(1983) 08 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition No. 347 of 1980

Satellite Engineering Ltd. APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 31-08-1983

Acts Referred:

Customs Act, 1962 — Section 111, 111(1), 112, 117, 128

Citation : (1984) 3 ECC 217 : (1983) 14 ELT 2177 : (1983) 141 ITR 399(1)

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

Pendse, J.—By this petition filed under Article 226 of the Constitution of India, a portion of the order passed by the Special Secretary to the Government of India in exercise of the revisional powers conferred under the provisions of the Customs Act on October 13/20, 1979 is challenged.

2. The facts which gave rise to the filing of this petition are required to be briefly stated. The petitioners are manufacturers of Fluorescent Starter Switches and for the purposes of manufacture required lead glass tubings. One Parmanand Maneklal & Company had business and technical collaboration with Messrs. Kupfer Limited, United Kingdom. On April 16, 1962, the petitioners got the business of Parmanand Maneklal & Company transferred to them and continued purchasing raw materials from M/s. Kupfer Limited. On January 17, 1972, the petitioners placed an order with M/s. Kupfer Limited for 30 tonnes of lead glass tubing. The first consignment of 164 cases arrived on March 11, 1973 and in respect of that consignment, the Collector of Customs, Bombay served show cause notice on July 7, 1973 upon the petitioners to show cause why the goods should not be confiscated on the ground of value mis-statement. The value mentioned in the bill of entry was Pounds 0.15 per kg. and the Collector felt that the price was absurdly low as the quotations received by the Customs authorities indicate the prevailing price of Pounds 0.430 per kg. The second consignment of 164 cases arrived in May 1973 and in respect of this consignment also a show

cause notice was issued on July 7, 1973 as to why the goods should not be confiscated for mis-declaration of value. The third consignment of 164 cases containing 8,030 kgs. of lead glass tubing arrived in November 1973 and the Bill of Entry was filed by the petitioners on November 9, 1973 for 8,030 kgs. claiming value at Pounds 0.25 per kg. The show cause notice in respect of third consignment was served on the petitioners on November 19, 1973 for mis-declaration of value and also for mis-declaration of weight in the Bill of Entry as the goods imported were 10,037 kgs. instead of 8,030 kgs. as declared in the Bill of Entry.

3. In respect of the first two consignments, the Collector passed an order on August 7, 1973 confiscating the consignments u/s 111(m) of the Customs Act, 1962 with redemption fine of Rs. 54,500 in respect of each of the consignments. The order was passed by the Collector on the basis that the value of the lead glass tubing imported was found Pounds 0.430 per kg. and the price declared by the petitioners was wholly under-valued. In respect of the third consignment, the Collector passed an order on April 24, 1974 confiscating the consignment u/s 111(1) and (m) of the Customs Act with redemption fine of Rs. 33,000. The Collector also imposed a penalty of Rs. 27,000 and Rs. 1,000 under Sections 112 and 117 of the Customs Act respectively. The Collector in respect of the third consignment, came to the conclusion that the goods were under-valued and also there was a mis-declaration in respect of the weight.

4. The petitioners carried three appeals in respect of the three consignments before the Central Board of Excise and Customs, New Delhi as provided u/s 128 of the Customs Act. The three appeals were consolidated and were disposed of by common order and all the three appeals were dismissed by an order dated January 16, 1978. The petitioners carried revision applications in respect of the three consignments before the Central Government and the revisions in respect of first two consignments were allowed and the order of confiscation was set aside. In regard to the third consignment, the redemption fine of Rs. 33,000 was reduced to Rs. 15,000. While the penalty of Rs. 27,000/- in respect of mis-declaration of weight was upheld. The petitioners have preferred the present petition to challenge the adverse order against them in respect of the three consignments.

5. Shri Talyarkhan, learned counsel appearing in support of the petition, advanced two submissions to challenge the legality of the order passed by the revisional authority. The first submission of the learned counsel is that the three authorities below were in error in holding that the value of the goods declared by the petitioners in the Bill of Entries in respect of three consignments was under-valued and the reliance by the three authorities on the two quotations was entirely misconceived. The second ground of challenge is that the revisional authority was in error in upholding the amount of penalty levied on the ground of mis-declaration of weight in respect of the third consignment. In regard to the first ground, the petitioners have declared the value of the imported goods at the

rate of Pounds 0.15 per kg. in respect of the first two consignments and Pounds 0.25 per kg. in respect of the third consignment. Shri Talyarkhan submits that the price declared by the petitioners was proper and the conclusion of the authorities that the price was Pounds 0.430 per kg. is without any basis. Before adverting to the submission of the learned counsel, it would be appropriate to make reference to Section 14 of the Customs Act, 1962. Section 14 of the Customs Act provides that for the purposes of the Act whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be -

"(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation as the case may be, 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 offer for sale."

