CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

West Zonal Bench AHMEDABAD

COURT NO. I

Appeal No. C/12056/2015-DB

[Arising out of Order-in-Original No MCH/PR. COMMR/26 & 27/2015-16 dated 29.10.2015 passed by Commissioner of Customs, Mundra]

M/s. Welspun Corp. Limited **: Appellant**

vs.

Commissioner of Customs, Mundra **: Respondent**

Appearance:

Shri Vipin Jain, Ms. Dimple Gohil & Ms. Manya Bhardwaj, Advocates for the Appellant
Shri Jeetesh Nagori, Additional Commissioner (AR) for the Respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing : 02.08.2018
Date of Decision : 03.12.2018

Final Order No. A/12700/2018

Per : Ramesh Nair

This appeal is directed against order-in-original dated 29.10.2015 passed by the Principal Commissioner, Customs Mundra, wherein the following order was passed:-

(i) I order confiscation of 2605.480 (2281.112+324.368) MTs of HR Steel Plates valued at Rs. Rs. 13,80,54,382/- (122999765/- + 1,50,54,617/-) under Section 111(d)(j)(l)(m) and (o) of the Customs Act, 1962 read with Section 120 of the Customs Act, 1962.

(ii) I order for confiscation of 75524.588 (55486.79 + 20037.798) MTs of HR Steel Plates totally valued at Rs. 385,94,21,322/- (298,98,47,535/- + 86,95,73,787/-) covered under 9 (4+5) Bills of Entry under Section 120 of the Customs Act, 1962. I impose a redemption fine of Rs. 2,00,00,000/-(Rs. Two Crores only) under Section 125 ibid in lieu of confiscation as the goods have been already cleared on furnishing a bond and Bank Guarantee.

(iii) I determine and confirm the demand of duty amounting to Rs. 3,56,89,819 (3,17,97,899/- + 38,91,920/-) on the undeclared 2605.480 (2281.112+324.368) MTs HR Plates totally valued at Rs. 13,80,54,382/- (122999765/- + 1,50,54,617/-) under Section 28(4) of the Customs Act, 1962 with interest at applicable rate in terms of Section 28AA of the Customs Act, 1962.

(iv) I order to en-cash the Bank Guarantee for Rs. 2,60,000,00/- furnished by them and to appropriate the same against duty and interest liabilities payable by them.

(v) I impose a penalty of Rs. 3,56,89,819/- (Rs. Three Cores Fifty Six Lakhs Eghty Nine Thousand Eight Hundred Nine only) and an amount equal to interest payable on the importer, M/s Welspun Corp Limited, District Bharuch, under Section 114(A) of the Customs Act, 1962. However, if the Customs duty and interest confirmed as discussed above is paid by the importer within 30 days from the date of communication of this order, the amount of penalty stands reduced to 25% in terms of provisions of Section 1 14A of Customs Act, 1962.

(vi) I also impose a penalty of Rs. 10,00,000/- (Rs. Ten Lakhs only) on the importer, M/s Welspun Corp Limited, District Bharuch, under Section 1 14(AA) of the Customs Act, 1962.

2. The brief facts of the case are that the appellant during the period from 11.03.2013 to 21.06.2013, imported the goods described as "Prime HR steel Plates of Alloy and Non Alloy Steel" at Custom House MP & SEZ, Mundra and sought duty free clearance thereof by way of filing different Bills of Entry against the advance authorization No. 410036328 dated 06.03.2013 by claiming exemption Notification No.96/2009 dated 11.09.2009. On a surprise check by the officers of Central Bureau of Investigation, Gandhinagar, they intercepted three trucks carrying HR Steel plates imported by the importer. The weighment of the goods with truck with the help of port personnel was done at weigh bridge No. 8 of the CFS CG-7. The CBI officers drawn a Panchanama detailing therein as to the goods found in excess than the goods declared in the relevant Bills of Entry and shown by the port personnel in the documents given by them to the transporters. The CBI officers handed over the said intercepted goods to the custodian of CFS CG-7. The appellant vide their letter dated 21.03.2013 and 22.03.2013 requested the CBI, Gandhinagar and concerned officers for delivery of the imported goods to carry out their production of Steel Pipes. Consequently, the importers submitted an undertaking dated 23.06.2013 that the entire cargo arrived in the captioned vessels shall be weighed by

