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Cc Vs. Vardhman Acrylic Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-23-2002

Reported in : (2002)(102)LC485Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Cc

Respondent : Vardhman Acrylic Ltd.

Judgement :

1. The respondents herein were originally known as M/s. Vardhman Fibres Ltd. which was re-organised in accordance with the terms and conditions of the Joint Venture Agreement dated 22.12.1995 entered into by and among M/s. Ma-havir Spinning Mills Ltd., Ludhiana, M/s. Japan Exlam Co.

Ltd. Japan and M/s. Marubeni Corpn., Japan as Joint Venture Company with the purpose of conducting the business of manufacture, marketing and distribution of acrylic fibres and tow. They imported various equipments for setting up 16500 T/Y acrylic fibre plant for manufacture of acrylic fibre from M/s. Marubeni Corporation, Japan in accordance with the terms and condition of an equipment supply contract entered into with them. The foreign supplier was found to be related to the importer in terms of Customs Valuation Rules, 1988 and hence the matter was taken up by the Gatt Valuation Cell for investigation of Valuation aspect. A questionnaire was supplied to the respondents and in the reply therein, they stated that they were not a brand of the foreign supplier, that no amount of royalties and

licence fee related to the imported goods has been paid or is payable and against the column requiring the details of cost and services paid/payable for the engineering, development, artwork, design work plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods they have answered 'not applicable'. The Asstt.

Commissioner held that M/s. Marubeni Corporation was related to the respondents in terms of Rule 2(2) of CVR, 1988 but the relationship did not influence the import price in any manner. The price was considered to be the sole consideration in their commercial dealings. He held that the payment made to M/s. Kawasaki, Japan in consideration of supply of know-how of Exlan who operates an Acrylic Fibre plant, Japan and owns the required technology and know-how for the construction, operation and maintenance of the acrylic fibre plant does not form part of the transaction value for the equipments imported from M/s; Marubeni in terms of Rule 9(1)(b)(IV) of the Customs Valuation Rules for the reasons that-- (a) Know how in question is not needed or used for the production of the goods imported.

(b) The contract price for technical know how is neither a direct nor an indirect payment for the imported merchandise as M/s.

Marubeni has no intellectual propriety over the same.

(c) The technology and know how fees are not a condition of the sale of the imported equipments. Both the contracts have termination clause which are not depending upon each other.

(d) In the equipment supply contracts the seller M/s. Marubeni have indemnified the importer and confirmed that no third party intellectual property and/or industrial property rights will be violated by erection, use and operation of the equipments supplied.

He ordered acceptance of transaction value and directed finalisation of pending provisional cases in the light of the above.

2. The Commissioner of Customs, Mumbai reviewed the order of the Asstt.

Commissioner on the ground that the basic engineering design required for the production of the equipments in the instant case was developed elsewhere than in India (in Japan) by M/s. Exlan/Kawasaki and supplied to the respondents at a cost as per the technical know how agreement and that the said engineering design was used by M/s. Marubeni Corporation, Japan for production of impugned goods under import. He, therefore, held that the value of engineering design was required to be added to the value of the impugned goods for the purpose of assessment and proposed rejection of transaction value. Under his direction, the department preferred an appeal to the Commissioner (Appeals). The importers filed cross objection before the lower Appellate Authority, pointing out that the technology supplied by M/s. Japan Exlan through M/s. Kawasaki was for manufacture of acrylic fibre in India and not for manufacture of the equipment to be installed in the plant; that what was provided by M/s. Kawasaki is only basic design while detailed design is carried out by them and sent for approval and M/s. Marubeni carried out manufacture of equipments on the basis of the detailed design; that the provisions of Rule 9(1)(b)(IV) do not apply since the agreement does not provide nor has it been proved that the importers had supplied any goods or services free of charge or at reduced cost for use in connection with the production and sale of the imported goods; that M/s. Marubeni Corporation have guaranteed that the equipment supplied by them conformed to process requirement and also extended warranty against design defects; that M/s. Marubeni had indemnified the respondents against any loss or damage etc. which would show that the designs were not supplied either directly or indirectly by the respondents to M/s. Marubeni. The Commissioner (Appeals) upheld the adjudication order and rejected the department's appeal holding as under: I have carefully gone through the records the case and I find that the department has not been able to prove that the Buyer (the Respondent) has supplied any goods or services free of charge or at reduced cost to M/s. Marubeni for the supply of the imported goods.

The department has also failed to prove that the technical documents were supplied/made available by Kawasaki to Marubeni either free of charge or at the instance of the Respondent or cost thereof was incurred, wholly or partly by the respondent. The department has based its case only on assumptions and presumptions.

It is thus apparent that technical know how fees has nothing to do with the manufacture or sale of the impugned goods supplied by M/s.

Marubeni Corporation to the respondents. I, therefore, find that in the present case Rule 9(b)(iv) of the Customs Valuation Rule 1988 are not invokable.

On the contrary I observe that the Respondent has proved beyond doubt that under the technology supply contract they have only received basic specification of the plant and not basic engineering design for the manufacture of the equipments in question.

It also becomes explicit from reading the equipment supply contract and paras mentioned by the Respondent in its cross objection that M/s. Marubeni has procured equipment drawings by themselves and the price of the equipment is inclusive of the cost of design and drawing.

