

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

REGIONAL BENCH- COURT NO. 3

CUSTOMS Appeal No. 10318 of 2015-DB

(Arising out of KDL-CUSTM-000-APP-439-14-15 Dated-31/12/2014 passed by Commissioner of CUSTOMS- KANDALA)

Chakra Special Trading Co. Pvt Ltd
301-A Wing, Raj Sagar, Kandar Pada, Dahisar (W)
Mumbai, Maharashtra-400 068

.....Appellant

VERSUS

C.C.-Kandla
Custom House near balaji Temple
Kandla, Gujarat

.....Respondent

APPEARANCE:

Shri Prabhat Kumar & Shri. Rishabh Mishra, Advocates for the Appellant
Shri Ghanshyam Soni, Authorised Representative for the Respondent

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

Final Order No. A/ 10247 /2022

DATE OF HEARING: 12.01.2022

DATE OF DECISION:14.03.2022

RAMESH NAIR

The present appeal has been filed by the appellant against the impugned Order-in-Appeal No. KDL-CUSTM-000-APP-439-14-15 dated 31.12.2014 passed by the learned Commissioner (Appeals) Ahmedabad. The brief facts of the case are that the appellant has entered into a contract dated 28.09.1995 with their supplier, namely, M/s Special Trading Co., USA for supply of scrap, which is in the form of used rails. Consequently, the appellant imported the scrap in the year 1996 and declared the value at a price of USD \$ 110 PMT. However, the consignment has not been cleared yet inasmuch as there was intense litigation going on between the appellant and some foreign entities claiming right over the cargo and simultaneously investigation was also initiated by the Directorate of Revenue Intelligence (DRI) almost after 10 years after the arrival of the cargo i.e. in the year 2005 and cargo was

detained since 2005 till date. The following are the important facts in brief highlighting the litigation happened between the parties and investigation conducted by the DRI.

(a) Multiple litigation started in the year 1996 itself, firstly, at Mumbai by one M/s. 21st Century and secondly, at Civil Court Gandhidham by one M/s. Eisenberg and Company, USA who claimed to be financier of the exporter M/s. Special Trading Company. In the Civil Suit at Gandhidham, one injunction order was operative and goods could not be cleared due to the restraining order of the court. Ultimately, the civil suit was dismissed in the year 2005.

(b) In 2005, again, Bill of Entries were filed and even permission for warehousing was given on 28.09.2005. But before goods could be delivered to the warehouse, DRI Unit Gandhidham seized the cargo and handed over the same to traffic inspector Kandla Port Trust on the proper supradnama. The panchnama and supradnama clearly show that goods were never delivered to the warehouse and remained with the DRI Officials and with the officials of the Kandla Port Trust.

(c) The supradnama clearly says that 12900 MTS were detained by panchnama dated 10.10.2005 and handed over to the port officials for safe custody.

(d) Once again, a second round of civil litigation started in the year 2006 and again a restraining order was passed by the civil court Gandhidham. Ultimately, the second suit came to be dismissed by an order by the special judge Gandhidham on 31.10.2012.

(e) Though a first appeal has been preferred but the Hon'ble High Court of Gujarat refused to grant any injunction order till date and rather vide order dated 28.02.2014 custom was asked to assess the remaining 13 bills of entry and pass appropriate assessment order.

1.1 The learned Assessing Officer passed an assessment order dated

28.03.2014 in compliance of the aforementioned order passed by the Hon'ble High Court. In the assessment order, the learned Assessing Officer has classified the goods under Chapter 7302 of the CETA, value of the goods was also enhanced to USD \$ 176 PMT and interest was also levied in terms of Section 47 and 61 of the Customs Act. Being aggrieved on the issue of classification, valuation and interest, the appellant filed the appeal before the learned Commissioner (Appeals), who rejected the same vide his impugned order dated 31.12.2014. Being aggrieved, the appellant is before this Hon'ble Tribunal.

