

Supreme Electronics Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-06-1994

Reported in : (1994)LC600Tri(Delhi)

Appellant : Supreme Electronics

Respondent : Collector of Customs

Judgement :

1. M/s. Supreme Electronics, Ropar, Punjab, and M/s. Caditronics, Faridabad, Haryana, have filed separate appeals against the Order-in-Original dated 18-2-1992 of the Collector of Customs, Sahar Airport, Bombay. Both the appellants have also filed separate miscellaneous applications duly supported by affidavits for re-export of the goods. As both the appeals arise out of the common order they were heard together and are being disposed of by this common order.

2. M/s. Supreme Electronics ('S.E.' for short) and M/s. Caditronics ('CAD' for short) imported parts of video cassette recorders (VCR) from Singapore. M/s. CAD were not engaged in the manufacture of VCRs. M/s.

SE were also not registered for manufacture of VCRs. On examination, it was found that between them they had imported 2000 sets of complete VCR kits (minus some minor parts) in the form of assemblies and sub-assemblies which were in the nature of restricted items for import licensing purposes. It was alleged that the goods imported had been misdeclared and under-invoiced and that they had been imported without valid import licence. Under show cause notice dated

25-11-1991, M/s.

SE, M/s. CAD and others were show caused for confiscation of the goods, demand of proper customs duty on proper assessed value and imposition of penalty. The matter was adjudicated by the Collector of Customs, Sahar Airport, Bombay, who after discussing the description and value of different items ordered confiscation of the goods, re-determination of the assessable value, imposed redemption fine and levied penalties, as detailed in his Order-in-Original.

3. The matter was posted for hearing on 23-5-1994 and 24-5-1994 when Shri L.P. Asthana, Advocate appeared for the appellants. Shri Prabhat Kumar, SDR represented the respondent.

4. Shri L.P. Asthana, The learned Advocate stated that these were two appeals. Some items were common to both the appeals and that the supplementary show cause notice in the matter was issued together for both the parties. In the case of CAD, there were 9 consignments covered by 9 bills of entry, and the goods were components of VCRs. The goods were imported from Singapore and were of Sony and National brands. Sony was of Malaysia and National was of Japan. After issue of the show cause notice the appellants had approached the Bombay High Court. They had also filed a Miscellaneous Application for allowing re-export of the goods, which were still with the Customs. No remittance of foreign exchange has yet been made. In the meantime, the market situation has gone down. The Learned Advocate stated that there were no valid grounds to reject their invoice value and that the method adopted by the Revenue was not correct and that the value adopted by the customs was not consistent with the rules. In this connection, he relied upon the Tribunal's decision in the case of Punjab Niryat Aayat Private Limited v. Collector of Customs, 1992 (58) E.L.T. 340 (Tribunal). He challenged the expertise of the experts whose testimony has been relied upon by the department for rejecting their invoice value, without any reference to the cross-examination of those experts. The examination report was in conformity with the packing list. In support of his arguments, the learned Advocate relied upon the following decisions :-Siemens India Limited v. Collector of Customs - 1989 (42) E.L.T. 96 (Tribunal)Gold Plast India Pvt. Limited v. Collector of Customs -1991

(53) E.L.T. 147 (Tribunal) (3) Manjushree Minerals Limited v. Collector of Customs -1993 (68) E.L.T. 273 (Cal.) (4) Sushil Kumar Kayan v Assistant Collector of Customs -1993 (68) E.L.T. 537 (Cal.) (5) Ghanshyam Chejra v. Collector of Customs -1989 (44) E.L.T. 202 (Cal.) Polestar Electronics Pvt. Ltd. v. Collector of Customs, Airport -1988 (33) E.L.T. 373 (Tribunal) Sandip Agarwal v. Collector of Customs - 1992 (62) E.L.T. 528 (Cal.) Sawhney Export House Pvt. Ltd. v. Collector of Customs - 1992 (60) E.L.T. 327 (Tribunal) Honesty Traders v. Collector of Customs -1991 (55) E.L.T. 102 (Tribunal) Atco Industries Ltd. v. Collector of Customs - 1992 (57) E.L.T. 654 (Tribunal) As regards ITC angle it was stated that the department was relying on serial No. 176 of Appendix 2 Part-B which is a general residuary item and excludes items specified elsewhere. The licence produced by them covered the goods imported. In this connection, reliance was placed on the Calcutta High Court decision in the case of Collector of Customs, Calcutta v. Mitsun Electronics Works, 1987 (30) E.L.T. 345 (Calcutta).

