Bombay Dyeing & Manufacturing Co. Ltd.

Vs

Collector of Customs, Bombay

Civil Appeal No. 4439 of 1990

(S. P. Bharucha, S. B. Majmudar JJ)

18.02.1997

BHARUCHA, J.

1. This is an appeal against the judgment and order of the Customs, Excise and Gold (Control) Appellate Tribunal and it concerns the assessment of project imports for the purposes of customs duty.

2. Prior to the introduction of Item 72-A in the earlier Customs Tariff, individual imports, though intended for a single project, were separately assessed to customs duty. To obviate the inconveniences that resulted, the facility of project imports was introduced and it required that the contract relating to the project import should be registered. The Project Imports (Registration of Contract) Regulations, 1965, were introduced as a consequence. They provide that every importer claiming assessment of articles falling under the relevant entry, being Heading 84.66 of the present Customs Tariff, should apply to the appropriate officer of Customs at the port where the goods are to be imported for registration of his contract. The application in that behalf must specify "such other particular as may be considered necessary by the appropriate officer for the purposes of assessment under the said heading".

3. The appellants entered into a contract on 19-12-1978, with corporations doing business in the United States of America in the style of "Hercofina" to purchase manufacturing equipment, apparatus, machinery, including spare parts and accessories, comprised in Hercofina's plant at Burlington, New Jersey, USA, for manufacture of Dimethyl Terephthlate (DMT) at the price of US $ 10,000,000 (US $ ten million). The appellants applied for registration of the said contract under the Project Import Registration of Contract Regulations, 1965 (hereinafter called "the said Regulations"). On 11-4-1979, the appellants were informed by the Under Secretary to the Government of India in the Department of Industrial Development, Ministry of Industry that the Government had approved the import by the appellants of the aforesaid capital goods for the production of DMT for the CIF value of US $ 17 million. It was noted in the said letter that the appellants would be incurring as dismantling charges the cost of US $ 5.50 million for which necessary clearance from the Reserve Bank should be obtained. On 21-5-1979, the Deputy Secretary in the Ministry of Petroleum, Chemicals and Fertilizers required the appellants to furnish a certificate from a firm of Chartered Engineers regarding the soundness and reliability of the aforesaid plant before incurring any expenditure for its purchase. On 1-8-1981, the Under Secretary in the Department of Economic Affairs in the Ministry of Finance informed the Reserve Bank that the Government had approved the procurement of capital goods, technical assistance, etc., in connection with the DMT project of the appellants thus :

"Value (i) Import of capital goods US $ 17 million (ii) Overseas dismantling

charges etc. US $ 5.5 million(iii) Fee for Technology & Technical US $ 2.5 million" Assistance##

On 24-8-1982, the Assistant Collector of Customs, Bombay, informed the appellants that the said contract had been registered and that spares to the extent of 10 per cent of the value of the main machinery were eligible for the concessional rate of assessment under Heading 84.66(II). On 30-9-1982, the Reserve Bank informed the appellants that is had agreed to the expenditure by the appellants of US $ 5.5 million towards dismantling and other charges in respect of the import of the aforesaid plant, which charges were not required to be endorsed on the import licence issued for that import. On 8-10-1982, the Joint Controller of Imports and Exports wrote to the Collector of Customs, Bombay, asking the Collector not to debit the said dismantling charges to the face value of the said import licence.

4. It was contended by the appellants before the Tribunal that there had been a pre-assessment of the said plant and that, therefore, the Collector of Customs was in error in applying the provisions of Section 14 of the Customs Act to the valuation of the said plant for the purposes of customs duty. The Tribunal did not accept the argument that the registration of the said contract by the Customs in terms of the said Regulations amounted to pre-assessment of the value of the said plant. It accepted the argument on behalf of the Revenue that there had only been a provisional assessment and it was open to the Collector to value the said plant on the basis of Section 14.

5. Before us it was accepted that there had been only a provisional assessment at the stage when the said contract was registered under the said Regulations, but it was submitted that once the value of the said plant was determined at US $ 17 million and the said contract was registered under the said Regulations read with Heading 84.66, then for the purposes of the final assessment, the value of the said plant had to be taken to be the value that had been so determined and it was open to the Customs authorities not to accept that value only if there was material to indicate that it was arrived at on account of some error or a particular item fell outside the scope of the project import. We find it difficult to accept the submission. Once it is accepted that there is no more than a provisional assessment at the stage when the contract is registered under the said Regulations, it is open to the Customs authorities to make a final assessment taking into account all factors that are relevant thereto, and they are not inhibited by reason of the registration of the contract under the said Regulations.

6. The question now is whether the Customs authorities have taken relevant factors into account in making the final assessment of the said plant.

