
(2009) 02 CAL CK 0032

In the Calcutta High Court

Case No : A.P.O. No. 299 of 2004 and W.P. No. 2741 of 1992

Dunlop India Limited

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 23-02-2009

Acts Referred:

Customs Act, 1962 — Section 14(1), 14(1A)

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 — Rule 4, 9, 9(1)

Citation : (2010) 258 ELT 328

Hon'ble Judges : Pratap Kumar Ray, J; Manik Mohan Sarkar, J

Bench : Division Bench

Advocate : Debiprosad Pal and Ananda Sen, for the Appellant; C. Bhattacharya, A. Dutta and S.P. Majumder, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Kumar Ray, J.—Challenging the judgment and order dated 31st March, 2004 passed by the learned trial Judge in W.P. No. 2741 of 1992, this appeal has been preferred by the writ Petitioner. Writ application stood dismissed by the impugned judgment under appeal. The impugned judgment reads such:

Dunlop India Ltd., Petitioner No. 1, in this case intended to import a Bag-O-Matic Press for manufacturing tyres. Such machine was not available at the relevant point of time in India and could be imported from Russia. But the Petitioner did not have the import licence. Accordingly, the Petitioner enquired of the Respondent No. 5 by its letter dated 18th March, 1989 as to whether the latter would be in a position to arrange an additional licence for Rs. 35 lacs which would include Rs. 34 lakhs on account of cost, insurance and freight and Rs. 1 lac on account of stevedoring charges. Respondent No. 5 replied by its letter dated 2nd November, 1989 stating that they could arrange for additional licence but the premium would be 35% of the licence value and requested the Petitioner to confirm its acceptance. The Petitioner did accept the offer by its letter dated 17th

November, 1989. Based on this offer and acceptance the principal of the Respondent No. 5 namely the Respondent No. 6 obtained an additional licence dated 13th March, 1990 for importing Bag-O-Matic Press on the following condition:

The item of capital goods imported against this licence would be disposed of to an actual user.

The amount of service charge @ 35% which is around Rs. 12,25,000/- was paid by the Petitioner to the Respondent No. 5 on 20th April, 1990 that is to say almost five weeks after the additional licence was obtained by the Respondent No. 6. Thereafter High Seas Sale Agreement dated 1st November, 1991 was entered into between the Respondent No. 6 and the Petitioner by which parties agreed that the title of the goods would be transferred by the seller by endorsement of the Original Shipping Documents in favour of the buyer on High Seas Sale basis. Accordingly, the bill of lading which was drawn to the order of Union Bank of India was endorsed in favour of the Petitioner on 1st February, 1992. The Petitioner appears to have lodged the bill of entry on 20th November, 1992, on the basis of an authorisation made by the Respondent No. 6. The, however, came the most important letter dated 3rd December, 1991 written by the Petitioner to the Assistant Collector of Customs, the relevant portion whereof reads as follows,:

We paid the Export House their legitimate licence premium and asked them to place the order on our behalf and finally purchased the material on High Seas basis. There is no difference in the C1F value charged by the overseas supplier in the invoice on the Export House and as also to ourselves. The service charges paid to the Export House, basically the licence premium as stated earlier, have got no connection with the price and value of the Press.

I would, therefore, request you to kindly consider the C1F value only while assessing the above consignment for the purpose of levying import duty.

The Petitioner appears to have written a few more letters to the customs authority. The Department of Customs by its order dated 15th October, 1992 held that the service charges amounting to Rs. 12,25,000/- should form part of the transaction value within the meaning of Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and therefore according to the customs the said sum should form part of the assessable value. The Petitioner did not prefer any appeal although the order was an appealable order and straightway moved the present writ petition on 28th October, 1992 challenging the order dated 15th October, 1992. Besides customs the Port Trust authority was also made party Respondent who figured as Respondent No. 4.

After hearing the learned Counsel for the parties on 28th October, 1992 the following ad interim order was passed:

Finding a prima facie case, there will be an interim order of injunction restraining

the Respondents from giving effect and/or further effect to the impugned order dated October 15, 1992 as stated in the writ petition and also restraining the Port Trust authorities from taking any further step to realise the demurrage charges, on condition that the Petitioners will pay a sum of Rs. 29 lacs in cash to the Customs authorities without prejudice and furnish a bank guarantee for the sum of Rs. 9,20,00/- in favour of the Collector of Customs and also 50% of the demurrage charges payable to the Port Trust authorities in cash and furnish a bank guarantee for the balance 50% of the demurrage charges in favour of the Chairman, Calcutta Port Trust, within a period of one week from date. In default, this interim order of injunction will stand vacated.

