CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SZB, CHENNAI

REGIONAL BENCH - DB Court No-4

Customs Appeal No. C/42336/2016-DB

(Arising out of Order-in-Original No.12/2016 dated 04.08.2016 passed by the Commissioner of Customs, Tuticorin).

The Commissioner of Customs **Appellant**
Custom House, New Harbour Estate,
Tuticorin-628 004.

Vs.

M/s. KrishakBharati Co-operative Ltd. **Respondent**
(KRIBHCO), A-10, Sector 1, Noida,
GautamBudh Nagar, U.P,- 201 301.

APPEARANCE:

Ms. K. Komathi, JC, Learned Departmental Representative
for the appellant.

None
for the Respondent

CORAM:

HON'BLE MR C.J. MATHEW, TECHNICAL MEMBER

HON'BLE MR P.DINESHA,JUDICIAL MEMBER

FINAL ORDER No. 41756 /2020

Date of Hearing: 09.12.2019
Date of Decision:09.12.2019

Per P. DINESHA

The Assessee–respondent had imported during the relevant year, Urea from M/s. Oman India Fertilizer company, (OMIFCO in short), at about US$ 160 per Metric

Tonne (MT). The facts borne out of records before us reveal that the said company is a joint venture between the Oman Oil Company (50%), M/s. IFFCO (25%) and M/s. KRIBHCO (25%). Further, the import of urea from the said company was on the basis of a long term urea off-take agreement (UOTA) between the Government of India (in short GOI) and OMIFCO. Urea was purchased by the Department of Fertilizers, GOI from OMIFCO; and the imports were made by M/s. IFFCO and the assessee-respondent on the basis of an agreement for handling and marketing of urea signed between the Department of Fertilizers and KRIBHCO and IFFCO.

2. Department of Revenue Intelligence (DRI) initiated investigation into the imports made by the assessee-respondent during the course of which, it recorded statement of some of the employees of the assessee. After analysing the documents and statements, a Show cause notice (SCN) dated 02.05.2014 was issued proposing inter alia to reject the declared value of imported urea and also to re-determine the same in terms of Section 14 of the Customs Act, 1962 read with Rule 4 of the Valuation Rules, 2007; that the imported urea (643994.20 MTs) should be liable for confiscation under Section 111 (m) ibid; etc. It was also proposed to demand the differential customs duty in terms of Section 28 (1) ibid apart from interest under

Section 28 AA and penalty under Section 112 (a) ibid. Thereafter, a corrigendum was also issued vide C.No. VIII/10/79/2014-ADJN dated 12.08.2014, proposing to demand differential custom duties payable under Section 28 (A) ibid, apart from penalty under Section 114 A and 112 (a) ibid.

3. Assessee-respondent filed a detailed reply vide letter dated 19.09.2014, interalia contending that:-

i. The GOI and Sultanate of Oman signed a memorandum of understanding for strengthening economic and trade co-operation by initiating mutually beneficial investments in the year 1993 particularly in the field of projects concerning production of fertilizers on the basis of their economic and commercial viability by commercial enterprises of the two countries designated for this purposes; that the MOU was followed by another MOU in the year 1994 wherein the GOI, assessee-appellant, RCF, the Sultanate of Oman and Oman Oil Company Ltd., reiterated their contention and agreed to design, finance, construct, own, and operate a fertilizer manufacturing plant which would use natural gas supplied by the Sultanate through Oman Oil Company under a long-term gas supply agreement;

ii) that the GOI had agreed to perform its obligations through the assessee and RCF, and the Sultanate of

