Associated Traders Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-23-1989

Reported in : (1990)(25)ECC210

Appellant : Associated Traders

Respondent : Collector of Customs

Judgement :

1. The above captioned 4 appellants had filed 4 appeals in the Tribunal. Being aggrieved from the order No. S/10-83/87 S1IB/DRI/BZU/122/43/86 dated 23rd February, 1988. Since all the appeals emerge from the same order and as such the same are being disposed of by a consolidated order.

2. Briefly the facts of the case are that M/s. Prabhat General Terpene Industries Pvt. Ltd.; M/s. Associated Traders; and M/s. Sarvodaya Rosin Works, had imported Gum Rosin of 'FAQ grade' of Indonesian Origin.Name Bill of Entry for warehousing No.Quantity & CIF value.Prabhat General Terpene 2357/66 (N.V. Naptune 90 MTIndus. (P) Ltd. Hasper).

Rs. 4,53,228/-Associated Traders.

2357/65 (N.V. Neptune 90 MT Jasper).

Rs. 4,53,228/-Sarvodaya Rosin Works.

2508/163 (N.V. Annapurna) 54 MT Rs. 2,71,776/- The above captioned Bill of Entries filed by Shreeram Clearing and Forwarding Agency, Bombay-38 for warehousing covering the import of 90 MTs and 54 MT Gum rosin declared to be of 'FAQ' grade of Indonesian origin on the above captioned appeals Nos. 1 to 3. The goods were supplied by M/s. Kapsco Pvt. Ltd. at the price of US $ 390 MT CIF, Bombay under cover thereof invoice Nos. KPL/B/062/86 dated 6th October 1986, No. KPL/E/063 dated 6th October, 1986 and KPL/E/079/86 dated 18th October 1986. The goods covered by the first two invoices both dated 6th October, 1986 and have been shipped on 'DP' and 'DA' basis whereas the third Bill of Entry in the case of Sarvodaya Rosin Works was against L/C No. BF-01-29/86-12 dated 5th August 1986. The appellants had claimed the clearance under OGL, appendix 6, Item 1 of AM 85-88 Import Policy. The declaration under Section 46 of the Customs Act, 1962 were duly filed. In a declaration the appellant had maintained that "contents of relative invoices are true and correct, they have not received or do not know any other documents or information showing a different price or value or quantity and description of the goods.

Based on the above declaration the Bill of Entries were completed by the concerned appraising group C of the Customs House on 3rd October 1986 and 2nd November 1986 and the goods were allowed to be warehoused under Section 59 of the Customs Act, 1962. On the basis of the Intelligence by the Directorate of Revenue Intelligence, Zonal Unit, Bombay that certain importers were importing Gum Rosin and standard grades like 'WW' 'WG' and 'N' by labelling it as 'FAQ' grade from Indonesia through indenting agents from M/s. Appollo International, 192, Shaheed Bhagat Singh Colony, Bombay owned by one Shri H.S. Saigal.

Intelligence also indicated that the 'FAQ' grade was non-existent grade both in the international and ISI standard and the sole purpose of the mis-declaring the grade of the goods as 'FAQ' grade is to under invoice the goods to avoid payment of appropriate Customs duty. Intelligence gathered further indicated that though the goods imported were Indonesian Origin, the shipment documents are being made by M/s. Kapsco Pvt. Ltd., Singapore. During the course of investigations by the DRI, Bombay, office premises of M/s. Prabhat General Terpene Industries, Bombay and Indenting Agents M/s. Appollo International, Bombay were searched by the officers of this unit on 24th November, 1986 and certain incriminating documents containing import of Gum Rosin 'WW' and other grades as against 'FAQ' grade were seized. During the investigation representative samples of goods covered by Bill of Entries Nos. 2357/65 (T.R.Lab. No. 1146 C/10-11-1986) and No. 2357/66 (T.R. Lab No. 1119-C/7th November, 1986) were retested by the Custom House Laboratory. In the retest Customs House Laboratory opined that the samples have got characteristic similar to pale type of 'WG' grade of ISI specification and similarly the goods pertaining to Bill of Entry No. 2508/163 were also found to be of 'WG' grade as per Customs T.R. Lab. C. No. 1395 of 3rd December, 1986. Statement of S/Shri H.S.Saigal, Prop. of M/s. Appollo International, Bombay, N.R. Rao, Prop. of Prabhat General Industries and Tolaram Chudiwala, Prop. of M/s. Prabhat General Agencies, Bombay were recorded under Section 108 of the Customs Act, 1962 on various dates. Shri H.S. Saigal, in his statement stated that Shri Balwinder Singh Kapoor who was the Managing Director of M/s.

