

Globe Engineering Works Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-29-1988

Reported in : (1988)(38)ELT471TriDel

Appellant : Globe Engineering Works

Respondent : Collector of Customs

Judgement :

1. These three appeals involve common facts and issues and arise out of a common order-in-original passed by the Collector. They were, therefore, clubbed together, heard together and this combined order will dispose of all of them.
2. Both sides argued their respective cases with the help of M/s. Globe Engineering Works' appeal file. They confirmed that material facts and issues in the other two appeals were identical, minor differences in dates etc. being immaterial. Accordingly, in this order we have also largely relied on the appeal file and the paper-book of M/s. Globe Engineering Works.
3. At the out-set, the appellants dropped their plea of violation of principles of natural justice by the adjudicating Collector saying that their imported consignment had been under detention for the last 4 years and 6 months and they did not want a remand of the matter to the Collector for re-adjudication.
4. We have heard both sides at length and have carefully considered their submissions and the record. The goods involved in the controversy are alloy steel

pipes (stain-Jess steel pipes)-shipped from South Korea by M/s. Sammi Corporation. The old name of this supplier company was M/s. Sammissa Co. Ltd. till 1.6.1982. The goods arrived in India around 10.2.1984. About two years earlier, w.e.f. 13.2.1982 to be exact, the rates of cus-toms.duties on stainless steel pipes had been steeply increased to more than double. Even before the consignments Imported by the appellants landed In India, they filed writ petitions in Calcutta High Court and pleading promissory estoppel on the ground that their purchase orders were of 11.2.1982, two days earlier than the date of the increase In customs duties on 13.2.1982, obtained interim orders from the Hon'ble High Court to assess the goods at the old rate of customs duties on the declared values; the appellants were to furnish bank guarantees for the difference in duties on the basis of the old and the new rates. Armed with the Interim orders of the Hon'ble High Court, the appellants Immediately filed bill of entry with the Custom House for clearance of the goods. In support of the value of the goods declared in the bill of entry, the appellants enclosed Import invoices showing the unit rate of the goods at U.S \$ 1,050 per M.T. In compliance with the Hon'ble High Court's Interim orders, the Customs Officer completed the assessment on the bill of entry on 14.2.1984. On 23.2.1984, the appellants furnished the Import Invoice bearing attestation of Dena Bank (Brabourne Road Branch, Calcutta). This Bank attested invoice also showed the same unit price @ U.S. \$ 1,050 per M.T. The appellants paid the assessed customs duties on 23-2.1984.

Thereupon the Customs Officer signed the 'out of charge' order for the goods on 28.2.1984.

5. At about this time, the Customs received secret information that the appellants were trying to get release of the goods with the help of false documents and by over-awing the Customs Oncers with the Interim orders of the Hon'ble High Court obtained in advance. The Special Investigation Branch of the Custom House contacted the licensed Custom House Agent who had filed the bill of entry and the other import documents with the customs for clearance of the goods. The said Custom House Agent told the investigators that the documents of the consignment had been given to him by one Shri B.K. Nair of M/s. Metal and Alloys Industries. The Customs searched the office premises of M/s.

Metal & Alloys Industries. Amongst some 60 documents etc. seized, the authorities recovered the following also from the premises :- (1) Rubber stamps of 14 parties and firms including M/s. Mishra Enterprises, one of the three present appellants.

(2) Un-signed letter-heads of 27 firms and parties. 19 of them had their addresses in Assam and the rest in Arunachal Pradesh, Nagaland, Mizoram etc.

(3) Signed letter-heads of 5 firms, including M/s. Mishra Enterprises, one of the present three appellants.

(4) Blank sheet bearing signature and seal of a Government functionary, namely, the General Manager, District Industries Centre, Dibrugarh, Assam.

(6) Two copies (original and one carbon copy) of Order No. SKU/SC/82-83, dated 11.2.1982 of M/s. Esskay Udyog, Cachar, Assam on M/s. Sammi Corporation, Seoul, Korea for supply of the similar goods @ U.S. \$ 3,400 per M.T. (7) Order No. GEW/10/83-84 (unsigned), dated 8.7.1983 from Globe Enigneering Works to M/s. Sammissa Co.Ltd. for supply of similar goods @ U.S. \$ 3,400 per M.T. CIF Calcutta. In this document, the Order No."83-84" has been encircled and the figures "82-83" have been written above it in ink. Similarly, the date "08.07.1983" has been encircled and the date "11.2.1982" has been written in ink.

Also the unit rate "U.S. \$ 3,400" has been struck out with a pen and the figure "1050" written above it in ink.

