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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 3606/2003

OSWAL CHEMICALS & FERTILIZERS LTD. Petitioner
Through: Mr. Rakesh Tiku, Senior Advocate with
Mr. Prakash Gautam, Mr. Vivek Ojha and Mr.
Sandeep Kumar, Advocates.

versus

UNION OF INDIA & ORS Respondents
Through: Mr. Bhagwan Swarup Shukla, CGSC
with Mr. Shambhu Chaturvedi, Advocate for R-1.
Mr. Sanjeev Narula, Senior standing counsel with
Mr. Abhishek Ghai, Advocates for R-2.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

ORDER
25.05.2017

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Dr. S. Muralidhar, J.

1. The Petitioner, Oswal Chemicals and Fertilizers Ltd., has filed the present petition under Article 226 of the Constitution seeking a declaration that the impugned Notification No. 23/2002-Cus dated 1st March 2002 issued by the Department of Revenue, Ministry of Finance, Government of India to the extent that it removed 'sulphur' and 'rock phosphate' from the ambit of goods entitled to nil rate of Special Additional Duty ('SAD') on their import and subjecting them to SAD @ 4%, is illegal.

Background facts

2. The brief facts are that the Petitioner is a domestic manufacturer of

phosphoric acid which in turn, is mixed with ammonia to produce phosphatic fertilizers. Two of the raw materials used in the manufacture of phosphoric acid are sulphur and rock phosphate and both of them are imported. They are classified under Tariff Headings 25.03 (sulphur of all kinds) and 25.10 (natural calcium phosphates etc.) of the Customs Tariff. The customs duty on both the products at the relevant time was 5% *ad valorem*. Phosphoric acid is also imported by other manufacturers of fertilisers.

3. SAD was introduced, on articles imported into India, by insertion of Section 3A of the Customs Tariff Act, 1975 ('CTA'), by Section 104 of the Finance Act, 1998. The relevant portion of Section 3A reads as under:

3A. Special Additional Duty:

(1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the special additional duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India.

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

Explanation- In this sub-section, the expression "maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India" means the maximum sales tax, local tax, other charges for the time being in force, which shall be leviable on a like article, if sold or purchased in India, or if a like article is not so sold or purchased which shall be leviable on the class or description of articles to which the imported article belongs.

(2) For the purpose of calculating under this section the special additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962 or Section 3 of this Act, be the aggregate of –

(i) the value of the imported article determined under sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be;

(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 the special additional duty referred to in sub-section (1) and

(iii) the additional duty of customs chargeable on that article under Section 3 of this Act.

(3) 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.

(4) The provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties shall, so far as they may be, apply to the duty chargeable under this Section as they apply in relation to the duties leviable under that Act.

(5) Nothing contained in this section shall apply to any article, which is chargeable to additional duties levied under sub-Section (1) of Section 3 of the Additional Duties of Excise (Goods of Special Importance), Act, 1957 (58 of 1957).”

4. The Petitioner draws attention to the Budget Speech of 1998 of the Finance Minister where the rationale and reason for introduction of SAD

was explained, as under:

"119. The domestic industry has responded favourably to the restructuring of customs duties and has shown commendable resilience. They need to improve their competitive efficiency to meet the challenges of global competition. But they also have legitimate concerns which cannot be ignored. In this background, the path of transition has to be carefully calibrated to ensure that the adjustment process for the Indian industry is orderly without leading to serious disruption.

120. I have received representations from a cross section of the industry about the regime of import duties. Many Hon'ble Members have also written to me expressing their concern on the general health of the domestic industry. The demands are diverse and asymmetrical in most cases. This is for obvious reasons. While the users of imported raw materials and other inputs or the consumers of finished imported goods would benefit from further reduction in import duties, the domestic producers have made a convincing case for urgent relief to the domestic industry.

