

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

COURT NO. I

Appeal No. C/11804,12543/2018 -DB

[Arising out of Order-in-Appeal No OIA-MUN-CUSTM-000-APP-457-458-17-18 dated 14.03.2018 and OIA-MUN-CUSTM-000-APP-061-18-19 dated 24.05.2018 passed by Commissioner (Appeal) of Customs, Mundra]

M/s. Sumit Enterprises **: Appellant**
M/s. Liberty Enterprises

vs.

Commissioner of Customs, Mundra **: Respondent**

Appearance:

Shri N.D. George, Advocate for the Appellant
Shri S.N. Gohil, Superintendent (AR) for the Respondent

CORAM:

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

Date of Hearing : 27.11.2018

Date of Decision : 07.12.2018

Final Order No. A/12719-12720 / 2018

Per : Ramesh Nair

The common facts in both the appeals are that the appellants are engaged in the import and trading of ordinary belts (PU Belts). The case of the department is that the appellant undervalued the said imported goods. The details such as B/E, The value, quantity, value declared, value enhanced and differential duty etc. is given below :-

Liberty Enterprises (Table -1)

B/E No & Date	Quantity	Assess-able Value at Rs. 18.58 per pc	Basic duty at 10.00%	CVD at 12%	Edu Cess @ 2%	HSS @ 1.00 %	Addi tional duty @ 4%	Total amount of duty leviable	Duty amount already paid	Amount of differen ce in duty
7286169 05.11.14	132000	2452560	245256	323738	11380	5690	121545	707609	265767	441842
7574383 03.12.14	113400	2106972	210697	278120	9776	4888	104418	607900	188271	419629
7696749 15.12.14	132000	2452560	245256	323738	11380	5690	121545	707609	218801	488808
7798137 24.12.14	132900	2469282	246928	325945	11457	5729	122374	712433	225051	487382
7915836 6.1.15	135000	2508300	250830	331096	11639	5819	124307	723691	228429	495262
Total	942900	11989674	119896	1582637	55632	27816	594189	3459242	1126319	2332923

Sumit Enterprises (Table -1)

S. No	B/E No.	Date	Qty	Declared A.V.	A.V. at Rs. 18.58 per pc	Duty paid	Differen tial duty
1	6788935	17.03. 2014	135000	998082	2508300	287965	435726
2	7012082	09.10. 2014	140700	1106658	2614206	319291	434956
3	7064003	14.10. 2014	135000	1104299	2508300	318610	405081
4	7420776	18.11. 2014	136500	1024061	2536170	295460	436272
5	7627985	08.12. 2014	126000	954450	2341080	275376	400069
6	7817103	26.06. 2014	135000	1044714	2508300	301419	422272
Total			808200	6232264	15016356	1789121	2534376

Sumit Enterprises (Table -2)

S. No	B/E No.	Date	Qty	Declared A.V.	A.V. at Rs. 18.58 per pc	Duty paid	Differential duty
1	7911219	06.01. 2015	134700	1041576	2502726	300514	421569

The Customs Department on the basis of DGOV Circular No. Val/Tech/25/2013 dated 07.08.2013 which was issued for suspected under valuation in import of PU Belts, investigated the case and applying the NIDB data, enhanced the value of the aforesaid imported goods and demanded differential duty. For confirmation of demand, value of contemporaneous imports and market survey were relied upon. Being aggrieved by the impugned orders, the appellant filed the present appeals.

2. Shri N.D. George, Id. Counsel appearing on behalf of both the appellants submits that an identical case which was made out in the same investigation, in respect of the same goods, was extensively heard in the case of M/s. SRR International in appeal No. C/12341/2018-DB. He adopted the same arguments made in respect of appeal of SRR International in the present appeals also. He also made written submission which was taken on record.

3. Shri S.N. Gohil, Id. Superintendent (AR) appearing on behalf of the Revenue reiterated the findings of the impugned orders.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that Appeal No. C/12341/2018-DB has been disposed of vide order No. A/12702/2018 dated 04.12.2018. On perusal of the appeal papers, we find that the goods in all the three appeals i.e. M/s. SRR International, M/s. Liberty Enterprises and M/s. Sumit Enterprises are identical. The facts such as, reliance on contemporaneous imports, market survey, DGOV Circular, identical products were relied upon in all the three cases. It is also observed that the price of the goods declared by all the three parties are more or less same even though minor variation is there. Supplier in all the three cases is also the same party i.e. M/s. Wenzhou Yuanqiao Leather Goods Company Limited, China. We have dealt with identical issue in the case of SRR International and allowed the appeal of the said party vide order dated 04.12.2018 which is reproduced below:-

“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.

5. From the above order, it can be seen that the goods in the present two appeals as well as in the appeal disposed by the above mentioned order, are absolutely identical. Therefore, there is no need to give the findings again on the identical facts. Therefore, following the ratio of the decision in the case of M/s. SRR International (supra), we are of the considered view that enhancement of the value of imported goods and consequential differential duty demand is not legal and correct. Accordingly, the impugned orders are set-aside and appeals are allowed.

*(Order pronounced in the open court on **07.12.2018**)*

Raju
Member (Technical)

Ramesh Nair
Member (Judicial)