IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

C/137/2008

(Arising out of Order-in-Original No. 7045/2008 dated 10.01.2008 passed by the Commissioner of Customs (Seaport-Imports), Chennai)

M/s. Foto Link — Appellant

Vs.

CC (Port-Import), Chennai — Respondent

Appearance

Shri A.K. Jayaraj, Advocate,
for the appellant/respondent

Shri B. Balamurugan, AC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing: **14.08.2017**
Date of Pronouncement : 31-08-2017

FINAL ORDER Nos.: 41917 **/2017**

Per Bench

1.1 The facts of the case are that M/s. Foto Link, the appellant herein, had imported one set of used "Konica Minilab System comprising of Printer processor and Film processer with standard accessories, with declared invoice vale of Rs. 2,39,042/-. At the time of import the appellant also submitted a Chartered Engineer's Certificate signed by one Mr. William Choy, Senior Executive (Engineer) in the letter head of M/s. Konica Singapore Pvt. Ltd. stating that the year of manufacture of the machine is 1989 and the cost when new as Singapore $19500 and estimated present value as Singapore $ 9400. Department sought to ascertain the correctness of the value and genuiness of the Chartered Engineer's Certificate and sent a fax to M/s. Konica Singapore Pvt. Ltd. on 13.09.1996 requesting them to confirm the price of these machines. In reply M/s. Konica Singapore vide their fax message dated 24.09.96, apparently stated that the price of Konica Minilab System model 612 is USD 59000 as cost price when new. The department also took note of another certificate issued by the very same Mr. William Choy for the same model of Konica Minilab System of 1989, for another importer M/s. Karuna Colour Lab, Pollachi, where the cost of new machine in 1989 was indicated as Singapore $ 23500. On this count, the department took the view that certificates issued by the said Chartered Engineer are false and fabricated. The department further adopted the value of the Konica Minilab System in 1989 as USD 59000 and after extending the depreciation of 54% and freight, insurance charges, the assessable value of those goods was worked out to Rs.9,90,498/-, allegedly resulting in evasion of customs duty to the tune of Rs.6,17,230/-. In adjudication, the Commissioner vide impugned order dated 21.02.1997 ordered that the assessable value of the imported machinery be fixed at Rs.9,90,498/- confiscated the goods under Section 111(m) of the Customs Act, 1962, however gave an option to redeem the goods on payment of fine of Rs. 2.00 lakhs and also imposed penalty of Rs. 70,000/- on the importer under Section 112 ibid.

1.2 On appeal to Cestat Chennai, the Tribunal vide final Order No. 1176/1997 dated 09.05.1997, held that the price of both machines should be fixed based on the price of printer processor as USD 29100 in the year 1989 and for film processor as USD 11650; that depreciation should be given taking the year of manufacture as 1989; upheld the order of confiscation, however reduced the redemption fine to Rs. 1,00,000/-. Penalty was also reduced from Rs.70,000/- to Rs.23,000/-. The appellant preferred writ petition No. 488/1999 before the Hon'ble High Court of Madras, who in their order dated 25.07.2006 set aside the order of the Tribunal and remanded the matter back to the Commissioner to fix the value of the goods "on the basis of the evidence available and the invoices produced by the representatives and any other material that may be produced at the time of hearing". The Hon'ble High Court also ruled that "the finding of the appellate Tribunal that the fax message cannot be accepted is confirmed". Pursuant to the High Court order, the matter was re-adjudicated by the Commissioner of Customs, who vide impugned order dated 10.01.2008 fixed the assessable value of the goods at Rs.4,08,820/-, confiscated the goods under Section 111 (m) of the Act, however, gave an option to redeem the goods on payment of fine of Rs.1,00,000/-, and also imposed penalty of Rs. 25,000/-

under Section 112 A of the Act. Hence the matter is once again before this forum as appeal C/137/2008 dated 14.08.2017.

2. When the matter came up for hearing on behalf of the appellant Ld. Counsel Shri A.K. Jayaraj reiterated the grounds of appeal and also made oral submissions which can be broadly summarized as under:-

i) Customs Valuation Rules 3 & 4 clearly lay down that the value of the imported goods shall be the transaction value and also that if the value cannot be so determined, the value shall be determined by proceeding sequentially to Rule 5 to Rule 8 of the Rules. However, the adjudicating authority after rejecting the transaction value has switched over to Rule 8 on the same ground that the appellant did not produce manufacturer's invoice. It is contended that in respect of second hand machines no manufacturer can give an invoice as all manufacturers make only new machines. Therefore, the adjudicating authority ignoring the invoice value on this count is outside the scope of the Valuation Rules.

ii) The appellant had already furnished the Chartered Engineer's Certificate from the supplier which clearly confirms the value and the year of manufacture.

iii) Price of a new machine cannot be taken up for comparison as new machines are technology upgraded machines and compared to second hand machines of older age group. Therefore working backwards from the cost of the new machines is unrealistic.

iv) Value declared by the appellant should therefore followed and they had produced proforma and later on agreed which confirms the actual payments made by the appellant towards cost of the goods.

