

SUPREME COURT OF INDIA

Commissioner of Customs, Kolkata

Vs.

Initiating Explosives

C.A.No.2237 of 2002

(Ashok Bhan and Dalveer Bhandari,JJ.)

24.01.2008

ORDER

1. The present appeal has been filed by the Revenue under Section 130A of the Customs Act, 1962 (the Act) against the final order being Order No.A-704/Kol/2001 dated 09th August 2001 in Appeal No.C/V-296/2001 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, Eastern Bench, Kolkata, (for short 'the Tribunal') whereby the Tribunal allowed the appeal of the respondent-assessee. M/s. Initiating Explosives Systems India Ltd., the respondent herein, had been importing "Orange Shock Tube" from M/s. The Ensign Bickform Co., 660, Hopmeadow Street, USA (hereinafter referred to as, 'the exporter') at a unit price of US\$ 15.00/1000 ft. (0.015/ft.) which was the declared value of the tubes till November 2000. In November 2000, the price was reduced to US\$ 0.0141/ft. (14.10/1000 ft.). The said reduction in the price was attributed to the increase in the import by the importer. The Department accepted the said reasoning.C.A.No.2237/02 (contd.)

2. However, in June 2001, the importer declared the value of the imported tubes at a unit price of US\$ 0.01/ft. (i.e. US\$ 10.00/1000 ft.) and submitted Invoice No.259217-4 dt. 05.02.2001. The total quantity imported vide Bill of Entry was 78 lacs feet indicating the value at Indian Rs.6.30 crores and US\$ 13,25,660 ft. As per Export Import Policy, this item is restricted one and import is allowed only against specific licence. The Customs Officer, while comparing the value of the tubes with the value of the tubes imported in the month of November 2000, February, March and May 2001, found that the declared value was substantially lower than the actual value. Respondent, when asked to explain the reasons for this reduction in the price of the imported goods, submitted that they had entered into an agreement dated 16th April 2001/23rd April 2001 with the foreign supplier and one of the conditions of the said agreement was that the respondent shall purchase from the supplier 100% of their annual requirement of the goods in question and in the light of these conditions the import price was reduced and thus quoted. After having been given an opportunity of personal hearing to the respondent, the Dy. Commissioner of Customs observed that the value cannot be accepted under Section 14(1A) of the Act and the said value cannot be determined as per Rule 4 C.A.No.2237/02 (contd.) of the Customs Valuation Rules, 1988

because buyer and seller are related and the relationship has influenced the price reduction. This finding was arrived at as the exporter was having 30% holding in the paid up share capital of the respondent. He further observed that value has to be determined as per Rule 5 of the said Rules, viz., transaction value of identical goods. Accordingly, the goods were ordered to be assessed at the enhanced value for duty, viz., US\$ 14.10/1000 ft. (0.0141/ft.) FOB. Commissioner (Appeals) confirmed the order passed by the Dy. Commissioner aggrieved against which the respondent carried an appeal to the Tribunal. The Tribunal, following the decision in the case of *Daewoo Motors India Ltd. v. Commissioner of Customs, New Delhi reported in¹* and *Collector of Customs, Bombay v. Maruti Udyog Ltd., Gurgaon reported in²* which have attained finality, held that the respondent and the exporter were not related persons. Merely because the supplier was holding 30% of equity in share capital of the buyer does not establish mutuality of interest as no equity was held by the buyer in the foreign company, the supplier. It was further held that the respondent had imported the orange shock tubes for the manufacture of detonators prior to the agreement entered into between the exporter and the importer on 16th April 2001/23rd April 2001. That there was no C.A.No.2237/02 (contd.) contemporaneous import by any other importer of the identical goods during the material time. On these two findings, the Tribunal came to the conclusion that the Department had not been able to prove the enhancement of the assessable value under Rule 5 of the Rules. Accordingly, the appeal filed by the assessee was allowed. Aggrieved by this order of the Tribunal, the Department is in appeal before us. Counsel for the parties have been heard.

3. We agree with with the view taken by the Tribunal. No doubt, the exporter was holding 30% of the equity in the share capital of the importer but the holding of the equity in the share capital does not establish the mutuality of interest as the respondent did not hold any equity in the unit of the supplier. This finding has been recorded following the decisions in the case of *Daewoo Motors India Ltd. (supra)* and *Maruti Udyog Ltd., Gurgaon (supra)* which have attained finality. There is no doubt that the respondent had imported the identical goods at a higher price prior to the agreement dated 16th April 2001/23rd April 2001, but, the respondent had purchased goods in question at a lesser price from the exporter only after the said agreement subject to the condition that the respondent shall purchase 100% of its annual requirement from the same exporter. We find from the record that the respondent had purchased 7.15 lac metres during the year 1997-98, 1.3 crore C.A.No.2237/02 (contd.) metres during the year 1998-1999, 1.31 crore metres during the year 1999-2000 and 1.90 crore metre during the year 2000-2001. It is manifest from the said period that the volume of import was increased substantially by the importer. The said increase in the volume of import may have been the reason for decreasing the price. This can be a valid consideration. Revenue has failed to place any contemporaneous imports of identical goods by any other importer during the material time showing the purchase to be more than US\$ 10/1000 ft. The burden to prove that the goods in question were under-valued by the respondent lies on the Revenue which the Revenue has failed to discharge. For the reasons stated above, we do not find any merit in this appeal. The appeal is, accordingly, dismissed leaving the parties to bear their own costs.

Judgment Referred.

¹*2000(115) ELT 0489 (Tri.)*

²*1987 (28) ELT 0390*