0% duty of customs scheme with effect from April 1, 1999. But the prayer of the petitioner company was rejected on the ground that the notification in exercise of powers conferred by sub-section (1) of

Section 25 of the Customs Act, 1962 was issued on November 4, 1999 to give effect to the above import policy of the government. According to the learned Senior Counsel, notification no.29/97-Cus was issued on April 1, 1997 with regard to import of goods under EPCG Scheme. Second proviso to condition (2) in Paragraph 2 of the above notification was substituted by a subsequent notification no.31/99-Cus dated March 8, 1999 for the purpose of inclusion of “bio-tech and engineering sectors”, amongst others. The second proviso to condition (2) in Paragraph 2 and the first proviso to condition (5) in above paragraph of the notification no.29/97-Cus dated April, 1997, were further substituted by another subsequent notification no.122/99-Cus dated November 4, 1999 to introduce the term “Textile and Chemical Sectors”. According to the learned senior Counsel, the above notification no.122/99 dated November 4, 1999 was issued to give effect to the government policy of 0% import duty of customs in Textile and Chemical Sectors for the period from April 1, 1999 up to March 31, 2000.

Relying upon the decision of **Government of India & Ors. Vs. Indian Tobacco Association, reported in (2005) 7 SCC 396**, the Learned senior Counsel submits that the term “substitution” was interpreted in the above decision. In view of the above interpretation, the impugned order dated July 30, 2003 cannot be sustained in law.

Opposing the above submissions made on behalf of the petitioners, it is submitted by Mr. Malay Kumar Singh, on behalf of the respondents, that in accordance with the provisions of Section 25 of the Customs Act, 1962, the Central Government may exempt goods of any specified description from payment of customs duty. But according to the above provisions such exemption takes effect from the date of publication of the notification in the official gazette. Admittedly, in this case the import of machineries under reference took place prior to the date of publication of such notification in the official gazette extending the benefit of 0% duty of customs under EPCG Scheme. Therefore, the impugned order is sustainable in law.

I have heard the learned Counsel appearing for the respective parties and I have also taken into consideration the facts the circumstances of this case. It is not in dispute that the petitioner company imported three textile machineries under reference in the month of August 1999. This is also not in dispute that the government introduced 0% duty of customs under

EPCG Scheme on textile machinery with effect from April 1, 1999. But the gazette notification to that effect was issued on November 4, 1999.

In order to adjudicate the point of law involved in this case the relevant portions of notification no.29/97-Cus dated April 1, 1997 are quoted below:

“Import of goods under EPCG Scheme – Exemption from Additional Customs Duty

In exercise of the powers conferred by sub-section(1) of section 25 of the Customs Act, 1962(52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table annexed hereto from whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975(51 of 1975) and from whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely:-

(1)....

(2)....

Provided that export obligation of a particular block may be set-off by the excess exports made in the said preceding blocks.

Provided further that in case of licences issued with an obligation to export products related to agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, viticulture and sericulture, the export obligation shall be required to be discharged in six years from the date of issue of licence and the proportion of total export obligation for the blocks of 1st and 2nd year, 3rd and 4th year and 5th and 6th year shall respectively be 15%, 35% and 50%.”

There was a further notification no.31/99-Cus dated March 8, 1999 for the purpose of substitution of second proviso to condition (2) in paragraph 2 and the relevant portions of the above notification are quoted below:

“Capital goods, components and spares thereof imported under EPCG Scheme- Amendment to Notification No.29/97-Cus.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.29/97-Customs, dated the 1st April, 1997, namely:-

In the said notification-

(i)...

(ii) in paragraph 2,

(A) for second proviso to condition (2), the following proviso shall be substituted, namely:-

“Provided further that in case of a licence of CIF value of Rupees one crore or more but less than rupees twenty crores, where the licence is issued-

(a) with an obligation to export products of electronics, food processing, garments, leather, sport goods, gem and jewellery, agriculture, animal husbandry,

floriculture, horticulture, pisciculture, viticulture, poultry, sericulture, bio-tech and engineering sector, or.”

