

**Phoenix International Ltd. Vs. Cc**

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

**Decided On :** Dec-22-2000

**Reported in :** (2001)(73)ECC743

**Judge :** R T Lajja, P Bajaj

**Appellant :** Phoenix International Ltd.

**Respondent :** Cc

**Judgement :**

1. M/s. Phoenix International Ltd. (hereinafter referred to as 'PIC') had filed an appeal being aggrieved with the Order-in-Original dated 12.4.99 passed by the Commissioner of Customs, Inland Container Depot (ICD), Tughlakabad, New Delhi. Against the same Order-in-Original dated 12.4.99, the Revenue had filed 10 appeals in which the respondents are PIL, M/s. Phoenix Industries Ltd. (hereinafter referred to as 'PID'), Directors and other Company officials in the above-named two companies.

All the 11 appeals (one filed by PIL and 10 filed by the Revenue) were heard together and are being disposed of by this common order.

2. PIL were engaged in the manufacture of footwear. They were exporting footwear to different countries, and under Duty Exemption Entitlement Certificate (DEEC) Scheme were in possession of quantity based advance licence for import of parts of footwear. They imported vide two bills of entries, both dated 16.2.96,

5251 pairs of footwear uppers. At the same time, 5251 pairs of unit soles, insoles and insocks (sock liner)--parts of footwear, were imported in the name of PID. PID was a 100% owned subsidiary of PIL.

3. It has alleged in the show cause notice dated 7.5.96 that the parts of footwear imported in the name of PIL and PID were nothing but three models of footwear of Reebok brand, in semi-knocked down (SKD) condition. Footwear were considered to be consumer items whose import required a specific import licence. Footwear were liable to a higher rate of customs duty, higher than the parts of footwear. Certain discrepancies were found in the relevant documents filed for customs clearance. It was alleged that the parts of footwear imported by PIL and PID were complete shoes imported in SKD condition, and were classifiable under sub-heading No. 6404.19 of the Customs Tariff, and that the complete footwear had been imported in contravention of the provisions in the relevant Import Policy. It was also mentioned that the unit soles and insoles were designed for use in the accompanying synthetic footwear uppers, and not for leather's uppers, and that thus, the benefit of Notification No. 45/94--Cus dated 1.3.94 was not available to the importers. The charge of under-valuation was also levelled, and the value adopted for applying the higher rate of customs duty as applicable to complete footwear was the retail price of such complete footwear in the international market, reduced by 25%, to take care of the retailer's profit margin and local taxes. Differential customs duty of Rs. 57,51,183.50 was demanded. In para-41 of the show cause notice dated 7.5.96, the noticees were called upon to show cause as to: (i) why benefit of Notification No. 45/94--Cus dated 1.3.94 should not be disallowed in B/E No. 101719 dated 16.2.96.

(ii) why the consignment of PIL and PID should not be clubbed together for purposes of assessment both under the Exim Policy 92-97 and the Customs Act, 62.

(iii) why the CIF value of the shoes in SKD form be not taken as Rs. 1566.39 per pair.

(iv) why the shoe uppers, soles, insoles and sock liners valued at Rs. 8225113.80 (CIF) should not be confiscated under Section 111(d), (1) & (m) of the Customs

Act, 1962.

(v) why the shoe uppers, soles, insoles and insocks should not be assessed to duty under heading No. 6404.19 of the 1st Schedule to the Customs Tariff Act, 1975, as shoes in SKD condition were liable to basic customs duty at the rate of 50% Adv. and countervailing duty of 15% Adv. (vi) why DEEC benefit as claimed by PIL and PID should not be denied as the import was not of components as mentioned in the relevant advance licence(s) but that of shoes in SKD condition form, and (vii) why penalty under Section 112(a) should not be imposed on them for the above contraventions.

Another show cause notice was issued on 1.7.96 for the import of 71141 pairs of Reebok shoes in SKD condition during the period 21.6.95 to 4.11.95, demanding customs duty of Rs. 6,43,06,756 from PIL and PID. Similar allegations as in the earlier show cause notice dated 7.5.96 were levelled in the show cause notice dated 1.7.96 also. In the show cause notice dated 1.7.96 demanding duty for the clearances from 21.6.95 to 4.11.95, extended period of limitation was invoked. In this show cause notice dated 1.7.96 the noticees were called upon to show cause as to (i) why the benefit of Notification No. 45/94--Cus dated 1.3.94 should not be disallowed in respect of the bills of entry mentioned in Col. 13 of Annexure J of the notice, in connection with the import of outer soles and insoles (ii) why the consignments of PIL and PID should not be clubbed together in respect of the said bills of entries for the purposes of assessment both under the Export Import Policy 1992-97 and the Customs Act, (iii) why the CIF value of Reebok footwear in SKD condition should not be taken as indicated in Col. 8 of the table of para-31 of the notice, (iv) why the footwear uppers, soles, insoles and insocks imported under the aforesaid bills of entry and having total CIF value of Rs. 919,88,080 should not be confiscated under Sections 111(d), (1), (m) and (o) of the said Act. Since those goods were no longer available for confiscation having been already sold by the noticees, why fine in lieu of confiscation should not be imposed, (v) why the footwear uppers, soles, insoles and insocks imported under the aforesaid bills of entries should not be assessed to duty under sub-heading No. 6406.19 of the Customs Tariff, as footwear in SKD condition were liable to basic customs duty @ 50% Adv. and counter-vailing duty of 15% Adv., (vi) why DEEC benefits as

claimed by PIL on imports covered by the aforesaid bills of entry should not be denied as the imports were not of parts but those of footwear in SKD condition, (vii) why differential duty of Rs. 6,43,06,756 should not be recovered from them under proviso to Section 28(1) of the Customs Act and (vii) why penalty under Section 112(a) of the Customs Act should not be imposed on them for the aforementioned contraventions.

