CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH- COURT NO. 1

CUSTOMS Appeal No. 12852 of 2018-DB

[Arising out of Order-in-Original/Appeal No MUN-CUSTM-000-APP-086-18-19 dated 21.06.2018 passed by Commissioner of CUSTOMS-AHMEDABAD]

Ferromatik Milacron India Pvt Ltd **...Appellant**

Plot No.93/2 & 94/1, Phase-1, Gidc, Vatva,
Ahmedabad,
Gujarat-382445

VERSUS

C.C.-Mundra **...Respondent**

Office Of The Principal Commissionerate Of Customs, Port User
Buld. Custom House Mundra, Mundra
Kutch
Gujarat-370421

APPEARANCE:
Shri. S J Vyas, Advocate for the Appellant
Shri. Anand Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA MEMBER (JUDICIAL)
HON'BLE MR. C.L MAHAR, MEMBER (TECHNICAL)

FINAL NO. A/ 12105 /2023

DATE OF HEARING:19.09.2023
DATE OF DECISION:25.09.2023

SOMESH ARORA

Brief facts of the case are that the appellant had imported "Injection Moulding machine" (impugned goods for short) and filed Bill of entry no.6524432 dated 29.8.2016 through their Customs broker (CB for short) M/s Jeena & Co., by declaring the impugned goods as "Old and Used" valued at USD 98500/- (Rs.6673375/-) and evaded Customs duty by mis-declaring and -under valuing the imported goods. The Dock examination officer observed that the impugned goods were not as per declaration i.e."Injection moulding machine, old and used" due to the reasons as mentioned below:

> *a. all the connecting points, pipes and sockets, wires etc., appeared to be new and did not show any sign of its use and;*
>
> *b. physical condition of the parts of the machine did not show any sign of use thereof and the devices were new and unused.*

1.1 The goods were further examined by two empanelled Charter Engineers namely Shri NJ Lalwani and Shri Anwar Y Kukad in presence of the Superintendent (Docks).

1.2 Shri Lalwani, in his report No.NJI/Kandla/16-208 dated 16.9.2016 observed that The YOM is March 2014. The main frame, moving parts, foundation are found new and unused and no part of machine is found used. Mould/ die holding holes are in perfect condition. No scratches on painting or any part of machine. Considering the status of moving parts, non-moving parts, hoses, fittings, paintings and accessories, the machine has apparently not been used. My considered opinion machine is old but unused. The present international market value may be USD 135000/-

1.3 Shri Kukad in his report No.AYK:INSP:0439:2016 observed that machine in good condition as unused and new, balance life span is more than 15 years subject to suitable installation and maintenance. The estimated value of identical machine in international market may be USD 130000/-. The value of new machine of this nature may be USD 145000/-

1.4 The Committee member, the Superintendent (Docks), in his report observed that cargo examined on 15.9.2016 under supervision of AC(Docks), cargo is a machine labeled as ARBURG Model 520-S-1600-400 Make-2014. The machine was apparently never used, as can be inferred from general visualization of the threading of the holes and/or greasing on exposed parts of machine. Therefore, in my considered opinion the machine may be old but not a used one and even if for the sake of argument it is presumed that the machine is used one, then it might had been used under trial run and as such not for commercial production." Another member, Superintendent (Docks) in his report observed that on examination of the machinery, it was found as new and unused. However, it appeared that it was run for some trials."

(emphasis supplied)

1.5 The goods were examined by Shri Mihir T Mistry, Government Registered Value, who vide letter dated 2.9.2016 had observed that:

> *"I observe that the aforesaid imported machine is unused and new it was used only on trial run. I therefore, submit my detailed examination report in prescribed Form B which is as under:*

(emphasis supplied)

Observation of CE: Based on wear-tear, technology and status of machine, the estimated CIF value of this machine may be 130000 USD. "

1.6 On the basis of the report by the Committee and government approved empanelled Chartered Engineer it is evident that machine is old but not used, and so the goods are liable for confiscation under section 111(m) of the Customs Act, 1962, so was seized by SIIB under panchnama dated 22.9.2016. The appellant released the goods on execution of bond of full value and Bank guarantee to the extent of 25% of assessable value

