Polyvinyl Industrial Corpn. Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-30-1994

Reported in : (1994)(74)ELT426TriDel

Appellant : Polyvinyl Industrial Corpn.

Respondent : Collector of Customs

Judgement :

1. These are two appeals filed by the Supplier and Importer respectively with reference to common impugned order involving common issues. Therefore, they are clubbed together and are being disposed of by this common order.

2. The First appellant Shri Aamir H. Nakhoda is the proprietor of M/s.

Aamir Universal Trading Centre carrying on business as Importer and Exporter in Singapore. The second appellant is the sole proprietor of M/s. Polyvinyl Industrial Corporation, New Delhi. This unit is registered as small scale unit engaged in the reprocessing and manufacturing of PVC Granules out of the damage wasted PVC material. On 31-12-1990, the second appellant filed a Bill of Entry through their authorised Clearing Agent, M/s. Loknath Shipping & Clearing Agency for clearance of the goods declared as 118.10 M/T high density Polyethylene Resin in the Bill of Entry/Invoice. Since the grade was not mentioned and the Clearing Agent did not produce original documents at the time of filing the Bill of Entry the Assistant Collector of Customs sent goods to the Appraiser for examination of the goods with specific direction that the goods to be examined in the presence of

A.C.(Docks). In the meanwhile on 3-1-1991, a case was detected by the Special Investigation Branch wherein 16 M/T Polyamide was sought to be cleared by the second appellant in the guise of High Impact Polystyrene. According to the Department on two previous occasions, the same Importer had cleared 210 M/T Acrylonitrile Butadiene Styrene (ABS) granules covered under Appendix-2, Part-B of the Import Policy against provisional duty bond and after clearance on test of samples, the goods were found to have been misdeclared as High Impact Polystyrene involving duty evasion of over Rs. 75 lakhs. Hence the detailed investigation started with reference to consignment in question on the plea that the Importer was involved in misdeclaration in collusion with the suppliers in a number of recent imports with a view to evading proper payment of duty, accordingly the goods covered by the Bills of Entry were seized on 19-2-1991 under Section 110(1) of the Customs Act, 1962. The proprietor of the Clearing Agency indicated that he had not put up the Bills of Entry for examination as the Importer had not sent to him the original documents. It was further transpired that apparently the Importer had returned the documents to his bank for not taking delivery of the goods. During the investigation on the intervention of Hon'ble High Court of Calcutta on the Writ Petition filed by the Supplier of the goods, the goods were allowed to be stored in a bonded warehouse as per Hon'ble High Court's directions and as the supplier had shown interest in taking the delivery of the goods and selling it to the another Indian buyer of its re-export. Further the Court directed the Department to issue show cause notice against the goods as well as the parties involved if the Customs were not satisfied with the bona fides the transaction and also to take a view on the request of the first appellant. A detailed show cause notice was issued both to the supplier and to the importer charging among other things that there was deliberate attempt on the part of the importer to misdeclare the value of the goods as also to suppress/mis-declare the grade of the HDPE resin imported with a view to evading Customs Duty.

It was charged that the Suppliers also have connived with the Importer in this attempt of evasion. The show cause notice was duly answered by both the appellants denying the charges. After considering the facts and circumstances and material evidence placed on record and on considering the submissions made by the parties, the Collector who adjudicated the proceedings observed that it would

