CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

CustomsAppeal No.10817 of 2021
(Arising Out of OIA-KDL-CUSTOM-000-APP-014-18-19dated 21.06.2019Passed by Commissioner of Customs (Appeals) -Ahmedabad-)

Macklow International Inc **...Appellant**
L-528A, Street No. 15, Delhi
New Delhi-110035

VERSUS

C.C. –Kandla **...Respondent**
Custom House, Near Balaji Temple
Kandla - Gujarat

APPEARANCE:
Shri Vikas Mehta, Consultant appeared for the Appellant
Shri A.R. Kanani, Superintendent (Authorized Representative) for the Respondent

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

Final Order No.__ 12011 /2024

DATE OF HEARING: 25.06.2024
DATE OF DECISION: 11.09.2024

RAMESH NAIR

The brief fact of the case is that the appellant had filed warehousing Bill of entry No. 1019538 dated 01.12.2017 with Kandla, SEZ for clearance of different types of whey proteins. ThegoodswereclearedfromSEZtoDTAunderBillofentryNo.2003411dated04.04.2018. On 23.02.2018, goods were placed under seizure on the ground of undervaluation by comparing different warehousing bills of entry filed between 16.09.2017 to 16.11.2017. The appellant for the purpose of clearance of goods paid the duty as per the enhancement value and cleared the goods. The appellant also waived the show cause notice on the ground that they paid the duty however the adjudication order was passed ordering enhancement of the value, confiscation of goods under Section 111(m) and imposition of penalty under Section 112 on the ground of mis-declaration of value. The appellant paid the differential duty, fine and penalty under protest and filed appeal before the Commissioner (Appeals), who upheld the order-in-original, therefore, present appeal is before this Tribunal.

2. Shri Vikas Mehta, learned consultant appearing on behalf of the

appellant submits that as per para 4(iii) of Instruction No. 6 dated 03.08.2006 issued by Ministry of Commerce & Industry, Government of India, New Delhi, at the time import of goods into the SEZ, the assessment of bill of entry shall be on the basis of the value declared by the SEZ units. However when the goods were cleared in the domestic market, then the assessment of the goods will be as is being done in the case of import of goods for home consumption. However, in this case, the aforesaid instructions have not been followed and goods have been assessed on the basis of NIDB data of 2017 whereas DTA clearance in this case took place in 2018. On this basis, it is submitted that value enhancement being in breach of the Instructions of Government of India, is not tenable in the eyes of law. He further submits that except the reliance of NIDB data, there is no other evidence of under valuation such as invoice of the supplier is manipulated or the differential value has been paid to the supplier by any other means therefore there is no malafide on the part of the appellant, accordingly, there isno basis of enhancement of the value, confiscation under Section 111(m) and imposition of penalty under Section 112 of the Customs Act, 1962. He further submits that with regard to imposition of fine and penalty on the ground of mis-declaration of value and hence confiscation under Section 111(m) of Customs Act, 1962, Hon'ble Tribunal has held in case of Shivkumar S. Dubey vs Commissioner of Customs (Adjudication), Mumbai reported as 2014 (308) ELT 170 (Tri. – Mumbai) that allegation of undervaluation is not sustainable when value is enhanced on the basis of NIDB data.

3. Shri A.R. Kanani, Learned Superintendent (Authorized Representative) appearing for the revenue, reiterates the finding of the impugned order.

4. We have considered the submission made by both the sides and perused the records.

5. We find that the Revenue has enhanced the value in respect of the goods warehoused in Kandla Special Economic Zone on the basis of NIDB data. It is admitted fact that the NIDB data is of 2017 whereas the DTA clearance in this case was taken place in 2018 therefore, since the import under NIDB data and in the present case on a different time, the NIDB data cannot be applied straightaway.

Moreover it is observed that there is absolutely no evidence with regard to the allegation of undervaluation such as any manipulation in the invoice issued by the appellant from their SEZ unit or there is any flow back of consideration from the buyer of the goods, therefore, in these facts the enhancement of value is baseless and on assumption. Therefore, we are of the view that the department could not establish the case of undervaluation against the appellant. As regard, the redemption fine and penalty imposed on the appellant, we find that the value declared in the bill of entry as per the invoice since there is no other material adduced by the revenue, no malafide intention can be attributed to the appellant that there was intentionally undervalued the goods. In such case, no fine and penalty can be imposed. The appellant have relied upon the judgment in the case of Shivkumar S. Dubey vs Commissioner of Customs (Adjudication), Mumbai reported as 2014 (308) ELT 170 (Tri. – Mumbai), the ratio of the said case is directly applicable to the present case. The said judgment is reproduced below:

> "The appellant is in appeal against the impugned order wherein a penalty of Rs. 8,00,000/- has been imposed on them under Sections 112(a) and 114AA of the Customs Act, 1962 for contravention of the provisions of Section 111(d) and 111(m) of the said Act.
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> **2.**Brief facts of the case are that the appellant is a CHA and it has been alleged against them that the appellant has indulged in the activity of arranging IEC of some other persons for unauthorized/illegal imports of toiletries, paraffin wax, tiles and fabrics by mis-declaring the value of the goods. Therefore, it was alleged that the appellant has violated the provisions of Section 111(d) and 111(m) of the Customs Act. Adjudication took place and a penalty of Rs. 8,00,000/- has been imposed on the appellant for violation of the provisions under Section 111(d) and 111(m) of the Act. Aggrieved by the said order, the appellant is before me.
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> **3.**Heard both sides.
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> **4.**The learned Counsel appearing for the appellant submits that the provisions of Section 111(d) and 111(m) of the Act do not apply to the facts of this case as the impugned goods are freely importable and there is no restriction under the Customs Act to import the said goods. As Section 111(d) prohibits importing of any restricted or prohibited goods, therefore, the said provisions do not apply to the facts of this case. He further submits that the Section 111(m) of the Act deals with the mis-declaration of the value of the imported goods. In this case, while assessing the goods, the appraiser loaded the value to the tune of 52% on the basis of NIDB data available with them. Therefore, the allegation of mis-declaration of the value is also not sustainable. Accordingly, penalty on the appellant is not warranted.
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> **5.**On the other hand the learned AR appearing for the Revenue drew my intention to the various statements of the appellant as well as co-noticees wherein it has been admitted that the appellant has used the IEC of other persons for importing the impugned goods. Therefore, the goods are liable for confiscation and accordingly, penalty has been rightly imposed on the appellant.
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> **6.**Considered the submissions and perused the records.

> **7.**On perusal of the records, I find that the allegation has to be proved by the adjudicating authority that the appellant has violated the provisions of the Section 111(d) and 111(m) of the Act. Section 111(d) of the Act deals with the provisions of imports of prohibited/restricted goods. Admittedly, in this case the impugned goods are freely importable therefore, I hold that the appellant had not violated the provisions of Section 111(d) of the Act. Further I find that while assessing the goods, 52% of the value has been loaded on the basis of NIDB data therefore, the allegation of undervaluation of the goods is not sustainable. Accordingly, the provisions of Section 111(m) is also not violated. As the allegations held against the appellant are not sustainable therefore, penalty on the appellant is not warranted. Accordingly, the impugned order quo imposing penalty on the appellant is set aside. The appeal is allowed with consequential relief, if any."

6. In view of the above judgment coupled with observation made herein above, we are of the view that the impugned order is not sustainable. Hence, the same is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 11.09.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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