the custodian during the delivery and in case while taking delivery, if the weight is found to be in excess the same shall be debited in Advance License. Subsequently, on furnishing an undertaking by the appellant, the goods after weighment were cleared on provisional basis. On the weighment of the goods, it was found that the goods physically imported were not found in excess as compared to the weight declared in the respective bills of entry. Therefore, the excess cargo was provisionally cleared on furnishing the bank guarantee of 25% value of excess HR Steel Plates. Thereafter, the appellant vide their letter dated 14.05.2013 furnished bank guarantee dated 10.05.2013 of Rs. 60 Lakhs and an undertaking of Rs. 8 Crore. Vide their letter dated 21.05.2013, the appellant provided another bank guarantee dated 19.05.2013 for Rs. 2 Crore. After clearance of the goods, the appellant vide their letter dated 18.07.2013 and letter dated 07.08.2013 requested the customs authorities to consider the theoretical weight declared in the Mill Test certificate and bill of lading and to finalize the bills of entry with request to release their bank guarantee.

3. Thereafter, a show cause notice F. No. S/48-147/Import/Misc/MP & SEZ/13-14 dated 06.01.2014 was issued to the appellant proposing confiscation of the goods involving excess weight and to demand customs duty on the undeclared weight of 2281.112 MT of HR Plates. It was also

proposed to adjust the duty by encashment of bank guarantee executed by the appellant. A penalty under Section 114AA was also proposed to be imposed. The show cause notice was adjudicated and the charges proposed in the show cause notice were confirmed as per the operating portion of the order reproduced above in Para-1. Being aggrieved by the order-in-original, the appellant filed the present appeal.

4. Shri Vipin Jain, ld. Counsel along with Ms. Dimple Gohil and Ms. Manya Bhardwaj, ld. Advocates appeared on behalf of the appellant. He submits that it is an undisputed and uncontroverted fact that the steel plates in international trade are traded with reference to their length, width and thickness. The weight of such plates is never the basis or criteria for trading in such goods. The weight of such steel plates is never determined by actually weighing them on a weigh scale but is always computed with reference to a scientifically approved universal formula which is 7.85kg/dm3. The impugned order does not dispute the correctness that the weight of steel plates in international trade is only arrived at on the basis of a scientifically approved formula. However, an adverse inference was drawn against the Appellant on the premise that there was a difference between the actual weight vis-a-vis the weight arrived at on the basis of a scientifically approved formula. He submits that it is nobody's case that the number of steel plates which were supplied to the appellant were in excess

of what had been requisitioned for or paid for or that the length, width or thickness of the plates was different from what had been declared in the Bills of Entry. The Appellant submits that it is also nobody's case that the weight declared by it was different from what had been declared by the suppliers or that the weight declared was not by applying the scientifically approved formula, which is applied universally while trading in the steel plates. Therefore, no adverse inference could have been drawn against the appellant on the premise that on physical weighment, the weight of the plates was found to be different from what had been declared based on the supplier's documents even though all other parameters such as length, width or thickness, number of pieces as also the weight based on the universally approved formula as declared in the supplier's documents, were found to be correct and unexceptionable. He submits that it is not in dispute that world over as also in India, the standards which have been laid down in respect of steel plates envisage that the mass of the steel plates shall be expressed with reference to the density of the steel plate by applying the formula 7.85kg/dm3. This formula finds mention not only in the Indian Standards IS 1730:1989 but also in JIS Handbook for Ferrous Materials and Metallurgy issued by the Japanese Standard Association. The said formula also finds a mention in the ASTM. The impugned order does not dispute that the international standards provide for computation of weight of steel plates with reference to their length, width and thickness by