There was no basis for confiscation and for imposition of penalty. In this connection, reference was made to the Supreme Court decision in the case of Akbar Badruddin Jiwani v. Collector of Customs -1990 (47) E.L.T. 161 (SC), and Hindustan Steel Limited v. State of Orissa - 1978 (2) E.L.T. (J 159) (SC). It was also submitted that the Order-in-Original did not cover all their arguments and submissions.

While coming to his conclusion regarding mis-declaration of description, under-declaration of value and violation of ITC policy, the learned Collector of Customs had not considered the evidence adduced by the appellants, although the said evidence was on record.

The learned Advocate, however, pleaded that the appellants were not for remanding the case but for re-export of the goods. In this connection, he relied on the Supreme Court decision in the case of MJ Exports Limited v. CEGAT - 1992 (60) E.L.T. 161 (SC). As an alternative, the learned Advocate submitted that if for any item any contravention was found to be established then the appropriate fine could be imposed and the goods allowed to be re-exported.

5. Shri Prabhat Kumar, the learned SDR referred to the valuation provisions and stated that the invoice value has been correctly rejected and the value has been enhanced correctly in accordance with the legal provisions. He mentioned that flexibility was provided in the rules. As observed by the Tribunal in the case of Lal Plastic Industries v. Collector of Customs, Bombay -1989 (40) E.L.T. 59 (Tribunal), in absence of evidence, the value was determinable on ad hoc basis according to best judgment. The appellants had not furnished full and accurate details. No catalogue was produced. No technical literature was made available, and as held by the Tribunal in a series of decisions the declared values were correctly rejected and the value determined on the principles as laid down in the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. In support of his arguments, the learned SDR referred to a number of decisions:-Universal Commercial Corporation v. Collector of Customs, Delhi -1994 (69) E.L.T. 150 (Tribunal)Kothari and Company v. Collector of Customs - 1989 (40) E.L.T. 155 (Tribunal)Polestar Electronics Pvt. Limited v. Collector of Customs, AirportPhotocopy Centre v. Collector of Customs - 1991 (56) E.L.T. 801 (Tribunal)Shiv Shakti Enterprises v. Collector of Customs - 1991 (52) E.L.T. 439 (Tribunal)Metal and Alloys Industries v. Collector of Customs -1989 (40) E.L.T. 207 (Tribunal) (7) Satellite Engineering Limited v. UOI-1983 (14) E.L.T. 2177 (Bom.) (8) Satellite Engineering Limited v. UOI -1987 (31) E.L.T. 356 (Bom.)East-African Traders v. Collector of Customs - 1992 (59) E.L.T. 314 (Tribunal)Pradeep Kedia v. Collector of Customs -1993 (67) E.L.T. 519 (Tribunal)Trimurthi Enterprises v. Collector of Customs - 1992 (59) E.L.T. 139 (Tribunal) (12) Atma Ram Agarwalla v. Collector of Customs - 1992 (60) E.L.T. 217 (Cal.) On ITC angle the learned SDR stated that the goods imported were assembly/sub-assembly of electronic goods and were rightly confiscated.

He stated that the question of mens rea was not relevant for liability to confiscation and penalty, as held by the Hon'ble Supreme Court in the case of Pine Chemical Suppliers v. Collector of Customs -1993 (67) E.L.T. 25 (SC).