4. The matter was adjudicated by the Commissioner of Customs, ICD, Tughlakabad, New Delhi, who under his Order-in-Original dated 30.9.97 held that the allegations of suppression of facts, mis-statement, etc.

stood established against the importing parties. With regard to valuation, he held that the value declared for the SKD packs alone had to be taken for the purposes of demand of customs duty under Section 14 of the Act. He appropriated the amount of bank guarantee (furnished by PIL to secure release of the seized goods) of Rs. 2,00,000. The differential customs duty of Rs. 2,16,47,301 was confirmed on verification, under corrigendum dated 4.12.97 (Vide show cause notices demand of Rs. 57,51,183.50 + Rs. 6,43,06,756 had been made). In the original order dated 30.9.97, the duty confirmed was of Rs. 43,37,744 only. A penalty of Rs. 20,00,000 was imposed on PIL and a penalty of Rs. 1,00,000 each was imposed on the General Manager (Technical), Managing Director and the Dy. General Manager (Excise). The proceedings against other Directors/officials were dropped.

5. PIL filed an appeal against the above-mentioned order dated 30.9.97 in the Tribunal, and the Tribunal under Final Order dated 22.9.98 remanded the matter for re- adjudication with certain observations. No appeal was filed by the Revenue against the aforesaid order of the Commissioner of Customs. The Tribunal in its remand order observed: A mere mention by the adjudicating authority that the amount is subject to verification by the Addl. Collector of Customs, Tughlakabad cannot lead to increase in duty liability to such a huge extent without giving an opportunity to the appellants as to how this liability has been arrived at and further giving an opportunity to them to defend against the said liability.

The impugned order was set aside on the ground that the additional duty liability of Rs. 2,16,47,301 made under the corrigendum could not be sustained, for violation of the principles of natural justice. The appeal of PIL was allowed by way of remand.

6. On re-adjudication, the Commissioner of Customs under the impugned Order-in-Original dated 12.4.99 with regard to valuation observed that as the Department had not filed any appeal before the Tribunal against the order of the Commissioner on the valuation aspect "the findings of the Ld. Commissioner in the order dated 30.9.97 on the aspect of valuation of the imported components have attained finality and the same cannot be re-adjudicated again in the de novo proceedings. (refer para-20 of the impugned order at page 460 of the paper book).

With regard to the relationship between PIL and PID, he came to a conclusion that PID was a dummy unit of PIL. (refer para-50 of the impugned order at page 492 of the paper book).

PIL and PID had described their process of manufacture in detail describing how the parts imported by them were subjected in different ways, with different type of machines, to manufacture an acceptable finished footwear, and the Commissioner of Customs, ICD, opined as under: There is no evidence on record to question the manufacturing process undertaken by the noticees. (refer para-56 of the impugned order at page 504 of the paper book).

In his view, the elaborate manufacturing process undertaken in the factory to produce a complete footwear would indicate that even after clubbing the imports of PIL and PID, it was not possible to hold that the complete footwear in SKD condition or ready to assemble condition had been imported by them, insofar as it related to the alleged contravention of para-156A of the Export Import Policy 1992-1997 was concerned. He held that in so far as the import angle was concerned, the allegations against the noticees was not established. It was also held that the advance licences produced by PIL at the time of import were valid and acceptable in so far as they related to the imports covered under show cause notice dated 1.7.96 were concerned. He did not agree with the allegation that the parts imported were consumer goods.

With regard to the rate of customs duty, however, while agreeing that making of footwear from the parts imported, did amount to the process of manufacture, taking recourse of the legal fiction as provided by Rule 2(a) of the Rules of Interpretation, and ignoring the Explanatory Notes, he held "that all the imports made by M/s. Phoenix International and M/s. Phoenix Industries are liable to pay duty at the rate applicable to shoe and not at the rate applicable to the components of shoe" (refer para-64 of the impugned order at page 514 of the paper book).

In para-66, he summarised the position with regard to the customs duty as under: In view of the observations, the imports made by M/s. PINT would appear to be in order inasmuch as the components mentioned therein have been imported and exemption from import duty upto a value limit, irrespective of the rate applicable was available to the goods covered under the advance licences. Thus, no duty is demandable in respect of imports made by M/s. PINT for the imports of components made during 21.6.95 to 4.11.95. However, for the imports made by M/s. PIND, the exemption would not be available as no exemption to footwear is available under Notification No. 45/94-Cus dated 1.3.94 and all the components imported by M/s.

Phoenix Industries would attract duty at the rate applicable to the fully finished footwear.

With regard to the show cause notice dated 7.5.96, however, he held that the exemption of customs duty under advance licences would not be applicable to the footwear uppers imported by PIL inasmuch as the nexus between imports and exports had not been established.

Rejecting the plea of limitation, he confirmed the differential duty of Rs. 45,93,824. A penalty of Rs. 10,00,000 was imposed on PIL. In re-adjudication order, no penalty was imposed on any other noticees.

