
(2015) 09 SC CK 0098

In the Supreme Court Of India

Case No : Civil Appeal Nos. 2603 and 4374 of 2006

Dr. Reddy's Laboratories

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Customs Act, 1962 — Section 108, 111, 112, 114A, 125

Citation : (2015) 323 ELT 440 : (2015) 52 GST 949 : (2015) 34 GSTR 668 :
(2015) 9 SCALE 507 : (2016) 1 SCC 480

Hon'ble Judges : A.K. Sikri, J; Rohinton Fali Nariman, J

Bench : Division Bench

Advocate : Aurav Agrawal, Vyom Shah, Manisha Singh, Vishal Gehrana, Abhijit Mitra, Ruby Singh Ahuja and B. Krishna Prasad, for the Appellant; Yashank Adhyaru, Sr. Adv., Rupesh Kumar, Shirin Khajuria, Jitin Singhal and B. Krishna Prasad, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rohinton Fali Nariman, J—The present case relates to appeals filed both by the Assessee and by the revenue against the judgment dated 20th January, 2006 passed by Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"). The Appellant company had been importing various models of diagnostic equipment such as BTS 302, BTS 310, BTS 320 and BTS 370 manufactured and supplied M/s. Bio Systems, Barcelona, Spain. On 27th May, 1999, the Appellant in its Bill of Entry filed at Hyderabad for clearance of models of BTS 320 and BTS 310 classified the goods as "auto analysers" under Entry 9030.89 of the Customs Tariff Act, 1975. The goods were seized by the custom authorities, being a total of 8 BTS 320 and 15 BTS 310 models, valued at Rs. 26,97,741.21. During the course of investigation, statements of six persons were recorded Under Section 108 of the Customs Act. On 2nd November, 1999 the Directorate of Revenue Intelligence, Chennai issued a show cause notice stating that the goods in question are "photometers" and not "auto analysers". On this basis, the revenue demanded:

(a) Duty of Rs. 1,79,11,499/- [as detailed in Annexure 11 to the Notice] towards import of BTS 302, BTS 310, BTS 320 and BTS 370 from 1994 till 1999.

(b) Confiscation of goods valued at Rs. 3,31,55,908/- imported without payment of duty and sold (in the market) as auto analysers Under Section 111(m) of the Customs Act, 1962.

(c) Confiscation of goods valued at Rs. 26,97,741/- imported vide Bill of Entry No. 4454 dt. 27-05-99 and seized by the officers of DRI on 8.6.99 Under Section 111(m) of the Customs Act, 1962.

(d) Penalty Under Section 114A of the Customs Act, 1962.

(e) Penalty Under Section 112(a)/112(b) of the Customs Act on Dr. Jayaram Chigurupati, Senior Vice President and in-charge of Diagnostic Division of the Appellant.

2. On 24th December, 1999, the Assessee sent a detailed reply to the said show cause notice and explained that the imported equipments were "Auto Analysers" which used the photometry principle and were different from photometers. Being a pathology lab, these equipments were imported for the purpose of automatic analysis of blood samples. This, according to the Assessee, could not be done by a photometer. The only difference between the four models imported was that whereas model BTS 370 was technologically superior and fully automatic, the other models were not as technologically advanced nor were they fully automatic. However, insofar as the analysis of Enzymes is concerned, the said two models, namely, BTS 310 and BTS 320 were fully automatic, the only non-automatic part being the manual mixing of certain elements with blood samples. They further relied upon the technical literature to buttress their point and claimed that they were exempted under notification No. 20/1999 dated 28th February, 1999. The said notification exempts medical equipments specified in List 21, serial No. 66 of which reads as follows:

Sl. No. 66: Blood Gas Analyser (including cartridges, if any) Sodium Potassium Analyser, Auto Analyser for Enzymes, Drug Levels and Biochemical Investigations, or a combination of two or more of the aforesaid.

3. The Assessee was given a hearing on 9th January, 2001 by the learned Commissioner of Customs, Hyderabad. In a detailed order dated 1st March, 2001, the learned Commissioner went through the show cause notice and the reply filed by the Assessee. He correctly concluded that the issue for determination was whether the impugned goods were qualified to be called "auto analysers" of Enzymes, drug levels and biochemical investigations. In this connection, he referred to a book by "Tietz Text Book of Clinical Chemistry", second edition, edited by Carl A. Burtis and Edward R. Ashwood. More importantly, in para 46, which deserves to be quoted, the Commissioner found:

46. This very question came up for examination before the conference of Commissioners of Customs held in Cochin in October 1995 in the context of

Notification No. 55/95-Cus. dated 16.3.95. It would be important and relevant to reproduce the extracts of the minutes of the said conference herein below:

The issue raised by the Board was whether the term "Auto Analysers for enzymes, Drug levels and Biochemical investigations" could be applied to Analyzers in which a part of the operations are performed manually, like some in which mixing of samples and reagents is done manually but the actual analysis is done automatic. The doubt arose since a view existed that the term applied only to those instruments in which all operations, including mixing of samples and reagents are automatic. However, in one particular case of semi-automatic analyser "Technician-Chemistry Auto Analyzers", the DGHS had clarified that the term could fall within the item auto Analyzers in the predecessor Notification namely 122/94-Cus.