be fair and reasonable to take a view that the value of the HDPE of blow moulding grade consignment in question at material time would not be less than U.S. $1200 M/T. It was observed that the price declared on the invoice cannot be held to be genuine at arm's length transaction price at which any other buyer would have obtained identical/similar goods at the same price. Accordingly he ordered for confiscation of the goods under Section 111(m) of the Customs Act, 1962, a penalty of Rs. 10 lakhs was imposed on the Importer and of Rs. 7 lakhs 50 thousands on the supplier. However, he gave an option to the Importer to redeem the goods on payment of redemption fine of Rs. 5 lakhs subject to the condition that the goods are re-exported after following the prescribed procedure (including submission of no objection certificate from the Reserve Bank of India), alternatively, the Collector agreed to allow release of the goods on payment of redemption fine to another importer provided such Indian Importer was agreeable to pay the duty on goods on the assessed value of U.S. $ 1200 per M/T without any objection and in that case redemption fine was however reduced to Rs. 2,50,000/-. On filing the supplementary affidavit by the supplier in the pending Writ Petition before the Calcutta High Court, the Hon'ble High Court as per the Matter No. 465/91, dated 18-7-1991 passed the order by giving directions to both sides while desposing of the Writ Petition and the relevant said order is as follows :- "(1) Mr. P.K. Chakraborty, Assistant Collector of Customs Appraisement Group-II, Calcutta, will advertise for sale of the goods in two local daily newspapers. The cost of such advertisement shall be borne by the petitioner herein. At least 3 weeks notice shall be given of such sale. The sale shall be made to the highest bidder. The sale shall be made subject to a reserve price which would cover the duty as claimed by the Customs Authorities on the goods, the penalty and the redemption fine as determined by the adjudication order, the warehousing charges and together with a margin of Rs. 10,00,000/-therein. If the reserve price is not reached the sale shall be not effected.

(2) Upon the prosective purchaser being determined, the petitioner will send the documents of title to Mr. P.K. Chakraborty. The documents of title will not be handed over to the purchaser until the entire purchase price had been received in cash.

(3) Out of the price paid, Mr. P.K. Chakraborty shall make payments in the following manners : (i) The entire amount of the admitted duties on the basis of the invoice price and the Bills of Entry already filed shall be paid to the Customs Authorities against proper receipt.

(ii) The difference between the admitted duty and the duty as determined by the adjudication order as well as the amount on account of penalty and redemption fine shall be kept deposited with the Collector of Customs, who will keep the said amount in any Nationalised Bank in a fixed deposit and who will hold the fixed deposit receipts subject to any order that may be passed by any Appellate Authority.

(iii) All warehousing charges must be paid against proper receipt, (iv) The balance shall be made over to the petitioners' constituted Attorney.

(4) Upon receipt of the entire purchase money the Customs Authorities will release the said goods to the petitioners' Power of Attorney holder within a period of 48 hours from the date of such payment on the basis of the Bill of Entry already filed.

(5) The petitioner will be at liberty to challenge the adjudication order dt. 6.5.1991 before the Appellate Authority under the Act. The petitioner will be at liberty to raise all points taken in this Writ Petition before the Appellate Authority. It is made clear that this Court has not determined any question on merit.

(6) The amount deposited by fixed deposit as prescribed in clause 3(ii) above, shall be held by the Collector subject to the decision of the Appellate Authority. If the petitioner is successful, the Collector shall make over the entire amount covered by the fixed deposit receipt together with accrued interest thereon to the petitioner within 7 days of appellate order. If the petitioner is unsuccessful and the appeal is dismissed, the Collector will be at liberty to encash the fixed deposit receipt and appropriate the proceeds thereof together with all interest thereon toward its claim against the petitioners, and refund any excess to the petitioner 7 days after, the appellate order has been communicated to the petitioner or his Advocate on record." Accordingly both Supplier and Importer have come before us by way of these appeals.

3. The appellants were represented by Shri L.P. Asthana and Smt.

Ar-chana Wadhwa, learned Advocates respectively and the Department was duly represented by Shri A.K. Singhal, learned JDR.4. Sh. L.P. Asthana, learned Counsel appearing on behalf of the supplier, submitted that the contract of sale of goods was entered into between the Supplier and the second appellant on 5th September, 1990 with reference to the previous enquiry made by the second appellant in the middle of August, 1990 and accordingly contract for purchase of the said goods was entered into by the first appellant with the local dealer PAS Plexchem (Singapore) Pvt. Ltd. at Singapore on 24th August, 1990, as can be seen from the respective sales contracts. The Collector rejected the contract of sale on the ground that it was not backed up by opening of letter of credit and the contract was not signed by the importer. He said that it cannot be discarded on these grounds as there is no provision of law for invoking letter of credit and it is for the parties to enter into a contract as per their terms and conditions including mode of payment and genuineness of contract cannot be doubted on the ground that the prices in December, 1990 were higher than prevailing in September, 1990. When once contract was entered into, the parties to the contracts were bound by it irrespective of the variation in the price. He contended that price at the time of entering into contract is relevant to determine the assessable value and not the increased price on the date of delivery since delivery period was mentioned in the contract relying upon the following decisions.Sneha Traders Pvt. Ltd. v. Collector of Customs - 1992 (60) E.L.T. 43 (Calcutta) 2. Kishco Cutlery Ltd. and Anr. v. Union of India -1984 (15) E.L.T. 367 (Bombay)India Infusion Ltd. v. Collector of Customs -1993 (63) E.L.T. 263 (Tri.).

