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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.19961 of 2019

M/s. Dalmia Cement (Bharat) Limited ..... **Petitioner**

versus-

Union of India and others ..... **Opposite Parties**

Advocates appeared in this case:

For petitioner : Mr. V. Sridharan, Sr. Advocate
Mr. Mukesh Panda, Advocate
Mr. Shobhit Jain, Advocate
Mr. Rahul Tangri, Advocate

For opposite parties : Mr.T. K. Satapathy, Advocate
Senior Standing Counsel

CORAM:

THE HON'BLE MR. JUSTICE ARINDAM SINHA
AND
THE HON'BLE MR. JUSTICE M.S.SAHOO

J U D G M E N T

Dates of hearing : 7th October, 2024, 29th October, 2024 and 20th November, 2024

Date of judgment: 20th November, 2024

ARINDAM SINHA, J.

1. The writ petition was filed by petitioner challenging requirement to pay Social Welfare Surcharge (SWS). Mr. Sridharan, learned senior advocate appearing on behalf of petitioner

had moved it on 7th October, 2024. Mr. Satapathy, learned advocate, Senior Standing Counsel appears on behalf of revenue.

2. Petitioner says it imports petroleum coke required in the manufacture of cement. Not being an exporter it purchased duty credit scrip issued under Merchandise Exports from India Scheme (MEIS). In importing the goods, it is thereby exempted from whole of the customs duty leviable thereon. The scrip is at annexure-1 and clearly says it was issued in exercise of powers conferred under sub-section (1) in section 25, Customs Act, 1962.

3. To import said goods petitioner used the scrip. There were difficulties faced and it made representation dated 27th May, 2019. The difficulties arose because of the additional levy of SWS, by section 110 in Finance Act, 2018.

4. Drawing attention to cause of the difficulties Mr. Sridharan referred to circular dated 10th January, 2020 issued by Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Customs. He pointed out from the circular, revenue relies on judgment of the Supreme Court in **M/s. Unicorn Industries v. Union of India**, reported in **2019 (370) ELT 3**. It was said, ratio of the judgment is to be applied to

the issue of levy of SWS on imported goods, when the basic customs and additional duty of customs are debited in the scrip. Paragraph 7 from said circular 2/2020-Cus. dated 10th January, 2020 is reproduced below.

> *"7. The ratio of the afore cited judgment is seen to apply to the issue at hand of levy of SWS on imported goods when the Basic Customs Duty and Additional Duties of Customs are debited through duty credit scrips."*

5. Mr. Sridharan explained to us working of section 110 and also section 136 in Finance Act, 2001. Section 136 is reproduced below.

> *"136. National Calamity Contingent duty.-(1) In the case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collected for the purposes of the Union, by surcharge, a duty of excise, to be called the National Calamity Contingent duty (hereinafter referred to as the National Calamity duty), at the rates specified in the said Schedule.*
>
> *(2) The National Calamity duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods*

under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the National calamity duty leviable under this section in respect of the goods specified in the Seventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be."

6. He drew attention to **M/s. Unicorn Industries** (supra), inter alia, paragraph 40 (Manupatra print). We reproduce below a passage from the paragraph.

"40. ... ... The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. ... ..."

7. He then took us back to sub-section (3) in section 136. He laid emphasis that the mechanism is by provision in Central Excise Act, 1944 and rules made thereunder. The additional duty of NCCD is leviable in respect of goods specified in the seventh schedule as they apply in relation to levy and collection of duty of excise. According to him, therefore, it is a charge on value of the specified goods. In the case of his client, it is exempt from paying customs duty. The SWS is a percentage of the customs duty. Customs duty being zero, levy of SWS must also be zero.

8. Mr. Satapathy referred to section 110 in Finance Act, 2018. In placing sub-section (3) he submitted, SWS levied under sub-section (1) is to be calculated at a percentage, inter alia, on aggregate duties, levied under section 12, including any sum chargeable on the goods specified. As such, SWS is to be paid by petitioner in spite of it entitled to benefit under the scheme.

9. For his submission he relied on **M/s. Unicorn Industries** (supra), paragraph 41 (Manupatra print). The paragraph is reproduced below.