2. Shri Prabhat Kumar, learned Counsel appeared on behalf of the appellant and submitted that the impugned order dated 31.12.2014 and assessment order dated 28.03.2014 is improper, bad in law and suffers from incurable defects. He submitted that three issues are involved in the present appeal, which are as follow:

2.1 Classification of goods:

2.1.1 He submits that the learned Adjudicating Authority erred in classifying the goods under CTH 7302 instead of CTH 7204 (FERROUS WASTE AND SCRAP; REMELTING SCRAP INGOTS OF IRON OR STEEL). It is submitted that the appellant has imported old and used rusty rails for melting and therefore the same was described as Heavy Melting Scrap, which can also be appreciated from the contract entered with the buyer and the certificate issued by M/s SGS India Limited at the load port. It is further submitted that, admittedly, the imported cargo/goods are nothing but used rail as heavy meltingscrap that can be seen from the contract which described the item as "Used Rail HMS". That there was an examination order to check the cargo and it classified the goods as rusted, re-rollable rails/rail of iron and steel of varying length starting from 1 m length to 12.5 m. He further submits that classification in the present case should be under CTH 7204 and not under

chapter 73 as has been done in the impugned order. The appellant also relies on following documents to establish that the cargo is Used Rail as heavy melting scrap:

- a) Advice of status by City National Bank USA dated 12.10.1996; and
- b) SGS survey report/ certificate dated 22.04.1996.

It is further submitted that no evidence has been led by the department in the present case. Moreover, the evidence led by the appellant has not been discarded by the revenue. Therefore, the classification claimed by the appellant be accepted.

2.1.2 He submits that the issue is no longer res-integra and covered by the judgment of this Hon'ble Tribunal in favour of the appellant in the case of **Hinduja Foundry Limited vs. Commissioner of Customs, Chennai [2013 (288) E.L.T. 571 (Tri. Chennai)]**. The learned Counsel heavily relied upon the aforesaid judgement passed by this Hon'ble Tribunal.

2.1.3 He vehemently submits that onus to classify the goods under particular heading is on the department and the same has not been discharged by the department in the present case. He relied upon following judgements to support this argument:

- (a) **Hindustan Ferodo Ltd. Vs CCE, Bombay, reported in, 1997 (89) ELT 16 (SC)**; and
- (b) **Parle Agro (P) Ltd. Vs Commr. Of Commercial Taxes, Trivandrum, 2017 (362) ELT 113 (SC)**.

2.1.4 He submits that, in the present case also, there is no evidence led by the department and the onus to classify the product under Chapter Heading 7302 has not been discharged by the department. In view of the

settled principles of law, the classification claimed by the appellant under Chapter Heading 7204 be accepted.

2.1.5 He submits that the impugned order merely relies upon the Board Circular No. 8/2006 dated 17.01.2006 without appreciating that the aforesaid circular has been considered by this Hon'ble Tribunal in the case of **Hinduja Foundry Limited(supra)** while deciding the identical issue in favour of assessee. He therefore submits that the correct classification of imported goods would be covered under Chapter Heading 7204.

2.2 Valuation of Goods:

2.2.1 He submits that in the impugned order, the valuation of the goods has been enhanced to 176.58 USD PMT for the reasons as follows:

- a) According to investigation report of DRI Ahmedabad, the assessable value of the goods in 176.58 USD/METRIC TONNE.
- b) That the appellant has shown willingness in the high court of Gujarat to deposit security at the rate of USD 200 PMT.

2.2.2 He submits that, so far as the grounds for enhancing the value are concerned, both grounds do not have any substance inasmuch as DRI investigation is not conclusive. This is for the reason that no show-cause notice was issued based upon the investigation of the DRI till date. The DRI investigation was not concluded and only some observation has been made during the course of investigation. The investigation relied upon one invoice no. 4433 dated 26.04.1996 by one ALL-RAD VERTRIESS in which the price at the rate of USD 176.58 is indicated. The invoice itself is not reliable inasmuch as it is not related to the cargo in question and no investigation has been done by the DRI to link this invoice with the cargo in question. On numerous occasions, the appellant has explained that the aforesaid invoice has nothing

to do with the cargo in question and as such it cannot be relied upon. It is therefore submitted that no reliance can be placed on the said investigation report of the DRI which is half baked and inconclusive.

2.2.3 He further submits that no evidence has been produced by the department for enhancing the goods of the cargo. It is further submitted that it is well settled law that value of the goods cannot be enhanced merely on the basis of willingness by the appellant in the proceedings before High Court of Gujarat to deposit security at the rate of USD 200 PMT in order to get goods released.

