

Mirah Exports Pvt. Ltd.

Vs

Collector of Customs

Civil Appeals No. 47 of 1990 with Nos. 1030-34 of 1990

(S. C. Agarwal, G. T. Nanavati JJ)

04.02.1998.

JUDGMENT

S. C. AGRAWAL, J. -

1. These appeals have been filed against the judgment of the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal") dated 4-9-1989. They raise the question whether there was undervaluation for the purpose of levy of customs duty under Section 14 of the Customs Act, 1962 (hereinafter referred to as "the Act") in the invoices of the various consignments of ball-bearings which were imported by the appellants.

2. Skefko India Bearing Co. Ltd. (hereinafter referred to as "the Skefko"), appellant in CAs Nos. 1030-34 of 1990, are importers of ball and roller bearings. They also act as intending agents for marketing of imported ball-bearings for and on behalf of AB-SKF, Sweden. Ball-bearings of various types are manufactured by AB-SKF in Sweden and by their subsidiary companies in U.K., Germany, France and Italy. Skefko book orders from different types of customers which can be classified into three categories :

- (a) Original Equipment Manufacturers (OEM);
- (b) Replacement User - also described as Actual Users (AUs); and
- (c) Dealers who import for stock and sale.

In addition to this Skefko book orders on their own behalf for stock and sale in India. Ball-bearings could only be imported against an import licence and order to secure a large volume of orders, agents were required to contact the licence-holders and secure their orders for the purpose of consolidating these orders into one large order. Skefko had appointed persons, described as "canvassers", who would go round the market and secure large volume of orders. Punjab Bearing Traders were appointed as one such canvasser by Skefko.

3. Mirah Exports Pvt. Ltd. (hereinafter referred to as "Mirah Exports"), appellant in CA No. 47 of 1990, is a private limited company incorporated under the Companies Act, 1956, carrying on business as importers, exporters and manufacturers' representative at Bombay. In July and September 1982 Mirah Exports contacted Skefko for purchase of approximately 15 lakh pieces of ball-bearings from SKF from Italy/Germany. The entire negotiations for purchasing the said goods were carried out by Mirah Exports with Punjab Bearing Traders. Out of the goods contracted to be purchased by Mirah Exports, 24 consignments of ball-bearings were imported by Mirah Exports

from SKF, Italy and SKF, Germany and the balance quantities were imported by Skefko in the months of November 1982 and January 1983. The bills of entry in respect of 24 consignments imported by Mirah Exports were submitted to the Collector of Customs, Bombay in the months of November 1982 and January 1983 and the same were noted. Clearance was sought against 22 import licences held by Mirah Exports. On or about 22-6-1983, pursuant to certain information, the officers of the Enforcement Directorate carried out search at the premises in Bombay of : (i) Skefko; (ii) Associated Bearings Co. Ltd.; and (iii) Shri Kishan Chand, the President of Skefko. During the said search certain documents were seized by the Enforcement Directorate. After further investigation a show-cause notice dated 31-5-1984 was issued to (i) Skefko; (ii) Mirah Exports; (iii) Punjab Bearing Traders; and (iv) the clearing agents of Mirah Exports. In the said show-cause notice it was stated that by undervaluing, Mirah Exports had misdeclared the value for Bearings Nos. 6201, 6202, 6203 including shielded bearings in each of the 24 bills of entry which misdeclaration had rendered all the 24 imports liable for action under Section 111(m) of the Act and that in respect of the goods, so undervalued to the extent as indicated in the said show-cause notice, no import licences had been produced and in the absence of any import licence in respect of such goods in each consignment, such goods had apparently become liable for action under Section 111(d) of the Act read with Section 3(2) of the Imports and Exports (Control) Act, 1947 and that Mirah Exports, Punjab Bearing Traders and Skefko had done or omitted to do certain acts, which acts of commission/omission had rendered the goods liable for confiscation and that they had thus become liable for action under Section 112 of the Act. The parties mentioned above were required to show cause to the Collector of Customs, Bombay as to why the goods detailed in Annexure 'A' to the show-cause notice should not be confiscated under Section 111(d) of the Act read with Section 3(2) of the Imports and Exports (Control) Act, 1947 and also under Section 111(m) of the Act and why penal action should not be taken against them under Section 112 of the Act. The said show-cause notice was based primarily on the price list for the year 1981-82 that was furnished by the Central Office of the Overseas Suppliers to Skefko since the invoice value of the goods imported by Mirah Exports was 48.7% of the prices mentioned in the said price list. It was claimed that the price list was recovered during the course of search that was conducted by officers of the Enforcement Directorate on or about 22-6-1983.

