

**Customs, Excise & Service Tax Appellate Tribunal,
West Zonal Bench : Ahmedabad**

REGIONAL BENCH - COURT NO. 3

Customs Appeal No. 12 of 2010

[Arising out of Order-in-Appeal No OIO-KDL/COMMR/19/09-10 passed by
Commissioner of CUSTOMS-KANDLA]

M/s Asia Motor Works

..... Appellant

34 Km Milestone, Bhuj-bhachau Road,
Village : Kanaiyable,
KUTCH, GUJARAT-370020

VERSUS

C.C. Kandla

.....Respondent

Custom House,
Near Balaji Temple,
Kandala-Gujarat

AND

**Customs Appeal No. 72 of 2010
C/CO/102/2010**

[Arising out of Order-in-Appeal No OIO-KDL/COMMR/19/09-10 passed by
Commissioner of CUSTOMS-KANDLA]

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VERSUS

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Village : Kanaiyable,
KUTCH, GUJARAT-370020

APPEARANCE :

Sh. A. Sheeraji, Ms. Dimple Gohil & Sh. Roshil Nichani, Adv. for the
Appellant

Sh. K.J. Kinariwala (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

FINAL ORDER NO. A/11945-11946 / 2019

DATE OF HEARING: 16.09.2019

DATE OF DECISION: 17.10.2019

RAJU

This appeal has been filed by M/s. Asia Motor Works against demand of Customs Duty, imposition of penalty and denial of Notification No. 97/2004- Customs. The Revenue has also filed appeal against the order for failing to confiscate the goods and failure to impose the redemption fine. M/s. Asia Motor Works has filed Cross Objections against said appeal filed by the Revenue.

2. Ld. Counsel for Asia Motor works (AMW) pointed out that they had imported certain capital goods under EPCG Scheme claiming Notification No. 97/2004- Customs claiming concessional rate of @ 5% duty. He pointed out that the appellant had purchased a Paint-Shop from the Foreign Party. In terms of the agreement with the seller the Asia Motor Work was required to do as follows:

"2.4 Cost of freight for shipment, loading of the ship and the shipment to Indian harbor will be paid for by the Purchaser. Port of discharge will be Kandla of Mundra.

2.5 The purchaser shall be responsible for all costs and actions subsequent thereto which will include payment of all local Indian taxes and / or import duties, etc.

2.6 All shipping, insurance and customs costs to be incurred, as well as risk of damage and loss to the Assets during transportation shall be borne by the Purchaser."

Consequently AMW appointed a freight forwarder namely Pro Logistics (I) Limited (PLIL) offered following terms for the said transport of goods from Argentina to India.

"Proposal For Ex Works In Argentina.

We are pleased to detail below our indicative prices for cutoms clearances at Buenos Airs Port, Argentina for the forth coming movement of approx. 50 FEU's

(1) Inland Freight + Ocean Freight per Container

Liner:

USD 2150.00/40'GB and HC

Buenos Airs Charges:

CAF: Variable cost to be charged at actual

BAF: Varibale cost to be charged at actual

THC: Fixed Cost USD 140.00 Per Container

Toll: Fixed Cost USD 90.00 Per Container

B/L Fee: Fixed Cost USD 42.35 Per B/L

(2)Ocean Freight: US\$ 4900 – All In for 40’OT
(MOL)

Ocean Freight: US\$ 3900 – All In for 40’OT
(CMA)

Buenos Aires Charges:
THC:US\$ 140,-per Cont.
Toll: US\$ 90,-per Cont.
B/L US\$ 42,35 per B/L
Handling: US\$ 35, -per Cont.
Log. Fee: US\$ 25,-per Cont.
Sim: US\$ 15,- per cont.

(3)Inland Haulage & Ocean Fright Break Bulk
Cargo
USD 225.00 W/M (Full Liner Terms)

Destination Charges will remain as agreed
(4)Service Tax as applicable
(5)Exchange Rate will be charged with the bank
support.”

