

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench AHMEDABAD

COURT NO. I

Appeal No. C/12341/2018 –DB
(Application No. C/EH/10687/2018)

[Arising out of Order-in-Appeal No OIA-MUN-CUSTM-000-APP-096-18-19 dated 25.06.2018 passed by Commissioner (Appeal) Customs, Mundra]

M/s. S R R International : **Appellant**

vs.

Commissioner of Customs, Mundra : **Respondent**

Appearance:

Shri N.D. George, Advocate for the Appellant

Shri K.J. Kinariwala, Assistant Commissioner (AR) for the Respondent

CORAM:

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

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing : 23.10.2018

Date of Decision :04.12.2018

Final Order No. A/12702 / 2018

Per : Ramesh Nair

The brief facts of the case are that the appellant are engaged in the trading activity. They imported a consignment of ordinary belts (PU Belts) and filed a bill of entry No. 9127790 dated 05.05.2015. The assessable value of the said goods was declared as Rs. 7,34,568/- i.e. at the rate of US\$ 0.083 per piece of belt. The said goods were detained under Panchanama dated 15.05.2015 by the officers of SIIB Mundra. The detained goods were handed over to the Manager of CFS (Seabird) Mundra under Supratnama

dated 15.05.2015 and was released provisionally on furnishing bond and bank guarantee. The sample of the goods were drawn from the live consignment and forwarded to chemical examiner, Kutch Customs, Kandla for testing. On the basis of SSIB Mundra intelligence that the importers are importing ordinary belts (PU Belts) and are undervaluing the goods with intent to evade customs duty, the aforesaid consignment was examined in light of DGOVs Circular No. Val/Tech/25/2013 dated 07.08.2013 issued for suspected undervaluation in import of PU Belts. It was found that goods imported under aforementioned bill of entry had declared value Rs. 5.25 per piece which was appeared low as the value declared by SSIB officers examined total of 1,37,100 pieces of PU belts and on reasonable belief that the goods were undervalued than the actual value detained and released provisionally. Thereafter, a show cause notice was issued asking the appellant as to why:-

- (i) the declared value of Rs. 22,19,739/- imported under the bills of entry as mentioned aforesaid under Rule 12 of the Valuation Rules, 2007, should not be rejected and should not be re-determined to Rs.78,30,968/- under Rule 9 of the Valuation Rules, 2007;
- (ii) the goods imported should not be confiscated under Section 111(m) of Customs Act, 1962;
- (iii) the duty of Rs.22,59,378/- on re-determined value of Rs.78,30,968/- should not be demanded and recovered under Section 28 of the Customs Act, 1962 alongwith interest under the provisions of Section 28AB (Section 28AA from 8.4.2011) of Customs Act, 1962;
- (iv) penalty should not be imposed under Section 112(a) and/or 114A and 114AA of Customs Act, 1962.

The show cause notice was adjudicated whereby the declared value of Rs. 22,19,739/- on imported goods under Rule 12 of Customs Valuation Rules was rejected and re-determined the value to Rs. 78,30,968/- under Rule 9 of the Customs Valuation Rules and ordered for confiscation of the impugned goods under Section 111(m) with an option to redeem the goods on payment of redemption fine of Rs. 7,72,000/-. The customs duty of Rs. 22,59,378/-, differential value was confirmed under Section 28(4) of the Customs Act, 1962 and amount of Rs. 6,44,764/- paid by the appellant was appropriated. Interest on short paid duty was also confirmed under Section 28AA. Penalty of Rs. 16,14,614/- was imposed under Section 114A of the Customs Act, 1962. Being aggrieved by the order-in-original, appeal filed before the Commissioner (Appeals) which came to be rejected and therefore the present appeal.

