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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-15-1997

Reported in : (1998)(97)ELT112Tri(Mum.)bai

Appellant : Mohammad Samiullah

Respondent : Commissioner of Customs

Judgement :

1. The appellant imported a Pajero Mitsubhishi car, and claimed its clearance in terms of Public Notice No. 202/PN/92-97, dated 30-3-1994, claiming to be in category A. Category A provides for clearance without a specific import licence for motor car which have been in the use of the importer abroad for more than a year. The appellant claimed that he had purchased the car in United Arab Emirates (UAE) on' 20 January, 1995 and since he came to India only in April, 1996, the condition of one year possession and use were satisfied. Enquiries made by the Department led it to believe that the car was imported into Dubai on 14 February, 1995 by Al Habtoor Motors Co., and apparently sold by it to M/s. Georgina Trading, Dubai which in turn sold the car on 9 April, 1996 to Altaf Hussain. In the statements recorded by the investigating agency, Samiullah, the importer admitted that Altaf Hussain was his cousin; that he had said that he had not purchased the car in Dubai or registered it. He said that prior to his departure from Dubai he was approached by an unknown Indian who suggested that if he imported a car in terms of the Import Trade Control Policy, he would be paid Rs. 50,000/-. On his agreeing to do so he was given further details and copies of the papers relating to

the car. After his arrival in India, he contacted the Customs House Agent Koladkar as he had been instructed. In other words, he, in essence, admitted that he had not owned or used the car in Dubai.

2. On the basis of these disclosers Customs issued notice proposing confiscation of the car and imposing penalty. The notice also made a ground that the odometer of the car had recorded only 53 kilometers and that therefore the car was not in the use of the appellant as provided in the public notice. The importer resisted the notice, contending that he had retracted his statement reiterating that he was the owner of the car and has used it sparingly. The notice also proposed that the assessable value of the car was Rs. 13.78 lacs. The importer, in the Bill of Entry had not declared the value of the car and left the appropriate column blank. The appellant resisted the notice reiterating that he was the owner of the car in Dubai. He had retracted his statement. He contended that he had used the car sparingly before it was imported into India. He challenged the proposed valuation claiming that the receipt issued by Geor-gina Trading Co. for 75,000 Dirhams was genuine. He relied, for this purpose, a certificate stated to have been issued by M/s. Mitsubhishi Motor Corporation dated 12 December, 1995 describing the car in terms of engine and chassis number. The Commissioner did not accept this contention. He held that the car was not in Samiulla's possession for a year, as required by the policy; relying for this purpose on the figures in the odometer. He therefore held the car liable to confiscation. As for the value, he did not accept the valuation proposed in the notice holding that the cash receipt on which that valuation was based did not bear the engine number of the car, and no corroboration have been obtained from ostensible issuer of the receipt M/s. Georgina Trading that it was genuine. He proceeded to determine the value according to the certificate of the manufacturer produced by the importer, the certificate produced by the DRI and based on the practice followed by the Customs House where value was not available. He found that the price of the new Mitsubhishi with accessories was Japanese Yen JY 33,91,208, according to the manufacturer's price list. Deducting 15% discount and adding freight and insurance he arrived at the value 11,62,817. He confiscated the car with an option to redeem it on payment of fine of Rs. 10.00 lacs and imposed a penalty of Rs. 50,000/- on the appellant. Hence this appeal.

3. It was first contended on behalf of the appellant that the statement which he gave on 6 June, 1995 admitting that he had not imported the car into Dubai and did not own it in Dubai was retracted by him on 19-6-1995. The delay in the retraction is sought to be explained on the ground that he apprehended retaliatory action by the officers if he retracted it earlier. It was next contended that there was no reason why the documents showing purchase of the car in UAE on 20 January, 1995 and its registration by Ajman Traffic Department on 25 January, 1995 should not be admitted. It is therefore contended that the car has been in the appellant's possession for a year abroad. It was claimed that the car was very sparingly used in order to qualify for the import and that the appellant mostly used another car which he owned. It was contended that the value should be on the basis of the certificate claimed to have been issued by M/s. Mitsubhishi Motors Corporation showing the value of the car at JY 19,00,000. The documents relied upon in the notice have been assailed on the ground that they were only photocopies and were not authenticated.

4. The notice relied upon the following documents in support of its contention: (a) Certificate issued by the Department of Ports and Customs dated 14 February, 1995 showing import of the car by Al Habtoor Motors Co.

on 12 February, 1995.

(b) Receipt dated 9 April, 1996 issued by Georgina Trading to Al Habtoor Motors Co. for 1,44,000 Dh. photocopy of which was authenticated by the Indian consul.

Both the documents are photocopies. We are not in a position to say that the certificate were of the car and actually issued by the UAE Customs and Port in the absence of any authentication by any person of the photocopy as being the true facsimile of the original. The receipt issued by Georgina Trading has been certified to have been seen and a photocopy authenticated by the Indian consul, we are' vary of accepting this. The appellant has also relied upon a receipt dated 20 January, 1995 to him issued by the same firm. The genuineness of a person who issues two receipts for the same vehicle to two different persons, and the consequent genuineness of the two documents is seriously open to question.

5. We are therefore not satisfied that solely on the basis of these documents, the Department has made out a case 'that the car was not in the appellant's possession in Dubai for a year. However, the appellant had, inliis statement before the DRI, accepted that the car was not in his possession and use. The appellant retracted from his statement on 19 June, 1996,12 days after his statement.

6. The question that we have to now address is whether the retraction is genuine and is acceptable as such. The delay of 12 days between the recording of the statement and its retraction goes against the appellant. No satisfactory explanation is forthcoming for this delay.