applying a scientific formula. This accepted basis on which the steel plates are being traded internationally is not in dispute. He submits that the sheets imported by the appellant had a length of approximately 12.5 metres and a width of 3-4 metres. The surface area of the sheets imported by the Appellant was approximately 50^2 metres. The appellant pointed out that trying to physically weigh each sheet by putting it on a weigh scale was not only a cumbersome and time consuming process, but was neither credible nor reliable as it would require huge weigh scales as also material handling equipments which ought to be capable of holding as also moving around the over-dimensional plates. Considering the fact that the physical weighment was arrived at in a crude and unscientific basis by the custodian, the Respondent was clearly not justified in applying the results so arrived at without conforming to the standards prescribed and without dealing with the Appellant's submission that none of the standards prescribed for steel plates envisaged a physical computation of the weight of steel plates. All the standards envisaged computation of weight only on a scientific basis with reference to the length, width and thickness and not on a physical weighment basis.

4.1 Ld. Counsel submits that it is a settled law laid down by the Hon'ble Apex Court in the case of *Tata Chemicals Limited vs. CC, reported in - 2015 (320) ELT 45 (SC),* that where the tariff does not prescribe a manner for

testing any goods, and there is an Indian Standard prescribed for the same, the testing has to be only in accordance with the manner prescribed in the Indian Standards. While IS 1730:1989 is not a standard for testing of steel plates, the standard lays down the manner in which the thickness, size, mass of steel plates and sheets is to be expressed. This standard prescribes as to how given the length, width and thickness, the mass of plates is to be computed by applying a scientific formula and the said standard does not refer to physical weighment as a basis for computing the mass/weight of steel plates. He submits that the Adjudicating Authority has erred in overlooking the certificates furnished by the traders/ manufacturers who are of world repute, wherein they had certified that the steel plates are traded with reference to their theoretical weight.

4.2 Without prejudice to the above submissions, ld. Counsel further submits that in the purchase orders placed on its suppliers for the supply of steel plates provided for a tolerance of at least -0/+2% with respect to the quantity, which was expressed with reference to the number of plates as also the weight arrived at on the basis of the scientific formula. In some other purchase orders, the tolerance prescribed was with respect to the thickness, width and length of the plates being ordered. He submits that the Adjudicating Authority, without taking note of the fact that the purchase orders themselves contemplated of positive tolerance in the weight by up to

2% and did not provide for a negative tolerance and consequently no adverse inference could have been drawn against the appellant based on the alleged variation in physical weight vis-a-vis that computed on a theoretical basis. He submits that IS 1730:1989 which deals with the dimension, mass and surface area of the steel plates in Clause 8 thereof refers to IS 1852:1985 with respect to the tolerance limits. As per the said IS, the tolerance with respect to width ranges from -0.0 to +2Omm/+0.5% of width! +0.3% of length. The tolerance for length ranges from -0.0 to +4Omm/+0.5% while the tolerance limit for thickness ranges from -5 to +12.5%. The standard further provides that the consignment weight shall not vary from the theoretical weight specified in Table 3 of IS 1730:1974 which was subsequently revised to 1989 by more than +5% / -2.5%. He submits that it is clear from IS-1852:1985 that the weight of steel plates is always expressed as a theoretical weight and that statutorily a tolerance of up to +5%/-2.5% is within the normal tolerance levels. He submits that it is not in dispute that the difference in the weight declared, as indicated in the import documents vis-à-vis that computed by the authorities was well within the prescribed IS-1852:1985 tolerance limit of +5%. It is his submission that the Adjudicating Authority, without taking cognizance of the said tolerance levels which are themselves prescribed for in the IS specifications, passed the impugned order which is clearly untenable. He further submits that the Adjudicating Authority has solely relied upon the