2.2.4 He submits that the value of goods has been rejected by applying Rule 10A of the Customs Valuation Rules and re-determined by applying Rule 3(i) read with Rule 4(i) of the Customs Valuation Rules, without first rejecting the value under Section 14 of the Customs Act, 1962. It is well settled law that department has to first reject the transaction value under Section 14 of the Customs Act, 1962 with cogent evidence and thereafter the department has to apply the valuation sequentially. In the present case, the said procedure has not been followed. Therefore, on this ground alone, the value declared by the appellant at the rate of 110 USD PMT has to be accepted. He relied upon the judgement of the Hon'ble Supreme Court of India in the case of **Eicher Tractors Ltd. Vs. Commissioner of Customs, Mumbai, reported in, 2000 (122) ELT 321 (SC)** and **CCE&ST, Noida Vs. Sanjivani Non-Ferrous Trading Pvt. Ltd., reported in, 2019 (365) ELT 3 (SC)**, to support its proposition of law.

2.2.5 He further submits that the imported goods are heavy melting scrap, which cannot be compared with other goods. It is submitted that no contemporaneous data has been relied upon in the present case. It is further

submitted there is neither allegation nor any finding nor any evidence to show any extra financial flow back from the appellant to the overseas buyer, which is also one of the pre-requisite to prove undervaluation of goods.

2.2.6 He submits that, it is well settled law that the burden to prove undervaluation is on the department. That the Hon'ble Supreme Court of India in the case of ***Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd., 2007 (214) ELT 3 (SC)*** has held that the casting suspicion on the invoice produced by the appellant is not sufficient to reject the transaction value of the imported goods and that undervaluation of the imported goods has to be proved by the department. It has further been held by the Hon'ble Supreme Court that, in case the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the appellant. The appellant is relying upon para 6 of the aforesaid decision. It is therefore respectfully submitted that, the burden to prove undervaluation was squarely upon the Department and that Department having failed to discharge the said onus without adducing any evidence, therefore value cannot be enhanced without any basis. It is further submitted that in the present case, the department has not made any suspicion on the invoice value submitted by the appellant. It is therefore submitted that value declared by the appellant be accepted.

2.3 **Demand of Applicable Interest :**

2.3.1 He submits that in the assessment order, interest has been asked as per sub clause 2(ii) of Section 61 of the Customs Act without realizing the fact that the goods were never warehoused and no order for clearance for home consumption in terms of Section 47 was issued. He submitted that the term 'warehoused goods' is defined under Section 2 (44) of the Customs Act, 1962 as 'goods deposited in a warehouse'. He further says that Section 61 further indicates that the warehoused goods have to remain in the warehouse beyond a period of ninety days, for the interest to be chargeable. The Sub-

section 2 (ii) of Section 61 and the definition of the term 'warehoused goods' indicates that when the goods deposited in a warehouse remain warehoused beyond a period of ninety days, then the interest starts accruing. Therefore, demand of interest either Under Section 61, 15 or 47 of the Customs Act is not at all sustainable. In fact, goods were never warehoused is an admitted fact and the same can be ascertained from the DRI letter dated 31.08.2012 in which the appellant was informed that seizure of the goods was made on 10.10.2005 and the cargo was handed over to Kandla Port Trust under supradnama of the same date.

2.3.2 He further relied upon the judgement passed by the Hon'ble Supreme Court of India in the case of **PRATIBHA PROCESSORS & ORS. Vs. UNION OF INDIA & ORS., in CIVIL APPEAL NOS. 13097-13100 of 1996**, wherein it was held that *"the duty payable would be the duty in force on the date of clearance of goods from the warehouse and not the one in force on the date of import or on the date of warehousing and the liability to pay interest arises only after the expiry of the period of 15 days from the date of demand notice."* He submits that in the present appeal, the goods were not warehoused so, the interest under section 61(2)(ii) would not be applicable. He also refers to Section 47(2) of the Customs Act.