1.7 Shri Rajesh Soni, Deputy General Manager (EXIM) of the appellant in his statement confirmed that machine is old and is of 2014 make. The machine is used for testing and for trial run. The actual value of the imported machine purchased in 2014(new machine) was USD 1,41,936/-

and they declared the value of imported machine as US $ 98,500/- after allowing depreciation. He agreed to the value of the machine as US $ 1,30,000/- as valued by Shri Kukad and agreed to pay duty on USD 1,30,000/-.

1.8 On completion of investigation a show cause notice dated 27.10.2016 was issued to the appellant. After due process of law the adjudicating authority vide the impugned order rejected the value declared at Rs.66,73,375/-(USD 98,500/-) of the impugned goods declared under Bill of entry no.6524432 dated 29.8.2016 and re-determined its value to Rs.88,07,500/-(USD 1.30,000/-) under Customs valuation (Determination of value of imported goods, Rules, 2007. Ordered confiscation of the impugned goods under Section 111(m) of the Customs Act, 1962 and as the goods were released provisionally allowed to redeem in lieu of confiscation by imposing redemption fine of Rs.15,00,000/- under Section 125 of Customs act, 1962. Confirmed differential duty of Rs.5,64,012/- under Section 28(4) along with interest under Section 28AA of Customs Act, 1962. Imposed penalty of Rs.56,000/- under Section 112(a) on the appellant. Enforced the bond executed by the appellant at the time of the provisional release of the goods.

1.9 Being aggrieved by the said order the appellant filed an appeal, Commissioner (Appeals) accepted the order-in-original in totality. Being aggrieved by the order of Commissioner (Appeals), Appellants have filed the present appeal.

2. Learned Advocate for the appellant submits that the machine imported by them was correctly described at the time of importation as used and was imported in 2016, though the same was of year 2014 vintage. On being specifically asked as to whether the same was re exported as declared at the

time of importation, a response was given in negative mentioning that the same was due to own litigation.

2.1 It was further submitted that under the Customs Act, the value has to be transaction value. The transaction value in this case is available. There is no averment in the notice that the transaction value is affected by any of the factors. It is settled law that the department must first reject the transaction value and only thereafter, the other methods of valuation can be followed. In the present case, there appears to be no reason for rejecting the transaction value. The notice does not show why the transaction value is not correct. Merely saying that the machine appears to have not been used, and therefore, may have higher value, is not sufficient basis for rejecting the transaction value. Unless and until the transaction value is rejected, no further enquiry can be entered into. Clearly, therefore, the very basis of the notice does not survive.

2.2 Appellant relied upon Tribunal decision in the case of DIVINE INTERNATIONAL 2016 (338) ELT 142 (Tri. Del.). Even otherwise, if the transaction value is to be rejected, the due procedure of law, as per the valuation provisions, must be followed to arrive at transaction value. The value on the basis of Chartered Valuer opinion cannot be adopted. Since the new procedure of law and sequence of events for ascertaining the assessable value in the event of rejection of transaction value is not followed nor even attended, the value cannot be accepted and, therefore, the very basis of the notice does not survive.

2.3 In this connection, appellant invites attention to Rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The Rule categorically provides that the transaction value has to be accepted. Clearly, none of the conditions of the said Rule would permit the department to reject the transaction value and adopt any other basis for valuation.

2.4 Without prejudice to above, as per sub-rule 4 of Rule 3, the value, if at all cannot be determined, then the value shall be determined by proceeding sequentially through Rule 4 to 9 of the said Rules. Clearly, the present notice does not follow Rule 3 in both these respects. Clearly, therefore, the very basis of the notice is not tenable and, therefore, the notice is required to be set aside with consequential relief.