7. No appeal had been filed by the Revenue against the first Order-in-Original dated 30.9.97 read with corrigendum dated 4.12.97 passed by the Commissioner of Customs, ICD. Against the re-adjudication order, which had been passed by the

Commissioner of Customs after the first order dated 30.9.97 had been remanded for re-adjudication, the Revenue had filed 10 appeals, the respondents being as PIL, PID and 8 other Directors and company officials. In the grounds of appeal, the Revenue has pleaded as under: (1) After clubbing all the components it was not correct for the Commissioner to hold that the goods could not be considered as SKD footwear and that Commissioner should have held that the imports were in SKD condition.

(2) The advance licences were not applicable to the goods under import.

(3) Rule 2(a) of the General Rules for interpretation of the Tariff, was applicable in respect of the import of SKD components of footwear for interpreting the exemption notification.

(4) It was a case of mis-declaration of value, and the invoice value was liable for rejection. Resort had to be taken to the Customs Valuation Rules.

(5) Directors/officials to whom the show cause notice had been issued were liable to penalty. Further, deterrant penalty should have been imposed on PIL.

(6) Fine could be imposed even when seized goods were not available for confiscation.

At this stage itself, we make it clear that both the sides are at liberty to file appeals against the orders passed in remand proceedings.

8. All the appeals were heard on 28.11.2000 when Shri S.N. Singh, SDR appeared for the Revenue. Shri V. Lakshi Kumaran, Advocate represented the PIL and other noticees.

Shri V. Lakshmi Kumaran, Advocate submitted that with regard to the footwears, Rule 2(a) of the Interpretative Rules was not applicable.

The footwear parts were procured from the approved vendors of Reebok Company. He referred to the Harmonised Commodity Description and Coding System (HSN) Explanatory Notes to plead that the parts imported were not footwear in SKD pack. He relied upon the Tribunal's decision in the case of Modi

Xerox Ltd. v. Collector of Customs, New Delhi/Mumbai (Tribunal), observed that for convenience of transport many machines and apparatus are transported in an unassembled state, and that when the convenience of transport so demand the goods through a collection of parts are classifiable as being the machine. In that case, the Tribunal had held that the individual parts were imported and not the fax machine in unassembled form. The Ld. Advocate submitted that the situation in the present case was similar and that what was imported were the individual parts, and not the footwear in un-assembled form. He also submitted that the first order was not reviewed by the Department and as the noticees filed appeal in the Tribunal and the Tribunal allowed their appeal by way of remand, that order got merged with the Tribunal's remand order. As regards the valuation, the Ld. Advocate submitted that the matter is already settled by the Tribunal's decision in the case of Wipro G.E. Medical Systems Ltd. v. Commissioner of Customs, Bangalore , wherein the Tribunal had held that when only 5 out of 6 essential components of CAT Scan System were imported in CKD (completely knocked down)/SKD packs, the transaction value as declared was acceptable, in absence of evidence of contemporaneous import of similar goods or of extra remittance. He also submitted that Rule 2(a) of the Interpretative Rules was not applicable to valuation. It was only for classification. The basis adopted for determining the customs prices after taking the prices in the international market was not correct.

The process of manufacture of the footwear was very elaborate and complicated. The parts imported were not SKD packs. This concept was for machinery, mechanical and electronic items and not for the goods like shoes. On manufacture of the footwear, out of the parts imported or indigenously procured, the assessee were paying the appropriate central excise duty.

HSN Explanatory Notes were applicable to the interpretation of the Customs Tariff. The Customs Tariff was completely aligned with the HSN. The observations of the Commissioner that the HSN Explanatory Notes were not applicable for interpretation of the Customs Tariff, were not correct in the light of the Supreme Court's decision in the case of Collector of Central Excise, Shillong v. Wood Craft Products Ltd. and the Delhi High Court's decision in the case of Manisha Pharma Plasto Pvt. Ltd. v. Union of India The shoe parts were imported between 21.6.95 to

4.11.95 and were cleared by the Customs after examination of the goods without any objection. Nothing was hidden from the Department. There was no suppression of any fact. PID were a 100% owned subsidiary of PIL. It was otherwise an independent and separate unit. It could not be considered as a dummy unit. There could not be any ground for invoking the extended period of limitation. In any case the status of PID will have no bearing on the assessment as they have cleared the goods on payment of duty under Notification No. 45/94 Cus.

The Ld. Advocate pleaded that there is no merit, in the appeal filed by the Revenue, and that the importers/manufacturers had not violated any provisions of the law.

In reply, Shri S.N. Singh, SDR referred to the grounds of appeal in appeal filed by the Revenue and submitted that the case was based on facts and that the footwear in SKD condition had been imported while the advance licence was only for the import of parts. The parts were not for the leather shoes. The noticees had suppressed the facts and extended period of limitation was invokable. He pleaded that the reasons given in the appeal filed by the Revenue be accepted and the appeal filed by the Revenue be allowed and the appeal filed by the importers/manufacturers be dismissed. He relied upon the Supreme Court's decision in the case of *Jai Shri Engg. Co. Pvt. Ltd. v. CCE*, where the Hon'ble Supreme Court had held that when there was any fraud, collusion, wilful mis-statement or suppression of facts, then the Deptt. was justified to claim duty beyond a period of six months. The Apex Court had also held that penalty was imposable if there was deliberate suppression or wrong statement. He pleaded that a deterrant penalty was called for in the facts and circumstances of the case and that penalty was also imposable on the Directors/Company's Officials for their acts of commission and omission, leading to evasion of customs duty.