2.3.3 He submits that the learned Assessing Officer passed assessment order on 28-03-2014 in respect of all the 13 bills of entry filed by the appellant as per directions of Hon'ble Gujarat High Court vide order dated 28/02/2014 in Civil Application No. 7653 of 2013. This means that bill of entry is returned for payment of duty to the Appellant was on 28-03-2014. Any kind of interest levied under section 15, 47(2) or 61 (2) (ii) is applicable only after the date of return of bill of entry i.e. 28-03-2014. The Appellant is not liable to pay interest/penalty levied before the date of return of bills of entry i.e. 28-03-2014 as levied under the provisions of Section 15(1), 47, 58, 61 or 72(1) of the Customs Act, in the assessment

order dated 28-03-2014. The goods are not eligible to duty at that time. Calculation of interest is always on the principal amount. The "interest" payable under Section 61(2) of the Act is a mere "accessory" of the principal and if the principal is not recoverable/payable, so is the interest on it. The interest provided under section 61(2) has no independent or separate existence. This is a basic principle based on common sense and also flowing from the language of Section 61(2) of the Act. Payment of interest under section 61(2) is solely dependent upon the eligibility or factual liability to pay the principal amount of levied customs. Once the duty is found payable on such improperly cleared goods, then under section 72 read with section 61 of the Customs Act, the duty is recoverable with interest. If goods are not assessed by the department then one cannot be saddled with the liability to pay interest on a non-existing duty. Payment of interest under section 61(2) is solely dependent upon the eligibility or factual liability to pay the principal amount. Section 61(2) will only apply to the goods which are kept in warehouse beyond the period specified in section 61(1). In the present appeal the original assessment order was passed on 28-03-2014 for the assessment of the goods and in the assessment, the department has levied interest @ 15% for 3221 days from 27.12.2005 to 17.07.2013 which is not permissible. The department cannot and may not charge interest before the duration of return of bill of entry. He also relied upon the affidavit of the custom before the High Court of Gujarat at Ahmedabad in SCA No. 21324/2005. Even the DRI report which has been much relied upon in the assessment order has clearly stipulated that goods were not physically removed/deposited in the warehouse and were still in the custody of Kandla Port Trust. He submits that the rate of interest has been asked by invoking Section 61 and 47 of the Customs act, without considering the fact that the goods were never warehoused and even no order was passed for clearing the same for home consumption, therefore, the demand of interest is not

sustainable. He therefore prays that impugned order be set aside and the appeal filed by the appellant be allowed.

3. Sh. Ghanshyam Soni, the learned Joint Commissioner (AR) appearing on behalf of the revenue reiterated the findings of the impugned order. He submits that goods have been rightly classified under Chapter Heading 7302 by relying upon the circular issued by the Board. He further submits that the value of the goods has been rightly enhanced and interest has been rightly levied. He, therefore, prays for dismissal of appeal.

4. We have carefully considered the submissions made by both the sides and perused the records. The issue arises for our consideration are as follows:-

- (i) Whether the goods imported by the appellant would be classifiable under Chapter Heading 7302 as alleged by revenue or Chapter Heading 7204 as declared by the appellant?
- (ii) Whether the value of goods is liable to be enhanced from USD 110 PMT to USD 176.58 PMT as alleged by revenue?
- (iii) Whether interest has been rightly levied by the learned Assessing Officer?

4.1 As regards to classification of goods, we find that the appellant has relied upon the survey report/ certificate dated 22.04.1996 issued by M/s SGS India Limited at the land port; Advice of status by City National Bank USA dated 12.10.1996 and the contract entered between the appellant and his foreign buyer, which show that goods imported are Used Rail Heavy Melting Scrap. On the other hand, no evidence has been led by the department in order to classify the goods under Chapter Heading 7302. We also find that the lower authorities have discarded the evidence led by the

appellant by merely relying upon the Circular 17.01.2006 classified the goods under Chapter 7302. Firstly, this circular was quashed by the Hon'ble High Court of Madras in the case of **Madras Steel Re-Rollers Association Vs Union of India, reported in, 2007 (217) ELT 167 (Mad.)** which was appealed against by the revenue before the Hon'ble Supreme Court wherein the Apex Court held that in the cases of classification of used rails the authority needs to decide the matter exercising their own independent mind. With this observation of the Hon'ble Supreme Court, the board circular cannot be applied straightway without verifying the facts of each case. Therefore, the revenue decided the classification solely on the basis of circular dated 17.01.2006 is nor correct and legal. The relevant order of the Hon'ble Supreme Court is re-produced below:

"7. Considering the facts and circumstances of the case and relying on the aforesaid decision of this Court, we hold that the Assessing Authorities as well as the Appellate and the Revisional Authorities are creatures of the Act and they perform the functions of the Quasi judicial Authorities and the orders passed by them are also Quasi judicial Orders. Therefore, such orders are required to be passed by exercising independent mind and without impartiality and while doing so, such Authorities are required to consider various evidences made available to them. The Circulars issued by the Department which are in the nature of guidance to such Authorities and, therefore the contents of such circulars could also be considered as evidence available before them. On the basis of all the materials available on record including the evidence, the Assessing Authority has come to an independent finding on its own and therefore, in our considered opinion, the matter can now be allowed to be determined by the Assessing Authority in the light of the aforesaid observations."