There was no reason to disbelieve contract which was duly entered into between the parties and in the absence of allegation on this issue in the show cause notice, the order is not sustainable referring to the decision - Raphael Pharmaceuticals Pvt. Ltd. v. Superintendent of Distilleries 1988 (38) E.L.T. 11 (A.P.), Motilal Lalchand Shah v. L.M.Kaul and Anr. 1984 (17) E.L.T. 294 (Gujarat) and Pradyumnna Steels Ltd. v. Collector of Central Excise 1989 (41) E.L.T. 556. He said that the appellants were neither related nor have got mutual interest in the business and in the absence of any evidence, the Collector was not right in

arriving at the conclusion that the first appellant was connived with the second appellant in misdeclaring the value. It was charged that Importer was involved in misdeclaration in collusion with the Suppliers in a number of imports, but for the first time the Supplier entered into a contract with the Importer for the supply of goods in the normal course and on knowing through the Banker that Importer had refused to retire the documents, they had approached.the concerned authorities either to allow them to sell the goods to other Indian buyer or to allow reshipment of the goods to safeguard their interest. He said that prices for HDPE were lower in August as well as in early September, 1990 and prices were raised upto 20th December, 1990 due to gulf war and as soon as war was over prices have fallen as can be seen from the evidence placed on record and same was accepted by the Adjudicating Authority. He said that there are four types of HDPE but since the grade was not specified by his Supplier and in the absence of direct contact with the manufacturer non-mentioning of grade cannot be construed as misdeclaration to discard transaction value.

Further there has been no importation of identical goods at the time of shipment of the goods at Calcutta port, but the Collector compared with various imports of different types/grades of the goods from different countries which have no relevance in determining the assessable value.

For instance, prices of the goods of Japanese origin, and of other European countries were compared in determining the assessable value of the impugned goods of U.S.A which were totally irrelevant. He said that comparing with different type/grade of the goods of different origin of country or of comparing with the goods at single instance of similar goods imported for lesser quantity cannot be considered to be contemporaneous evidence. He argued that even applying the Valuation Rules in determining the assessable value, it was not followed in sequence as specified therein and in the instant case the value is to be determined under Section 14 of the Act, since the transaction was principal to principal basis and the goods were sent by the appellant to India at price which was the internationally prevailing market price on the date of contract and that price is the basis in determining the assessable value under Section 14 of the Act. He cited a series of decisions in support of his contention that burden lies on the

Department to prove undervaluation and in the absence of contemporary imports of comparable goods, the value of the goods is to be determined by adopting transaction value. Particularly he referred to the following decisions :-Honesty Traders v. Collector of Customs - 1991 (55) E.L.T. 102 (T).Sanjay Chandiram v. Collector of Customs -1991 (52) E.L.T. 413 (T).Sawhney Export House (P) Ltd. v. Collector of Customs - 1992 (60) E.L.T. 327 (T).Atco Industries Ltd. v. Collector of Customs -1992 (57) E.L.T. 654 (T).Sandip Agarwal v. Collector of Customs -1992 (62) E.L.T. 528 (Calcutta).

5. Arguing for the second appellant Smt. Archana Wadhwa, learned Advocate, adopted the arguments of Shri L.P. Asthana, learned Advocate, as regards contract and determination of the value on prevailing market rates on the date of contract. She further emphasised that imported goods cannot be compared with that of different grade or of different origin of country and in the absence of comparable price, the invoice value is to be accepted and referring to the Order No. 434/92-A, dt.

