

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 108 of 2012

[Arising out of OIA-18-19-2011-CUS-COMMR-A—AHD dated 29/02/2012 passed by
Commissioner of CUSTOMS-AHMEDABAD]

West Wing Infrastructures Private Limited

.....Appellant

130, Kalpna Complex, Near Memnagar Fire Station,
Navrangpura, Ahmedabad,
Gujarat

VERSUS

C.C.-Ahmedabad

.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi
Gujarat- 396191

WITH

CUSTOM Appeal No. 318 of 2012

[Arising out of OIA-18-19-2011-CUS-COMMR-A—AHD dated 29/02/2012 passed by
Commissioner of CUSTOMS-AHMEDABAD]

Kalpesh Dhulabhai Prajapati

.....Appellant

Director, West Wing Infrastructures P Ltd.,
130, Kalpna Complex,
Near Memnagar Fire Station, Navrangpura,
Ahmedabad,
Gujarat

VERSUS

C.C.-Ahmedabad

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

APPEARANCE:

Shri Shyamsunder Takalkar , G.M for the Appellant
Shri G. Kirupanandan, Superintendent (Authorized Representative) for the
Respondent

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

FINAL ORDER NO.A / 11298-11299 /2022

DATE OF HEARING:21.10.2022

DATE OF DECISION:27.10.2022

RAMESH NAIR

The brief facts of the case are that the appellant have imported furniture from China. On the intelligence gathered by the DRI officers they have conducted detail investigation. As per outcome, it was found that under a systematic modus operandi, the appellant in collusion with the Chinese counterpart have undervalued the furniture to the extent of 17% and the undervalued amount have been transacted through hawala. Therefore, there was a clear admission of under valuation of the imported goods. Accordingly, the Adjudicating Authority passed the following order:

"(a) I reject the declared assessable value of the goods imported under B/E No.237699 dated 30.11.2010 as mentioned supra and I re-determine the value to Rs.17,90,422/- (Seventeen Lakhs Ninety Thousand Four Hundred Twenty Two only) as already in terms of Section 14 of the Customs Act, 1962 read with Rule 9 of Customs Valuation (determination of price of imported goods) Rules, 2007 and the B/E be finally assessed to duty with an assessable value of Rs 17,90,422

(b) I order to confiscate the consignment imported under B/E No. 2376990 dated 30.11.2010 valued at Rs 17.90.422/- (re-determined value). under Section 111(m) of the Customs Act, 1962. The said goods are not physically available for confiscation, however as the same were cleared provisionally against a bond, I impose redemption fine of Rs. 8,00,000/ (Rupees Eight Lakhs only) on M/s. West Wing Infrastructures Pvt. Ltd., Ahmedabad in lieu of confiscation under Section 125 of the Customs Act, 1962.

(c) I order to recover the differential duty amounting to Rs. 3,08,111/ (Rupees Three Lakhs Eight Thousand One Hundred Eleven only) as discussed at para 15.1 of the SCN recoverable on the re-determined value of the imported goods from them in terms of proviso to Section 28(1) of the Customs Act, 1962

(d) I order to recover the interest at the appropriate rate in terms of Section 28AB of the Customs Act, 1962

(e) I impose the penalty of Rs. 3,08,111/- (Rupees Three Lakhs Eight Thousand One Hundred Eleven only) on M/s. West Wing Infrastructures Pvt. Ltd., Ahmedabad under Section 114A of the Customs Act, 1962. However, if the duty along with interest is paid within 30 days from the date of communication of this order, this penalty shall be reduced to twenty five percent.

(f) I also order to appropriate the amount of Rs. 4,80,800/- (Rupees Four Lakh Eighty Thousand Eight Hundred only) voluntarily deposited by Shri Kalpesh D. Prajapati towards the payment of duty vide T.R.6 challans No. 994 dated 01.02.2011 for Rs. 3,08,111 and No 200497583 dated 01.02.2011 for Rs.1,72,689/-, against the amount confirmed in this order.