As per the facts of the present case, it is undisputed that the report certifies that the goods in question are rusted, re-rollable rails/rail of iron and steel of varying length starting from 1 m length to 12.5 m. Due to the varying length, it establishes that the rails of different length are meant for remelting. We also note that similar issue came before this Hon'ble Tribunal in the case of **Hinduja Foundry Limited vs. Commissioner of Customs, Chennai [2013 (288) E.L.T. 571 (Tri. Chennai)]**, wherein the learned Tribunal after considering the circular dated 17.01.2006 decided the issue in favour of assessee by holding as under:-

"25. So we come to the conclusion that there is no reason to deny the classification claimed by the appellant for the goods to be under Heading 72.04 or to consider the goods not to be "Melting scrap of Iron and Steel" as described in Notification 21/2002-Cus. (S. No. 200). It follows that confiscation of the goods and penalty imposed in the impugned order becomes not maintainable."

4.2 We find that it is well settled law that burden to classify the goods under particular heading is on the department. In the present case, the department has not discharged their burden to prove their alleged classification of goods by adducing cogent and tangible evidence.

We further find that goods were in custody of the department and were also investigated by the DRI, however, still no evidence has been led by the department. Further, we also take note that the Hon'ble Supreme Court of India in the following cases :-

i. **Hindustan Ferodo Ltd. Vs CCE, Bombay, reported in, 1997**

(89) ELT 16 (SC) has held as follow:

"3. It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."

ii. **Parle Agro (P) Ltd. Vs Commr. Of Commercial Taxes,**

Trivandrum, 2017 (362) ELT 113 (SC) has held as under:

"61. It is further relevant to note that Revenue has not filed any material on the record either before the Clarification Authority or before the High Court in support of its view that product is covered under Section 6(1)(a) that is 'aerated branded soft drink'. This Court in several cases has observed that onus to prove that particular goods fall in particular tariff item is on the Revenue."

Therefore, relying on the above mentioned judgment we hold that the impugned goods are rightly classifiable under Chapter Heading 7204 as "USED RAIL HEAVY MELTING SCRAP."

4.3 As regards to valuation of goods, we find that the value of goods

has been rejected by the department by straight away applying Rule 10A of the Customs Valuation Rules and re-determined by applying Rule 3(i) read with Rule 4(i) of the Customs Valuation Rules, without first rejecting the value under Section 14 of the Customs Act, 1962. We note that it is well settled law that department has to first reject the transaction value under Section 14 of the Customs Act, 1962 with cogent evidence and thereafter the department has to apply the valuation rules sequentially. The Hon'ble Supreme Court in the case of **Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd., 2007 (214) ELT 3 (SC)** has 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."

Further, recently, the Hon'ble Supreme Court of India in the case of **CCE&ST, Noida Vs. Sanjivani Non-Ferrous Trading Pvt. Ltd., reported in, 2019 (365) ELT 3 (SC)**, has held as under:

"10. *The law, thus, is clear. As per Sections 14(1) and 14(1A), the value of any goods chargeable to ad valorem duty is deemed to be the price as referred to in that provision. Section 14(1) is a deeming provision as it talks of 'deemed value' of such goods. Therefore, normally, the Assessing Officer is supposed to act on the basis of price which is actually paid and treat the same as assessable value/transaction value of the goods. This, ordinarily, is the course of action which needs to be followed by the Assessing Officer. This principle of arriving at transaction value to be the assessable value applies. That is also the effect of Rule 3(1) and Rule 4(1) of the Customs Valuation Rules, namely, the adjudicating authority is bound to accept price actually paid or payable for goods as the transaction value. Exceptions are, however, carved out and enumerated in Rule 4(2). As per that provision, the transaction value mentioned in the Bills of Entry can be discarded in case it is found that there are any imports of identical goods or similar goods at a higher price at around the same time or if the buyers and sellers are related to each other. In order to invoke such a provision it is incumbent upon the Assessing Officer to give reasons as to why the transaction value declared in the Bills of Entry was being rejected; to establish that the price is not the sole consideration; and to give the reasons supported by material on the basis of which the Assessing Officer arrives at his own assessable value."*