7-10-1992 of the Tribunal in the case of Basant Industries, she said that it should be with the comparable quantity and if the quantity imported by others is substantially less than the quantity imported, that price cannot be treated as comparable price. As regards penalty, she said that the role of Importer has not been discussed except making some observations in page 3 of the order that he was involved in importing and misdeclaration of high quality of polyamide. But these charges were false and there is no clear finding on these charges since the proceedings are still pending. She said that the appellant instructed the Bank to return the documents to the Supplier even before the proceedings were initiated by the Department as he was unable to honour the contract due to paucity of funds since his financiers backed out. Since the Importer is no longer interested in the goods and abondoned the goods, penalty cannot be imposed on him. She also referred to the order of the Tribunal (Order No. A/271 to 273/92-NRB, dt. 13-6-1992) in the case of Savithri Electronics Co. in support of her contention. She submitted that even if assessable value is determined on higher side, ignoring the date of contract, the penalty cannot be imposed on the Importer since he has abondoned the goods.

6. Shri A.K. Singhal, learned JDR appearing for the Revenue, submitted that it is a clear case of misdeclaration of the goods since grade as well as country of origin was not mentioned and it was done with deliberate intention to evade payment of heavy duty. Grade was known to the Department only on examination of the goods and it was subsequently accepted by the parties. There is nothing to show that they have entered into contract either in August or September, 1990, and the document dt. 5-9-1990 said to be a contract of sale is nothing but a manipulated document and subsequently brought on record to gain the advantage. There was no reference of enquiry nor grade of the item in question and furthermore it was one sided document since it was signed by the Supplier and not by the Importer. In fact the other document referred to by the Supplier as a sale contract between him and his Supplier indicates that it was duly signed by both sides. He said that contract was not genuine and hence determining the value on the basis of prevailing market rate on the date of contract does not arise.

Referring to the decisions in the case of M.M.T.C. (India) Ltd., Madras v. Collector of CustomsCalcutta Motor Dealers Association v. Collector of Customs -1989 (42) E.L.T. 693, he submitted that duty is leviable on the price of goods at the time of importation and not on the contracted price inspite of the fact that importation was under old contract and increase in the price after the date of contract. Since there has been misdeclaration of description of the goods in as much as grade 'Blow moulding' has not been specified in the Bill of Entry Invoice value cannot be accepted as transaction value relying upon the following decisions :-Shiv Shakti Enterprises v. Collector of Customs - 1991 (52) E.L.T. 439 (Tribunal).Photo Copy Centre v. Collector of Customs -1991 (56) E.L.T. 801 (Tri.).Globe Engineering Works v. Collector of Customs - 1988 (38) E.L.T. 471 (Tribunal).

Referring to the decision in the case of Crescent Corporation, Calcutta v. Collector of Customs - 1992 (41) ECR 444, he said that there is no infirmity in the order in invoking any rule of the Valuation Rules in determining the value under best judgment though that rule as such was not specified in the show cause notice. As regards Importer's liability, he submitted that Importer has misdeclared the description and value of the goods with connivance of the Supplier with an intention to evade payment of duty. At the first instance he filed a Bill of Entry with

an intention to clear the goods but on knowing the detailed investigation in this case and further it was detected that he was involved in other imports in evading to the tune of Rs. 75 lakhs, he backed out and instructed the Banker to return the document without specifying any valid reason. He said that this type of habitual offender should be punished severelly and no lenient view is called for and accordingly the Department was justified in imposing penalty of Rs. 10,00,000/- (ten lakhs).

7. We have considered the rival submissions and perused the records. It was contended on behalf of the appellants that prevailing market price on the date of contract is to be taken into consideration while determining the assessable value since they have entered into contract on 5th September, 1990, for the sale of goods, relying upon the decision in the case of Sneha Traders Pvt. Ltd. v. Collector of Customs 1992 (60) E.L.T. 43 (Calcutta). Hence the first point to be considered in this case is whether contract was genuine. We are not convinced with the arguments advanced on behalf of the appellants that the third party cannot go into question of validity of contract when it was duly entered into between the parties and the same was accepted by the respective parties. It is true, it is for the parties to enter into a contract in the manner they desire and as per terms and conditions agreed upon and the third party has no say in the validity of contract.

