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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-23-1995

Reported in : (1995)(80)ELT173TriDel

Appellant : Nirav International

Respondent : Collector of Customs

Judgement :

1. M/s. Nirav International, Bombay (hereinafter referred to as 'Nirav') being aggrieved with the orders bearing Numbers 77/94-AP and 78/94-AP, both dated 30-12-1993, both passed by the Collector of Customs, Madras, have filed two separate appeals. As both the appeals cover the same grounds, they were heard together and are being disposed of by this common order.

2. M/s. Nirav had imported from a Shipper in Hong Kong, in September/October 1991, the goods declared as disperse dyes Blue/red.

The value of the two consignments was declared as Rs. 81,378/- and Rs. 81,430/- respectively. The goods were declared to be of China origin.

They did not file the requisite details, such as name of the manufacturer, type or variety of the dyes, their colour index number, concentration etc., required for the purpose of assessment of value, under Rule 10 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (hereinafter referred to as 'Valuation Rules'). The packages were not marked as per the invoice, while the

packages recovered had marks and numbers. The importer requested for getting the goods tested, and on test, the goods were found to be synthetic organic dye-stuff (disperse dye), in the form of coloured powder with the shade similar to colour index (CI) disperse blue 165/red 343. Under this classification, the CI lists blue GSL 400/resolin red F 3 BS. The value was found to be mis-declared, and was found to be more than the permitted value of Rs. 79,666/- Rs. 80,624/-, under the import license. Under Rule 8 of the Valuation Rules, the value was determined as Rs. 1207037/-, Rs. 977,168/-, and it was alleged in the respective show cause notices that the customs duty of Rs. 2617153/Rs. 3082591, had been evaded. Nirav filed a writ petition in Madras High Court, in December, 1991. In their order dated 30-4-1992, the Hon'ble High Court observed in para 7 that the CC, Madras had taken all possible efforts to ascertain the value of the goods imported by the petitioner, and on coming to know that the petitioner had under-valued the goods imported, seized the same. The Hon'ble High Court further noted that the department itself had taken the task of testing the goods imported by the petitioner, and arriving at the correct value thereof, and that this was because the petitioner had clearly stated that he was unable to get the original invoices from the manufacturers/suppliers from whom the petitioner had obtained the supply of the goods in question, due to business secrecy. The Hon'ble High Court observed "I am unable to agree with the stand taken by the petitioner that due to business secret, he could not get the copies of original invoices from the supplier. If the department is not provided with the copies of the documents as asked for, in my view that itself will entitle the department to take all possible efforts in arriving at the correct value of the goods imported especially when the Department had received some intelligence reports as to the under-valuation of the goods imported in the instant case." 3. The matter was adjudicated by the Collector of Customs, Madras who observed that the invoice filed and value declared were not prima facie eligible for acceptance as transaction value for purpose of Rule 4 of the Valuation Rules. He held that the goods had been mis-declared with respect to value. He also came to a finding that the importers had not produced sufficient REP licenses to cover the value of the goods. He determined the value of the dyes red imported under Bill of Entry No.31963, dated 15-10-1991 at DM 62.5 per kg. CIF, confiscated the goods but allowed their redemption on payment of

redemption fine of Rs. 2 lakhs and imposed a penalty of Rs. 1 lakh on M/s. Nirav. With regard to CI disperse blue, M/s. Chika Ltd., Madras had quoted a price of DM 69.3 per kg. vide their letter dated 30-12-1991, while M/s. Color Bombay had quoted a price of DM 80.25 per kg. The Show Cause Notice proposed adoption of the price of DM 80.25 per kg. As recorded in the adjudicating order, the appellant had pleaded that even if their other pleas were not admitted, they must be given the benefit of lower price quoted by M/s. Chika Ltd.; the adjudicating authority accepted this plea of the appellant. He determined the value of the dyes blue imported under bill of entry No. 29399 dated 17-9-1991 at DM 69.3 per kg. CIF, confiscated the goods but allowed the redemption on payment of Rs. 4 lakhs and imposed a penalty of Rs. 1.25 lakh.

4. Both the appeals were heard on 26-10-1994 when Dr. N. Kantawala, Advocate with Shri N. Singh, Consultant appeared for the appellant, Shri A.K. Singhal, JDR represented the respondent.

5. Dr. N. Kantawala, the Ld. Advocate briefly recapitulated the facts of the case and stated that the goods had been imported at Madras. As there was delay in proceedings by the Department, they had taken up the matter with the Madras High Court. He mentioned that there was no import of the type of the goods as mentioned by the Collector. The Valuation Rules were very clear, and the Ld. Advocate pleaded that the Collector had wrongly gone to Rule 8 of the Valuation Rules. Relying on the Tribunal's decision in the case of Sai Impex v. CC, 1992 (62) E.L.T. 616 (T), the Ld. Advocate pleaded that the goods were of Chinese origin, wherein the import and export trade is controlled by the State.