4.4 In the present case, the department has enhanced the value on the basis of one invoice no. 4433 dated 26.04.1996 by one ALL-RAD VERTRIESS in which the goods are sold at the rate of USD 176.58 . We find that

transaction value cannot be rejected merely on the basis of one invoice, which even the department has failed to link with the present impugned consignments. We also find that the investigation conducted by the DRI is inconclusive and hence cannot be held against the appellant inasmuch there is no tangible evidence that has been adduced by the DRI and neither a show cause notice has been issued on the basis of said inconclusive investigation of DRI. We also find that it is well settled law that value of the goods cannot be enhanced merely on the basis of willingness shown by the appellant in the proceedings before High Court of Gujarat to deposit security at the rate of USD 200 PMT in order to get goods released for the reason that such release is deemed to be provisional and for that the Hon'ble High Court put a condition of security deposit which does amount to acceptance of the value proposed to be enhanced by the assessing officer.

4.5 It is settled law that the price of contemporaneous goods cannot be applied invariably in each and every case. Before applying the enhanced comparable price varies circumstances need to be verified such as the quality of goods, quantity of goods, country of origin etc. In the present case, the revenue has neither carried out any investigation on this aspect nor brought any such data of the import related to invoice no. 4433 dated 26.04.1996 which was the sole reliance for enhancing the value. This issue has been considered by the Hon'ble Supreme Court in the case of **Eicher Tractors Ltd. Vs. Commissioner of Customs, Mumbai (supra)**. The relevant is reproduced below:

"22. In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a mis-description of the goods imported as was the case in Padia Sales Corporation. It is also not the respondent's case that the particular import fell within any of the situations enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list is invariably proof of the transaction value. This was erroneous and could not be a reason by itself to reject the transaction value. A discount is a commercially acceptable measure, which may be resorted to by a vendor

for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case discount up to 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it was a one time sale of 5 year old stock. When a discount is permissible commercially, and there is nothing to show that the same would not have been offered to any one else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1)."

4.6 Further as discussed in the case of **Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd. (supra)** we find that onus is on the department to prove undervaluation of goods, which has not been discharged by the department. We, therefore hold that value of goods cannot be enhanced and value declared by the appellant at USD 110 PMT is to be accepted.

4.6 As regards to demand of interest, the appellant's contention is that the goods were never warehoused, therefore, interest cannot be levied. We find from the letter dated 31.08.2012 issued by the DRI informing the appellant that seizure of the goods was made on 10.10.2005 and the cargo was handed over to Kandla Port Trust under supradnama of the same date. Even the DRI report which has been much relied upon in the assessment order has clearly stipulated that goods were not physically removed/deposited in the warehouse and were still in the custody of Kandla Port Trust. Therefore, we hold that goods were never warehoused by the department. We also find that the assessment order has been passed after the directions issued by the Hon'ble High Court of Gujarat. After going through the relevant provisions of the Act i.e. Section 15(1), 47, 58, 61 or 72(1) of the Customs Act, we hold that appellant is not liable to pay interest for the period prior to passing of assessment order on 28.03.2014.

4.7 It is pertinent to note that it is the department who has not assessed

the Bills of Entry due to the various reasons such as litigation by the various parties in connection with the supplies, detention of goods by the DRI. The assessment was admittedly done by the department on the direction of the Hon'ble High Court vide order dated 28.02.2104. Therefore, the assessment was admittedly done on 28.03.2014. The due date for payment of duty is from the date of assessment of Bills of Entry in terms of Section 47 of the Customs Act, Therefore, it at all there is any liability of interest, it should start from the date of assessment of Bills of Entry i.e. 28.03.2014. Accordingly, in the facts of the present case, demand of interest is not sustainable for the period prior to assessment of Bills of Entry which has taken place on 28.03.2014.

5. In view of the above discussion, we hold as under:

- a) The impugned goods are classifiable under Chapter Heading 7204;
- b) The value of goods declared by the appellant USD 110 PMT is held to be correct; and
- c) Demand of Interest as levied in the impugned order [for the period prior to passing of assessment order on 28.03.2014] is set aside.

6. In view of the aforesaid discussion and observations, the impugned order is set aside and the appeal filed by the appellant is allowed in the above terms with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 14.03.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)