4. Replies to the said show-cause notice were submitted by Mirah Exports as well as Skefko. Mirah Exports, in their reply to the said show-cause notice, stated that they were not aware of any price list in use by Skefko; since the quantity being imported was about 5 lakh pieces of each type reduced prices had been given by the suppliers; the imports by M/s. Crompton Greaves, Mahindra & Mahindra and Jay Engineering Works, who had been importing quantities from 10,000 to 50,000 pieces, had been at similar prices and that even the government undertakings like BHEL, Hindustan Teleprinters and other public limited companies had been offered discounts ranging from 50% to 70%; and the invoice prices were favourably comparable with similar bearings from other countries like USSR, Romania, Czechoslovakia and Japan. Skefko, in their reply to the show-cause notice, submitted that Mirah Exports were not required to pay any amount over and above the invoice prices; the prices charged in the invoice were in consonance with the pricing policy of the company; the exchange rate difference had caused variation of approximately 27% over their prices in 1981-82 for US dollar when compared with the exchange rate applicable to DM; and the local agent have a discount up to 20% and for any higher discount, prices had to be accepted for each import by the supplier.

5. The Additional Collector of Customs by his order dated 16-4-1985, discharged the notice since the charges set out in the show-cause notice failed and directed that the consignments in question be assessed on their invoice value. The Additional Collector of Customs has found that the appellants

herein, particularly during the personal hearing, had led substantial evidence to chronologically show that despite the said price list there was a development of a new sales and pricing policy for not only India but the world over, after exchange of numerous correspondences and personal discussions during the visits of representatives of the seller and that this policy distinguished between the following categories of buyers on logical commercial grounds :

(i) Replacement users who order small lots at infrequent intervals;

(ii) Original Equipment Manufacturers (OEMs) who import for fitment in their manufactured products and for this build up inventories with sizeable orders after securing favourable prices between various competitors and in view of their sizeable orders and the competition involved, the sales policy allowed up to 20% discounts (on quantity) upon the prices of the said price list;

(iii) Canvassers and Skefko, who import in even greater bulk for the purposes of only trading, and may secure even lower price, particularly if they generated additional volumes of sales.

6. This policy was aimed at a more aggressive marketing objective and envisaged discounts even over 20% (but on the approval of the sellers on a case-by-case basis, on reference to them).

7. The Additional Collector held that the documents which had been referred by the appellants to evidence the existence of the said policy were valid and acceptable since they were from amongst those which were seized by the Enforcement Directorate and on some of which even the department had based its case. The Additional Collector found that apart from Mirah Exports, a number of other importers, viz., Skefko, Amul Engg., Krishna Engg. Works, Delhi, Jayaveer Forge, Davangere, Ajay Trading Co., Delhi, Ramgopal Lachmi Narayan, Bombay, Sanmukh Engineering Industries. etc. had also imported comparable quantities of similar bearings at the same (or lesser) prices as those of Mirah Exports and the mere fact that the prices charged to buyers through Punjab Bearing Traders is as low as 48.7% of the price list does not prove anything by itself. The Additional Collector also found that the evidence produced by Mirah Exports, along with their reply to the show-cause notice, shows that 50 to 70% discount over the list prices were the normal invoice prices for a number of unconnected importers during that period (including a public sector institution) and that there is nothing abnormal in the alleged 51.93% discount averaged by Punjab Bearing Traders. While referring to the provisions contained in Section 14 of the Act, the Additional Collector held that quantity discounts is a recognised feature of international trade practices and that different prices for different commercial levels of import is supported by international trade practices and that as long as those discounts are uniformly available to all and based on logical commercial basis they cannot be denied under Section 14. It was observed that there was nothing in the documents evidencing the new sales policy to show that it is a restricted policy not open to all canvassers. It was held that the policy of selling additional volumes at higher discount is totally within the ambit of the expression "in the course of international trade" in Section 14 of the Act and that it also does not, by itself, constitute any special interest between the buyer and seller in the business of each other and that on the contrary it is a contract based on the seller's considerations of his own profits and continuance of industry in the teeth of fierce international competition and the buyer's considerations of obtaining goods of acceptable quality at the lowest possible prices. The Additional Collector also held that the Department has not been able to prove beyond doubt that a special relationship exists between supplier (M/s. SKF) and the importers (Mirah Exports) through the media of Skefko and Punjab Bearing Traders inasmuch as no evidence was forthcoming to prove

that there is any interest in the business of each other e.g. due to shareholdings, royalty, common directorships, family relationships, etc. and there is also no evidence available to prove or even create a doubt that any illegal relationship exists in the subject transaction i.e. that any extra sums have been unofficially passed on by the buyer to the seller either directly or indirectly through the canvassers/indenting agents.

