IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos.C/71018-71128/2016-CU[DB]

(Arising out of Order-in-Appeal No. 484-613-CUS/APPL-LKO/LKO/2016 dated 22/08/2016passed by Commissioner of Customs, Central Excise &Service Tax (Appeals), Lucknow)

M/s Ashthvinayak & Co. **Appellant (s)**

Vs.

Commissioner of Customs & Central Excise, Lucknow **Respondent (s)**

Appearance:

Shri Bipin Garg & Ms Stuti Saggi, Advocates for Appellant (s)
Shri Mohammad Altaf, Assistant Commissioner (AR), for Respondent (s)

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 19/02/2018
Date of Decision : 19/02/2018

FINAL ORDER NOs-70580-70690/2018

Per: Anil G. Shakkarwar

The above stated 111 appeals are arising out of a common impugned Order-in-Appeal No. 484-613-CUS/APPL-LKO/LKO/2016 dated 22/08/2016 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Lucknow. All the above stated appeals are arising out of a common impugned order. Therefore, they are taken together for decision.

2. The brief facts of the case are that the appellants imported various items of readymade garments, such as Girls Knitted Top, Girls Cotton Top, Girls Ensembles, Girls Skirts, Baby Pants, Baby Socks, Girls Pyjama, Baby Blanket, Baby Jacket, Baby cap, etc. and filed in all 130 Bills of Entry, earliest Bill of Entry being Bill of Entry No.67/2014-15 dated 09/09/2014 and last bill of entry being No.163/2015-16 dated 02/02/2016 at CCSI Airport, Amausi, Lucknow. The above stated 130 bills of entry were assessed provisionally as per the provisions of Section 18 (c) of Customs Act, 1962 on the reasonable belief that the declared retail sale price of the goods imported for which said bills of entry were filed appeared to be less than the prevailing market price of the said goods. It was noted by Revenue that the goods imported by the importer were generally sent for retail sales to Mumbai. The market enquiry about the retail sales price was conducted at 4 retailers in Mumbai, namely (1) M/s OM Namo, Old Khar, Mumbai, (2) M/s Rudra Shop, Khar West, Mumbai, (3) M/s Rise UP, Khar West, Mumbai and (4) M/s I-Baby Enterprises, Tilak Bhavan, Mumbai. The investigating offices submitted report to Lucknow Customs (Preventive) Commissionerate through their letter dated 05/02/2016 and the enquiries were conducted about the retail sale price on the basis of description of items declared by the importer in the Bills of Entry. The appellants were intimated vide letter C.No.VIII (14) 06 –Provisional Assessment/Ashthvinayak/

Cargo/14/30 dated 25/02/2016 about the enquiry report dated 05/02/2016. The importer submitted his response through their letter dated 01/03/2016. The Learned Original Authority then resorted to provisions of Rule 4(c) (ii) of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 and held that going by the spirit of said provision, it was very clear that the Retail Sale Price was the maximum price at which the excisable goods in packaged form may be sold to the ultimate customer and includes all taxes, local delivery, packaging, forwarding and the like and the price was sole consideration for such sale. He further refused the plea submitted by the appellants in their defense letter dated 01/03/2016 and held that the importer, that is present appellant had deliberately miss-declared the Retail Sale Price of the items with intention to evade duty by resorting to undervaluation of goods. Holding such findings the Original Authority issued 130 Final Assessment Orders dated 26/03/2016 to 29/03/2016 in respect of Bill of Entry No.67/2014-15 to Bill of Entry No.163/2015-16 wherein all final assessment orders were issued, resorting to the above stated provisions of said Rules, 2008 on the basis of maximum retail price as reported to him by the investigating officers through letter dated 05/02/2016. The Original Authority enhanced the assessable value for the purpose of assessment of CVD and ordered the appellants to pay differential CVD. Further, the amounts already paid were appropriated by the Original Authority. Aggrieved by the said 130 Final Assessment Orders, appellants preferred appeals before the Commissioner (Appeals). The Learned Commissioner (Appeals) has passed a common impugned Order-in-Appeal dated 22/08/2016 and upheld the said 130 Final Assessment Orders passed by Original Authority. Aggrieved by the said order of the learned Commissioner (Appeals), appellants have filed above stated 111 appeals before this Tribunal.

3. The grounds of appeals are as follows:-

1. The orders passed by Lower Authorities are against the facts and law.

2. The enhancement of value for the purpose of levy of CVD in the impugned orders passed by Lower Authorities is based on presumption that Section 4A of Central Excise Act, 1944 is invocable in terms of proviso to Section 3 (2) (ii) of Customs Tariff Act, 1975 and the issue gets covered under Sub-rule (i) of Rule 4 of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 which envisaged that if RSP cannot be ascertained in terms of Sub-rule (i) then it would be ascertained through enquiry in the retail market.