121. I have given by earnest consideration to these concerns and the competing claims. I am persuaded about a clear disability that our commodity taxation inflicts on the indigenous goods vis-a-vis the imported goods. While the former are subject to sales tax and other local taxes and levies, the import sector, escapes them by their very nature. In order to provide a level playing field to the domestic industry, I propose to impose an additional non-modvatable levy of 8% on imports which is approximately equal to the burden of local taxes on domestic producers. This duty should not be viewed as a protectionist measure but only as a response to a legitimate demand for a level playing field. The new levy would not apply to crude oil, newsprint, capital goods sector under a special tariff regime or goods which are subjected to additional duties of excise in lieu of sales tax, gold and silver imported by passengers or other nominated agencies and life saving drugs that are free from customs duties. The levy would also not apply to goods which are currently exempt both from basic and additional duties of customs. Similarly, goods imported for subsequent trading have also been left out of its purview, since they

bear the burden of sales tax at the time of first sale. The new levy will also not apply to inputs imported under export promotion schemes. In addition, there may be other sectors eligible for exemptions. These would be examined and if considered appropriate notified separately.

122. The gradual reduction of import duties in the past few years has resulted in certain distortions and anomalies. My proposals seek to correct them as far as found feasible without causing abrupt disruption in the duty structure."

5. Accordingly, it is submitted by the Petitioner that the intent and purpose of SAD was "to afford a level playing field for indigenous manufacturers of goods which were also imported from outside, to protect the indigenous industry." It is pointed out that the various notifications were issued specifying rates or exempting certain goods/categories of goods from SAD. Specific to the goods on hand, the notification Nos. 18/2000-Cus dated 1st March 2000 and No. 19/2011-Cus dated 1st March 2001, both of which prescribed the rate of SAD for sulphur and rock phosphate respectively as 'nil'. The relevant portion of the notification No. 19/2011-Cus reads thus:

"In exercise of the powers conferred by sub-section (1) of section 3A of the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act), the Central Government, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on the like goods on their sale or purchase in India, hereby specifies the rates of special additional duty as indicated in Column (4) of the Table below in respect of goods when imported into India, specified in corresponding entry in column (3) of the said Table and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act as are specified in the corresponding entry in column (2) of the said Table:

Provided that in respect of the goods specified against S. Nos. 30, 31, 32, 42 and 43 of the said Table, 'Nil' rate shall be subject to the conditions, if any, subject to which the goods are exempt either

partially or wholly from the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act.

S.No.	Chapter or heading No. or sub-heading No.	Description of goods	Standard rate
(1)	(2)	(3)	(4)
7.	25.03	Crude or unrefined sulphur	Nil
26.	10.01, 2301.20, 25.10, 2814.10, 2814.20, 3102.21, 3105.20, 3105.51, 3105.59, 3105.60, 3105.90, 44.01, 44.02, 44.03 or 52.01	All goods	Nil

6. As far as the imported phosphoric acid is concerned, it is classified as Sub-Heading 2809.20 of the Customs Tariff and the customs duty payable is at 5% *ad valorem*.

The impugned notification

7. According to the Petitioner, with the issuance of the impugned notification No. 23/2002-Cus effective 1st March 2002 however this 'level playing field' was completely disturbed. The said notification was issued in supersession of Notification No. 19/2011-Cus. The impugned notification prescribed the fresh rates of SAD on sulphur and rock phosphate at 4% *ad valorem*. The relevant portion of the said impugned notification, reads as under:

"In exercise of the powers conferred by sub-section (1) of Section 3A of the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the said Act), and in supersession of the notification of the

Government of India in the Ministry of Finance (Department of Revenue), No. 19/2001-Customs, dated the 1st March, 2001 [G.5.R. 118(E) dated the 1st March, 2001], the Central Government, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on the like goods on their sale or purchase in India, hereby specifies the rates of special additional duty as indicated in column (4) of the Table below in respect of goods, when imported into India, specified corresponding entry in column (3) of the said Table and falling within the Chapter, heading or sub-heading of the First Schedule to the said Act as are specified in the corresponding entry in column (2) of the said Table:

Provided that in respect of the goods specified against S. Nos. 38, 39, 40, 56 and 57 of the said Table, "Nil" rate shall be subject to the conditions, if any, subject to which the goods are exempt either partially or wholly from the duty of customs leviable thereon which is specified in the said Act.