8. In pursuance of the orders dated 7-6-1985 passed by the Central Board of Excise & Customs, the Collector of Customs presented three appeals against Skefko, Mirah Exports and Punjab Bearing Traders against the order of the Additional Collector before the Tribunal. The said appeals were registered as Appeals Nos. C/1925/85-A, C/1926/85-A and C/1927/85-A.

9. Skefko had also imported ball-bearings on the basis of import licence issued in its favour under invoice dated 20-5-1983 from SKF-Germany and under invoices dated 17-3-1983 and 29-4-1983 from SKF-Italy. In addition, M/s Rajkumar & Co. had imported one consignment of bearing of SKF brand, Part No. NU 209 under invoice dated 31-7-1984. Separate show-cause notices dated 30-1-1984, 3-2-1984, 29-3-1984 and 21-10-1986 were issued by the Collector of Customs, Bombay in respect of the said imports. Skefko filed its reply to the said show-cause notices. On the basis of the said show-cause notices separate orders dated 20-3-1987 were passed in respect of the show-cause notices dated 30-1-1984, 3-2-1984 and 29-3-1984 and order dated 5-12-1986 was passed in respect of the show-cause notice dated 21-10-1986. In the said orders the Collector of Customs took a view contrary to that taken by the Additional Collector in his order dated 16-4-1985. The Collector of Customs proceeded on the basis that the price list does not show any discount schedule or reduction in the price for any reasons, i.e., cash discount, trade discount or quantity discount and that from the record seized it is seen that Skefko were entitled to 6% commission in the c.i.f. value if the invoice prices are as per the list price and that if the invoice prices are with discount higher than 20% they are entitled to 3% commission only and that the prices with the discount up to 20% is not available to everyone but is discretionary discount to be given by the importers with utmost discretion and that any price which was less by more than 20% of the price indicated in the list price was a special price and that such discount is not available to all and hence it cannot be admissible while determining the assessable value under Section 14 of the Act. He further held that the importers had not made out any case of quantity discount at predetermined level available to all customers exceeding certain quantity or value limit. The Collector was of the view that a special price for bulk purchase is not a quantity discount and is not a percentage of a basic price and that it could at best be a negotiated price and normally even such a price will not be accepted under Section 14 of the Act, unless it is shown that it is the price at which such or like goods are normally sold or offered for sale in such quantities at the time and place of importation. The Collector has also referred to one of the seized documents, namely, "Fixation of Price Level Objective for 1983" and has observed that the said document shows sales to Kirloskar Electric, Bangalore a of bearing for c.i.f. value of Rs. 22,43,000 at 0.5% discount of list price, to M/s. Premier Automobiles Ltd., for c.i.f. value of Rs. 20,64,000 at a price 30% higher than the list price, to Eicher Good Earth for c.i.f. value of Rs. 20,36,000 at a discount of 20% of the price list as against the sales to Punjab Bearing Traders of Rs. 9,21,000 at 48.7% discount. The Collector has observed that this clearly shows that discounts given for even larger quantity or value are not more than 20%. According to the Collector, the contention of the importers that only negotiated price which is actually paid should be the assessable price is therefore not tenable and is contrary to the provisions of Section 14 of the Act and that once it is established that for the similar quantity, discounts not exceeding 20% is normally given, place and period of import being same, discount more than 20% becomes inadmissible in arriving at assessable value. The Collector, therefore, held that for arriving at a value for assessment purposes in terms of Section 14 of the Act prices indicated in Price List No. 8211 for 1982 will be taken as

the base and if discount is allowed up to 20% of the price list, depending upon the quantity, the same can be accepted. This being an old case, where the goods have already been cleared provisionally, the Collector refrained from taking any action under Section 111(d) of the Act and further held that since the importers declared their special relationship with the supplier and, therefore, special price charged cannot be treated as misdeclaration as the importers have paid the amount only due to their special relationship, charge under Section 111(m) of the Act was also dropped. Feeling aggrieved by the aforesaid order of the Collector of Customs, Skefko filed four appeals (Nos. C/1473/87-A, C/2426/87-A, C/2435/87-A and C/2472/87-A) before the Tribunal.

