

(2014) 02 DEL CK 0212
In the Delhi High Court
Case No : Criminal A. 118 of 2008

Pernod Ricard India Pvt. Ltd.

APPELLANT

Vs

Special Director of Enforcement

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Customs Act, 1962 — Section 111 124 18 18(2) 28

Evidence Act, 1872 — Section 106

Foreign Exchange Regulation Act, 1973 — Section 40 40 51 8(1) 8(3)

Citation : (2014) 02 DEL CK 0212

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Rajeev K. Virmani, Mr. Ashish Kothari and Mr. Abhay Pratap Singh, for the Appellant; Subhash Bansal, for the Respondent

Judgement

S. Muralidhar, J.—Crl.A. 118 of 2008 by Pernod Ricard India Pvt. Ltd. ("PRIPL") and Crl.A. 148 of 2008 by Sunil Mehdiratta are directed against the impugned common order dated 30th October 2007 passed by the Appellate Tribunal for Foreign Exchange ("AT") dismissing their respective Appeal Nos. 1116 and 1117 of 2004, thereby affirming the order dated 21st September 2004 passed by the Special Director ("SD"), Directorate of Enforcement ("DoE") holding the Appellants to be in violation of Section 8(3) and (4) of the Foreign Exchange Regulation Act, 1973 ("FERA") and levying a penalty of Rs. 2,00,00,000 on the company and Rs. 50,00,000 on Mr. Sunil Mehdiratta. By an order dated 14th February 2008, the impugned order was stayed by this Court and thereafter the said interim order made absolute by order dated 15th November 2010.

Background facts

2. The background to the present appeals is that PRIPL, earlier known as Seagram India Pvt. Ltd. ("SIPL"), a subsidiary of Seagram Company Ltd., Canada ("SCL"), was permitted by the Government of India by a letter dated 20th July 1993 to set-up a wholly owned subsidiary for the establishment of a non-

molasses based spirit manufacturing/blending facility to make potable spirit. The letter noted that the project would involve import of scotch whisky and malt to be used in upgrading locally manufactured liquor products through blending. It is stated that, in terms of the Excise laws prevalent in India, the potable liquor that is permitted to be sold for consumption cannot have alcoholic strength in excess of 42.8% V/V.

3. Seagram Manufacturing Ltd. ("SML") was incorporated as a wholly owned subsidiary of SIPL. SML, with effect from 5th November 2001, became a private limited company, Seagram Manufacturing Ltd. (SMPL). On 20th September 1994 SMPL applied to the Director General of Foreign Trade ("DGFT") for import of scotch whisky concentrate/malts for upgrading the local production through blending. Since SMPL was permitted to establish a manufacturing/blending facility to make potable spirit, it disclosed in its application that it planned to import proprietary vatted malts for upgrading locally manufactured liquor products to be sold under Seagram's international brands.

4. The import license dated 20th December 1994 issued to SMPL by the DGFT described the goods to be imported as "concentrate of alcoholic beverages ("CAB")". In other words, the goods to be imported had to be alcohol of a concentration higher than 42.8 V/V. It is stated that upon receipt of the said license, SMPL imported the first consignment of CAB from Joseph E. Seagram & Sons, Scotland, a related party. It is stated that SMPL submitted to the customs officers a provisional duty ("PD") bond along with the bill of entry indicating its relationship with the supplier. Thereafter, the customs authorities referred the matter to the Special Valuation Branch ("SVB") to enable the consignments to be cleared on the basis of provisional assessment in terms of Section 18 of the Customs Act, 1962 ("CA"), subject to SMPL furnishing a PD bond. In terms of the PD bond, SMPL undertook to pay the difference between the duty finally assessed and the duty provisionally assessed, as and when the final assessment took place. It is stated that in light of the PD bond furnished by SMPL, the bills of entry ("B/E") filed by SMPL for further imports were also provisionally assessed during the years 1994-2000.