(8) Three copies of the above order corrected/modified and re-typed as indicated above (one original and two carbon copies), all signed by the proprietor, Globe Engineering Works.

(9) Documents similar to those at 7 & 8 above in the name of the other two appellants.

(10) Letters of the three appellants to Dena Bank and the Bank's letter/cable to M/s. Sammissa Co. Ltd./Bank of America, Seoul, Korea taamend the Marine Insurance Policy so as to cover 110% of invoiced value Instead of 300%/200% as

originally stated.

(11) Copy of Samml Corporation's invoice No.TPS-4063, dated 28.12.1983 to Globe Engineering Works, showing the price of the goods at U.S. \$ 3,400 per M.T.It is significant to note that while numerous signed and unsigned purchase orders placed on the Korean supplier were found in the premises, no sales confirmation of the Korean supplier was found.

6. The appellants tried to explain away the recovery of documents In the name of other firms saying that other out-station firms were using their office premises in Calcutta for the sake of convenience. But the recovery of letter-heads and rubber stamps of so many firms and parties from the premises of M/s. Metal and Alloys Industries and the fact that the import documents of the present three appellants had been given to the Custom House Agent by M/s. Metal and Alloys Industries only, set the authorities thinking whether the three appellant firms were genuine. They noticed that the three appellant firms had also given their addresses in the interior of Assam, Makum Road, Tinsukia and Badar-pur Ghat, Cachar. An enquiry was conducted about the appellant firms through the Asstt. Collector of Central Excise, Head Quarters (Preventive), Shillong. The enquiry revealed that M/s. Globe Engineering Works (Proprietor: Binod Kumar Ojha), M/s. Rahul Enterprises (Proprietor: Kishore Kumar Sharma) and M/s. Ess Kay Udyog could not be located at the given addresses. The local office of the State Industries Department also could not throw any light on the existence of these firms. However, the declared proprietor of the third appellant, M/s. Mishra Enterprises, Shri Shambhu Saran Mishra, was traced in his house. In his statement given to the Customs & Central Excise officers on 7.3.1984, Shri Shambhu Saran Mishra stated that his father's name was late Siapal Mishra. On verification, it was found that in the original petition filed by Shri Shambhu Saran Mishra in the Calcutta High Court his father's name was stated as late Udai Narain Mishra. This discrepancy deepened the mystery regarding genuineness of the three appellant firms. Obviously Shri Shambhu Saran Mishra, proprietor of M/s. Mishra Enterprises whom the Customs and Central Excise officers traced in the course of their enquiries and the one who affirmed the affidavit before the Hon'ble High Court were not one and the same person.

7. Further strange things came to notice. Shri Shambhu Saran Mishra, in the same statement dated 7.3.1984 given to the Customs and Central Excise officers of Assam, deposed that he started his factory in 1982 but that the factory had not been working for the last 9-10 months. The total value of the goods sold by him was stated to be approx. Rs. 3.5 lakhs. He stated that he did not have any records of the goods manufactured and sold. Thus, he gave a picture of M/s. Mishra Enterprises as a very modest firm and defunct for the last 9-10 months.

Yet, from th'e vouchers/documents seized from the premises of M/s.

Metal & Alloys Industries it was found that an amount of Rs. 1.13 crore was deposited in Dena Bank A/c. Mishra Enterprises during the period from 23.9.1983 to 9.2.1984. These facts lent credence to the belief that someone else was the real operating force behind the names of the three appellant firms.

8. In the course of their enquiries, the authorities issued repeated summons to the proprietors of the appellant firms but none of them responded. During the hearing before the adjudicating Collector, the counsels, who appeared on behalf of the appellants, were directed by the Collector specifically to present the three proprietors. But again none of them appeared. The appellants had tried to explain it saying that they were afraid of being detained under the COFEPOSA. But the explanation does not wash. The best way to clear the mystery and their name would have been for the appellants to come forward and offer their explanation to the authorities. But the appellants did not do so. In the circumstances, the Collector's conclusion that the imports were effected in the names of non-existent/rubber stamp firms and that the real person behind the imports was M/s. Metal & Alloys Industries could not be faulted. The conduct of M/s. Metal & Alloys Industries themselves lent support to this conclusion. The guarantors for the Letters of Credit opened by the three appellants as well as M/s. Esskay Udyog were none other than Shri Shyam Sunder Sharma and Shri S.M.Agarwal, the two partners of M/s. Metal and Alloys Industries, Calcutta. The same Shri S.M. Agarwal was also a partner of M/s.