3. Shri Viraj Gupta, departmental representative submits that the Commissioner (Appeals) has given 3 reasons for not accepting the appeal of Revenue before him viz.

(1) that the buyer (the respondents) herein has not supplied any goods or services either at reduced cost or free of charge to the supplier; (2) that the department has failed to prove that the technical documents were supplied/made available by Kawasaki to Marubeni either free of charge or at the instance of the respondent or that the cost was incurred by the respondents and (3) that the technical know how fees has nothing to do with the manufacture or sale of the final products manufactured by the respondents.

4. While the department does not dispute the first reason, the departmental representative contends that the technical know how and documents supplied by or through the respondents are required for setting up of the plant for manufacture of acrylic fibre and without such technical know how, the plant will not function and hence goods cannot be produced and the goods viz. battery limit equipment supplied by M/s. Marubeni have to be as per basic engineering design provided by M/s. Kawasaki. Further the basic engineering design has been undertaken and

developed elsewhere than in India (in Japan by M/s. Exlan/Kawasaki) and have been supplied to the joint venture at a cost and therefore, the conditions set out in Rule 9(1)(b)(iv) are fulfilled. The departmental representative further contends that since engineering design has been obtained by the respondents at cost from M/s. Kawasaki, it is logical that the respondents would not permit M/s. Marubeni to include this cost in the price of equipment as that would amount to paying twice for the same engineering design, which is possible only if the basic design has been provided at no cost to M/s. Marubeni either directly by the respondents or indirectly by M/s. Kawasaki. He takes us through the relevant clauses of the agreement entered into between M/s.

Kawasaki and the respondents to substantiate the above submissions and on this basis he seeks addition of the value of engineering design to the assessable value of battery limit equipments and seeks rejection of the transaction value.

5. The prayer is opposed by Shri Sridharan, Id. counsel for the respondents who while admitting that in terms of the agreement M/s.

Kawasaki furnished the basic engineering design to the respondents who prepared detailed designs on this basis and forwarded the same for approval to M/s. Kawasaki who in turn sent them back to the respondents after approval and thereafter, the respondents supplied the designs to M/s. Marubeni, the design was not necessary for the production of the imported goods viz. battery limit equipments, but for the manufacture of acrylic fibre in India by the respondents and he, therefore, submits that the provisions of Rule 9(1)(b)(iv) are not attracted in this case.

In support of his submission that the engineering design was not for use in the production of battery limit equipments supplied by M/s.

Marubeni, he draws our attention to clauses in the agreement where M/s.

Marubeni has put the respondents under an obligation of secrecy of its design, construction etc. and extension of warranty against design defects by M/s. Marubeni and the clause wherein M/s. Marubeni confirms that no third party

intellectual property and/or industrial property rights will be violated by erection, use and operation of their supply equipment and also indemnifies the buyer (the respondents) against any losses, damages liabilities etc. and submits that from the above, it is abundantly clear that M/s. Marubeni never received any design or engineering either from the respondents or from M/s. Kawasaki for use in the production of the equipment supplied by M/s. Marubeni. The Id.

counsel also raises the plea that the review application filed by the Revenue before the Commissioner (Appeals) was barred by limitation since the date of issue of the decision of the Commissioner to review the Asstt. Commissioner's order that is 24.1.2000, was beyond the period of one year from the date of issue of the Asstt. Commissioner's order Le. 6.11.1998. In support of his contention, he cites the decision of the Tribunal in the case of Commissioner of Customs, Mumbai v. M/s. Fujitus India Telecom Ltd. (Final Order No.C.II/2938-39/WZB/2000 dated 20.10.2000). He, therefore, urges rejection of the appeal before the Tribunal.

6. We have carefully considered the rival submissions. We see force in the submission of the Id. counsel that the review application before the Commissioner (Appeals) was barred by limitation. The relevant provisions of Section 129D are as under: (2) The Commissioner of Customs, may, of his own motion, call for and examine the reeord of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Customs in his order.

(3) No order shall be made under Sub-section (1) or Sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.

In the case law cited by the Id. counsel the Tribunal has considered the language of Section 129D and held that the direction of the Commissioner of Customs must be made to the officer who is to make an application to the Commissioner

(Appeals) and the period of one year prescribed in Sub-section 3 of Section 129D is to be computed from the date of issue of the order of the adjudicating authority till the date of issue of the direction of the Commissioner under Section 129D. The Tribunal has relied upon the decision of the Apex Court in the case of Collector of Cen. Excise v. M.M. Rubber Co. 1999 (55) ELT 289 (SC) : 1991 (36) ECR 305 (SC) wrongly mentioned as UOJ v. Mahindra & Mahindra Ltd. (1991 (55) ELT 281 SC). In the present case, the date of issue of the Commissioner's decision is 24.1.2000. From the date of issue of the order of the adjudicating authority i.e. 6.11.1998 this order was clearly passed beyond the period of one year. Therefore, following the ratio of the Apex Court Judgment cited supra and the Tribunal's decision in the case of CC, Mumbai v. M/s. Fujitus Telecom Ltd. supra, we hold that the review application suffers from the limitation laid down in Section 129D(3) of the Customs Act, 1962.

7. Since the application under Section 129D of the Act was deficient in law, the impugned order passed in pursuance thereof becomes non est, and deserves to be set aside. We do so and reject the appeal.

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