A M/S APPOLLO TYRES LTD.

v.

THE COLLECTOR OF CUSTOMS AND ANR.

DECEMBER 10, 1996

B [S.P. BHARUCHA AND S.C. SEN, JJ.]

Customs Act, 1962 : Section 14

Customs duty—Goods imported—Assessable value—Determination of.

C *Customs Valuation Rules 1963 : Rule 8—Applicability of.*

Assessee setting up a tyre manufacturing plant—Entering into an agreement for know how—Appointment of purchase agent under the agreement—In terms of the agreement goods purchased through Agent—Goods made to D *specifications and not purchased off the shelf—Goods purchased by Agent directly in the name of Assessee after approval by latter—Service charges paid by the Assessee for procurement of goods—Held not includible in the assessable value of goods.*

The appellants were setting up a plant for the manufacture of tyres. E **They entered into an agreement with General Tyre International Company under which the General Company was appointed its agent for procurement of equipment, machinery, spares, accessories and raw materials required for the plant. Under the terms of the agreement, for items to be procured for the appellants, the General Company was to obtain quota-** F **tions from the appropriate suppliers and submit them, with its recommendations to the appellants for final approval. Approved goods were to be purchased directly in the name of the appellants. Besides payment for goods, transportation charges and insurance premia, the appellants agreed to pay procurement charges @ 3% of the FOB value of the items of equipment. Accordingly, the appellants procured through the in-** G **strumentality of the General Company ten items of equipment which were cleared on the basis of their invoice value. Thereafter, the assessable value of these items of equipment was recomputed and enhanced by adding to the invoice value thereof the procurement charges thereof i.e. to say 3% of the FOB value of each items of equipment. The assessee's appeal to the** H **Central Board succeeded, and therefrom the Revenue went in appeal to**

the Central Excise and Gold(Control) Appellate Tribunal. The Tribunal held that as the imported goods were machinery made to specification and not off the shelf, the assessable value thereof could be determined only under Rule 8 of the Customs Valuation Rules by the best judgment method and no other. Consequently it held that the procurement charges paid by the assessee was not an irrelevant factor in determining the assessable value of the goods. The appellant-assessee preferred appeal before this Court.

Allowing the appeal, this Court

HELD : It is difficult to accept the Tribunal's reasoning that the assessable value of machinery made to specifications and not purchased off the shelf can only be determined by the best judgment method and no other. The Tribunal, apparently, failed to take notice of the fact that this was not a case where the invoices produced by the appellant or the agreement had been rejected. It was the case of Revenue that to the value mentioned in those invoices 3% should be added by reason of the terms of the agreement. A best judgment assessment, therefore, was not called for and had not been made. The provisions of the agreement show beyond any doubt that the value of the items of equipment was not enhanced thereby. Consequently, the order of the Tribunal is set aside and that of the Central Board of Excise and Customs is restored. [806-D-E; 809-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2704 of 1987.

From the Judgment and Order dated 12.2.87 of the Customs Excise and Gold (control) Appellate Tribunal, New Delhi in A.No.1330 of 1981-A.

J. Vellapally, Ms. Amrita Mitra and Ravinder Narain for the Appellant.

K.N. Bhatt, Additional Solicitor General and P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

S.P. BHARUCHA, J. Under appeal is the judgment and order of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. The Tribunal allowed the appeal of the Revenue setting aside the order of

A Control Board of Excise & Customs and restoring the order of the Collector of Customs, subject to the modification or reducing the quantum of penalty.

The appellants were setting up a plant for the manufacture of tyre. They entered into an agreement for the supply of technical know-how, B documentation and the like. On the same day they entered into a second agreement which noted that the second party to the agreement, General Tyre International Company, had for many years been engaged and had acquired vast experience in the manufacture of tyres as well as the design, engineering and equipment of plants for the same. The agreement in C Article 5 stated, so far as is relevant;

OPTIONAL PROCUREMENT SERVICES:

5.1 ATL shall have the option and right to call for the services of D GENERAL for procurement of any one or more items of equipment, machinery, spares, accessories and raw materials required for the PLANT, which ATL may elect to purchase, and GENERAL shall arrange for obtaining quotations and for rendering or all the related services, including inspection at the supplier's manufacturing site, furnishing for such supply E of all necessary documentation, guarantees, data and manuals relating to and customarily supplied with, for installing, testing, operating and maintaining such equipment and machinery and the details as to the needs and procurement of spare parts and accessories therefor. Prior to placing of any firm order for purchasing any equipment, machinery, spares, accessories, or raw materials, GENERAL shall obtain quotations from respon- F sible qualified suppliers thereof and shall submit quotations and GENERAL'S recommendation to ATL for final approval and authorization to place such order's but no orders shall be placed by GENERAL unless approved and authorized in writing by ATL.

