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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-23-1994

Reported in : (1994)(74)ELT49TriDel

Appellant : Nitisoya Diamond Tools

Respondent : Collector of Customs

Judgement :

1. This appeal is directed against order-in-appeal No. 118-C/DLH/92, dated 11-8-1992 passed by the Collector (Appeals), New Delhi. By this order, the Id. Collector has confirmed the classification of the imported product, 'Natural Graphite' weighing 4986 kgs. of declared FOB value at US \$ 9526/-, under Heading 3801.90 of CTA. The claim for classification under Heading 2504.90 was rejected on the basis that the goods have undergone processes in excess of the ones mentioned in Note I of Chapter 25. The next point of dispute raised by the deptt. was with regard to the valuation of the goods. The value was loaded by department in accordance with an invoice from M/s. Le Carbone Lorraine, France, a manufacturer of graphite, bearing invoice No. 809981, dated 12-7-1991. The importer has contended that they had imported a consignment of Japanese origin from M/s. KAZ International (P) Ltd., Singapore under the supplier's invoice No. KSZ/92/909, dated 2-4-1992 against contract dated 10-3-1992 between the appellants and the foreign supplier. They disputed the reliance by department on the invoice dated 12-7-1991 as it related to the goods of French origin; whereas the impugned goods were of Japanese supplier. It was also pleaded by them that

the invoice dated 12-7-1991 was only of 360 kgs. whereas quantity imported by them was 4986 kgs, thus 12 times more quantity than the one mentioned in the invoice relied by the department. Therefore, they submitted that the invoice relied by the department cannot be said to be related to import at or about the same time as the appellants' goods-. They had further submitted that Rule 6 of the Customs Valuation Rules, 1988 stipulated that the value of the imported goods shall be the transaction value of similar goods sold for export to India and imported at about the same time as the goods being valued. They also submitted that the department had not alleged that there had been any payment either directly or indirectly in respect of the goods over and above the invoice value, that the invoice transaction value has therefore to be accepted for the purpose of assessment. They also relied on the invoice dated 2-4-1992 of M/s. Kaz International (P) Ltd. 2. The Id. Collector after a careful consideration of the plea has rejected both the submissions on classification as well as valuation.

The Id. Collector has held that merely because the goods are to be grooved and cut further to the required sizes, it does not mean that the impugned goods are natural graphite as claimed by the importer. The Id. Collector has accepted the Chemical Examiner's report which states "The sample is in the form of a cut piece of black coloured block.

It is graphite having a specific gravity of 2.03 and purity 91.3%.

NOTE : As per HSN explanatory note under Heading 25.04 natural GRAPHITE is stated to have a specific gravity varying between 1.9 and 2.6, the carbon content of the purest grade ranges from 90 to 96% whereas the specific gravity of Artificial graphite is stated to be about 1.5 to 1.6 under Heading 38.01".

The Id. Collector on the point of valuation has held that the importer had not submitted the invoice of the manufacturer. The invoice dated 2-4-1992 submitted by them is from M/s. Kaz International and has noted that nothing prevented them to produce the manufacturer's invoice. He has held that the price difference between the two invoices is substantial, in as much as their value works out to Rs. 76 per K.G. CIF whereas in case of French invoice it works out to Rs. 128 per K.G. and that this substantial difference has not been explained by them. He has held

that their contentions regarding different origin, different suppliers, different time of importation become only of academic interest and irrelevant for explaining the aforesaid substantial difference in the invoice price. Therefore, the Id. Collector has held that in the absence of any corroborative evidence such as manufacturer's price, the case does not present the correct transaction value. He has accepted the appellant's contention with regard to Rule 6(2) read with Rule 5(3) but has held that it could be so in the case of genuine transaction values. However, in this case the transaction value claimed by the appellants is clearly not a genuine value since the substantial difference in the two invoices has not been explained by the appellants. He has also noted that the freight paid for the goods is more than the value of the goods.

3. We have heard Id. Advocate Shri L.P. Asthana and Id. SDR Shri Sharad Bhansali. Reiterating the grounds of appeal and the submissions made by the appellants before the Collector, the Id. Advocate submitted that the classification of the impugned goods will not be under Chapter 38 but would be rightly classifiable only under Chapter 25 in view of the fact that the goods are in natural state. He submitted that Chapter 28 would apply only if the goods are artificial graphite and Note 1 of Chapter 38 clearly excludes natural graphite. He submitted that there is no process of purification carried on after mining and hence the classification would clearly be under Chapter 35. He also draws support from the Chemical Examiner's report. Further arguing on the valuation point, the Id. Advocate submitted that the invoice dated 12th July 1991 relied by the department is of a French origin and not of comparable goods. He submitted that the three bills of entries relied by the appellants should have been accepted. He submitted that their goods are Japanese origin and the rate of contract with the departmental invoice being different, the department was not justified in rejecting their invoice and accepting the invoice of the French Supplier. The Advocate further submitted that the burden of proof for undervaluation is always on the department and the same has not been discharged. He also submitted that there is no special relationship between the party and the supplier and that there is no allegation also of suppression, mis-declaration and mis-representation. In that view of the matter, he submitted that Rule 6(2) of the Valuation Rules is not applicable. The Id. Counsel relied on the definition of "Identical goods" appearing in Rule 2 of the