9. We have carefully considered the matter. Issues being common, the appeal filed by M/s. Phoenix International Ltd. and the other appeals filed by the Revenue are taken up together and issues discussed jointly. M/s. Phoenix International Ltd. (PIL) had imported during 21.6.95 to 4.11.95, shoe uppers in 20 consignments. For the clearance of these shoe uppers, they produced quantity based advance

licence, issued in terms of the Export and Import Policy April 92 to March '91, under the quantity based Duty Exemption Entitlement Certificate (DEEC).

They claimed the benefit of exemption under Notification No. 204/92-Cus dated 19.5.92 (as amended). Under this exemption notification, materials imported into India against an advance licence and covered by a quantity based DEEC, enjoyed full exemption from the payment of customs duty, subject to the conditions as named therein. During the same period 21.6.95 to 4.11.95, M/s. Phoenix Industries Ltd. (PID), a 100% owned subsidiary of PIL, imported some other shoe parts--insoles, unit soles and insoles, in 20 consignments under Open General Licence (OGL), and claimed the benefit of concessional rate of customs duty under Notification No. 45/94-Cus dated 1.3.94. Under this exemption notification, the goods specified in the Table annexed to that Notification when imported into India for use in the Leather Industry enjoyed concessional rate of customs duty. In so far as the goods listed under Heading A of the Table annexed to that Notification were concerned, the application of the concessional rate for the goods imported for use in the Leather Industry, was without any condition.

Shoe parts such as insoles, unit soles, insoles, etc. figured in Heading A of the said Table. The goods imported both by PIL and PID were examined and were cleared by the Customs authorities without any objection at that time. Similar goods were imported by both PIL and PID during Feb., 1996, and clearance was sought as for the earlier consignments imported during 1995. These goods were not cleared by the Customs and two show cause notices were issued one on 7.5.96 and the other on 1.7.96. The main allegation in these show cause notices was that M/s. PIL had imported Reebok shoes in SKD (semi-knocked down) condition.

10. The issue for our consideration is whether the shoe uppers imported by PIL, and other shoe parts--insoles, unit soles, and insoles imported by PID when taken together could be considered as import of the shoes in SKD condition.

11. There is nothing on record to show, and there is also no allegation to that effect, that the shoes had been manufactured in the first instant, and thereafter they had been dismantled for ease of transport, for convenience of packing or

handling or for any other purpose. The goods could be considered as SKD only when either they had been knocked down or had been taken apart of the parent goods, made or constructed of such knocked down goods. The parts which are ready to be assembled to make or construct the parent goods could also be called as SKD parts. The expression SKD in ordinary meaning signifies partly assembled parts taken apart from a fully assembled article or the partly assembled parts, which could be readily assembled to form the finished article, (refer para-12 of Union of India v. Tarachand Gupta & Brothers 12. The footwear are not the type of goods that could not be transported without being knocked down or without being taken apart. In the present case, what were imported were the parts of footwear. The importers/manufacturers have submitted that a very elaborate process of assembly, manufacture and finishing is involved in obtaining the fully finished footwear having consumer appeal. Reference has been made to 18 components that were required for manufacturing complete shoe through the help of 37 machines and machinery items. (refer para-53 of the impugned Order-in-Original dated 12.4.99).

In reply to Question No. 5, Shri Bhupendra Nagpal, General Manager (Tech.) in his statement recorded on 20.3.96 had replied as under: Question 5: Whether complete shoe uppers, unit sole, insole, insock (sock liner), for a particular model of Reebok shoe imported by you can constitute a complete shoe in ready to assemble form? Ans. 5: Using shoe uppers, unit sole, insole and insock (sock liner), one can manufacture a complete shoe, yet it needs following materials and processes.

(a) Materials: Latex, lasting clips, last, laces, primer, adhesive, hardner, size label, marking pen, masking tape, sole stitch thread, toluene, mek, packing material, such as box, outer carton, label, tape, etc.

(b) Processess: Latex drying, preparation to match upper and soles, toe lasting, humidifying, steaming, side lasting, seat lasting, roughing, buffing, grinding, priming, cementing, heating, sole attaching, sole press, refrigerating, delasting, sock liner pressing, sole stitching, cleaning, finishing, labeling and packing.

This process needs 180 workers for 1000 pairs of manufacturing." (refer page 121-122 of the paper book).

In the impugned Order-in-Original dated 12.4.99, the process of manufacture is described in para-55 under the following headings: Upper clipping; Back moulding and seat lasting; Insole (Bontex) latex applying; Latex Drying; Shoe Upper Latex Applying and Latex Drying; Humidifying; Toe Lasting; Side Lasting; Heal Heating; Seat Lasting; Heat Setting; Bottom Roughing; Upper Gauge Marking; Edge Roughing; Shoe Upper Scouring/Wire Brush Roughing; Shoe Upper and Unit sole Priming; Shoe Upper and Unitsole Cementing; Cementing Drying; Cement Reactivation; Sole attaching; Toe and heel press; Sole press; Chilling; Unlasting; Sole Stitching; Insock Attaching (removable); Lacing; and Finishing, Labelling and Packing. (refer pages 495 to 504 of the paper book).

In para-56, the adjudicating authority had noted that there was no evidence on record to question the manufacturing process undertaken by the noticees. For the Import Policy purposes, he viewed as under: In my view, the elaborate manufacturing process undertaken in the factory to produce a complete footwear would indicate that even after clubbing the imports of M/s. Phoenix International Ltd. and M/s. Phoenix Industries Ltd., it is not possible to hold that the complete footwear in CKD or SKD condition or "ready to assemble" condition has been imported by them so far as it relates to alleged contravention of Para 156A of EXIM Policy 1992-97.