But when the contract itself is the basis to determine the duty payable in respect of the goods under contract it is within the right of the Taxing Authorities to go into the question of validity of contract and to examine whether contract was entered into between the parties was genuine or not. Opening letter of credit may substantiate that there was a contract but not opening irrevocable letter of credit may not be a ground to invalidate contract since terms may provide for payment against documents and/or after a certain period and similarly longer period taken in supplying the goods also may not be a ground if the period of supply under contract was agreed upon subject to essentials of a valid contract. In the case of Sneha Traders (supra) sufficient evidence was brought on record to show that contract was duly entered into on detailed enquiry, discussions and on inviting quotations. No such reference in the contract dt. 5-9-1990 to substantiate that

there was a contract in this case as it was rightly pointed out by the learned JDR. In the instant case it is not mere terms of the contract are under consideration but whether contract was originated on 5-9-1990 as stated by the parties is to be considered. It was argued by Shri L.P. Asthana, Learned Advocate that contract need not be in writing and contract may take place by conduct of the parties and there are implied contracts which are recognised in law. We have no quarrel with this proposition but they are subject to proof when they are under scrutiny.

The burden lies on the parties to prove that there was a valid contract. Mere statement or producing a letter dated 5-9-1990 purported to be a sale of contract signed by one party and not by other party without earlier references is not sufficient to prove that there was a valid contract. A contract is an agreement which is enforceable in a Court of law but not vice versa. An agreement remains as an agreement without forming a contract in the absence of ingredients of valid contract. The main ingredients of a valid contract are two or more parties to the contract, offer, and acceptance supported by consideration. In fact quotation or price list itself is not an offer but it invites the prospective buyers to make offer. When once offer is given to the offeree if it is accepted same should be communicated to the person who made an offer. In the instant case the letter dated 5-9-1990 cannot be considered as an acceptance in the absence of reference to the offer and if it is treated as an acceptance from the Supplier it remains as an acceptance against the Supplier but not against the Importer since it was not communicated and nothing to show same was consented by both sides on 5-9-1990. There is nothing on record that agreement was enforced in a court of law. It is not even the case of the parties that contract was enforceable and they have taken legal steps for enforcement of the agreement. In the normal course the Supplier would have filed a suit against the Importer in a Court of law for enforcement of agreement for the recovery of the amount or for specific performance of the contract. Not even a legal notice was issued for discharge of contract nor placed such documentary evidences on record. Instead of filing a suit for specific performance, the Supplier has chosen to approach the Customs Authorities to permit him to sell the goods to other buyer or to return the goods claiming continue to be the owner of the goods. All these factors proved that there was no valid contract on 5-9-1990 but that letter dated 5-9-1990 was a

manipulated document and strengthens the view that Supplier and Importer were connived with in misdeclaring the description and value of the goods.We are also not convinced with the arguments advanced by Shri L.P. Asthana that there was no allegation with reference to the validity of contract in the show cause notice and accordingly the adjudicating authority is not correct in going to this issue. We find it was charged that the appellants have misdeclared the description of the goods and the value of the goods. The appellants themselves have ... a defence that they have entered into contract on 5-9-1990 and that date should be taken as relevant date in determining the value. Hence it is for them to prove that there was a valid contract on 5-9-1990 but they have failed. Although the Supplier attempted to prove that he has entered into a contract with the other local Supplier in respect of the goods on enquiry from the Importer, same was not substantiated with the evidence of sale invoice of that Supplier or the manufacturer's invoice and other evidences as it was rightly observed by the Collector in the order. When once we are of the view that contract was not genuine, determining the assessable value based upon the prevailing market rate on the date of contract does not arise. We find that the goods imported in this case are of high grade of HDPE. The major grades under which HDPE is marketed are blow moulding grade, injection moulding, extrusion grade. These grades are well known in the plastic trade and industry.

The manufacturers in the world manufacture high density polyethylene under various categories termed as grades for catering the needs of different uses of plastic materials. Hence these grades are known to the all concerned persons. In spite of the fact that Blow Moulding grade of HDPE was imported but the same was not mentioned in the Bill of Entry and the Department had come to know the grade only on detailed examination. The explanation given by the appellants for not specifying the grade is not convincing especially value is also linked with the grade. This is a clear case of misdeclararion of description of the goods as it was rightly observed by the Collector in the order. Since there has been misdeclaration of the description of the goods, the declared price cannot be said to be the transaction value and the Department was right in discarding the invoice value and resorted to determine the value under Section 14(1A) read with Valuation Rules.