Saraswat Enterprises and in that capacity he introduced the three appellants to South Indlan Bank in which the three appellants opened current accounts on the

same day on 9.2.1984. Yet, when questioned by the authorities later, Shri S.M. Agarwal deposed in his statement dated 5.5.1984 that though he was staying at Makum Road, Tinsukia, Assam, he did not know any company by the name of Mishra Enterprises, Rahul Enterprises and Globe Engineering Works. The other partner, Shri Shyam Sunder Sharma, also stated similarly.

9. Further inquiries revealed that It was not just a case of benam firms; more serious things were involved. The appellants filed the import bill of entry alongwith the import invoice on 10.2.1984. Inquiry with Dena Bank revealed that the original Import invoice and other import documents of the consignment, as received by the Bank from the foreign supplier through official channel, were retired by the appellants only on 14.2.1984 and that the said official invoice showed a much higher price for the goods than that declared by the appellants in the bill of entry and stated in the import invoice enclosed with the bill of entry on 10.2.1984. An obvious question arises as to wherefrom the appellants got the invoice at lower price which they filed with the Customs on 10.2.1984. There could be only two possibilities. Either the foreign supplier sent them two sets of invoices at two different prices, the one sent through official channel to the Bank showing the price @ U.S. \$ 3,400 per M.T. and the other sent direct to the appellants showing the price at U.S. \$ 1,050 per M.T. We are told by the appellants that the foreign supplier was a concern of repute having annual turn-over of millions of dollars. Well, if such a big international company of repute was not expected to do this sort of double dealing, the only other possibility was that the appellants themselves created the second set of invoices which they filed with the customs with the bill of entry. Other discoveries strengthened the belief that this is really what happened. Comparison of the two sets of invoices even by a lay-man was enough to indicate that they had been prepared by two different typewriters and in two different inks. The Bank invoices were in blue ink while the invoices presented by the appellants to customs were in black ink. The supplier's signatures on the invoices filed with the customs were also found to differ considerably from the supplier's signatures on the packing list, on the certificate of origin and on the import invoice as recovered from the Bank. The Bank stamp found on the attested invoice filed by the appellants with customs on 23.2.1984 was, on inquiry, found to be other than the stamp in use in the foreign exchange department of the Bank at that time. It

was beyond doubt that the appellants had forged the invoices which they presented to the customs on 10.2.1984. They had also managed to get these invoices attested by an obsolete stamp of the Bank with the 'co-operation' of some Bank official. The true invoice for the imported goods which showed the price of the goods @ U.S. \$ 3,400 per M.T. and which the foreign supplier had sent to Dena Bank through official channel was not produced by the appellants before the customs.

10. The fact that U.S. \$ 3,400 per M.T. was the real price of the goods as billed by the foreign supplier was corroborated by other documentary evidence. Though the purchase orders were claimed by the appellants to be each for 102 MTs, the applications for letters of credit and the letters of credit opened did not mention the quantity to be supplied.

For the respective quantities actually supplied to the three appellants, the foreign supplier realised the amounts @ U.S. \$ 3,400 on the basis of the letter of credit opened. The official import invoice of M/s. Globe Engineering Works recovered from Dena Bank showed the same amounts @ U.S. \$ 3,400. The Marine Insurance Policies of the appellants were also for 100% or 110% of the same amounts. The certificate of origin for the goods issued by the Korean Chamber of Commerce and Industry indicated the same higher invoiced prices. These certificates of origin were recovered from the premises of M/s. Metal & Alloys Industries on search. The appellants had not presented them to the customs. Instead, what they presented to the customs were the certificates of origin issued by the Ministry of Commerce and Industry, Seoul, Korea, which did not indicate the CIF value of the goods.

Finally, there was the Independent evidence of order No. NE/Ord/83-84, dated 8.7.1983 of M/s. Navprabhat Enterprises, Tinsukla, Assam addressed to the same supplier for similar goods @ U.S. \$ 3,400 per M.T. CIF/Calcutta. This order was recovered by the authorities from Dena Bank.

11. The appellants' version is that the foreign supplier, by mistake, billed them at higher price by ignoring the old contract note. They stated that as soon as they came to know of the higher Invoice prices, they sent a protest letter dated

10.2.1984 to the Bank. The Bank stated that this letter was not available in their file. The Bank also denied having received it or having entered into any correspondence with the Korean supplier over the price issue. It is strange that on 10.2.1984 the appellants, as per their own version, were aware of the higher invoice price charged by the foreign supplier and yet they declared a lower price in the bill of entry and filed with the Customs some invoices at that lower price on 10.2.1984. It is obvious that they had no respect for the statutory declarations which they were required to make under the Customs Act, 1962.

