CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Appeal Nos.70584 to 70585 & 70650-70652 of 2017

[In Customs Appeal No.70584 of 2017]

(Arising out of Order-in-Original No.08/PR.COMMR./NOIDA-CUSTOMS/2017 dated 26/05/2017 passed by Commissioner of Customs, Noida)

M/s JKB Exim Pvt. Ltd. .....Appellant

(5593, Gali No.76, Raigerpura, Karol Bagh, New Delhi-110005)

VERSUS

Principal Commissioner of Customs, Noida ....Respondent

(Customs Commissionerate, Concor Complex,

Container Depot, Greater Noida-201311)

WITH

(i) Customs Appeal No.70585 of 2017 (M/s Hero Traders)
(ii) Customs Appeal No.70650 of 2017 (M/s Rightways Exim Pvt. Ltd.)
(iii) Customs Appeal No.70651 of 2017 (Shri Jamaal N. Akhtar)
(iv) Customs Appeal No.70652 of 2017 (Shri Kamaal N. Akhtar)

(Arising out of Order-in-Original No.08/PR.COMMR./NOIDA-CUSTOMS/2017 dated 26/05/2017 passed by Commissioner of Customs, Noida)

APPEARANCE:

Shri Abhijit Bhattacharyya & Shri Sumanta De, Advocates &
Shri Siddharth Kak, Consultant for the Appellants
Shri Anupam Kumar Tiwari, Authorised Representative for the Respondent

CORAM: HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NOS-71919-71923 / 2019

DATE OF HEARING : 31 July, 2019

DATE OF PRONOUNCEMENT: 27 November, 2019

PER: ANIL G. SHAKKARWAR

Above stated appeals are taken together for decision since all of them are arising out of common impugned Order-in-Original No.08/PR.COMMR./NOIDA-CUSTOMS/2017 dated 26/05/2017 passed by Commissioner of Customs, Noida.

2. Brief facts of the case are that M/s JKB Exim Pvt. Ltd. and M/s Rightways Exim Pvt. Ltd. were engaged in import of PVC/PU Coated Fabrics. They were importing the said goods through Nhava Sheva port. M/s Hero Traders were also engaged in the import of PVC/PU Coated Fabrics through ICD, Patparganj, ICD Loni and ICD, Tughlaqabad. DRI officers had intelligence that PVC/PU Coated Fabrics falling under Customs Tariff heading 5903 commonly known as Artificial Leather cloth was being imported into India by undervaluing the same resulting in evasion of Customs duty. Therefore, DRI initiated investigation in respect of importers who had imported the said goods. DRI came to know that other two appellants Shri Jammal Akhtar and Shri Kamaal Akhtar were the persons associated with M/s JKB Exim Pvt. Ltd. and M/s Rightways Exim Pvt. Ltd. who were importing the said goods through Nhava Sheva port and also that Shri Surendra Kumar Pandey was clearing agent engaged in clearance of the said goods at Nhava Sheva port. Therefore, on 06.06.2013 statement of Shri Kamaal Akhtar was recorded. On 18.06.2013 statement of Shri Jamaal Akhtar was recorded. Statement of Shri Surendra Kumar Pandey was recorded on 22.04.2013 and 08.01.2014. Further, inquiries were conducted