(g) I impose the penalty of Rs. 1,00,000/- (One Lakh only) on Shri Kalpesh D Prajapati, Director, M/s. West Wing Infrastructures Pvt. Ltd., under section 112 (a) of Customs Act 1962;

(h) I impose penalty of Rs. 1,00,000/- (One Lakh only) Shri Kalpesh D Prajapati, Director, M/s. West Wing Infrastructures Pvt. Ltd., under section 114AA of Customs Act, 1962.

(i) I also impose penalty of Rs. 50,000/- (Rupees Fifty Thousand only) each on (1) Shri Naresh N. Garg, Ahmedabad (2) Shri Vivek Pawan Kumar Agrawal, Ahmedabad (3) Shri Nitesh Garg. Properitor, M/s. S. R.Industries, Hong Kong, residing at Ahmedabad and (4) Shri Prakash Laxmandas Lalchandani, Ahmedabad, under Section 112 (a) of the Customs Act, 1962."

Being aggrieved by the above Order In Original appellants filed following appeals before the Commissioner (Appeals):

Sr. No.	Appeal No.	Name of the Appellant	OIO No. & Date	Amount Involved
01	309/AHD/11	M/s. West Wing Infrastructure P. Ltd. 130, Kalpma Complex, Near Memnagar Fire Station, Navarangpura, Ahmedabad-380009	36/Addl. Commissioner/ICD Sab-DRI/O&A/2011 dated 28.09.2011	Duty Rs.3,08,111/- (paid) Penalty Rs. 3,08,111/- R.F. Rs. 8,00,000/-
02	310/AHD/11	Shri Kalpesh D. Prajapati, Director, M/s. West Wing Infrastructure P. Ltd. 130, Kalpma Complex, Near Memnagar Fire Station, Navarangpura, Ahmedabad-380009	36/Addl. Commissioner/ICD Sab-DRI/O&A/2011 dated 28.09.2011	Penalty Rs. 1,00,000/- [(u/s-112(a))] Rs. 1,00,000/- [u/s.-114AA]

The Commissioner (Appeals) in the impugned order rejected the appeal except setting aside the penalty imposed under Section 114AA on appellant No. 2 Shri Kalpesh D. Prajapati, however, the penalty of Rs. 1 Lakh under Section 112(a) was maintained. Being aggrieved by the order in appeal, both the appellants have filed the present appeals. On behalf of the appellants, Shri Shyamsunder Takalkar (Authorized Representative) appeared and he submitted a written brief vide letter dated 17.10.2022, which is taken on record.

3. Shri G. Kirupanandan, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that there is a clear admission by all the witnesses in their statements that there was under valuation in respect of imported furniture and the undervalued amounts have been transacted through hawala to China. He submits that even the appellants have not rebutted the allegation made in both the orders passed by the lower Authority. Therefore, there is no substance in appeals filed by the appellants, which deserves to be dismissed.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that the under valuation has been established on the basis of confessional statements given by various witnesses in their statement. Therefore, more or less there is no dispute about the charge of under valuation against the appellant. The appellant have mainly harped on the excessive imposition of redemption fine. Considering the gravity of the offence committed by the appellant under a systematic modus operandi, the redemption fine imposed by the Lower Authority appears to be proper. The learned Commissioner (Appeals) in his order has dealt with each and

every point very carefully and elaborately, the finding of the impugned order is reproduced below:

7. *I have gone through the appeal memorandum, stay application, facts of the case and the relied upon case laws in the present appeal. Since the impugned orders/decisions involving common issues were argued together, the subject appeals are taken up for disposal by this common order.*

8.1 *Holding prima facie that the balance of convenience is in favour of the revenue and the interest of revenue is safeguarded in as much as the appellant has furnished a bond for Rs. 18,00,000/- supported with a bank guarantee for Rs. 4.50.000/- at the time of provisional release of the goods. and further an amount of Rs. 4.80.000/- at the initial stage has been paid by the appellant. I. in exercise of powers conferred by section 129E of the Customs Act, 1962, grant complete waiver of pre-deposit and proceed to decide the main appeal on merit.*