2.5 It is submitted that the imported machine was intended for the purpose of study of design of the machine. Appellant are also engaged in the manufacture of similar machine and, therefore, for the purpose of understanding design of other manufacturers, this machine was imported. After studying the design, the machine is to be re-exported. This was already communicated to the department under our letter dated 26-8-2016.

2.6 Even in the bill of entry, it was specifically stated that this was temporary import. Considering the purpose behind the import and considering the fact that the machine is old and used, the transaction value cannot be rejected. Furthermore, in the statement of Shri Rajesh Soni, the value was arrived at after depreciation. The machine is of 2014 and the initial value was US$ 1,41,939/- and the value shown by us is after deducting the depreciation. Thus, the basis of the value adopted by us is reasonable, logical and in accordance with normal commercial principle of valuation.

2.7 The issue involved in present matter is valuation of imported injection molding machine. The value is sought to be enhanced on the ground that the machine is new / unused and hence has higher value. Thus short point involved in this matter is to decide whether the imported injection molding machine is used or unused. This is pure question of fact. The matter can be decided obviously, only by examination of the imported machine.

2.8 However, it is on record that there is one expert (Manish T Mistry) who had given two separate contrary opinions on the very same day of inspection, there are two expert opinion obtained by the department, at our back, stating that the machine is unused and there is an opinion by another expert with photographic evidences to show that the machine is used. The Superintendent in cross-examination has also indicated that the machine was used though may be for trial purpose.

2.9 Further the machine had in-built counter to show number of moldings undertaken. This counter will be functional if power is connected to the machine. This would conclusively establish the use of the machine.

2.10 Subject to our above request, appellant make following submission. The department appears to have called technical expert Shri Manish T Mistry for examination. Shri Mistry has carried out the examination and given report on 02-09-2016. The examination was without their presence.

2.11 In this report, it was specifically certified that the machine was used injection molding machine. The examination had taken 3-4 hours. Obviously, this report was contrary to the belief / opinion of the officers and, therefore, it appears that Shri Manish T Mistry was pressurized to change his opinion. Therefore, Manish Mistry has, on the very day, issued second report. The preamble of the second report, relevant for our purposes, is reproduces below:

> *"It is to hereby submit that earlier I had issued one certificate in form B on dated 02-09-2016 as prescribed by CBEC vide Circular No. 25/2015 dated 15-10-2015 certifying that the machine/goods viz injection moulding machine imported vide bill of entry no. 6524432 dated 29-08-2016 are used without inspecting the machine and merely on the basis of documents*

> *produced before me by the Customs Broker M/s. Jeena & Co. I am also to submit that during inspection, I could not inspect the aforesaid machine as it was covered by hard wooden box lying inside the container which was got opened slightly from the one corner. So I relied upon the documents so produced before me by the CB.*
>
> *Now, on being called by the Superintendent (DE) and DC (DE) for proper inspection of the said goods on the same day i.e. 02-09-2016, I have carefully and thoroughly examined the said machine after removing wooden box from the front side in such a way that it could be examined properly. After thoroughly examination in the presence of the above said officers of Customs (DE) and Customs Broker representative, I observed that the aforesaid imported machine is unused and new and it was used only on trial run. I, therefore, submit my detailed examination report in prescribed Form B which is as under and my earlier issued certificate as mentioned above may please be treated as cancelled."*

2.12 The reason shown for change in the opinion, obviously, is factually incorrect. It is not possible to accept the explanation that the Chartered Engineer gave opinion without examining the goods. Further, the reason given for change in the opinion is that the machine was packed and, therefore, not examined earlier. Presuming for a minute, this to be correct, than clearly this contradicts the initially examination carried out by the officers and noted in para 2 of the show cause notice. The Docks Examination Officers have clearly examined the goods which would not have been possible if the machine was fully packed as claimed by the Chartered Engineer in his second report. These two facts clearly contradict. The Docks Examination Officer would have occasion to call for expert opinion only if *prima facie* doubt arose. Without examination, the Docks Examination Officers would not have called for expert opinion. Thus, the probability is more that the first opinion of the Chartered Engineer is correct whereas the second opinion was made under pressure from the department clearly because it was contradictory to officers desire to declare the machine to be unused.