2.1 Ld. Counsel pointed out that AMW filed 15 Bills of Entry. Out of 15 Bills of Entries, in case of 10 B/E the freight charges were claimed to have been included on actual basis and in 5 B/E the freight charges were included @ 20% of the FOB Value in terms of Proviso to rule 9 of the Custom Valuation Rules. He argued that the rule 9 of the Custom Valuation Rule, 1998 prescribes as follows.

"(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include —

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :

[Provided that —

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board

value of the goods;
Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above].

[Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a).]”

He argued that at the time of filing of Bill of Entry the Freight element was not known to the appellant in respect of 5 Bills of Entries and therefore, in terms of aforesaid proviso to rule 9(2) of the Custom Valuation Rules, Freight @ 20% of FOB Value was included for the purpose of Assessment. He argued that the computation of freight depended on the CAF & BAF which are variable cost depending on the exchange rates. He pointed out that since these amounts were not available at the time of the assessment benefit of the proviso to rule 9 (2) of Custom Valuation rules was availed.

2.2 He argued that even if the argument of revenue that the extra freight paid by them to the freight forwarder is to be included in the assessable value, then also they are entitled to benefit of Notification No. 97/2004-Customs, as they had significant amount of value was available in the said license. He argued that even if the assessable value is revised by including the extra freight paid by them to the freight forwarder, they are entitled to benefit of Notification No. 97/2004-Customs to the extent of the amount available in their EPCG license for concessional rate of duty of 5%. He further argued that the demand is barred by limitation. He pointed out that both these kind of bills of entry, i.e one with freight bills as well as others were 20% of the FOB value was taken for assessment and Rule 9(2) of the CVR was considered. He argued

that in these circumstances extended period of limitation cannot be invoked. He relied on the decision of Tribunal in case of Dr. Reddy's Laboratories Ltd. V. CC, 2012 (284) ELT 545 (T).

2.3 Ld. Counsel for AMW also argued that the Revenue has not challenged the assessment done in case of this 15 bill of entries and therefore no demand under section 28 can be raised.

2.4 Ld. Counsel for AMW argued that the Show Cause Notice did not propose confiscation but only propose why the said goods should not be held as liable to confiscation. He argued that the adjudicating authority cannot traverse beyond the SCN. He further argued that since the goods have already been cleared and are unavailable for confiscation and were never seized no confiscation can be ordered. He relied on the decision of Hon'ble High Court of Punjab and Hariyana in case of Raja Impex-2009 (229) ELT 185 (P & H) and the decision of larger bench of Tribunal in case of shivkrupa Ispat Pvt.Ltd. 2009 (235) ELT 623 (LB). He argued that the decision of Apex court in case of Weston Components Ltd. is applicable only when goods are seized and subsequently allowed to be cleared to the assessee on execution of bond. He argued that the bond in the instant case is not the kind of bond referred in the decision of Hon'ble Apex Court in case of Western Components (Supra).

3. The Ld. AR relied on the impugned order. He pointed out that the Rs. 4,50,15,398/- was demanded by the Freight forwarder from the AMW and Rs. 4,32,98,915/- was actually paid by the AMW to the freight forwarder. They had included only an amount of Rs. 1,60,69,376/- in the assessable value of all 15 bills of entry. He pointed out that in first 10 bill of entries they had included freight, on the basis of some documents, an amount that they claimed was the actual cost of transport and in balance five B/E, they had claimed benefit of proviso to Rule 9 (2) of CVR 1988. He pointed out that the bills of entries were filed over a period from 10.05.2007 to 29.06.2007 a period of almost 50 days. While in case of bill of entries filed from 10.05.2007 to 12.06.2007 actual transport freight was claimed to be available with the AMW and claimed to have been

included in the assessable value, but in respect of bill of entries filed from 12.06.2007 to 29.06.2007 the freight amount was not known to them at the time of filing bill of entry. He pointed out that out of total amount of Rs. 4,32,98,915/-, the appellant have included only Rs. 1,60,69,376/- in the assessable value. They have failed to include an amount of Rs. 2,92,35,480/- in the assessable value and consequently, they have undervalued the goods.