There was a further notification no.122/99-Cus dated November 4, 1999 and the relevant portions of the aforesaid notification are quoted below:

“Capital goods, components and spares thereof imported under-EPCG Scheme – Amendment to Notification No.29/97-Cus.

In exercise of the powers conferred by sub-section (1) of Section 25 of Customs Act, 1962(52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.29/97-Customs, dated the 1st April, 1997, namely:-

In the said notification,-

(a) in paragraph 2, -

- (i) in the second proviso to condition (2), for the words “bio-tech and engineering sectors,” the words “bio-tech, engineering textile and chemical sectors,” shall be substituted;***
- (ii) in the first proviso to condition (5), for the words “bio-tech and engineering sector,” the words “bio-tech, engineering textile and chemical sectors,” shall be substituted;”***

On a plain reading of the notification no.31/99-Cus dated March 8, 1999 it is revealed that the term “bio-tech and engineering sectors” had been introduced as back as on March 8, 1999 by way of substitution. The term “bio-tech and engineering sectors” in paragraph 2 of notification no.29/97-Cus date April 1, 1997 was further substituted by the term “bio-tech, engineering, textile and chemical sectors” by virtue of the notification no.122/99-Cus dated November 4, 1999.

Therefore, the term “bio-tech and engineering sectors” have been introduced in paragraph 2 with effect from March 8, 1999. By virtue of the latest notification no.122/99-Cus dated November 4, 1999 the term “textile” was also substituted, amongst others.

The substitution of the text “bio-tech, engineering, textile and chemical sectors” by virtue of notification no.122/99-cus dated November 4, 1999 for pre-existing text of “bio-tech and engineering” in notification no. 31/99-cus dated March 8, 1999 was based on recognised practices employed in legislative drafting. Above substitution of the provision resulted in repealing the former provision and its replacement by the later one amending the operation of the provision during the period in which it was in force on the basis of the policy of the Government, i.e. from April 1, 1999. The principles of law with regard to the interpretations of the word “substitute” has already been settled in matter of **Zile Singh Vs. State of Hariyana & Ors., reported in (2004) 8 SCC 1** and the relevant portions of the above decision are quoted below:

“23. The text of Section 2 of the Second Amendment Act provides for the word “upto” being substituted for the word “after”. What is the meaning and effect of the expression employed therein – “shall be substituted”?

24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. “Substitution” has to be distinguished from “supersession” or a mere repeal of an existing provision.

25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see principles of Statutory Interpretation, ibid., p.565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills

Assn. v. State of U.P., State of Rajasthan v. Mangilal Pindwal, Koteswar Vittal Kamth v. K. Rangappa Baliga and Co. and A.L.V.R.S.T. Veerappa Chttiar v. S. Michael. In West U.P. Sugar Mills Assn. case a three-Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case a three-Judge Bench of this Court emphasised the distinction between “supersession” of a rule and “substitution” of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place.”

The above settled principles of law has been repeated and reiterated in the Matter of **Indian Tobacco Association(supra)** and the relevant portions of the above decision are quoted below:

“14. However, the question which arises for consideration in this case is as to what would be the effect of the subsequent notification.

15. The “substitute” ordinarily would mean “to put(one) in place of another”; or “to replace”. In Black’s Law Dictionary, 5th Edn., at p.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.”

The settled principles of law as laid down in the above decisions, therefore, run counter to the submissions of the Learned Counsels of the respondents that in view of the provisions of Clause(a) of sub-section(4) of Section 25 of the Customs Act, 1962, the benefit of 0% duty of customs under EPCG Scheme was introduced with effect from November 4, 1999. Because the above notification was introduced for the purpose of substitution of earlier notifications. The word substitution would connote that the Central Government intended to give benefit of 0% duty of customs under EPCG Scheme from the date of introduction of the policy of the Central Government.

Consequent upon the above discussions and observations the impugned order dated July 30, 2003 stands quashed and set aside. The respondents are directed to give the benefit of 0% duty of customs under EPCG Scheme to the petitioner company in respect of the import of textile machineries under reference within a period of two months.

This writ application is, thus, allowed.

There will be, however, no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Debasish Kar Gupta, J.)