with the shipping lines. The scrutiny of imported documents of all the above stated three importers revealed that all the imports were done from China. M/s NYK Line (India) Ltd. vide their letter dated 03.09.2013 forwarded to DRI four invoices filed by the suppliers at the port of export. Similarly, M/s Hamburg Sud India Pvt. Ltd. vide their letter dated 10.09.2013 forwarded to DRI two invoices filed by the suppliers at the port of export. Further, Orient Overseas Container Line vide their letter dated 03.09.2013 forwarded to DRI one invoice and seven export declarations filed by suppliers at the port of export. The said documents were referred to by DRI as load port documents. The said documents were correlated with respective Bills of Entry to compare the information contained in the said load port documents and the bills of entry filed by the above stated three importers to examine the correctness of the value declared for the purpose of assessment of Customs duty. It appeared to revenue that the value declared by the importers who are appellant in the present case was much less than the value reflected in load port documents and therefore, in respect of 13 bills of entry it appeared to revenue that there was under valuation of the goods and differential Customs duty was required to be recovered from the appellants. In another case of investigation in respect of PVC/PU Coated Fabrics imported by one Shri Vishal Madan, it was revealed that actual transaction value of goods imported by him was in the range of US $ 1.77 to 3.7 FOB per Meter instead of US $ 0.4 declared by Shri Vishal Madan to the Customs Authorities in the year 2008. Therefore, investigations were carried out in respect of imports done by Shri Vishal Madan. It appeared to revenue that the goods imported by Shri Vishal Madan were similar to the goods imported by present appellants. Therefore, on the basis of scrutiny of documents in respect of imports effected by Shri Vishal Madan, the values were adopted from the said investigation and it appeared to revenue that present importers also imported similar goods and therefore, said values were adoptable for demand of differential duty from the present appellants in respect of the past clearances effected during the year 2009-10, 2010-11 & 2011-12. Therefore, it appeared to revenue that in respect of 365 consignments imported by the present appellants during the above stated period there was undervalued and by adopting the value discovered during the investigation in respect of goods imported by Shri Vishal Madan differential Customs duty appeared to be recoverable from the present appellants was computed. Therefore, all the 5 appellants were issued with a common show cause notice dated 16.05.2014. Through the said show cause notice M/s Hero Traders were called upon to show cause to Commissioner of Central Excise and Customs, ICD Loni as to why declared value of around Rs.39.07 crores should not be re-determined to the tune of around Rs.57.58 crores in respect of goods imported by them. Similarly, M/s Rightways Exim Pvt. Ltd. were called upon to show cause to the Commissioner of Central Excise & Customs, ICD Loni why declared value of around Rs.5.75 crores should not be re-determined at around Rs.8.56 crores in respect of goods imported by them. Similarly, the proposal in respect of M/s JKB Exim was to enhance the value to the tune of around Rs.12.49 crores approximately from declared value of Rs.8.27 crores approximately. Accordingly, above stated 3 appellants were required to show cause to the same authority why differential customs duty of around Rs.3.8 crores, Rs.0.8 crores and Rs.1.2 crores respectively should not be recovered from them under the provisions of Section 28 of Customs Act, 1962 and why penalties under Section 112 (a), 112(b), 112A & 114AA of Customs Act, should not be imposed on them. Further, through the same show cause notice M/s Rightways Exim Pvt. Ltd. and M/s JKB Exim Pvt. Ltd. was called upon to show cause to Commissioner of Customs (Import), Nhava Sheva Customs, as to why declared value should not be increased from around Rs.10.65 crores to around Rs.19.68 crores and from around Rs.6.67 to around Rs.14.62 crores respectively and why differential customs duty of around Rs.2.51 crores and Rs.2.02 crores respectively should not be demanded from them under the said Section 28 and why penalty should not be imposed on them under Section 112 (a), 112 (b), 114A & 114AA of the Customs Act, 1962 should not be imposed on them. Similarly, M/s Hero Traders and Shri Jamaal Akhtar were called upon to show cause to the Commissioner of Customs Customs House, Kolkatta as to why value should not be increased from around Rs.7.66 crores to around Rs.10.79 crores in respect of goods imported by them and why differential Customs duty of around Rs. 62.5 lakhs should not be recovered from them and why similar penalties should not be imposed on them. Further, through the said show cause notice M/s Hero Traders and Shri Jamaal Akhtar were called upon to show cause to Additional Commissioner of Customs (Import) ICD, Tughlaqabad as to why the value should not be enhanced from around Rs.64 lakhs to around Rs.95 lakhs and why differential customs duty of around Rs.5.51 lakhs should not be recovered in respect of imports made by them and penalty should not be imposed under the same provisions. All the above appellants were called upon to show cause why the goods involved should not be confiscated and why interest should not be recovered from them on differential Customs duty.