If the appellant wished to retract from his statement, he would have done so at the earliest opportunity unless he was prevented from doing so by factors such as illness. The appellant says that he made the admission in his statement because the officers threatened that if he did not make the admission as desired by them, he would be detained as a smuggler under COFEPOSA and his property would be seized by the income tax department, and since he was unfamiliar with the law he made the admission.

7. The appellant, as he narrates in the retraction, was served a summons to appear on 5 June, 1995. In that statement the appellant has stated that he was the owner of the car which he possessed in Dubai for more than a year. He stated that he wrote the statement on 6th & 7th June stating that he was not the owner. Now there is no contention that the appellant was arrested or detained overnight in the Department's custody. Therefore, after his statement was recorded on 6th June the appellant was free. He was therefore free to take legal advice, consult his friends and otherwise ascertain whether action under income-tax could be taken against him or prevehtive detention imposed on him. He does not appear to have taken steps in this direction. He has on the other hand again gone to the DRI office on the next day and again given a statement confirming the admission made on the previous day.

8. After 12 days the appellant did retract from his admission. Now the appellant could have found the same information on 6th June which he found later, on the basis of which he retracted his statement. There is no reason or explanation

forthcoming as to why he chose not to do so.

In the background of these events we are satisfied that the retraction of the statement of 7th June Was not genuine. Therefore, we do not consider it necessary that corroboration is required of his statement.

In coming to this conclusion we have been guided by the observation of the Supreme Court in K.I. Pavunni v. Asstt. Collector -1997 (90) E.L.T.241 (S.C.).

9. The public notice specifies that the car must have been in possession and use of the importer for more than a year. It is not the appellant's contention that the car was in somebody else's ownership and he was using it. It is contended that 53 kilometers recorded in the odometer shows sparing and selective use and that it was used.

10. An argument was made by the appellant that the car has been used in the sense that the appellant would occasionally listen to the music system playing in the car. This may perhaps constitute use of the music system. It does not in our view to constitute use of the car. The car is intended to be used for conveyance of persons and their goods and it cannot be said to have been used unless it is employed for this purpose. The odometer showing 53 kilometers rurvi year amounts to one kilometer run in a week. By stretching the term with reference to the maximum it cannot be said with any seriousness that the appellant used the car. Reliance was placed upon the decision of the Madras High Court in Union of India v. TV Moidu - AIR 1960 Madras 205 but this according to us is misplaced. Moidu one of the petitioners had been convicted under Motor Vehicles Act and the rules by driving a vehicle on a route not authorised by the permit and on a trip totally unconnected with use under the permit. It was argued that Sections 42 and 152 of the Motor Vehicles Act, under which he was convicted would not apply, because he had not used the vehicle, which was required to have been done before the sections would apply. The Court made a distinction between the words "using" and "driving" and held that it had not been "used" within the meaning of Section 112. The distinction between "using" and "driving" made in the decision has no relevance to the facts of this case.

It is therefore not possible to accept that listening to the music system of a car or using it for 53 kilometers in a year constitute use of the car as it is commonly understood, as the object and intention behind the policy, as expressed in the public notice requires. We therefore hold that the appellant has not satisfactorily established that the car was in his possession and usage for more than one year before its importation into India. Confiscation of the car is upheld.11. The Commissioner's order with regard to valuation is somewhat curious. While he says that he does not accept the documents produced by the Department referred to in the notice because it does not contain engine number but later on places reliance on the documents produced by the appellant. From these two documents it is difficult to see how he applied the method of valuation in vogue in the Customs. He relies upon the price list of the manufacturer details of which he has not given.

Examination of the relevant adjudication file of the Customs House during the hearing did not disclose the presence of any such documents.

Copies of documents indicating the price of a Pajero car and some documents printed by Nippon Indo Translab have been found in the file.

However, they are photocopies unsigned and unauthenticated and the Departmental Representative was not able to show as to how this can be considered to be price list of the manufacturer. We are unable to accept it as such. At the same time, the appellant was unable to produce the original of the documents stated to have been issued by Mitsubhishi Motor Corporation. It was claimed that it has been handed over to the officers of the DRI when the statement was recorded.

Samiullah in his statement has admitted that the certificate was not addressed to him and that it was a fax message collected from Mitsubhishi show-room in Dubai. It would therefore not be correct to say that the original was produced by him. The certificate, since it is unauthenticated and a photocopy cannot be accepted as having been issued by Mitsubhishi. We suggested to the advocates for the appellant that if the certificate had infact issued by Mitsubhishi it would be appropriate to approach local Indian office of the company for issuing similar certificate and the matter was adjourned for this purpose. The Department was also given a similar opportunity. However, both sides reported that they were unable to obtain such a document.

12. We are therefore left with no option but to remand the matter back to the Commissioner so as to have the car valued by reference to the price of the make and model of the car in question, available either from the records of contemporaneous imports of such cars or price list of the manufacturer or the price of the car published in reputed and recognised trade journals such as the World Car Guide. In arriving at the valuation the Commissioner must give due regard, where require deduct such elements as local taxes etc. The car shall be assessed to duty on the basis of these directions after giving the importer an opportunity of personal hearing with regard to the proposed valuation.

13. We confirm the liability to confiscation of the car for the reason that it did not satisfy the condition of one year's use. In our view the importer is also liable to penalty in that he attempted to import the car which he knew that it was not in his possession or use for the minimum period prescribed. The importer will have to be given an option to redeem the car since it is not prohibited for import. The quantum of penalty and redemption fine are contingency upon the value of the car.

Since we have ordered determination afresh we are of the view that it is appropriate that the penalty and redemption fine should be fixed after such hearing. We would request the Commissioner to adjudicate the case earliest in view of the time that has elapsed.