

C.C. (import) Vs. Nav Maharashtra Chakkan Oil Mills

C.C. (import) Vs. Nav Maharashtra Chakkan Oil Mills

SooperKanoon Citation : sooperkanoon.com/33603

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-31-2003

Reported in : (2004)(92)ECC193

Judge : N T C.N.B., P Chacko

Appellant : C.C. (import)

Respondent : Nav Maharashtra Chakkan Oil Mills

Judgement :

1. Vitamin C when imported from China Japan, Russia and European Union was brought under Anti-Dumping duty vide Notification No. 104/2000 dated 21.7.2000 and Notification No. 118/2000 dated 15.9.2000. The respondent M/s Nav Maharashtra Chakkan Oil Mills imported a 5000 kgs.

consignment of Vitamin C (Ascorbic Acids) and took clearance of the same through Nhava Sheva Port under Bill of Entry No. 204633 dated 12.9.2001 No anti-dumping duty was levied on the consignment, since the goods were claimed to be of United State of America origin. The importer had also produced invoice, bill of lading certificate of origin in support of the claim. The Country of origin certificate was issued by Des Plaines Chamber of Commerce & Industry, 1401, Oakton Street Des Plaines, IL 60018 (847)824-4200. The indent for the goods was placed by the importer through a trading firm M/s OPEC International, Ghatkoper(W) Mumbai M/s OPEC International had ordered the goods from M/s Aerchem Inc. 320, Northwalnut Street, Bloomington Indiana USA,

again a trading firm.

2 Based on intelligence that goods were not of American origin the Directorate of Revenue Intelligence investigated into the matter .During the investigation a copy of certificate in Form 9 dated 1.11.2000 issued by M/s Procaps Inc. 3741 Walnut Street Suite 635, Philadelphia PA 19104 purported manufacturer, was also produced. The form 9 certificate is a requirement under 224 of Drugs Rules 1945 and the certificate issued by ProCaps Inc. Philadelphia stated inter alia that Ascorbic Acid USP XXIV was manufactured at 3741, Walnut Street, Philadelphia PA 19104, Feb I.D No 23-2858039. We read the relevant portion of the certificate issued by Procaps, Inc. as under 3) We declare that we are carrying on the manufacture of the drugs mentioned at the premises specified below and we shall from time to time report any change of premises on which the manufacture will be carried on and in case where manufacture is carried out.

4) We shall comply with the provision of the Part IX of the Drugs Rules 1945.

5) Every drug manufactured by us for import under licence into India shall as regards strength, quality and purity, conform with the provision on Chapter III of the Drugs Act 1940 and of the Drugs Rules 1945. We Shall comply with such further requirements of any, as may be specified by rules made by the Central Government under the Act and of which the licensing authority has given the licence not less than four months notice.

Particulars of premises where manufacture is carried on at Procaps, Inc 3741, Walnut Street Philadelphia PA 19104 Fed ID No. 23-2858039".

As against the aforesaid declarations the investigation carried out in USA by the Indian Consulate General of India, New York found the following position about the purported USA manufacturer of the goods.

"2. With my above-referred letter, I had enclosed a copy of Form-9 issued by ProCaps, Inc. which was sent to me by Aerchem Inc. (the company which claims to be marketing ascorbic acid manufactured by ProCaps) In the said copy of form-9 (which shows that it was not only notarized but also got attested from Indian

Consulate.

Chicago), it is stated that the 'particulars of premises where manufacture is carried on at: Procaps Inc. 3741, Walnut Street, Philadelphia PA 19104; However, physical verification of the said address showed that this address (3741 Walnut Street Philadelphia PA 19104) belongs to MBE Mailboxes. Indeed, there is a multi-storey building the first and higher floors of which are used as parking lot and on its ground floor are a branch of Commerce Bank, a beauty parlour, a photocopy centre (namely, Campus Copy Centre) and the said mail-box facility (shop). The address 3741 Walnut Street specifically belongs to the MBE Mailboxes facility. He confirmed that the address 3741 Walnut Street, Philadelphia PA 19104 belongs to MBE Mailboxes and he has never heard of Procaps Inc. The Form-9 mentions suite No.835 (or 635) in the address of Procaps given at the top left corner of the said Form-9. There is no suite there. There is also no such mailbox in the said MBE Mailboxes Enquiries were also made with a bank staff working in the said branch of Commerce Bank.