Oman agreed to perform its obligations through Oman Oil Company Ltd; that setting up of Oman-India Fertilizer Project (OMIFCO) was conceived with the above objective; that as a consequence to this MOU, a joint venture agreement (herein after referred to as JVA for brevity) amongst Oman Oil Company, assessee-respondent and RCF was signed in 1997 wherein it was decided that the share capital of the three companies shall be issued, subscribed and paid up in the ratio of 50%, 25% and 25% respectively, ***that the JVA***, the composition of Board of Directors was also decided; that it was agreed initially that the Board will consist of 6 Directors, out of which 3 would be the nominees of the assessee-respondent/RCF and other 3 would be the nominees of Oman Oil company; that the GOI was not a party to this JVA nor did the GOI had any right to appoint any Director on the Board of OMIFCO;

iii) that later due to low urea market price and problems relating to project financing, RCF withdrew from the project; that then in its place IFFCO was inducted and an amended and restated JVA was signed in October 2000; that as per paragraph 2.2. of the JVA, OMIFCO had to be considered as an independent company; that three Directors of the Company were to be nominated by the assessee-respondent and IFFCO and three Directors were to be nominated by Oman Oil; that later the number of Directors was raised to eight and finally w.e.f. February 2009 it was raised to ten Directors, five of whom would be the nominees of Oman Oil, two of whom would be nominees of assessee-respondent and one Director would be nominated jointly by IFFCO and the assessee-respondent; that accordingly, assessee-respondent and IFFCO appointed a senior officer of the Department of Fertilizers (hereinafter referred to as DOF) on the Board of OMIFCO out of their quota of one combined director; that the GOI was not a shareholder in OMIFCO and they had no rights to appoint any nominee/representative on the board of OMIFCO;

iv) that as per paragraph 8.4 (b) of the JVA 2000 the company had entered into a take or pay agreement with the GOI which would provide for fixed long term pricing of urea for fifteen years commencing with the date of commercial production; that the assessee-respondent and IFFCO would get urea sales fee of US$ 3.50 per MT of urea sold to the GOI (Para 8.4 of the JVA); that a separate agreement known as urea sold to the GOI (Para 8.4 of the JVA); that a separate agreement known as urea sales fee agreement was also arrived at amongst OMIFCO, assessee-respondent and IFFCO for this purpose; that as the project was of national importance the GOI agreed to purchase entire quantity (16.52 lakh metric tonnes per annum being the rated capacity), under a fifteen year agreement; that the GOI had also conferred the right of first refusal for urea produced beyond rated capacity at a price of 5% discount to published market price;

v) that the GOI agreed to buy the entire quantity at pre-fixed prices, terming it long-term prices (LTP) ranging from US$ 150 per MT to US$ 90.8 per MT in descending order, under a long-term urea off-take agreement (UOTA) as communicated by the Ministry of Fertilizers vide their letter dated 10th August 2000 issued from F. No. 13029/29/97-FP-I addressed to both IFFCO and assessee-respondent; that the GOI entered into an urea UOTA with OMIFCO in May 2002 for purchase of urea.

vi) that the agreement was signed on behalf of the President of India and Sultanate of Oman by the representatives of respective governments in the presence of representatives of assessee-respondent and IFFCO. The price structure indicated at article 5 of the agreement covers entire production of urea up to the rated capacity of the plant for 15 years and is referred to as long term price (LTP)

vii) that under the determination of market price was to be based on the average of high and low of the Middle East prices of granular urea in bulk as published in specified fertilizer market bulletins of UK.

viii) the GOI decided to appoint the assessee-respondent and IFFCO as its Fertilizer Marketing Entity (FME) for distribution of urea in India and entered into an agreement with them called handling and marketing agreement.

ix) that the SCN issued by DRI and the allegations contained therein had been made mainly because the subject SCN was entirely based on the investigations carried out by DRI Zonal Unit Ahmedabad. As in the case of DRI SCN, the Commissioner of Customs, Tuticorin, had also rejected the transaction value of urea imported by the assessee-respondent under Rule 12 of the Valuation Rules 2007 and determined the value under Rule 4 of the Valuation rules 2007 by taking the transaction value of identical goods imported at and around the same time by IFFCO.