8.2 *Now coming to the main issue, I find there is admittedly no denial that the impugned goods were grossly undervalued as the appellant No.2, Shri Kalpesh D Prajapati, Director of M/s. West Wing Infrastructures Pvt. Ltd. Ahmedabad, had himself in his statement recorded under Section 108 of the Customs Act, 1962 on 13.11.2010, categorically admitted that they had imported the impugned goods at undervalued price with intent to pay lesser import duty. This statement of the appellant has not been retracted at any point of time and therefore there is no reason to disbelieve the appellant's said version. Further, the other co noticees Shri Vivek Agarwal and Shri Naresh Garg in their statements recorded under Section 108 of Customs Act, 1962 have duly corroborated the facts of undervaluation. Thus, there are admitted facts of undervaluation which is very much available on records. Thus there is no reason to deny the same nor did the appellants deny either.*

83 *As regards the appellant's contention that the department has considered higher value of the goods at Rs. 17,90,422/- instead of the correct assessable value of Rs. 13,48,384/-(USD 29735.5) mentioned in the revised commercial invoice, I find that the appellants said grievance is not valid in light of the back ground facts of the case and the adjudicating authority has given fair findings thereon in para 14 in the impugned order, which is reproduced below for sake of convenience. I do not find any infirmity in the methodology used by the adjudicating authority.*

"14. In terms of Section 14 of the Customs Act, 1962, the value of the imported goods shall be transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for the delivery at the time and place of importation, where buyer and seller of the goods are not related and price is the sole consideration for the sale, provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for cost and services. In the instant case the importer had mis-declared/undervalued the

consignment and filed the Bill of Entry No. B/E No. 2376990 dated 30.11.2010 declaring assessable value of Rs. 6,43,049/-. It appears that an additional amount of Rs. 11,36,013/- (Rs. 10,00,000/- + RMB 20000) was paid by the importer against the cost of the above said imported goods. Therefore, the value declared by the importer before the customs authority at the time of the filing of the Bill of Entry, was grossly undervalued and is not the sole consideration for the sale. In the instant case it was found that Rs. 6,36,682/- was not the only amount which was paid against above import consignment. Rather an amount of Rs. 11,36,013/- was also paid through unauthorized channel and fraudulent documents were produced before Customs to evade payment of appropriate Customs duty and, therefore, the transaction value is liable to be rejected in terms of Rule 12 of the Customs Valuation (determination of price of imported goods) Rules, 2007. Once transaction value is rejected the value shall be determined by proceeding sequentially through Rule 4 to 9 of the Customs Valuation (determination of price of imported goods) Rules, 2007. The value of goods cannot be determined under Rule 4 in absence of value of identical goods. Similarly, the goods cannot be determined in absence of value of similar goods, as prices would vary depending upon the brand, make and design etc. Further the value cannot be determined under Rule 7 (Deductive Value) and Rule 8 (computed Value) as no data is readily available with regard to the unit price at which identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India and further the cost or value of materials and fabrication or other processing employed in producing the imported good is also not available. Accordingly, the value is to be determined in terms of Rule 9 of the Customs Valuation (determination of price imported goods) Rules, 2007. The importer vide his stated dated 13.11.2010 had accepted that he had paid Rs. 11,36,013/- (Rs. 10,00,000/- +20,000/- RMB) to the overseas supplier through unauthorized channel. Therefore, the correct value can be obtained after adding this additional amount paid through unauthorized channel. The actual value in terms of Rule 9 of the Customs Valuation (determination of price of imported goods) Rules, 2007 shall be arrived by addition of this additional amount of Rs. 1,36,013/- paid to the exporter unlawfully. The re-determined assessable value comes to Rs. 17,90,422/- as shown here below:

Declared Invoice Value USD	Declared Invoice Value In Rs Ex.Rate 1.00 USD =44.90 INR	Additional amount paid in Rs.	Total CIF Value-in Rs.	Landing charge@ 1%	Re determined Assessable Value in Rs.
14180	6,36,682/-	11,36,013/-	17,72,695/-	17,727/-	17.90.422/-

