CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH

CUSTOMS APPEAL NO. 70376 OF 2019

[Arising out of Order-in-Appeal No. 19-Cus/APPL/LKO/2019 dated 22.01.2019 passed by the Commissioner (Appeals) Customs, CGST & Excise, Lucknow]

M/s Ganpati Trading Company **Appellant**
Shree Venkateshwar Floor Mills, Compound
Aishbagh, Lucknow 226004

Versus

Commissioner of Customs, Lucknow **Respondent**
5th Floor, Kendriya Bhawan, Sector H
Aliganj, Lucknow 226001

<u>Appearance</u>

Shri Ashish Kumar Shukla, Advocate for the Appellant

Shri Shashi Shekhar, Authorized Representative for the Respondent

CORAM : HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 28.01.2022
Date of Decision: 11.02.2022

Final Order No. 70067/2022

P.V. Subba Rao:

This appeal is filed by the appellant assailing the order-in-appeal[1] dated January 22, 2019 passed by the Commissioner of Customs (Appeals), Lucknow upholding the order-in-original dated 31 March 2016 passed by the Additional Commissioner of Customs, Central Excise and Service Tax, Kanpur.

2. The appellant imported plywood through Inland Container Depot[2], JRY, Kanpur. Officers of the Directorate of Revenue Intelligence[3] received intelligence that the appellant had mis-declared the quantity and value of the goods imported vide Bill of

---
[1] **Impugned order**
[2] **ICD**
[3] **DRI**

Entry 2002531 dated 30.04.2013 and its officers requested the jurisdictional Customs officers and accepting the request, the goods were examined by the jurisdictional Customs officers in the presence of DRI. The quantity of plywood imported was marginally higher at 51.86 Cubic metres than the 48 Cubic metres declared in the Bill of entry. DRI found that **'the values of contemporaneous imports of similar goods at other ports was US$ 300 per CBM while the invoice value in the importer's case was US$ 190 per CBM.'** DRI also found that the importer had imported consignments previously also which were already assessed and cleared at the declared rates. DRI concluded that all those consignments were also undervalued. After investigation and recording statement of the owner of the appellant firm, A show cause notice[4] dated 28.2.2012 was issued by the Additional Director of DRI proposing confiscation of the current consignment of the goods as well as the past consignments under section 111(m) on the ground of undervaluation, rejecting the declared value of the goods and re-determining the value at the rate of US$ 300 per CBM as per Rule 12 of the Customs Valuation Rules (CVR) 2007 and its re-determination under Rule 5 of CVR, 2007 and recovering the differential duty amounting to Rs. 3,58,028/- along with interest and proposing to impose penalty under Section 114A of the Customs Act. Thus, the entire case in the show cause notice is built on the ground that the appellant had mis-declared the value of the imported plywood in the current and past consignments and the proposals for confiscation, penalty and demand of differential duty and interest emanate from them.

[4] **SCN**

3. After following due process, the Additional Commissioner passed the Order in Original confirming the demand of duty, confiscation of goods and imposing penalties as proposed; this order upheld by the impugned order passed by the Commissioner (Appeals). Hence, this appeal on the various grounds including that the transaction value has been rejected without any basis.

4. We have examined the records of the case and heard learned counsel for the appellant and learned Departmental Representative. On a specific query from the bench, both sides agree that in this case the show cause notice was issued by the officers of DRI demanding duty under Section 28. Hon'ble Supreme Court held that DRI officers were held to be not proper officers for issue of show cause notice demanding duty under Section 28 in the **Cannon India[5].** Since the show cause notice itself was issued without authority of law, the entire proceedings get vitiated. The ratio of **Cannon India** was followed in several cases and demands were set aside by the Supreme Court, various High Courts and this Tribunal only on the ground that the show cause notice was issued under Section 28 by the officers of DRI. Some of these cases are:

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys[6]**

Madras High Court- Madurai bench

2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs[7]

Karnataka High Court

3. **Givaudan India Pvt. Ltd.** vs Commissioner of Customs[8]

---

[5] 2021 (3) TMI 384- Supreme Court
[6] 2021(9) TMI316- Supreme Court
[7] 2021 (3) TMI 1034- Madras High Court

Punjab and Haryana High Court

4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI[9]

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**[10]
6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs[11]

5. We further note that Hon'ble Supreme Court has, in the case of **Canon India** held that the demand under Section 28 can be issued only by "the proper officer" i.e., a particular officer viz., the one who did the assessment in the first place. We find that the assessment of Bills of Entry was done by the officer of ICD, JRY Kanpur who alone can issue the show cause notice under Section 28 even for this reason, officers of DRI was not competent to issue the show cause notice in this case.

6. Learned counsel for the appellant submits that even on merits they have a strong case in their favour because their transaction value was rejected and the value of the imported goods was re-determined without any basis and merely on the basis of 'contemporaneous imports' which is not sustainable because the customs valuation is based on transaction value. Their transaction value has not been shown to be false. Merely because some other importers imported the goods at a higher price it does not mean that their transaction value is not correct. He submits that in an

---

[8] **2021(8) TMI 178- Karnataka High Court**
[9] **Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petiton No. 19871 of 2020**
[10] **2021 (10) TMI 771- CESTAT, New Delhi**
[11] **2021(8) TMI 906- CESTAT, New Delhi**

identical case booked against M/s Amar Delhi Ply Pvt. Ltd., NOIDA, the demand was set aside by the Tribunal holding that rejection of the transaction value was not correct. On appeal by the Revenue, the jurisdictional Allahabad High Court has, in **Customs Appeal No 10 of 2019 Commissioner of Customs, NOIDA vs Amar Delhi Ply Pvt. Ltd.,** upheld the decision of the Tribunal. Hon'ble High Court held as follows:

> "The present appeal has been pressed on following question of law.
>
> > *" Whether the Hon'ble CESTAT order that " Revenue has nowhere attacked the transaction value and has not produced any evidence to show that transaction value was wrong" instead of misdeclaration of quantity/ Thickness as well as value of imported goods having been accepted by the Director of the Party in his statement recorded under Section 108 of the Customs Act, 1962 is justified/ legal or not."*
>
> Perusal of the order of the Tribunal and the order in original reveal that at one stage revenue sought enhancement of value of goods citing earlier transaction performed by the assessee at a higher value of 300 dollars per CBM. The present transaction was valued at 200 dollars per CBM.
>
> The discrepancy was explained by the assessee on the basis of urgent clearance in the earlier transaction. Undisputedly, other than the mere discrepancy noted by Revenue Authority, there does not exit any material as may warrant rejection of valuation of goods. Merely because there exists an alert circular and enabling power under Rule 12 of the Valuation Rules as may allow the Revenue Authority to disbelieve the valuation in a given set of circumstances, it cannot be cited as a matter of fact to disbelieve the valuation. Disbelieving the valuation would have serious consequence. The initial burden rests on the revenue.
>
> In absence of any material or evidence as may suggest any perversity in the order of the Tribunal, we do not find any merit in the appeal.
>
> Accordingly, the appeal is dismissed.

7. We have considered these submissions. We find it unnecessary to examine the merits of the case as the show cause

notice itself was issued under Section 28 by an officer of DRI who is not "the proper officer" to issue the show cause notice in this case as per **Cannon India** followed by a catena of judgments some of which were cited above. Thus, if the show cause notice is without authority, regardless of the merits of the case, the order cannot be sustained. Even if we examine the merits of the case the outcome is irrelevant whether we find in favour of Revenue or in favour of the appellant. The impugned order still needs to be set aside as per the ratio of the aforesaid judgments.

8. Respectfully following ratio of **Canon India** and other case laws cited above, we find that the impugned order cannot be sustained. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced in open court on 11/02/2022.)

P. Venkata Subba Rao

Member (Technical)

Rachna Gupta
Member (Judicial)