

Basant Industries and anr. Vs. Collector of Customs and anr.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-03-1987

Reported in : (1987)(12)LC84Tri(Delhi)

Appellant : Basant Industries and anr.

Respondent : Collector of Customs and anr.

Advocate for Pet/Ap. : Shri. Sorabjee

Judgement :

1. These are two appeals filed against the order in adjudication of the Additional Collector of Customs, Bombay dated 16-4-1985, by which he, while directing (i) assessment of the goods in question (Tarn Brand Bearings No. 7511 of Chinese origin) at U.S. \$ 2.20 per piece C.I.F., (ii) confiscation of the goods subject to redemption on payment of a fine of Rs. 3,33,000/-, additionally levied a penalty of Rs. 1000/- on M/s Basant Industries.

2. While M/s Basant Industries appeal (Appeal No. 1442/85-A) against the aforesaid order in regard to the determination of assessable value as well as the confiscation, determination of the quantum of fine for redemption and levy of penalty, the Revenue's appeal (No. 912/86-A) is for enhancement of the penalty in the facts and circumstances of the case.

3. The facts, in so far material, are substantially the same as in Appeal No. C/144/85-A decided in our order No. 509/85-A dated 18-7-1985, (now stated to be

the subject matter of an appeal by the assessee before the Hon'ble Supreme Court), since the import in question was, in fact, the second instalment of supply in terms of the identical contract involved in that appeal. They do not, therefore, require to be recapitulated, in extenso. Suffice it, however, to notice that in the case of the earlier shipment, there was neither a finding of misdeclaration nor the imposition of a penalty or direction for confiscation subject to redemption on payment of fine "considering the circumstances of the case" in the order in adjudication, while, in the instant case, a penalty of Rs. 1000/- and a fine in lieu of confiscation of Rs. 3,33,000/- were levied. In so far as the Revenue are concerned, the earlier order of adjudication not having been appealed against, had become final in regard to the questions of penalty and confiscation. One other factor that distinguishes the instant appeals from the earlier one, according to the learned senior counsel Shri Sorabjee, appearing for the appellant, was that in the instant case, although it was only one contemporaneous import [pursuant to Invoice No. F.D.N. 84031-B dated 20-8-1984 of M/s Ravi Agricultural Industries] that was cited in the notice to show cause dated 20-3-1985, the adjudication officer relied in the course of his order additionally on another invoice [F.D.NL 849031 dated 4-6-1984 of M/s Ravi Agricultural Agencies]. A copy of the latter was neither supplied nor allowed to be inspected and, consequently, there has been a violation of the principles of natural justice. In the determination of the fins in lieu of confiscation as well, the adjudicating officer proceeded on the basis of the margin of profit on the goods which "is reported to be approximately 110%" without affording the assessee any opportunity in violation of the principles of natural justice.

4. The Appellant in Appeal No. 1442/85-A (M/s Basant Industries) had preferred an application (C/Misc/744 of 1986-A) for admission of additional evidence consisting of copies of an invoice No, 655 dated 20-9-84 favouring M/s Ruby Bearings Pvt. Ltd. and the Bill of Entry dated 2-2-1985 relevant for the import in question. The Respondent objected to the admission of the copy of the invoice only and not the Bill of Entry. It would be recalled that in the hearing of the earlier appeal as well, a copy of an invoice of August, 1984 in favour of M/s India Casting Co., Agra, was relied upon and produced but not admitted in evidence at the appellate stage. The learned senior counsel did not press for the admission of the

copy of the invoice now sought to be brought in as additional evidence. Accordingly, while admitting the copy of the Bill of Entry, we do not admit the copy of the aforesaid invoice dated 20-9-1984.

5. On a perusal of the papers and on the submissions made, it would appear to us that - (a) the contract concluded between M/s Basant Industries and the foreign supplier provided for delivery in instalments in September and October, 1984 of an aggregate quantity of 40,000 pieces of the bearings in question; (b) a contract providing for delivery in instalments is divisible and each instalment is treated as a separate contract for the purpose of determination of breach thereof or the ascertainment and computation of damages in consequence. Likewise, for determination of the assessable value of the goods on import, in terms of S.14(1)(a), the price at which such or like goods "are ordinarily sold or offered for sale for delivery at the time and place of importation" is relevant and it may differ from import of one instalment to another. In other words, the assessable value for each instalment of import pursuant to a single contract for delivery in instalments may vary depending on the price at which such goods are ordinarily sold at the time of import in terms of S.14(1) (a).