It is made clear that the above two bank guarantees will be renewed by the Petitioners incorporating all the standard clauses. Such renewal of the bank guarantee should be made within a period of 15 days before their respective dates of expiry. It is also made clear that upon fulfilling the conditions as above and also the other necessary formalities, the Petitioners will be entitled to clear the goods.

All aforesaid payments and furnishing of bank guarantees are, however, without prejudice.

The matter was finally taken up for hearing by this Court on 22nd May, 2003 and has been heard from time to time. Lastly it was heard on 30th March, 2004 and this 31st March, 2004.

Mr. Khaitan, learned Advocate appearing for the Petitioner, has made following submission in support of the petition.

- (a) The sum of Rs. 12.25 lacs is not the price paid for the goods;
- (b) In any event the sum of Rs. 12.25 lacs cannot be included in the transaction value and has to be excepted as and by way of "buying commission" under Rule 9(1)(a)(1) of the Customs Valuation (Determination of price of Imported Goods) Rules, 1988;
- (c) In the event Petitioner's contentions are upheld the customs authority should be directed to bear the demurrage payable or paid to the Port Trust.

On 4th July, 2003 when this matter was partly heard Mr. Khaitan was directed to ascertain from his client as to how was the sum of Rs. 12.25 lacs was shown in the Books of Accounts to have been spent. Mr. Khaitan on instruction submitted that this sum of Rs. 12.25 lacs in the Books of Accounts have been shown to have been spent for acquiring machine as part of cost of the machine itself. Mr. Khaitan has very fairly drawn attention of this Court to a judgment of the Apex Court in the case of Hyderabad Industries Ltd. Vs. Union of India and Others, That was the case in which the Appellant had imported raw asbestos through MMTC, a state undertaking. As a matter of fact MMTC obtained orders from Indian buyers and on that basis procured the material from abroad and thereafter sold the same to the Indian buyers and realised the cost price

together with 3.5% of the CIF value of the imports as service charge. The Appellant before the Apex Court contended that the service charges realised by the agency could not be part of the transaction value or alternatively the said service charge should not be included under Rule 9(1)(a)(i) and should be treated as buying commission. The Apex Court in its judgment repealed both the contentions and held that the service charge was part of the transaction value.

Learned Counsel appearing for the customs authority submitted that he has not been properly instructed in the matter and he left the matter to the Court. Mr. Majumder learned Counsel appearing for the Port Trust submitted that the bank guarantee which was furnished pursuant to the order dated 28th October, 1992 was not kept renewed from time to time and accordingly the Port Trust was entitled to recover the proceeds thereof and had in fact done so.

It was further submitted that some amount is lying with the Port Trust in excess of its lawful dues which the Port Trust authority is willing to refund to the Petitioner.

After hearing the learned Counsel for the parties, this Court is of the view that in ascertaining the transaction value, the Court has to look at the substance of the matter. It cannot be disputed that the sum of Rs. 12.25 lakhs was paid by the Petitioner to the Respondent No. 5 who is, in fact, an agent of the Respondent No. 6, the importer, by way of service charge and/or on account of licence premium. Whether the sum was paid on account of service charge or on account of licence premium, the fact remains that such payment was made in order to require and/or purchase the machine in question. On the top of that, the cost price of the machine charged by the exporter has been paid by the Petitioner directly to the bank when the bill of lading was endorsed in its favour. The payment of the service charge or the licence premium was a necessary pre-requisite for the purpose of purchasing the foresaid machinery at the price indicated in the invoice. Without first containing the licence, the Petitioner could not have purchased the machine. Therefore, the payment of the aforesaid sum of Rs. 12.25 lakhs is an incidental to the purchase made by the Petitioner and accordingly the Petitioner has treated the same as part of the cost price itself in its books of accounts. In this respect, the case of the Petitioner made out in its letter dated December 3, 1991, noticed above, is also relevant. However, the contention appearing in the said letter dated December 3, 1991, that there is no difference in the CIF value charged by the overseas supplier and what was paid by the Petitioner to the bank, is not correct because without first pay in the licence premium or the service charge, howsoever is the payment called, the Petitioner would not have been enabled to purchase the machinery. Therefore, such payment undisputedly was in aid of the purchase and is a part of the purchase money and in any event is a part of the transaction value.