x) that the only requirement of 'Transaction value' was that it should be the price actually paid or payable; that in the instant case there was no allegation that either price paid or price payable was different from the price declared by the notice in the Bill of Entry; that as a matter of fact, the price declared by the notice in all Bills of Entry was based on long term price agreement (LTP) between OMIFCO and the GOI; that invoices were also raised by the OMIFCO in accordance with the LTP and the GOI also paid as per the invoice raised by OMIFCO;

xi) that even though DRI presumed that the GOI and assessee-respondent were related because at the time of signing MOU/JVA, the GOI had equity stake in assessee-respondent, which incidentally on date was zero the notice would not like to dwell upon this issue any more because for the purpose of determining relationship under Section 14 of the Customs Act,1962, it was primarily important that the two persons were buyer and seller;

xii) that the GOI as a buyer and OMIFCO as seller cannot be considered as legally recognised partners in business for the simple reason that the GOI was not a business entity; that merely because the GOI bought urea from OMIFCO as per contracted prices indicated in the UOTA and both were bound by certain terms and conditions of the agreement, they cannot be considered as legally recognised partners in business.

xiii) that the GOI was neither a sole agent nor a sole distributor or a sole concessionaire of OMIFCO; that merely because the GOI had agreed to buy the entire production up to the rated capacity of the plant for fifteen years at a pre-determined price. That did not make the GOI a sole agent, sole distributor or sole concessionaire;

xiv) that after amendment of Section 14 in the year 2007 the concept of deemed value had been done away with and the transaction value means "the price actually paid or payable", which had already been substantially and sufficiently dealt with to prove that buyer and seller in this case were not related.

xv) that Rule 12 of the Valuation Rules 2007 made it clear that the transaction value of imported goods could be rejected only when the proper officer had reason to doubt "the truth or accuracy of the value declared in relation to any imported goods"; that in such a situation, he may ask for any further information or documents or any other evidence and if even after receiving the desired information/document the officer continues to nurse reasonable doubt about the truth and accuracy of the declared value, he may reject the declared value as not representing the transaction value and proceed to determine the value sequentially in accordance with Rule 4 to 9 of Valuation Rules 2007;

xvi) and that they also relied on the following decisions in support of their contentions:-

1. **Commissioner of Customs, Vizag Vs. Aggarwal Industries** reported in 2011 (272) ELT 641 (SC),
2. **Commissioner of Customs Vs. Micro Inks** reported in 2009 (244) ELT 143 (Tri.-Ahm),
3. **Pushpanjali Silks Vs. Chief Commissioner of Customs Chennai** reported in 2007 (211) ELT 206 (Madras).

4. The Commissioner/Adjudicating authority vide impugned adjudication order has however, dropped further proceedings initiated in the impugned SCN for the detailed reasons given in the impugned adjudication order. Assailing the correctness of the impugned adjudication order, Revenue has preferred this appeal before this forum and the grounds urged reveal the grievances of the revenue, which are:-

a. The import of rated capacity production of urea was at the pre-determined price of about US $160 per MT. Whereas, the urea produced in excess of the rated capacity was imported at the prevailing market price ranging from US $ 404 to US$ 501,

b. There was a huge difference between the price of the same goods produced under rated capacity and that produced in excess of rated capacity which only points out that the price of urea imported was not representing the true and correct value.

5. When the matter was taken up for hearing, Ms. K. Komathi, Jt. Commissioner appeared for the Revenue but, however, the assessee-respondent was not represented.