CONFERENCE CONCLUSION:

The conference was of the view that the process of analysis is automatic, though mixing of sample is done manually. It is to be noted that for the exemption to accrue under the entry at SI. No. 77 thereto, all that is required is that the analysis has to be done automatically. TRU may, however, examine in consultation with the administrative Ministry concerned whether they would like this entry to be amended in any manner to remove ambiguity.

Thus what is crucial to determine whether a medical equipment is an auto analyser or not is to see whether the analysis is done automatically or not. All the models (BTS 302, BTS 310, BTS 320 and BTS 370) in the impugned goods did not achieve this purpose. of course, more and more features increasing the extent of automation have been built-in in the later models as compared to the earlier models. But all of them are auto analysers. It would also be relevant to note that the Minutes of the Conference of Commissioner's of Customs extracted above also indicates that DGHS a competent expert body did clarify that a semiautomatic analyser was eligible for the exemption under Notfn. No. 122/94-Cus. as auto analyser. Furthermore inspite of the recommendation of the Conference of Commissioners of Customs to amend the entry relating to auto analysers if found necessary for the purpose of removing ambiguity, no such amendment has been carried out till date indicating that there is no ambiguity regarding the scope of the expression auto analysers as viewed by the Conference of Commissioners of Customs.

4. He further held:

47. The word photometer used by M/s. Bio Systems, Barcelona, Spain to describe two out of the four models of the impugned goods (BTS 302 and BTS 310) has been the fundamental cause for generating doubts in the minds of the investigating officers about the bonafides of the importer in availing full exemption on the impugned goods from time to time and also in provoking the importer to resort to ways and means to overcome problems with Customs in the matter of assessment of the impugned goods. Photometer is a generic

expression meant to refer to a wide range of instruments used for taking measurements of light or electro magnetic radiation. Photometry is a branch of physics dealing with measurement of intensity of light sources. Instruments used for such measurements are called Photometers. However the principle of photometry has found application in the field of clinical chemistry and auto analysers are one type of medical equipment which have been invented incorporating the principle of photometry applied to investigations in clinical laboratories. The catalogues of the manufacturer for the four models of the impugned goods describe the impugned goods as follows:

a) BTS 302

The Basic Photometer

The BIOSYSTEMS range of photometers has been developed to meet the standards of today's analysis in the clinical laboratory.

b) BTS 310

The Photometer

c) BTS 320

The most versatile and user friendly Semi-Auto analyser with capacity to perform ELISA with Microtitre Wells.

d) BTS 370

Fully-automatic Clinical Analyser

Biosystems technology to meet your requirements.

I have carefully gone through the rest of the salient features of each of the above models printed elsewhere in these catalogues. There is no doubt in my mind that these equipments are auto analysers meant for conducting tests in clinical laboratories.

Just because the word Photometer has been used by the manufacturer in the catalogues for two first two models, neither will these two models (BTS 302 and BTS 310) nor the other two models (BTS 320 and BTS 370) cease to be auto analysers. It is true that all these models are based on the principle of photometry and therefore have a photometer built-in within. It will be totally incorrect to conclude that the impugned goods are not auto analysers.

5. Having found that in point of fact what was imported was, in fact, auto analysers, the learned Commissioner held that the Assessee was guilty of several manipulations which presented a description of the goods convenient for itself, but not exactly what the real invoice from the exporter would have carried. He thus held that this amounted to a misdeclaration of description and that therefore the impugned goods were liable for confiscation and penalty. However, no penalty Under Section 114A was imposed on the importer because there had,

in fact, been no evasion of duty on the imported goods. Importantly, the learned Commissioner concluded:

52. Since the goods under import are required to be programmed after import by feeding standardized procedures separately developed before they can be used as auto analysers it has been alleged in the show cause notice that they cannot be called as auto analysers in the condition in which they are imported. After having gone through the features of the four models of the auto analysers under import as mentioned in the catalogues of the manufacturer and also the comparative details of these four models furnished by the importer in their reply as Exhibits V. and VI to the letter of the importer dated 24.12.99 sent in reply to the show cause notice, I find that there is absolutely no merit in this allegation that the need to program the impugned goods according to the needs of each individual customer would for that matter render the goods into something entirely different from auto analyser. It is common knowledge that auto analysers come both as closed system and as open systems enabling customers to program them according to their own needs when they are open system models. In fact open systems are more popular these days because it allows the customer the flexibility to adapt the system to his own needs.

6. Finally, he ordered:

ORDER

(i) Under Section 111(m) of the Customs Act, 1962 I order confiscation of goods valued at Rs. 26,97,741/- seized on 8.6.99. However Under Section 125 of the Customs Act, 1962 I give M/s. Dr. Reddy's Laboratories Ltd., the option to redeem the said goods by paying a fine of Rs. 1,00,000/- (Rupees one lakh only). Since the goods have already been provisionally released to the importer I order that the fine amount of rupees one lakh only be recovered by enforcing the bank guarantee furnished by the importer at the time of provisional release.