statement prepared by the custodian listing out the weight of the plates which were loaded-on to different truck/ trailers. What the custodian has done is, taken the gross weight of the truck-trailer with the steel plates on it and reduced from the same, the tare weight of the truck and has arrived at the net weight of the consignment. This weight has then been compared with the weight declared in the import documents. He submits that, firstly, there is no sanctity as to the authenticity and correctness of the weigh bridge where the custodian has arrived at the gross weight of the consignment. Secondly, it is not specified as to how the tare weight of the truck/trailer was arrived at. Thirdly, there are no weigh slips which are produced or relied upon to show the gross weight or the tare weight of the truck. Fourthly, it is not shown as to how the weight declared in the Bill of Entry which is common for the goods removed against several hundred trucks- trailers was distributed for the purpose of comparison amongst the various truck trailers, under cover of which the material was moved out of the port. He submits that in the absence of evidence regarding the authenticity and genuineness on the basis of which the so called physical weight of the steel plates had been computed, no adverse inference can be drawn against the appellant. He submits that the Adjudicating Authority has also not examined and/or ruled out the aspect of there being a human error and/or a calibration error while computing the gross weight of the truck trailer tare weight of the truck and comparing it with the weight

declared in the Bills of Entry. He further submits that the Adjudicating Authority has erred in holding that while taking delivery of the goods from the custodian, the appellant had not disputed the manner in which the weighment was undertaken. This finding in the impugned order clearly shows that the Adjudicating Authority has failed to discharge his obligation. The Adjudicating Authority was required to examine whether there was any infirmity in the procedure of weighment and thereafter to decide whether the manner in which the weighment was undertaken could be accepted or not, without applying his mind to this issue the authorities have left the issue by contending that the appellant not having objected to the manner of weighment while taking delivery of the goods, it could not raise such an objection subsequently.

4.3 Ld. Counsel further submits that for steel products, it is a well-accepted practice that if the said steel products are accompanied by Mill Test Certificate issued by the Manufacturer which gives details such as the manufacturer's name, Heat No., dimensions, finish, chemical composition, weight etc., the same are required to be accepted by the customs department. It is not in dispute that the Mill Test Certificate which had been filed along with the import documents stated all the requisite specifications including the length, width, thickness, number of pieces, etc. It is also not in dispute that it has been clarified in Public Notice no.17/2010 dated

13.04.2010 issued by the Kandla Customs, specifically states that in respect of steel products, since all imported goods are covered by Mill Test Certificates issued by foreign manufacturers and the invoices and packing list issued by them contain details about the value and quantity of the goods in number as well as weight, the same have to be accepted on face value unless there is something specifically pointing out to any fraud in this behalf. The impugned order has been passed without effectively dealing with these submissions. He submits that the Adjudicating Authority has refused to apply the Public Notice No. 92/2009 issued by the Nhava Sheva Customs. The Adjudicating Authority also erred in refusing to apply the Circular No. 06/2006 dated 12.01.2006 on the premise that the same applied only to liquid cargo and not apply to bulk solid cargo.

4.4 Without prejudice to the above submissions, he also submits that all the 9 consignments in question have been cleared against advance licenses and in every case, there was sufficient balance, both towards quantity as also the value available in the said licenses. The fact that has not been controverted by the Adjudicating Authority is that even if one was to consider the weight being adopted in the notice as the weight of the plates, there was no change in transaction value as the consideration paid by the appellant did not get altered as a consequence of the alleged excess quantity having been shipped. He further submits that the entire impugned order has been passed with reference to the instructions contained in Public

Notice No. 17/2010 dated 29.06.2010 issued by the Commissioner of Customs, Kandla. He submits that even if the said circular was to be applied, admittedly even then as per the said circular, if there was a deviation noted from the declared weight, the deviation is required to be debited in the license, is available. In the instant case, the appellant has been from the time when the investigation was being conducted, right till its reply to the notice as also in the course of personal hearing, has submitted over and over again that if there is any difference in weight, the same may be debited in the license and it has produced the license for this purpose. The Adjudicating Authority has however ignored the same for the reasons best known to him. He submits that the Notification No. 96/2009 dated 11.09.2009, in terms of which the advance licenses have been issued provide for exemption from the levy of customs duty subject to the condition that:

(i) the authorization is produced before the proper officer at the time of clearance of debit.