> *"41. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has*

no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. ***The reason employed in SRD Nutrients Private Limited (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon.*** *The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted."*

(emphasis supplied)

10. Pursuant to above law declared, a learned single Judge of the Madras High Court applied it. It was by **judgment dated 3rd January, 2020** in, inter alia, **W.P. no.24490 of 2019 (M/s. Gemini Edibles and Fats India Pvt. Ltd. v. Union of India and others)**, made against petitioner therein. The judgment was confirmed in appeal by the Division Bench. He submitted, SWS being a levy under the Finance Act, it is a separate and distinct levy. The scrip entitling holder of it benefit of exemption is pursuant to notification dated 8th April, 2015 issued under the Customs Act. There is no exemption notification under the Finance Act. **M/s. Unicorn Industries** (supra) is clear declaration of law that exemption pursuant to notification issued under a legislation cannot extend to exemption of another levy imposed by a different legislation, for different purpose. The levy of customs duty is for generation of revenue and levy of SWS is for exactly the stated purpose, welfare.

11. We had made a query to Mr. Sridharan in respect of part of the sentence in paragraph-41 of **M/s. Unicorn Industries** (supra) saying, inter alia, "... ... ... *additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based*

thereupon. ... ...” Mr. Sridharan submitted, he would contend the observation is distinguishable as not applicable to his client’s case. He added, in **Union of India v. Modi Rubber Ltd.,** reported in (**1986) 4 SCC 66,** issue before the Supreme Court was, where there had been partial exemption of duty payable, whether additional duty was also thus exempted. The Supreme Court upheld revenue’s contention that the additional duty by percentage was to be calculated on the reduced duty payable. In **M/s. Unicorn Industries** (supra) the Supreme Court followed **Modi Rubber Ltd.** (supra).

12. Today Mr. Sridharan refers us to view taken by the Division Bench of Madras High Court in confirming the learned single Judges’ view in **M/s. Gemini Edibles and Fats India Pvt. Ltd.** (supra). View of the Division Bench was on **judgment dated 10th May, 2024** in, inter alia, **W.A. no.830 of 2020** (**M/s. Gemini Edibles and Fats India Pvt. Ltd**. **v. Union of India (through its Secretary), Assistant Commissioner of Customs and others.** He submits, the Division Bench differed from similar views taken by the Andhra Pradesh, Gujarat and Bombay High Courts, including earlier view taken by another Division Bench of the same Court in

Commissioner of Customs, Tuticorin v. DCW, reported in **(2014) 306 ELT 398.**

13. He refers us to article 265 in the Constitution. The article is reproduced below.

> *"265. Taxes not to be imposed save by authority of law.—No tax shall be **levied** or **collected** except by authority of law."*

(emphasis supplied)

He submits, word 'collected' used in the article stood interpreted by the Supreme Court in **Somaiya Organics v. State of Uttar Pradesh,** reported in **2001 (13) E.L.T.3 (S.C.).** Mr. Sridharan relies on a passage in paragraph-28, reproduced below.

> *"... ... ... In taxing statute the words 'levy' and 'collect' are not synonymous terms (refer to Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. 1978 (2) E.L.T. (J 416) (S.C.)= (1972) 2 SCC 560 at page 572, while 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realization of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded. ... ...*"

14. He again draws attention to section 25 to submit, there can either be levy and collection of tax or exemption. His client being holder of the scrip is entitled to exemption of duty to extent provided for in it. Fulfillment of requirement under clause 5 in General Exemptions no. 162 of notification no.24 of 2015-Cus., dated 8th April, 2015 as amended is only for purpose of keeping track of quantum exemption availed by holder of the scrip. No tax can be said to have been paid, when exempt. Article 265 in the Constitution and this aspect of exemption was not considered by the Division Bench in formulating the view by paragraph-7.51 on **judgment dated 10th May, 2024** (supra). Said paragraph 7.51 (taxmanagementindia.com print) is reproduced below.

> *"7.51. The above would clearly show that the **debit** of MEIS/SEIS scrips **is one of the modes of discharging the duty obligation under the Customs Act. The contention of the appellant that there is no payment although** the **duty credit scrips is debited is ill-founded** and runs counter to the notifications, provisions of the Customs Act, the FTP and the binding decision of this Court in **TANFAC Industries**, supra.*
>
> *(d) Whether forming part of the Consolidated Fund of India is a sine qua non for a levy to operate/exist?"*

(emphasis supplied)

15. Mr. Satapathy submits as rejoinder that above view is correct. Debit in the scrip is in fact discharge of the requirement to pay customs duty. He relies on Foreign Trade Policy, Chapter-3 on Exports from India Schemes, paragraph-3.02. The paragraph 'Nature of Rewards' is reproduced below.