S.No.	Chapter or heading No. or sub-heading No.	Description of goods	Standard rate
(1)	(2)	(3)	(4)
62	Any chapter	All goods, other than those specified against S. Nos. 1 to 61 above.	4% <i>ad valorem</i>

8. The Petitioner submits that the indigenous phosphoric acid manufacturers have as a result of the above notification No. 23/2002-Cus been adversely affected as they have now to pay the customs duty almost twice the rate payable by importers of phosphoric acid. In other words while the importers would pay the customs duty @ 5% *ad valorem* the Petitioner and indigenous manufacturers of phosphoric acid have to pay customs duty on both sulphur and phosphoric acid at 5% plus 4% SAD. The impugned notification is stated to have placed the indigenous manufacturers of phosphoric acid "in

severe jeopardy'. It is submitted that despite representations made by the Petitioner to the Government of India, on several occasions there has been no response received.

9. However, in the 2003 Union Budget, the Respondents have remedied the situation, but only prospectively. Notification No. 29/2003-Cus dated 1st March 2003 was issued amending Notification No. 23/2002-Cus. By this time, both sulphur and rock phosphate were included amongst those items on which nil rate of SAD was payable. However, since the notification No. 29/2003-Cus dated 1st March 2003 was only prospective, SAD paid by the fertilizer manufacturers who imported sulphur and rock phosphate in 2002-03 has been lost forever and even refund could not be claimed.

Submissions of Senior counsel for the Petitioner

10. Mr. Rakesh Tiku, learned Senior counsel for the Petitioner, submits that the scope of judicial review for withdrawal of exemption was explained by the Supreme Court in the decision ***Dai Ichi Karkaria v. Union of India 2000 (119) ELT 516*** where it was held as under:

- (i) where an exemption was withdrawn, such withdrawal was open to challenge, in judicial review, on the basis that it did not serve public interest,
- (ii) in the event of such challenge, the onus would be on the Department to establish, before the Court, that the withdrawal of the exemption was in public interest, and
- (iii) in the absence of satisfactory discharge of this onus, the withdrawal of the exemption would have to be declared illegal.

11. Mr. Tiku submitted that the same logic would , *pari passu*, apply where

an item in respect of which rate of SAD was specified as 'nil' has been subjected to SAD @ 4% *ad valorem*. Mr. Tiku further submitted that the statutory power under Section 3 A CTA has to be exercised in accordance with the conditions stipulated therein. In other words, it is submitted that in deciding the make sulphur and rock phosphate amenable to 4% SAD, the Respondent had to strictly abide by Section 3A (1) of the CAT. In terms thereof, SAD had to be levied "having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India." This according to Mr. Tiku was not done by the Respondents and therefore the impugned notification was bad in law. He referred to the decision of the Supreme Court in ***Babu Verghese v. Bar Council of Kerala (1999) 3 SCC 422***.

Submissions of counsel for the Respondents

12. In reply, Mr. Sanjeev Narula, learned Senior standing counsel appearing for Respondent No. 2, at the outset pointed out that the impugned notification was in force only for one year. The position that obtained prior to the issuance of the impugned notification was restored by the subsequent notification No. 29/2003-Cus dated 1st March 2003. Thus both sulphur and rock phosphate were subject to nil SAD for the period prior to 1st March 2003 and the period subsequent to 1st March 2003. Mr. Narula submitted that the decision regarding fixing rate of SAD was essentially a fiscal policy decision which is not amenable to judicial review. Mr. Narula referred to the decision of the Supreme Court in ***Arun Kumar Agrawal v. Union of India AIR 2013 SC 3127***.

13. Mr. Narula drew attention to the distinction between a notification

granting exemption and a notification that either imposed or increased rates of SAD in place of an earlier notification which levied nil or a lower rate of SAD. Mr. Narula explained the difference between the basic customs duty and the SAD and additional duty which was also evident from Sections 2,3 and 3 A of the CTA. He referred to the decision of the Supreme Court in ***Colgate Palmolive (India) Limited v. Commissioner of Customs, Patna 2016 (339) DLT 161 (SC)***.

14. Mr. Narula also referred to the counter-affidavit which explained that a conscious decision has been taken by the Respondent to increase the rates of duty gradually on specified goods having duty exemption including exemption from SAD.” The decision to bring sulphur and rock phosphate within the ambit of SAD by the impugned notification and restoration of nil rate of duty of SAD on both products was also part of the Government's policy of reviewing the tax rates and exemptions.