5. It is stated that, sometime in 1998, the Directorate of Revenue Intelligence ("DRI") initiated an investigation into the imports of CAB by SMPL. On 19th December 2000, the DRI issued a show cause notice ("SCN") to SMPL in which it was stated that SMPL had misdeclared the value and the description of the imported goods between the years 1994 to 2000. SMPL was asked to show cause to the Commissioner of Customs, New Delhi why the value of the imported goods be not determined as suggested therein and penalty be not imposed on it. A demand u/s 28 of the CA was also raised.

Order of the High Court

6. Aggrieved by the aforementioned SCN, SMPL filed CWP No. 1348 of 2001 before this Court. The said writ petition was disposed of by the Division Bench by

an order dated 27th August 2001, which reads as under:

Heard. Notice issued u/s 28 and Section 111 of the Customs Act, 1962 (in short the Act) is assailed in this writ petition. Learned Solicitor General, on instructions, submits that the notice may be treated to be one for the purpose of finalization of the assessment in terms of Section 18(2) of the Act. It is further submitted that if it is so thought proper, notice in terms of Section 111 read with Section 124 shall be issued. Learned counsel for the petitioner, on the other hand, contends that the stage for initiation of action u/s 111/124 has not yet taken place. According to the petitioner, Section 28 of the Act has no application to the facts of the case because a final assessment in terms of Section 18(2) has not yet been made. In view of the statement of the learned Solicitor General, we need not go into that question. Obviously, the authorities are free to decide as to whether at the present juncture any notice in terms of Section 111/124 is warranted or is called for. In case the authority decides to initiate action under the said provisions, it shall be open to the petitioner to approach the appropriate forum for its remedy. It goes without saying that if such a notice is issued, the petitioner can, in the first instance, respond to that highlighting its objections, if any, to the issuance.

The writ petition and the application stand disposed of in the above terms.

7. In other words, it is seen that since no final assessment had taken place, the question of raising a demand u/s 28 of the CA did not arise. It was for that reason that the Solicitor General of India stated that the SCN could be treated as one for the purposes of finalization of assessment u/s 18(2) of the CA.

8. The case of the Appellants is that the remittances for the imports of CAB from December 1994 to April 2000 was by way of a foreign exchange requisition and was further duly remitted by SMPL's bank towards the payment of the invoices of the foreign suppliers of CAB. It is stated that the foreign exchange was utilized for the imports of CAB and remitted only after the goods arrived in India and were cleared. The foreign exchange was directly remitted by the bank after it was satisfied that the remittance was for the goods imported as declared in the invoice, the import licences and elsewhere

The DoE's Memorandum

9. On the basis of the SCN dated 19th December 2000 issued by the DRI, the DoE issued a SCN/Memorandum dated 23rd May 2002 to SMPL and its executives. The Appellant has summarized the allegations in the SCN thus:

(a) During December 1994 to April 2000, SMPL had imported three types of blend matured whiskies, namely, "Something Special", "Passport" and "100 Pipers" and vatted malts used in the production of admix whisky;

(b) Value of such imports covered by 197 consignments from Chivas Brothers Ltd. and Joseph E. Seagram & Sons was GBP 24,88,840;

(c) The above items were supplied at lower prices as compared to the supplies to the other countries;

(d) The said blend matured whisky and vatted malts were imported by declaring the same as "concentrate of alcoholic beverages" as against the actual description of scotch whisky;

(e) That by declaring lower value than the actual value and by misdeclaring the description of the imported goods, SMPL have failed to utilize the foreign exchange of GBP 28,88,840 for the purpose for which it was so acquired and thereby appeared to have contravened the provisions of Section 8(3) read with Section 8(3) of FERA and

(f) That by misdeclaring the value of the goods, SMPL have violated Section 8(3) of FERA.