3. CBEC issued notification dated 31.05.2016 through which Principal Commissioner of Customs, Noida was appointed as common adjudicating authority in respect of the above referred show cause notice dated 16.05.2014. The appellant submitted before the Original Adjudicating Authority that the load port documents obtained from shipping companies are unauthenticated photocopies and the said documents had neither been confirmed by the overseas suppliers nor by the overseas Customs Department and therefore, the same are not admissible evidences for leveling charges of mis-declaration of value on them. They further relied upon the Final Order of this Tribunal in the case of M/s Ramkrishna Sales Pvt. Ltd. Vs Commissioner of Customs, Ahmedabad reported as 2008 (230) ELT 431 (Tri.-Ahmd). They therefore, argued that there was no basis for re-determination of value in respect of 13 Bills of Entry. They further, submitted before the Original Adjudicating

Authority that similar goods means imported goods which although not alike in all respects, but all having like-characteristics and like-component materials which enable them to perform the same functions and should be commercially interchangeable with regard to quality, reputation and trademark. They further submitted that valuation in respect of PVC/PU Coated Fabrics vary according to nature of fabrics, quality of coating and surface graining besides thickness. Further, PVC Coated fabric and PU coated fabric are not similar goods. They have also submitted that DRI had taken up investigations in respect of goods imported through 643 Bills of Entry filed by the importers and in respect of 265 Bills of Entry the invoice values of the goods received were found to be higher than the values adopted for re-determination of value based on evidences found in respect of investigation of goods imported by Shri Vishal Madan. The Original Adjudicating Authority adjudicated the said show cause notice through the impugned Order-in-Original and through the said order, he had accepted all the proposals contained in the said show cause notice dated 16.05.2014 and accepted enhancement of value proposed therein and confirmed the differential duties proposed in the said show cause notice. He further ordered for confiscation of all the goods proposed in the said show cause notice and imposed penalties equal to the duty and also ordered to pay the interest. He imposed penalties on Shri Kamaal Akhtar and Shri Jamaal Akhtar under the provisions of Section 112 (a), 114AA of

Customs Act, 1962. Aggrieved by the said order appellants are before this Tribunal.

4. Shri Abhijit Bhattacharyya & Shri Sumanta De learned Advocates and Shri Siddharth Kak, learned Consultant appeared on behalf of all the appellants. On behalf of all the appellants Shri Abhijit Bhattacharyya, learned Advocate argued the case. He has submitted that the allegations in the show cause notice in respect of goods imported through 13 Bills of Entry were on the basis of documents which were collected through shipping lines and were called as load port documents and the same were not authenticated by anybody and the same were also not verified from the overseas exports or by the overseas Customs Department. Therefore, as held in the case of Ramkrishna Sales Pvt. Ltd. (supra) the enhancement of values on the basis of photocopies of export declarations made abroad is not sustainable. Therefore, the enhancement of value, confirmation of Customs duties, imposition of penalties, imposition of personal penalties along with directions to pay interest and confiscation in respect of imports through the said 13 Bills of Entry deserved to be set aside. In respect of all the allegations, in respect of goods imported through 365 Bills of Entries where allegations were made on the basis of investigation conducted in respect of goods imported by Shri Vishal Madan, he has submitted that as per Customs Valuation Rules, 2007 similar goods means imported goods which although not alike in all respects, have like-characteristics and like-component materials which enable them to perform the same functions and to be commercially

interchangeable with the goods being valued having regard to quality, reputation and insistence of trademark. He further submitted that for determination of value under Rule 5 of said rules the similar goods should be imported at the same time and at the same commercial level and in substantially at the same quantity. He further submitted that invoice value of overseas suppliers received and submitted by the appellant were found to be in order during the assessment in different customs formation and have been found to be contemporaneous and that whenever contemporaneous value was found to be on higher side the value was enhanced and assessments were ordered during the relevant time and said enhancement were accepted by the appellant and no appeals were filed and therefore, in respect of such consignments there cannot be enhancement of value once again without revenue filing appeal before Commissioner (Appeals). He has also submitted that there were no information given in the show cause notice as to how the goods imported by Shri Vishal Madan and the goods imported by the present appellant were similar goods. Further, Original Adjudicating Authority has also not established through the impugned order that the goods imported by Shri Vishal Madan and goods imported by the present appellants were similar goods. Since there is no discussion in the impugned order on how the said two sets of goods are similar, the impugned order in respect of 365 Bills of Entry and the goods involved therein is not sustainable. He further submitted that since the entire differential duty demanded is not sustainable the personal penalties imposed on all the appellants are also not sustainable. He has further submitted that Revenue has not disclosed any evidence that the appellants have paid any amount more than the amount mentioned in the invoices on the basis of which assessments were done on the importation of the goods. Further, he prayed to set aside the impugned order and to allow the appeal.