10. All the 7 appeals have been disposed of by the Tribunal by the impugned judgment dated 4-9-1989. The Tribunal has dismissed the appeals filed by Skefko against the orders of the Collector of Customs dated 5-12-1986 and 20-3-1987 but has allowed the appeals filed by the Collector of Customs against the order of the Additional Collector of Customs dated 16-4-1985. The Tribunal has directed the Revenue authorities to fix the value as mentioned in Price List No. 8102 dated 15-2-1981 less 20% discount. The Tribunal has also found that there is violation of provisions of Section 111(d) and Section 111(m) of the Act and has directed the Collector of Customs to fix the quantum of fine and penalty keeping in view the gravity of the offence and the margin of profit. The Tribunal has proceeded on the basis that the genuineness of Price List No. 8102 dated 15-2-1981 has not been doubted by the appellants and that reliance could not be placed on the pricing policy of the foreign supplier of the appellants and that the invoice price could not be accepted in view of the said list price. According to the Tribunal 20% discount is the normal discount. Feeling aggrieved by the said decision of the Tribunal, the appellants have filed these appeals. The Tribunal has not taken note of the documents referred to by the Additional Collector of Customs in his order dated 16-4-1985, showing that other importers had been given 50% to 70% discount over the price list by SKF.

11 Shri H. N. Salve, the learned counsel appearing on behalf of the appellants, has urged that the burden lies on the Revenue to show that the invoice price does not represent the true price of the goods and that there is an undervaluation and that in the present case Revenue has not adduced any evidence except Price List No. 8102 dated 15-2-1981 which was found among the documents seized during the course of search and seizure of the premises of Skefko, etc. It was submitted that on the basis of the said price list only it could not be said that the value as indicated in the invoices was not the correct value of the goods which were imported by the appellants. It has also been urged that the Additional Collector of Customs in his order dated 16-4-1985 has taken into consideration the evidence that was produced by the appellants to come to the conclusion that the invoice prices represent a proper basis for valuation of the consignment for the purpose of assessment under Section 14 of the Act and neither the Collector of Customs nor the Tribunal have taken note of the said evidence and that in view of the said evidence it could not be held that the invoice prices cannot be made the basis for valuing the consignment for the purpose of assessment under Section 14 of the Act. It has been urged that the price list of the supplier does not preclude the supplier and the importers from negotiating at a lower price keeping in view the quantity of the bearings to be imported and that the Collector of Customs was in error in holding that such negotiated price was not permissible for the purpose of assessment of the value of the goods under Section 14 of the Act. It was also urged that the Tribunal was in error in holding that the reliance could not be placed on the pricing policy of the foreign supplier. Shri Salve has submitted that at the relevant time SKF was facing stiff competition from other manufacturers and the prices of SKF were higher than those quoted by Japanese manufacturers of bearings and that this fact is borne out by the documents that were seized during the course of search of the premises of Skefko, etc. The learned counsel has placed reliance on the decisions of this Court in *Basant Industries v. Addl. Collector of Customs* (1995 Supp (3) SCC 320 : (1996) 81 ELT 195); *Collector of Customs v. Nippon Bearings (P) Ltd.*

((1996) 82 ELT 3 (SC)) and Union of India v. Mahindra & Mahindra Ltd. (1995 Supp (2) SCC 372 : (1995) 76 ELT 481)

12. Shri Gowri Sankaramurty, the learned counsel appearing on behalf of the Revenue, has submitted that the Tribunal has rightly ignored the invoice price in view of the price list of the foreign supplier, the genuineness of which is beyond doubt. The learned counsel has placed reliance on the decision of this Court in Sharp Business Machines (P) Ltd. v. Collector of Customs ((1994) 1 SCC 154 : 1991 SCC (Cri) 114 : (1990) 49 ELT 640); Padia Sales Corpn. v. Collector of Customs (1993 Supp (4) SCC 57 : (1993) 66 ELT 35) and Commerce International v. Collector of Customs ((1995) 3 SCC 343 : (1995) 77 ELT 20).

13. The legal position is well settled that the burden of proving a charge of undervaluation lies upon the Revenue and the Revenue has to produce the necessary evidence to prove the said charge. "Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs" and what is to be examined is "whether the Revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price." (See : Union of India v. Mahindra & Mahindra (1995 Supp (2) SCC 372 : (1995) 76 ELT 481), ELT at p. 487 : SCC pp. 379-80, para 6)