10. The Memorandum asked SMPL and its executives to show cause why proceedings u/s 51 FERA could not be initiated against them. The relied upon documents included the SCN dated 19th December 2000 of the DRI, the statement recorded by the DRI, the letters obtained by the DRI from the Indian High Commission in London and the statement dated 18th March 2002 of one Mr. Mukesh Narain recorded u/s 40 FERA.

The Adjudication Order

11. In the adjudication order dated 21st September 2004, the SD held that the pending provisional assessment proceedings under the CA would hold good only for the "assessment by the customs for levy of customs duty." It was held that the FERA provisions would be attracted once there was misdeclaration of the consignments "in terms of quality, description and quantity based upon which foreign exchange was acquired and remitted." The SD stated that, in the absence of any other document, in order to ascertain whether SMPL had misdeclared the imported goods "the only available option is to examine the import documents submitted by the company to the customs at the time of clearance of the consignments and whether the customs authorities observed any discrepancies in the declarations with the actual goods." The SD noted that "all the import documents were gathered from the customs department and explanations were obtained from the noticee importer." The SD concluded that "The declarations made by the noticee importer in the requisite import documents clearly demonstrate that the descriptions of the goods were "Concentrate of Alcoholic Beverages" whereas the goods were actually scotch whisky @ 63% which was used for blending with Indian liquor @ 42.8% as per rules prevalent in India." The SD observed that SMPL had admitted that, in the B/Es dated 26th May 1997 and 13th August 1997, the quantities declared were 6946.40 and 7505 bulk litres("BL "), whereas, in the relevant invoices, the quantity was expressed in alcoholic litres ("A/L"), which in BL terms, worked out to be 11745 and 12562 BL. It was held that the explanation offered by SMPL that the matter would have to be resolved at the time of "final assessment" under the CA would not hold

good as far as FERA was concerned, since the offence was complete from the time the importer misdeclared the goods. The SD further observed that the goods supplied to SMPL were grossly under-invoiced on the basis of the comparative study of the prices of imports by other liquor manufacturers in India. It was noted that the other liquor manufacturers were importing the goods of the same quality at much higher rates. Accordingly, it was held that the charges against SMPL for contravention of Section 8(3) and (4) FERA had been established. However, it was held that the charge u/s 8(1) FERA had not been proved.

12. As regards Mr. Mehdiratta, the SD observed that he was "actively involved in the import negotiations, fixation of prices, dealing with the suppliers etc." and, therefore, his involvement in the transactions which resulted in the commission of the offences stood proved. Consequently, the SD proceeded to levy penalties, as earlier mentioned, on the company as well as on Mr. Mehdiratta.

The order of the Appellate Tribunal

13. Aggrieved by the aforementioned order of the SD, SIPL (with which SMPL had amalgamated during the pendency of the adjudication proceedings) and Mr. Mehdiratta filed Appeal Nos. 1116 of 2004 and 1117 of 2004 respectively. The AT dismissed the appeals and one more appeal by the Managing Director of SMPL by the common impugned order dated 30th October 2007.

14. In the impugned order, the AT referred to an order dated 25th March 2003 passed by the Customs, Excise and Gold (Control) Appellate Tribunal ("CEGAT"), New Delhi disposing of the appeal filed by SMPL against the order dated 31st May 2002 and 4th June 2002 passed by the Commissioner of Customs, New Delhi adjudicating two SCNs, one issued by the DRI dated 19th December 2000 covering the imports of alcoholic beverages from the period January 1995 to June 2000 and the second issued by the Commissioner, ICD, Tughlakabad, New Delhi dated 16th August 2001 covering the imports during the period July 2000 to May 2001 and confirming the extra duty payment of Rs. 41,70,49,724. The AT held that scotch whisky was also CAB having strength of 42.8% V/V and that SIPL had not brought on record any material to show the correct concentrate strength of the CAB imported by it. Relying on Section 106 of the Evidence Act 1872, the AT observed that "the true nature of the imported goods is within the special knowledge of the appellants who did not prefer to disclose." It was accordingly held that the DoE had succeeded in proving that the imported goods were not mere concentrates of alcoholic beverages but having higher concentrated strength than the scotch whisky when bottled in India. The AT also referred to varying quantities mentioned in the B/Es and that "there is a huge gap between the actual quantities imported than what had been declared."