The submission that the sum of Rs. 12.25 lakhs should be excluded under rule 9, noticed above, treating the same as buying commission, cannot be accepted because in the interpretative notes "buying commission" has been defined as

follows:

Note to Rule 9 - In Rule 9(1)(a)(i), the term "buying commissions" means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued.

It is nobody's case that the sum of Rs. 12.25 lakhs was paid for representing the Petitioner abroad in the purchase of the goods.

Both the submissions (a) and (b) have thus been rejected. The rest of the submissions made by Mr. Khaitan need not be considered because the earlier two submissions have been rejected. The judgment of the Apex Court in the case of Hyderabad Industries Ltd. v. Union of India (supra), in my view, is directly on point. Mr. Khaitan, the learned advocate appearing for the Petitioner, wanted to distinguish this judgment by submitting that in that case the service charge was realised from the purchaser as a part of the price of the goods itself, and secondly that the Indian buyer came into the picture only after the goods had been imported by MMTC or at any rate when the goods were already on high seas. This distinction, sought to be made by the learned Counsel, has not impressed me. In the case before the Apex Court, the goods were imported by the Indian buyer through the State undertaking namely MMTC and MMTC realised service charges which were indicated in the invoice raised by MMTC itself. In the present case, the service charges or the licence premium was realised by the Respondent No. 5, the agent of the Respondent No. 6, immediately after obtaining the licence. The present case, in my view, is stronger than that which was before the Apex Court. In the case before the Apex Court, only at the time of purchasing the goods the service charges were paid. In the present case, in the hope that the Petitioner will be able to purchase the goods, the Petitioner had to pay the sum of Rs. 12.25 lakhs. There is, thus, no real distinction between the case decided by the Apex Court and the case before me.

For the aforesaid reasons, the petition fails and is dismissed. All interim orders are vacated. It will be open to the customs authority to encash the bank guarantee and to realise its dues including interest, if any, in accordance with law. In so far as the Port Trust is concerned, it was submitted by Mr. Majumdar that the entire dues of the Port Trust have been realised and the balance would be refunded. The Port Trust is therefore directed to act accordingly.

There will be no order as to costs.

Let xerox certified copy of this order be supplied to the parties expeditiously, if applied for.

2. A short question involved in the matter whether the service charge/license premium as was paid to the Respondent No. 5 amounting to Rs. 12.25 lakhs applying the principle of attribution of certain costs to the price of the imported goods as provided under Rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, hereinafter for brevity referred to as "CVR, 1988",

could be applied in this case to add said Rs. 12.25 lakhs with the price paid under high seas agreement for determining transaction value of said goods.

3. Dr. Pal, senior advocate, appearing for the Appellant has vehemently submitted that Rule 9(1)(a) and 9(1)(c) of the said Rule has no applicability in the instant case. Rule 9 of the said Rule, reads such:

9. Cost and services. - (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods.:

(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:

(i) material, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation on the seller, to the extent that such payments are not included in the price actually paid or payable.

(2) For the purposes of Sub-section (1) and Sub-section (1-A) of Section 14 of the Customs Act, 1962 (52 of 1962), and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include:

- (a) the cost of transport of the imported goods to the place of importation;
- (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and
- (c) the cost of insurance:

[Provided that:

(i) where the cost of transport referred to in Cl. (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in Cl. (b) shall be one per cent, of the f.o.b. value of the goods plus the cost of transport referred to in Cl. (a) plus cost of insurance referred to in Cl. (c);

(iii) Where the cost referred to in Cl. (c) is not ascertainable, such cost shall be 1.125% of f.o.b. of the goods:

Provided further that in the case of goods imported by air, where the cost referred to in Cl. (a) is ascertainable, such cost shall not exceed twenty per cent of the f.o.b. value of the goods:

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause(a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (I) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above.]

[Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight station, the cost of freight incurred in the movement of container for the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a).]

