SUPREME COURT OF INDIA

Collector of Customs

Versus

M\s. Television & Components Ltd.

(S.P. Bharucha and Ruma Pal, JJ.)

Civil Appeal Nos. 9026-9028 of 1996.

24.02.2000

JUDGMENT

Ruma Pal, J. - The issues in these appeals arise out of the import of Tape Deck Mechnisms (TDMs) by the respondent No. 1. According to the appellant, not only were the TDMs imported at a gross under-value which resulted in a non-payment of the appropriate customs duty bit they were also imported contrary to the provisions of the Import and Export (Control) Act, 1947 and the Import Control Order 1955.

2. The TDMs had been imported by the respondent No. 1 at S $ 250.00 per set from Yamato Industrial Co. Ltd. (referred to hereafter as `Yamato'). Acting on intelligence that the imported TDMs were fraudulently under-invoiced and that the provisions of the Import Control Order, 1955 had been violated, the consignment was intercepted by the Directorate of Revenue Intelligence (DRI) at Kandla Port. Investigations were started by the DRI. The respondent No. 1 challenged the investigation under Article 226 before the High Court at Gujarat. The writ petition was disposed of by directing the DRI to complete the investigation and issue the show cause notice within two months.

3. Raids were conducted at office and factory premises of the respondent No. 1 by the DRI and several documents recovered. Statements of the Managing Director, the Director and Assistant Manager as well as the clearing agent of the respondent No. 1 were recorded under Section 108 of the Customs Act, 1962 (referred to as the `Act').

4. The TDMs were seized. The respondent No. 1 appears to have filed a Second Writ Application in the High Court at Gujarat challenging the seizure of the TDMs. The High Court directed the provisional release of the TDMs against security. The goods were accordingly released but the investigation continued.

5. On the basis of the documents recovered and statements under Section 108, a detailed show cause notice was issued to the respondents on 15th June, 1990 alleging *inter alia* that the respondent No. 1 was liable to pay the difference of duty in respect of the TDMs calculated at the rate of S $ 343.45 per set instead of S $ 250.00 as well as alleging contravention of the Import Control Order. The respondent No. 1 replied to the Notice. The Collector gave the respondents a hearing.

6. The Collector after considering the evidence found that there was a deliberate mis-

declaration of value, manipulation of documents, attempt to evade payment of full customs duty and attempt to circumvent the Import Control Regulations by the Respondent No. 1 and its Directors. According to the Collector, the TDMs imported by the respondent No. 1 at S $ 250.00 per set were of the value of Singapore Dollar 343.45 per set and that the respondent No. 1 should have declared the value of the TDMs at Rs. 88,34,698\- as against the declared value of Rs. 64,30,847\-. He, therefore, concluded that the respondent No. 1 had sought to evade duty to the extent of Rs. 32,03,594.00 and that the entire consignment was liable to confiscation under Section 111(m) of the Act. The Collector also held that the TDMs required an import licence and since no import licence had been produced, the goods were liable for confiscation under section 111(d) of the Customs Act read with Section 3(2) of the Import and Export (Control) Act, 1947 and Clause 3 of the Import Control Order, 1955.

7. Having regard to his findings and the fact that the goods had already been released pursuant to an order of the High Court, he directed the respondent No. 1 to pay the differential duty of Rs. 32,03,594.00 and imposed penalty of Rs. 40 lakh on the respondent No. 1 under section 112(a) of the Act (as the redeemable value of the goods) and Rs. 5 lakh each on the Managing Director and Director of the respondent No. 1.

