
(2015) 09 SC CK 0164

In the Supreme Court Of India

Case No : Civil Appeal No. 4469 of 2006

Commissioner of Cus. (Imports), Mumbai

APPELLANT

Vs

Bayer Corp. Science Ltd.

RESPONDENT

Date of Decision : 08-09-2015

Acts Referred:

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 — Rule 2(2), 4

Citation : (2015) 324 ELT 17

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : Pinky Anand, A.S.G., Ashok K. Panda, K. Radhakrishna, Sr. Advocates, Rupesh Kumar, Binu Tamta, Jitin Singhal, B. Krishna Prasad and Hrishikesh, Advocates, for the Appellant; V. Lakshmikumaran, M.P. Devanath, S. Vasudevan, L. Charanaya, R. Ramachandran, Ad

Final Decision : Dismissed

Judgement

1. The Respondent/Assessee herein had entered into agreement dated 1-11-1995 with one M/s. Rohm Hass Company (hereinafter referred to as "M/s. R & H"). In this agreement, the Assessee was to import the product known as Mencozeb Technical 85% at US\$ 2.10 per kg., CIF, Mumbai. Large quantities of the aforesaid product were imported by the Assessee from M/s. R & H under the said agreement. Agreement also provided that the Assessee was to be the sole distributor for the aforesaid product and it was given the task of advertising and promoting the sales of the said product in India. The Assessee has been filing the Bill of Entry for the purpose of import duty, disclosing the aforesaid price at US\$ 2.10 per kg. which was paid by the Assessee to M/s. R & H. It came to the notice of the Appellant/Revenue that prior to the aforesaid agreement dated 1-11-1995, which was entered into between M/s. R & H with the Assessee, M/s. R & H had similar arrangement with M/s. Indofil, which is a division of M/s. Modipon Ltd. Agreement with M/s. Indofil was entered on 3-5-1965 which continued up to 31-10-1995 and on termination of the agreement between M/s. R & H and M/s.

Indofil, arrangements were entered into by M/s. R & H with the Assessee on 1-11-1995.

2. The Revenue found that M/s. Indofil had paid the price of the product at US\$ 2.71 per kg., CIF, Mumbai during the period from December, 1994 to March, 1995 and US\$ 2.85 per Kg. for the period from August, 1995 to February, 1996. Since M/s. Indofil had purchased the same product from the same manufacturer viz M/s. R & H at a higher price i.e. US\$ 2.85 per kg. during August, 1995 to February, 1996, the Revenue took the view that the Assessee had misdeclared the price by showing it at US\$ 2.10 per kg. On that basis, show cause notice was issued stating that as to why the transaction value was not treated as US\$ 2.85 per kg. The demand in show cause notice was confirmed by final Order-in-Original after eliciting the response from the Assessee. The Assessee challenged this order by filing appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) and the CESTAT has allowed the said appeal.

3. A perusal of the order of Adjudicating Authority would show that the Assessee was treated as related person of M/s. R & H and for this reason the price at US\$ 2.10 per kg. shown in the invoices was discarded as to be the transaction value. Rule 2(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 defined "related persons" which reads as under:

"2(2) For the purpose of these rules, persons shall be deemed to be "related" only if-

- (i) they are officers or directors of one another's business;
- (ii) they are legally recognised partners in business;
- (iii) they are employer and employee;
- (iv) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other;
- (vi) both of them are directly or indirectly controlled by a third person;
- (vii) together they directly or indirectly control a third person; or
- (viii) they are members of the same family.

Explanation I - The term "person" also includes legal persons.

Explanation II - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule."

4. As per the Revenue the arrangement between M/s. R & H and Assessee gets covered by Sub-clause (v) of Rule 2(2) as according to the Revenue M/s. R & H

directly or indirectly control the Assessee. This control is brought into operation on the premise that the Assessee is a sole distributor of M/s. R & H on the facts of this case. We do not find it to be so.

5. Explanation-II which is appended to Rule 2(2) would make a "related person" as a sole distributor only if it falls within the criteria of this sub-rule. Therefore, mere sole distributorship is not the conclusive consideration. It has also to be demonstrated that the case falls in one of the clauses mentioned in Rule 2(2) out of clauses stipulated therein.

6. The transaction between M/s. R & H and the Assessee, as it is clear from the reading of agreement, was at arms length. By no stretch of imagination it can be said that M/s. R & H had been controlling the assessee either directly or indirectly. In fact, there was no such allegation in the show cause notice nor any finding in this behalf in the Order-in-Original was rendered by the Commissioner.

7. Mr. Ajit Kumar Sinha, learned Senior Counsel appearing for the Revenue has referred to the judgment of this Court in Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd., . The law on this aspect is explained in para 11 to 14 of the said judgment, which read as under:

"11. On a plain reading of Section 14(1) and Section 14(1A), it envisages that the value of any goods chargeable to ad valorem duty has to be deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1). It is made clear that Section 14(1) and Section 14(1A) are not mutually exclusive. Therefore, the transaction value Under Rule 4 must be the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation 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 for offer for sale. Therefore, what has to be seen by the Department is the value or cost of the imported goods at the time of importation, i.e., at the time when the goods reaches the customs barrier. Therefore, the invoice price is not sacrosanct.

12. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient

to reject it as evidence of value of imported goods. Under-valuation has to be proved. If the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege undervaluation, it must make detailed inquiries, collect material and also adequate evidence. When undervaluation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving undervaluation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of undervaluation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods.

13. Section 14(1) speaks of "deemed value". Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion.

14. Applying the above tests to the facts of the present case, we find that there is no evidence from the side of the Department showing contemporaneous imports at higher price. On the contrary, the Respondent importer has relied upon contemporaneous imports from the same supplier, namely, M/s. Pearl Industrial Company, Hong Kong, which indicates comparable prices of like goods during the same period of importation."

8. Once we apply the principles stated in the aforesaid paras to the facts of the present case, we are of the view that the aforesaid judgment helps the Assessee rather than the Revenue. In para 12 it is categorically mentioned that before rejecting the invoice price the Department has to give cogent reasons for such rejection. There are no such cogent reasons coming forth in the present case. Moreover, it is to be borne in mind, as stated in para 14 of the said judgment, that the onus is on the Department by leading cogent evidence. No evidence of any nature whatsoever is brought on record to show that they were contemporaneous sales/transactions at high price. Reliance upon the agreement between M/s. Indofil and M/s. R & H is of no avail as admittedly the transaction between the aforesaid two parties were for the period prior to 1-11-1995 and

they were not contemporaneous. We, thus, do not find any error in the judgment of the Tribunal. This appeal is accordingly dismissed.