2.13 It is also noteworthy that neither during examination by the Docks Examination Officer nor by the expert, the CHA or the importer was present. There appears to be no reason to conduct such examination at the back of CHA / importer. The reference to documents in the opinion is to the documents filed with customs for assessment. No documents were given to the Mr Mistry.

2.14 What is more surprising is though the second (managed) report was available, the department has chosen not even to refer to this fact in the show cause notice and completely hidden the same.

2.15 It is surprising that even during the second inspection by two different experts and also by Docks Examination Officer, it was not thought proper to give intimation and call for presence of either CHA or importer. In our understanding, any such examination has to be undertaken only in the presence of CHA or importer. This is necessary since the importer can definitely contribute technically to the examination and can also ensure that all relevant factors necessary, in the opinion of importer were properly examined and brought on record. The secrecy on the part of the department and complete lack of transparency and non-observation of departmental inspection was fatal to any such investigation.

2.16 It is equally surprising that when re-examination was granted and our experts carried out the inspection, specific intimation was given to the department to attend such examination, however, this opportunity was not availed by the department.

2.17 It can be seen that though not a technical expert, the Superintendent Mr. Vaghela, conducting examination on 15-09-2016 for half an hour, could clearly observe that (1) plastic granules were lying in the machine, (2) oil &

grease was found in certain places (3) Residua of molten plastic materials in barrel area (4) scratch mark/dent on ram (5) corrosion on various metallic parts (6) condition of threads inside mold fixing plate showing that mold has ben fitted and removed after use (7) General condition panels and distribution devises seems having heat pressure etc, which showed that the machine was used. Thus, even a cursory examination by non-expert, but an experienced departmental officer, show clear fact of the machine having been used. This contradicts not only Docks Examination Officer's opinion but also contradicts experts' opinion on 16-09-2016.

2.18 Further he also submitted that the report of expert on re-examination was shown to both the departmental experts, but they refused the same. That in normal course the machine was meant to be re-exported after 6 months in which case they were entitled to draw back therefore there was no cause for them to under value. However on being asked they stated that the machine was initially intended to be re-exported could not actually be subjected to re-export till date.

2.19 During the course of hearing, the Advocate further pointed out the Circular No. 25/2015-Cus dated 15.10.2015, can have applicability in their case, only if machinery is old and used. Therefore the department is seeking to apply the circular they are by implication agreeing with the product description and also to the fact that goods were old and used and were second hand machinery. Therefore, as per para 3 of the board circular, the goods are required to be assessed as per the price paid or payable which is already available as per their invoice. Therefore department has clearly erred in treating the goods to be as per their description, albeit by implication, on one hand and still not accepting the value as indicated by them. He also places reliance in the matter of M/s. Champion Photostat as reported in 2021 (376) ELT 394 (Tri-Del), that the enhancement of value and rejection of transaction value cannot be done on the basis of Chartered Engineer’s certificate.

3. As against this Learned AR relies upon the following findings of the Commissioner (Appeals) to justify the rejection of the appeal and pleaded for upholding the finding as below in the impugned order.

3.1 “The issue to be decided in the present case is whether the goods "Injection moulding machine" declared as "old and Used" was used even if for purpose of trial runs only can be considered so and whether the value enhanced on the basis of the Chartered Engineer certificate is legally tenable for the purpose of leviability of Customs duty. The appellant contended that Shri Manish T Mistry carried out the examination as department's call and gave report on 2.9.2016, the examination was without the appellant's presence. The report was contrary to the opinion of the officers and therefore, it appears that Shri Mistry was pressurized to change his opinion; a second report by Shri Mistry was issued on 2.9.2016 wherein he stated that he issued the earlier certificate as per circular No.25/2015 dated 15.10.2015 and certified that the goods are used without inspecting the machine and so relied upon the documents submitted by the Customs broker to give certificate. On the same day before the Superintendent (DE) and DC (DE) another inspection carried out, the CE observed that imported machine is unused and new and it was used only on trial run; the facts of docks examination officer and the facts of charter engineer certificate contradict. the docks examination officer would have occasion to call for expert opinion only if prima facie doubt arose. Thus probability is more that the first opinion of the CE is correct and whereas the second opinion was made under pressure from department; during examination by the Docks examination officer nor by the expert, the CHA or the importer was present. I find that the adjudicating authority has correctly observed at para 13 of the impugned order that the goods were examined by Shri Mihir T Mistry, Government Registered Valuer, under his report No.CIM/2016-17/035A dated 2.9.2016. The Govt. Regd. Valuer has certified as under:

"It is to hereby submit that earlier I had issued one certificate in form B on dated 2.9.2016 as prescribed by CBEC vide Circular No.25/2016 dated 15.10.2015 certifying that the machine/goods viz. Injection Moulding machine imported vide Bill of entry No.6524432 dated 29.8.2016 are used without inspecting the machine and merely on the basis of the documents produced before me by the Customs broker M/s Jeena & Co.. It is also to submit that during the inspection, I could not inspect the aforesaid machine as it was covered by hard wooden box lying inside the container which was got opened slightly from one corner. So I relied upon the documents so produced before me by the Customs broker. Now on being called by the Superintendent (DE) and DC(DE) for proper inspection of the said 13 goods on the same day i.e.2.9.2016, I have carefully and thoroughly examined the said machine removing wooden box from the front side in such a way that it could be examined properly.

After thorough examination, in the presence of the above said officers of Customs (DE) and Customs broker representative, I observe that the aforesaid imported machine <u>is unused and new and it was used only on trial run</u>. I therefore, submit my detailed examination report in prescribed Form B which is as under and my earlier issued certificate as mentioned above may please be treated as CANCEL.

(emphasis supplied)

The relevant portion of his examination report is as follows:

(vii) If no, please estimate the original sale price of capital goods: 1,30,000 USD (Approximate)

(viii) Present condition of second hand machinery capital goods and expected life span: Satisfactory and balance life span is more than 20 years subject to suitable installation and routine maintenance plan is implemented and executed by qualified engineer.

Observation of CE:-

(1) Based on wear-tear, technology and status of machine, the estimated CIF value of this machine may be 1,30,000 USD."

3.2 I find that the adjudicating authority has correctly observed at para 15 of the impugned order that the examination done by the CE appears to have laid the emphasis on its prior use before the imports and thereby estimated the value of the same. I find that the Chartered Engineer himself has retracted from his version laid during first time inspection and on the grounds that he had not personally supervised the goods, but only on the basis of the documents inasmuch as second time inspection was done in presence of the officers of the Customs and the authorized representative of Customs broker. The second noticeable statement of the CE also incorporates the fact that the said machine has been used for trial runs only The second noticeable statement of the CE also incorporates the fact that the said machine has been used for trial runs only which leads to the belief that no actual production has been carried out on the said machinery so as to declare as USED. I find that the reasons on which the CE has retracted are valid, logical and judicious inasmuch as visual examination was necessary so as to give proper report. Further, on going through the report No.CIM/2016-17/035A dated 2.9.2016 issued by Shri Mihir T Mistry. Government Registered Valuer, I find that the valuer has categorically indicated that the examination of the cargo was done in the presence of the officers of Customs (DE) and Customs broker representative. The Customs broker is appointed by the importer for clearance of his goods, and hence, his presence during the examination will be treated as presence of the importer. Therefore, his contention that the examination was without the appellant's presence is not tenable.

3.4 I find that further inspection was carried out on the direction of Additional Commissioner (Customs) Mundra, to clear out the contradictory opinion, if it is so, given by Shri Mistry. Government Registered Valuer, by forming a committee of two departmental officers and two in-panel Chartered Engineer and AC (Docks). The committee examined the impugned goods and Shri NJ Lilwani vide his report dated 16.9.2016 confirmed that machine's YOM is March 2014. The Main frame, Moving parts/Ram, all hoses with their fittings, gauges, electrical panel, electronic display, gas cylinder, foundation, are found new an unused and no part of machine is Wounded Mould/die holding holes are in perfect condition. No scratches on painting or any part of machine. Considering the status of moving parts, non-moving parts, hoses, fittings. paintings and accessories the machine has apparently not been used. Thus in my considered opinion machine is old but unused. Based on YOM, the present international market value may be USD 1,35,000.