8. The respondent No. 1 and its Directors preferred an appeal before two Members of the tribunal.

9. During the pendency of the appeal the Gujarat High Court on a Writ Application filed by the respondent No. 1 passed an order on 26th June, 1992 to the following effect :

> "Notice. Mr. B.B. Naik, learned counsel, waives service of notice.
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> We heard Mr. S.I. Nanavati, learned counsel for the petitioners and Mr. H.M. Mehta, Senior Central Government standing counsel, for the respondents.
>
> We have been informed that as against the adjudication order, dated 26th February, 1992, the petitioners have already preferred an appeal. The only grievance is that respondent No. 2 is not permitting the petitioners to produce the import licence. His grievance could be ameliorated by directing respondent No. 2 to accept the import licence within two weeks from today and respondent No. 2 shall proceed with the matter in accordance with law. This petition is disposed of in the above terms. Notice is discharged. No costs."
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> 10. As far as the appeal before the Tribunal was concerned, on a difference of opinion between the two members as to whether the order of the Collector should be upheld or not, the matter was referred to a third Member. The third Member concurred with the view that the order of the Collector in so far as it assessed the value of the TDMs at Singapore Dollar 343.45 was wrong. Consequently, the imposition of differential duty was set aside. On the question of the violation of the Import Control Order, the Tribunal acted on the basis of the High Court order and the concession of the departmental representative that the issue was one which the "original authority" would have to look into and decide and remanded the matter back to the Collector with liberty granted to the

parties to produce any fresh evidence before the adjudicating authority in this connection. In view of this order, the penalty imposed by the Collector on the respondents was also set aside.

11. These appeals were thereafter preferred. No stay having been granted, the order of the Tribunal directing a re-adjudication of the licensing aspect was taken up by the Commissioner of Customs on 27th September, 1995. Before the Commissioner, additional licences were produced by the respondent No. 1. It was noted that since it was already found by the Collector that the licence covered the goods in question, and that the issue had not been pursued before the Tribunal, the licences should be accepted. The order, some what ambiguously, concludes with the sentence :

"However, if the Department now decides not to accept the licences the party may be given another hearing to argue the merits of the case from the ITC angle."

12. The first question raised before us by the appellant relates to the finding of mis-declaration of the value and the evasion of customs duty. In our opinion, the finding of the Collector that the TDMs imported from Yamato should be valued at S $ 343.45 instead of S $ 250.00 was justified in fact and was in keeping with the relevant statutory provisions on the subject. As for the finding on facts, the relevant and admitted facts are required to be set out chronologically.

13. The respondent No. 1 had placed several orders in July, September, October and December, 1988 on M\s Mohan Impex for supply of TDMs. None of the orders mentioned the model or the make of the TDMs. Each of the earlier consignments had been obtained by respondent No. 1 from M\s Mohan Impex @ s $ 343.45 per set.

14. As far as the consignment in question is concerned, the DRI recovered two identical invoices bearing the same number, both dated 29.12.1998 for supply of 3000 sets of TDMs. Both were invoices of M\s Mohan Impex but the price quoted in one was S $ 343.45 per set and the other for S $ 250.00 per set. The respondents have not been able to explain this duplication of invoices.

15. The respondent No. 1 then placed an order on M\s Mohan Impex being Order No. TC-89-004 dated 5th January, 1989 for supply of 3000 sets of TDMs at S $ 343.45 per set. The DRI recovered an identical order bearing the same number and date placed by respondent No. 1 on Yamato but @ S $ 250.00 per set. The respondent No. 1's Director admitted in his statement under Section 108 that no order was placed on Yamato on 5.1.89 and this was a fabricated document.

16. A letter of credit was established by respondent No. 1 through the Bank of India in favour of M\s Mohan Impex for supply of "Electronics components for VCRs, viz. Tape Deck Mechanisms as per order No. TC-80-004 dated 5th January, 1989."

17. It is not in dispute that till 21st March, 1989, TDMs were covered by Open General Licences (OGL) under the Import and Export Policy of April, 1988 to March, 1991. By public notice dated 21st March, 1989 the Import and Export Policy was amended by removing TDMs after 21st March, 1989 required a licence in terms of clause 3(1) of the Control Order. The public notice, however, allowed certain imports of TDMs without licence subject to the fulfilment of conditions detailed in paragraph 4 of the notice, as under :

"In respect of raw materials, components and consumables taken out of Open General Licence in terms of this Public Notice import under Open General licence by eligible importer shall not be permitted except to the extent of irrevocable letters of credit already opened and established before the date of this Public notice for which shipments are made within a period of ninety (90) days from the date of this Public Notice."