6. in rejoinder, the learned Advocate submitted that the flexibility could not be stretched, and again pleaded for allowing re-export of the goods.

7. We have carefully gone through the facts and circumstances of the case and have given our due thought and consideration to the submissions made by both the sides.

8. M/s. 'S.E.' had imported 8 consignments of parts/components of VCRs and submitted 8 bills of entry for their clearance. M/s. 'CAD' had imported 9 consignments and submitted 9 bills of entry for their clearance. Between them, they had imported 2000 sets of VCRs. On examination of the goods a number of discrepancies were noted with regard to description. The invoices did not contain full description and the type of the goods imported. No manufacturer's invoice was furnished. On comparison with the invoices of contemporary imports, the imports of similar goods by other importers, and on the basis of the expert advice by panel of experts from the electronic industry, the goods were found to be under-invoiced and the value under-declared. The goods were found to be wrongly described/misstated in regard to sort, quality and value, with a view to evade payment of appropriate customs duty. With regard to import policy, the imports were found to be unauthorised. The appellants filed writ petition No. 2604 and 2608/91 in the Bombay High Court and in pursuance to the directions of the Hon'ble Bombay High Court a supplementary show cause notice was issued jointly to both the concerns. On detailed investigations, it was found that none of these concerns were engaged in the manufacture of VCRs; they were not registered/licenced either with the Directorate of Small Scale Industries or DGTD for undertaking the manufacture of VCRs. CAD had only an office at Faridabad while their factory was said to be at Sabarmati (Ahmedabad) with a L 4 licence. There also, no manufacturing of VCRs was taking place. They also did not have any knowledge and expertise of the import and manufacture of VCRs. It was also found that there were certain common features and common factors in the import by the two concerns. Imports appeared to have been effected under a common arrangement and pursuant to a common plan. The basic items were found fitted with various components and essential parts.

9. There is no correspondence with regard to the enquiries before import. It is stated that the import order was booked with the supplier on telephone. There is no follow-up by the importers on record. It is seen that the concerned parties had

visited Singapore to finalise the deal. In the proforma invoices there is no reference to any earlier correspondence, telephonic conversation or personal visit. The goods were shipped to Ahmedabad although SE were located in the district of Ropar in Punjab and CAD were located at Faridabad in Haryana State.

There is no evidence about the payment for the imports and it was stated that the remittance was to be effected only after the clearance of the goods from customs. There is, however, no agreement/correspondence to this effect. No negotiable documents were produced and the copies of the invoices did not refer to the Bank from which the documents were to be retired. The goods are said to be still with the customs after being imported in early part of the year 1991.

In other words, for all these years no payment has reportedly been made to the suppliers. In fact all these years there is nothing to indicate that the supplier has asked for payment. While copies of the REP import licences were produced, it was found that in the transfer letters no date was mentioned and that no licence was found transferred in the name of CAD. It was noted that assemblies/sub-assemblies being restricted items could not be permitted against REP licences.

10. The basis for revising the value upwards has been discussed in detail by the adjudicating authority in his order. The matter has been analysed item wise. Depending upon the goods as described and as found on examination, and taking note of the valuation provisions, he has discussed the basis for accepting or rejecting the invoice value and for arriving at the correct assessable value. In the particular circumstances of the case the valuation has to be determined under Rule 8 of the Customs Valuation Rules, 1988, using reasonable means, consistent with the principles and provisions of these rules and on the basis of the best possible information available. In the case of *Universal Commercial Corporation v. Collector of Customs, Delhi -1994 (69) E.L.T. 150 (Tribunal)*, the Tribunal has held that the invoice value was rejectable when the goods were different from what they were declared in the invoice. Paras 34 and 60 from the Tribunal's decision are extracted below :- 11. As regards ITC angle, the adjudicating authority has discussed each item in detail and had given basis for his findings in each case. In para 30 of his order for M/s. CAD and in para 36 for M/s. SE, this matter has been

discussed with reference to the applicable policy.