Similarly, it is not inconceivable that the assessable value is not constant on the application of the Valuation Rules as well when the imports are separated in point of time or place. The extent of misdeclaration, if any, will vary accordingly from import of one instalment to another; (c) nevertheless, in terms of the notice dated 29-3-1985 to show cause, the allegations made and the evidence relied upon are precisely those in the notice dated 28-11-1984 to show cause issued in respect of the import of the first instalment, except that while both the invoices of M/s Ravi Agricultural Industries (Invoices - FDN 849031 of June, 1984 and FDN 849031-B of August, 1984) were specifically referred to and relied upon in the earlier notice, only one of them - namely FDN 849031-B dated 20-8-1984 -was adverted to as the evidence in the later notice to show cause. The charge of misdeclaration leading to a proposal for confiscation of the goods and the imposition of penalty were also indicated in an identical manner in both the aforesaid notices. The value declared by M/s Basant Industries in the respective Bills of Entry was also the same; (d) in separate adjudications of the aforesaid notices as well, by the self

same officer, the assessable value determined was identical at US \$ 2.20 C.I.F. per piece not in terms of S.14(1)(a) but in terms of Rule 3 of the Customs Valuation Rules pursuant to Clause (b) of Section 14, on the basis of the value at which such goods are ordinarily sold to other buyers in India; (e) nevertheless, while in the earlier order in adjudication, he thought fit to refrain from a categorical finding on misdeclaration or direct the imposition of any penalty or confiscation of the goods imported subject to redemption "considering the circumstances of the case", in the latter order, he seems to have concluded on identical allegations in the notice to show cause and evidence that it was a "deliberate misdeclaration" of the value, deserving both confiscation and penalty; (f) if there was no misdeclaration earlier, on identical allegations and evidence in the second adjudication, there could hardly be any, much less a deliberate misdeclaration that deserved Confiscation and penalty. Right or wrong, the assessee declared -the price payable for each instalment in terms of the contract as the assessable value in each of the Bills of Entry relating to the successive shipments in accordance with the instalment delivery. The assessable value determined by the Additional Collector was the subject matter of an appeal filed on 5-2-1985 (i.e. almost contemporaneously with the B/E filed in this case) before the Tribunal. Before that appeal was decided, he could not have adopted any other value for the import of the second instalment without prejudice to his contentions in the appeal. Consistent with his case in the appeal, he could declare nothing other than the price payable in regard to the shipment. The Revenue had equally no additional material or evidence for the determination of an assessable value different from the earlier one.

Nor did the Revenue file an appeal against the earlier order in adjudication (in relation to the import of the first instalment) wherein there was neither a direction for confiscation nor levy of penalty. Till the assessable value was conclusively and finally determined, if the identical value declared earlier was reiterated as the value for the second instalment, did it amount to a deliberate misdeclaration? We think not; (g) further in terms of S.111(m) of the Customs Act, 1962, it is only when the goods did not correspond in respect of value with the entry relating to assessable value that they are liable to confiscation. When the first instalment was imported and the identical value was declared, there was neither a finding of misdeclaration

nor a direction for their confiscation or the imposition of a penalty, in adjudication. Is it unreasonable to presume that when the second instalment arrived, and the identical value was declared, it would once again be held not to amount to a misdeclaration, deserving of confiscation and penalty?; (h) while in assessment proceedings the principles of res judicata and estoppel are inapplicable, nevertheless, a decision reached in a previous assessment is not to be departed from capriciously but for good and cogent reasons like e.g. fresh facts, change in the law etc. [Para 18 of the report of the judgment of the Delhi High Court in 1981 ELT 328 - J.K. Synthetics Ltd. v. Union of India]. No such reasons appear in the course of the adjudication order except that" it was a deliberate mis-declaration. Further, proceedings for confiscation under Section 111 or for levy of penalty under Section 112 are penal in nature and quasi-criminal in character even though such proceedings are under a fiscal enactment. Assessment of duty and levy of penalty or a direction for confiscation are two separate aspects of adjudication. "Penalty is not merely an adjunct to assessment, nor is it consequential to assessment. It is in addition to tax and is an independent liability under the fiscal statute (AIR S.C. 1549 -Khemka v. State of Maharashtra). In either view, therefore, it does not appear that a finding contrary to what was arrived at in an earlier proceeding on identical facts inter-parts is justified or warranted; (i) while it may be that the invoice No. F.D.N. 849031 dated 4-6-1984 of M/s Ravi Agricultural Industries relied upon in the adjudication order was not cited in the course of the notice to show cause, it was not as if the assessee was taken by surprise since it was very much relied upon and in evidence in the earlier adjudication of the import of the first instalment. Again, it is true that the observation in the course of the adjudication order to the effect that the margin of profit "is reported to be approximately 110% is one not supported by any evidence. Nor was the assessee afforded any opportunity to prove that to be any different.

Nevertheless, we are disinclined to remand the matter for a denovo adjudication in the view we had taken on the question of misdeclaration or . confiscation itself. If the confiscation cannot sustain in the facts and circumstances of the case, a remand for the computation of fine in lieu thereof is uncalled for.

6. In the premises, while confirming the assessable value in accord with our judgment in relation to the earlier import of the first instalment (Order No. 509/85-A in Appeal No. C/144/85-A), we set aside the order for confiscation as well as penalty. The appeal of M/s Basant Industries (No. 1442/85) is allowed to that extent. The appeal of the Revenue (No. 912/86-A) is dismissed.

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