He also referred to the Tribunal's decision in the case of Varsha Poly Products Pvt. Ltd. v. CC, Kandla, 1994 (4) RLT 673 (T) to plead that the invoice value was to be accepted unless there was evidence of sale at higher prices.

6. Shri A.K. Singhal the Ld. JDR replied that there was no certification about the country of origin, name of the manufacturer was not disclosed, and CI. No. was not given in respect of the goods imported. The concentration of the product was also not disclosed. The identify of the goods was not disclosed. They had also not given any analysis of the product. The photocopy has been produced of the

invoice, and no original invoice was made available; authenticity of the same had not been proved. On the invoice, it was written that the packages had no marks and numbers, but on the packages there were some marks and numbers. The Ld. JDR relied upon a number of decisions by the Tribunal, and particularly referred to the Tribunal's decision in the case of Poonam Plastics Indus. v. C.C., 1989 (39) E.L.T. 634 (T), wherein it has been held that the department was not to prove actual value with mathematical precision. In the case of Photocopy Centre v.C.C., 1991 (56) E.L.T. 801 (T), it has been observed that in case of mis-declaration the declared price was not to be the transactional value. He submitted that there were valid reasons to discard the declared value. In the case of Nav Bharat Enterprises Pvt. Ltd. v.C.C., Madras - 1988 (34) E.L.T. 388 (T), the Tribunal had observed that exceptionally low price, even if bona fide, not available to other importers at the relevant time, was not to form the basis of assessment. In the case of Consolidated Coffee Ltd. v. C.C.- 1986 (24) E.L.T. 429 (Tribunal), the Tribunal has held that deemed value of imported goods was neither the actual value nor the invoice price at which the goods were capable of being sold, but was the price at which goods were ordinarily sold or offered for sale, that is the market price at the time and place of importation. In the case of Unisef Electronics India Ltd. v. C.C. - 1990 (49) E.L.T. 380 (T), the goods were imported from Japan whereas invoice was from Hong Kong. It was held that in such circumstances, the invoice value of goods was not to be accepted. Similar observations were made by the Tribunal in case of Plast Fab v. C.C. - 1993 (66) E.L.T. 441 (T). The Ld. JDR pleaded for rejection of both the appeals, and for confirmation of the orders passed by the Collector of Customs, Madras.

7. In rejoinder, the Ld. Advocate referred to the order passed by the Collector of Customs, Bombay in identical matters, and pleaded for acceptance of their appeals.

8. 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.

9. The goods were imported by the trader for sale to other buyers. The foreign supplier was also a trader, and not the manufacturer of the goods. The goods were described as disperse dye red/blue. Under Bill of Entry No. 31963, dated 15-10-1991, the description was disperse dyes red, and under Bill of Entry No. 29399, dated 17-9-1991, they were mentioned as disperse dyes blue. There was no other description of the goods imported. Dye is a chemical compound used to produce long lasting colours in materials. The Textile Industry uses dyes to colour fibres, yarns and fabrics. Manufacturers also dye food, fur, ink, leather, paper, wood, plastics and a host of other items. Disperse dyes dissolve only slightly in water. Dyeing at high temperatures helps dissolve the insoluble dye particles, allowing them to be absorbed into the fibres.

Disperse dyes colour acetate, acrylic, nylon and polyester. There are many varieties of dyes, and they have many applications. As mentioned above, there are dyes not only for textiles but for a host of other purposes. They come in different shades and different concentration.

Colour Index (CI) is an important factor in identifying the dyes. In international market they are sold by specific description. There is wide range of price. According to the Condensed Chemical Dictionary 10th Edition, published by Van Nostr and Reinhold Company page 398, Dye disperse is "a dye that may be in any of three clearly defined chemical classes; (a) nitroarylamine; (b) azo and (c) anthraquinone, and almost all contain amino or substituted amino groups but no solubilising sulfonic acid groups. They are water-insoluble dyes introduced as a dispersion or colloidal suspension in water and are absorbed by the fibre after which they may remain untreated or be after-treated (diazotized) to produce the final color. Their use is primarily for cellulose acetate and nylon, polyester and other synthetic fibres and for thermoplastics." According to the Kirk Othmer Encyclopaedia of Chemical Technology 3rd Edition; "A large number of dyes, with widely differing properties is necessary because of the great variety of materials to be dyed." They are classified into groups by chemical constitution and end-use. It has been mentioned at page 160 : "The dual classification system used in the Colour Index (CI) is accepted internationally throughout the dye-manufacturing and dye-using industries (3). Adopted in the second edition published in 1956, it