14. In the present case the only evidence that was adduced by the Revenue in support of the charge of undervaluation is Price List No. 8102 dated 15-2-1981 which was found during the course of search in the premises of Skefko, etc. that was conducted by the officers of the Enforcement Directorate on or about 22-6-1983. The price list does not even mention about the discount of 20% that has been allowed by the Tribunal in the impugned judgment. The matter of discount to be given on the prices indicated in the price list is actually mentioned in other documents that were seized during the search. The said documents include the various letters and telexes received from SKF Overseas Bearings Division, Sweden which indicate the new pricing policy of the foreign supplier. As pointed out by the Additional Collector of Customs in his order dated 16-4-1985 the said documents show that 20% discount is allowed to the original equipment manufacturers who import for fitment in their manufactured products and for this build up inventories with sizeable orders after securing favourable prices between various competitors but as regards canvassers and Skefko, who import in even greater bulk for the purposes of only trading, the policy envisaged that they may even secure lower price particularly if they generated additional volumes of sales. The documents seized during the search and seizure that were produced by the appellants before the Customs authorities (genuineness of which was accepted by the Additional Collector of Customs) show that apart from Mirah Exports a number of other importers, namely, Skefko, Amul Engg., Krishna Engg. Works, Delhi, Jayaveer Forge, Davangere, Ajay Trading Co., Delhi, Ramgopal Lachmi Narayan, Bombay, Sanmukh Engineering Industries, etc. had also imported comparable quantities of similar bearings at the same or lesser prices as that of Mirah Exports and that discount from 50% to 70% on the list prices was the normal invoice price for a number of unconnected importers during the period. The Collector of Customs, while passing the orders dated 5-12-1986 and 20-3-1987 and the Tribunal in the impugned judgment have not taken note of the said documents and the fact that the importers had been given 50% to 70% discount on the prices indicated in the list price.

15. In Basant Industries (1995 Supp (3) SCC 320 : (1996) 81 ELT 195) this Court has pointed out that "in the business a world, considerations of relationship with the customer are also a relevant factor" and that "a price which is offered by a supplier to an old customer may be different from a price which the same supplier offers to a totally new customer". In that case, the Court, on the basis of the correspondence that had ensued between the supplier and the importer, found that there was

some bargaining before the price was finalised and that the price mentioned in the invoice that was agreed was in view of the quantity that was being imported by the importer. Thus it is not unusual for a foreign supplier to give a higher discount to an importer who is importing a much larger quantity and merely because such a discount has been given by the supplier it cannot be said that there has been any undervaluation in the invoice.

16. Section 14 of the Act prescribes that valuation of goods for the purpose of assessment has to be made at the price at which such goods or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. In the present case neither has it been alleged nor has any material been produced to show that Mirah Exports and the foreign suppliers have any interest in the business of each other. As regards Skefko it has been pointed out that AB-SKF, Sweden, holds 39.8% of the share capital in Skefko but there is nothing to show that Skefko has any interest in the business of AB-SKE. Moreover it is of no consequence in the present case because the invoice price at which the imports were made by Skefko were the same at which Mirah Exports and other importers had imported and no special price was given to Skefko for import. In these circumstances, we are of the opinion that the invoice prices as mentioned in the invoices could be treated as the price at which the goods are ordinarily sold or offered for sale in the course of international trade and that it had been rightly accepted as the value for assessment purposes under Section 14 of the Act by the Additional Collector of Customs.

17. In *Sharp Business Machines (P) Ltd.* ((1991) 1 SCC 154 : 1991 SCC (Cri) 114 : (1990) 49 ELT 640) the invoice value was not accepted as the real value of the goods which were imported in view of the special facts and circumstances of that case. It was found that the appellant company in that case had tried to practise a fraud in defeating the import policy relating to import of copiers which enabled the new entrepreneurs establishing small-scale industries to import, in the first phase, 62% of the components of the copiers and the balance of the 38% was to be manufactured by them indigenously. In that case it was found that the appellant company had purchased 14 fully finished plain paper copiers of Japanese origin in Hong Kong and Singapore and had them dismantled in Hong Kong for importing the same in the guise of components of the copiers and thereby the company not only had violated the terms and conditions of a the licence but had also committed a fraud on the import policy itself in importing the fully finished copiers which was a totally prohibited item for import. The finding about undervaluation in the invoices was arrived at on the basis of prices mentioned in quotations of the authorised agents of the manufacturers and it was held that there was no question of supplying the components of the copiers on a lower price than given by the manufacturers themselves. The decision in *Sharp Business Machines* ((1991) 1 SCC 154 : 1991 SCC (Cri) 114 : (1990) 49 ELT 640) has, therefore, no application to the facts of this case. Similarly the decisions in *Podia Sales Corpn.* (1993 Supp (4) SCC 57 : (1993) 66 ELT 35) and *Commerce International* ((1995) 3 SCC 343 : (1995) 77 ELT 20) which were decided on their own facts have no application to the present case.

18. In the result, the appeals are allowed, the impugned judgment of the Tribunal is set aside and it is held that the invoice prices as mentioned in the invoices for the imports of ball-bearings by the appellants shall be treated as the value for the purpose of assessment of customs duty under Section 14 of the Act. No order as to costs.