2. Shri N.D. George, Id. Counsel appearing on behalf of the appellant submits that the entire case of undervaluation was made on the basis of DGOV Circular dated 07.08.2013 wherein an apprehension was made that there is likelihood of undervaluation in case of import of PU Belts. He submits that only on the basis of Circular, no case of undervaluation can be made out. The said Circular is for the customs authorities but not a concluding authority to book a case. In the present, no independent evidence was brought on record. He submits that the appellant have been

importing the same goods earlier at the same price which were accepted by the customs authorities. He submits that though there is mention about the price adopted by the Customs on the basis of NIDB data but no bill of entry of contemporaneous import was provided. Even as per the Circular, if there is any doubt about the value of PU Belts, the customs authorities were supposed to carry out the market enquiry. In the present case, no material except an unauthenticated/unsigned bill was adduced to show that any market enquiry was properly conducted. Therefore, enhancement of the value is arbitrary and without any basis. He further submit that Id. Commissioner (Appeals) has rejected the declared value under Rule 12 and re-determined the value under Rule 9 of Customs Valuation Rules, even when the goods are regularly being imported and cleared by various customs stations. In this position, the residual method is not applicable. In support of his submission, he placed reliance on the following judgments:-

- (a) CC, New Delhi vs. Nath International – 2013 (289) ELT 305 (Tri. Del.)
- (b) Om Drishian International Limited vs. CCE, New Delhi – 2015 (315) ELT 441 (Tri. Del.)
- (c) Topsia Estates Pvt. Limited vs. CC (Import-Seaport), Chennai – 2015 (330) ELT 799 (Tri. Chennai)
- (d) Selection Enterprises vs. CC, Chennai – 2005 (183) ELT 273 (Tri. Bang.)
- (e) Andaman Timber Industries vs. CCE, Kolkata – 2015 (324) ELT 641 (SC)

(f) CC (Import) Chennai vs. Sainul Abideen Neelam – 2014 (300) ELT 342 (Mad.)

(g) CC, Calcutta vs. South India Television Pvt. Limited – 2007 (214) ELT 3 (SC)

(h) Tolin Rubbers Pvt. Limited vs. CC, Cochin – 2004 (163) ELT 289 (SC)

3. Shri K.J. Kinariwala, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterated the findings of the impugned order.

4. We have carefully gone through the submissions made by both sides and perused the record. We find that the assessable value of the goods i.e. PU Belts is enhanced by the customs authorities mainly on the basis of DGOV Circular, which is not an authority to dispute the valuation of the imported goods. It is necessary that if there is any doubt, an investigation has to be carried out on the basis of material available on record. In the present case, though the value was enhanced on the basis of NIDB data but no bill of entry of contemporaneous import was brought on record. It is also not established that price of which goods adopted by the customs in the present case is of the same quality, quantity and origin. Therefore, the NIDB data is also of no basis and relevant to the present case. Even the customs authorities who are abide by the DGOV Circular which categorically states that market enquiry has to be conducted. In the present case, there is nothing on record that customs authorities have properly conducted a

market enquiry. There is no report such as Panchanama of market enquiry on record nor was any report provided to the appellant. The Revenue only relied on one Bill which is neither signed nor authenticated hence, the same cannot be relied as market survey report. There is no case of the Revenue that the appellant have made a payment over and above the value declared in their bills of entry/invoices. In similar case, this Tribunal time and again has taken a view that enhancement of the value without proper evidence is not correct and legal. In the case *CC, Calcutta vs. South India Television Pvt.*

Limited (supra), held as under:-

“6. We do not find any merit in this civil appeal for the following reasons. Value is derived from the price. Value is the function of the price. This is the conceptual meaning of value. Under Section 2(41), “value” is defined to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed only in respect of imported goods. There are no rules governing the valuation of export goods. That must be done based on Section 14 itself. In the present case, the Department has charged the respondent-importer alleging mis-declaration regarding the price. There is no allegation of mis-declaration in the context of the description of the goods. In the present case, the allegation is of under-invoicing. The charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Under Section 2(41) of the Customs Act, the word “value” is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the Bill of Entry is the value referred to above and not merely the invoice price. On a plain reading of Section 14(1) and Section 14(1A), it envisages that the value of any goods chargeable to *ad valorem* duty has to be deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1). It is made clear that Section 14(1) and Section 14(1A) are not mutually exclusive. Therefore, the transaction value under Rule 4 must be the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or for offer for sale. Therefore, what has to be seen by the Department is the value or cost of the imported goods at the time of importation, i.e., at the time when the goods reaches the customs barrier. Therefore, the invoice price is not sacrosanct. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the

transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods. Under-valuation has to be proved. If the charge of under-valuation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege under-valuation, it must make detailed inquiries, collect material and also adequate evidence. When under-valuation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving under-valuation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of under-valuation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under-invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. Section 14(1) speaks of "deemed value". Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion.

7. Applying the above tests to the facts of the present case, we find that there is no evidence from the side of the Department showing contemporaneous imports at higher price. On the contrary, the respondent importer has relied upon contemporaneous imports from the same supplier, namely, M/s. Pearl Industrial Company, Hong Kong, which indicates comparable prices of like goods during the same period of importation. This evidence has not been rebutted by the Department. Further, in the present case, the Department has relied upon export declaration made by the foreign supplier in Hong Kong. In this connection, we find that letters were addressed by the Department to the Indian Commission which, in turn, requested detailed investigations to be carried out by Hong Kong Customs Department. The Indian Commission has forwarded the export declarations in original to the Customs Department in India. One such letter is dated 19-9-1996. In the present case, the importer has alleged that the original declarations were with the Department. That certain portions of the originals were not shown to the importer despite the importer calling upon the adjudicating authority to do so. Further, by way of Interlocutory Application No. 4 in the present civil appeal, an application was moved by the importer calling upon the Department to produce the original declaration in the Court. No reply has been filed to the said I.A. till date. In the circumstances, we are of the view that the Department had erred in rejecting the invoice submitted by the importer herein as incorrect. Further, the Department received from the Hong Kong supplier a Fax message dated 22-7-1996. That was produced before the Commissioner. In that message, he had explained that the manufacturer of the impugned goods was getting export rebates and, therefore, it is possible that the manufacturer had over-invoiced the price in order to claim more rebate. The goods were of Chinese origin. In the Fax message it is further stated by the foreign supplier that he was required to show the export value on the higher side in order to claim the

incentives given by his Government. This explanation of the foreign supplier, in the present case, had been accepted by the Commissioner. In his order, the Commissioner has not ruled out over-invoicing of the export value by the foreign supplier in order to obtain incentives from his Government. For the aforesaid reasons, we find no infirmity in the impugned judgment of the Tribunal.

8. Before concluding, we may point out that in the present case at the stage of show cause notice, the Department invoked Rule 8 on the ground that the invoice submitted by the importer was incorrect. In *Eicher Tractors* (supra) this Court observed that Rule 4(1) of the Customs Valuation Rules refers to *the* transaction value. Utilization of the word '*the*' as definite article indicated that what should be accepted as the transaction value for the purpose of assessment under the Customs Act is the price actually paid by the importer for *the* particular transaction, unless it is unacceptable for the reasons set out in Rule 4(2). In the said judgment, it has been further held that, the word 'payable' in Rule 4(1) also refers to the "transaction value" and payability in respect of the transaction envisaged a situation where payment of price stood deferred. Therefore, this decision of the Supreme Court directs the Revenue to decide the validity of the particular value instead of rejecting the transaction value. We wish, however, to clarify that it is still open to the Department based on evidence, to show that the declared price is not the price at which like goods are sold or offered for sale ordinarily, which words occur in Section 14(1). 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."