Rule 3(d) of the Customs Valuation Rules, 1963 also provide :

"(d) If the value cannot be determined under any of the foregoing clauses, if may be based on the price at which such goods or comparable goods produced or manufactured by the person who has produced or manufactured the goods to be assessed, are ordinarily sold or offered for sale under competitive conditions to buyers in the country of origin."

From these provisions, it is clear that the value of the goods for the purposes of levying duty shall be fixed with reference to the price at which such goods are sold or offered for sale in the course of international trade and where the seller and the buyer had no interest in the business of each other and the price is the sole consideration. In other words, the transaction must be at arms length and not entered for other considerations.

6. Shri Talyarkhan submits that the authorities below ought to have accepted the value declared by the petitioners in the Bills of Entries filed in respect of three consignments and were not justified in relying upon the two quotations showing the value at the rate of Pounds 9.430 and Pounds 0.429 per kg. The first quotation relied upon by the authorities is from M/s. Chance Brothers Limited who are the manufacturers of lead glass tubing which the petitioners have imported. An enquiry was made by an importer on May 22, 1973 with M/s. Chance Brothers Limited in Great Britain inviting offers in respect of the item lead glass tubing. The manufacturers M/s. Chance Brothers Limited by their reply dated June 22, 1973 informed the intending importer that the value of 55 mm long lead glass tubing would be Pounds 0.430 per kg. This is the item which the petitioners having imported and in respect of which the petitioners are claiming that the value is Pounds 0.15 per kg. in respect of the first two consignments and Pounds 0.25 per kg. in respect of third consignment. The second quotation on which the authorities below have relied is from John S. Elmore Limited from England. In answer to the query addressed to them on May 18, 1973, John S.

Elmore Limited sent a reply on May 30, 1973 and the reply states that on enquiries from M/s. Chance Brothers Limited, the price quoted is Pounds 0.429 per kg in respect of lead glass tubing of 55 mm. length. The authorities below have relied upon the price in these two quotations to record a conclusion that the petitioners have under-valued the goods which they have imported under the three consignments. Shri Talyarkhan submits that the authorities were in error in relying upon these two quotations because the authorities declined to disclose the names of the parties or the intending importers to whom the quotations were sent by M/s. Chance Brothers Limited and John S. Elmore Limited. The learned counsel submitted that unless the names of the intending importers are disclosed to the petitioners and they are offered for cross-examination, it is not possible for the petitioners to establish that the price quoted in the two quotations was not just price.

7. Shri Mehta, learned counsel appearing on behalf of the Department, points out that the copies of the letters containing the price offered were handed over to the petitioners with a slip pasted on the name of the intending importer and that was done with a purpose, because the disclosure of the name of the intending importer may lead to several complications. The Department would not be able to collect such evidence if the name of the intending importer to whom the quotations are addressed are disclosed in the departmental enquiry. Shri Mehta submits that failure to disclose the name of the intending importer causes no hardship or prejudice to the petitioners as it was always open for them to establish by leading evidence of exporters that the quotations sent by the exporters from England did not disclose the true price. I find considerable merit in the submission of Shri Mehta that the non-disclosure of the names of the intending importers had caused no prejudice to the petitioners. Shri Talyarkhan relied upon the decision in the case of Collector of Central Excise and Land Customs, Shillong and another v. Sanawarmal Purohit and another reported in 1979 Excise Law Times 613 to urge that the principles of natural justice demand that every information available to the Department and on which they intend to rely must be disclosed to the party which is likely to be adversely affected. The principal undoubtedly requires to be observed in these proceedings but it is difficult to appreciate how the non-disclosure of the names of the intending importer would cause any prejudice to the petitioners. The petitioners were made aware that M/s. Chance Brothers Limited and John S. Elmore Limited had offered quotations at certain rates and it was open for the petitioners from this material to establish that the value quoted in those quotations was not the proper value. In case the department is compelled to produce such intending importers for cross-examination in departmental proceedings, then it would be well-nigh impossible to gather any material. In my judgment, the grievance of the petitioners on this count has no merit and deserves to be repelled.