He had also not heard of the existence of any such company.

3. Thus there is no company or manufacturing unit by the name of Procaps Inc. at 3741 Walnut Street Philadelphia PA 19104. Indeed as explained earlier there is no manufacturing unit of any type at all at the given address." 3. Investigations at Bombay also revealed from seized correspondence that M/s Aerhem was suggesting that Indian importer should accept Vitamin C of Chinese Origin. There was also suggestion by M/s OPEC International to give document showing that Vitamin C was originated in USA but M/s Aerhem was expressing their inability to give any "authenticated document" from USA Authority.

4. Based on the material collected during investigation, Show cause Notice Dated 26th April 2002 was issued by the Directorate of Revenue Intelligence, Mumbai alleging that the goods were not of USA origin but should be treated as of Chinese origin and anti-dumping duty levied on that basis. Penal action was also proposed against the importers M/s Nav Maharashtra Chakkan Oil Mills and M/s OPEC International Indenter.

5. The notice was contested by the parties contending that all the documentary evidence like Bill of Lading .Country of origin and the form 9 showed that the goods were of USA origin. It was also argued that there was no positive evidence showing that goods were actually of Chinese origin and that based on a mere fact that the foreign supplier was supplying the goods of Chinese origin also no presumption could be raised that goods are not of Chinese origin and that they were not liable to anti-dumping duty.

6. In adjudication the Commissioner of Customs, Mumbai held against the Revenue under his Order No. 264/2002/CAC/CC/A.S.S dated 13.6.02.

Commissioner of Customs noted that no proof has been produced about the Chinese origin of the goods. There was also no particulars as to who were the Chinese manufacturers, wherein China production took place and what is the brand name and other particulars of the goods or as to when the goods were taken to USA from China for being brought to India. He held that the evidence made available by the Revenue is insufficient.He has also gone by the rule that whoever asserts must prove.In the present case Commissioner was of the view that since the Revenue had alleged the goods were of Chinese origin it was for them to prove it.

7. The present appeal has been filed at the instance of the Central Board of Excise and Customs against the aforesaid findings of the Commissioner of Customs (Adjudication). Mumbai.

8. We have perused the records and have heard both sides. The contention of the Revenue is that since the country of origin declared by the importer was found to be false, in the circumstances of the case and based on the materials available the Commissioner should have held in favour of Revenue. Reliance has also been placed on the judgement of the Apex Court in the case of Sanjay Chandiram vs C.C.Calcutta -1995 (77) ELT 241(SC) in support of their case.

9. In the present case the claim about the country of origin was made by the importer. It was also not a case where country of origin was of no consequence. If the goods were from major suppliers of Vitamin C like China, Russia , European

Union they would have been liable to anti-dumping duty. Therefore, much turned on the correctness of the declaration of the country of origin. True rule is that whoever asserts must prove. That is to ask who asserted. Here assertion was by the foreign supplier and the importer, that the goods were of USA origin.

Therefore , it was for them to prove. They also tried to do so by producing various documents, mainly form 9, purportedly given by the American manufacturer, ProCaps, Inc. This form indicated the address of manufacture of goods, but on physical and other verifications at site it was found that no such manufacture existed there. So this is a case where the foreign supplier and the importer failed to prove their assertion.

10. That apart the verification report of the Indian Consulate also gets support from attendant facts and circumstances. There was initial suggestion for misdeclaring the country of origin by the Indian indenter to the foreign supplier. Foreign supplier had also expressed its difficulty in giving any " authenticated document" from USA authority. as though, they were willing to go along with the suggestion but for the difficulty in getting the documents. Further developments in the case also point to fraud. Once the investigation got serious, on October 10,2001 Shri Dipen Shah of OEPC International send a reminder seeking a certificate from Indian Embassy in the USA confirming the existence of ProCaps, Inc as a manufacturer of Vitamin C. It also sought some proof of any kind showing registration of Procaps with American Governmental authorities as a manufacturer. The request was repeated on October 10,2001 requesting for "some USA Governmental authority showing Procaps as a manufacturer of Vitamin C or Procaps" letter claiming their manufacture of Vitamin C which is to be signed by some USA Govt. official". This message also reminded Shri Michael Jeffers of the request already made " for the photograph of Procaps factory". Such material in support of the claim was sought in the light of the Customs investigations. On October 17,2001, Shri Dipen Shah sent another" Top most important & urgent" message to Mr Michale Jeffers requesting "please let us know if Procap is genuine manufacture of Vitamin C or not. This is most important for us to know because the DRI and CIU people has sent message to our embassy in New York to investigate the same and if Procap is genuine manufacturer we shall fight it out with all possible way. But most

important important thing is we must know if Procap is genuine manufacturer or not and only you can let us know this. Truth is clear from the messages dated October 15 and 24, 2001 to Shri Dipen Shah from Mr. Michael Jeffers. The relevant portion reads.

"What more can we do. You have requested multiple documents and them to you. Each one has been signed by your Consulate in the USA. Your additional not discussed or requested. We are not happy about the change of events. They key to any communication. You requested we provided What is this new twist you have added please clarify.

" I will re-fax Mr. Singh letter this morning. I work on a picture. Keep in mind that we have no government documentation to prove manufacturing. Anything we do would be fabricated and I prefer not to do that." 11. The Conduct of Arechem the foreign supplier, can lead only to the conclusion that the claim about the goods being manufactured by ProCaps, Inc were false and the documents produced and declarations made to that effect were also false M/s Aerchem Inc. is the supplier of the goods to the Indian importer. It procured the goods. Therefore, it was in the best position to identify the manufacturer and place of manufacture. Its failure to do so is even more surprsing when the product in question is a pharmaceutical item. Production and sale of pharmaceutical products is under strict regulations all over the world. Most so in the USA. Still their supplier is not able to provide any material either from public domain or otherwise to substantiate its claim that supplier is not able to provide any material either from public domain or otherwise to substantiate its claim that supplier is a manufacturer of the goods and undertakes production in USA. The rule of evidence is clear. When a person in possession refuses or fails to produce the best evidence, in support of a claim, the conclusion to be drawn is that the claim is unfounded or false.

12. The case is also covered in favour of the Revenue by the decision of the Apex Court in the case of Sanjay Chandiram vs C.C. Calcutta Facts were similar in that case also. The importer claimed assessment based on the country of origin certificate. That certificate was found to be false. A question arose as to whether the value declared could be accepted for the purpose of assessment when country

of origin certificate was found to be false. The Apex Court held that since the claim about the country of origin was found to be false, the price claimed as the price in that country's market should also be rejected.

It was therefore, held that the goods were required to be valued under Rule 8 and Section 14 of the Act and not according to the claimed transaction value. In the present case also a claim about the country of origin was made. Some documents were also produced in support of the same. On verification, they were found to be false. Therefore the authorities were right in contending that the goods should be treated as of Chinese origin, because the benefit to the goods from a false claim of country of origin was to escape anti-dumping duty. The allegation that the goods should be of Chinese origin is also supported by the correspondence between indenting agent and the supplier where the supplier was pressing the indenting agent to buy Chinese goods and the indenting agent was suggestions that goods made in China be described as of USA origin.

13. In the view we have taken above, we hold in favour of Revenue. The appeal is allowed after setting aside the impugned order. However duty (anti-dumping) amount,, penalty etc. remain to be determined in an adjudication. For that limited purpose, we remit the case to the Commissioner of Customs after setting aside the impugned order. He shall give a fresh hearing to the respondent on the limited question of correct amount of duty, interest and penalty and pass a fresh order.

14. Before parting with the case, we may mention the need for the Drugs Authorities to look into this matter, Clearly, the conduct of Aerchem Inc., 320 North Walnut Street, Bloomington Indiana and OPEC International Ghatkopar, Mumbai in this transaction is shady. Since the transaction concerns medicine and drugs affecting public health, Drugs Control authorities should investigate the matter. Registry is, therefore, directed to send a copy of this order to Drugs Controller of Indian. Customs Authorities at the port of Import shall also inform the local Drugs Control Authorities about this import.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com