3.1 Ld. AR pointed out that under valuation of goods amounts to an offence under section 111 (m) of the customs Act, 1962 and consequently the goods imported by them become liable to confiscation under section 111 (m) of the Customs Act. He argued that the impugned order fails to order confiscation of goods on the grounds that the same are not available for confiscation. He argued that the goods imported by the appellant were released on bond subject to the condition for import prescribed in notification No. 97/2004- Customs Act, which prescribes execution of bond as follow.

“(2) That the importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs binding himself to fulfil export obligation on FOB basis equivalent to eight times the duty saved on the goods imported as may be specified on the licence, or for such higher sum as may be fixed by the Licensing Authority, within a period of eight years from the date of issue of licence, in the following proportions, namely :-

S. No.	Period from the date of issue of licence	Proportion of total export obligation
(1)	(2)	(3)
1.	Block of 1st to 6th year	50%
2.	Block of 7th to 8th year	50%; ”

3.2 He relied on the decision of Hon’ble Supreme Court in case of Weston Components Ltd. Vs. CC 2000 (115) ELT 278 (SC) wherein Hon’ble Court has observed as follows:

“It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently

it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine."

He argued that in the instant case the clearance has been made against a bond. He argued that in these circumstances the impugned order should have ordered confiscation of goods and imposed redemption fine.

3.3 Ld. AR pointed out that the demand under section 28 can be raised even if the assessment is not revised or challenged in view of the decision of Hon'ble supreme court in case of Jain Shudh Vanaspati Ltd.,1996 (86) ELT 460 (SC).

4. We have gone through rival submissions. We find that AMW had purchased a paint shop in Argentina. The obligation of seller was just to dismantle the plant and thereafter it was the responsibility of AMW to bring the said goods from Argentina to India. AMW engaged freight forwarder namely Prologestics I Ltd. (PLIL) who offered them their services on the following terms.

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We are pleased to detail below our indicative prices for cutoms clearances at Buenos Airs Port, Argentina for the forth coming movement of approx. 50 FEU's

(1)Inland Freight + Ocean Freight per Container

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USD 2150.00/40'GB and HC

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BAF: Varibale cost to be charged at actual

THC: Fixed Cost USD 140.00 Per Container

Toll: Fixed Cost USD 90.00 Per Container

B/L Fee: Fixed Cost USD 42.35 Per B/L

(2)Ocean Freight: US\$ 4900 – All In for 40'OT (MOL)

Ocean Freight: US\$ 3900 – All In for 40'OT (CMA)

Buenos Airs Charges:

THC:US\$ 140,-per Cont.

Toll: US\$ 90,-per Cont.

B/L US\$ 42,35 per B/L

Handling: US\$ 35, -per Cont.

Log. Fee: US\$ 25,-per Cont.

Sim: US\$ 15,- per cont.

(3) Inland Haulage & Ocean Freight Break Bulk Cargo

USD 225.00 W/M (Full Liner Terms)

Destination Charges will remain as agreed

(4) Service Tax as applicable

(5) Exchange Rate will be charged with the bank support."

4.1 The Paint shop was imported in 15 different consignments. The AMW paid the Freight forwarder an amount of Rs. 4,32,98,915/- where as in the 15 Bills of entries they included freight amounting to Rs. 1,60,69,376/- only. As a result an amount of Rs. 2,92,35,480/- escaped inclusion in the assessable value. The reason given by AMW is that at the time of filing bill of entry in first 10 cases they were aware of the actual freight charged by the freight forwarder whereas in last 5 Bills of entries they were not aware of the actual freight payable to the freight forwarder. The reason cited was that the variable cost based on CAF/BAF was not known. The method of calculating freight agreed by AMW with PLIL was very clear as can be seen from the terms in para 4 above.

