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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-30-1999

Reported in : (2000)(115)ELT674TriDel

Appellant : A.T. and T. Switch System (India)

Respondent : Commissioner of Cus.

Judgement :

1. Brief facts of the case as summarised in paragraphs 1 & 2 of the impugned order are as under :- "In response to a tender issued by the Department of Telecommunication M/s. AT & T Switching equipment for 200 K Lines Electronic Exchange during the period June, 1992 to July, 1993. The imported equipment was allowed to be cleared without payment of duty in terms of exemption Notification No. 3/89-Cus., dated 9-1-1989, on the appellants giving requisite undertakings backed by bank guarantees, promising to re-export, the goods within six months of the date of import. On the party's request the date by which the goods were to be re-exported was extended more than once, but as the importer had not re-exported the goods even upto March, 1994 the bank guarantees of Rs. 6,37,00,520/- furnished in terms of the undertakings were encashed by the Asstt. Commissioner of Customs on 29-3-1994.

2. The appellants filed a letter with the Collector of Customs on 8th April, 1994 requesting for finalisation of duty assessment in respect of the goods that were not being re-exported. It was stated that the duty assessed had originally been calculated "on the basis of prices shown in the proformainvoice", but as the

Department of Telecommunications (DOT) had considered purchasing the 10,000 lines imported by them and had also given a letter of intent mentioning the ceiling price of Rs. 4,673 per line at site, assessment may be finalised on the basis of the deduced value of Rs. 2,000 per line since the ceiling price calculated by DOT was inclusive of Customs duty as well as transport and other charges from Delhi to Ahmedabad and other misc. expenses involved. Vide a routine communication dated 12-5-1994, the appellants appear to have been advised to file sale bills of entry for each of the consignments in the concerned group and file application for Refund in the prescribed proforma before the Asstt. Commissioner of Customs (Refund) on 31st May, 1994. They filed an application for claiming Refund on 31st May, 1994. The Assistant Commissioner (Refunds) directed them to first approach the concerned proper officer i.e. Assistant Commissioner in charge of the Group, for finalisation of assessment and obtain a speaking order from the Group and file an appeal in case they were aggrieved by such order. The appellants, thereafter, filed sale bills of entry under cover of their letter dated 10-10-1994 requesting the Assistant Commissioner to finalise the assessment on the basis of the price at which DOT was procuring their goods after deducting Customs duty and other expenses from the said price of Rs. 4,673 per line. The impugned assessment order dated 22nd June, 1996 rejecting the appellants request for reassessment, was passed in the aforesaid context." 2. The appellants had submitted that the goods were imported as a Validation Exchange and had been installed at Ahmedabad. The goods were cleared at the time of import against a proforma invoice and sale took place only after the exchange was accepted by the DOT and price approved was Rs. 4673 per line at site. The appellants' submission has been that the price indicated in the proforma invoice was only quoted price and not a transaction value. The transaction value emerged only after validation and purchase by DOT. Therefore, they maintained that the assessment should be carried out based on the transaction value and not the proforma invoice. Evidence by way of letters as mentioned hereunder from DOT were also produced in support of this contention. - 4. Purchase Order No. 117-01/92-MMD/AT&T Diary No. 9248, dated 2-9-1994 of DOT.3. The Assistant Commissioner of Customs, Group 5B, Air Cargo Unit, New Custom House, New Delhi vide his Order No. 8/96 ordered that "the assessable value determined at the time of original

assessment...

should be taken for the purpose of levy of Customs duty under Section 14 of the Customs Act, 1962. The duty shall be determined in accordance with the aforesaid values and the Sale Bills of Entry filed in terms of Notification 3/89-Cus. shall be assessed accordingly." He further held that "refund is not the subject matter in the present case where the issue to be decided is the re-assessment of imported goods at lower value". This order of the Assistant Collector was passed in the view that invoice submitted along with the original Bills of Entry had stated that the values were CIF values and not cum-duty values; the goods were assessed finally at the time of import; the duty was determined at the time of import itself and the bond was taken based on the calculated duties; the value declared in the import invoices had been declared as "true declared value for customs purposes"; the subsequent value of Rs. 4,673/- per line was fixed by a third party (DOT) and cannot be taken as a basis to revise the transaction value which was originally accepted. The impugned order has confirmed the order in adjudication holding that since the goods had been cleared for home consumption at the time of import and they had been assessed to duty there was no merit in the appellants submissions. The Commissioner also rejected the contention that the value adopted at the time of import cannot be the correct basis as it was not a sale price, holding that sale is not a precondition for determination of assessable value and goods have to be assessed for duty even in cases where there is no sale and the appellant having filed a declaration that value had been duly declared for customs purposes, there is no justification for revaluing the goods at the lesser value approved by the Department of Telecommunication. The Commissioner also held that there was no merit in the appellants' submission that the goods should have been valued at the value of comparable goods, if not at the purchased price. He has held that the valuation done was in conformity with the provisions of Section 14 and other Sections of the Customs Act.