6. We have heard the Learned Departmental Representative and perused the documents placed on record.

7.1 Learned Adjudicating authority in the impugned order has analysed various documentary evidences including various agreements entered into between the two Governments i.e. GOI and Govt. of Sultanate of Oman and the following are some of his findings on facts/law which have remained unquestioned/ unchallenged:-

i) Perusal of records reveal that in order to meet out the urea requirement in India and to ensure uninterrupted supply of urea to farmers in India at a subsidized price a joint venture company had been formed as per the Memorandum of Understanding (MOU) dated 15.06.1993 entered in to between the GOI and the Sultanate of Oman. In terms of the said MOU the companies designated by the GOI for setting up of the proposed joint venture ammonia-urea project were M/ KRIBHCO (assessee-respondent) and M/s. Rashtriya Chemicals and Fertilizers Limited (RCF) (subsequently replaced by IFFCO) while Oman Oil Company Limited was similarly designated by the Sultanate of Oman in pursuance of the said MOU a further MOU was signed on 30.07.1994 between the GOI, RCF, assessee-appellant on one hand and Sultanate of Oman and the Oman Oil Company Limited on the other. As per the said MOU dated 30.07.1994 the obligations of the GOI were to be performed through assessee-respondent and RCF while the Sultanate of Oman would perform its obligations through Oman Oil company Limited. As per the said MOU the equity participation in the new JV company was under :-

1. Assessee-respondent & RCF - 50%
2. Oman Oil Company Limited - 50%

Oman Oil Company Limited were expected exclusively to provide natural gas to the proposed fertilizer plant under a long term gas supply agreement at a price determined and stated in the said MOU. Assessee-respondent and RCF would be committed to purchase on FOB Oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of urea production of the fertilizer plant at a price equal to the defined calculated floor price or the market price of urea at FOB Oman, whichever is greater. The calculated floor price (CFP) of urea was defined to mean a price necessary to yield a 10% internal rate of return (IRR) on the equity investment in the fertilizer project. Assessee-respondent and RCF would be entitled to a urea sales fee at the rate of US$ 3.50 per MT in consideration of the sales and take–or-pay expenses incurred by them. Thus in pursuance of the said MOU dated 30.07.1994 and the joint venture agreement dated 02.04.1997 was signed between assessee-respondent, RCF and Oman Oil Company Limited a new JV company in the name and title of Oman India Fertilizer company LLC (OMIFCO) was formed with equity participation as envisaged in the MOU, i.e. assessee-respondent – 25%, RCF – 25% and Oman Oil Company Limited – 50%. In addition, in the Board of Directors of the new company there is equal number of Directors nominated by either side.

ii) The GOI and Sultanate of Oman have protected their interests conceived behind the MOU signed between them by way of assigning the rights and responsibilities to the entities under each. It is to be noted on record submitted by the notice in defense that as per the note of discussion of the meeting held on 20.12.19999 and 27.12.1999 of the Public Investment Board of the GOI vide paragraph 8 thereof that the imports made under the project would be on GOI account and that under the UOTA the Indian sponsors (assessee-respondent and RCF then and IFFCO now) have been designated as agents of GOI.

iii) In OMIFCO, though equity participation is by assessee-respondent and IFFCO and directors are nominated by them it is evident that the real person behind the project is the

GOI as far as the Indian side is concerned and that the entities are only agents. In addition, it is a fact that when the J V agreement was signed between the assessee-respondent, IFFCI and Oman Oil Company the GOI was having a majority equity stake in IFFCO/assessee-respondent. As a result one has to acknowledge the fact that GOI had control over OMIFCO through assessee-respondent and IFFCO during the relevant period of import. Since both the promoters holding equal stakes (50:50) in the joint venture company through their entities they were having equal control over OMIFCO.

iv) Clause 2.1 of Urea Off-Take Agreement (UOTA) as regards (supply and sale by the company) OMIFCO was bound to offer to supply and sell to the GOI in bulk at FOB the loading terminal one hundred percent (100%) of the actual production of urea from and after the date of commencement of production for the term and on the terms and conditions of the agreement. Further, as per clause 5.1 price of urea produced after the date of commercial production the company and GOI agreed for the long term price of urea for rated capacity (initially specified manufacturing capacity) quantity and for excess quantity. It had further been provided vide clause 5.1 (a) that the agreement for urea produced up to rated capacity the rates were finalized for the initial 15 years and further that vide clause 5.1 (c) 'excess urea' the price of FOB the loading terminal payable by the GOI to the company for purchase of excess urea was to be an amount equal to ninety five (95) percent of the market price prevailing on the date of applicable bill of lading.

v) In a nut shell what is evident on record is that GOI had agreed to purchase 100% of rated production on the basis of a fixed Long Term Pricing (LTP) for 15 years. These facts would evidence that there was a long term agreement as regards production and sale of urea by OMIFCO and purchase of the same by GOI.