Kapsco Pvt. Ltd., Singapore is his son-in-law and are importers and exporters of various items like sports goods, Jute, Gum Rosin and he was getting 1% commission of CIF value from M/s. Kapsco Pvt. Ltd. against all his indents booked since January 1986. And the CIF price includes commission and 'FAQ' grade is mixed and unsorted 'WG' and inferior grade. In his statement dated 8th April 1987 Shri Saigal further stated that he had learnt from his principles M/s. Kapsco Pvt.

Ltd., Singapore, suppliers of the above consignments, 'WG' grade was US $ 450 to 460 per M.T. and grade price 435 to 440 C & F per MT although these are invoiced as gum rosin 'FAQ' grade of US $ 390 per MT. On being questioned that the real price was 460 per MT as against US $ 390 per MT how the difference between invoice and actual price was being adjusted. Shri Saigal has stated that "I want to state that according to my knowledge the importers were getting his amount directly with the suppliers. I have not dealt with any payments. My role was restricted to booking order. I am receiving my commission directly from the suppliers." The goods were thus found to be 'WG' grade in addition to the telexes messages quoted in the order-in-original and seized from the office premises of indenting agents also refer to gum rosin grade such as 'WW'/'FAQ' grade. M/s.

R.R. Mewani & Company one of the leading indenting agents of Gum Rosin of Indonesian Origin vide their letter 6075 dated 11th December 1986 had inter alia confirmed that Department of Forestry offers Government of Indonesia only Gum Rosin 'WW' grade and the price normally varies between US $ 450/- to $ 465/- per MT and during the material period the price of US $ 465 per MT vide invoices Nos. 163A/EXP/86 dated 18th September 1986 and No. 166A/Exp/SBU/86 dated 4th October 1986 and Bill of Entry No. 2191/2/ dated 30 September 1986 and 22nd October 1986 per s.s. Naptune Jasper by M/s. Gem Syndicate & Polymer India, Bombay. The revenue authorities had adopted the value at US $ 465 per MT against the declared value of US $ 390 and the CIF price works out as under:-1) 2357/66 US $ 41850/- (Rs. 5,37,227/-)M/s. Prabhat General Terpene Industries2) 2357/65 US $ 41850/- (Rs. 5,37,227/-)M/s. Associated Traders. 90 MT @ US $3) 2508/65 US $ 25110/- (Rs. 3,22,336/-)M/s. Sarvodaya Resin Works. 54 MT @ US The learned Collector had observed that the aforementioned consignments were under invoiced to Rs. 84,629/-, 84,629/- and Rs. 50,940/-, and expected losses of revenue would have been to the tune of Rs. 1,19,750/-, Rs. 1,19,750/- and Rs. 72,080/- and the total Rs. 3,11,580/-. The revenue authority was of the view that the goods were liable to confiscation under Section 111(m) of the Customs Act, and penal action was called for Section 112 of the Customs Act, 1962. The importers as well as indenters by the letter dated 10th October, 1987 requested for the waiver of the issue of show cause notice. Shri T.S.Chudiwala had appeared and his statement was also recorded. Shri Chudiwala stated that identical imports of 'FAQ' grade of the other importers were cleared. The learned Collector after taking into consideration the seized documents in the correspondence between the indentors and the suppliers and grade indicators was 'WW'/FAQ and 'WG' made of ISI specification. He had further observed that on testing the goods were found to be similar to pale type 'WG' grade of ISI specification. The learned Collector had ordered that in one telex it was mentioned that 'WW' grade and 'FAQ' anonymous and one of the statement mentioned that shipment of the effect rolling only document 390 and the only meaning of this is that the value of US $ 390 per MT.M/s. R.R. Mewani & Co. had also confirmed that the price normally varies from US $ 450 to 465 per MT. Accordingly, the learned Collector had order that the value to be adopted was US $ 465 per MT. He had ordered the confiscation of the goods under Section 111 of the Customs Act, 1962 and had given option to M/s. Prabhat General Terpene Industries Pvt. Ltd., M/s. Associated Traders, M/s. Sarvodaya Resin Works to redeem the goods on payment of Rs. 2,65,000/-, Rs. 2,65,000/- and Rs. 1,60,000/-. He had also imposed a penalty of Rs. 1,30,000/- on Prabhat General Terpene Industries, 1,30,000/- on M/s. Associated Traders and Rs. 80,000/- on Sarvodaya Resin Works and 1,00,000/- on M/s. Appollo International, the indenting agent and the duty to be recovered on the enhanced value @ US $ 465 CIF per MT. Being aggrieved from the aforesaid order the appellants have come in appeal before the Tribunal. Shri A.K.S. Bedi, the learned Advocate has appeared on behalf of the appellants. He has reiterated the contentions made in the appeal memo. He has stated that Gum Rosin imported by the appellants i.e. M/s.