12. The appellants invited our attention to M/s. Sammi Corporation's telex dated 3.3.1984 to Dena Bank to the effect that Sammi Corpn. had, by mistake, ignored the old contract note. They also told us that on 16.5.1984 M/s. Sammi Corpn. remitted the price difference to Dena Bank.

We also find from the impugned order that on 4.6.1984 Dena Bank asked M/s. Sammi Corpn. to send all signed invoices and refund, if any, only through the Bank of America, Seoul, Korea. M/s. Sammi Corpn. did not do so and on 21.6.1984 again sent the invoices and refund order direct to Dena Bank. The conclusion that the appellants' tactic dated the purchase orders in order to create evidence for 'the old contract note' is proved by three things. First, the various over-writings and corrections of dates and rates of duty in the numerous signed and un-signed purchase orders seized from the premises of M/s. Metal and Alloys Industries tell their own tale. Second, to quote from the Collectors' order - "It is a matter of common sense that the year of the order numbers cannot be ME/IMP/83-84, GEW/10/82-83 and RE/82-83 when the orders dated 11.2.1982, 14.2.1982 and 11.2.1982 fall within the financial year 1981-82". Third, the customs authorities recovered an order dated 11.2.1982 of M/s. Mishra Enterprises from the premises of M/s. Metal & Alloys Industries. This order was found addressed to M/s.

Sammi Corpn. Well, Sammi Corpn. came into existence only after 1.6.1982 and the name of the foreign supplier as on 11.2.1982 was Sammissa Co.

Ltd. It obviously shows that this order dated 11.2.1982 was a bogus document.

13. We summarise below the orders passed by the Collector on the conclusions reached by him :-

S. No.	Name	Value declared @ \$	Value assessed @ \$	Value sought by MT	Value as- Customs Amount of No. 1,050 per 3,400 per	Value as- Customs Amount of No. 1,050 per 3,400 per
1.	Mishra Enterprises	2,70,433	8,75,688	14,89,867	3,50,000	1,75,000
2.	Globe Engg.	1,56,516	5,06,815	8,62,278	2,00,000	1,00,000
3.	Rahul Enterprises	93,840	3,08,864	5,16,984	1,25,000	65,000

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Rahul Enterprises 93,840 3,08,864 5,16,984 1,25,000 65,000

14. During the hearing before us, the appellants did not argue on the aspects of mysteries of the appellant firms or the genuineness of the various documents filed in the name of these firms. The burden of their song before us was : "well, the appellants may be bad people and all that, but what was the correct assessable value of the goods". Their defence, as pressed before us during the hearing, was three fold : I. Since the customs officer had already assessed the goods and allowed their release under Section 47 of the Customs Act, 1962, the show cause notice issued under Section 124 for confiscation of the goods and imposition of penalty was out of jurisdiction. The only course open to the authorities for revising the out of charge order dated 28.2.1984 was to file an appeal before the Collector (Appeals) under Section 129 D(2). The adjudicating Collector had no jurisdiction to revise the out of charge order passed under Section II. The onus to prove under-valuation was on the department. The department had adduced no independent evidence of what was the ordinary international price of the goods. The appellants produced before the Collector a summary of about 15 earlier releases of similar goods at the lower price of about US \$ 1,050 per MT but the Collector did not comment on it at all in his order-in-original.

III. The show cause notice had alleged violation of Section 111 (d) of the Customs Act also on the ground of import licence being not valid. In his adjudication order, the Collector dropped the charge of import control violation but yet, while passing the final order of confiscation, he mentioned Section 111 (d) also alongwith Section 111 (m). This showed that the Collector's mind was conditioned by two violations while determining the amount of fine and penalty.

Secondly, market price of the goods was not mentioned in the order.

Third, there was no basis for confiscation and penalty since the appellants had got the refund of price difference and the excess foreign exchange had come back to India.

15. We find no substance in any of the above pleas of the appellants.

Taking the question of jurisdiction first, one look at the bill of entry shows that the customs officer made the order of assessment and release in compliance with the interim order of the Hon'ble Calcutta High Court. There was no independent adjudication by the customs officer. Secondly, the judgment of the Hon'ble Delhi High Court in the case of . Jain Shudh Vanaspati (1982 ELT 43 Delhi), on which the appellants relied, among others, makes it clear beyond doubt that the bar on revision under Section 124 of an order of release made under Section 47 applied to cases other than those of fraud or suppression.