8. Next question arises whether sufficient evidence was brought on record by the Department and adopted the Valuation Rules in sequence in determining the assessable value. It is well settled that the burden lies on the Department not only in bringing sufficient evidence on record, but also the same should be disclosed to the other side for rebuttal while determining the assessable value. In the order the Collector observed that prices were considerably lower upto early September but there was steady increase upto December, 1990 in respect of Blow Moulding grade in the international market and the same is supported by quotations published in the International Magazine Chemical Week in respect of wholesale international price od HDPE Blow Moulding grade in the U.S. and European Markets.

9. Shri L.P. Asthana, learned Counsel also drew our attention to the above Magazine to show that prices of HDPE Blow Moulding grade of European countries were more compared to the similar goods of U.S.A.and said that they are not comparable goods. It was submitted by him that the goods were mostly compared with that of different grades and of different countries and at only one instance where it was compared with the same grade but of lesser quantity and evidence placed by the party was not considered. In the impugned order the Collector observed that no importation of identical goods at this port at the relevant time has come to notice and accordingly taking into consideration of the nature of the goods, country of origin he has resorted to determine the value as per residual method under Rule 8 of the Valuation Rules.

There is nothing wrong in determining the value under Rule 8 even without invoking the rule as such in the show cause notice as argued by the learned JDR relying upon the decision in the case of Crescent Corporation, Calcutta (supra), but valuation Rules must be followed in sequence. When declared value cannot be accepted as transaction value, the Valuation Rules provide for the method of valuation. The said rules lay down that if it is not possible to arrive at a transaction value then the other rule of the said Valuation Rules which are framed thereunder are to be followed sequentially. In other words one cannot jump into residuary rule unless the previous rules in order of sequence are exhausted and giving reason why it is not possible to determine the value under the earlier rule. In the instant

case we find that the Collector has resorted to Rule 8 in determining the value without giving reasons why it is not possible to arrive at the value under previous rules. Of course he has come out with reasons that the identical goods were not imported at the relevant point of time.

Identical goods are those goods which must be the same in all respects including physical characteristics, quality and reputation and must be produced in the country in which the goods being valued were produced.

In case Rule 5 is ruled out Rule 6 comes into rescue to determine the value with reference to importation of similar goods. Similar goods are those goods which although not like in all respects, but having same characteristics and are commercially interchangeable with the goods being valued having regard to quality, reputation, grade etc. Since the Adjudicating Authority has not given specific reasons with reference to Rule 6 before resorting to Rule 8, we are of the view that this issue requires reconsideration. In applying the transaction value under Rule 5 or Rule 6 of the Customs Valuation Rules, 1988, the transaction value should be at the same commercial level and in substantially the same quantity as the goods being valued. We, therefore, direct the Jurisdictional Collector to examine and consider the assessable value of the goods in the light of above observation and taking into consideration of the evidence adduced by the appellants in this regard and to pass an appropriate order in accordance with law after giving one more opportunity to the appellants. The appellants may make use of this opportunity to adduce evidence if any with reference to similar imports at the relevant point of time.

10. As regards imposition of penalty under Section 112 of the Act, having regard to facts and circumstances of the case and particularly taking into consideration that they have misdeclared the description of the goods in as much as grade was not mentioned in the Bill of Entry and the goods are liable for confiscation under Section 111(m) of the Act, the imposition of penalty on both the Importer as well as Supplier was justified. There is force in the arguments advanced by the learned JDR that the Importer has misdeclared the goods and had an intention to clear the goods for lower value but on initiating the proceedings and on detecting similar

offences with reference to different imports he has backed out and abandoned the goods. However in the absence of clear findings with reference to charges in respect of other imports we are not convinced that he is a habitual offender and although imposition of penalty was justified. In the facts and circumstances of this case, we are of the view the quantum requires to be reduced. Accordingly penalty is reduced to Rs. 2,50,000/- as against Rs. 10,00,000/- (ten lakh) in case of Importer and similarly penalty is reduced to Rs. 2,50,000/- as against Rs. 7,50,000/- on Supplier. As regards prayer of the Supplier for allowing them to sell the goods in the country to another party, we direct the Collector to release the goods on payment of duty amount on redetermined value and on collection of other incidental charges.

Quantum of redemption fine can also be reviewed by the Collector in the light of the redetermination of the assessable value.