

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

REGIONAL BENCH- COURT NO.3

Customs (CROSS) Appeal No. 14 of 2012

(on behalf of respondent)

in

Customs Appeal No. 13 of 2012

(Arising out of OIA-127/COMMR-A-/JMN/2011 dated 09.11.2011 passed by
Commissioner of CUSTOMS-JAMNAGAR(PREV))

C.C. JAMNAGAR

SHARDA HOUSE...BEDI BANDAR ROAD,
OPP. PANCHAVATI,
JAMNAGAR-GUJARAT

.....Appellant

VERSUS

SHREE CEMENT LIMITED

BANGUR NAGAR, BEAWAR,
AJMER-RAJASTHAN

.....Respondent

APPEARANCE:

Shri G. Kirupanandan, Superintendent (Authorized Representative) for the Appellant
Shri P.D. Rachchh (Advocate) appeared for the Respondent

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

Final Order No. A/ 10301 /2023

DATE OF HEARING: 17.10.2022
DATE OF DECISION: 17.02.2023

RAMESH NAIR

This is Revenue's appeal arising out of Order in Appeal No. 127/COMMR(A)/JMN/2011 dated 09.11.2011. The issue involved in the present case is that whether the value declared by the appellant in respect of import of Non-calcined petroleum coke as Rs. 2871.15 is correct or price of comparable import made by BGH Exim Limited @ Indian Rs. 3701.20 is correct. Accordingly whether the enhancement of value should be made taking the price of comparable imports.

2. Shri G. Kirupanandan, Learned (superintendent) Authorized Representative appearing on behalf of the Revenue reiterates the grounds of appeal. He submits that learned Commissioner (Appeals) has not considered the fact that all the main factors i.e. Origin of Cargo, date of shipment / bill of lading, vessel carrying the cargo remain the same. He further submits that also certificates of sampling and analysis issued

by M/s Sai Gulf Lic, an independent analysing agency for quantity of 40,500 MT of cargo and 9,400.480 MT of cargo respectively clearly indicated that the cargo in both the cases is identical in terms of Rule 4(1) of Customs Valuation Rules 2007 imported by two different importer in which date of importation also remained same. Even the supplier in both the cases was M/s Swiss Singapore Overseas Enterprises Pte Ltd., Singapore. This clearly indicates that cargo in the case of Shree Cement (the Respondent) and M/s BGH Exim Limited is identical because there is no change in analysis result. Therefore, the order in appeal passed on the basis of incorrect appreciation of facts, suffers from factual infirmity. Hence, the same deserves to be quashed and set aside.

3. Shri P.D. Rachchh, learned advocate appearing on behalf of the respondent submits that the impugned order was passed on appreciation of factual as well as legal aspect, proper reasoning was given by the Ld. Commissioner (Appeals) inasmuch as it was contended that Import of the appellant can be differentiated from the import made by BGH Exim Limited. Therefore, the Revenue's appeal is frivolous and without application of mind. He submits that as per the provisions of Section 14 Ibid, the value of imported goods shall be the transaction value. The transaction value is the price actually payable for the goods when sold for export to India adjusted in accordance with the provisions of Rule 10 of these Rules. He further submits that the goods were sold for export on the date of contract and there was three months difference between the date of contract of the respondent and other importer, namely, BGH Exim Limited whose value is proposed to take, therefore, the price of BGH Exim Limited cannot be taken. He placed reliance on the following judgments:

- Gira Enterprises vs CC Ahmedabad 2006 (194) ELT 92 (Tri. Mum.)
- Nav Bharat Enterprises 1988 (34) ELT 388 (T)