15. As regards Mr. Mehdiratta, the AT referred to para 12 of SCN dated 23rd May 2002 that he and the other co-noticees were responsible to the company for the conduct of its business during the relevant period and, therefore, he could not

escape the liability.

Misdescription of goods

16. One of the first questions to be addressed is whether by importing CAB of concentration 60% and above, there was a misdescription of goods and a consequent misdeclaration by SMPL so as to invite action for violation of Sections 8(3) and 8(4) FERA. The said provisions read as under:

8. Restrictions on dealing in foreign exchange--

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money-changer.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time, or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

17. As noted by the AT, for potable alcohol to be sold in India, the permissible level of concentration is 42.8% V/V. Whether it is scotch whisky or vatted malt, any concentration higher than the above permissible strength of 42.8% would have to be classified as CAB. In this context, reference has been made to the classification of alcoholic beverages under Heading No. 22.08 of the Customs Tariff, which at the relevant point in time, read as under:

18. Heading No. 22.08 covers exclusively compound alcoholic preparations of a kind used for manufacture of beverages. The HSN explanatory notes divide Heading 22.08 into the following categories:

(a) Undenatured ethyl alcohol of an alcoholic strength by Volume of less than 80% vol.; Spirits, liqueurs, and other spirituous beverages;

and

(b) Compound alcoholic preparation of a kind used for the manufacture of beverages.

The HSN further states as follows:-

(1) Undenatured Ethyl Alcohol of An Alcoholic Strength by Volume of Less Than 80% Vol; Spirits, Liqueurs And Other Spirituous Beverages

The heading covers, whatever their alcoholic strength;

A. Spirits produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas.

B. Spirits, liqueurs and cordials, containing added flavouring and, in the case of liqueurs and cordials, usually certain amount of added sugar.

C. All other spirituous beverages not falling in any proceeding heading of this Chapter.

Provided that their alcoholic strength by volume is less than 80% vol., the heading also covers undenatured spirits (ethyl alcohol and neutral spirits) which, contrary to those at (A), (B) and (C) above are characterized by the absence of secondary constituents giving a flavor or aroma. These spirits remain in the heading whether intended for human consumption or for industrial purposes.

19. The HSN, therefore, makes it clear that undenatured ethyl alcohol is not the same as the spirits listed under A, B and C above. Consequently, heading 2208.90 covered undenatured ethyl alcohol of an alcoholic strength of less than 80%. What is apparent from the HSN is that "compound alcoholic preparations" are not intended to be consumed immediately. The CAB imported by SMPL was admittedly 60 to 63% V/V concentration. It was, therefore, not possible to be consumed immediately. It was also not imported in bottles, but in large wooden vats. It could not have been sold as such for consumption. It was meant to be mixed with water or blended with spirits to bring it to the strength of 42.8% V/V. As a result, while importing CAB, SMPL correctly described the goods as falling under Heading No. 2208.10. Once that sub-heading stood removed, the goods could be classified under Heading No. 2208.90.

20. In *Bussa Overseas and Properties (Pvt.) Ltd. Vs. Union of India*, the issue was whether whisky or gin with concentration of 60% and 61% V/V ought to be classified as CAB. The Bombay High Court accepted the contention of the importers that since the concentrate was not consumable as such, the correct classification was under Heading No. 2208.10 as contended by them and not 2208.30, as contended by the Department. The CEGAT in its order dated 25th March 2003 in the assessment proceedings in this case, set aside the order of Commissioner of Customs finding it to be contrary to the aforementioned

decision of the Bombay High Court. The CEGAT observed that no material had been placed before it by the Revenue to contradict the contention of SMPL that for marketing potable whisky in India, the ethyl alcohol concentration had to be 42.8 V/V. The CEGAT noted that the imported product was whisky of 60% strength which could not be sold to the consumer directly but only after converting it into whisky that was potable. The order of CEGAT, which incidentally has attained finality, concluded as under:

From the facts of the case it can be seen that the product imported was also concentrated whisky of 60% strength. The department contended that the products are nothing but concentrated whisky. They are potable. The mere fact that it can be consumed after dilution by adding more water or soda than in the case of ordinary whisky or Gin sold in the market, does not mean that it is not consumable and cannot be drunk at all. The department contended that the goods imported have to be classified as Whisky or gin. The petitioners on the other hand contended that the goods imported are known in the trade as concentrated whisky or gin which are qualitatively different from whisky or gin known to trade. Concentrate whisky or gin is not and cannot be sold to consumers or even wholesalers directly as whisky or gin. They have to be sold to distilleries only who after due process convert them into India made foreign whisky or gin. It is only thereafter the product is known and sold as potable whisky or gin.

21. In that view of the matter, the order of the SD holding that there was misdeclaration of the goods, because what was imported was scotch whisky of 63% strength, is not sustainable in law. Interestingly, the SD notes that the imported CAB of 63% concentration was to be used for blending of Indian liquor at 42.8%. In other words, what was imported by SMPL could not be sold as such for consumption and answered the definition of CAB. The AT too appears to have overlooked the fact that CAB of a concentration higher than 42.8% V/V could not be sold as such and had to be diluted or blended to bring it to 42.8% V/V concentration.

22. Mr. Subhash Bansal, learned counsel for the DoE, referred to the information obtained from the exporters abroad. He referred to para 6 of SD's order dated 21st September 2004 which noted that while the goods were described by overseas suppliers as CAB in their invoices, in the export declarations they declared the goods to be "wholly malt scotch whisky and scotch blend whisky" and that in the export declaration, the commodity code number was declared which specifically covered for scotch whisky. He further submitted that anything less than 100% concentration could not be classified as "concentrate."

23. As pointed out by Mr. Rajeev K. Virmani, learned Senior counsel for the Appellants, the above submission overlooks the fact that much turns on the strength of the spirit that is sought to be imported. By a letter dated 20th July 1993, SCL Canada was permitted to set up a subsidiary for manufacturing and marketing non-molasses based potable spirit. The said letter noted that "project

will involve import of scotch whisky and malt to be used in upgrading locally manufactured liquor products through blending." SCL was asked to obtain an import licence as per the prescribed policy and procedure under EXIM Policy. CAB is mentioned place at Sl. No. 30 in the list of restricted items in Appendix 2, Part B of the 1988-1991 Import and Export Policy. SMPL applied for and was granted an import licence permitting it to import CAB. The import licence dated 20th December 1994 indicates the end product as alcoholic beverages. In the form submitted by SMPL for obtaining permission for remitting foreign exchange for the import, the description of the goods is "concentrate of alcoholic beverages." Clearly, therefore, there is a distinction drawn between CAB and alcohol for potable use. If what was imported was alcohol of a concentration of higher than 42.8 V/V, then clearly it satisfied the description of CAB. The mere fact that the exporters declared the goods to be "wholly imported scotch whisky" did not mean that they were alcohol of a concentration that rendered them fit for consumption.

Misdeclaration of quantity

24. On the question of misdeclaration of quantity, the Appellants are right in their submission that two B/Es mentioned in the adjudication order have not been referred to in the SCN dated 23rd May 2002. The Bombay High Court in Dodsai (P.) Ltd. Vs. Foreign Exchange Regulation, Appellate Board, set aside an adjudication order on a similar ground. The statement of Mr. Mukesh Narain, which is also referred to in the adjudication order, explains that indication of the quantity as "BL" instead of "AL" was an error. This has been noted by the CEGAT in its order dated 25th March 2003 and held to be not relevant to the assessment proceedings. In any event, the issue of misdeclaration not having been mentioned in the SCN, ought not to have been adjudicated upon by the SD.