Associated Traders, Sarvodaya. Resin Works and Prabhat General Terpenes India Pvt. Ltd., is used in the manufacture of various artificial or syntehtic resins and plastic material. The imports had taken place in October, 1986. The appellants had declared the value of US $ 365 whereas the revenue has assessed the same US $ 465 per MT. The appellants had declared the Gum Rosin 'FAQ' grade and the revenue says it is 'WW grade as per ISI specification. Shri A.K.S. Bedi, the learned Advocate stated that paler is the gum rosin, the quality will be superior. He has referred to the test reports which appears on page-15 & 16 of the paper book. In the Sarvodaya Resin Works on the test memo it is mentioned that it has got characteristic similar to pale type,'WG' grade resin mentioned in ISI. On page 16 vide its report dated 9th December, 1986 vide L.R.No. 1146-C dated 10th November, 1986 and 1119-C dated 7th November, 1986 both the samples had characteristic similar to pale type 'WG' grade ISI. He has also referred to the statement of Shri H.S. Saigal and has pleaded that the onus is on department to prove the mis-declaration of the goods and under valuation and the revenue had not discharged the same. In support of his argument he has referred to the following judgments:-Tara Art Printers, New Delhi v. Collector of Customs, Bombay - 1985 (20) E.L.T. 358 (Tribunal) 2. Super Fastners, Marwana v. Collr. of Cus., Bombay - 1984 E.C.R. 443 (Cegat) Shri A.K.S. Bedi, the learned Advocate has argued that the evidence on which the revenue has relied is not sufficient enough and the Saigal's statement is contrary. The statement of 3rd April is incriminatory and the retest report is 'WG' grade. Shri Bedi stated that no reliance should be placed on telexes. He has pleaded that the value declared by the appellant is correct. The same should be accepted. Alternatively pleaded that the fines and penalties were highly excessive. He has pleaded for the acceptance of the appeals.

3. Shri R.D. Sarvana, the learned Advocate who has appeared on behalf of M/s. Appollo International stated that the penalty of Rs. 1,00,000/- is highly excessive. The appellant's premises were searched and there are 4 statements all from Shri H.S. Saigal and he did not receive any notice of hearing. He has also referred to a telex messages and also para 8 of the Order-in-Original. He has pleaded that no penalty is leviable and the order imposing penalty should be quashed.

