

**Deepak Electronics Vs. Collector of Customs**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Aug-09-1994

**Reported in :** (1994)(73)ELT817TriDel

**Appellant :** Deepak Electronics

**Respondent :** Collector of Customs

**Judgement :**

1. These two appeals arise out of a common order dated 5-2-1992 passed by the Collector of Customs, Bombay wherein the Collector had enhanced the declared value. The Collector had ordered the CIF value of the imported goods in Bill of Entry No. 1391/108 dated 24-7-1991 for 48 cartons to be enhanced to Rs. 1,38,000.00 as against declared CIF value of Rs. 82,102/-. Likewise, the Collector ordered CIF value in respect of another Bill of Entry No. 1149/75 dated 12-6-1991 where the clearance had already been taken to be enhanced to Rs. 1,43,000/- as against declared CIF value of Rs. 84,942.00. He, further, ordered confiscation of the goods for misdeclaration under Section 111(m) of the Customs Act, 1962. A redemption fine of Rs. 70,000/- was levied.

He, further, imposed a total penalty of Rs. 1,25,000/- on the appellants, M/s. Deepak Electronics. A further penalty totalling Rs. 20,000/- was imposed on the appellant, Shri Parmod B. Agarwal.

2. The brief facts are that an intelligence was gathered by the Directorate of Revenue Intelligence that appellants, M/s. Deepak Electronics are importing video

magnetic tape on jumbo rolls under DEEC Scheme from Hongkong and that the goods have been misdeclared in respect of their description, quantity and value. A discreet watch was kept on Bill of Entry No. 1391/108 dated 24-7-1991 covering import of 48 cartons containing 48 rolls of video magnetic tape on jumbo rolls of length 10,000 ft. each roll of width 123/4 inches which have been filed in the Bombay Customs House. The cartons were examined in the presence of representative of the importers M/s. Mirah Shipping Services. The invoice value declared for the goods was Hongkong dollar 625 per roll CIF Bombay, but it was observed that video magnetic tape on jumbo rolls of the same country of origin had been assessed at the Customs House at higher value of Hongkong dollar 1050 per roll CIF. The matter was, therefore, taken up for investigation by the DRI. Statements were recorded from the persons concerned by the DRI including Pramod B. Agarwal. In his statement dated 10-10-1991, Shri Parmod B. Agarwal submitted, inter alia, that he looked after the work of placing order and clearance of exports, finance, etc. of the two firms, M/s. Deepak Electronics and another M/s. Zoom Films Ltd. He said that they had imported 48 rolls of video magnetic tape on jumbo rolls of Hongkong origin for Deepak Electronics. He said that the total value of video tapes on jumbo rolls imported in the name of M/s. Deepak Electronics of 4,80,000 ft. is Hongkong dollar 60,000 as against the total value of Hongkong dollar 30,000 declared in the relevant Bill of Entry i.e.

Hongkong dollar 1250 GIF for each roll of 10,000 ft. Following further investigation, show cause notice was issued dated 26-12-1991 in which it was alleged that M/s. Deepak Electronics had already cleared one consignment of 50 cartons of jumbo rolls of 10,000 ft. and width 123/4 inches for a total GIF value Hongkong dollars 31,250 amounting to Rs. 84,942.00. In a previous consignment vide Bill of Entry No. 1149/75, dated 12-6-1991, it appeared to the Customs House that the goods, in question, were also sought to be cleared under DEEC Scheme with exemption similarly for 48 cartons. The show cause notice noted that similar consignment of jumbo rolls of 10,000 ft. per roll of the same country of origin had been noticed at the Customs House at higher price of Hongkong dollar 1050 per roll CIF. Further, the show cause notice alleged that from the same manufacturer to M/s. Acme Magnetics, the Customs House noticed import of jumbo rolls at higher price by another party at Hongkong dollar 1050 per roll. On considering the reply and

hearing the appellants in the matter, the Collector confiscated the goods and imposed a penalty on the appellants, herein, as already stated above.

3. Shri G.L. Rawal, Id. Counsel appearing for the appellants, contended that the department is relying upon three bills of entry but in their reply to show cause notice, the appellants have clearly stated that the goods covered by the Bills of Entry, relied upon by the department, are not identical goods. They differed in weight from the present consignment, the manufacturer is different and they relate to a period six months prior to the present import. The width is also not comparable. The Id. Counsel, further, pointed out that according to the definition in Rule 2 of the Customs Valuation Rules, 1988, identical goods means imported goods which are same in all respects including physical characteristics, quality and reputation as the goods being valued. Also similar goods have been defined in Rule 2(e) in the same Rules. In the present case, the Collector has applied Rule 5 of the Valuation Rules relating to transaction value of identical goods.