(ii) the authorization bears the name of the importer and the description and other specifications were applicable of the imported material and the description, quantity and value of the resultant product.

(iii) the material imported corresponds with the specifications applicable of the imported material and that the value and quantity thereof are within the limits of the specified in the authorization.

The appellant submits that there is no dispute that it fulfills all the stipulations referred to in the Notification No. 96/2009. This being the case, there is no basis whatsoever to deny the benefit of exemption to the alleged differential quantity. He submits that the Adjudicating Authority has erred in relying upon the Public Notice 17/2010 dated 29.06.2010 as if the same were the law of the land and that what is stated therein was to be applied without any independent examination. The impugned order having been passed without taking cognizance of the provisions of the Customs deserve to be quashed. He submits that the said Public Notice dated 29.06.2010 applies to those cases where duty is payable with reference to the weight of the product and not where variation in the weight of the product on the higher side does not have any impact of the applicable duty payable. By applying the said public notice, the Adjudicating Authority has contended that as long as the variation in the weight was more than 1%, as mandated in the Public Notice, the adjudication was required to be undertaken. What the Adjudicating Authority has failed to appreciate is that 1% variation in weight cannot be taken as a standard yardstick for each and every commodity. It is possible that in some commodities, variation of even less than 1% may be material and may require adjudication while in respect of

some other commodities like plates in the instant case, where Indian Standard itself recognizes up to 5% variation as a standard norm, applying the 1% weight variation criteria on the said commodity was clearly erroneous. He further submits that had the quantity imported to India been lesser than that which it had ordered for and even if there was no price variation provided for in the contract, it would have, by virtue of section 12 as also 23 of the Act, been eligible to claim that no duty was payable on that quantity of goods which was not imported into India. However, on imports in excess of what had been declared, the transaction value was not required to be altered even if there was a slight variation as a consequence of which a higher quantity was imported as the transaction value did not change in respect of the said imports. He further submits that the demand of duty is wholly illegal inasmuch as there is no change in the transaction value of the goods, and regardless of the weight of the consignment, the actual price paid for the goods is the same and since the duty is chargeable on ad-valorem basis, with no change in the invoice price or the transaction value, the question of differential duty, does not arise at all.

4.5 As regard limitation, ld. Counsel submits that the Adjudicating Authority has erred in invoking the extended period for demanding duty as he has failed to appreciate that weight declared by it on the import documents was what had been declared by the supplier who were

manufacturer/ traders of international repute. The Adjudicating Authority has overlooked the fact that for the extended period to be invoked there had to be deliberate suppression, misstatement with an intention to evade payment of duty. In the instant case, there is no such evidence which would suggest let alone established that the appellant had suppressed or misstated any fact with an intention to evade payment of duty and consequently the extended period of limitation was clearly not invokable. Without prejudice to the above submissions, he also submits that goods procured were to be cleared against the advance license without suffering any duty incidence. The value declared for the goods was true and correct transaction value, therefore, except for the quantity, to be debited against the license for which also there was sufficient balance available, there was absolutely nothing else required to be done. Accordingly, the transaction value in question did not entail any duty liability and consequently there could not be any incidence of payment of duty. He submits that as per the above submissions, duty demand is not sustainable and since there is no mis-declaration of goods as well as value, there is no question of any confiscation and penalty. In support of his submission, he relied on the following judgments:-

(a) Eicher Tractors Limited vs. CC, Mumbai – 2000 (122) ELT 321 (SC)

(b) Topain Properties Pvt. Limited vs. CC, Nhava Sheva – 2006 (192) ELT 950 (tri. Mumbai.)