Misdeclaration of value

25. The third issue concerns the value declared in the invoices. The SD appears to have misinterpreted what was stated in the Memorandum dated 23rd May 2002. Page 2 of the SCN set out the rates at which the different brands of whisky were supplied by SCL "to other countries" and compared them with rates charged for the supplies to India. These were not "invoice prices of imports of similar goods by other manufacturers of alcoholic beverages" as was erroneously noted in the adjudication order of the SD. Consequently, the conclusion of the SD in para 44 that the goods supplied to SMPL "were grossly under invoiced" is not based on any material available to the SD. If there was such material, then it was not put to the Appellant and therefore could not have formed the basis of the order.

No violation of Sections and 8(3) and 8(4) FERA

26. The DoE has been unable to counter the submissions of the Appellants that the foreign exchange acquired was fully utilized for making payments against the import invoices. The language of Section 8(3) read with Section (4) indicates

that the said provisions would be attracted in three possible situations in the context of the import of goods. First, where a person fails to bring or send goods for which the foreign exchange was acquired. Second, where the person does not send or bring goods of a value representing the foreign exchange acquired. Third, where he brings goods of a kind, quantity and quality different from that which is specified while acquiring the foreign exchange.

27. As already noted hereinbefore, the DoE has been unable to show that SMPL imported goods different in quality or quantity from that declared at the time of acquiring foreign exchange for the import. The DoE has also been unable to show that the invoiced value of the goods imported by SMPL was not equivalent to the foreign exchange remitted by it. In this connection, the decision of the Bombay High Court in *The Tata Engineering and Locomotive Company Ltd. v. Director of Enforcement* (decision dated 20th March 1999 in First Appeal No. 918 of 1982) would be relevant. There it was held that as long as the foreign exchange was acquired for the import of spare parts and the same was utilized for the import of the said items and not any other items, there would be no violation of Sections 8(3) and 8(4) FERA. In the present case also, the foreign exchange acquired has been used entirely for the goods imported and, therefore, there was no violation of Sections 8(3) and 8(4) FERA.

28. Finally, it must be noted that on the issue of valuation the Supreme Court has, in *Pernod Ricard India (P.) Ltd. Vs. Commissioner of Customs, ICD Tughlakabad*, affirmed in part an order of the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") directing the Commissioner of Customs to re-determine the value of the imported CAB in terms of Rule 5 (1) (c) read with Rule 6 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Thus, even in the assessment proceedings under the CA, the issue is about the proper valuation of the goods. This cannot, per se, form the basis of the proceedings under Sections 8(3) and 8(4) FERA. In the present case, apart from the SCN under the CA and the statement of Mr. Mukesh Narain u/s 40 FERA, there was no independent investigation undertaken by the DoE.

The liability of Mr. Mehdiratta

29. Finally, as regards the individual liability of Mr. Mehdiratta, apart from stating in the Memorandum that he was "responsible to the company for the conduct of its business during the relevant period", there is nothing indicated as to on what basis such conclusion has been reached. The adjudication order also fails to deal with this issue and merely states that "it is observed from the records" that the co-notices Mr. Akram Fahmi and Mr. Mehdiratta "were actively involved in the import negotiations, fixation of prices, dealing with the suppliers etc." There is no basis for this conclusion. Consequently, the fastening of the liability on Mr. Mehdiratta for the contravention of Sections 8(3) and 8(4) FERA is not based on any material whatsoever and cannot be sustained in law.

Conclusion

For the aforementioned reasons, the adjudication order dated 21st September 2004 insofar as it concerns the Appellants and the impugned common order dated 30th October 2007, insofar as it dismisses Appeal Nos. 1116 and 1117 of 2007, are hereby set aside. The appeals are allowed in the above terms with costs of Rs. 5,000 in each appeal.