> *"3.02 Nature of Rewards*
>
> *Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against them shall be freely transferable.* ***The Duty Credit Scrips can be used for****:*
>
> > *(i)* ***Payment of Basic Customs Duty and Additional Customs Duty*** *specified under sections 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 for import of inputs or goods, including capital goods, as per DOR Notification, except items listed in Appendix 3A.*
> >
> > *(ii) Payment of Central excise duties on domestic procurement of inputs or goods,*
> >
> > *(iii) Deleted*
> >
> > *(iv) Payment of Basic Customs Duty and Additional Customs Duty specified under Sections 3(1), 3(3) and 3(5) of the Customs*

Tariff Act, 1975 and fee as per paragraph 3.18 of this Policy.
Merchandise Exports from India Scheme (MEIS)"

(emphasis supplied)

He reiterates, no exemption is available to petitioner since levy of SWS is under Finance Act, 2018 and there stood no notification issued under said Act exempting anyone from payment of SWS. Debit in the scrip denotes discharge of the payment. The percentage of the duty discharged is the SWS levied.

16. We understand that petitioner is not claiming exemption. Petitioner's contention is based on section 110 of Finance Act, 2018. Reproduced below are sub-sections (1) and (3) of section 110.

"110. (1) ***There shall be levied and collected****, in accordance with the provisions of this Chapter, for the purposes of the Union,* ***a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified*** *in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods* ***imported into India****, to fulfil the commitment of the Government to provide and finance education, health and social security.*

(2) ... ...

(3) ***The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent. on the aggregate of duties****, taxes and cesses which are levied and* ***collected*** *by the Central Government in the Ministry of Finance (Department of Revenue)* ***under section 12 of the Customs Act, 1962*** *and any sum chargeable on the goods specified in sub-section (1) under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including—*

(a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act;

(b) the countervailing duty referred to in section 9 of the Customs Tariff Act;

(c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;

(d) the Social Welfare Surcharge on imported goods levied under sub-section (1).

... ..."

(emphasis supplied)

17. We see from relevant provisions in section 110 reproduced above that the levy and collection is provided by sub-section (1). The levy is to be on goods imported into India and accordingly collected. Sub-section (3) is the charging provision. It says, the levy

under sub-section (1) shall be calculated at 10% on the aggregate of duties, taxes and cesses, which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under section 12 of the Customs Act, 1962. There is no dispute before us that the scrip petitioner holds, exempts it on collection from it, the customs duty levied.

18. In **M/s. Unicorn Industries** (supra) case of appellant before the Supreme Court was in resisting the levy and collection of National Calamity Contingency duty (NCCD). A finding by the Supreme Court that appeared to be obvious from the beginning was, absence of any notification issued under the legislation or Act providing for the levy and charge for collection of NCCD, being Finance Act, 2001. On behalf of petitioner clear submission is, for furthering challenge in the writ petition reliance is not placed on **M/s. Unicorn Industries** (supra) nor **SRD Nutrients Private Limited vs. Commissioner of Central Excise, Guwahati**, reported in **(2018) 1 SCC 105.** The challenge mounted is on case that where the charge is on amount of customs duty paid and such duty is exempt, the charge being a percentage of duty paid, must be zero. No duty

was paid so there cannot be a percentage of it, to result in any sum payable as SWS.

19. We respectfully disagree with view taken by the Division Bench in the Madras High Court on **judgment dated 10th May, 2024** (supra). Upon a person obtaining exemption, he cannot be said to be discharging liability to pay duty. There is no fact of collection following the levy. The charging provision by sub-section (3) in section 110 is a percentage of customs duty paid, as collected by the Central Government. The duty paid being zero, collection is zero and percentage of it must also be zero. Our reasoning might appear to be similar to that made by the Supreme Court in **SRD Nutrients** (supra) but petitioner is not relying on the judgment, understandably so. Petitioner's case is of submitting to provisions in section 110 of Finance Act, 2018, as applicable to it but, working of the charging provision releasing it from paying SWS. Debits in the scrip is for purpose of measure of quantum of exemption utilized under it.

20. Having said that, it appears petitioner has prayed for exemption in its prayer. It is competent for us to mould the prayer. On query made Mr. Sridharan submits, his client protested but the new system in place does not permit registration of any protest. As

such, his client was compelled to pay. In the circumstances, petitioner is entitled to and gets declaration that it is not required to pay SWS calculated on customs duty, exempted under scrip held by it.

21. The writ petition is allowed and disposed of.

(Arindam Sinha)
Judge

(M.S. Sahoo)
Judge

Jyostna/Gs