**Vxl India Ltd. Vs. Commissioner of Central Excise**

**Vxl India Ltd. Vs. Commissioner of Central Excise**

**SooperKanoon Citation** : sooperkanoon.com/12721

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Jan-27-1998

**Reported in** : (1998)(100)ELT138Tri(Mum.)bai

**Appellant** : Vxl India Ltd.

**Respondent** : Commissioner of Central Excise

**Judgement** :
1. The appellant had placed the order for supply of 20,000 MT of Metallurgical coke of the size of 25 mm to 50 mm with M/s. Jemseon and Nicholson Pvt. Ltd., Singapore at the stipulated price of US $ 114 per MT (C&F). Clause 12 of the Contract, provided for price adjustment due to variation in the ash content or the size of the coke beyond permissible limits. According to the invoice received from the supplier, the price of the consignment was shown as US $ 21,43,524.

Based on this invoice value, the appellant filed a bill of entry, for home consumption on 19-3-1990. The consignment was assessed accordingly on the transaction value shown in the invoice and the goods were cleared by the appellant on payment of custom duty. On detailed inspection of the material in the plant site, the appellant suspected that the size of the coke was not as per the terms of the contract and a sizeable portion of it was in dust condition. As such, this was brought by them to the notice of the representative of the foreign supplier and a sample was sent to M/s. SGS India Pvt. Ltd., Jamnagar for test. The test report indicated that the size of the coke below 25 mm was 17.34% as against the agreed permissible limit of 5%, necessitating reduction in the price. After negotiation, the foreign supplier agreed to reduce the invoice price by US $ 18,90,024.

Subsequentiy, the appellant filed the refund claim on 13-9-1990 for the excess duty paid by them as per the original invoice value. However, a show cause notice was issued for rejecting the refund claim since the appellant could have requested for verification of the quality of the imported material at the time of the drawal of the sample by the department. The Asstt. Commissioner rejected the refund claim on the ground that there is no proof that the goods subjected to analysis, were the same as imported; and that the tests had been carried out through a private firm without informing the Customs. The Asstt.

Commissioner further held that the test result by M/s. SGS, Jamnagar is not binding on the department.

2. The appeal against the Asstt. Commissioner's order having been rejected by the Commissioner of Central Excise & Customs (Appeals), Ahmedabad, the present appeal has been filed. Ld. Sr. Counsel Shri K.S.Nanavati for appellants urged that the goods could be tested regarding size only on being taken to factory site. But the specification of size of the material is a stipulation in the purchase agreement even though it was not tested for that purpose before clearance. The supplier has however accepted appellants claim and has reduced the price making out a revised invoice which, the Id. Sr. Counsel contended, is the transaction value of the goods. It was further argued that if the lower authorities had any doubts about the appellants claim they ought to have called upon the appellants for further proof instead of rejecting their claim altogether. The Id. Sr. Counsel urged that it has been showed that this is a case of genuine reduction in price due to the goods being found to be below specification and the revised value should be accepted as assessable value.

3. Shri S.V. Singh, Id. DR pointed out that no test regarding size of the material was carried out by Custom House as the description of the goods in Bill of Entry was not so declared although the sample was tested before clearance for ash content. Ld. DR urged that even in cases of survey of damages to goods while in docks, proper officer of Customs is associated with such survey conducted before

clearance, whereas in the present case the test as to the size of the material conducted after clearance without informing/associating any Customs officer. The Id. DR further contended that the revised invoice for lower price is a post clearance document on the basis of revised agreement of 24-8-1990. The goods had been cleared in March, 1990. Ld.

DR also argued that the supplier has prepared the revised invoice in pursuance of the post clearance agreement as a matter of compromise, and it was not as if the supplier had accepted the appellants claim regarding the quality of the goods. The price reduction, Id. DR urged, was hence on a special consideration to avoid litigation and hence cannot be the transaction value of the goods. The refund claim, concluded the DR, was rightly rejected.

4. On a careful consideration of rival contentions, we find lot of force in the arguments put forth by Id. DR. There was no dispute regarding valuation at the time of original assessment which has been made on the basis of the invoice value as declared by the appellants and after testing the sample of the goods for ash content. The appellants had also not asked for testing the goods for size specification, nor had they declared the goods in the B/E with regard to size. In such a context, when the refund claim is now filed on the basis of a revised invoice, made out following a post clearance test of the goods at their factory by a private agency, without participation or information to the Customs authorities, and in pursuance of a post clearance agreement, it has, in our view, rightly been found unacceptable by the Customs authorities. It is well settled that for any abatement of duty due to damages to goods imported has to be claimed before clearance thereof from Customs and survey for damage is done while the goods are in Customs control on intimation to Customs and with their participation. This clearly is not the case herein.

5. Further, as has been pointed out by Id. DR, it is not as if the supplier has entered into the revised post clearance agreement and has given abatement in price in the revised invoice because of acceptance of appellants claim that the size of the coke imported is not as per original purchase agreement. On the other hand, the revised post importation agreement shows that the supplier has denied

the claim of the appellants. The relevant paras of the revised agreement read as follows : "Differences have arisen between the parties in relation to the quality and specifications of the said coke supplied particularly about ash, moisture and size and whereas sankem (i.e. the appellants herein) allege they have suffered losses, and whereas JNS (i.e. the suppliers) deny these allegations.

As a result of discussions between the representatives of the parties hereto, it has been amicably agreed, without any admission of liability by either party that in consideration of both parties refraining from commencing or proceeding with any legal action against the other...in consideration of the mutual promises and covenants contained herein and intending to be legally bound hereby, the parties hereto have reached an amicable agreement to settle all disputes in connection with the said contract and the said coke as follows...." 6. Clearly it is a compromise arrived at by both parties to avoid litigation and not an acceptance by the supplier of the appellants claim that the coke was below specification as regards size. Then it also follows that what has been given as abatement by the supplier would still be part of the transaction value of the goods as a compromise and so far as the assessment of goods to duty is concerned it has rightly been made on the declared transaction value.

7. In the result, we see no reason to interfere with the impugned order which is hence upheld and the appeal is accordingly rejected.