18. The respondents sought to avail of this exemption. To this end, on 26th May, 1989, the respondent No. 1 wrote to the Reserve Bank of India through the Bank of India stating that it had been informed by M\s Mohan Impex that the material `will not be ready for shipment before July, 1989. Since we are urgently in need of the Tape Deck Mechanism to ensure smooth production, we advised the beneficiary to arrange for immediate shipment. Accordingly, our beneficiary could find out a Japanese supplier who is in a position to give immediate delivery.' It was also stated that the supplier, Yamato had written stating that they were `holding the goods ready' and that L\C should be amended accordingly. The implication of this letter is that Yamato was to supply the same material for which the order had been placed on M\s Mohan Impex and that Yamato was the agent of M\s. Mohan Impex.

19. Incidentially, the respondent No. 1's Director subsequently admitted that the amendment of the L\C had been obtained on a mis-representation that Yamato had been introduced to the respondent No. 1 by M\s Mohan Impex in May, 1995. In fact, the respondent No. 1 and its Directors were personally known to Yamato and its partner for several years and Yamato was wholly independent of M\s. Mohan Impex.

19-A. The Collector held that the consent of the Bank of India and Reserve Bank of India to the amendment of the Letter of Credit by submitting Yamato in place of M\s. Mohan Impex and chance in the Port of shipment in place of origin of the TDMs was obtained by suppression and mis-representation of essential facts. It was also held that the letter of credit which was operated for payment of M\s. Yamato was in fact a new letter of credit and therefore the import of the TDMs from Yamato was not covered by clause 4 of the Public Notice dated 21st March, 1989. Before the Tribunal the advocate for the respondents did not press for the validity of the letter of credit from January, 1989 and conceded that it may be deemed as if the letter of credit was opened in May, 1989 as held by the Collector.

19-B. In view of this, the entire consignment of TDMs required an import licence under clause (2) of the Import and Export (Control) Act, 1947 and

clause 3 of Import Control Order, 1955 prior to the import.

20. Returning to the narration of facts relevant to the issue of valuation. After the issuance of the Public Notice, there was a purported fall in the declared value of TDMs from S $ 343.50 to S $ 250.00 per set. Yamato is a Japanese concern. Yet on 17.5.1989 Yamato is alleged to have given a fresh proforma invoice to the respondent No. 1 quoting the price in Singapore Dollars per set instead of quoting the price in yen. As said by the Collector "Due to the change in the Import Policy, the importers had a special interest in ensuring that the unit price was brought down so that the quantity of import could be increased."

That this dramatic "fall" in value of the TDMs did not reflect the real value of the TDMs is borne out by the evidence both documentary and oral. ely, Tape Deck Mechanisms, as per order No. TC-89-004 5189." In other words, the type and rate of TDMs of S $ 343.45 remained the same. In availing of the letter of credit, the parties thereto must be taken to have done so in fulfilment of the original order placed on the Mohan Impex where the rate mentioned was S $ 343.50 per set.

22. Secondly, Yamato's invoice which was filed with the Customs authorities also described the TDMs as electronic components for VCRs viz. Tape Deck Mechanisms as per order No. TC\89\004 dated 5.1.89. As already noted, it was admitted by the respondent No. 1's Director in his statement under Section 108, that in fact no order had been placed on Yamato on 5th January, 1989 and the only genuine order was the one placed on M\s Mohan Impex. Since Yamato's supply of the 3000 sets of TDMs was "as per" Mohan Impex's order, it must be taken to have supplied the same goods at the rate of S $ 343.50 per set.