It is also seen from the detailed terms of the manufacturing agreement dated 21.12.94 entered between the noticees and Reebok that the manufacturing was to be undertaken under the strict control of Reebok with checks at various stages of the production, labelling, etc.

With regard to the purchase of the "Trim", the following conditions find place in the Agreement in para-10.1 at page 51 of the paper book: 10.1 With respect to purchase of Trim bearing the trade marks, manufacturer shall comply with the following conditions unless otherwise agreed by RIL US or its designated representative.

(i) Manufacturer shall forward to purchaser the names and addresses of the proposed Trim manufacturer and (if different) the proposed seller of the Trim and copies of all contract documents concerning manufacturer's purchase of the Trim.

(ii) Any order for Trim by manufacturer shall be authorised by purchaser before it becomes effective. Manufacturer agrees to obtain such authorisation from purchaser prior to despatching any orders for Trim to the Trim manufacturer.

(iii) Manufacturer shall be responsible for entering into Trim manufacturing agreements with RIL US, RIL UK and each of its Trim manufacturers substantially in the form of the draft annexed hereto as Exhibit A. Trim shall mean accessory and related items, including without limitation, thread, closures, snaps, rivets, soles, midsoles, linings, laces, boxes, packaging materials, tags and labels used in the manufacture of the products, as well as any other item obtained by manufacture from a sub-contractor for inclusion in the products.

13. Shoes are not an item of machinery. It is not as if by the process of assembly of components/parts, footwear was ready for use. When complete, the identity of the parts is fused in the unit product. A number of other materials/processes are consumed and involved in the fashioning of the shoe. We consider that even when the four footwear parts imported were assembled, they would not form a completed footwear, because of lack of certain other essential materials. As a complete footwear could not be formed even when all the four parts imported were assembled, the restriction/prohibition with regard to the import of complete footwear could not be made applicable to these four parts, which because of the lack of certain other essential parts and materials, were not sufficient to make the footwear. In this connection, we may refer to para-6 of the Supreme Court's decision in the case of *Girdhari Lal Bansidhar v. U.O.I.* For excise duty purposes, the manufacture of shoes out of parts whether imported or indigenous--is a process of manufacture, and the footwear are separately classifiable. parts of footwear fall under separate sub-heading of the Tariff. There was a separate scheme of exemption for parts of footwear under Chapter 64 of the Central Excise Tariff. There was no prohibition for the import of parts of footwear. The parts were freely importable.

14. The parts as imported also could not be considered as shoe incomplete or unfinished, for the purposes of Rule 2(a) of the General Rules for the interpretation of the Tariff. This Rule will apply when incomplete or unfinished article has the essential character of complete or finished article. When the article is complete for which it is valued and appeals to the consumer but requires certain finishing processes, fitting, polishing, etc., they had to be accorded a treatment for Tariff purposes, similar to the one reserved for the complete or finished article, after such finishing, fitting, processing, etc. In the present case, the parts imported could not be considered as incomplete or unfinished footwear. In this connection, para-13 of the Tribunal's decision in the case of Modi Xerox Ltd. v. Collector of Customs, New Delhi/Mumbai: is extracted below: 13. The general rules for the interpretation of the Tariff lay down the principles for the classification of the goods in the Tariff.

The basic rule is Rule 1 which lays down that for legal purposes the classification of the goods in the Tariff shall be determined according to the terms of the headings and the relative Section Notes and Chapter Notes. Resort to the rules other than Rule 1 can only be had when the goods could not be classified in terms of such headings and the notes. If the heading or the notes do not so require, other rules, other than Rule 1, will have no application.

In these proceedings the appellants had not denied that the goods imported could be classified in terms of Rule 1.

Rule 2(a) of the general rules for the interpretation of the Tariff provides that "any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished provided that as presented the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule) presented unassembled or disassembled".

The items as imported and as presented for assessment were not incomplete or unfinished fax machine. They were parts, and the process of completion or finishing of the fax machine had not been undertaken by the suppliers. It could

also not be said that the goods in the form imported were complete or finished fax machines in unassembled or disassembled condition. For the purposes of Rule 2(a) of the Rules for interpretation of the Tariff:-- the goods should be incomplete or unfinished having the essential character of the complete or the finished article.

the goods should be (a) complete or finished or (b) incomplete or unfinished having the essential character of the complete or finished article, but are presented for assessment in unassembled or disassembled condition.

For unassembly or disassembly the goods have to be a collection of parts. While it is a fact that for convenience of transport, many machines and apparatus are transported in an unassembled state but unassembly does not mean the individual parts.

According to the Section Note 2 of Section XVI of the Tariff, parts if are such that are specifically unchanged in any particular Tariff heading are to be classified in such specific heading; other parts if suitable for use solely or principally with a particular kind of machine or with a number of machines of the same heading, they are to be classified with the machine of that kind. Even when they are so classified they do not become a machine.

According to the explanatory notes with regard to unassembled machines, in terms of general interpretation Rule 2(a) [refer harmonised commodity description and coding system (HSN) explanatory notes in Vol. 3 Section XVI page 1132], for convenience of transport many machines and apparatus are transported in an unassembled state.

Fax machines are not such type of machine which for the convenience of transport are required to be transported in an unassembled state.

As we have already observed above it is not the desire of the customer but the convenience of transport which is going to determine as how the goods should be transported. When the convenience of transport so demand the goods through a collection of parts are classifiable as being the machine. In this case the individual parts were imported and not the fax machine in unassembled form.