Valuation Rules and also that of the definition of 'similar goods' and submitted that Rules 5 & 6 cannot be applied in the light of these definitions. He submitted that there is no evidence produced by the department to reject the transaction value under Rule 4. He submitted that the freight element should not be a cause to suspect the transaction value, as Rule 9 permits such a situation. He submitted that as per Rule 11, if there is a dispute between the department and the Importer then it should be resolved in terms of Section 14. However, he submitted that Section 14 should not be read in isolation to the advantage of the department. The Id. Counsel also relied on the following rulings : Punjab Niryat Aayat Pvt. Ltd. v. Collector of Customs - 1992 (58) E.L.T. 311 Elite Packaging Industries v. Collector of Customs & Central Excise Sawhney Export House (P) Ltd. v. Collector of Customs - 1992 (60) E.L.T. 327 Sandip Agarwal v. Collector of Customs 4. Id. SDR submitted that the product is a preparation of graphite and that it is not a natural graphite. He submitted that if it is a block then it goes out of Chapter 25. He submitted that once the blocks are cut into small blocks then they will no longer be in crude form and hence they have to be excluded from Chapter 25 in terms of Note 1. As regards the valuation, the Id. SDK submitted that the importer did not file the manufacturers' invoice despite requests by department and therefore the department was justified in resorting to Rule 8.

5. We have carefully considered the submissions made by both the sides and have perused the impugned order and relevant records. As regards the classification of the impugned goods, the contention of the appellant is well sustained. The reason being that Section V of the Customs Tariff deals with mineral products, Note 1 of Chapter 25 clearly stipulates that it covers only products which are in the crude state and the note further submits that even if the product has been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, grounded, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physical processes (except crystallisation) and despite these processes, the product continues to fall within Chapter 25. However, the exception is that the product should not be roasted, calcined or obtained by mixing or subjected to processing beyond that mentioned in each heading. It follows from the Note 1 that the processes which are carried out should be only for

eliminating the impurities without changing the structure of the product. Thus, so long as the product is a natural graphite and after mining, for the purpose of transportation, some processes are carried out for the purpose of eliminating the impurities and such other process as noted in Note 1, even then the product would fall under Chapter 25. In this case the Chemical Examiner's report clearly states that the product is in the form of a cut piece black coloured block and that it is a graphite. The Chemical Examiner has also noted from HSN Explanatory Note about the specific gravity varying in natural and artificial graphite. In view of the goods being natural graphite, which is not being disputed by the department, the question of its being eliminated from Chapter 25 does not arise. Further Chapter 38 deals with "Miscellaneous Chemical Products" and also those which do not have a separate chemically defined elements or compounds with the exception of Artificial graphite which falls under Heading No. 38.01. Therefore, the Heading 38.01 deals only with Artificial graphite. The present crudes are not artificial graphite and in that view of the matter, the classification adopted by the department under Chapter 38 is not well founded. The Id. Collector has also proceeded on the reasoning that merely because the goods are to be grooved and cut to further sizes, it does not mean that the impugned goods are natural graphite. In this context, he has relied on the appellant's own plea that the goods are to be further cut to the required sizes and grooved before use/and therefore has held the goods to be covered under Chapter 38. We are not impressed with the finding. We notice that Heading 2504.10 refers to natural graphite, in powder or in flakes. Therefore, it is seen that the natural graphite even if in powder form or in flakes is also classifiable under Heading 25.04. In that view of the matter, the reasoning adopted by the Id. Collector is not sustainable. Therefore, we uphold the importer's plea for classification of the product under Heading 2504.90.

We also note that the Hon'ble Supreme Court's rulings rendered in the case of Toshiba Anand Batteries Ltd. v. Collector of Customs as reported in 1991 (51) E.L.T. 200 also supports our view.

6. As regards the question of valuation, the Id. Collector has rejected the appellant's invoice on the ground that the difference between the invoice of the French supplier and that of the importer declared value is substantial, in as much

as the importer's value works out to Rs. 75/- per kg. whereas that in the French Invoice works out to Rs. 128/- per kg. He has also noted the importer's refusal to furnish the invoice despite reminders being given by the department. The Id. Advocate has submitted that the department has not produced evidence to show that the appellants had mis-declared their value and that, to accept an invoice of France, which is of a different country of origin and of a different date and quantity is not sustainable. The Id. Advocate has pointed out to the definition of "identical goods and similar goods" appearing in Rule 2 of Customs Valuation Rules, 1963 to buttress his point that the transaction value as per Rules 4, 5 & 6 be accepted in their case. He has also pointed out that the parties are not related and the transactions are genuine.

7. The Additional Collector in his order has invoked the provision of Rule 6 of the Customs Valuation Rules, 1988. She has justified enhancing the value on the basis of the invoice of M/s. Le Carbone, France. This rule relates to the value of goods similar with those being valued. For goods to be "similar" they have to be produced in the country in which the goods being valued were produced, as provided in Sub-rule 2A(ii) of the Rules. Since the comparison here is between goods stated to have been produced in Japan and those produced in France, the provisions of Rule 6 would not apply. The Collector (Appeals') reasoning in his order that since the value which has been declared by the importer is, "on the face of it a suspect transaction value", the appellant's contention regarding the application of Rule 5 is not acceptable, proceeds on the assumption, without any basis or evidence that the value declared is false. Both the Additional Collector and the Collector (Appeals) have, thus, in their orders, assumed what had to be established i.e. the value declared by the importer was false or in any case not acceptable under the law. These orders. therefore suffer from want of application of mind and hence are not sustainable. The value of the goods will have to be determined afresh on the basis of evidence available in accordance with the provisions of the Section 14 of the Act and the valuation rules.

8. In the result, the appeal is allowed to the extent that the classification of impugned goods is confirmed under sub-heading 2504.90 of the CET, the question of valuation is remanded to the original authority for de novo

consideration to be decided in the light of the observations made above and in accordance with the principles of natural justice.

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