

A M/S. DR. REDDY'S LABORATORIES

v.

COMMISSIONER OF CUSTOMS

(Civil Appeal No.2603 of 2006)

B SEPTEMBER 02, 2015

[A.K. SIKRI AND R.F. NARIMAN, JJ.]

Customs Act, 1962 – ss. 111(m), 114A – Customs Tariff Act, 1975 – Classification of goods as auto analysers or photometers – Appellant filed Bill of Entry for clearance of goods classified as auto analysers under Entry 9030.89 – Goods seized by custom authorities – Issuance of notice stating that the said goods were photometers and not auto analysers – Demand of duty – Confiscation of goods and imposition of penalty – Commissioner held that goods imported were auto analysers, thus, amounted to misdeclaration of description and that the goods were liable for confiscation and penalty – No evasion of duty on the imported goods, thus, no penalty u/s. 114A – Tribunal set aside the order – Held: Without any analysis of whether the imported equipments were, in fact, auto analysers or were only photometers, the tribunal concluded that one can never come to a conclusion that a photometer is the same as an auto analyzer – Commissioner had held that a photometer is a generic expression and auto analysers are photometers with software installed in them which could then perform various operations – Tribunal found this logic faulty but did not given any reason for disregarding the same – Commissioner concluded that since the process of analysis is automatic, though mixing of samples may be done manually, yet since analysis has to be done automatically, an analyser would fall under the expression “auto analysers” for enzymes, drug levels and biochemical investigations – Thus, the order of the tribunal is set aside and that of the

DR. REDDY'S LABORATORIES v. COMMISSIONER OF 387
CUSTOMS

Commissioner is restored.

A

Tietz Text Book of Clinical Chemistry edited by Carl A Burtis and Edward R. Ashwood 2nd Edn – referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2603 of 2006. B

From the Judgment and Order No. 99 of 2006 dated 20.01.2006 of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore in Appeal No. C/ 130/2002. C

WITH

Civil Appeal No. 4374 of 2006.

Aurav Agrawal, Vyom Shah, Manisha Singh, Vishal Gehrana, Abhijit Mitra, Ruby Singh Ahuja, B. Krishna Prasad for the Appellant. D

Yashank Adhyaru, Rupesh Kumar, Shirin Khajuria, Jitin Singhal, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by E

R. F. NARIMAN, J. 1. The present case relates to appeals filed both by the assessee and by the revenue against the judgment dated 20th January, 2006 passed by Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"). The appellant company had been importing various models of diagnostic equipment such as BTS 302, BTS 310, BTS 320 and BTS 370 manufactured and supplied M/s Bio Systems, Barcelona, Spain. On 27th May, 1999, the appellant in its Bill of Entry filed at Hyderabad for clearance of models of BTS 320 and BTS 310 classified the goods as "auto analysers" under Entry 9030.89 of the Customs Tariff Act, 1975. The goods were seized by the custom authorities, being a total of 8 BTS 320 and 15 BTS 310 models, valued at Rs. 26,97,741.21. During the course of investigation, statements H

- A of six persons were recorded under Section 108 of the Customs Act. On 2nd November, 1999 the Directorate of Revenue Intelligence, Chennai issued a show cause notice stating that the goods in question are “photometers” and not “auto analysers”. On this basis, the revenue demanded:-
- B
- (a) Duty of Rs.1,79,11,499/- [as detailed in Annexure 11 to the Notice] towards import of BTS 302, BTS 310, BTS 320 and BTS 370 from 1994 till 1999.
- C
- (b) Confiscation of goods valued at Rs.3,31,55,908/- imported without payment of duty and sold (in the market) as auto analysers under Section 111(m) of the Customs Act, 1962.
- D
- (c) Confiscation of goods valued at Rs.26,97,741/- imported vide Bill of Entry No. 4454 dt. 27-05-99 and seized by the officers of DRI on 8.6.99 under Section 111(m) of the Customs Act, 1962.
- E
- (d) Penalty under Section 114A of the Customs Act, 1962.
- (e) Penalty under Section 112(a)/112(b) of the Customs Act on Dr. Jayaram Chigurupati, Senior Vice President and in-charge of Diagnostic Division of the Appellant.
- F
2. On 24th December, 1999, the assessee sent a detailed reply to the said show cause notice and explained that the imported equipments were “Auto Analysers” which used the photometry principle and were different from photometers.
- G
- Being a pathology lab, these equipments were imported for the purpose of automatic analysis of blood samples. This, according to the assessee, could not be done by a photometer. The only difference between the four models imported was that whereas model BTS 370 was technologically superior and
- H
- fully automatic, the other models were not as technologically