7. The adjudicating authority added the following in making the final assessment of the value of the said plant which was upheld by the Tribunal :

"US $1. Inspection/dismantling/packing and forwarding 38,47,6212. Vendor inspection 3,39,2533. Insulation removal 6,91,9814. Insurance in USA 1,39,3655. Tata Incorporated charges 2,17,5006. Reimbursement to Tata Incorporated for 2,65,018 miscellaneous expenses such as equivalent transport, copying, telephone, telex, postage, legal expenditure. ---------- 55,00,738" ----------##

8. After some debate, the learned counsel for the appellants fairly stated that he could not contest the addition of dismantling, packing and forwarding charges in Item 1 above and "Insurance in USA", being Item 4 above, because these expenses arose upon the terms of the said contract.

9. The amount relating to inspection in Item 1 above is US $ 1.048 million. It was submitted by the learned counsel for the appellants that these inspection charges could not be included in the assessable value of the said plant as the inspection was optional. It did not flow from the terms of the said contract nor did it enhance the value of the said plant. It was not needed to be incurred for dismantling the said plant and making it ready for transport. It was only for determining what parts of the said plant needed repair. The Tribunal had been in error in emphasising clause 9 of the said contract in holding that these inspection charges were includible for the purposes of arriving at the assessable value of the said plant. Clause 9 of the said contract records that independent certification of the condition of the said plant was required to enable the appellants to obtain an import licence for it. It was, therefore, agreed that the appellants would engage, in consultation with Hercofina, an engineering contractor, at the appellants' expense, to insect the major pieces of the said plant and issue a certificate in this behalf. It seems to us clear that this inspection, carried out by Catalytic Inc., was pursuant to the aforementioned term of the said contract and the expenditure incurred in that behalf was rightly held by the Tribunal to flow thereout.

10. Insofar as "Vendor inspection" (Item 2 above) is concerned, it appears that it was carried out by the original supplier of the said plant. It was not required to be incurred for the purposes of dismantling the said plant nor for making it ready for being transported. There is no material shown to us from the record that suggests the contrary. We are, hence, of the view that the expenditure on this inspection should not have been taken into account for the purposes of arriving at the assessable value of the said plant.

11. The learned counsel for the appellants submitted that the expenditure incurred on "Insulation removal" (Item 3 above) should also not have been taken into account for the purposes of arriving at the assessable value of the said plant. Under the terms of clause 4 of the said contract it was the obligation of the appellants, at their own cost and expense, to make all arrangements and perform all work, themselves or through agents or contractors of their choice, necessary to effect dismantling, packing, removal and shipment of the said plant from Burlington, New Jersey. The said plant as installed was insulated by asbestos. Environmental laws in the USA required that the asbestos insulation that was removed from the said plant in New Jersey to enable the said plant to be transported had to be buried at an approved site. It was, therefore, that the appellants had to engage the services of a specialist contractor who came to the site with protective devices and vehicles to remove the asbestos insulation and transport it to the burial site. The learned counsel for the appellants submitted that while the said contract required the appellants to dismantle the said plant and, therefore, to remove the asbestos insulation, it did not require the appellants to bury the asbestos. We must proceed upon the assumption that the said contract required the appellants to carry out their obligations thereunder in a lawful manner. It was, therefore, implicit that the appellants should conform to the law that required the removed asbestos insulation of the said plant to be buried. The obligation in this behalf flowed out of the said contract and the expenditure incurred thereon was rightly taken into account in determining the assessable value of the plant.

12. The appellants had entered into a contract with M/s. Tata Projects for providing services in India with regard to the construction of the said plant. They had agreed to pay the expenses in this behalf actually incurred by M/s. Tata Inc. in the USA and their fees. Accordingly, the appellants had paid the fees of M/s. Tata Inc. (Item 5 above) and reimbursed them for the expenditure which they had actually incurred (Item 6 above). The learned counsel for the appellants submitted that the payment of the fees of M/s. Tata Inc. was payment for rendering a service and could not be taken into account in arriving at the value of the said plant. Attention was drawn to the judgment of this Court in Apollo Tyres Ltd. v. Collector of Customs [(1997) 2 SCC 607 : (1997) 89 ELT 7 (SC)] (to which

one of us was a party) where it was held that the commission or remuneration payable to a purchasing agent did not enhance the value of the items purchased. The same reasoning, it was submitted, applied to the fees of M/s. Tata Inc. and the reimbursement to them of actual expenses. The learned counsel for the Revenue, fairly, did not dispute this.

13. To summarise, only the additions of US $ 3,39,253; 2,17,500 and 2,65,018, being the additions on account of "Vendor Inspection" (Item 2), "Tata Incorporated charges" (Item 5) and "Reimbursement to Tata Incorporated ..." (Item 6) are not sustained.

14. The letter dated 24-8-1982, written by the Assistant Collector of Customs to the appellants intimating to them that the said contract had been registered, stated that spares to the extent of 10 per cent of the value of the main machinery were eligible for the concessional rate of assessment under Item 84.66. It goes without saying that this percentage must now be calculated on the basis of the enhanced value of the said plant. Spares to that extent would form part of the project import and must be valued on a par with the said plant, that is to say that the rate of exchange which is applied in respect of the said plant must also be applied to this percentage of the spares.

15. The appeal is allowed and the order under appeal modified to the extent aforestated. There shall be no order as to costs.