COMMISSIONER OF CUSTOMS, MUMBAI

v.

M/S CLARIANT (INDIA) LIMITED, WORLI

MARCH 29, 2007

[S.H. KAPADIA AND B. SUDERSHAN REDDY, JJ.]

Customs Act 1962—Technical collaboration agreement—Between manufacturer-Company and another company—Import of raw material by the manufacturer under the agreement—Revenue imposing technical know-how charges to the assessable value of the raw material—Adjudicating Authority held the charges not includible to the value of raw material as the companies were not related—Appellate Authority holding the same to be includible—Tribunal in view of admission by the manufacturer, despite holding that the companies were related, held the charges not includible to the cost of raw material—On appeal, held: In view of admission by the manufacturer that the companies were related, the matter needs de novo consideration whether payment of technical know-how charges was the condition for import of raw material in the light of relationship with the parties—Hence matter remitted to Adjudicating Authority—Customs Valuation Rules. 1988—Rules 4(2)(9), 4(2)(b), 4(3)(b) and 8.

Respondent-company was manufacturer of leather chemical products. Under a Technical Collaboration Agreement, it imported raw material from a company. Department-appellant called upon the respondent to pay technical know-how charges to the assessable value of the material u/r 4 (2) (a) and (b) of Customs Valuation Rules, 1988 on the ground that the two companies were related and that payment of fees was the condition for importation of the quality raw material. Adjudicating Authority held that the fees payable were not includible in the assessable value of the raw material as the two companies were not related. Appellate Authority held that the technical know how charges were required to be loaded to the value of raw material as the two companies were related. Customs, Excise and Gold (Control) Appellate Tribunal, on the admission of the respondent, held that the two companies were related. However, it held that the Department was not correct in adding technical know-how charges to the cost of raw material, since the issue was not before it.

A **Allowing the appeal, the Court**

HELD : 1. The approach of the Tribunal is not correct. Firstly, in the present matter the entire finding of the adjudicating authority is based on the premise that the two companies are not related. That premise got eliminated when, before the appellate authority, the assessee fairly stated that
B **the two companies were related. Secondly, once it is conceded on behalf of the respondents that the two companies are related, that matter takes a different complexion. It is in this light that the matter needs *de novo* reconsideration. Therefore, the question as to whether the said payment of DM 5,00,000 was the condition for import of quality raw material needs to be examined,**
C **particularly in the light of the relationship between the parties. It is clarified that merely because the two parties are related to each other will not amount to under valuation *per se*. It will depend on the facts and circumstances of each individual case. [Paras 9 and 11] [518-F-G; 519-A-E]**

Union of India **v.** *Mahindra & Mahindra Ltd.,* **(1995) 76 ELT 481,**
D **referred to.**

2. The matter is remanded to the Adjudicating Authority which will decide the matter *de novo* in the accordance with the Customs Valuation Rules, 1988. [Para 12] [519-F]

E CIVIL APPELLATE JURISDICTION: Civil Appeal No. 509 OF 2002.

From the final Order No. CZB/4180/WZB/2000 dated 27.11.2000 in Appeal No.C/401/98-Bom passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai

F Mathai M. Paikeday, Navin Prakash and B. Krishna Prasad for the Appellants.

Joseph Vellapally, Sanjay R. Hegde, Ragvesh Singh and Krishna Kumar Darbha for the Respondents.

G The Judgment of the Court was delivered by :

KAPADIA, J. 1. This is a civil appeal under Section 130E of Customs Act, 1962 filed by the Department against the order dated November 27, 2000 in Appeal No. C 401/98-Bom passed by the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT), Mumbai.

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2. Respondent No.1 herein, during the assessment year 1977-78, imported raw material from M/s Sandoz Quinn (subsidiary of M/s Sandoz (India). This was under the Technical Collaboration Agreement dated April 2, 1990, between the said two companies. That Technical collaboration agreement provided for import of capital goods, raw materials, intermediates etc. along with transfer of technical know how and technical assistance for upgradation of the respondent's manufacturing plant in India. The respondent is a manufacturer of leather chemical products. Respondent entered into three agreements particulars of which are given at page 36 of the paper book. One of the agreement is called Technical Collaboration Agreement. The other two agreements pertain to import of seeds. According to the technical collaboration agreement the respondent was to import raw materials for manufacture of leather chemical products. The Department called upon the respondent to submit their invoices and certificates from Chartered Accountants. They gave the said particulars contending that the Technical Collaboration Agreement with the Sandoz Quinn was for upgradation of the chemical plant in India and for that purpose they were not required to pay technical know how charges. They contended that the import was on principle to principle basis and that the price was the sole consideration. They also contended that the import of raw material had no nexus with the collaboration agreement and that the import of raw material was not a condition of the collaboration agreement. In the circumstances it was urged that the Department should not load the technical know-how charges to the assessable value of the, raw materials under Rule 8 or any other Rule framed under the Customs Act, 1962. At this stage it may be clarified that in the present case the respondent had waived the show cause notice.