DR. REDDY'S LABORATORIES v. COMMISSIONER OF 389
CUSTOMS [R.F. NARIMAN, J.]

advanced nor were they fully automatic. However, insofar as the analysis of Enzymes is concerned, the said two models, namely, BTS 310 and BTS 320 were fully automatic, the only non-automatic part being the manual mixing of certain elements with blood samples. They further relied upon the technical literature to buttress their point and claimed that they were exempted under notification No. 20/1999 dated 28th February, 1999. The said notification exempts medical equipments specified in List 21, serial No. 66 of which reads as follows:-

“SI No. 66: Blood Gas Analyser (including cartridges, if any) Sodium Potassium Analyser, Auto Analyser for Enzymes, Drug Levels and Biochemical Investigations, or a combination of two or more of the aforesaid.”

3. The assessee was given a hearing on 9th January, 2001 by the learned Commissioner of Customs, Hyderabad. In a detailed order dated 1st March, 2001, the learned Commissioner went through the show cause notice and the reply filed by the assessee. He correctly concluded that the issue for determination was whether the impugned goods were qualified to be called “auto analysers” of Enzymes, drug levels and biochemical investigations. In this connection, he referred to a book by “Tietz Text Book of Clinical Chemistry”, second edition, edited by Carl A. Burtis and Edward R. Ashwood. More importantly, in para 46, which deserves to be quoted, the Commissioner found:-

“46. This very question came up for examination before the conference of Commissioners of Customs held in Cochin in October 1995 in the context of Notification No. 55/95-Cus. dated 16.3.95. It would be important and relevant to reproduce the extracts of the minutes of the said conference herein below:-

“The issue raised by the Board was whether the term

A "Auto Analysers for enzymes, Drug levels and
Biochemical investigations" could be applied to
Analyzers in which a part of the operations are performed
manually, like some in which mixing of samples and
B reagents is done manually but the actual analysis is done
automatic. The doubt arose since a view existed that the
term applied only to those instruments in which all
operations, including mixing of samples and reagents
are automatic. However, in one particular case of semi-
C automatic analyser "Technician - Chemistry Auto
Analyzers', the DGHS had clarified that the term could
fall within the item auto Analyzers in the predecessor
Notification namely 122/94-Cus.

CONFERENCE CONCLUSION:

D The conference was of the view that the process of
analysis is automatic, though mixing of sample is done
manually. It is to be noted that for the exemption to accrue
under the entry at Sl. No. 77 thereto, all that is required is
E that the analysis has to be done automatically. TRU may,
however, examine in consultation with the administrative
Ministry concerned whether they would like this entry to
be amended in any manner to remove ambiguity."

F Thus what is crucial to determine whether a medical
equipment is an auto analyser or not is to see whether
the analysis is done automatically or not. All the models
(BTS 302, BTS 310, BTS 320 and BTS 370) in the
G impugned goods did not achieve this purpose. Of course,
more and more features increasing the extent of
automation have been built-in in the later models as
compared to the earlier models. But all of them are auto
analysers. It would also be relevant to note that the
H Minutes of the Conference of Commissioner's of
Customs extracted above also indicates that DGHS a

DR. REDDY'S LABORATORIES v. COMMISSIONER OF 391
CUSTOMS [R.F. NARIMAN, J.]

competent expert body did clarify that a semi-automatic analyser was eligible for the exemption under Notfn. No. 122/ 94-Cus. as auto analyser. Furthermore inspite of the recommendation of the Conference of Commissioners of Customs to amend the entry relating to auto analysers if found necessary for the purpose of removing ambiguity, no such amendment has been carried out till date indicating that there is no ambiguity regarding the scope of the expression auto analysers as viewed by the Conference of Commissioners of Customs."

