

(1993) 04 MAD CK 0055

In the Madras High Court

Case No : Writ Petition No. 5199 of 1993

Bharat Goyal and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-04-1993

Acts Referred:

Customs Act, 1962 — Section 14, 17, 18, 46

Citation : (1993) 43 ECC 193

Hon'ble Judges : Bakthavatsalam, J

Bench : Single Bench

Judgement

Bakthavatsalam, J.—The prayer in the above writ petition is as follows:

... to issue a writ of mandamus or any other appropriate writ, direction or order directing the second and third respondents herein to pass final orders in respect of goods viz., Rubber Bands covered under bill of entry No. 34897 dated 13.10.1992 forthwith after giving an opportunity to the petitioners and to....

2. The petitioners purchased an advance licence on 20.7.1992 and imported 8000 kgs of rubber bands from Taiyo Nokusai Boeki, Osaka, Japan. The bill of entry bearing No. 34897 dated 13.10.1992 was filed. The price declared therein was JY 110 per kg. However, the respondents have refused to adopt this value and insisted on provisional assessment of the goods at the unit price of US \$ 2.40 per kg and since the goods were urgently required it seems that the petitioners had to agree to their course of action and clear the goods. The licence was accordingly debited as per the price fixed by the customs. Subsequent to that the petitioners placed an order on M/S. Sun Fashions Corporation, Osaka, Japan, who are the Sole Export Selling Agents for Nishiban Mobilon Polyurethane Bands for supply of 54,000 kgs of rubber bands at a price of JY 120 per kg. The first-shipment of 6400 kgs was to take place during December, 1992 and the balance in seven equal shipments of 6800 kgs per month. It may be stated here that Advance Licences are issued against exports under the duty from scheme [sic] in order to encourage exports. The petitioners imported 6400 kgs of rubber

bands from M/s. Sun Fashions Corporation and filed a bill of entry No. 1350 dated 12.1.1993. The invoice value was JY 7,68,000 at the unit rate of JY 120 per kg which works out to Rs. 1,94,017/-. The respondents wanted to provisionally assess the goods in US \$ 2.40 per kg by following the method adopted in the previous bill of entry. By that time the petitioners had in their possession several bills of entry under which similar goods were cleared at even lower prices of JY 110 per kg. both at Madras Cochin Ports. It is alleged in the affidavit filed in support of the above writ petition that the Special Investigating Branch of the Customs investigated the value of the goods and found that instead of Rs. 24/- per kg as declared by the petitioners, the value of Rs. 30/- per kg should be adopted. However, the third respondent passed an order on 11.2.1993 adopting the same value of US \$ 2.40 per kg in respect of the goods imported in respect of the bill of entry No. 1350 dated 12.1.1993. The only reason given was that identical goods covered under the bill of entry was provisionally assessed pending investigation by the Appropriate Authority. Against the said order passed by the Customs Department, the petitioners filed a writ petition No. 3064 of 1993 and after hearing the learned Counsel appearing for both parties, this Court passed the following order:--

... After hearing Mr. Habibulla Badsha, Senior Counsel appearing for the petitioner and Mr. C.S. Sundaram, A.C.G.S.C., a direction to issue to respondents 2 and 3 to release 6400 kgs of rubber bands covered by B/E No. 1350 dated 12.1.1993 forthwith on production of a copy of this order, without resorting to PD assessment and enhancement value. It is open to the Department to take appropriate action according to law as and when it is found that the petitioner is going to exceed the licence value quoted by the Department....

On the basis of the said order of this Court, the respondents released the goods debiting the licence with the declared value of Rs. 1,94,017/-.

3. In the meanwhile it seems a further consignment of goods are stated to have been shipped, of which one is arriving shortly, that if the Department is going to once again take the arbitrary stand that the goods should be valued at US \$ 2.40 per kg. then the petitioners will be put to unnecessary hardship, that though the respondents have no power of jurisdiction to provisionally assess the goods since Section 18 of the Customs Act, 1962 does not apply, the respondents are resorting to this arbitrary and capricious method, that when the Collector himself has accepted the price is Rs. 30/- per kg, there is no scope for the Department arguing that the matter is under investigation and the price has got to be increased further and that in view of the problems that are likely to arise due to the arbitrary stand of the Department, the petitioners have approached this Court.