However, the Id. Counsel urged that the goods are not at all identical and the burden of proving valuation on the basis of identical goods is on the department. Relying upon the case law reported in 1992 (62) E.L.T. 528 in the case of Sandip Agarwal v. Collector of Customs, the Id. Counsel argued that Rule 4 of the Valuation Rules relating to transaction value is the same value for imported goods and the other Rules cannot be invoked by the department unless this Rule is shown to be not applicable to a consignment. The Id. Counsel, further, relied upon the Tribunal's decision in the case of Laxmi Colour Lab v. Collector of Customs reported in 1992 (62) E.L.T. 613 (Tri.) that evidence of the comparable imports more than six months in time interval cannot be a sound basis for basing assessable value. It was, further, urged by the Id. Counsel that the quotation cannot form a sound basis and in the present case all the quotations relating to imports subsequent to that of the appellants, even the quotations do not give all the particulars. The decision of the Tribunal in the case of Punjab Niryat Ayat Pvt. Ltd. v. Collector of Customs reported in 1992 (58) E.L.T. 340 (Tribunal) was cited to say that the goods should be exactly similar. It was further, argued that there can be no proceedings against the goods which have been already cleared. In this case the department is seeking to enhance the value of goods in a previous

consignment which have been cleared for home consumption. The Id. Counsel in this regard relied upon the Bombay High Court judgment in the case of Union of India v. Popular Dye Chem reported in 1987 (28) E.L.T. 26 and also the following case law :Khemka Travels v. Collector of Customs, Bombay.

(ii) 1987 (31) E.L.T. 236 - Suntex Pvt. Ltd. v. Collector of Customs, Cochin.

(iii) 1988 (38) E.L.T. 105 - Collector of Customs v. Mansingka Brothers.

and it was also argued by the Id. Counsel that these decisions clearly laid down that against an order under Section 47 by the proper officer permitting clearance for home consumption, there could be only a review order as provided for under the law and the matter cannot be adjudicated by the Collector by issuing a show cause notice. It was, further, argued that the statement on 10-10-1991 of the appellant Parmod B. Agarwal cannot be relied upon by the department because on 11-10-1991, he had retracted therefrom. It was, further, contended that Shri Agarwal had no link with the Deepak Electronics and the Collector himself in the order is not relying upon the statement for the value arrived at by him.

4. Shri Prabhat Kumar, Id. S.D.R. appearing for the department contended that it has been laid down by the Delhi High Court in the case of Jain Shudh Vanaspati Ltd. and Anr. v. Union of India and Ors.

reported in 1982 (10) E.L.T. 43 (Del.) that an order can be reversed where the department discovers fraud or suppression. In the present case, certain facts had come to light after the release of the material consignment regarding valuation of the goods which has been set out in the show cause notice. These facts were not available at the time the proper officer passed the order for clearance under Section 47. The Id.SDR urged that the question of review does not arise in this case and fresh adjudication proceedings will be justified and he relied upon the case law reported in 1993 (68) E.L.T. 289 (Cal.) in the case of Chandrakant Seth v. Collr. of Customs, and in the case of Madanlal Steel Industries Ltd. v. Union of India reported in 1991 (56) E.L.T.705 (Mad.). In this judgment, the Id. S.D.R. pointed out that the High Court has considered the Bombay High Court decision in the case of Popular Dychem (supra). It was submitted by the Id. SDR that the

provision of confiscability under Section 111(m) applies to goods already cleared regardless of the fact that such clearance was under Section 47 by a proper officer. Such goods can also be confiscated. The Id. SDR, further, argued that it is well settled that when the valuation of the goods, as declared in the Bill of Entry, is not found to be correct, applying Rules 5 to 8 of the Valuation Rules is in order and also relied upon the following case law :Trimurti Enterprises v. Collector of Customs.India Infusion Ltd. v. Collector of Customs.

Further, it was urged that quotation of comparable goods is valid basis for assessment as laid down in 1990 (49) E.L.T. 640 (S.C.). He cited the following case law: (i) Satellite Engineering Ltd. and Anr. v. Union of India and Ors.

reported in 1987 (31) E.L.T. 356 (Bom.)UNISEF Electronics India Ltd. v. Collector of Customs -1990 (49) E.L.T. 380 (Tribunal).

Another argument put forth by the Id. S.D.R. says that transaction value, as declared, need not always be accepted and it can be discarded under certain circumstances for which he relied upon the case law reported in 1993 (49) ECR 493 (Tribunal) in the case of Veekay Fotokad India (P) Ltd. v. Collector of Customs, New Delhi. It was also urged that a perusal of the notes to Rules 5 to 8 of the Valuation Rules would indicate that these provide flexibility in determining the assessable value. The Id. S.D.R. pointed out that video magnetic tape in jumbo rolls are of standard width and that a difference of few mm cannot be material as also difference in gross weight of the goods.

Among the Bills of Entry, relied upon by the department, there is a Bill of Entry which is contemporaneous and some which are prior to the present import. Hence, the department has shown by evidence that the price prior and subsequent to the present import have been higher. On the difference in time interval between the import, the Id. S.D.R.cited the case of Hind Packaging Industry v. Collector of Customs, Calcutta reported in 1989 (40) E.L.T. 168 (Tri.) and the case of Sarinsons v. Collector of Customs reported in 1993 (67) E.L.T. 418 (Tri.). He also cited certain instances where the Tribunal had accepted invoices of longer interval than four months.