(c) Bharat Petroleum Corporation Limited vs. CC (Import), Mumbai – 2015 (320) ELT 294 (Tri. Mumbai)

5. On behalf of the Revenue, Shri Jeetesh Nagori, Ld. Additional Commissioner (AR) appeared. He reiterated the findings of the impugned order and submits that as per the Customs Act, there is no provision for tolerance in the weight. Therefore, on physical weighment, whatever the excess weight is there, as compared to the weight mentioned in the import documents, is liable for duty. As regards the confiscation, he submits that under Section 111, no *mensrea* is required therefore, the confiscation of goods was rightly ordered. He relied on the judgment of Hon'ble Supreme Court in the case of *Mangalore Refinery & Petrochemicals Limited vs. CC, Mangalore – 2015 (323) ELT 433 (SC).*

6. We have carefully considered the submissions made by both sides and perused the record, we find that the two primary issues that arise for our determination are whether:

(i) the department was right in demanding differential customs duty by re-computing the assessable value in respect of the alleged un-declared excess weight to the tune of 2605.480 metric tonnes, in respect of the HR Plates imported by the Appellant;

(ii) whether the alleged undeclared excess quantity of HR plates was liable to confiscation under Section 111(d),(j),(l),(m),(n),(o) of the Customs Act; and the Appellant are liable to consequent penalties."

7. We are of the view that the demand for the differential duty is not sustainable both on facts and as well as in law. It is not in dispute that the transaction value as determined in terms of Section 14 of the Act, is required to be taken as the basis for computing the assessable value on which the duty is to be assessed. It is nobody's case that the importer has paid anything over and above the declared value for the goods in question. It is also nobody's case that any of the exceptions provided for in proviso to Rule 3(2) of the Customs Valuation (Determination of Value of Imported goods) Rules, 2007 are attracted to the facts of the instant case, thereby warranting rejection of the transaction value.

8. It is settled law laid down by the Hon'ble Apex Court in the case of Eicher Tractors Ltd vs Commissioner of Customs reported in 122 ELT (321) that it is only when the transaction value is liable to be rejected, based on the exceptions provided for in Rule 3(ii) of the erstwhile Customs Valuation Rules, 1988, could the assessable value be determined in terms of the valuation provisions. The relevant observations of the Apex Court are extracted for use of reference.

''13. That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of

value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.

14. It is only when *the* transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules''

8.1 The ratio laid down in the aforesaid judgement applies in all fours even under the amended Section 14 and the Customs Valuation Rules, 2007. Under the amended provisions the transaction value has been defined in Section 14 to mean the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. The transaction value so declared by an importer, is required to be adjusted in accordance with the provisions of Rule 10. The transaction value post its adjustment in terms of Rule 10 is required to be accepted as stipulated in Rule 3(2) subject to the exceptions provided for therein. It is nobody's case that price is not the sole consideration or that any of the exception provided for in the proviso to Rule 3(2) are attracted, this being the case there is no basis for enhancing the value on an arbitrary basis without reference to the statutory provision of Section 14 and the provisions of the Valuation Rules, 2007.

9. In the instant case, we find that the adjudicating authority has not come to a conclusion that the transaction value as adjusted in accordance with the provisions of Rule 10, was incorrect or mis-declared and was required to be rejected and the assessable value re-computed under the valuation rules. The adjudicating authority has in a completely ad-hoc and arbitrary manner, without any reference to any provisions of the law and as also without following the provisions of the Valuation Rules, which lay down a codified manner of re-computing the value, arrived at an assessable value which has no legal basis or sanctity. It is settled law laid down by the Apex Court in the case of CCE vs South India Television Pvt Ltd reported in 2007 (214) ELT 3 that even if the declared value is to be rejected the department has to apply the valuation rules, sequentially and cannot arrive at the value in an arbitrary and ad-hoc manner. The relevant observations of the Apex court in this regard are extracted herein below for ease of reference.