5. On the issue of market enquiry, for the purpose of value of imported goods, this Tribunal in the case of *Selection Enterprises vs. CC, Chennai* (supra) passed the following order:-

"4. We have given a careful consideration to the submissions made by the appellants and the revenue. The Commissioner (Appeals) has upheld the original order on the ground that the department has followed the correct method in accordance with the valuation rules in enhancing the CIF value of the imported goods. The original authority in para 8 of his order dated 24-1-2002, has stated the manner of arriving at the assessable value of the imported goods. According to him the value declared by the appellants was very low. Hence the same could not be accepted as per rule 4 of the Customs (Valuation) Rules, 1988. Since the goods imported are of various countries origin and brand and no identical imports have been noticed during the relevant period, the value could not be determined under Rule 5 and 6 of the Customs (Valuation) Rules. No data was available for duty paid imports or for condition of value of goods under Rules 7 and 7A. The importer has also failed to furnish the manufacturers inputs in terms of Rule 10A. Hence the values have to be determined under Rule 8 of the Customs (Valuation) Rules. He has further stated that the market enquiries revealed that the MRP value of the imported goods is equal to Rs. 27,89,680/- by working backwards, by allowing a margin of 40% from the wholesaler to the retailer and further 50% margin

from the importer to the wholesaler and by deducting duty element. The total CIF value was fixed at Rs. 8,07,671/- on 22,000 US \$ Rs. (16,739.30) The differential duty was worked out to Rs 65,11,706/- It is seen that the goods imported by appellants are assorted chocolates and are from various countries. Even though the original authority has stated that market enquiries have been made, there is no indication that a copy of the market enquiry made by the department has been furnished to the appellant for his rebuttal or otherwise. The market enquiry report is also not available in the records for our perusal. Simply on the basis of the appellants' acceptance of the enhanced value when his statement was recorded, enhancing the assessable value *without adhering to the principles of natural justice cannot be sustained*. The vague assertion that market enquiries have been made without indicating the details of the same and fixing the duty liability on the importer on the basis of the same cannot be accepted. In view of the above observations we allow the appeal with consequential relief."

The above decision of the Tribunal was upheld by the Hon'ble Apex Court by dismissing the Civil Appeal filed by Commissioner of Customs, Chennai in the case of *Topsia Estates Pvt. Limited vs. CC (Import-Seaport), Chennai* the Tribunal held that merely on the basis of NIDB data, the declared value cannot be enhanced. As regards the DGOV Circular, on the similar and standing order, issued by a Commissionerate, this Tribunal in the case of *Om Drishian International Limited vs. CCE, New Delhi (supra)* passed the following order:-

"3. The dispute in the present appeal relates to the assessable value of the ball bearings. The lower authorities enhanced the value of the bearings based upon the Circular No. S/26-Misc.-2195/2005 VA, dated 24-9-2008 issued by the Commissioner of Customs (Import), Jawaharlal Nehru Customs House, Nhava Sheva. Vide the said Circular, the value of different sizes of Chinese ball bearings was mentioned. Inasmuch as the said Circular was issued on the basis of average cost of raw material in the international market as well as on the basis of inputs provided by various importers, associations of manufacturers and traders, All India ball bearings, merchant associations, the floor prices were fixed accordingly. Having gone through the impugned orders, we find that the Revenue has solely relied upon the said Circular issued by the Commissioner of Customs. There is no other evidence to reject the transaction value. Only provision for fixing certain assessable value for the purpose of assessment is Section 14(2) of the Customs Act, 1962 under which the Central Government by a

notification fixes the tariff values on which the imported goods are to be assessed. Such assessable values cannot be fixed by the assessing officer on their own.”

6. It is further observed that on the same or approximately same price, various consignments were imported which have been accepted by the department. Copies of some of Bills of Entry submitted by the appellants which are placed in the appeal records. Even if price of contemporaneous import to be adopted, as per the above datas, no enhancement can be made. Moreover, in the appellant’s own case, for the same goods, value was disputed. Matter travelled up to Commissioner (Appeals) who vide order No. 122{Gr.II(HK)}/2016 (JNCH)-Appeal-II dated 20.04.2016 allowed the appeal which was accepted by the Revenue as there is no record of challenging the said order by the department.

7. As per our above discussions, in our considered views the enhancement of the value as held by the lower authorities, is not sustainable. Accordingly the impugned order is set-aside and the appeal is allowed.

(Order pronounced in the open court on 04.12.2018)

Raju
Member (Technical)

Ramesh Nair
Member (Judicial)