5. The submissions made by both the sides have been carefully considered. Taking up, firstly, the question whether the application of Rule 5 of the Valuation Rules by the Collector in this case relating to transaction value of identical goods, the contention of the appellants, herein, that the goods are not identical as defined in Rule 2(c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The definition in the Rule reads as follows: (i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods; (ii) produced in the country in which the goods being valued were produced; and (iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person." 6. In the present case, admittedly, the goods imported are video magnetic tape in jumbo rolls of 10,000 ft. and width of 123/4 inches.

The invoice for identical goods imported at about same time, by Hari Ram Gobind Ram is also the same. There is no difference in physical characteristics of the goods. It is also seen from the record that the identical goods taken for consideration are also produced by the same manufacturer, namely, Acme Magnetic Ltd. and from the same country, namely, Hong Kong. In such a context, the difference pointed out in the width as between 330 mm and 123/4 inches is minor. The transaction value of identical goods of the import by Hariram Gobindram is covered by invoice dated 19-6-1991 and it is also for the same goods of 10,000 ft. and width 330 mm. The present imports were effected in June and July the same year. As regards the time of import, the difference is not significant and the Tribunal in the case of Aarkeyess Imports Corporation v. Collector of Customs -1988 (37) E.L.T. 118 (Tribunal) held that for good reasons even older price but everyone or two years are not irrelevant for purposes of valuation. The Bill of Entries relied on by the Department, therefore, acquire relevance. The department has, further, sought to rely upon the quotation for these identical goods obtained by M/s. Toshniwal. Although the appellants have contended that these quotations are subsequent to the import, the difference in timing is not very much as these quotations are of November, 1991 where the imports are June and July, 1991. The value of the identical goods both lengthwise and widthwise when worked out is the same as in the case of identical transaction

value for the goods imported by Hariram Gobindram. In both these periods, the price of the goods is definitely at a higher level than that declared by the appellants, herein. The appellants have contended that the quotation should not form the basis of determination of value, but in this case it is not only on the quotation that the determination of value has been based and the quotation in this case only goes to support the department's case that the value of the goods is higher and should be fixed at Hong Kong dollar 1050 per roll. Therefore, it is seen that there is an evidence on record to justify the Collector directing the value declared as transaction value under Rule 4 and to fix the assessable value by applying Rule 5 of the Valuation Rules by taking the transaction value of identical goods. Another contention of the appellants, herein, has been that in respect of the consignment which has already been cleared by the proper officer under Section 47 of the Customs Act, there could be no adjudication under the Act and the order of the proper officer under that Section could be reviewed only by the provisions for that purpose in the Act. This contention is unacceptable because the very same contention had been raised before the Division Bench of the Madras High Court - 1992 (38) ECC 325 (Mad) in the case of Madanlal Steel Industries Ltd. v. Union of India. In that case, the High Court has also considered the decision of Delhi High Court in Jain Shudh Vanaspati v. Union of India -1982 (10) E.L.T. 43 and Union of India v. Popular Dyechem - 1990 (26) ECC 334 of the Bombay High Court which have been relied upon by the appellants, herein. The Madras High Court has also noted the decision of this Tribunal in the case of R.K.Industries v. Collector of Customs & Central Excise "Both the Bombay High Court judgment in the case of Union of India v. Popular Dyechem -1990 (26) ECC 334 (Bom.); 1987 (28) E.L.T. 63 and the Delhi High Court judgment in the case of Jain Shudh Vanaspati Ltd. and Ors. v. Union of India and Ors. 1982 (10) E.L.T. 43, on their peculiar facts, are good for taking notice of the order under Section 47 of the Act and saying accordingly that unless that order was set aside, no proceeding for confiscation should have been taken. It is difficult, however, to accept this as a law, as once there is a clearance under Section 47 and/or Section 51 of the Act is ordered, unless that order is set aside, the proper officer cannot act on his reasonable belief under Sections 110, 111 or 113 of the Act. The Calcutta Full Bench judgment in the case of Euresion Equipments & Chemicals v. Collector of

Customs (AIR 1980 Calcutta 188); (CFS (Cal) 159 (FB) has, in substance, pronounced that such proper officer's satisfaction for confiscation proceedings shall remain unaffected by the order of the proper officer permitting the clearance of goods under Section 51 of the belief that goods have been improperly imported or exported and such belief being in relation to the goods and in rem, it will not be correct to read in the orders under Section 47 or Section 51 of the Act any inhibition upon the jurisdiction of the proper officer to act under Sections 110, 111, and 113 of the Act." This decision of the Division Bench of the Madras High Court was, further, followed by the same High Court in another case of MM. Joyce Industries v. Union of India -1992 (38) E.C.C. 339.

7. In view of the above, the contentions of the appellants in this regard are not sustainable.

8. As regards the penalty on the appellant, Parmod Agarwal, it has been brought out in evidence that he played a dominant role in arranging for the import and clearance thereof and as such the penalty on him is warranted and the quantum thereof is also not very high and the penalty on the firm is also reasonable in the circumstances of the case. In the result, there is no need to interfere with the order passed by the Collector and the appeals are rejected.

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