
(1981) 09 BOM CK 0027

In the Bombay High Court

Case No : Miscellaneous Petition No. 1729 of 1977

Uni-sankyo Limited

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 04-09-1981

Acts Referred:

Customs Act, 1962 — Section 14, 14(1), 28

Citation : (1981) 8 ELT 922

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

Bench : Single Bench

Judgement

1. The petitioners are a Company incorporated under the Companies Act, and have established a factory at Hyderabad in collaboration with M/s. Sankyo Company Limited, Tokyo, for manufacturing of "Fungal Diastase" and certain other products. The petitioners were granted an import licence dated October 19, 1968 for importing complete machinery for the manufacture of Sanzyme. The machinery was imported from time to time and the petitioners cleared the consignment as per the procedure of the customs authorities. The material arrived at India in the Port of Bombay on or about February 20, 1970 and April 25, 1970, and the necessary bills of entry in connection therewith were filed by the petitioners and import duty paid on the basis of value shown in the said bills of entry. The duty paid by the petitioners was on the basis of provisional assessment made on the strength of invoice value. Certain correspondence took place between the petitioners and the Appraising Officer, Special Valuation Branch, Bombay, in respect of value of the imported goods and ultimately on April 11, 1972, the Assistant Collector of Customs informed the petitioners that he proposes to load the ex-works invoice price by 15 per cent under Customs Valuation Rules. The Assistant Collector stated in the said letter that with regard to the import of Capital Plant and Equipment the petitioners have submitted a certificate dated July 19, 1971 of the Chartered Accountant from which it is noticed that the collaborators have not charged any margin of profit in respect of the Plant and Equipment supplied by them. The Assistant Collector informed that

such marginal profit is an element of value as defined in Section 14(1)(a) of the Customs Act, 1962, and therefore, it is necessary to load the invoice price by 15 per cent. The Assistant Collector further informed that in case the petitioners desire that invoice value should be accepted, then the petitioners should submit proper evidence and on failure of the petitioners to submit evidence the course of loading invoice value by 15 per cent would be adopted. In spite of this letter, the petitioners led no evidence to establish that the invoice price includes the marginal profit. The Assistant Collector, by letter dated July 5, 1972, informed the petitioners that the decision conveyed by letter dated April 11, 1972 is confirmed. To arrive at the conclusion that the invoice price did not include the marginal profit, the Assistant Collector relied upon the Auditor's certificate dated July 19, 1971 which specifically indicated that the collaborators had not charged any marginal profit.

2. The petitioners carried an appeal against the order of the Assistant Collector before the Appellate Collector of Customs, Bombay. Along with the appeal memo, which was presented on September 23, 1972, the petitioners produced a letter dated August 18, 1972 from the Auditors of the Collaborators clarifying that the invoice price includes the normal profit as that is the normal practice of trade. The petitioners on August 28, 1973, produced order acknowledgment of the collaborators placed with manufacturers and claimed that the said acknowledgment would show that there is a difference between the price charged to the collaborators and charged by the collaborators to the petitioners, and such difference would reflect the marginal profit. The appellate authority by its order October 25, 1973, dismissed the appeal and that order was further confirmed in revision preferred by the petitioners before the Government of India. The order on revision application was passed on March 25, 1975. The Assistant Collector, thereafter on April 19, 1977 called upon the petitioners to deposit the customs duty amounting to Rs. 64,155.20 as found at the time of the final assessment. The petitioners have approached this Court by filing the present petition on December 6, 1977 under Article 226 of the Constitution of India and the petitioners are challenging the legality of the orders passed by the customs authorities as well as the show cause cum demand notice served on April 19, 1977.

3. Shri Taleyarkhan, the learned counsel appearing in support of the petition, has raised two or three contentions to challenge the legality of the orders and the demand notice. The learned counsel urged that the authorities below were totally in error in ignoring the clarification received from the Auditors of the collaborators and the orders passed upon the certificate of Auditors issued on July 19, 1971 cannot be sustained. The learned counsel also submitted that the appellate authority and revisional authority have ignored the clarification as well as the acknowledgment orders produced by the petitioners before the appellate authority. The learned counsel also submitted that the Assistant Collector was in error in loading the price by 15 per cent. The last submission is that the demand notice was barred in view of provisions of Section 28 of the Customs Act, and on

that count the notice is required to be struck down. In my judgment, there is no merit in any of the contentions urged by the learned counsel.

4. The main grievance of Shri Taleyarkhan is that the appellate authority ignored the clarification submitted by the Auditors on August 20, 1972 and relied solely upon the certificate issued by the auditors on July 19, 1971. The learned counsel did not dispute that the certificate of auditors issued on July 19, 1971 specifically indicates that the collaborators have not charged any marginal profit. I have also perused the original certificate and it leaves no manner of doubt that the auditor has specifically stated that the profit margin was nil. After this certificate was produced by the petitioners, the Assistant Collector by his letter dated April 19, 1972 informed the petitioners that the invoice value does not reflect the correct valuation of the goods for the purpose of assessment as the profit margin is totally absent, and unless the petitioners submitted the evidence to establish the correct profit margin, the value would have to be loaded by 15 per cent. In spite of this notice the petitioners did not care to produce any evidence to establish the profit margin or to claim that the invoice value includes the profit margin. The failure on the part of the petitioner led to the Assistant Collector passing the order on July 5, 1972. The petitioners thereafter claims to have secured clarification from the auditors on August 18, 1972. It is difficult to appreciate why the petitioners could not secure this clarification till the Assistant Collector passed the order. The Assistant Collector called upon the petitioners to submit the evidence in April 1972 and passed the order in July 1972, while the petitioners thought it fit to obtain clarification only in August 1972. It is obvious that the clarification given by the auditors is clearly an after-thought and was secured to overcome the adverse order passed against the petitioners by the Assistant Collector. It is not possible to attach any value to such a clarification.