12. In the facts and circumstances of the cases before us, and on an overall view of the matter we consider that the declared prices have been rightly rejected in respect of the items as discussed in the impugned order. On licencing angle also we find no infirmity in the said order. As regards the determination of the assessable values by the adjudicating authority on which duty has been demanded and the quantum of fine and penalty fixed, while we agree that the goods were liable to confiscation and the importers were liable to penalty, we do not consider it necessary to discuss the quantum of fine and penalty in detail in view of the appellants' request for re-export of the goods, which we now take up for consideration.

13. Under their miscellaneous application for re-export of the goods, the appellants have prayed as under :- "(3) The applicants have made detailed submissions against the findings of the Collector and are hopeful of succeeding in their appeal. However, the applicants submit that there has been a steep fall in the market prices of video recorders and it would be impossible for them to sell the parts imported in India on payment of duty, fines and penalties. In view of the devaluation the applicants will also be required to pay to the suppliers almost the price twice of that originally agreed upon in Rupee terms. The applicants are therefore interested in the re-export of goods to their suppliers.

(4) The applicants have already discussed this question with the suppliers and the suppliers have agreed to take back the goods. It may be pointed out that no payment has yet been made to the suppliers and therefore the re-export of the goods would not cause any loss of foreign exchange to the country. On the other hand the country would save foreign exchange which would otherwise be payable if the goods are not re-exported.

(5) The applicants feel that they have a strong prima facie case on merits. However, considering other aspects referred to above, they do not wish to clear the goods for home consumption even if the fines and penalty are remitted by the Hon'ble Tribunal in appeal." 14. The goods have been provisionally allowed to be warehoused under Section 59 of the Act against PD bonds and ITC bonds. The

goods have not yet been cleared. The goods are not prohibited goods for the purposes of Section 51 of the Act read with Section 2(33) of the Act.

Under clause 15 of the Export Control Order 1988 certain situations in which the Export Control Order does not apply have been enumerated. It provides that in certain circumstances exports can be permitted even where such export might otherwise contravene the provisions of the Export Control Order. It provides, among others, that the goods imported without a valid licence if permitted to be re-exported could be re-exported irrespective of any restrictions under Export Control Orders issued from time to time. Para 174(1) of the Import-Export Policy for the period 1988-91 provides that no REP benefits are admissible in the case of imported goods which are re-exported in the same State without undergoing any processing or manufacturing operations in India. Impliedly, it recognises that the imported goods could be re-exported as such. As held by the adjudicating authority the goods were not placed under OGL. It is also relevant to note that the appellants have contended that they have not paid for the goods so far and it has been submitted that the payment for the goods will be made to the suppliers after the goods are cleared from the customs. Of course, as what arrangements have been made for ensuring/guaranteeing payments of price of imported goods, is not known. It is also relevant that from the statement of Shri Pawan Kumar Sharma of M/s. CAD summarised in paras 15 (ii) and 10 (i) of the order, it appears that the payment for the goods has already been made, while it is shown that no payment has yet been made. No supplier will wait for indefinite period for payment and there is nothing on record that the supplier has pursued the matter of payment, although the import is by now about 3 years old. Thus, without taking a final and categorical view on the question of payment, we consider that if the importers are to be believed then even at this late stage the exporter is not deprived of his title to the imported goods (refer Supreme Court's decision in the case of Union of India v. Sampat Raj Dugar, -1992 AIR SCW 1420), and that there is no legal bar for the re-export of these goods imported, which had been provisionally warehoused and are in a way still within the customs control.

15. With regard to the request for re-export of the goods made before us, it may be mentioned that the appellants had filed bills of entry and had contested the

charges of unauthorised importation and under-valuation. No request for re-export appears to have been made before the adjudicating authority. Even at the time of filing of the appeal with the Tribunal, no such request for re-export appears to have been made. Accordingly, the facts in the case before us are distinguishable from the facts in the cases of Padia Sales Corporation v. Collector of Customs(CEGAT), and Uma Textiles v. Collector of Customs 16. In the circumstances, we consider that while the request of the appellants for re-export of the goods merits acceptance, in view of the contraventions of law as discussed above, the goods are liable to suitable fine and the importers are liable to suitable penalty.