4. The petitioners further state in the affidavit that the provisional assessment under bill of entry No. 34897 dated 13.10.1992 was made on 18.12.1992 at US \$2.40 kg., that there is no provision for provisional assessment in respect of the goods covered by an advance licence for no duty is involved, that the second and

third respondents cannot under the guise of some investigation delay the matter unnecessarily and arbitrarily, thereby causing much hardship to the petitioners, that the third respondent has to finalise the so-called provisional assessment within a reasonable period, which has not been done, that the petitioners have been making reported oral requests, to the third respondent to finalise the assessment at an early date and pass speaking orders and that therefore the third respondent cannot choose to keep silent and not do anything thereby creating an air of uncertainty for the petitioners. With these allegations, the petitioners have come up before this Court for the relief cited supra.

5. A counter-affidavit on behalf of all the respondents has been filed. It is stated in the counter-affidavit that the Duty Exemption Entitlement Scheme has been formulated by the Government of India with a view to encourage exports and certain essential goods required to be used in the manufacture of export goods are permitted to be imported free of duty, that in the normal course" rubber bands being a consumer item can be imported only under a specific licence, that however owing to the fact that the petitioner was the holder of an advance licence, the petitioner was not (sic) permitted to import the goods mentioned in the advance licence, free of duty, that although in the case of an import under the DEEC Scheme, payment of duty is not involved, the bills of entry filed by the importers are assessed, that it is open to the Customs Department to call for the various import documents like the advance licence, DEEC book, the manufacturer's invoice, etc., so as to satisfy itself with the value declared by the importer, that there is no under-invoicing so as to give rise to import of quantity in excess of what an importer requires for the manufacture of export goods, that the second petitioner first imported a quantity of 7200 kgs of rubber bands and filed bill of entry dated 13.10.1992, that the price declared by the petitioner was JY 110 per kg, that it was noticed that in the case of import of similar goods the actual price was in the range of Rs. 75/- per kg which was about 21/2 times than the price declared by the petitioner, that the respondents have indicated that the goods could be cleared though a provisional assessment at US \$ 2.40 per kg. was made after the advance licence and the DEEC book were provisionally debited at such rate, that the order dated 11.2.1993 passed by the third respondent was challenged by the petitioners in W.P. No. 3064 of 1993, that this Court by order dated 1.3.1993 issued a direction to release of 6400 kgs of rubber bands without resorting to provisional assessment and without debiting the advance licence and the DEEC book at the value adopted by the respondents, that the respondents are investigating into the valuation, that they have to necessarily make investigations with overseas parties including the manufacturer of the goods in question and also to get various documents including the manufacturer's invoice to ascertain the actual value of the goods especially since the petitioner has not produced the manufacturer's invoice, that the respondents expect these investigations to be completed in or about six weeks, that in the case of import of 6400 kgs of rubber bands in January, 1993 covered by bill of entry No. 1350 dated 12.1.1993, the petitioner had declared the value of JY 120

per kg which was not accepted by the Department and that the petitioner was informed that the value declared by them would not be accepted and that the goods could be released only on the basis of the provisional assessment. It is further stated in the counter affidavit that inasmuch as the importers in these cases has not produced the manufacturer's invoice, the value declared in such bills cannot be accepted, that although in the case of an importation under an advance licence goods are permitted to be imported free of duty, the Department has to carefully consider the value declared by the importers inasmuch, as, should there be any under-invoicing and consequently debiting of the DEEC Book for a lesser amount, importers would import quantities much in excess of what they are entitled to under the DEEC Scheme which would affect the revenue interests, that the duty exemption entitlement scheme has been formulated by the Government of India only with a view to encourage export of goods and under the scheme only goods and raw materials which are actually required in the manufacture of export goods would be permitted to be imported free of duty and that therefore the respondents are justified in making proper investigations with regard to the value prevailing in the international market at the relevant point of time. It is also stated in the counter-affidavit that in a case of import of similar goods the Department had obtained the manufacturer's invoice according to which the value was US \$ 2.40 per kg. equivalent to about Rs. 75/- and even in the instant case, it was only the same value which was adopted for the purpose of provisional assessment and that it would be open to the Department to investigate as to the correct valuation of the goods imported and debit the advance licence and the DEEC book on the basis of such valuation and not at the rate declared by the petitioners.