3.5 Shri Anwar Y Kukkad vide his report dated 16.9.2016 confirmed that machine is in good condition as unused and new, balance life span is more than 15 years subject to suitable installation and maintenance. The estimated value of identical machine in international market may be USD 1,30,000/-. The estimated yalue of new machine of this nature may be USD 1,45,000/ The adjudicating authority has correctly further observed at para 17 of the impugned order that as per the above reports, though the machine was found to be unused and new yet it was accepted by the committee members that the same might have been used for trial runs and the current value of similar machine in international market is estimated to be USD

1,30,000/-. The committee's report was contrary to the description of imported goods in as much as the same was found to be old but not used. In view of the above, I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority.

3.6 The appellant contended that the department's right to cross fore-closes as when the examination was granted on 22.11.2016 and our experts Shri D P Jani and Shri Nikunj Naik carried out the inspection the department choose not to remain present during the examination, both the experts have categorically mentioned that imported machine is not new but it's a used machine. I find that the adjudicating authority has correctly observed in para 18 of the impugned that the importer was allowed to carry out the examination of the machinery and they submitted the report dated 29.11.2016 for the examination carried out on 22.11.2016 which appears to be a question answer session between the importer and Chartered Engineer. The report speaks that the consignor is a machinery manufacturer and not an end user of this type of machinery. Further, during the survey/ examination, the surveyors/ Engineers had asked certain questions to the consignees, to one of the question the importers replied that "This machine is manufactured by other manufacturer, and procured for testing/ trial run and for study of design. This machine was run for trial run and for study of design in USA and our supplier had given us the testing reports of trial run and we forward the same to you. This report contains 14 number of pages which show the various data gathered while doing the trial run of the machines." The said report does not allow me to comprehend as to whether the machine has been literally used for production runs or trial runs, which altogether carry a vast difference in terms of interpretations. Hence the earlier reports issued by the CE's relatively appear to be more correct and fair in terms of the conclusion which has been drawn after due deliberations as may have been required under their professional competence. In view of the above, I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority.

3.7 The appellant contended that plastic moulding machine requires mold of the product to be molded in the machine; Mold area gives clinching evidence as to machine being used or puuted, Shri Lalwani stated it was difficult to recollect whether mold was fitted and Shri Kukad stated there was marking of mold; Different answers by the CE shows suspicious as to correctness and veracity of their opinion. I find that the adjudicating authority has correctly observed in para 19 of the impugned order that during the cross examination, in answer to the question "Do you recollect that any indication whether the mould has been ever fixed or not?" Shri Lalwani replied that "The moulding area was found in good condition, appearing to be unused" whereas Shri Kukkad replied "may be for trial", whereas adjudicating authority has correctly opined that these replies supports each other and inspires a confidence that the machine, before import might had undergone some trial runs and as such not for commercial productions. I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority.

3.8 The appellant has contended that the adjudicating authority found that the imported machine is old but not used, the use may be for trial production but not for commercial production, the logic is incorrect and erroneous; once the finding has arrived that the machine is old and used for trial production, the value cannot be adopted that of value of new machine. I find that adjudicating authority has correctly observed in para 21 and 22 of the impugned order that the word and expressions "Trial run" means a test in which a product or procedure is tried to see if it works correctly, whereas the words expressions "Commercial production" means where the manufacturing industry is ready to put his products for sale in open market or to the intended buyers. In this instant case, the importers could not establish their case that the imported machine had ever been put into use by any manufacturer of plastic injection for "commercial production." Thus adjudicating authority has correctly held that though the machine is old, of model March-2014, yet it is unused and new or at the best may have been used for some trial runs and not as such employed for commercial production. I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority.