8. It is not in dispute that the copies of the letters received from M/s. Chance Brothers Limited and John S. Elmore Limited were supplied to the petitioners prior to the commencement of the enquiry. Shri Talyarkhan then submitted that

the material produced by the petitioners in support of their claim that the value quoted in the two letters on which the authority has placed reliance is not accurate was overlooked by the three authorities below. The reliance was placed on a letter addressed by M/s. Chance Brothers Limited to M/s. Kupfer Limited on October 29, 1973 in answer to the query made by M/s. Kupfer Limited on October 16, 1973. The price quoted in this letter is Pounds 0.340 per kg. The other document to which Shri Talyarkhan made reference is the certificate issued by M/s. Chance Brothers Limited on November 7, 1973 confirming that the price was Pounds 0.340 per kg. in May 1973. The next document relied upon is the letter dated September 20, 1974 from M/s. Chance Brothers Limited to the petitioners offering the price at Pounds 0.340 per kg. These letters and the certificate were relied upon by the learned counsel to claim that the quotation value of Pounds 0.430 per kg. relied upon by the authorities was not accurate. There is no merit whatsoever in this contention. Each and every document on which reliance is placed had come into existence after the order was passed by the Collector on August 7, 1973 in respect of the first two consignments. After the Collector recorded the conclusion that the value shown by the petitioners in the Bills of Entries was grossly inadequate. The petitioners had maneuvered to secure the letters from the exporters to substantive their claim. This clearly indicates that the petitioners were willing to produce false evidence before the authorities to sustain their claim. If the authorities below have ignored this false evidence, then no infirmity can be found in that conclusion. It is difficult to appreciate what prevented the petitioners from obtaining these letters from the exporters prior to the decision of the Collector. The letters and the certificate relied upon by Shri Talyarkhan are obviously manoeuvred documents and the petitioners cannot draw any strength from such manoeuvred evidence. The authorities were perfectly justified in ignoring the evidence and relying upon the quotations establishing that the prevalent value in the market was Pounds 0.430 per kg.

9. Shri Talyarkhan submitted that the price charged to the petitioners in respect of the imported goods should be accepted because the petitioners had booked a very large order and in such cases M/s. Chance Brothers Limited grants certain concession in the price. In support of this submission, reliance was placed upon the contents of letter dated May 30, 1973 addressed by John S. Elmore Limited to the intending importer, where it is mentioned that M/s. Chance Brothers Limited suggested that the C. I. F. Bombay price would largely depend upon quantities ordered at one time. It is common knowledge that when a bulk order is placed, then some concession is given in the price but it is impossible to imagine that M/s. Chance Brothers Limited would sell the goods at the rate of Pounds 0.15 per kg. when the normal price was Pounds 0.430 per kg. In my judgment, the submission of Shri Talyarkhan that the price from the quotations available to the Department did not reflect the true price could not be accepted. It is obvious that the petitioners have under-valued the importer goods while declaring the value in the Bills of Entries and the Department was perfectly

justified in holding that the petitioners had made a declaration which was not proper. The challenge to the orders of the three authorities below on the question of under-valuation of the goods cannot be accepted and deserves to be repelled.