6. The contention raised by the petitioners that the respondents cannot resort to provisional assessment u/s 18 of the Customs Act, in the case of import of goods under an advance licence is denied in the counter-affidavit. According to the respondents they are acting only in accordance with the relevant provisions of the Customs Act. and on the basis of Customs Valuation Rules and while so, resorting to provisional assessment in the instant case cannot be termed as arbitrary or capricious. In the counter-affidavit it is also stated that while what is permitted to be imported under the advance licence are rubber bands made of natural rubber, what is being imported by the petitioners are bands made of synthetic materials, that this would certainly constitute mis-declaration and it would attract initiation of proceedings under the Customs Act against the petitioners for such mis-declarations, that in any event, the assessment would be finalised only after giving an opportunity to the petitioners, that so far as the goods covered by bill of entry No. 34827 dated 13.10.1992, the petitioners themselves agreed for a provisional assessment at US \$2.40 per kg, that although no duty is payable in an import covered by an advance licence, it is still open to the respondents to go into the valuation angle to prevent import of a quantity in excess of what an importer is entitled to and that therefore the respondents were fully justified in provisionally assessing the goods and on the

basis of such assessment, the advance licence could be debited for the actual value of the goods imported by the petitioners. It is further stated in the counter-affidavit that they are not delaying the matter unnecessarily and arbitrarily under the guise of investigations, that there has been no delay at all in finalising the assessment and that the respondents have to necessarily make enquiries with overseas buyers and collect various documents for finalising the assessment. As soon as the investigations are completed, the assessment would be finalised after giving an opportunity to the petitioners.

7. Mr. Habibulla Badsha, learned senior counsel for the petitioners contends that the bill of entry was filed as early as on 13.10.1992 for the import of rubber bands under the advance licence scheme, that in such cases the question of payment of duty does not arise, that at any rate, the provisional assessment of the goods was subjected to on 18.12.1992, that yet another consignment of goods is expected to arrive, that therefore the petitioners had come up before this Court, that the respondents had released the goods on the basis of an order dated 1.3.1993, that the respondents are delaying the matter unnecessarily and arbitrarily under the guise of investigation, that as another consignment of goods is expected to arrive, the petitioners have to clear the goods, that if no finality is given to provisional assessment by the respondents the petitioners have to pay heavy duty unnecessarily, that the petitioners also have to incur demurrage charges, and that the declared value given by the petitioners should be taken into account but the respondents under the guise of investigation are making an arbitrary valuation. Learned senior counsel drew my attention to the Customs Valuation Rules, 1988, especially Rules 2C, 3, 4 and 5 explained what is meant by "identical goods" and clarified the meaning of "transaction value". Learned senior counsel further invited my attentions to Rule 8 of the said Rules, where under the Department has the power of "best judgment" assessment and also to Section 14 of the Customs Act. According to the learned senior counsel, the valuation given by the petitioners is the "transaction value" and it is not disputed in the counter-affidavit and no other valuation is also stated in the counter-affidavit, and as such the respondents have no jurisdiction to enhance the value. As such, learned senior counsel for the petitioners states that the goods cannot be held up for a long time i.e. the consignment already arrived or just to arrive and the respondents is to pass final orders, expeditiously.

8. Mr. C.A. Sundaram, learned Additional Central Government Standing Counsel appearing for the respondents has produced before me the file and I have gone through the file. The only point that arises for consideration in this writ petition is whether to adopt the value of US \$2.40 per kg as advised by D.R.I. earlier or to adopt the unit price as per the manufacturer's invoice (i.e. 120 kg.) [sic]. It is further seen from the file that the D.R.I. has stated that the valuation aspect has got to be finalised only by the Customs House, that there is no evidence except what they have stated earlier to adopt Rs. 30/- per kg that a suggestion was also made to the petitioner to execute a bond for 25 per cent bank guarantee towards the difference in value, that. P.D. assessment may be referred to. It is also seen

that the Deputy Director of the Directorate of Revenue Intelligence, Madras-17 was informed by the Deputy Collector of Customs by letter dated 19.2.1993 that the petitioner company has produced an invoice issued by M/s. Sun Fashion Corporation and also the price list effective from January, 1989 that in the said invoice and price list the value of the rubber bands is quoted as JY 140 kg., that despite the documentary evidence produced by the party, the Customs House has adopted the unit price of US \$2.40 [per] kg. and assessed the bill of entry in question provisionally pending further investigation regarding the valuation and in the said letter the Deputy Director of the Directorate of Revenue Intelligence was requested to do further investigation. It is further seen from file that M/s. Sun Fashion Corporation, Japan, has given the price list containing the prices for various quantities of Mobilon colour rubber bands, which is inclusive of handling commissions of agents, subject to change without any notice and certified that the GIF price of Mobilon Rubber Bands for India is Japanese Yen 110 per kg. and at the same time it was also declared by Nisshinbo Industries Inc. that Mobilon Polyurethane Rubber Bands are the products of Nisshinbo Industries etc., and that the petitioner by letter dated 3.2.1993 informed the Assistant Collector of Customs that clearance of similar goods was made by the petitioner company both at Cochin and at Madras Customs House by various importers at a price of JY 110 to 120 per kg. CIF Madras/Cochin. It is also seen from the file that the Deputy Directorate of the Revenue Intelligence by his letter dated 16.12.1992 made a suggestion to provisionally adopt the price of US \$2.40 per kg. for the purpose of assessment, pending finalisation.