3.9 The appellant further contended that transaction 'value has not been rejected by the adjudicating authority, therefore order of value enhancement as well as confiscation, is incorrect; notice does not show why the transaction value is not correct, merely saying that the machine appears to have not been used, and therefore, may have higher value, is not sufficient basis for rejecting the transaction value, They relied on case law: Divine International 2016(338)ELT142(Tri.-Del); for rejection of the transaction value valuation provisions has to be followed, value of the Chartered Valuer cannot be adopted. The value shall be determined by proceeding sequentially through Rule 4 to 9 of the Valuation rules, the notice did not follow Rule 3, so the notice is not tenable and liable to be set aside; the machine is of 2014 and initial value was USD 1,41,939/- and the value shown by them is after allowing depreciation; value declared is correct as per the above submissions, so question of confiscation or differential duty, interest and penalty does not arise. I find that the adjudicating authority has correctly observed in para 24 of the impugned order that when the department has issued show cause notice for rejection of the transaction value of USD 98,500/- and has demanded customs duty and such duty has been paid by the appellant, it is clear that the declared transaction value has not been accepted by the department. The case law cited by the appellant reads as "the transaction value has to be accepted as the correct assessable value unless contrary evidence is available to show that the payments made by the importer to the exporter stand influenced by the other compelling circumstances." In my considered opinion there are sufficient evidence on record evidencing that the invoice value of USD 98,500 is not sufficient and thus liable to be rejected and thereby the same is re-determined at USD 1,30,000. I find that the goods have been consigned by Milacron, USA, a related person to the appellant, therefore, the invoice value cannot be accepted as transaction value. Further, the adjudicating authority has observed in para 25 of the impugned order that the valuation done on the basis of in-panel Chartered Engineer may be accepted as upheld by CESTAT in the cases of Rex Printing Press vs CC 2005 (184) ELT73 and Swan Press vs CC 2005(184) ELT93. It is to mention that any reasonable method to ascertain the assessable value may be adopted by the assessing authority, as upheld in matters of Atlas Casting & Metal Impregnation vs CC Hyderabad 2005 (186) ELT575 (Tri. Bang.). Further in terms of Circular No.4/2008-Cus dated 12.2.2008 under para 8(c) it is provided that the certificate of local Chartered Engineer may be accepted. I find that during the investigation, the importers under their voluntary statement dated 3.10.2016 have accepted that the machine was used for testing and trial and they agreed to the transaction value @ USD 1,30,000 and were willing to pay duty.

3.10. The adjudicating authority further in para 26 of the impugned order has correctly observed that the "trial runs" do not justify the goods as "used" as declared by the importer in the import documents, since the machine was never deployed for "Commercial production". As opined by the two in-panel Chartered Engineers the value of machine considering the old technology and conditions may be arrived at USD 1,30,000/- and the same may be accepted as DV fair, as also accepted by the importer. Hence, the value of such imported goods enhanced from the declared price to one by the Chartered Engineer is legally tenable for the purpose of leviability of Customs duty.

3.11 The adjudicating authority has correctly observed in para 27 and para 28 of the impugned goods that Section 111(m) clause reads as "The following goods brought from a place outside India shall be liable to confiscation (m) any goods which donot correspond in respect of value or in any other particular with the entry made under this Act." The goods imported by the appellant is laible for confiscation in terms of Section 111(m) since the same has been mis-declared by the importer with reference to the description and the value. The goods are liable for confiscation it becomes imperative to impose the penalties under Section 112(a)(ii) of the Customs Act, 1962. In view of the above, I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority.

3.12 The adjudicating authority has correctly observed in para 29 that since the goods are rendered liable for confiscation by the importer, it becomes imperative upon the appellant to pay of the differential duties of Rs.5,64,012/- and once the demand of duty is justified, it is imperative that the importers are also liable to pay interest at appropriate rate under Section 28 of the Customs Act, 1962, on the unpaid amount of duty. In view of the above, I do not find infirmity in the impugned order and no interference is called for in the order passed by the adjudicating authority."