10. Shri Talyarkhan the submitted that the revisional authority was in error in upholding the levy of penalty on the ground of mis-declaration of weight in respect of their consignment. As mentioned hereinabove, the Bill of Entry in respect of third consignment was filed by the petitioners on November 9, 1973 claiming that the quantity of the goods was 8030 kgs. It was found and it is not in dispute that the actual quantity imported was 10037 kgs. and the authorities below have imposed the penalty for mis-declaration of weight of the imported goods. Shri Talyarkhan submits that the Collector and Appellate authority had not recovered any finding in respect of the mis-declaration of weight by the petitioners. It was urged that the petitioners have given explanation about the mistake in declaration of the weight of the goods and as the Collector and the Appellate authority had not recorded specific findings rejecting the explanation, it should be held that the explanation was accepted. The explanation was that the declaration of weight was made by mistake which occurred in view of the shipping documents sent by the exporter. The petitioners claimed that it was not made wilfully or deliberately. It is undoubtedly true that the Collector in his order has not specifically found that the explanation is not acceptable but there is hardly any doubt that he was not inclined to accept the explanation because he had levied a penalty of Rs. 27,000 for mis-declaration of the weight of the imported goods. That order was confirmed by the appellate authority and the revisional authority found that the levy of penalty was justified and, in these circumstances, it is not possible to accept the submission of Shri Talyarkhan that the revisional authority made out a new ground for levying the penalty for mis-declaration of weight. The penalty was levied u/s 111(1) of the Act which enables the Customs authorities to confiscate the goods when any dutiable goods are not included or are in excess of those included in the entry made under the Bill of Entries. Shri Talyarkhan submitted that the authorities below have not given any reasons for rejecting the explanation of the petitioners and on the facts and circumstances of the case, the explanation ought to have been accepted. In my judgment, it is not possible to accept this submission for more than one reason. In the first instance, it is not permissible in exercise of the writ jurisdiction to disturb the orders of the authorities below recorded on appreciation of evidence. The mere fact that the explanation was not assessed in detail and a finding was recorded that it was unacceptable is no ground to examine the explanation for the first time in these proceedings. Secondly, even assuming that I can re-examine the explanation, I have no hesitation in concluding that the explanation was false and frivolous. The petitioners had filed a Bill of Entry declaring the weight of the imported goods which was obviously less than the actual goods. It is futile for the petitioners to claim that the mistake occurred because of the shipment documents sent by the exporters. The idea of the petitioners was obviously to evade the duty and this aspect has to be considered in the light of

the fact that prior to the filing of the Bill of Entry in respect of third consignment, the Collector had already passed an order confiscating the first two consignments on August 7, 1973. The conduct of the petitioners in the proceedings before the Collector and subsequent thereto clearly indicates that the petitioners had no value for the truth and they are willing to produce false evidence to sustain their claim and to evade the duty. If the petitioners are willing to procure false evidence to support their claim about the value of the goods after the order was passed by the Collector, then it is impossible to rely upon the statement of such person while considering whether the mis-declaration was made in respect of the weight of the imported goods by mistake. In my judgment, it is clear that the mis-declaration of weight was not because of a valid mistake but was deliberate to avoid the duty. The submission of Shri Talyarkhan that the Collector and the Appellate authority had not considered this aspect is not accurate because the order of the Collector specifically refers to the penalty for mis-declaration of weight and the challenge levied by the appellant to this aspect was present before the Appellate authority while hearing the appeal as the appeal Memo itself includes a ground in this regard.

11. Shri Talyarkhan then submitted that even assuming that the petitioners have made a mis-declaration in respect of the weight of their consignment as such mis-declaration was not done mala fide but out of a bona fide mistake, the authorities were not justified in imposing a penalty. In respect of this submission, reliance was placed on the decision in the case of Hindustan Steel Ltd. Vs. State of Orissa, In paragraph 7 of the judgment, the Supreme Court while considering the validity of the penalty imposed under the provisions of the Orissa Tax Act observed that the liability to pay the penalty does not arise merely upon proof of default and an order imposing penalty can be passed provided the party has acted deliberately in defiance of law or is guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. In my judgment, the penalty imposed in the present case is clearly sustainable as the petitioners have acted deliberately in defiance of law and their conduct was dishonest in making a false declaration about the weight of the third consignment. On the test laid down by the Supreme Court, the penalty imposed in the present case can be perfectly justified. In my judgment, there is no merit whatsoever in the petition and the same deserves to be dismissed.

12. Before parting with the matter, it is required to be stated that the Revisional authority was too kind to the petitioners in setting aside the penalty imposed in respect of the first two consignments. The Revisional authority, after recording the conclusion that the basis of the value given by the petitioners in respect of the two consignments was wholly under-valued was not justified in setting aside the penalty imposed on the ground that it was not done deliberately. The entire conduct of the petitioners leaves no manner of doubt that their action in declaring the value of the imported goods at under-valued rate was deliberate and was done with a view to evade the duty. The petitioners should thank themselves for securing an order in their favour in respect of the first two

consignments.

13. Accordingly, the petition fails and the rule is discharged with cost.