15. In re-adjudication proceedings, for Import Policy purposes, the Commissioner of Customs, the adjudicating authority had observed that the parts and components could not be treated as fully finished articles at the time of import. (refer para-60 of the order at page 511 of the paper book). However, for the purpose of applying the rate of customs duty, he had considered that the rate of duty as applicable to complete footwear was to be applied.

We have carefully gone through the reasoning adopted by the Ld.

Commissioner, and we consider that the parts imported even when taken together could not be considered as incomplete or unfinished footwear.

As these parts could not be treated as having the essential character of footwear, the reasoning adopted by the Ld. Commissioner for applying the rate of the customs duty as applicable to complete footwear, could not be justified. Union of India v. Tarachand Gupta and Brothers, the Hon'ble Supreme Court in para-24 of their judgment had held that the parts and accessories of motor cycles and scooters imported in CKD condition were to be treated as import of parts and accessories only. The Tribunal in the case of Hindustan Teleprinters Ltd., Madras v. Collector of Customs, Madras in para-5 of the order had held that the importation in a nearly complete assembled condition was not the same as importation of components in SKD condition. In the Collector of Customs, Calcutta v. Mitsun Electronics Works, the Calcutta High Court had held that the possibility of assembling the parts and accessories of television sets to make complete television sets by the three export houses, who imported the parts and accessories of television sets, could not be the ground for withholding the goods from clearance. (refer para 6 of the said judgment). The Tribunal in the case of Susha Electronics Industries v. Collector of Customs and Central Excise 1989 (39) ELT 585 (Tbl.) had observed in para 15 that when the goods imported under OGL by themselves were not constituting colour television sets, such goods were not to be clubbed together with goods imported under specific licence to refer them as consumer goods in SKD condition. The Tribunal had relied upon the Supreme Court's decision in the case of Union of India v. Tarachand Gupta & Brothers. Para-15 of the Tribunal's decision in the case of Susha Electronics Industries 1989

(39) ELT 585 (Tribunal) is extracted below: 15. The above observations of the Supreme Court aptly apply to the present imports. The imports at Air Cargo Complex, Ahmedabad, were covered by licences. The imports at Kandla Port are OGL items. The policy did not place any restriction regarding import of OGL items under OGL and restricted items against licences even if the OGL items and restricted items put together would make complete T.V. sets. When the policy permitted import of all components of T.V. sets, some against licences and some under OGL the Collector has no jurisdiction to object to the clearance of the OGL items on the ground that those items if clubbed with other items imported against licences would constitute complete T.V. sets in SKD condition. *Sharp Business Machines Ltd. v. Collector of Customs*, the import of fully assembled plain paper copier was prohibited. The appellants were entitled to import 62% of the components of such copiers. The appellants imported plain paper copiers in SKD/CKD condition in the guise of parts and accessories, under the phased manufacturing scheme of import policy. It was held by the Hon'ble Supreme Court that the appellants were doing indirectly what they were not permitted to do directly. In the present case, as we have discussed above, it could not be said that the parts imported were footwear in SKD condition. They were also neither incomplete nor unfinished footwear. They were simply parts with which footwear was to be manufactured through the process of manufacture. Parts were freely importable during the relevant time. Thus, this Supreme Court's decision is not applicable to the facts and circumstances of this case. *Photocopy Centre v. Collector of Customs*. The goods imported were seven pieces of complete photocopy machines in SKD condition. This decision is also not applicable to the facts of the present case.

Reference to the licence dated 19.4.96 to M/s. Moga Industries Pvt.

Ltd. for import of Nike brand shoes in CKD/SKD form ('Annexure 'Q' of the show cause notice dated 1.7.96) is also not appropriate as in the present case, it is clear that what were imported were pure and simple parts, which even if assembled could not make a footwear. The shoes could also not be compared with the cars for alleging that what was imported was footwear in SKD condition.

18. Keeping in view the nature of the goods, footwear--the process of manufacture in finishing a footwear out of its various parts/components, we agree with the findings of the adjudicating authority that even after clubbing all the parts/components imported, it could not be said that footwear had been imported in SKD condition.

19. On valuation, it was proposed in the show cause notice that the CIF value was to be determined on the basis of the retail prices of the complete shoes in the international market, with suitable deduction to take care of the retailers profit margin and local taxes as well as the job charges paid to PIL for manufacture of one pair of Reebok shoes, from the component (refer para-34 of the show cause notice dated 7.5.96 and para-31 and 32 of the show cause notice dated 1.7.96). It had been taken as if what was imported were complete footwear, and not the parts. In view of the above discussion, this basis has no validity. In the first adjudication order, the Commissioner of Customs in Para 18 of the order, had agreed that the valuation of the goods for the purposes of assessment was to be the CIF value declared in the bill of entries.

This finding was not challenged by the Revenue at that stage. There is also nothing on record to show that any cross objections were filed by the Revenue when this order was challenged by the importers/manufacturers in the Tribunal. On re-adjudication also the Commissioner of Customs agreed with the view taken in the earlier adjudication order, dated 30.9.97 that the value as declared in the bill of entry was to be accepted, as the real value. He held in para 69 of his order--"that the value of footwear will be the value as declared in the bills of entry and not any other value assumed by the Deptt.

In the grounds of appeal, the Revenue had pleaded in para-3 (iv) as under: The Commissioner has accepted the invoice value of the components of the parties. When CKD/SKD kits have been mis-declared, as components it clearly becomes a case of mis-declaration and in that case, the invoice value is liable for rejection as held by Supreme Court in the case of Collector of Customs v. Sanjay Chandi Ram . Once the invoice value was rejected, resort had to be taken to the customs valuation rule for valuation purposes as discussed in paras 29 to 32 of the show

cause notice dated 1.7.96.