> **''8**.....Lastly, it is important to note that in the above decision of this Court in *Eicher Tractors* (supra) this Court has held that the Department has to proceed sequentially under Rules 5, 6 onwards and it is not open to the Department to invoke Rule 8 without sequentially complying with Rules 5, 6 and 7 even in cases where the transaction value is to be rejected under Rule 4. In the present case, the show cause notice indicates that the Department had invoked Rule 8 without complying with the earlier rules.''

9.1 Even otherwise, the sole basis on which the Revenue has contended that the assessable value was to be enhanced and the matter taken up for adjudication, is the reliance on Public Notice No.17/2010 dated 29.6.2010 and Public Notice No.10 dated 17.6.2013. The impugned order has in para

19.5, 19.6 and 19.12 placed reliance on the said Public Notice, the relevant extracts of which has been reproduced in the impugned order in para 19.5, which reads as under:

> ''……As per point 6(E) of the manual, if the deviation in the declared weight is not more than 1% or if the amount of duty involved on excess weight does not exceed Rs.25/-, the declared weight may be accepted. As per point No.10 of the said manual, when excess weight over prescribed allowance is noticed the weight and value of the consignment should be proportionately increased on the bill of entry and the license debited with the full rate or value so re-determined. .
>
> (iii) In view of the guidelines of the appraising manual, following practice will be followed in this Commissionerate.
>
> (a) In all kinds of cargo, including scraps, no addition will be done upto 1% deviation in the actual weight than the declared weight, but the value of excess goods will be loaded in the total assessable value and appropriate duties will be recovered.
> (b) If the variation is above +/-1%, value will be loaded with adjudication with appropriate redemption fine and penalty.''

9.2. It appears from the said Public Notices that the weight variation upto 1% is to be accepted and ignored irrespective of the nature and type of the commodity. We are unable to persuade ourselves to accept this proposition. In our view there cannot be a thumb rule in such cases. The extent of permissible variation between the declared and actual weight has to be with reference to the type of commodity qua which the said difference is being evaluated. For eg: a commodity like diamond, it would be impermissible to accept and ignore 1% difference between the declared and the actual weight. However for a commodity like HR steel plates, which is an over dimensional cargo having a length of approximately 12.5 metres and width of 3 to 4 metres and a surface area of above approximately 50 sq. metres, it is completely unreasonable and illogical to apply 1% as the acceptable difference between the declared and the actual weight. In coming to this

conclusion we are guided by the Indian Standard specification 1852:1985 which provides the specification for rolling and cutting tolerance for hot rolled steel products.

9.3. The said standard in clause 1.1 while explaining the scope thereof states that the said standard lays down rolling and cutting tolerance for hot rolled structural steel, beams, channels, equal and un-equal leg angles, Tee bars, bulb angles, round and square bars, flats, plates, strips and sheets rolled from structural steels including medium and high strength steel. Part 7 of the said standard deals with rolling and cutting tolerance for plates. Clause 7.1 stipulates the tolerance with respect to the width of the plates; Clause 7.2 provides for the tolerance with respect to the length of the plates; Clause 7.3 provides for the tolerance with respect to the thickness of the plates. Clause 7.4 provides for the tolerance with respect to the weight of the plates and reads as under:

> ‘’7.4 The consignment weight shall not vary from the theoretical weight specified in table 3 of IS:1730 (Part 1)-1974 by more than +5% / -2.5%’’.

9.4. It is an admitted fact that the theoretical weight is to be arrived at by taking the density of steel at 7.85 g/cm^3. In other words the theoretical weight of the steel plates is to be computed by multiplying its volume (length X breadth X width) with its density. The said formula has been

prescribed in Indian Standards specification 1730:1989 for steel plates, sheets, strips and flats for structural and general engineering purposes. The said formula also finds reference in Japanese Industrial Standards (G3193, Iron and Steel Handbook for ferrous materials and metallurgy issued by the Japanese Standard Association).