4. We have carefully considered the submission made by both the sides and perused the records. We find that the case of the department is that due to similarity in various factors, the import price of BGH Exim Limited needs to be followed and the price declared by the appellant should be rejected. We find that learned Commissioner (Appeals) has considered the entire issue in detail not only on the facts but also on the law point. There is an important difference between the facts of the present import and the import made by BGH Exim Limited in which there is only one consignment whereas in the respondent's case the contract was for a quantity of minimum 8 lakh Tonnes Per Annum for the period of 5 years and the respondent had imported 89249 MT of Non-calcined petroleum coke compared to the import quantity of 9400 MT of M/s BGH Exim Limited. On this difference itself, it can be construed that when there is a long term contract for lifting of a minimum 8 Lakh Tonnes Per Annum, obviously there will be substantial discount in the price. On this basis, it cannot be said that the comparable price of BGH Exim Limited should be taken for assessment of import of the appellant. The learned Commissioner (Appeals) has, after examining the entire fact and legal issues as well as the observation of this Tribunal in the earlier remand matter, given following findings:

"7. The factual position do indicate that there is vast difference to the tune of IRS 830.05 PMT (approx 22.42%) between the declared invoice price IRS 2871.15 PMT of the appellant and the transaction value IRS 3701.20 PMT of the other importer M/s BGH Exim Ltd. in this case. It is clearly established that import item in both the cases is Non-Calcinated Petroleum Coke in bulk; country of origin is USA; Destination Port is Navlakhi; the cargo arrived by the same vessel, supplier M/s Swiss Singapore Overseas Enterprises Pte. Ltd., Singapore is common invoices are consecutive and are of closely proximate dates; bill of lading/shipment are of same date Le. 28.06.2009; the destination port is also the same and therefore the goods in both the cases can be held to be identical. The appellant's main plea is that the adjudicating authority should have favourably considered the contract date and the quantity factor while rejecting the transaction value for redetermination thereof. While deciding the stay application, the case of Rajkumar Knitting Mills (P) Ltd. vs. CC, Bombay 1998 (98) ELT 292 (SC), was relied upon, which the appellant has vehemently contested stating that this judgment

relates to un-amended section 16 of the Customs Act, 1962 where there was concept of 'deemed value', and that the position has changed substantially with the concept of transaction value incorporated in section 14. Accordingly, it has been contended now that if date of contract varies, it will reflect the fluctuation in international price, and thus the transaction value of two consignments may differ, even if imported together or invoiced on or about a particular date. For the sake of analysis, I find that Hon'ble Supreme Court in its decision in *Rajkumar Knitting Mills (P) Ltd vs. CC, Bombay* 1998 (98) ELT 292 (SC) has clearly ruled that in matters of Customs valuation, though the contract between the supplier and the importer may have a bearing in governing the inter se relationship between the supplier and the importer but insofar as assessment of the value for the purpose of levy of customs duty under Section 14 of the Act is concerned, what is necessary is to determine the value of the goods as on the date of importation or exportation. This apart, the contracted value can be challenged if it can be shown that it is significantly lower than prices of comparable goods imported at or about the same time. Indeed, this decision relates to prior to amendment in section 14. I have also found that the Hon'ble CESTAT has taken into account the submission of the appellant's advocate that the aforesaid decision is not applicable to cases after amendment in section 14 and Valuation Rules thereunder, as also held in the case of *CC v/s Pushpanjali Silk Mills Ltd.*, upheld by the Hon'ble Supreme Court and reported at 2007(207) E.L.T. A 100, and while remanding this case noted that "there is virtually no evidence on record rejecting the invoice value". Hence, I proceed to

examine the matter afresh, keeping in view the current provisions of section 14 of the Act and rules framed thereunder.