4. He further held:

"47. The word photometer used by M/ s. Bio Systems, Barcelona, Spain to describe two out of the four models of the impugned goods (BTS 302 and BTS 310) has been the fundamental cause for generating doubts in the minds of the investigating officers about the bonafides of the importer in availing full exemption on the impugned goods from time to time and also in provoking the importer to resort to ways and means to overcome problems with Customs in the matter of assessment of the impugned goods. Photometer is a generic expression meant to refer to a wide range of instruments used for taking measurements of light or electro magnetic radiation. Photometry is a branch of physics dealing with measurement of intensity of light sources. Instruments used for such measurements are called Photometers. However the principle of photometry has found application in the field of clinical chemistry and auto analysers are one type of medical equipment which have been invented incorporating the principle of photometry applied to investigations in clinical laboratories. The catalogues of the manufacturer for the four models of the impugned goods describe the impugned goods as

A follows: -

a) BTS 302

The Basic Photometer

B The BIOSYSTEMS range of photometers has been developed to meet the standards of today's analysis in the clinical laboratory.

b) BTS 310

C The Photometer

c) BTS 320

D The most versatile and user friendly Semi-Auto analyser with capacity to perform ELISA with Microtitre Wells.

d) BTS 370

Fully-automatic Clinical Analyser

E Biosystems technology to meet your requirements.

F I have carefully gone through the rest of the salient features of each of the above models printed elsewhere in these catalogues. There is no doubt in my mind that these equipments are auto analysers meant for conducting tests in clinical laboratories. Just because the word Photometer has been used by the manufacturer in the catalogues for two first two models, neither will these two models (BTS 302 and BTS 310) nor the other two models (BTS 320 and BTS 370) cease to be auto analysers. It is true that all these models are based on the principle of photometry and therefore have a photometer built-in within. It will be totally incorrect to conclude that the impugned goods are not auto analysers."

H

5. Having found that in point of fact what was imported was, in fact, auto analysers, the learned Commissioner held that the assessee was guilty of several manipulations which presented a description of the goods convenient for itself, but not exactly what the real invoice from the exporter would have carried. He thus held that this amounted to a misdeclaration of description and that therefore the impugned goods were liable for confiscation and penalty. However, no penalty under Section 114A was imposed on the importer because there had, in fact, been no evasion of duty on the imported goods. Importantly, the learned Commissioner concluded:-

"52. Since the goods under import are required to be programmed after import by feeding standardized procedures separately developed before they can be used as auto analysers it has been alleged in the show cause notice that they cannot be called as auto analysers in the condition in which they are imported. After having gone through the features of the four models of the auto analysers under import as mentioned in the catalogues of the manufacturer and also the comparative details of these four models furnished by the importer in their reply as Exhibits V and VI to the letter of the importer dated 24.12.99 sent in reply to the show cause notice, I find that there is absolutely no merit in this allegation that the need to program the impugned goods according to the needs of each individual customer would for that matter render the goods into something entirely different from auto analyser. It is common knowledge that auto analysers come both as closed system and as open systems enabling customers to program them according to their own needs when they are open system models. In fact open systems are more popular these days because it allows the customer the flexibility to adapt the system to his own needs."

A 6. Finally, he ordered:-

"ORDER

B (i) Under Section 111(m) of the Customs Act, 1962 I order confiscation of goods valued at Rs. 26,97,741/- seized on 8.6.99. However under Section 125 of the Customs Act, 1962 I give M/s. Dr. Reddy's Laboratories Ltd., the option to redeem the said goods by paying a fine of Rs. 1,00,000/- (Rupees one lakh only). Since the goods have already been provisionally released to the importer I order that the fine amount of rupees one lakh only be recovered by enforcing the bank guarantee furnished by the importer at the time of provisional release.

D (ii) Goods valued at Rs. 3,31,55,908/- already cleared and sold by M/s. Dr. Reddy's Laboratories Ltd. are also liable for confiscation under Section 111(m) of Customs Act, 1962. But as the said goods were neither seized nor available now for seizure it is not possible for ordering its confiscation at this point of time.

E (iii) Under Section 112(a) of the Customs Act, 1962 I impose a penalty of Rs. 50,000/- (rupees fifty thousand only) on M/s Dr. Reddy's Laboratories Ltd. This amount of penalty is also ordered to be recovered by enforcing the bank guarantee furnished at the time of provisional release of the seized goods.

F (iv) Under Section 112(a) of the Customs Act, 1962, I impose a penalty of Rs. 5,000/- (rupees five thousand only) on Dr. Jayaram Chigurupati, Sr. Vice-President, M/s Dr. Reddy's Laboratories Ltd.

G (v) I drop further proceedings in respect of rest of the actions proposed in the show cause notice.