(ii) Goods valued at Rs. 3,31,55,908/- already cleared and sold by M/s. Dr. Reddy's Laboratories Ltd. are also liable for confiscation Under Section 111(m) of Customs Act, 1962. But as the said goods were neither seized nor available now for seizure it is not possible for ordering its confiscation at this point of time.

(iii) Under Section 112(a) of the Customs Act, 1962 I impose a penalty of Rs. 50,000/- (rupees fifty thousand only) on M/s. Dr. Reddy's Laboratories Ltd. This amount of penalty is also ordered to be recovered by enforcing the bank guarantee furnished at the time of provisional release of the seized goods.

(iv) Under Section 112(a) of the Customs Act, 1962, I impose a penalty of Rs. 5,000/- (rupees five thousand only) on Dr. Jayaram Chigurupati, Sr. Vice-President, M/s. Dr. Reddy's Laboratories Ltd.

(v) I drop further proceedings in respect of rest of the actions proposed in the show cause notice.

7. Against the said order of the learned Commissioner, revenue filed an appeal Under Section 129D(4) of the Customs Act on 12th April, 2002. The Assessee filed a reply-cum-cross objection dated 8th June, 2002 in which the Assessee specifically stated:

In all cases, closed or open the in-built software contains programs for analysis and interpretation. The only inputs which are entered in-an open system is volume of reagents to be used for each test, time of incubation, temperature for incubation etc. Reagents from each manufacturer have variation in this regard. Even though the Respondent's engineers program the machines, for DRL manufactured reagents (nor for reagents manufactured for Bio-systems), the customers can themselves change these programs over a period of time if they choose to purchase reagents from other manufacturers. It is always in customers" best interest to have an open system.

8. By the impugned order, the CESTAT allowed revenue"s appeal. It found fault with the book quoted by the Assessee which found favour with the learned Commissioner, and stated "Instead of appreciating the evidence unearthed by the investigating officer with reference to the goods imported, the adjudicating authority has embarked himself on a detour deviating from the main issue".

9. We are at loss to understand what is meant by this statement. The evidence analysed by the investigating officer in the form of statements made by six persons affiliated to the Assessee led to confiscation of the goods and imposition of penalty. Without any analysis of whether the imported equipments were, in fact, auto analysers or were only photometers, the CESTAT went on to conclude that one can never come to a conclusion that a photometer is the same as an auto analyser. The learned Commissioner had held that a photometer is a generic expression and auto analysers are photometers with software installed in them which could then perform various operations. The CESTAT in finding this logic faulty has not given any reason for disregarding the same. It then goes on to say that the whole of paragraph 46 of the Commissioner"s order is irrelevant. In this paragraph the learned Commissioner referred to the Commissioners" Conference to arrive at the conclusion that since the process of analysis is automatic, though mixing of samples may be done manually, yet since analysis has to be done automatically, an analyser would fall under the expression "auto analysers" for enzymes, drug levels and biochemical investigations. This finding of the learned Commissioner was important in that the model BTS 370 which mixed both samples automatically and did the analysis automatically, was found by the customs authorities to fit the description of auto analyser. In holding that this paragraph is not at all relevant, the CESTAT does not seem to have come to grips with the real issue at all.

10. This is a peculiar case in which it is clear that what has, in fact, been imported is an equipment which is to be used in a pathological lab for the automatic analysis of blood samples. It is an admitted fact that models BTS 310 and BTS 320 were imported with inbuilt software that contained programmes for

analysis and interpretation. It is equally an admitted fact that an importer can change such programmes to suit its own convenience. From this it does not follow that what has been imported is only a photometer. Learned senior advocate appearing for the revenue had to admit that a photometer is an instrument which measures intensity of light. There is no necessity for any inbuilt software in such photometer unless such instrument is, in fact, to be used for the automatic analysis of blood samples. This being the case, it is clear that oral statements made by persons affiliated to the Assessee to the effect that the description of the imported goods was changed from photometers to auto analysers to avail the benefit of the exemption under notification No. 20/1999, and that the foreign supplier was requested to alter the description of the goods from photometer to auto analysers in order so to do, would not change the position in law. As correctly held by the learned Commissioner, these statements would be material in deciding whether Section 111(m) of the Customs Act read with Section 125 are attracted as to amount to misdeclaration of description of goods resulting in confiscation of the said goods, fine, and penalty Under Section 112(a) of the Customs Act.

11. We, therefore, allow the appeal of the Assessee and set aside the order of the CESTAT and restore that of the learned Commissioner. Revenue's appeal concerns itself with penalty Under Section 114A of the Customs Act. Since we have set aside the CESTAT's order, which imposed a penalty Under Section 114A, revenue's appeal no longer survives and is therefore dismissed as such.