5. Learned Authorised Representative Shri Anupam Kumar Tiwari appearing on behalf of Revenue has supported the impugned order. Further, he has also submitted written submissions which are repetition of the impugned Order-in-Original.

6. Having considered the submissions from both the sides and on perusal of records, we note that differential Customs duty was demanded in respect of 13 consignments on the basis of load port documents. It is undisputed fact that the said documents were not authenticated by either the overseas exporters or the Overseas Customs Organizations. We, therefore, hold that in view of the finding of this Tribunal in the case of M/s Ramkrishna Sales Pvt. Ltd. the impugned order is not sustainable in respect of goods imported through 13 Bills of Entries where allegations were made on the basis of load port documents. For the sake of ready reference we reproduce para 3 of Final Order in the case of M/s Ramkrishna Sales Pvt. Ltd. here under:-

> ***"3.*** *In the case of East Punjab Traders - 1997 (89) E.L.T. 11 (S.C.) has held that the presumption under Section 139(ii) of the Customs Act cannot be raised because the documents did not bear any signature of the exporter, the forwarding agents,*

the stevedore or the Customs Officer. We find that entire law on the point stands discussed by the Tribunal in the case of Truwoods Pvt Ltd. v. Commissioner of Customs, Visakhapatnam - 2005 (186) E.L.T. 135 (Tri.-Del.) and Revenue's stand to enhance the value on the basis of photocopies of export declaration obtained from Italian/US Customs was not accepted. We note that apart from the said export declaration, there is no other evidence on record showing payment of higher value to the foreign supplier. As such, by following the decisions, declaring the law on the point, we find no justification for enhancement of the prices, in respect of the above Bill of Entry."

In the present case also there is no other evidence on record showing payment of higher value to the foreign suppliers. Further, the value has been enhanced on the basis of photocopies of documents obtained from the overseas shipping lines. By applying the ratio of Final Order of this Tribunal in the case of M/s Ram krishana sales Pvt. Ltd. we hold that the findings of Original Authority in respect of goods imported through 13 Bills of Entry are not sustainable. We, therefore, set aside the impugned order in respect of goods imported through the 13 Bills of Entry.

7. Further, in respect of goods imported through 365 Bills of Entries, we note that there is no discussion as to how the goods imported by Shri Vishal Madan are similar goods to the goods imported by present appellants. For the sake of clarity, we reproduce para 7.3 of said show cause notice dated 16.05.2014 as under:-

"7.3. ***Analysis of similar goods:-***

Investigation in another case of import of PU/PVC coated fabric (Artificial leather cloth), pertaining to Vishal

Madan who caused imports through firms viz. M/s Monarch, M/s RVK Impex, M/s Shree Siddhivinayak Impex and M/s M R Impex (cleared through Surendra Kumar Pandey) revealed that the actual transaction value of the goods was in the range of US $1.77 C & F to 3.7 FOB per meter instead of US $ 0.4 as declared by Vishal Madan to the Customs Authority in the year 2008. The details of the actual transaction value of these goods were recovered from the Email Account of Vishal Madan. On being confronted with the facts, Vishal Madan in his statement dated 1.4.2013 admitted that the value of PU/PVC coated fabric (artificial leather cloth) was in the range of US $ 1.77 C & F to US $ 3.3 FOB. It was also revealed that Surendra Pandey, the CHA was an accomplice in the fraud committed by Vishal Madan. On completion of investigation in the said case, a Show Cause Notice was issued on 08.04.2013 vide F.No. DRI/MZU/D/INV-01/2012-13 (RUD No.15). The country of origin of the goods in both the cases are the same i.e. China. The descriptions of the goods were also same. Therefore, the goods imported by Vishal Madanlal Madan appear to be similar to the goods imported by M/s. JKB Exim Pvt. Ltd., M/s. Rightways Exim Pvt. Ltd and Hero Traders. Hence the evidences of actual value of such goods are proposed to be used for valuation of goods in the instant case.