4. Shri G.V. Naik, the learned JCDR who has appeared on behalf of the respondent relied on the chemical report. He has referred to page 13 of the paper book. He has pleaded that the goods are similar to ISI specifications and are pale in colour. He has pleaded that the re-test were done very carefully. He has relied on para No. 4 of the Order-in-Original which appears on page 15 of the paper book and has referred to the telexes. He has also referred to Mr. Saigal's statement on page-21 of the paper book. Mr. Saigal has stated in his statement under-invoicing. In support of his argument he has referred to the following judgments:- 1. Satellite Engineering Ltd. v. U.O.I. & Ors. - 1983 (14) E.L.T. 2177 (Bombay)Jain Exports (P) Ltd. v. Collector of Customs & Central Excise, Ahmedabad.

Shri G.V. Naik, the learned JCDR has argued that the penalty is imposed is reasonable and correct. Shri A.K.S. Bedi, the learned Advocate prayed for the deletion of fines and penalties and acceptance of the appeals.

5. We have heard both the sides and have gone through the facts and circumstances of the case. It is not disputed that the appellants had imported Gum Rosin. The issue to be decided is whether the Gum rosin imported by the appellants is of FAQ grade Indonesian Origin or 'WW grade as per ISI specification. We have also perused the test reports appearing on pages 15 and 16 of the paper book. The relevant extracts of the same are reproduced below:-

"Sample is Rosin (Gum Rosin) in the form of pale small bristle, lumps and power. It has got characteristic similar to pale type, WG grade, rosin mentioned in ISI." "Both the sample of Gum Rosin (Lab. No. 1146-C/10-11-1986 & 1119-C/7-11-1986) have been retested and found to have the following physic-chemical properties.(i) Both the samples are in the form of the pale coloured bristle smalllumps with samll amount of power.

As Lovribond US Rosin Standard sample and Gardner colour disc are not available in the laboratory it is not possible to determine the exact grade of Rosin here as per I.S.I. 553.1984. Lovibond colour value of the sample were determined as per I.S.I. 553.1969. Both the samples have got characteristic similar to pale type G.G. grade of I.S.I." We have also gone through the ISI 553/1984 specification as per para 3.2 grades of rosin from I.S.I. 553-1984 (para-5) is reproduced below:- "3.2 Grades - There shall be a total of 15 colour grades under 4 types of the material, the colour standards being approximately equivalent to Gardner Colour Values as given herein below: A simple perusal of the chemical exam, report with the I.S.I, standard will show that the goods imported are 'WW' grade and not 'FAQ' grade as declared by the appellants in the Bill of Entries. Now coming on valuation aspect we would like to observe that the appellants had declared the value at US $ 390/- CIF for 'FAQ' grade type of gum rosin.

The telexes from the file marked 'Appollo 8 & appollo 7, are reproduced below:-"At page 206: "NEW ORDER 180 MT (10 FCL) FAQ WW GRADE SEPT PER NOL NEED YR FULL TLX LCIMMDLYAt page 173: "AWTG DSUD BAL ORDERS. ALSO FR GFCL WW/FAQ GRADE SHIPMT NX WEEK CAN GIVE 3At page 164: "5 FCL GUM ROSIN WW/FAQ GRADE USD 480 240 KG. PKG TTL 90 MT CAN SHIP ON NEPTUNEAt page 122: "GUM ROSIN 'IS' GRADE (SIMILAR TO 'N' GRADE) 500 M/T AT USD 387 FOR INDONESIANAt page 101: "OFFERING GUM ROSIN FAQ/IS GRADE INDONESIAN ORIGIN PACKED IN 30 KGS NETT PERAt page 100: "PLEASE INFM BBAY PARTIES NAMES N BANKERS FAQ MUST 450 NOW DOCMT THRUAt page 61: "RE UR TLX FAQ SHIP ONLY IF DOCMT 390. RAMMURTHYINFD ON PHONE THAT HELOPENINGAt page 60: "DEST. 3 CONT OF 17.5 FAQ TO BBY 1 FOR ONE CONT PL. QT USD 450 CNF MADRAS IS TO SHREEPage 93: V HV SOLD TO DAJODWAL 220 MT T OIL