8. With regard to the contentions on contract date, I observe that though the appellant's contract date was 25.01.2009 as compared to 25.06.2009 of the other importer (BGH Exim). Thus, fluctuation in International prices in the span of 3 months is quite possible. A contract does reflect firming up of price of future supplies. Hence, if we look at it from the transaction value' point of view, it is possible that supplies made and invoice prepared on a particular day under two different contracts entered at two different points of time, reasonably apart, may have two different transaction value. I also find that the extent of difference, for identical or similar goods, would also depend upon other criteria, such as quantum of goods in a contract, established and regular customer vis-à-vis occasional customer, mode of payments etc. In the present case, it is an undisputed fact that while the appellant had contracted for a quantity of minimum 8 lakh tonnes per annum for a period of 5 years, and that they had imported 89249 MT of Non- calcined Petroleum Coke compared to the import quantity of 9400 MT of M/s. BGH Exim. This is a huge difference in quantity (almost 10 times), which fact was also mentioned in the Stay Order dated 21.09.2010. I find force in the contention of the appellant that considering the quantity factor, the goods in compared import was not comparable so as to rely on it for the rejection of transaction value in terms of Rule 12 of CVR. 2007. I also find that the case laws such as *Radheshyam Ratanial vs CC, Nhava Sheva* [2005 (190) ELT 2441 (Tri Deli), *Basant Industries vs. Addi. CC, Bombay* [1996 (81) ELT 195 (Sci. Vijay Leather Stores vs. CC. Vizag 12007 (215) ELT 304 -Bang)); *Super Duper TV CC, Chennai* 12007 (220) ELT 506 (Tri Chennai, *Keveeyam Company : CC, Cochin* [2006 (194) ELT 447 (Tri-Bang)], etc. do apply to this case. The decision in the care of *Aditya Fuels Ltd vs. CC, Kandla* reported at 2006/2011 ELT 464 (Tri-Mumbai) dealt with an identical case, where identical goods arrived in the same vessel and the price

contracted for one was one month earlier. It was held that there was no evidence that the importer did not pay the invoice price, and thus the invoice value was accepted as correct transaction value.

9. Besides, the appellant has also stated in their submissions that they are the regular buyers from the supplier, which gave them a better price advantage. They have contracted the quantity of minimum 8 lakh tonnes per annum for a period of 5 years. Also, as per one of the conditions of the contract 25% of payment was paid in advance on signing contract and nomination on vessel whereas there was no advance payment condition for BGH Exim, rather it was on sight payment basis. These factors explain the better price for the appellant, though I do not have evidences on record about the terms of contract of BGH Exim to verify. Yet, I find that the quantity factor is weighing heavily in favour of the appellant. I have also taken note of the fact that Purchase Contracts dated 27.2.2009, 21.3.2009 and 01.11.2009 executed by the appellant with the same supplier M/s Swiss Singapore Overseas Enterprises Pte Ltd. have been completed through 3 shipments of 45000 MT each with same specifications and allowed clearance at Navlakhi Port at price US\$ 38.75 per MT CFR FO. This indicates that indeed the import by BGH with one off import, and such one import would not form a ground for rejection on transaction value, especially in a case where there are no findings of mis-declaration or any evidences of payments made over and above the involved value. The case laws cited by the appellant do support their stance, such Hindustan Lever Ltd v/s CC, Chennai

10 In a recent decision, even in respect of the un-amended section and CVR, 1988, the Hon'ble Supreme Court in the case of Vishakhapatnam vs. Aggarwal Industries Ltd, reported at 2011 (2) ELT 641 (SC) held that same goods imported on the same dates and sold to other parties at higher prices, where product were subject to vol. fluctuations in its prices in international market, and where different prices were contracted under different contracts entered into different points of time and where there is no allegation or evidence of mis-declaration, collusion undervaluation, the transaction value has to be accepted. I, therefore conclude that there is no evidence on record to reject transaction value. In the instant case, the Hon'ble CESTAT has also, in unambiguous terms, already observed. that "there is virtually no evidence on record rejecting the invoice value" Thus, the declared transaction value has to be accepted for assessment.

11. In view of the above, I set aside the impugned order with the direction that the declared value shall be accepted as transaction value and assessment shall be done accordingly.

12. The appeal is allowed"

From the above, it is observed that the learned Commissioner (Appeals) has examined each and every aspect of the case and came to the conclusion that there is a vast difference between the nature of supplies made by BGH Exim Limited and the appellant in as much as there is a long term contract of the appellant with the suppliers and for the huge quantity of 9000 MT Per Annum. On careful consideration of the findings of the learned Commissioner (Appeals), we observe that there is no

infirmity in the findings of the impugned order. Hence, the same needs to be sustained. Accordingly, the impugned order is upheld. Revenue's appeal is dismissed. Cross also stand disposed of.

(Pronounced in the open court on 17.02.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha