

Collector of Customs Vs. Appollo Tyres

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-12-1987

Reported in : (1987)(11)LC473Tri(Delhi)

Appellant : Collector of Customs

Respondent : Appollo Tyres

Judgement :

1. The questions that arise for consideration in this proceeding pursuant to a notice to show cause in terms of Section 131(3) of the Customs Act, 1962, (hereinafter, the Act) as it read at the material time - transferred to the Tribunal and heard as if it were an appeal in accordance with Section 131B(2) of the Act are : (a) Whether the notice to show cause issued, ostensibly under the erstwhile Section 131(3) of the Act, is in reality one under Sub-section (5) thereof and is barred by the limitation prescribed therein? (b) Whether the assessable value of the goods imported can be determined under Section 14(l)(a) of the Act? If not, which is the provision applicable? (c) Whether, in the facts and circumstances of the case, there has been suppression of facts or misdeclaration of value entailing confiscation of the imported goods under Section 111(d) & (m) and levy of penalties under Sections 112 and 117 of the Act? If so what should be the penalties? (a) the appellant had entered into two agreements - the first executed on 27-3-1973 for supply of technical know-how, engineering, and documentation for operational facilities and the second executed a little later for technical services with M/s. General Tire International Company, Ohio, United States; (b) the

aforesaid agreements (which overlap to a certain extent), inter alia, provided for payment of U.S. Dollars 3% on the F.O.B. value of such equipment or machinery purchased with the aid, advice and supervision of M/s. General Tire International Company; (c) the Appellant registered in 1976 contracts for availing of the benefit of assessment of the goods to be imported pursuant thereto of the Project Imports (Registration of Contract) Regulations, 1965.

A number of imports had taken place and Bills of Entry in respect of such imports were duly assessed to duty on the basis of their invoice values; (d) no mention was, however, made in the declarations in the Bills of Entry in terms of Section 46(4) of the Act of the existence of the aforesaid agreements or the liability to pay procurement charges in respect of the imports effected thereunder; (e) it was only subsequently and upon enquiry that information relating to the agreements and the payment of procurement charges in respect of imports came to light; (f) a notice requiring the appellant to show cause as to why the assessable value should not be recomputed and enhanced so as to include the procurement charges and difference in duty demanded accordingly, was adjudicated by the Collector, who held inter alia that - (i) the procurement charges were forming "part of the assessable value, (ii) the failure to declare the payment of the aforesaid procurement charges amounted to suppression of facts and mis-declaration.

He, accordingly, directed inclusion of 3% of the F.O.B. value of the imports in question to arrive at the assessable value and debit of the licences correspondingly. He further levied penalties in sums of Rs. 1,000/- and Rs. 50,000/- respectively in contravention of Sections 46(4) and 112 of the Act.

(g) an appeal against the aforesaid order was decided by the Board in favour of the Respondent on 1-5-1980 on the ground that there was nothing to show that the imported goods could not have been procured and imported without any assistance whatsoever of a procurement agency; 3. (a) One of the first submissions made before us on behalf of the Respondent was that the notice for revision, ostensibly under Section 131(3) of the Act having been issued on 9-3-1981, was barred by limitation in terms of Sub-section (5) of the Act as it read at the material time. [Reliance upon 1975 (2) ILR Kerala 56 - Coromandal Fisheries

v. Collector of Customs (b) The decision relied upon in 1975(2) ILR Kerala 56 would appear, however, to have been reversed on appeal in 1979 ELT 81. Accordingly, reliance upon the decision cited by the Learned Counsel was misplaced.

The ratio of the Division Bench in Appeal in 1979 ELT 81 is, shortly stated, that Sub-section (5) of Section 131 of the Act deals merely with non-levy and short levy and does not cover an erroneous refund that is also comprehended within Section 28 of the Act. Accordingly, it was held that a revision in cases of erroneous refund would not be hit by any time limit for its exercise and would fall under Sub-section (3) of Section 131. This, however, is not a case of an erroneous refund.

(c)(i) It will, however, be observed that while, in terms of Sub-section (3) of the erstwhile Section 131 of the Act, the Central Government may, of its own motion, modify or annul any order under Section 128 (which provides for an appeal to the Board against an order in adjudication by the Collector), Sub-section (5) prescribes for the issue of a notice to show cause within the time limit specified in Section 28, "where the Central Government is of opinion that any duty of Customs has not been levied or has been short levied".

(ii) Although not specified, a notice has yet to be issued as a prelude to any action proposed under Sub-section (3), so that the action ultimately taken in modification or annulment of the order of the Board is not violative of the principles of natural justice.

(iii) The mere citation of Sub-section (3) in the notice to show cause is not conclusive on the issue as to whether it is more properly one issued under Sub-section (5).

(iv) Even so, a condition precedent for the issue of a notice under Sub-section (5) is the opinion of the Central Government that there was a non-levy or short levy, and such opinion must, *ex facie*, appear in the notice itself. (*Collector of Central Excise, Chandigarh v. British India Corporation, Gurdaspur*) and 1986 (7) ECR 196 - construing Sections 36(2) and 11A of the Central Excises and Salt Act, 1944 - provisions in *pari materia*. with Sections 131 and 28 of the Act. The only

difference between the two is while 131(3) of the Act prescribes no limitation whatsoever, the second proviso to Section 36(2) of the Central Excises Act provides for a period of one year from the date of decision or order proposed to be revised suo moto.

(d) We may reiterate with respect in the context of the aforesaid decisions of the Tribunal, and some subsequent decisions, that - (i) admittedly, the formation of an opinion is a condition precedent for initiation of action under either the third proviso to Section 36(2) of the Central Excises Act or Sub-section (5) of Section 131 of the Act [AIR 1967 S.C. 295 - (Barium Chemicals Ltd. v. Company Law Board and Ors.)(Rohtas Industries v. S.D. Agarwal); 1981 ELT 42 Is 1981 ECR 66 - Associated Cement Companies Ltd. v. Union of India]; (ii) still, on the issue as to whether the opinion should appear, ex facie, in the notice to show cause, or could be inferred from the contents of the notice read with the orders proposed to be revised, a decision of the Hon'ble Supreme Court in AIR 1963 S.C. 304 (Kothamasu Kanakarathnamrna v. State of Andhra Pradesh) would be relevant. The ratio of that decision was that jurisdiction conferred by statute subject to certain conditions cannot arise and be invoked, unless such conditions are complied with and fulfilled. The want of such jurisdiction, when it appears on the face of the proceedings cannot be waived. It follows from this that the existence or want of jurisdiction when it appears on the face of the proceedings is decisive. Once this is so, how could the fulfilment of the conditions precedent for the exercise of the jurisdiction be inferred from anything extraneous to the notice to show cause which is the prelude to the invocation of such jurisdiction; (iii) nor can the significance of providing two different periods of limitation with different dates for their commencement in the two provisos to Section 36(2) of the Central Excises Act be lost sight of. While, the limitation prescribed for commencement of revision proceedings in an ordinary case of illegality, incorrectness or impropriety was a period of one year from the date of the decision or order, the notice to be issued in terms of the third proviso is to be given "within the time limit specified in Section 11A of the Central Excises Act". This being so, it cannot be that both the second and third provisos apply to the same set of facts and every time an illegal, incorrect or improper order is sought to be revised, it is also a case where a non-levy or short levy is also involved as could be inferred from a history of the case or

material other than the notice itself. Such a construction would render one of the provisos nugatory; (iv) when one speaks of a period of limitation or time limit specified what is meant is the actual period of time reckoned from a date or time specified when it commences to run. A period of time without specifying when it commences is meaningless. The time limit specified in Section 11A accordingly comprehends the relevant date as well as for the commencement of that period. In Section 11A it is not one period but two that have been specified in different contingencies, both , commencing from the "relevant date" as defined therein, which in no case is the date of the order proposed to be revised. How then do we reckon such periods from the date of the order proposed to be revised, unless we ignore the "relevant date" as defined therein and read instead "the date of the order proposed to be revised"? Does it not amount to judicial legislation? Which period should we take - six months from the "relevant date" as provided in Section 11A(1) or five years in terms of the proviso? Why only six months, when for a fact, it could be gathered from previous proceedings on record that it was definitely a case where the non-levy or short levy or erroneous refund was alleged to have resulted from fraud, collusion, or any wilful mis-statement or suppression of facts, etc. in which case the proviso to Section 11A provides for a five-year period from the relevant date? (v) it is in view of all these considerations that the third proviso is to be construed strictly and applied only in a case where the condition precedent for its applicability is fulfilled on the face of the proceedings, i.e. in the notice to show cause itself. It is not something to be inferred by a process of reasoning or from surrounding circumstances or a history of the case. It must appear without any further necessity of an inference, from the recitals in the notice itself. Thus, if in the opinion of the Government, there was a non-levy or short-levy, one would expect some reference to it by its quantification or otherwise. It is the purport of the notice that should signify it so as to be brought within the scope of the third proviso. It may be that, in actual fact there may be a short-levy or non-levy but that is not relevant for a consideration of the applicability of either the one or the other of the two provisos, when not specifically adverted to in the notice as an opinion of the Government of India. Nor the ultimate result of the proceedings initiated, which may well be a recovery of duty short levied or not levied as a result of reversing the order proposed to be revised and restoration of the original order. When one

has to determine which jurisdiction out of a plurality of jurisdictions is actually invoked to ascertain if such invocation is within the period of limitation prescribed, one is not to take into account the end result of the exercise of that jurisdiction. The conditions prescribed for the exercise of one or the other of the jurisdictions cannot be jettisoned just because of the end result of the exercise thereof which may turn out to be identical partly with the condition precedent for the exercise of one of the jurisdictions. Jurisdiction depends for its exercise on the assumption of the existence of certain facts and circumstances prior to its invocation. In the course of its exercise, it may also so happen that the facts and circumstances assumed to exist are found, in fact, never to have existed. That by itself does not mean and imply that the jurisdiction could neither have been invoked or exercised. If such be the case, no jurisdiction can ever be invoked or exercised. The end result can, therefore, not be confused with the assumption underlying the invocation of jurisdiction or the condition precedent for the exercise thereof.

(e) (i) Reverting to the facts of this case, for the reasons stated supra, we have, necessarily, to hold that the jurisdiction that was expressly invoked in terms of Sub-section (3) is not to be confused with the jurisdiction that could have been exercised under Sub-section (.5) of the Act. There is nothing in the notice to indicate that the Government were of the opinion that any duty of customs had been short levied or not levied. The Government merely expressed their tentative view that the Board's order was not correct on a construction of the aforesaid agreements with General Tyre International Company and required the Respondent to show cause why that order should not be set aside and the Collector's order restored or such other further orders as may be deemed fit be not passed. This was nothing but invoking the jurisdiction indisputably vested in the Government under Sub-section (3) rather than Sub-section (5) of Section 131 of the Act, as it read at the material time.

(ii) If, on the contrary, it was really a case falling within Sub-section (5), on account of the surrounding facts, the allegations originally made, the purport of the adjudication order, the order in appeal by the Board and the oblique motives in the invocation of one jurisdiction rather than another, then in view of the suppression of facts relating to the payment of commission alleged and found by the Collector

to be true, the larger period of limitation (5 years from the relevant date) in Section 28 governs the proceedings.

One cannot have it both ways - the jurisdiction laid down in Section 131(5) and the lesser period of limitation of six months and that too from the date of the order proposed to be revised and not the "relevant date" defined in Section 28 of the Act. Thus reckoned, the notice was obviously within the limitation prescribed seeing that it was issued on 9-3-1981 and the project contract itself having been registered in 1976, all the imports made pursuant to it should have occurred, in any event, thereafter only i.e. within five years prior to the issue of the notice.

4. On merits, we observe that the goods (various items of machinery) but manufactured against specific orders. (Counsel's letter dated 20-7-1979 to the Collector of Customs and Central Excise). There is no question, therefore, of a "price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation" in terms of Section 14(i)(d) of the Act. The Board was clearly in error in assuming that "there is overwhelming evidence suggesting that these goods were normally available for sale in the course of international trade". The evidence is all to the contrary.

The assessable value cannot, in the circumstances be determined under Section 14(l)(a). Seeing that the imported goods were machinery made to specification and not off the shelf, the assessable value of the imports could be only determined under Rule 8 of the Customs Valuation Rules and no other. That Rule provides for the determination of assessable value by best judgment. Such a determination cannot be arbitrary but should take all relevant factors into account. The commission payable or paid to M/s. General Tyre is not an irrelevant factor in any such determination. Nor is it seriously contested that the commission was disclosed at any stage of the proceedings before the assessment of the various imports to duty. We, therefore, find, in the circumstances, that the order of the Board is not correct. It is, therefore set aside.

5. However, we find from the order of the Collector that while refraining from confiscation of the goods imported, he levies two penalties - one of Rs. 1,000/- under Section 46(4) of the Act and the other in a sum of Rs. 50,000/- under

Section 112 of the Act, as if the aforesaid provisions define two separate offences and not one in consequence of the other. It is the declaration in terms of Section 46(3) that constitutes a misdeclaration under Section 11 Km), It is, indeed, the nub of the charge of misdeclaration. Section 117 of the Act provides for levy of penalty where it is not otherwise provided for elsewhere. A misdeclaration in terms of Section 46(3) read with Section 111(m) is already penalised under Section 112. The two separate penalties do not therefore, sustain. Again, he did not find that the goods were deserving of confiscation - which he ought to have directed in consequence of the misdeclaration. We are no A/ helpless in the matter since the notice did not propose confiscation as well. Even so, the gravity of the offence of misdeclaration is not such that it did not warrant any reduction in the penalties. Accordingly, we restore the order of the Collector subject to the modification that the penalties may be reduced to Rs. 25,000/-. Any excess over the said amount, if realised, be refunded. If the amount of the penalties is already refunded, then an amount of Rs. 25,000/- be paid within three months of the communication of this order, by the Respondent to the Appellant, failing which it may be duly recovered.

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