3. It has been clarified by CBEC through Circular No.737/53/2003-CX dated 19/08/2003 that provisions of Section 4A of Central Excise Act, 1944 do not apply to the readymade garments as they have not been notified under said Section.

4. The statements and invoices of the dealers relied upon by the assessing officer were unauthenticated photocopies and there is no mention of witness in whose present the statements were recorded and the invoices were resumed. Further, none of them have been examined by the assessing officers himself nor they were produced for cross examination and Department has relied on such statements which were recorded on the back of the assessee in which there is no indication that there has been any flow back of the said proceedings to the appellants and that such statements cannot be basis for enhancement of the value.

4. Heard the learned counsel for appellants who has submitted copies of following statements:-

I- Statement recorded on 18/01/2016 of Shri Rajesh Nor, Manager of M/s I-Baby Enterprises, Mumbai.

II- Statement recorded on 19/01/2016 of Shri Mayur Jain brother of Shri Anil Rajesh Jain, proprietor of M/s Rise UP, Mumbai.

III- Statement recorded on 19/01/2016 of Shri Mahesh Chamay partner of M/s Om Namo, Mumbai, and

IV- Statement dated 19/01/2016 of Shri Keshavji Bhai of M/s Rudra Shop, Mumbai.

Further, he has taken us through all the 4 statements wherein in every statement the deponents have submitted that they purchase readymade garments and toys from different sellers mainly from local market in Mumbai and also they purchase from M/s Ashthvinayak and Company, Lucknow. Further, they have submitted few copies of invoices issued by them in which description of goods were mentioned. Further, he has submitted that under said Rule 4 of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 which was invoked by the Original Authority and upheld by the Learned Commissioner (Appeals) at clause (c) it is provided that when the manufacturer removes the excisable goods specified under Sub-section (1) of Section 4A of Central Excise Act, 1944 by declaring the Retail Sales Price but subsequently obliterates the same after removal from the place of manufacture then Retail Sale Price shall be ascertained by conducting the enquiry in the retail market where such goods have normally been sold at or about the same time of the removal of said goods from the place of manufacture. He has submitted that for invoking said provisions it is to be established that the enquiries were made at the same time. In the present case had importer obliterated the Retail Sales Price after clearance from Customs Authorities then only the market enquiries would be relevant. He has submitted that there is no evidence that the Retail Sale Prices of the goods imported by them were obliterated by them and also submitted that all enquiries were made during the period from 16/01/2016 to 19/01/2016 for the goods for which Bills of Entry were filed for the period from 19/09/2014 to 02/02/2016 which also includes some period which was after the enquiries were conducted. He has further submitted that burden was on the part of Revenue to establish that the Retail Sales Price have been obliterated, and that there is no evidence produced by Revenue to establish that the Retail Sales Prices were obliterated by the importer. He has further submitted that it is very clearly stated in the Order-in-Original that the enquiry was conducted on the basis of description of items declared by them in the bill of entry during the relevant period and that it is very clearly coming out that the goods were not identified to the respective bills of entry to establish that the Retail Sale Price was obliterated. He has submitted that on the basis of description, information was collected and without application of mind and same was used to enhance the assessable value for the purpose of CVD.

5. Learned A.R. for revenue has submitted that the appellants has full knowledge about the provisions of provisional assessment and they also followed the procedure under Section 18 of Customs Act, 1962 by submitting the bond for the purpose of provisional clearance of the goods and the procedure followed was an established procedure in Customs and therefore, he supported the impugned Order-in-Appeal.

6. Having considered the submissions from both sides and on perusal of records and particularly on perusal of said statements recorded that of Shri Rajesh Nor, Shri Mayur Jain, Shri Mahesh Chamey and Shri Keshavji Bhai, it is very clear that they have not stated that the invoice price which they were submitting to the Customs Authorities where in respect of goods which were procured by them from the importers. They simply handed over such invoices where the description of the goods sold by them tallied with the description of the goods imported by the appellants. That does not establish the link between the goods sold by the said 4 retailers to be the goods which were imported through the above stated Bills of entry. Therefore, we are not satisfied that the data used for enhancement of assessable value was the

appropriate data. We, therefore, hold that the Order-in-Original merged with the impugned Order-in-Appeal is not sustainable.

7. Therefore, we allow all the 111 appeals filed by the appellants. The appellants shall be entitled for consequential relief, as per law.

(Dictated in Court)

(Anil Choudhary)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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