9.5. It is not in dispute that the contracts that the Appellant had entered into with its overseas supplier provided for invoicing based on the theoretical weight basis of 7.85 kgs/m^3. A copy of one such purchase order has been annexed at page 130 of the appeal memorandum. The supplier's invoice, mill test certificate as also the bill of lading which are at pages 183, 184 and 185, have all arrived at the weight on the said theoretical basis by multiplying the volume (length x breadth x width) into density i.e 7.85.

9.6. The weight of the consignment covered by the two notices in dispute is 72919.113 metric tonnes, which has been declared in the theoretical basis as envisaged in the supply contract as also in the Indian Standard specifications and the Japanese Standards specification. As against this, the alleged excess quantity arrived at on a physical weighment basis, is 2605.480 metric tonnes. In percentage terms the difference works out to 3.57 % over the declared weight which is well within the prescribed

standard variation of + 5% / - 2.5% envisaged in the Indian Standard specifications.

10. In our view, undisputedly, when steel plates are globally traded based on their theoretical weight as has been contended by the appellant, which also appears to be the position as is evident from the Indian Standard specification as also the Japanese Standard specification, we feel that the weight tolerance envisaged in the trade notice referred to by the Respondent in the impugned order qua such steel plates has to be taken at + 5% / -2.5% and not at 1% as has been adopted by the Respondent. It is only in a case where the difference between the declared weight and the actual weight exceeds the tolerance limits prescribed in the Indian Standards specification can the matter be taken up for adjudication for examining whether any fine is leviable or penalty is imposable.

11. In the facts of the present case it is not in dispute that the difference between the theoretical weight that has been declared on the bill of entry vis-a-vis the weight that has been physically computed worked out to 3.57% and is well within the 5% tolerance provided for, in the Indian Standard specifications.

12. We also take note and find merit in the appellant's grievance to the effect that the manner of computing the physical weight was not the most scientific one inasmuch as the physical weight was arrived at by first arriving at the tare weight of the truck trailer and thereafter arriving at the weight of the truck trailer with the steel plates loaded on it. It is common knowledge that in addition to the weigh scale calibration error, the direction in which the vehicle is parked on the weigh scale, the breeze factor, the extent of fuel present in the vehicle, etc can all play a role in causing a weight variation. In our view more scientific method could have been by placing the steel plates directly on the weigh scale and arriving at its weight, or verifying the length, breadth and width of the plates i.e. its volume and also verifying whether the density was 7.85 gm/cm^3 as has been mandated in the standards. If there was a difference either in the volume or the density it could have resulted in variation from the declared weight. In any case as long as the variation is within the permissible limits prescribed in the relevant standards the same cannot result in any customs proceedings for alleged mis-declaration of particulars.

13. We further find that the allegation of suppression arrived at by the Respondent in para 19.21 of the impugned order, on the premise that the difference between the declared and the actual weight being more than 1% would not have come to the notice had physical weighment had not been

done, is completely untenable. We find that the documents filed along with the bill of entry such as the packing list, mill test certificate clearly state that the weight declared was a theoretical one. It is beyond our comprehension as to how suppression can be alleged when the importer has categorically declared that the weight declared in the import documents is on a theoretical basis. Besides, as the alleged variation is within the permissible limits prescribed in the Indian Standards specification and there is no dispute as to the correctness of the transaction value, there was no cause for initiation of any adjudication proceedings either for enhancement of value and/or imposition of fine and penalty.

14. We accordingly set aside the impugned order and allow the appeal with consequential reliefs if any, in accordance with the law.

(Order pronounced in the open court on **03.12.2018***)*

Raju
Member (Technical)

Ramesh Nair
Member (Judicial)

KL