SUBJECT TO APVL OF 1ST LOT AT USD 585 MT PLUS 6. A thorough reading of the telexes shows that page 100 of appollo 8 telex clearly show that the foreign supplier wants the indentor to inform Bombay parties name and Bankers and state that FAQ must be 450 and documents through Bank. In a statement recorded on 8-4-1987 Shri H.S. Saigal stated that being questioned that if real price of the declared goods in the relative Bills of Entry is US $ 460 PMT as against US $ 390 per MT C & F, as to how the difference between the invoice price and actual price was being adjusted, Shri Saigal has stated as under: "I want to state that according to my knowledge the importers were getting his amount directly with the suppliers. I have not dealt with any payments. My role was restricted to booking order. 1 am receiving my commission directly from the suppliers." In Appollo International M/s. R.R. Mewani Co. one of the leading indenting agent of Gum Rosin of Indonesian origin vide their letter No.6075 dated 11th December, 1986 had confirmed that the Department of Forestry, Government of Indonesia offers only Gum rosin 'WW' grade and the price normally varies between US $ 450/- to $ 465/- per MT and during the material period gum rosin grade was imported. The learned Collector had observed that during the period that 'WW' grade was imported and cleared at the US $ 465/- per MT vide receipt dated 18th January, 1986 and No. 166A/EXP/86 dated 4th October, 1986 Bill of Entry No. 2191 dated 30th September, 1986. Accordingly we are of the view that there was undervaluation of the goods imported by the appellants.

The learned Advocate's contention that there was no sufficient evidence is not acceptable. The judgments cited by the learned Advocate do not help him. The Tribunal in the case of Macneill & Magor Limited, Calcutta v. Collector of Customs, Calcutta reported in 1987 (28) E.L.T.318 (Tribunal) had held that "When the Bill of Entry or the declaration appended thereto or Section lll(m) speak of 'value', it has to be the value as defined in the Customs Act, i.e. in Section 2(41) thereof, and not the invoice price if such price is different from the 'value' (the price ordinarily charged). There is no point in asking the importer to declare only the invoice price because the invoice is even otherwise required to be annexed to the Bill of Entry under Section 46(4) and the Customs Assessing Officer could ascertain the invoice price from the invoice itself. No doubt, the Customs Officer is independently required to examine the goods and to determine their value and the duty leviable thereon under Section 17. But that does not mean that the importer has not to declare the value, as defined, in the Bill of Entry. If that were so, the amendment made in 1973 to Section 111 (m) regarding mis-declaration of value would be rendered nugatory." The Hon'ble Bombay H. C. in the case of Satellite Engg. Ltd. v. U.O.I. & Others reported in 1983 (14) E.L.T. 2177 (Bombay) had held that" If the conclusion arrived at by the authorities in regard to under-valuation of the goods was on the basis of two quotations sent by the exporters, the names of whom were not disclosed to the petitioners, it cannot be said that the non-disclosure of such names caused any hardship or prejudice to the peititioner because it was always open for him to establish by the leading evidence that the quotations sent by the exporters was not the true price." 7. Now coming to the fine and penalties we would like to observe that the goods were imported in the year 1986 and now it is 1989. The appellants must have suffered a lot. The respondents while imposing the fine and penalties has not given any basis as to the levy of the same.

There is also no calculation of expected margin of profit by the appellants. The particulars of the appellants' Bill of Entry wise declared, value, assessed value, difference in value, duty sought to be evaded, fine in lieu of confiscation and penalty are as under:-Sl Bill of Entry for Qty. & CIF Value Assessed ValueNo. warehousing No.1.

2357/66 90 M.T. Rs.4,53,228 Rs. 5,37,2272.

2357/65 90M.T. Rs. 5,37,227 Rs.4,53,2283.