7.2 Further, Learned Commissioner has also analysed various documents relating to the import of urea and as per his critical analysis the following facts emerged;

a) As per the Bill of Lading, Ministry of Chemicals & Fertilizers, GOI is the consignee of goods and assessee-respondent is the notified addressee.

b) In the IGM filed by the shipping liner under Section 30 of the Customs Act, 1962, Ministry of Chemicals & Fertilizers, GOI is shown as the consignee of goods.

c) In the certificate of quality given by OMIFCO the Ministry of Chemicals & Fertilizers, GOI is the consignee.

d) In the certificate of origin furnished by the Oman Chamber of Commerce and Industry, Department of

Fertilizers, Ministry of Chemicals & Fertilizers, GOI is the importer.

e) In the stowage plan and segregation report prepared by the foreign shipper, the Department of Fertilizers, GOI has been shown as the buyer of goods.

f) In the commercial invoice, it is mentioned that the consignment is to be billed to the Department of Fertilizers, GOI and that the goods have to be shipped to the assessee-respondent.

7.3. Learned Commissioner has also recorded that the import of urea was effected by GOI directly and the cost was paid to OMIFCO directly and thus it cannot be disputed that the GOI is the buyer of the goods. But, however, the assessee-respondent having filed the relevant Bills of Entry under Section 46 ibid has legally become the importer of urea in question (in terms of Section 2 (26) ibid) since the assessee-respondent has cleared the urea imported for home consumption being the importer of the same.

7.4. In ultimatum, Learned Adjudicating authority has concluded that GOI is the buyer and OMIFCO is the seller and they are related to each other in terms of Rule 2 (2) (i) (ii) and (vi) of the Valuation Rules 2007. But, however, there was no evidence to show that the value of the imported goods was influenced by their relationship. Learned Commissioner has also concluded that the demand proposed was also hit by limitation of time under Section 28 ibid and accordingly has held that the proposal to reject the transaction value of the imported goods and redetermination of the same was not legally sustainable. We find that the Revenue before us has not brought anything on record as evidence to support its contentions that there has been no valuation or that the value of the imported goods declared did not represent the true and correct price. On a perusal of the SCN also do not reveal any justification for invoking the larger period.

8. It is well settled that the valuation, if doubted by the revenue, like here, the valuation Rules prescribes guidelines that are to be followed whereby the officer could reject the declared value as not representing the transaction value and proceed to determine the value sequentially in accordance with Rule 4 to 9 of Valuation Rules 2007. Revenue cannot jump at its convenience and propose a demand alleging under valuation. Further, the SCN had only proposed rejection of declared value, but however, while adjudication, Ld. Commissioner has found that there was no suppression of the transactional value in the first place and has proceeded to accept the declared value. Thus, the under-valuation of the imported goods in the case on hand has not at all been established with the support data/evidences, in the first place. This very step having not successfully cleared

by the revenue, for this reason also we are of the view that the revenue has not made any case for intervention. We have to therefore accept the findings of the Ld. Commissioner and uphold the same which we hereby do.

9. For the above reasons, we do not find any merit in this appeal filed by the Revenue and accordingly we dismiss the appeal.

(Operative part of the Order pronounced in the Open Court on 09.12.2019)

(P. DINESHA)
MEMBER (JUDICIAL)

(C.J. MATHEW)
MEMBER (TECHNICAL)