3. By order dated 15.12.1994 passed by the adjudicating authority, it was held that there was no mutuality of interest between the respondent company and M/s Sandoz Quinn, and that the fees payable were not includible in the assessable value of the raw material.

4. Aggrieved by the decision of the adjudicating authority the Department carried the matter in appeal to the Collector of Customs (A). It was urged on behalf of the Department that the two companies were related and that the fees were includible in the assessable value of the capital goods.

5. By order dated 31.12.1997 passed by the Collector of Customs (A) it was held that the technical know-how charges were required to be loaded to the value of raw materials. It was further held that though the two companies

A were related their relationship did not influence the value of the capital goods. It was further held that since the said two companies were related valuation should be done under rule 4(2)(a) and (b) in the matter of computing the assessable value of the raw material.

6. Aggrieved by the decision of th. Collector of Customs (A) the B respondent herein went in appeal to CEGAT. By the impugned judgment it was held that both the companies are related to each other. The Tribunal recorded the admission made by the advocate for the respondents that the two companies are related to each other. The Tribunal found that the appellate authority had confused the valuation of capital goods with valuation of C imported raw materials. It was further held that the only issue before the appellate authority was regarding valuation of capital goods and therefore, it had erred in going into the larger question of adding DM 5,00,000 to the cost of raw materials. According to the Tribunal this was never an issue before the appellate authority. In the circumstances, the Tribunal concluded that the said amount should not be added to the cost of the raw material.

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7. At this stage it may be noted that the Department is seeking to invoke Rule 4(2)(a) and (b) of the Customs Valuation Rules, 1988 on the footing that the said two companies are related, and that the payment of fees was the condition for importation of the quality raw material.

E 8. The only question which arises for determination in the present civil appeal is whether the Tribunal was justified, on the facts and circumstances of the case, in holding that the addition of DM 5,00,000 to the cost of the raw material was never in issue before the adjudicating authority, and therefore, its finding to that extent was beyond the appeal.

F 9. We do not agree with the approach of the Tribunal for the following reasons. Firstly, in the present matter the adjudicating authority proceeded on the basis that the above two companies were not related to each other. The entire finding of the adjudicating authority is based on the premise that the two companies are not related. That premise got eliminated when, before the G appellate authority, the advocate for the assessee fairly stated that the respondent company and M/s Sandoz Quinn were related. Secondly, in the present case three agreements were entered into by respondent herein with three different companies, one of which was M/s Sandoz Quinn. One it is conceded on behalf of the respondents that the two companies are related the matter takes a different complexion. It is in this light that the matter needs H *de novo* reconsideration. The first two agreements pertain to import of seeds.

The third agreement pertains to technical collaboration. The third agreement provides for import of quality raw material for manufacture of leather chemical products. Therefore, the question as to whether the said payment of DM 5,00,000 was the condition for import of quality raw material needs to be examined, particularly in the light of the relationship between the parties.

10. In the case of *Union of India* v. *Mahindra & Mahindra Ltd.*, (1995) 76 ELT 481 the question arose as to how the Department should interpret an agreement between the buyer and seller in the context of valuation under the Customs Valuation Rules, 1988. It was held that ordinarily the Department should proceed on the basis of the apparent tenor of the agreement. However, it was up to the Revenue, on examination of the relevant circumstances to allege and prove, that the apparent was not real. In that case also the Department was required to consider technical know how agreement between the Indian manufacturer and foreign collaborator. In that case the Department contended that there was nexus between payment for know how transfer and import of engines. The assessee succeeded before this Court in that case and one of the main reasons for the success of the assessee was that this Court found that Mahindra & Mahindra were not related to the foreign collaborator.

11. In the present case that is not so. The respondent here had conceded before the appellate authority that the two companies are related. We make it clear that merely because the two parties are related to each other will not amount to undervaluation per se. It will depend on the facts and circumstances of each individual case.

12. For the above reasons we set aside the impugned judgment of the Tribunal and remand the matter to the adjudicating authority which will decide the matter *de novo* in accordance with the Customs Valuation Rules, 1988. The adjudicating authority will not only go by apparent tenor of the agreement, but also examine the necessary facts and decide the matter in accordance with law. We do not wish to express any opinion as to whether Rule 4(2)(a) or Rule 4(2)(b) or Rule 4(3)(b) is applicable in this case. It will all depend on the facts to be established in this case and the adjudicating authority has to decide about the applicability of the relevant rule in this case. We express no opinion in that regard.

13. Accordingly, the appeal is allowed with no order as to costs.

K.K.T. Appeal allowed.