Analysis and reasons

15. The above submissions have been considered. At the outset, it requires to be noticed that there is indeed distinction between the grant of exemption from payment of duty and enhancing the rate of duty that was initially fixed at 'nil'. In the latter case, it cannot be said that the commodity in question is not amenable to the levy of customs duty. The fact that there is a notification prescribing nil duty means that the goods is otherwise exigible to the levy of customs duty. However, in terms of the policy decision of the Government at the relevant time the rate of duty for those goods was fixed at 'nil' rate of duty. This is quite different from exempting any goods from the payment of the whole or part of customs duty.

16. The second aspect is the interpretation of Section 3A (1) of the CTA. The words 'having regard to' occurring in the said Section indicates what the Government is expected to do while fixing the rates of SAD in exercise of its power under Section 3A of the CTA. It has to keep in view the maximum sales tax, local tax and "any other charge for the time being leviable on a like article on its sale or purchase in India." It is to be interpreted purposively given the context in which the phrase "other charges" occurs. That expression cannot be confined to only charges that are similar to sales tax and local tax. To apply the rule of *ejusdem generis* to interpret the said expression would unnecessarily and unduly narrow the scope of the expression. In the considered view of the Court such a narrow reading of the expression 'other charges' is not warranted by reading Section 3A as a whole.

17. Sub-section (2) of Section 3A of the CTA states that for the purposes of SAD, the value of the imported article shall be the aggregate of (i) the value of the imported article; the customs duty chargeable and any sum chargeable thereon in the same manner as customs duty but does not include countervailing duty, safeguard duty, anti-dumping duty, the SAD etc. In this context, the word 'having regard to' cannot possibly have a restricted meaning. Likewise, the phrase 'any other charges for the time being leviable' cannot be confined only to local tax and sales tax.

18. What steps have to be taken on the fiscal front to provide a level playing field to both importers and indigenous manufacturers of phosphoric acid would undoubtedly be a policy decision. No doubt the CTA and the powers

under Section 3 A thereof are a means to achieve that fiscal objective. However, in exercise of the powers under Article 226 of the Constitution, it would not be for this Court to determine whether the rate of duty should be 'x' or 'y'. The Court can at best examine if all relevant considerations have been taken into account and whether the procedure envisaged has been followed while arriving at the decision to keep the rate at 'nil' or raise it to 'x' or 'y' percent. The decision making process and not the decision itself is amenable to judicial review. The merits of the decision can be reviewed only where it is shown to be vitiated by malice in law or in fact or is so irrational or unreasonable that it cannot be considered to be just and fair.

19. It is not as if in the present case, the impugned notification reflected in Notification No. 23/2002-Cus dated 1st March 2002 has no basis. The counter-affidavit filed by Respondent No. 2 explains the factors that were taken into consideration. The mere fact that the government made a reference to the prevailing rates of customs duty and not to sales tax or local tax and the impact thereof would not *per se* render the decision contrary to section 3 A CTA. The expression word 'other charges' is wide enough to include customs/excise duty which might impact the selling price of a commodity in the domestic market. The idea was to have a gradual change in the rates of customs duty especially in the case of those goods that were subject to 'nil' rate of duty. Again, this was not a rigid inflexible decision but obviously reviewable depending on the market conditions. In fact that is what has happened in the following year. The 'nil' rates of SAD for both sulphur and rock phosphate were restored. This is another factor which indicates that the decision was not unreasonable or irrational. The mere fact

that there might be some inconvenience for a short period on account of the increase or decrease in rates of SAD is not by itself a reason to declare the fixation of the rate of duty as unreasonable or illegal. That decision is essentially a policy one of the government and the judicial review of such a decision is indeed in a narrow compass as already explained.

Conclusion

20. The Court is not satisfied that in the impugned notification can be said to be arbitrary or irrational or that it has been issued by the government without taking into account all the relevant factors. Consequently, the Court is not inclined to interfere with the impugned notification dated 1st March 2002 which in any event has been superseded by the notification No. 23/2003-Cus dated 1st March 2003.

21. No case has been made out for grant of any relief as prayed for in the present writ petition. The petition is dismissed with no orders as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 25, 2017

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