was retained in the third edition published in 1971. In this system dyes are grouped according to chemical class with a Colour Index number for each chemical compound and according to usage or application class with a CI name for each dye, whether made by one or several different manufacturers. The CI numbers, the CI names, and the commercial names of the different dye-manufacturers are cross-referenced. The CI name for a dye is derived from the application class to which the dye belongs, the shade or hue of the dye, and a sequential number, e.g. CI Acid Yellow 3, CI Acid Red 266, CI Basic Blue 41, and CI Vat Black 7. The commercial names of dyes are also usually made up of three parts. The first is a trademark used by the particular manufacturer to designate both the manufacturer and the class of dye, the second is the color, and the third is a series of letters and numbers used as a code by the manufacturer to define more precisely the hue, and also to indicate important properties which the dye possesses. The code letters used by different manufacturers are not standardized. A few of the more widely used designations include R for reddish, B for bluish, and G for greenish shades; L for light, S for sublimation and W for wash are used for fastness properties. Dyeing properties are indicated by N for neutral, and E for exhaust. There are instances where one manufacturer may designate a bluish-red dye as Red 4BL and another manufacturer uses Violet 2RL for the same dye. The CI system overcomes this uncertainty by the use of a standard hue-indication chart in the shape of a hexagon with the six primary and secondary hues (yellow, orange, red, violet, blue, and green) each occupying one segment of this hexagon (see Colour). The tertiary hues (brown and black) are inside the areas of the primary hues. This system is one of several that have been developed for the mathematical definition of color (4). A five-digit CI number is assigned to a dye when its chemical structure has been made known by the manufacturer.

It is seen that at no stage the importers have described the goods imported in a manner to facilitate their identification, and the description given did not assist, in any way in arriving at the correct value.

10. The appellants have pleaded that "the said goods have been purchased out of negotiation", (page 41 of the paper book); but have not furnished any detail with regard to the said negotiation. No correspondence with the Hong Kong Shipper

had been filed. No literature about the product has been furnished. The appellants had contended that samples were sent to them in advance by the suppliers, and on being satisfied with the samples that they were of the specifications required, and its saleability in the Indian Market, they entered into negotiations with the suppliers. No details of the samples, specifications, tests and market inquiries have been given. The goods were reported to be of Chinese origin, but in the declaration form under Rule 10 of the Valuation Rules at 16 of the paper book (A. No.C/197/94) the goods have been declared to be of Hong Kong origin. The goods were shipped from Hong Kong and were declared in general terms.

No details for identifying the goods and to arrive at their correct value, were furnished. On test they were found to be synthetic organic dye-stuff (disperse dyes). The manufacturers' invoice was not produced purportedly on account of "business secrecy". On the question of the said 'business secrecy', the Hon'ble Madras High Court has to say as under :- "It is seen that the Department itself has taken the task of testing the goods imported by the petitioner and arriving at the correct value thereof. This is because the petitioner has clearly stated that he is unable to get the original invoices from the manufacturers/suppliers, from whom the petitioner had obtained the supply of the goods in question due to business secrecy. I am unable to agree with the stand taken by the petitioner that due to business secret he could not get the copies of the original invoices from the supplier. If the Department is not provided with the copies of the document as asked for, in my view, that itself will entitle the Department to take all possible efforts in arriving at the correct value of the goods imported, especially when the Department had received some intelligence reports as to the under-valuation of the goods imported in the instant case." 11. The importers had stated that the goods were purchased on FOB basis, and that they had not made any payment to the foreign suppliers.

It has been stated by Shri H. Shashikant Zhaveri at page 144 of the paper book in Appeal No. C/197/94-A that: "I have not made any payment to S.I. Group, Hong Kong. It was an understanding between me and the S.I. Group, Hong Kong that the amount i.e. CIF value not be remitted by me through the Bank i.e.