The judgment of Hon'ble Calcutta High Court at AIR 1975 Cal. 368 - Collector of Customs, West Bengal v. Hindustan Motors Ltd., was also to the same effect. From the facts of this case, which we have discussed in the preceding paragraphs, it is clear beyond doubt that this was a case of fraud played in the name of shadow firms and with the help of manipulated documents. Thirdly, the fraud was not known at the time the customs officer made his order of assessment and release. It came to notice only later. The review under Section 129 D(2) could only be on the basis of the record as was available before the customs officer when he made his order of release and not on the basis of the vast evidence of fraud which came to notice later. The correct remedy was, therefore, an adjudication on the evidence of fraud through issue of a show cause notice under Section 124 only.

16. It is true that the Collector has not discussed the evidence of earlier instances of import of similar goods at the comparable lower price. However, we have seen the summary of these instances. All these instances relate to a much earlier period between October 1982 to March 1983. The imports made by the appellants were about a year later, in February 1984. The value under Section 14 of the Customs Act has to be on the basis of the ordinary international price at the time and place

of importation. The instances relied on by the appellants were not at or near the time of their own importation and hence not acceptable.

Secondly, the appellants tried to create evidence of having placed their purchase orders as far back as in February 1982. We have discussed in the earlier paragraphs that this was a case of ante-dating the orders. No sales confirmation of these orders was produced by the appellants before the authorities nor was any such confirmation found during search of the premises of M/s. Metal & Alloys Industries, though other numerous documents were found. During the hearing before us, the appellants have placed in the paper book a copy of the sales note dated 27.2.1982 of the foreign supplier. In the background of this case we are not prepared to accept this document as genuine. Our conclusion is also based on the fact that no time limit was stated in the sales note for opening the confirmed letter of credit. It is not the international trade practice to give a sales confirmation/acceptance valid for an indefinite period. Finally, we also find that among the documents seized from the premises of M/s. Metal & Alloys Industries, there was a blank signed sales note of M/s. Sammissa Co. Ltd., Korea also. Well, it seems that the appellants had enough tools of trade available to produce any documentary evidence.

17. So far as the onus is concerned, after the Customs authorities had uncovered the documentary evidence of the genuine import invoices at the price of U.S. \$ 3,400 per M.T. as available with the Bank and also the evidence of numerous signed and unsigned orders in the names of the appellants showing the same price seized from the premises of M/s.

Metal & Alloys Industries, the onus shifted to the appellants to dis-prove these documents and to show what was the true ordinary international price at the time of Importation. The appellants have failed to discharge this onus. The simplest way to discharge their onus and to clear their name wSuld have been to produce the then current international price list of the foreign supplier. They could have easily obtained such a price list from the foreign supplier and produced it. During the hearing before us we repeatedly asked them why they did not do so. We even asked them whether, given time, they would produce it now before us. We got no

answer and no response from them.

Just complete silence.

18. From the evidence available on record (see paragraph 10 above), it is obvious that U.S. \$ 3,400 per M.T. was the ruling price at or about the time of import and the supplier invoiced at that price. A big and reputed international company in Korea could not be expected to go on making the same mistake regarding the price repeatedly for not one but three appellants. The foreign supplier realised his price also at this rate. The contention that the appellants received refund of the price difference later does not detract from this conclusion. When found out after searches of the premises of M/s. Metal & Alloys Industries and after inquiries in Assam and with the Bank, they may have arranged for foreign exchange to be repatriated through the foreign supplier or they may have obtained a favoured price in order to retrieve the situation to the extent possible. But in either case the lower price of U.S. \$ 1,050 per M.T. could not be accepted as the true ordinary international price charged at or about the time of importation.

19. In the circumstances, the charge of under-valuation stands proved against the appellants. From the figures as summarised in paragraph 13, it is quite evident that the quantum of fine and penalty adjudged by the Collector in each case is very moderate and only a fraction of the customs duty sought to be evaded by the appellants. Citing of Section 111 (d) in the final order of confiscation was only a typographical error and the very moderate fine and penalty bears it out in each case.

Secondly, the amount of fine in each case did not exceed the sum total of even the value as declared by the appellants themselves plus the customs duty chargeable thereon. There could, therefore, be no question of the amount of fine exceeding the Indian market price of the goods. As regards the justification for imposing fine and penalty, the facts of this case as discussed earlier speak for themselves. If fine and penalty were not justified in a case of blatant fraud and manipulation of documents as the one before us, we wonder whether there could be any case at all in which fine and penalty would be warranted.

20. In the result, we find no merit in these appeals and dismiss all of them.

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