It was thus the submission of AR that elaborate findings as above are correct and deserves to be upheld.

4. Considered. The matter pertains to injection moulding machine, which was described old and used by the party, and it was meant to be re-exported. However, the same it appears from the records and as confirmed

by Advocate was never re-exported. During the course of investigation, party with consent had accepted enhanced value and discharged the duty, which was arrived at through the experts and by a Constituted Committee. Having accepted the enhanced value and paid duty on the same and not having re-exported the goods as was ascertained from the Advocate during the course of the hearing, we find no reason to disagree with the findings as far as valuation is concerned, as the same was based on an expert opinion after seeing the usage or otherwise of the machine and the value enhanced was accepted for release of the goods by the appellant themselves. The duty and interest therefore have been correctly paid. The other dispute relates to mis-description, confiscation and penalty involved, if any. When it comes to the description of the goods, we find that the description given by the party in the bill of entry has been sought to be disagreed by the department through various opinions of experts, as well as a committee specifically constituted by the department. The committee was constituted as there were varied opinions, at various stages specially regarding the 'used' nature of the goods and whether as submitted by the party, the usage for trial purposes, if done prior to import as some of the reports indicate, could be treated sufficient to describe the goods as "used". We find that the goods even as per the party were used only to some extent, stated to be in some trial runs. The examination reports relied upon by the department, atleast some of them do mention possibility of such use. The authorities below have ousted the description of the party as given in the bill of entry on the ground that use in trial run cannot be equated with commercial use. While agreeing with the department that extent of usage can have impact on valuation, we are not inclined to go with the department's view point that the same were not as per the description of expression 'used' of the appellant for the following two reasons:

(1) When there is conflict in the departmental examination reports of the machine being new or used to some extent in trial run, the benefit of doubt of such conflicting views must go in favour of the appellant. Therefore, even if the use was for trial run as mentioned by Shri Mihir T Mistri, Government Registered valuer, vide his letter dated 02.09.2016, and as given by Superintendent (Docks) as Member of Committee in his report dated 15.09.2016, same is sufficient to consider that the machine was used and therefore the description given by the appellant in the bill of entry was correct. We are conscious of the fact that the usage, its purpose and its extent can have bearing on the value of the machine. However, to hold the description given by the party as "used", as inappropriate by the department does not meet out approval. We are already agreeing with enhanced value as indicated by the department and which was accepted by the party. The supervening conduct of the party in not re-exporting the machine despite importing the same in India at enhanced value, within 6 months as was indicated in the bill of entry is conduct which supports the notion that given the condition of machine, the appellant had rightly accepted the value as was enhanced by the department. And rest of the contest is an afterthought.

(2) Further on the part of the department, we find that Board Circular No. 25/2015-Cus dated 15 October, 2015 has been pressed into use for the valuation purposes, we find that this circular itself is applicable to the imports of second hand machine. Therefore, the department having pressed the circular into use cannot now revert back to say that, the goods were not old and used as the circular itself pertains to second hand machinery.

4.1 In view of the foregoing, we find that the goods were not liable for confiscation on account of description, and also the valuation since same depended upon usage, which was arrived only through various expert opinions. And the party having willingly accepted the value once the condition and extent of usage became known to them cannot be subjected to penalty. We therefore hold that the goods are not liable for confiscation in the specific facts of the case and penalty imposed cannot be sustained.

4.2 In view of the reasoning as stated above, and the post importation conduct of the party of voluntarily accepting enhanced value, when extent of usage became known to them, we while not imposing any penalty or upholding confiscation, sustain the order of the department as far as valuation and demand of duty and interest is concerned.

5. Appeal is accordingly disposed of, Appeal partly allowed.

(Pronounced in the open Court on 25.09.2023)

SOMESH ARORA
MEMBER (JUDICIAL)

C.L MAHAR
MEMBER (TECHNICAL)

PALAK