23. Thirdly, that the TDMs which were supplied by Yamato were the same as those for which the order had been placed on M\s Mohan Impex is further supported by the statements recorded under Section 108 of the Act. [See in this connection : ***Naresh J. Sukhawani v. Union of India, 1996(83) ELT SC.*** The respondent No. 1's Director and Assistant Manager confirmed before the DRI in their statements under Section 108 of the Act that the TDMs which were sent by Yamato were the same as those for which the orders were placed on M\s Mohan Impex. The Assistant Manager of the respondent No. 1 stated that the order with M\s Mohan Impex was subsequently "transferred" to Yamato and not that a fresh order was placed. Even the Managing Director of respondent No. 1 had this to say :

"I also state that whatever item was entered into contract with M\s Mohan Impex for the L\C opened with them in January 89 remained same (but for the make) even in our fresh contract with Yamato Japan. Thus, there is no material change in our fresh contract with M\s Yamato."

24. Now, the TDMs supplied by Yamato bore no marking and the order on M\s Mohan Impex did not mention the model. Interestingly, the clearing agent of the respondent No. 1 in his statement under Section 108 said :

"On the basis of common experience, it is stated that it is a fact that though importer had been telling the customs at Kandla port that these T.D.M.'s are not of national G-30, there cannot be any proof of these as it is undisputed that TDM (Tape Deck Mechanism) of National G-30 is 100% identical to the ones being now cleared by the importer. I can only say on the basis of my experience of exclusively handling this item (V.C.R.\T.V. and their components) for some importers and other sister concerns that as per sample drawn and being submitted to D.R.I. today, it is 100% same and identical to National G-30 but for only G-30 Marking not being shown on these sets. Anyone in this trade can also know the same as it is a trade information of such and such manufacturer."

25. Again the clearly agent stated that the price of the TDM as shown by respondent No. 1 was unusually low. He said :

"I am very well aware that in past consignments, the same was never so low at S $ 250 per set. Tape Deck Mechanism has never been passed by me for any importer for any model. I had told the importer that this value was too low but they stated that they would manage by showing that these goods were different. The party also said they would produce some engineer to show that these were different while I on the basis of my experience told them that these goods did not look different from what I have been clearing on their behalf. But they said they would try to bring some engineer."

26. The respondents sought to rely upon an invoice dated 10th March, 1989 passed by NEC to Yamato for which the price was shown at approximately @ 237.00 S $ per set. The invoice further showed that the shipment was to be made to India. The significance of the date was not lost on the Collector who noted that it could not relate to the shipment in question as admittedly the contract for supply of TDMs was placed on Yamato by respondent No. 1 only in May, 1995. The Collector also discounted the evidentiary value of two other invoices produced by respondents in respect of NEC model of TDMs on the ground that they related to imports of 8 to 10 months after the date of import of the consignment in question.

27. The Collector on the other hand relied upon earlier invoices showing the value of TDMs S $ 343.50 per set. There is nothing on record to show that the earlier invoices did not refer to TDMs of the type supplied by M\s Yamato. The Assistant Manager of respondent No. 1 had admitted that respondent No. 1 had effected many shipments of the same TDM (4 to 5 shipments) earlier.

28. The Collector, in the circumstances narrated, correctly determined the value of the TDMs supplied by Yamato to be "such or like" the goods for which the order was placed on M\s Mohan Impex within the meaning of S. 14(1) of the Act.

29. The finding of the Collector is also justifiable under Section 14(1A) of the Act. Section 14(1A) provides for the determination of the price in accordance with rules made in this behalf subject to the provisions of sub-section (1). The rules which have been framed in this connection are the Customs Valuation

(Determination of Price of Imported Goods) Rules 1988 (hereinafter referred to as the Valuation Rules).

30. Rule 3 of the Valuation Rules provides for the determination the method of valuation and states that :

"For the purpose of these rules :-

(i) the value of imported goods shall be the transaction value;

(ii) If the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules."

31. Rule 4 sub-rule (2) provides that the transaction value of imported goods shall be accepted. The transaction value has been defined in sub-rule (1) of Rule 4 as *the price actually* paid or *payable* for the goods when sold for export to India subject to certain adjustments with which we are not concerned.

32. Yamato supplied the TDMs "as per Order No. TC\89\004 dated 5.1.89" which was the order placed on M\s Mohan Impex for supply of TDMs at S $ 343.45 per set. The "price payable" for the goods remained S $ 343.50 per set. The transaction in this case *even at the time of import* referred to the order placed on M\s Mohan Impex. The price payable in respect of that transaction for the TDMs was S $ 343.45 per set. In may, therefore, be stated that the transaction value was S $ 343.45 per TDM set within the meaning of Rule 3.

33. The reasoning of the two Members of the Tribunal who set aside the order of the Collector proceeded on the fallacious premise that the Collector could not adopt two different dates, one from the date of L\C and other from the date of the valuation. They also relied on the invoice dated 10th March, 1989 issued by NEC as well a statement of the Collector quoted out of context to some to the conclusion that it was evident that the value of TDMs had substantially fallen.

34. The two members misread the order of the Collector completely. The Collector had referred to the date of L\C only in connection with applicability of paragraph 4 of the Public Notice and not in connection with the valuation at all. They also misconstrued the statement of the Collector relating to the fall in prices. What he had said was that the fall in price of TDMs was manipulated because of the change in the import policy by which the import of TDMs was restricted considerably.

35. We would, therefore, uphold the finding of the Collector that the unit price of the TDMs for S $ 343.45 as also his further order regarding payment of differential duty.

36. The second issue raised by the appellant before us is whether the question of acceptability of the licences covering the import of the TDMs should have been remanded by the Tribunal. According to the appellant, the import of TDMs clearly contravened the Import and Export (Control) Act, 1947 and the Import

Control Order 1955. It is submitted that the import of the TDMs having been made without a licence there was no question of submission of a licence subsequent to the import. According to the respondents the appellant should not be allowed to raise the issue because the appellant had participated in the proceedings before the Commissioner after the remand and that the hearing was proceeding.

37. We accept the submission of the respondents, not on the ground put forward but because the appellant's representative before the Tribunal had conceded that the issue should be decided by the original authority in terms of the order of the High Court. Nevertheless, we would like to clarify the scope of the issue before the adjudicating authority.

38. It is not clear on what basis the High Court was persuaded to allow the import licence to be produced subsequent to the importation of the goods. However, in directing the matter to be proceeded with in accordance with law, it is clear that the High Court did not decide finally whether the licence could, at all, be relied upon by the respondent No. 1 for avoiding their liability for contravention of clause (3) of the Control Order. The adjudicating authority will, therefore, have to decide (i) whether in law, a licence subsequently produced in respect of items already imported is acceptable in law, (ii) If so, whether the licences in fact covered the items imported and are otherwise valid.

39. This brings us to the question of penalty. It is to be remembered that the Collector had imposed a penalty of Rs. 40 lakhs on the respondent No. 1 as being equivalent to the redemption value of the TDMs which were not available for confiscation and Rs. 5 lakh each on the respondent No. 1's Directors. The penalty was a composite one in the sense that it was imposed both on account of violation of the Import Control Order and because of mis-declaration of value and evasion of customs duty. The majority set aside the penalty on the respondent No. 1 because they negatived the finding of under valuation and evasion and also in view of the order of remand. It is not possible to apportion the quantum of penalty between the contravention found. Therefore, although we have upheld the Collector's finding on the issue of mis-declaration and evasion, the question of quantum of penalty will have to be re-determined by the Collector after determining the issue on the licensing aspect.

40. We make it clear that there was no finding by the Tribunal that the penalty imposed was unreasonable. On the other hand, the dissenting Member who had opined against the remand, had held, in our opinion correctly, that in the circumstances of the case the quantum of the penalty was justified.

41. The appeal is accordingly partly allowed. The decision of the Tribunal is set aside in so far as it relates to the finding on mis-declaration and evasion. The order of the Collector directing payment of differential duty is affirmed. On the question of the violation of the Import Control Order, the adjudicating authority will decide the matter in the light of the questions earlier framed. Depending on his decision the quantum of penalty will thereafter be determined by the Collector in the light of the findings in this judgment. The respondents will pay

the costs of the appeals to the appellant assessed at Rs. 5,000\-.