5. There is another of the matter which cannot be over-looked. The clarification does not refer to the earlier certificate issued by the auditors on July 19, 1971. There is also an intrinsic evidence to indicate that the clarification is not with reference to the earlier certificate. In the clarification the cost of manufacture is mentioned as Japanese Yen 17,507,885, while in the certificate dated July 19, 1971 the price referred is 23,050,560. It is difficult to conclude that the clarification is in respect of the earlier certificate, but even otherwise no weight can be attached to a clarification which was secured after the date of order passed by the Assistant Collector. The appellate authority was perfectly justified in holding that it would not be proper to refer to the clarification when the earlier certificate issued by the auditors had no ambiguity. The claim of the petitioners that the auditors were not familiar with English language was rightly turned down. In my judgment, both the appellate authorities and the revisional were justified in ignoring the clarification in these circumstances, and the grievance of Shri Taleyarkhan that it was erroneously cannot be sustained.

6. Shri Taleyarkhan then submitted that the petitioners have produced order acknowledgment placed by the collaborators with various manufacturers and

those orders would indicate that there is a difference between the price charged by the collaborators to the petitioners and the difference is about 28.4 per cent. The learned counsel urged that these order acknowledgments were not taken note of by the appellate and the revisional authorities. I do not find any merit in the submission. It was open for the petitioners to produce this kind of evidence before the Assistant Collector and more so when the Assistant Collector has specifically called upon the petitioners to do so. The petitioners cannot reserve the right to produce evidence at any stage they chose. Even assuming that the petitioners were justified in producing this piece of evidence before the appellate authority, I find no reason to disturb their orders on the strength of order acknowledgment. The order acknowledgment by no stretch of imagination would establish that the price charged by the collaborators to the petitioners include the profit margin. The petitioners' submission that the orders of the appellate and revisional authorities suffer from serious infirmities because of failure to consider the clarification and acknowledgement is devoid of any merit and deserves to be repelled.

7. Shri Taleyarkhan then submitted that the authorities below were in error in loading the invoice value by 15 per cent. To appreciate the submission of the learned counsel, it is necessary to make reference to the provisions of Section 14(b) of the Act. The Section inter alia provides that where a duty is chargeable on any goods by reference to their value, the value of the goods shall be deemed to be the price at which such or like goods are ordinarily sold. Section 14(b) provides that where such price are not ascertainable, the nearest ascertainable equivalent thereof can be determined in accordance with the rules made in that behalf. The learned counsel invited my attention to the Custom Valuation Rules, 1963. Rule 2 provides that the valuation of the imported goods shall be determined in accordance with the provisions contained in Rules 3 to 8. Rule 3 sets out various modes in which the price can be determined and those are the value of goods, if ordinarily sold in India, value of the goods sold to buyers in countries outside India etc. The value in Rule 3 can be ascertained or determined provided the person who is liable to pay duty produces relevant evidence before the proper officer. Rule 8 provides that if the value of the imported goods cannot be determined, then the proper officer shall after taking into account all relevant materials determine the valuation to the best of his judgment.

8. Shri Taleyarkhan urges that loading invoice value by 15 per cent by the Assistant Collector was totally arbitrary. The submission cannot be accepted as the Assistant Collector specifically called upon the petitioners to submit evidence as to why the invoice value should not be loaded by 15 per cent in pursuance of the Customs Valuation Rules. The Petitioners declined to submit any evidence to enable the officer to arrive at the value under Rule 3, and therefore, the officer was left to record the best judgment valuation of the imported goods. In these circumstances, it is not open for the petitioners to complain that the loading of value by 15 per cent was arbitrary. In my judgment, due to the failure of the petitioners to submit any evidence, the officer was required to resort to the

provisions of Rule 8 and no fault can be found for the course adopted by him. In my judgment, the orders passed by the three authorities below are in accordance with law and requires no interference.

9. Shri Taleyarkhan then urges that the demand notice served by the Assistant Collector of Customs on April 19, 1977 was barred by limitation as provided u/s 28 of the Act. The submission proceeded on the basis that there was final assessment on July 5, 1972 and the notice u/s 28 in respect of duty short levied must be within a period of six months from the date of such final assessment. The submission cannot be accepted for more than one reason. In the first instance the demand notice dated April 19, 1977 is not respect of any duty not levied or short levied or erroneously refunded, but to enforce the duty which was found to be payable at the time of the final assessment. Section 28 provides for no period of limitation for recovery of duty which was found payable at the time of the final assessment. Secondly, the expression "relevant date" in sub-section 3(b) of Section 28 is the date of adjustment of duty after the final assessment thereof. In my judgment the provisions of Section 28 of the Act are not attracted to the facts of the case and the demand notice could not be declared as barred by limitation.

10. In the result, the petition fails and the rule is discharged with costs.

It hardly requires to be stated that the respondents are entitled to recover the amount mentioned in the demand notice.