G 5.2 Unless otherwise mutually agreed in any given transaction, all equipment, machinery, spares, accessories, and raw materials purchased by GENERAL, in pursuance of ARTICLE 5.1 for ATL, shall be purchased by GENERAL directly in the name of ATL and ATL shall pay for the same including shipping, transportation charges and insurance H premiums.

CONDITIONS OF PROCUREMENT SERVICES :

5.3 GENERAL agrees to observe the following norms in respect of procurement services to be rendered under this Article :

(c) For the obligations concerning optional procurement services preferred to in this Article, ATL agrees to pay GENERAL., in U.S. $ three per cent (3%) on the FOB value of such imported equipment, machinery, and/or raw materials for which GENERAL has rendered procurement services to ATL against ATL specific written request.

(d) The amount payable under Article 5.3 (c) shall be paid against a quarterly consolidated invoice to be submitted by GENERAL after having taken into accounts such invoices of supplies (with two copies thereof) in respect of which dispatches have been completed by GENERAL and goods received and approved at ATL's PLANT. This payment shall be effected within ninety (90) days from the date of receipt of the consolidated invoices by ATL from GENERAL.

The appellants procured through the instrumentality of General ten items of equipment. The same were cleared on the basis of their invoice value. Thereafter a notice was served upon the appellants asking them to show cause why the assessable value of these items of equipment should not be recomputed and enhanced so as to add to the invoice values thereof the procurement charges thereof, that is to say, to add 3% of the FOB value of each item of equipment. The show cause notice was confirmed. The appellants appeal to the Central Board succeeded, and therefrom the Revenue went in appeal to the Tribunal.

Paragraph-4 of the Tribunal's order records its reasons for setting aside the order under appeal before it. It reads thus:

> "On merits, we observe that the goods (various items of machinery) but manufactured against specific orders. (Counsel's letter dated 20.7.79 to the Collector of Customs and Central Excise). There is no question, therefore, of a "price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation" in terms of S.14 (1) (d) of the Act. The Board was clearly in error in assuming that "there is overwhelming evidence suggesting that these goods were normally available for sale in the

course of international trade." The evidence is all to the contrary. The assessable value cannot, in the circumstances be determined under S.14 (1) (a). Seeing that the imported goods were machinery made to specification and not off the shelf, the assessable value on the imports could be only determined under Rule 8 of the Customs Valuation Rules and no other. That Rule provides for the determination of assessable value by best judgment. Such a determination cannot be arbitrary but should take all relevant factors into account. The commission payable or paid to M/s General Tyre is not an irrelevant factor in any such determination. Nor is it seriously contested that the commission was disclosed at any stage of the proceedings before the assessment of the various imports to duty. We, therefore, find, in the circumstances, that the order of the Board is not correct. It is, therefore, set aside."

We find it difficult to appreciate the Tribunal's reasoning when it states that the assessable value of machinery made to specifications and not purchased off the shelf can only be determined by the best judgment method and no other. The Tribunal, apparently, failed to take notice of the fact that this was not a case where the invoices produced by the appellant had been rejected or, indeed, the agreement aforementioned. It was the case of the Revenue that to the value mentioned in those invoice 3% should be added by reason of the terms of the agreement. A best judgment assessment, therefore, was not called for and had not been made.

Now, the agreement provides that the appellant shall have the option and right to call for the services of General for the procurement of items of equipment required for the tyre plant and for rendering services related thereto. It provides that in the case of items of equipment which the appellants call upon General to procure, General shall contain quotations from the appropriate suppliers and submit such quotations, with its recommendations, to the appellants for final approval, and no orders may be placed by General unless final approval is accorded by the appellants. The agreement provides that such items of equipment shall be purchased directly in the name of the appellants and the appellant's would pay for the same, including shipping, transportation charges and insurance premia. For the procurement services the appellants' agreed to pay General 3% of the FOB value of the items of equipment, the payment to be made against a consolidated invoice to be submitted by General.

Clearly, this was an agreement by which General was appointed the purchasing agent of the appellants in respect of such items of equipment for the tyre plant that the appellants opted to purchase through the agency of General. The provisions aforementioned make it clear that the appellants would see the quotations submitted to General by the various suppliers and would approve the same. They provide that the purchases from the suppliers would be made by the appellants. They provide that what the appellants would pay to General was a commission or remuneration to be computed on the basis of 3% of the value of each of the items of equipment. These provisions show beyond any doubt that the value of the items of equipment was not enhanced thereby. We, therefore, cannot accept the reasoning of the tribunal.

In the circumstances, the appeal is allowed, the order under appeal is set aside and the order of the Central Board of Excise and Customs is restored.

There shall be no order as to costs.

T.N.A. Appeal allowed.