In view of our conclusion, that what were imported were parts/components of footwear and not the footwear in SKD condition, the findings of the adjudicating authority with regard to valuation, could not be faulted.

The importers/manufactures have relied upon the Tribunal's decision in the case of Wipro C.E. Medical Systems Ltd. v. CC, Bangalore , wherein the Tribunal had held that when only 5 out of 6 essential components of CAT Scan Systems were imported in CKD/SKD packs then the transaction value as declared was acceptable in absence of evidence of contemporaneous import of similar goods or of extra remittance. The Civil Appeal filed by the Commissioner of Customs, Bangalore against this Tribunal's decision was dismissed by the Supreme Court as reported at page A-54 in 2000(117)ELT. Collector of Customs, Calcutta v. Sanjay Chandiram , the importers had given a false certificate of origin of goods. The Zip Rolls were claimed to be of North Korea origin. This certificate of origin was found to be forged and non-genuine. It was in these circumstances that the Hon'ble Supreme Court agreed with the view taken by the Collector of Customs that the valuation of such goods was to be determined on the basis of contemporary import from other countries. The value determined by the Collector on the basis of the South Korean Zip Rolls was upheld by the Apex Court.

Thus, the facts in the above case before the Hon'ble Supreme Court were different.

20. It has been alleged in the show cause notice that PIND was dummy of PINT, and the imports made by PIND were required to be clubbed with the imports made by PINT, and the customs duty was to be demanded from PINT. It has been pleaded by the noticees that two companies have their separate existence, although PIND was a 100% owned subsidiary of PINT. It will however, not make PIND a dummy unit. In his statement dated 1.3.96, Shri Bhupendra Nagpal Pal, General Manager (Tech.), in M/s.

Phoenix International Ltd. recorded under Section 108 of the Customs Act, 1962 had started at page 104 of the paper book that both the companies had their own

manufacturing facilities. The noticees had argued that even if the imports in the name of both the companies were clubbed together, even then all the parts so imported will not make a footwear, and that it could not be said that footwear in SKD condition has been imported. Without going into this aspect of the matter, we are in agreement with the plea of the noticees that the parts/components imported by the two companies even when taken together could not be taken as the import of footwear in SKD condition.

21. As regards the benefit of Notification No. 45/94--Cus dated 1.3.94, the benefit of said exemption notification was extended to the noticees at the time of the clearance. The expression used in the exemption notification is "leather industry". A wide variety of goods were mentioned in the Table annexed to that Notification. Footwear are generally known by the 'uppers' whether they are of leather or otherwise. M/s. Phoenix Industries Ltd. had imported unit soles, insoles and insocks. Although the Revenue had alleged that these parts were for use in the synthetic shoe uppers, and not leather uppers, the importers had pleaded that they were recognised as falling under the category of Leather Industry by the Counsel for Leather Exports, sponsored by the Ministry of Commerce. Govt. of India.

We find that similar matter had come up for consideration before the Tribunal in the case of Shri Harak Chand, Dharmaji v. Commissioner of Customs, Madras . The Tribunal had held that the expression 'for use' in leather industry appearing in Notification No.45/94-Cus does not mean, actual use. The Tribunal had relied upon the Supreme Court's decision in the case of State of Haryana v. Damila Dadri Cement Ltd. 1988 (14) ECR 292 (SC), and the Tribunal's decision in the case of Asean Trading Agency v. Collector of Central Excise Para-4 of 4. We have considered the submissions made before us by both the sides. It is now seen that the exemption notification gives the benefit among other items to the goods which are imported into India in respect of PVA for use in the leather industry. The goods imported by the appellants admittedly fall under Sl. No. 36, Heading A of the notification. This position is admitted by the adjudicating authority. Therefore, there is no dispute in this regard. It is, therefore, admitted that goods which are imported by the appellants fall under Heading A of the notification. In the case of the goods under Heading B the notification stipulates that the importer at the time of

importation shall furnish an undertaking to the Assistant Collector to the effect that the said goods shall be used for the purpose specified and that the importer of the goods also shall produce an extract of such account duly certified by the manufacturer evidencing receipt of the said imported goods in the premises of the manufacturer and he shall also pay duty on demand and in case of failure to do so. These conditions are for importation of the goods described under Heading B of the notification. There is no such condition attached to the goods which are imported under Heading A of the notification. Therefore, the words 'for use' in the leather industry has to be interpreted by us.

Shri V. Thyagaraj, the learned SDR stated that the words "for use" in the leather industry connotes actual use and not capable of being used. We are unable to accept this contention of the learned SDR in view of the fact that words used in the notification are "for use" in the leather industry. "For use" in the leather industry does not mean actual use. In the decision cited by the learned Counsel viz.

1988 (14) ECR 292, the Hon'ble Supreme Court in Para 10 has held as follows:  
10. We are unable to accept the submission of Mr. Bana that, in order to get the exemption it must be shown that the goods in question, namely, the cement supplied by the assessee in this case actually used in the generation or distribution of electrical energy. It must be noted that the important words used in the relevant provisions are goods for use by it in the generation or distribution of "such energy" (emphasis supplied by us). On a plain reading of the relevant clause it is clear that the expression "for use" must mean "intended for use". If the intention of the Legislature was to limit the exemption only to such goods sold as were actually used by the undertaking in the generation and distribution of electrical energy, the phraseology used in the exemption clause would have been different as, for example, "goods actually used" or "goods used".