2508/163 54 M.T. Rs. 3,22,336 Rs.2,71,776Difference in Duty sought to Fine in lieu of confiscation Penaltyvalue evaded A simple look at the above chart will show that the total duty sought to be evaded is Rs. 1,19,750/- + 1,19,750/- + Rs. 72,080/- totaling Rs. 3,11,580/- and the fine in lieu of confiscation is at Rs. 2,65,000/- + Rs. 2,65,000/- + Rs. 1,60,000/- totalling Rs. 6,90,000/- and penalty at Rs. 3,40,000/-. The fine and penalties imposed are more than 3 times of the duty sought to be evaded. Hon'ble Supreme Court in the case of Arvind Mohan Sinha v. Amulya Kumar Biswas reported in AIR 1974 (S.C.) 1818 had held that while imposing penalty the Court or the quasi judicial authority must look into the gravity of the offence. The broad principle that punishment must be proportioned to the offence is or ought to be of universal application save where the statute bars the exercise or judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith.

Para No. 10 from the said judgment is reproduced below:- "We are unable to accept the appellant's contention that the Probation of Offenders Act can have no application to offences consisting of the contravention of the Customs Act or the 'Gold Control' Rule contained in part XII-A of the Defence of India Rules, 1962. True, that these offences are fundamentally of a different genre and are calculated to involve consequences of a far-reaching character as compared with offences under the general law of Crimes.

These are mostly economic offences which inconceivable cases may pose a grave threat to the economy and the security of the country.

But every contravention of the Customs Act or the 'Gold Control' Rules cannot, without more, be assumed to be fraught with consequences of national dimensions. The broad principle that punishment must proportioned to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith. The words of Section 4(1) of the Probation of Offenders Act are wide and would evidently include offences under the Customs Act and the Gold Control Rules." 8. In the matters before us the goods are under detention. The Tribunal in the case of Muddeeresware Mining Industries Co., Bangalore v.Collector of Customs, Bangalore, in appeal no. C/3531/87-A, Order No.197/88-A, dated 9th March, 1988 = 1989(39) ELT 630 (Tri.) had reduced the redemption fine from Rs. 5,00,000/- to Rs. 25,000/- on the ground that the machine on its importation had remained under detention for well over a year incurring port demurrage. Para 8 from the said judgment is reproduced below:- "8. Since the goods are liable to confiscation, the appellants were liable to a penalty under Section 112 as well. The impugned order imposing fine in lieu of confiscation and penalty is legally quite in order. However, considering the fact that the machine, on its importation, has remained under detention for well over a year, incurring port demurrage, we feel that some reduction in fine and penalty is called for. Considering all facts and circumstances, including the higher amount of depreciation allowed by us, we reduce the redemption fine from Rs. 5 lakhs to Rs. 25,000/- (Rupees twenty five thousnad only) and the penalty from Rs. 2 lakhs to Rs. 10,000/- (Rupees ten thousand only)."M/s. Delhi Plastics v. Collector of Customs, Delhi 360. Keeping in view the judgement of the Hon'ble Supreme Court mentioned above and the earlier judgments of the Tribunal we are of the view that the levy of the same is fully justified to meet the ends of justice we reduce the fine and penalties. In the case of M/s. Prabhat General Turpene we reduce the fine from Rs. 2,65,000/- to Rs. 1,32,500/- and penalty from Rs. 1,30,000/- to Rs. 65,000/- and in the case of Associated Traders we reduce the fine in lieu of confiscation from Rs. 2,65,000/- to Rs. 1,32,500/- and penalty from Rs. 1,30,000/- to Rs. 65,000/-. Whereas in the case of Sarvodya Resin Works we reduce the fine from Rs. 1,60,000/- to Rs. 80,000/- and penalty from Rs. 80,000/- to Rs. 40,000/-. We do not accept the arguments of Shri R.D.Suvarna, the learned Advocate who had appeared on behalf of the Appollo International that there was no justification for the levy of penalty of Rs. 1,00,000/-. The appellant in this case is the indenting agent had full role in the importation. To meet the ends of justice we reduce the penalty from Rs. 1,00,000/- to Rs. 50,000/-, except for the modifications made above the appeals are otherwise rejected. The Revenue Authorities are directed to give consequential effect to this order.