4. Valuation of imported goods for Customs duty is required to be carried out in terms of Section 14 of the Customs Act. According to that Section, value of the goods shall be deemed to be "the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place of importation or

exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale." Subject to this Provision, the valuation of imported goods is to be determined in accordance with the Customs Valuation Rules. In the instant case, the goods were imported on validation basis. The Bills of Entry described the import as "temporary import for purpose of Demonstration/Valuation & return". The Notification No. 3/89 specifically provided for duty-free import for such purposes and also stipulated that, in case, goods so imported were not exported, they may be entered for domestic consumption on payment of duty. The appellants' contention is that in the case of a demonstration/validation equipment, there is no sale of the goods at the time of their import. Therefore, there is no transaction value also. Further, the price indicated in the proforma invoice was based on Tender Selling Prices Quoted. Such a quotation price could not be taken as sale price at the time and place of import. In the absence of such a price, the Customs Authorities should have at least assessed the goods based on comparable value of identical or similar goods. That has also not been attempted by them.

Neither the adjudication order, nor the Order-in-Appeal mentions that there was import of comparable goods at the time of import, at the Proforma Invoice price. Instead the orders have gone by the mere fact that the appellants had filed declaration that these prices were CIF and were true. The authorities failed to realise that, while there was nothing untrue or false about the declaration of the values, they did not constitute the price at which the goods are sold at the time and place of import. The appellants have submitted that in such a case the proper thing would have been to work out the value from the sale price determined under the contract with DOT. They have also submitted that the authorities were bound to do so, in view of the instructions contained in the Customs Appraising Manual regarding assessment of goods exported to India on Consignment Account. The relevant instructions are as under :- "44. Goods Exported to India on Consignment Account: Goods shipped 'on consignment' are meant to be sold on account of shipper to whom the net proceeds of the sales will be remitted after the goods have been sold. The invoice, sent with the goods, is therefore, not the record of an actual sale and care must be exercised in accepting a declaration of 'real value'

based on such an invoice. 'Consignment' invoices are often not marked to show that they are 'consignment' invoices and are frequently indistinguishable from ordinary invoices. Enquiry regarding the method of payment for the goods will, however, reveal the position. (The enquiry can be accompanied by a demand for Bank draft, Bank memo, etc. when necessary). Such enquiry should frequently be made when the information regarding the method of payment is not given in the invoice unless the real value declared in the bill of entry is clearly acceptable on other grounds e.g. by comparison with other importations of the same goods. When detected, such cases should be brought to the notice of the Assistant Collector of Customs for Appraisal for discussion, as to the best way to deal with the assessment, in terms of the provisions of the Customs Valuation Rules, 1963." 5. The response of the Customs Authorities to these submissions is that the sale price to DOT is much after import of the goods and that it is a sale price in India after importation and not a price in international trade. They have also stressed the fact that the goods were not assessed provisionally at the time of their import and that duty had been calculated at the time of import based on the price indicated in the invoice which had been declared to be true as CIF prices.

6. It is admitted by both sides and documents also evidence it that the import was based on demonstration and not the result of sale. It is also admitted that the invoice accompanying the import was only a proforma invoice based on Tender selling prices quoted. It is common knowledge that proforma invoices do not constitute firm prices. They are only Tenders for offers and those prices are open to negotiation.

Therefore, the Customs authorities were clearly in error in insisting that these proforma invoice prices constituted assessable value under Section 14 of the Customs Act. Therefore the goods should have been valued based on the value of comparable imports or based on the sale price in India. As the sale price of Rs. 4,673/- per line was a price at site, it included Customs Duty and other taxes, freight in India and other post importation expenses. These post importation expenses were required to be deducted for the purposes of arriving at the assessable value of the goods. The fact that the goods had been cleared under the Bill of Entry filed under Section 46 of the Customs Act is no ground for not

reassessing the goods and refunding the excess duty collected as Section 27 of the Customs Act relating to refunds does not bar refund of excess duty paid if the assessment was final or that the goods had been entered under a Bill of Entry for home consumption under Section 46 or 47. Such a stand is contrary to the view taken in the adjudication order also as it has been held in that order that Sales Bills of Entry filed in terms of Notification 3/89-Cus. are required to be assessed, rather than treating the assessment made at the time of import as irrevocable. Such a view is contrary to the Specific provision of Notification 3/89 also as that Notification provides that, if the goods imported for demonstration are not exported, they may be entered for domestic consumption on payment of duty. That is exactly what is done by the filing and assessment of Sales Bill of Entry. The assessment of the Sales Bill of Entry become meaningless if valuation of the goods is not correctly done.

7. In the above view of the matter, we uphold the appellants' claim for reassessment of the goods based on the sale price with the DOT and consequential refund of the excess duty paid as just and legal. It is therefore, ordered that the goods shall be reassessed on the aforesaid basis and excess duty collected refunded to the appellant subject to the provisions regarding unjust enrichment. Since the excess duty was collected several years back, and the appellants have incurred considerable loss on account of delay in getting their refund, the Asstt. Commissioner shall carry out the reassessment and refund of duty on high priority, so as to effect the refund at least within 3 months of the receipt of this order.

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