Union Bank of India, Opera House Branch, Bombay after the sale of their consignment of Dye Blue." About the second consignment also he stated that he had not made any payment to the foreign suppliers for the same. He had visited Hong Kong and met one, Shri Ajay of S.I. Group Hong Kong, after the first consignment had been cleared. In his statement recorded under Section 108 of the Customs Act, 1962, he had stated that "if any differential duty is levied after the test report of the dyes blue is received by you I promise that I will pay whatever the differential duty on these consignments of dyes blue cleared by me from the Madras Air Port". In the case of Pine Chemical Suppliers v. C.C. -1993 (67) E.L.T. 25 (S.C.), the Hon'ble Supreme Court in para 7 of their judgment, have held that in a case where the importers had agreed to accept the test reports they cannot be permitted to dispute that position, and that the valuation on the basis of such reports did not suffer from any infirmity. Para 7 of the judgment is extracted below :- 7. The learned counsel for the appellants conceded as evident also from the record, that no challenge was made to the laboratory test reports which had found the imported goods to be Gum Rosin of 'WG' grade instead of 'OFF' grade as declared by the appellants and also described in the Bill of Entry. This question is concluded against the appellants by concurrent finding of fact throughout. Appellants cannot be permitted to dispute this position also in view of their categorical statement in writing to the authorities that they did not dispute the laboratory test reports and were ready to get the matter adjudicated straightaway by waiving the notice to show cause against confiscation of goods and imposition of penalty as required by Section 124 of the Act. It is on this basis that the appellants obtained clearance of the imported goods for appropriation by them.

It must, therefore, be accepted that the goods imported by the appellants of which they obtained clearance with request for early adjudication, accepting the laboratory test reports was Gum Rosin of 'WG' grade and not 'OFF' grade as declared by them or described in the Bill of Entry. The valuation of the imported goods as Gum Rosin of 'WG' grade for purposes of assessment at US \$ 465 per metric tonne on the basis indicated earlier does not, therefore, suffer from any infirmity and is not open to challenge. The only surviving question now is the examination of appellants' consequential liability as determined by the Tribunal.

12. In the case of disperse dyes blue as per the Show Cause Notice, the price adopted for the purpose of assessment under Rule 8 of the Valuation Rules was the CIF price of Samaron blue GSL which was ascertained to be DM 80.25 per Kg. Inquiries had been made with M/s.

Chika Ltd. who were the agents of M/s. Bayer. They had informed under their letter dated 30-12-1991 that the indicative price of resoline blue BBLS 200% was DM 69.3 per Kg. CIF Bombay. Inquiries had also been made with M/s. Colour Chem Ltd., Bombay who are the agents of M/s.

Hoechst, and it was informed by them in their letter dated 9-1-1992 that the correct CIF price by Sea of BIANIX/Samaron blue GSL 400 was DM 80.25 per Kg. As recorded in the order of the adjudicating authority, the appellants had pleaded before him that even if their other arguments are not accepted then they must be given the benefit of the lower price quoted by M/s. Chika Ltd. On page 16 of the adjudicating order it has been mentioned as under :- "On 20-9-1993 Shri R. Raghavan and Shri R. Venkatavaradhan, Advocates appeared for personal hearing. Apart from reiterating the contents of the written reply already submitted vide their letter dated 30-11-1992, Shri Raghavan also handed over his written submissions. In addition he highlighted that in case even if the price of Blue quoted by M/s. Chika Ltd. and M/s. Colour Chem Ltd. was taken as referring the blue dye under import, in spite of difference in the strength quoted in the letters of M/s. Chika Ltd. and M/s. Colour Chem Ltd., the party must at least be given the benefit of the lower price quoted by M/s. Chika Ltd." In para 4.10 of the order, the adjudicating authority has mentioned as under :- "4.10. Rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, envisages that, subject to the provisions of Rule 3 of the said rules, where transaction value cannot be accepted and cannot also be determined in terms of the Provisions of Rules 4, 5, 6 and 7, the same shall be determined using reasonable means consistent with the principles and general provisions of these Rules and Sub-section (1) of Section 14 of the Customs Act, 1962 on the basis of available data. In the instant case, I find that M/s. Chika Ltd. Madras has quoted a price of DM 69.3 per Kg. vide their letter dated 30-12-1991, while M/s. Colour Chem, Bombay has quoted a price of DM 80.25 per Kg. Show Cause Notice proposes adoption of

the price of DM 80.25 per Kg. On the other hand, the Advocate to the importer has pleaded that even if the remaining pleas are not admitted, they must be given the benefit of lower price quoted by M/s. Chika Ltd." The adjudicating authority while rejecting the declared value, conceded to the above request of the appellants, and accepted the value of DM 69.3 per Kg. CIF. The appellants in appeal had pleaded that this statement has been made "unknowingly". They had not rebutted it or contradicted it. They have averred in para (n) of their grounds of appeal as under :- "(n) It is submitted that the Respondent Collector takes into consideration to an argument made by the advocate of the appellant stating that if the Respondent Collector was to choose between the value at DM 62.50 and DM 80.25, the lowest of the two should be taken into consideration was only an argument on the ground that if the other pleas of the appellants not having been accepted, then in that case some benefit to be given. It is submitted that the Respondent Collector therefore, cannot take the same as an admission on the part of the appellant or his advocate for finalising the valuation dispute." State of Maharashtra v. Admane Anita Moti - 1994 AIR SCW 4539, the Hon'ble Supreme Court have held as under : "It is well established that the factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the Court and to produce such material, which may satisfy the Court that the recital in the judgment crept in inadvertently or it was erroneous." There is no such rebuttal in this case.