A perusal of the above decision goes to show that if the intention of the Legislature was to limit the exemption only to such goods as are actually used by the importer the phraseology used in the exemption clause would have been different, as for e.g. "goods actually used" or "goods used".

In the present case, the phrase used is goods imported into India "for use" in the leather industry. Therefore, the principle laid down by the Hon'ble Supreme Court in the above case will apply to the case of the appellants. The contention of the SDR that the words "for use" should be taken to be actual use cannot be accepted. This decision of the Hon'ble Supreme Court was also taken note of by the Tribunal in the decision reported in 1991 (45) E.L.T. 553. In that case also the issue involved was interpretation of the words used in the notification wherein the words used was "for use" in the context of penetrators used in the leather industry as per Notification 224/85. The Tribunal in the said decision has followed decision of the Hon'ble Supreme Court cited supra. The observation of the Tribunal in Para 16 of their decision is reproduced below: In the present case the notification permits exemption to penetrators imported for use in the leather industry. It has been shown that the substance imported has use in leather industry as a penetrator. Proof of actual use is not a condition attached to the exemption. If it were so, the notification would have provided for execution of a bond obliging the importer to produce proof of actual use as in the case of many other notifications. We, therefore, do not agree with the Revenue's contention that the benefit of exemption would not be available to the appellants since they are not engaged in the leather industry but are stockists for sale.

A perusal of the above decision goes to show that the burden of actual use is not a condition attached to the exemption, as otherwise the notification would have provided for executing a bond and obliging the importer to produce proof of actual use. In any event in the case of the goods falling under Heading A, there was no such condition attached and the conditions attached were only in the case of the goods described under Heading B of the notification. In view of the above, we are not able to agree with the contention of the learned SDR. At this stage, the learned Counsel for the appellants drew our attention to the Collectors' conference where this issue was taken and he also produced a copy of the minutes of the Collectors' conference which is reproduced below: CONFERENCE CONCLUSION: After discussing the issue, the Conference recommended that since question raised by Bangalore Custom House is about the goods which can be used for general purpose also. T.R.U. should re-examine the issue whether the items of general use can be shifted to list 'B'. The conference observed that items figuring at Sr.

No. 30, 31, 35 and 36 may have alternative uses and not having exclusive use in the leather industry. T.R.U. should also check with C.L.R.I., Madras or with any other Institute under the control of C.I.S.R. for revising the list 'A' to cover only those items which are exclusively used in the leather industry, to be in line with the intention of the notification. On the question whether, notification can be extended to traders, Conference felt that the same could be allowed as the items are not subject to any actual user condition.

22. The show cause notice dated 1.7.96 was issued demanding customs duty in respect of the goods imported during 21.6.95 to 4.11.95. The goods had already been cleared by the customs, and as recorded in the adjudication order, had already been disposed of. The basis of allegation of suppression was that the goods had been imported through fraud, by deliberately and intentionally breaking-up each consignment of Reebok SKD shoes into parts, and showing them as separate imports by PINT and its dummy company--PIND. It had further been alleged that there was suppression of facts also by the importers, by mis-declaring the items as parts of shoes or shoe components when in fact each consignment was of full Reebok shoes in SKD condition. These allegations have been discussed above, and it has been found that the parts/components were neither footwear in SKD form, nor incomplete or unfinished footwear. As the basis, on which the allegation of suppression had been sought to be established, is not found valid, the charge in this regard, could not be substantiated.

23. Although penalty could be imposed on Directors/Company Officials for their specific role in the evasion of duty and the contravention of the law; however, in the present case, the Commissioner of Customs had held in para-70 of his order that he was unable to locate anything culpable in respect of the Directors, and other functionaries of the Company. In para-3 (v) of the Grounds of Appeal, the Revenue had pleaded as under: The Commissioner has also held that none of the Directors/employees of the two parties can be held liable for penalty. This decision does not appear to be correct in view of the fact that the whole conspiracy of importing parts of the components through dummy unit was orchestrated with a clear knowledge of the Board of Directors and particularly, Shri Ajay Kalsi, Managing Director of M/s. Phoenix International Ltd. (and Director of M/s. Phoenix

Industries Ltd.) as well as Shri Bhupendra Nagpal, General Manager (T) and Shri Amit Singhal, Dy. General Manager (Excise). The roles of these persons have been clearly highlighted in paras 9 and 36 of the show cause notice dated 1.7.96. The Commissioner, therefore ought to have imposed deterrant penalties on these persons.

We have gone through paras 9 and 36 of the show cause notice dated 1.7.96. We find that in para 9, no specific role of any Director, or official has been detailed. In general terms, it had been mentioned that "PINT including its Directors and some senior officials hatched a conspiracy to import the SKD shoes in the name of two firms namely PINT and their dummy unit, PIND by describing the imported items as components of shoes (which are freely importable under the EXIM Policy 1992-97 being components of consumer items)". No names have been mentioned therein. In para 36 also, the names had been referred to in the context of their statements. There is no discussion about the role of the individuals on whom the penalties were sought to be imposed. On careful consideration of the facts, we find no material to disturb the findings of the adjudicating authority in this regard also.

24. After giving our careful consideration to all the relevant facts and circumstances of the case, we do not find any merit in the appeals filed by the Revenue. The same are rejected.

In view of the discussion made above, the impugned Order-in-Original is set aside, and the appeal of M/s. Phoenix International Ltd. is allowed. Cross objections are also disposed of in the above terms.

Ordered accordingly.

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