It can be seen that the only variable in the cost is the currency adjustments which simply converts all cost payable in US Dollar terms into Rupees. Thus it won't be correct for AMW to say that the cost of transport was not immediately available to them. The currency price are available directly on minute to minute basis every day. More over it is seen that out of total cost of Rs. 4.32 Crores paid to the freight forwarder. The appellant had included only Rs. 1.6 crores, in 15 consignments. Even if the actual freight of first 10 consignments was known on actual basis it could not have been its 40% of the total freight for 66% of the total consignments. The documents on the basis of which they had included freight on actual basis were however not available with AMW.

4.2 Rule 9 (2) of the Custom valuation rules reads as follows.

"(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include —

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :

[Provided that —

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

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(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above].

[Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a).]"

It is seen that the proviso can only be invoked where the cost is not 'ascertainable'. The proviso cannot be invoked just because the importer has not received the actual freight element at the time of filling bill of entry. In the instant case, the cost very much ascertainable and the importer have also claimed that they have ascertained the cost in respect of 10 out of 15 bills of entry at the time of import. The intention to evade becomes obvious as AMW has avoided inclusion of amounts of Rs. 2.92 Crores of Freight element, actually paid by them, in the assessable value by adopting this modus operandi.

5. Ld. Counsel for the AMW has claimed that the benefit of EPCG Scheme cannot be denied on the enhanced value of the imports. The impugned order denies the benefit of the EPCG scheme on the ground that the Chapter 5 of the Foreign Trade Policy requires the importer to produce license for debit by the proper officer of customs at the time of clearance. It has been argued in the impugned order that since the said amount was not declared at the time of import the benefit of scheme cannot be extended to the appellant. We do not find any merit in this argument. It is a fact that the appellant have EPCG License containing a specific amount. Therefore, if the value is enhanced then AMW is entitled for benefit to the extent the enhanced value is covered in the EPCG License.

6. It has been argued by the Ld. Counsel for AMW that since the assessment has not been challenged, demand under section 28 cannot be raised. In this regard Ld. AR had relied on decision of Ld. Apex Court in case of Jain Shudh Vanaspati Ltd. (Supra) wherein it has been held that the demand can be raised under section 28 even if challenging assessment. Consequently this argument of Ld. Counsel for AMW is rejected.

7. The next issue relates to invocation of extended period of limitation. We find that the appellant have paid significantly higher amount to the freight forwarder as freight. However, in 15 Bills of entry filed by AMW only 40% of the freight has been included in the assessable value. When the agreement and terms of payment are crystal clear the actions of importer are clearly intended to evade taxes. When documents on actual freight paid were demanded, Ld. Counsel failed to produce the same. In these circumstances, we find that it was a specific modus operandi devised by AMW to defraud the Government and therefore, extended period of limitation is rightly invoked in the instant case.

8. The next issue relates to confiscation of the goods already cleared by the AMW. The impugned order does not order confiscation and does not impose any redemption fine. Revenue has filed appeal against the said order for failure to confiscation the goods, AMW has also filed cross objection. Both sides relied on the decision of Hon'ble Apex Court in case of Weston Components Ltd. 2000 (115) ELT 278 (SC). In the said case the goods were released against a bond and therefore, the Hon'ble Apex Court held that confiscation can be ordered. In the instant case the goods have been cleared in regular course. The bond executed by the AMW is not for production of goods but for fulfillment of export obligation and to pay duty in case of failure to fulfill export obligation. Therefore, the ratio of decision in case of Weston Components Ltd. (Supra) is not applicable to the instant case. The goods cannot be confiscated, even if, the same are liable for confiscation.

9. The appeal of AMW is partly allowed in above terms. The appeal of Revenue is rejected. Cross objections filed by AMW are disposed of.

(Pronounced in the open court on 17.10.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)