13. In the case of Bhana Bhai Khalpabhai v. C.C. and Anr., 1994 (1) RLT 284 (S.C.), the Hon'ble Supreme Court have observed as under : "It is well known that it is very difficult for the prosecution to prove every link in respect of the commission of the offence under the Act by direct evidence. The whole process of smuggling, for evading payment of Customs duty consists of different links. The links aid and abet each other, sometimes through a remote control (para 9). In the case of Poonam Plastic Industries v. C.C., 1989 (39) E.L.T. 634 (Tribunal), the Tribunal in para 18 had observed as under :- "18. We are aware of the difficulties the Customs face in ascertaining the correct value in circumstances when the deals are between two parties, the facts are not visible, and the transaction is covered by a veil of secrecy. Actual Value cannot be proved with mathematical

precision. In such conditions, reasonable help can be taken of the documents available and other circumstances." The Tribunal in the case of Ruchi Associates v. C.C. - 1992 (59) E.L.T.155 (T) in para 10 of their order had observed as under :- "10. We observe that for any claim for acceptance of transaction value, the pre-requisite is satisfaction of the conditions as set out under sub-rule (2) of Rule 4 of the Valuation Rules, 1988. For authorities to be satisfied in regard to this, it would be essential for the authorities to have a look at the documents leading to the finalisation of the price including the relationship between the buyer and seller. The appellant's plea is that they entered into a contract over telephone and whatever prices have been agreed to should be taken to be the transaction value. This, we are afraid, cannot form the basis for acceptance of the transaction value. It is clearly envisaged in the Rules that the transaction value would be accepted provided that the conditions set out in sub-rule (2) of Rule 4 are satisfied. In short, the rules, we observe, cast a responsibility on the appellants to satisfy the authorities that the price has the attributes satisfying the conditions as set out in the Rules as above." 14. In the case of Sai Impex v. C.C., 1992 (62) E.L.T. 616 (T), the manufacturers' invoice had been filed before the Collector, and the dispute related to the fact that the manufacturers' invoice indicated that the goods were manufactured by M/s. Long March Pharmaceutical factory whereas the manufacturers of the said goods was M/s. Hinan Hualio Pharmaceutical factory, China. These facts are not relevant to the present case.

15. The appellants have relied upon the order passed by the CC (Prev.) Bombay in their own case. In the case decided by the CC (Prev.) in his Order No. 2/94, dated 14-1-1994 on the facts and circumstances of the case before him, the charge of mis-declaration regarding the true identity and country of origin of the goods imported had not been established. In so far as the valuation was concerned, the adjudicating authority in that case had rejected the declared value. He relied upon a contemporaneous import to ascertain the assessable value of identical product. The adjudicating authority spoke to the party's counsel who had no objection in taking the higher value for finalisation of the assessment. Obviously such proceedings are of no relevance to the proceedings before us.

16. Taking all the relevant considerations into account, and in the light of the above discussions, we consider that the declared price in both cases had been rightly rejected and the prices determined for assessment at DM 69.3 per Kg. CIF for disperse dyes blue, and at DM 62.5 per Kg. CIF for disperse dyes red, are correct. In so far as the quantum of redemption fine and the penalty amount is concerned, we consider that in the circumstances of the case some relief is called for. Accordingly, taking all the relevant considerations into account, we reduce in A. No. C/197/94-A, the amount of redemption fine from Rs. 4 lakhs (Rupees Four Lakhs only), to Rs. 2,00,000/- (Rupees Two Lakhs only), and the amount of penalty from Rs. 1,25,000/- (Rupees One Lakh Twenty Five Thousand only) to Rs. 60,000/- (Rupees Sixty Thousand only). In A. No. C/196/94-A the amount of redemption fine is reduced from Rs. 2,00,000/- (Rupees Two Lakhs only) to Rs. 1,00,000/- (Rupees One Lakh only) and the amount of penalty is reduced from Rs. 1,00,000/- (Rupees One Lakh only) to Rs. 50,000/- (Rupees Fifty Thousand only).

Subject to above, both the appeals are otherwise rejected.

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