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.

4. It is submitted that the amount Rs. 12.25 lakh neither was paid as Buying Commission for importation of the goods Bag-O-Matic Press nor it is a Commission or Brokerage in terms of Rule 9(1)(a). It is further contended that it does not fall even under Rule 9(1)(c) above as it is neither royalty nor license fee. Dr. Pal has stressed the point by referring the Black's Law Dictionary that

license premium is nothing but a reward to Respondent No. 5 for arranging the additional license to import the said machine.

5. Dr. Pal relied upon the following judgments for consideration of the issue, namely, DELHI STOCK EXCHANGE ASSOCIATION LTD. Vs. COMMISSIONER OF Income Tax, DELHI., , Fort Properties Pvt. Ltd. Vs. Commissioner of Income Tax,), Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar, , Commissioner of Customs Vs. Ferodo India Pvt. Ltd., and Hyderabad Industries Ltd. Vs. Union of India and Others,

6. The appeal has been opposed by the learned advocate for Respondent, Ms. Bhattacharya, by contending, inter alia, that to identify the liability to pay under the said Rule 9, the pay requisites for importation and nexus with such importation, any sum as paid required to be considered to identify the transaction value. It has been further contended that the Appellant-company itself included the said transaction value in its books and accounts and in the bill of entry, which has been shown as Commission. The relevant document is annexed in the paper book.

7. Learned trial Judge considering this aspect of the matter, accordingly, rejected the writ application by holding that it to be added as a transaction value applying the principle of attribution aforesaid.

8. The Respondent has countered the judgments as referred to by Dr. Pal, relying upon the views expressed by the Apex Court in the case of Commissioner of Customs (supra), which also has been relied upon by Dr. Pal. Paragraph 16 of the said judgment reads such:

16. Under Rule 9(1)(c), the cost of technical know-how and payment of royalty is includible in the price of the imported goods if the said payment constitutes a condition prerequisite for the supply of the imported goods by the foreign supplier. If such a condition exists then the payment made towards technical know-how and royalties has to be included in the price of the imported goods. On the other hand, if such payment has no nexus with the working of the imported goods then such payment was not includible in the price of the imported goods.

9. On a bare reading of the Rule 9 it appears that applying the principle of attribution, transaction value could be identified in the instant case by adding the amount of Rs. 12.25 lakh as paid as service charge of the license premium to Respondent No. 5 for the sole reason that until and unless the importer, the Appellant was successful to secure/procure any additional license to import the said machine, it was not possible for the seller, Respondent No. 6 with whom the Respondent No. 5 had a relationship as Principal/Agent to bring the said machine from Russia. Hence, for the purpose of importing the machine from Russia by purchase, the payments of Rs. 12.25 lakh has a direct nexus on importation as without additional license as was arranged by the Respondent No. 5, importer-appellant was not able to purchase the said imported goods. As such, such payment is includable in the price of imported goods. The said price is otherwise

coming as other payments in terms of Rule 9(1)(e) in the angle that for the purpose of satisfaction to import the goods, the seller was obliged to identify whether the purchaser had any additional license for importation or not, which practically has nexus to transaction of such sale, irrespective of the fact that the transaction value in the high sea was shown otherwise.

10. The judgments as relied upon by the Appellant is not assisting us to quash the judgment delivered by the learned trial Judge. Furthermore, Appellant itself has admitted in his document by making necessary entry in the books of accounts that the amount was shown for acquiring the machine as part of cost of the machine itself. The relevant bill of entry annexed in the Paper Book at page 40, wherefrom it appears that the value of the machine has been shown as Rs. 4696489.43/- by adding Rs. 34 lakh with 12.25 lakh as commission along with addition of other charges, namely, landing charges etc. In view of this bill of entry showing the value, there is no doubt that the transaction in fact is attracted under the provision of Rule 9 applying the principle of attribution.

11. Having regard to all this aspect of the matter, we are not finding any merit to disturb the judgment delivered by the learned trial Judge. The appeal stands dismissed accordingly.

ORDER

Manik Mohan Sarkar, J.

12. I agree, Later:

13. Stay as prayed for stands refused.

14. Let urgent Xerox certified copy of this judgment and order be supplied to the parties, if applied for, upon compliance with all requisite formalities.