H

DR. REDDY'S LABORATORIES v. COMMISSIONER OF 395
CUSTOMS [R.F. NARIMAN, J.]

7. Against the said order of the learned Commissioner, A
revenue filed an appeal under Section 129D(4) of the Customs
Act on 12th April, 2002. The assessee filed a reply-cum-cross
objection dated 8th June, 2002 in which the assessee
specifically stated:-

B
"In all cases, closed or open the in-built software contains
programs for analysis and interpretation. The only inputs
which are entered in an open system is volume of
reagents to be used for each test, time of incubation,
temperature for incubation etc. Reagents from each C
manufacturer have variation in this regard. Even though
the Respondent's engineers program the machines, for
DRL manufactured reagents (nor for reagents
manufactured for Bio-systems), the customers can
themselves change these programs over a period of time D
if they choose to purchase reagents from other
manufacturers. It is always in customers' best interest to
have an open system."

8. By the impugned order, the CESTAT allowed revenue's E
appeal. It found fault with the book quoted by the assessee
which found favour with the learned Commissioner, and stated
"Instead of appreciating the evidence unearthed by the
investigating officer with reference to the goods imported, the
adjudicating authority has embarked himself on a detour F
deviating from the main issue".

9. We are at loss to understand what is meant by this
statement. The evidence analysed by the investigating officer
in the form of statements made by six persons affiliated to the G
assessee led to confiscation of the goods and imposition of
penalty. Without any analysis of whether the imported
equipments were, in fact, auto analysers or were only
photometers, the CESTAT went on to conclude that one can
never come to a conclusion that a photometer is the same as H

A an auto analyser. The learned Commissioner had held that a
photometer is a generic expression and auto analysers are
photometers with software installed in them which could then
perform various operations. The CESTAT in finding this logic
faulty has not given any reason for disregarding the same. It
B then goes on to say that the whole of paragraph 46 of the
Commissioner's order is irrelevant. In this paragraph the
learned Commissioner referred to the Commissioners'
Conference to arrive at the conclusion that since the process
C of analysis is automatic, though mixing of samples may be
done manually, yet since analysis has to be done automatically,
an analyser would fall under the expression "auto analysers"
for enzymes, drug levels and biochemical investigations. This
finding of the learned Commissioner was important in that the
D model BTS 370 which mixed both samples automatically and
did the analysis automatically, was found by the customs
authorities to fit the description of auto analyser. In holding that
this paragraph is not at all relevant, the CESTAT does not seem
to have come to grips with the real issue at all.

E 10. This is a peculiar case in which it is clear that what
has, in fact, been imported is an equipment which is to be
used in a pathological lab for the automatic analysis of blood
samples. It is an admitted fact that models BTS 310 and BTS
F 320 were imported with inbuilt software that contained
programmes for analysis and interpretation. It is equally an
admitted fact that an importer can change such programmes
to suit its own convenience. From this it does not follow that
what has been imported is only a photometer. Learned senior
G advocate appearing for the revenue had to admit that a
photometer is an instrument which measures intensity of light.
There is no necessity for any inbuilt software in such photometer
unless such instrument is, in fact, to be used for the automatic
analysis of blood samples. This being the case, it is clear that
H oral statements made by persons affiliated to the assessee to

DR. REDDY'S LABORATORIES v. COMMISSIONER OF 397
CUSTOMS [R.F. NARIMAN, J.]

the effect that the description of the imported goods was A
changed from photometers to auto analysers to avail the
benefit of the exemption under notification No. 20/1999, and
that the foreign supplier was requested to alter the description
of the goods from photometer to auto analysers in order so to B
do, would not change the position in law. As correctly held by
the learned Commissioner, these statements would be material
in deciding whether Section 111(m) of the Customs Act read
with Section 125 are attracted as to amount to mis-declaration
of description of goods resulting in confiscation of the said C
goods, fine, and penalty under Section 112(a) of the Customs
Act.

11. We, therefore, allow the appeal of the assessee and
set aside the order of the CESTAT and restore that of the D
learned Commissioner. Revenue's appeal concerns itself with
penalty under Section 114A of the Customs Act. Since we have
set aside the CESTAT's order, which imposed a penalty under
Section 114A, revenue's appeal no longer survives and is
therefore dismissed as such.

Nidhi Jain

Appeals disposed of. E