v) In the second round of adjudication passed on the directions of the High Court, appellant had given details of imports of similar goods in support of their stand. The Ld. Counsel takes us to the written submissions filed in re-adjudication dated 04.11.2006 at page 77 to 88 of the appeal paper book, wherein details of Bills of Entry covering imports of identical goods in Chennai Customs House and Bangalore Customs house have been submitted; however, such data has not been taken into consideration by the adjudicating authority.

vi) At the time of hearing, the Commissioner had taken note of the invoice which shows the price of the goods as USD 29100 and passed an order of enhancement of value on this basis. Fixation of value on a new finding by the Commissioner when the same was not discussed nor relied upon by the Cestat in its order cannot be relied upon by the adjudicating authority especially since the appellant was not given opportunity of verifying the same not to comment on the same. Evidence relied upon by the Commissioner in the impugned order for fixing the value at Rs. 4,08,820/- is not

Customs, Excise & Service Tax Appellate Tribunal acceptable since earlier CESTAT in its Final order dated 07.05.1997 had fixed the value on same evidences which was set aside by the Hon'ble High Court vide order dated 25.07.2005.

3. On the other hand on behalf of Revenue Ld. AR, Shri B. Balamurugan, AC, reiterated the findings in the denovo adjudication and submitted that the adjudicating authority in para-19 of his order had already conveyed his inclination to consider the adopted value indicated in the invoice produced by the importer themselves, and that the assessable value of Rs. 4,08,820/- has been correctly arrived at after granting depreciation of 70% for the period from 1989 to 1996.

4. Heard both sides and have gone through the records.

5. In the earlier order of the Tribunal dated 09.051997, CESTAT had ruled that the letter received from M/s. Konica Corporation cannot be accepted as the basis for assessment, a view which was confirmed by the subsequent order dated 25.07.2006 of the Hon'ble High Court of Madras. In that order, CESTAT had relied upon the quotation which showed the price as USD 29100 in the year 1989 and he Tribunal had ordered the assessable value tobe worked out accordingly and for the film processor on the basis of USD 11650. This ruling of Cestat has further been set aside by the Hon'ble High court. However, the Hon'ble High Court directed that the Commissioner should fix the value of the goods on the basis of evidence available and the invoices produced by the

representatives and any other material that may be produced at the time of hearing.

6. Discernably the prices that USD 29100 and USD 11650 adopted for the printer processor and the film processor by the Tribunal in its earlier order can no longer form a basis since they have been set aside by the High Court.

7. Pursuant to the directions of the order of the High Court it emerges that appellants had produced details of Bills of Entry 22651 dated 6.9.1996 on identical goods cleared at Bangalore and Bill of Entry No. 422597 dated 3.9.2002 cleared through Chennai Customs House for identical goods. Based on this import data, the appellants contended vide their written submissions dated 4.11.2006 that the said goods had been cleared in these Customs Houses, for more or less the same value declared by them. However, the adjudicating authority, in para-17 of his order has dismissed these evidences on the grounds that the impugned goods were imported in 1996 whereas the details on identical imports given pertain to the years 1998 and 2002, further that that no imports of any two second hand machines can be comparable as the value depends on the actual physical condition of the used goods. Having rejected the evidences produced by the importer, the adjudicating authority has gone back to the same manner and method of arriving at assessable value, which was adopted in the earlier Tribunal order dated 9.5.1997, which has been set aside by the High Court. This being the case, the methodology adopted by

the adjudicating authority in arriving at the assessable value of Rs. 408120/- cannot be sustained.

8. As mentioned by the adjudicating authority himself in para-17 of the order, no imports of any two imports of secondhand machines can have the same value. At the time of import the Chartered Engineer's Certificate, on letterhead of Konica Singapore had been produced, which had been disregarded as unreliable by the department for various reasons, including the fact that M/s. Konica Singapore Pvt. Ltd in a fax reply had given a higher price of the same machine when new. However nothing prevented the department, if they were not in acceptance of the certificate of the foreign chartered engineer, to have got the make, condition and correct valuation of the used Konica Minilab system, from a local chartered engineer. This was not done. In these circumstances and also considering that the fax information conveyed by Konica Singapore is to be disregarded as per the orders of the High Court, there will be no other option and further since the value declared by the importer has not been disproved in any other manner by the department, the same will then necessarily have to be accepted as the transaction value of the goods. The import has been made in the year 1996 and this dispute has been festering for over two decades. In fact this is the second time that the matter has been come up to the Tribunal. In spite of the clear and cogent directions of the Hon'ble High Court, the denovo adjudication, in our view is found wanting and has not addressed the evidences provided by the importer. Taking all these factors into

consideration and especially considering that the declared values have not been satisfactorily demolished or disproved by the department, as per the parameters laid down by the Hon'ble High Court, there will only be one option left, viz., to accept the declared invoice/imported price as the transaction value and calculate duty liability accordingly. This, in our view is the only way to bring closure to this abssymally long pending dispute.

9. In view thereof, the impugned order is set aside in toto and the appeal is allowed by way of ordering acceptance of import/invoice values declared by the appellant as the basis of arriving at the assessable value and determination of duty liability.

(Order pronounced in the open Court on 31/08/2017)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

Sulekha Beevi C.S.
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

Customs, Excise & Service Tax Appellate Tribunal

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सीमाशुल्क उत्पादशुल्क एवं सेवा कर अपील अधिकारी / (CESTAT)
चेन्नै / CHENNAI