8.4 I am of the view that once mis-declaration of the value of goods is established, invoice value will not reflect

transaction value. Hon'ble High Court of Kerala in its judgment in case of PV Ukkru International Trade 2009 (235) ELT 229(Ker) has clearly held that 'when there is mis-declaration, transaction value automatically goes and the department gets the right to question the correctness of valuation by the importer once there is mis-declaration.' The facts further disclose that at the material time the appellant did not object, rather accepted the valuation without any objection. Adoption of transaction value applies only when the transaction declared is found to be genuine and correct. The transaction in this case is import of Chinese furniture and lightings, part payment thereof was remitted through Banking channel and remaining by hawala system. I am therefore, of the view that it would be wrong to interfere with the adjudicating authority's order as Rule 9 of the Customs Valuation Rules, 2007 has been correctly resorted, after ruling out the application of rules 4 to 8. In this regard I also rely on the CESTAT decision in Atlas Casting & Metal Impregation w/s. Commissioner of Customs, Hyderabad [2005(68) RLT 384 (Ban)] wherein the Hon'ble Tribunal has held that although normally, declared value cannot be rejected without a valid ground stated in Rule 4(2) of the Valuation Rules but in cases where it is found that the goods are mis-declared, the declared value can be rejected and the value could be arrived at for the purpose of assessment. Even as the appellant contests the valuation of the goods, they have not been able to provide any cogent defense against the value determined by the adjudicating authority in respect of the impugned goods. Though, a copy of revised Commercial Invoice was produced by the appellant showing value much less than the value ascertained during investigation and in view of systematic commission of under valuation, I find that the said Commercial Invoice has to be discarded. Thus, in the peculiar facts and circumstances of the present case, I do not think that determination of value of the offended goods in the impugned order require any interference at my hands and I hold that the determination of value under Rule 9 is legal and proper.

8.5 The appellants have emphatically contested the quantum of redemption fine of Rs. 8,00,000/- and penalty as very high. Considering the totality of facts and circumstances of the case and value of goods being a little over Rs. 17 lakhs and the fact that the appellants indulged into a systematic under valuation to defraud Government, I find that no lenient view need to be taken. As a practice, fine is determined based on the margin of profit. However, Section 125 of the Customs Act, 1962 provides that "the fine shall not exceed market price of goods confiscated less in case of imported goods the duty chargeable thereon". There is no market inquiry available in the present case to determine market value of goods. In absence of market value, [which is assessable value + duty + margin of profit + other costs(transport, insurance etc.)] one can always adopt, for guidance, at least the assessable value (which does not include Customs duty), for determining the fine. In the present case, the assessable value is Rs. 17 lakhs

and as per Section 125, the fine can be imposable upto Rs. 17 lakhs. Considering the gravity of offence, fine of Rs. 8,00,000/ imposed by the adjudicating authority cannot be considered as high and thus there is no reason to interfere therewith.

8.6 However, I find that the adjudicating authority erred in imposing penalty under Section-112(a) as well as under Section-114AA on the appellant No.2 for a single offence. It is settled law that for a single offence a person cannot be penalized twice. Thus, the penalty under Section 114AA needs to be struck down. Considering this fact, I hold that penalty of Rs.1,00,000/- would continue to rest on the appellant No.2 under section 112 (a) of the Act.

8.7 The appellants contended that duty deposited before issue of Show Cause Notice and hence penalty is not imposable, relying on the decision in the of Commissioner Vs. Rashtriya Ispat Nigam Ltd. 2004 (163)ELT A 53 is not tenable considering the provisions contained in Explanation-1 of Section-28 of the Customs Act, 1962.

9. In the result, but for the modification as mentioned in para-8.6 above, the appeals filed by the appellants are rejected. The stay applications in the subject appeals are also disposed of accordingly."

From the above finding and the facts of the present case, we find that the offence committed by the appellant has not been rebutted by the appellant in many words. Moreover, the under valuation has been clearly established on the basis of the statements given by various persons, which were never retracted. The transaction of the deferential value due to under valuation made by hawala has also been proved by the Revenue. In this facts and circumstances, we do not find any reason to interfere in the impugned order.

5. Accordingly, the impugned order is upheld, appeals are dismissed.

(Pronounced in the open Court on 27.10.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)