Accordingly, we do not consider it necessary to discuss the case law cited by both the sides in support of their respective arguments.

17. Taking all the relevant considerations into account and in the light of our findings that the goods were not correctly declared and the declared prices in respect of various items as discussed in the impugned order have been rightly rejected, we allow re-export of the goods subject to the condition that M/s. Caditronics pay a fine of Rs. 2.50 lakhs (Rupees Two Lakhs Fifty Thousand Only) and penalty of Rs. 1.25 lakhs (Rupees One Lakh Twenty Five Thousands Only) and M/s.

Supreme Electronics pay a fine of Rs. 1 lakh (Rupees One Lakh Only) and penalty of Rs. 50,000/- (Rupees Fifty Thousands Only). On payment of the above amounts of fine and penalty the goods which were provisionally allowed to be warehoused under Section 59 of the Act, shall be permitted by the competent authority to be re-exported to their suppliers under prescribed procedure and safeguards. Both the appeals are disposed of in the above terms.

18. I have gone through the order recorded by Ld. Brother Shri Lajja Ram. For the detailed reasons recorded by him in paragraphs 8 to 11 of his order, I agree with his findings in paragraph 12 that the declared prices have been rightly rejected by the Collector in respect of the goods in question. On the licencing angle also I agree that there is no infirmity in the order passed by the Collector holding the goods as liable to confiscation on the grounds that the imported assemblies/sub-

assemblies being restricted items they could not be deemed as covered by REP Licences. I am, however, of the view that having regard to the overall facts and circumstances of the case and taking into account the finding that Collector's order holding the goods as liable to confiscation and appellants liable to penalty is sustainable, the appellants' request for permitting re-export of the goods in question does not merit consideration. Union of India v. Sampat Raj Dugar reported in 1992 (58) E.L.T. 163 (SC), the Hon'ble Supreme Court has held that when goods are covered by valid import licence and the importer does not pay for the goods and abandons them the property in the goods continues to vest in the exporter or the owner of the goods who would be entitled to ask for their re-export unless proved to be a party to fraud or unless payment of price of the goods stands guaranteed by virtue of letter of credit or otherwise. In the present case, the exporter has not claimed the ownership of the goods nor have they asked for re-shipment. In regard to the payment of the goods the appellants' stand has been changing since during the hearing before us it was contended that no payment has been made in respect of the goods to the foreign suppliers, whereas as pointed out in para-14 of the order recorded by Ld. Brother Shri Lajja Ram in the statement of Shri Pawan Kumar Sharma of M/s. CAD summarised in paras 15(ii) and 10(i) of the impugned order, it appears that the payment for the goods has already been made. For this reason and having regard to the fact that the Collector's order holding the goods as liable for confiscation and the appellants liable to penalty has been found to be sustainable, I reject the request for re-export of the goods and confirm the findings of the Collector in the impugned order. However, having regard to the long detention of the goods and the fact electronic items are prone to rapid obsolescence, I reduce the redemption fine in respect of the goods imported by M/s. Caditronics India from Rs. 30 lakhs to Rs. 15 lakhs only and the penalty imposed on them from Rs. 5 lakhs to Rs. 1 lakh and similarly in the case of goods imported by M/s. Supreme Electronics redemption fine from Rs. 8 lakhs to Rs. 4 lakhs and penalty from Rs. 2 lakhs to Rs. 40,000/- only.

Subject to these modifications the appeals are otherwise rejected.

20. I have gone through the orders recorded above. I agree with the findings of the learned Member (J).

21. In terms of Majority order the appeals are rejected subject to the modification in the impugned order as indicated in para 19, with regard to fine and penalty.

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