7.3.1 Scrutiny of the documents and evidences recovered from Vishal Madan showed the actual values of the imports made by him during the period from 2008 to 2011. The minimum values of import of similar items are as tabulated below:

Year	*Minimum unit Price (in USD/metre)*	*Nature of evidence*	*RUD No.*
2009	*1.77 (C&F)*	*e-mail dated 31.01.2009*	*329*
2010	*0.99 (C&F)*	*e-mail dated 22.3.2010*	*330*
2011	*1.15 (C&F)*	*Original Packing List for container*	*331*

		No.HJCU 1640258	

7.3.2. From what has been discussed in paras 7.2 and 7.3, it appears that M/s Rightways Exim Pvt Ltd, M/s JKB Exim Pvt Ltd and M/d Hero Traders were importing similar goods amongst themselves. Further, the goods imported by them were similar to that imported by Vishal Madan through his various firms. Evidences of actual value of similar goods imported by M/s Rightways Exim Pvt Ltd, M/s JKB Exim Pvt Ltd are available in the form of overseas invoices and export declarations for the year 2012, the minimum of which is 1.40 USD (FOB). (refer para 7.14). Similarly, evidence of actual value of similar goods imported by Vishal Madan is available for the year 2009, 2010 and 2011, the minimum of which are USD 1.77, USD 0.99 and USD 1.15 (all C&F) respectively. In view of the above the minimum value of the goods similar to the goods imported by M/s Rightways Exim Pvt Ltd, M/s JKB Exim Pvt. Ltd. and M/s Hero Traders appears to be as follows"-

Sr.No.	*Year*	*Minimum value of similar*	*Terms of Payment*
1	*2009*	*1.77*	*C & F*
2	*2010*	*0.99*	*C & F*
3	*2011*	*1.15*	*C & F*
4	*2012*	*1.40*	*FOB*

Now, we re-produce findings of Original Authority in respect of the same as under:-

"Further, investigations have also revealed that the goods imported by M/s JKB Exim Pvt. Ltd., M/s Rightways Exim Pvt. Ltd. and M/s Hero Traders are similar to the goods imported by Sh. Vishal Madan through his firms. The actual transaction value of these goods is available for the years, 2009, 2010 and 2011. Therefore, the transaction

value of all the remaining 365 number of consignments are re-determined at the minimum value of the similar goods as shown in the table below for the imports of respective years in terms of Rule 5 of CVR, 2007.

Sr.No	*Year*	*Minimum value of similar goods (in USD)*	*Terms of Payment*
1	*2009*	*1.77*	*C&F*
2	*2010*	*0.99*	*C&F*
3	*2011*	*1.15*	*C&F*
4	*2012*	*1.40*	*FOB*

The value shown at serial no.4 of the above Table is US $1.4 FOB. Actual freight is not available for these consignments. Provision of sub-rule (2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provides for loading of 20% freight on the re-determined transaction value, if the same is not ascertainable. However, adopting a fair and reasonable approach, and to be on the realistic side, the CIF value is re-determined after adding the average actual freight obtained from the shipping line M/s NYK Line (India) Ltd. (refer para 5.1 of SCN). Insurance at 1.125% of FOB value is also added to arrive at the CIF value in respect of all consignments to arrive at the CIF value.

Similarly since the value mentioned at Serial no.1, 2 and 3 of the above table is C & F, Insurance at 1.125% of FOB value is also added to arrive at the CIF value in respect of all consignments imported by said parties."

It is very clear through the allegations made in the show cause notice and findings of Original Adjudicating Authority that Revenue nowhere established that the goods imported by Shri Vishal Madan and the goods imported by the appellants were similar goods since no such description and discussion has been recorded in the impugned order. We, therefore, hold that the findings of Original Authority in respect of consignments cleared through said 365 Bills of Entry are not sustainable since the same are not based on evaluation of evidence. We, therefore, set aside the same. We, therefore, set aside the impugned order in so far as the same is concerned with imports through said 365 Bills of Entry in respect of enhancement of value, confirmation of differential Customs duty, order to pay interest, confiscation of said goods and penalties imposed including personal penalties.

8. To conclude, we set aside the impugned order and allow all the appeals.

(Pronounced in open court on-27 November, 2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

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