9. I have heard the arguments advanced by the learned senior counsel appearing for the petitioners as well as Mr. Sundaram, learned Central Government Standing [Counsel] for the Department. Mr. Sundaram, learned Counsel appearing for the Department represents that a reasonable time may be given to the Department to consider the issue whether the goods imported by the petitioners can be termed as rubber bands and to pass final orders of assessment in respect of the bill of entry after issuing due show cause notice to the petitioners. Section 17 of the Act deals with assessment of duty. u/s 17(1) of the Act when the bill of entry is filed u/s 46 the goods must, without undue delay be examined and tested by the proper officer u/s 17(2) of the Act [and] after such examination and testing, the duty, if any leviable on such goods shall be assessed. Section 18 of the Act speaks about the provisional assessment of duty. It is only when duty is payable, Section 18 of the Act will be attracted. A reading of Clauses (a), (b) and (c) of Section 18 of the Act shows three circumstances under which the provisional assessment could be made. Provisional assessment can be resorted to only when the payment of duty arises. Even in the counter-affidavit, it is stated when the goods were imported, no payment of duty was involved and therefore the question of provisional assessment does not arise for the Department's consideration. Section 14 of the Act speaks of the valuation of the goods for purposes of assessment. For the purpose of assessing the goods, the Customs Valuation (Determination of Price of Imported Goods) Rules 1988

has been framed which is in pursuance of Section 14(1) of the Act. Under Rule 3(i) the value of imported goods shall be the "transaction value". Admittedly, in this case these Rules will come into operation only when duty is leviable in respect of the goods covered by advance licence. Further, I do not find any allegation in the counter-affidavit filed on behalf of the respondents that the price paid is more than what has been originally declared in the invoice value. Therefore, in my view the entire approach of the respondents is erroneous and contrary to the statutory provisions and they have misconstrued the scope of Section 18 of the Act. However, taking into consideration the facts and circumstances of this case and the petitioners have prayed for final assessment orders in respect of the goods covered under the bill of entry dated 13.10.1992, I do not think it necessary for this Court to go into the question in detail at this stage. Taking into consideration that more than one consignment of the petitioners have arrived on 20.3.1993 and that the Department is refusing to release the goods on the ground that they have to assess the goods, I am of the view that the goods are subject to pilferage and damage and that they are perishable in nature and have a limited shelf life and suffice it to direct the Department to pass final order of assessment in respect of the bill of entry in question and on the assessment done on 18.12.1992.

10. Though Mr. Sundaram learned Counsel for the Department seeks more than six weeks time to pass final order of assessment, taking into consideration the fact that the provisional assessment was done as early as in December, 1992 and about four months have elapsed, I do not think from the decision reported in 1992 (62) ELT 616 that manufacturer's invoice, if available and genuine is the best evidence of the price of imported goods and in that case there is no need to go to other contemporaneous imports of identical or similar goods in view of the China's Export Licensing Regulations and I am of the view that the respondents are bound by the said orders.

11. In the above circumstances, considering the interest of both the Revenue and the petitioner and to protect the petitioner from the arbitrary action of the Department, I think it suffice to direct the respondents to pass final orders of assessment in respect of the goods covered under the bill of entry No. 34897 dated 13.10.1992 on or before 22nd April, 1993 after affording opportunity to the petitioner by issuing due show cause notice. Mr. Govindan, learned Counsel appearing for the petitioner cannot have any objection for this course of action, since the petitioners can have their say in the matter when a prior notice is given. It is made clear that if no such final orders are passed, the respondents are directed to release the goods on the declared value, according to the Customs Act and the law as indicated above.

12. This writ petition is ordered accordingly. No costs.