CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO. III

Customs Appeal No.00237 of 2008 - DB

(Arising out of Order-in-Original No.7810/2008, dated 25.03.2008 passed by the Commissioner of Customs, Chennai)

M/s. Baburam Premchand, **: Appellant**
No.52, Vaidyanatha Street,
Tondiarpet, Chennai 600 081.

VERSUS

Commissioner of Customs, **: Respondent**
Customs House,
No.60, Rajaji Salai, Chennai.

APPEARANCE:

Shri N. Viswanathan, Advocate for the Appellant
Shri S. Balakumar, Authorized Representative for the Respondent

CORAM:

HON'BLE SMT. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)
Hon'BLE SHRI P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.

DATE OF HEARING: 17.08.2021

DATE OF PRONOUNCEMENT: 13.10.2021

Per Smt. Sulekha Beevi C.S:

The above appeal was originally disposed by the Tribunal vide Final Order No.40487/2017, dated 08.03.2017, whereby Tribunal dismissed the appeal. The appellant preferred appeal before the Hon'ble High Court as CMA No.173/2018 and vide judgment dated 18.9.2019, the matter has been remanded to the Tribunal for fresh consideration.

2. The learned counsel Shri N. Viswanathan appeared and argued for the appellant. The facts narrated in brief along with his submissions are as under :-

The Directorate of Revenue Intelligence [DRI], Chennai received specific information that M/s. Baburam Premchand (appellant herein) has imported a consignment vide Bill of Entry dated 20.06.2002 declaring the goods as Tin Free Sheets (Secondary/Defective TFSSD) and that in the said consignment Tin Sheets (secondary/defective Tin Sheets) were concealed; that earlier they imported Tin Coils mis-declaring it as Tin Free Sheets and that these goods are lying in the factory. On such information, officers of DRI searched the factory premises of the appellant on 22.06.2002. On verification of stock available in the factory premises, Tin Coils/Sheets totally weighting 65.4 MTs were found. Shri Prem Gupta, Partner of the firm stated that the said goods were part of the earlier consignments of 100MTs of Tin Coils, which they imported mis-declaring the same in the consignment of 167 Mts of TFSSD coils vide two bills of entry, dated 27.05.2002 and another bill of entry dated 16.04.2002. The goods weighing 68.4 MTs of Tin Sheets/Coils were seized under Mahazar dated 22.06.2002 as it appeared that the goods had been imported by mis-declaring the description, quality, quantity and value and in violation of provisions of Exim Policy which stipulated that secondary / defective Tin sheets has to be accompanied by pre-shipment certificate.

3. The live consignment covered under bill of entry dated 20.06.2002 lying at CFS was also examined by the officers on 25.06.2002. On such examination, it was found that the entire consignment was Tin Sheets of width of 500 mm, whereas, the goods were declared by the importer as Tin Free Sheets (TFSSD) and the value declared was USD 200/MT as against the prevalent value of USD 465/MT applicable to Tin Sheets of width above 600 mm. The goods weighing 48.851 MTs was also seized under a Mahazar, dated 25.06.2002. Samples were drawn from the goods lying at factory and the live consignment and sent for chemical analysis. Statement of Shri Prem Gupta was recorded. The report from M/s. National Metallurgical Laboratory [NML], dated 04.07.2002 certified that the

goods seized from the godown and the live consignment were Tin Sheets of width above 600 mm.

4. As per the Export-Import Policy 2002-07, the import of Tin Sheets of width above 600 mm has to be accompanied by a pre-shipment certificate issued at the Port of Loading. Such certificate has to contain the details of description of material, quality and chemical analysis of the material. Tin Free (TFSSD) coils imported are classifiable under CTH 7209.90 whereas Tin Sheets/coils are classifiable under CTH7210.99 attracting higher duty. It appeared that the appellant had declared the cargo as (Tin Free Sheets) TFSSD to evade payment of Customs duty. As the goods were mis-declared the value declared for importsby appellant was rejected. Since contemporaneous imports of identical goods were not available the value could not be arrived under Rule 5 of Customs Valuation Rules, 1998. Therefore, it was felt by the department that value has to be arrived on the basis of contemporaneous imports of similar goods, as shown in table below:

B/E No. & date	**Description of goods**	**Overseas supplier**	**Unit Price (USD) PMT**
398572/28.05.2002	TSSD	Euroferco NV Belgium	465
400157/04.06.2002	-do-	-do-	465
407039/02.07.2002	-do-	-do-	465
389055/10.04.2002	-do-	Sehgal GMBH, Germany	475
393031/03.05.2002	-do-	-do-	475

5. Based on the above, show-cause notice, dt.17.09.2002 was issued to the appellant by DRI under section 124 of the Customs Act, 1962 in which the following were proposed:-

> (i) To classify the goods of 100 MTs covered under bill of entry, dated 27.05.2002 and 16.04.2002 as well as 48.851 Mts covered under bill of entry dated 20.06.2002 as Tin Sheets/Coils falling under CTH 721090;
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> (ii) The declared value of the goods covered under the above bill of entry should not be rejected;

(iii) To fix the value of the goods at 465/MT for goods of Belgium origin and at USD 475/MT for goods of Germany origin covered under bill of entry dated 27.05.2002. Demand differential duty amounting to Rs.7,43,752/- on 100 MTs on Tin Sheets/Coils, 68.4 MTs seized from their godown and 31.4 MTs also sold without bills;

(iv) Demand duty of Rs.7,79,287 on 48.851 MTs of Tin Sheets covered under bill of entry dated 20.06.2002 for live consignment;

(v) To appropriate the amount of Rs.6,89,000/- and Rs.3,38,000/- deposited by the appellant towards duty liability for the past clearances and live consignments;

(vi) Interest under section 28AB of the Customs Act, 1962 should not be demanded on the duty evaded in respect of past clearances;

(vii) To confiscate 68.451 MTs of Tin Sheets/Coils seized from the godown valued at Rs.15,64,525/-;

(viii) To hold that 31.6 MTs of Tin Sheets/Coils valued at Rs.7,22,792/- already sold by the appellant is liable for confiscation;

(ix) To hold liable for confiscation of 67.13 MTs of TFSSD Coils valued at Rs.8,59,776/- which was used for concealing the Tin Coils should not be held liable for confiscation;

(x) To confiscate 48.851 MTs of Tin Sheets covered under bill of entry, dated 20.06.2002 valued at Rs.11,20,005. [CIF];

(xi) To impose penalty under section 114A of the Customs Act, 1962; and

(xii) To impose penalty under section 112(a) of Customs Act, 1962 in respect of live consignment covered under bill of entry dated 10.06.2002.

6. After adjudication, the original authority ordered for classification of the goods under CTH 721090, rejected the declared value, confirmed the differential duty as well as duty liability, interest and imposed penalty. He ordered as under:-

"(a) I order classification of goods (100 MTs covered vide Bs/E No.11630 & 11612 both dated 27.05.2002 and 389691, dated 16.04.2002 and 48.851 MTs. Covered under B/ENo.404351, dated 20.06.2002) as Tin Sheets/Coils (S/D) of width above 600 mm under CTH 7210.90.

(b) I reject the declared value for the goods covered under Bs/E No.11630 & 116/2, both dated 27.05.2002 and 389691, dated 16.94.2002 and 404351, dated 20.06.2002 (live consignment).

(c) I fix the value of the goods @ USD 465/MT for goods of Belgium origin covered under Bs/E No.389691, dated 16.04.2002 and 404351, dated 20.06.2002 and @USD 475/MT for goods of Germany origin covered under BS/E No.011630 & 011612, both dated 27.05.2002 *u/r* 6 of CVR, '88.

(d) I demand a differential duty amount of Rs.7,43,752/- on 100 MTs of Tin Sheets/Coils already cleared vide Bs/E.No.11630 & 11612 both, dated 27.05.2002 and 389691, dated 16.04.2002 under proviso to sec. 28(1) of CA, '62.

(e) I order levy of duty amount of Rs.7,79,287/- on 48.851 MTs of Tin Sheets covered under B/E No.404351, dated 20.06.2002 on merits.

(f) An amount of Rs.6,89,000/- & Rs.3,38,000/- deposited by BP be adjusted towards the duty liability for the past clearances and live consignments respectively.

(g) I demand interest *u/s* 28AB of the Customs Act,'62 on the duty evaded in respect of past clearances.

(h) I order confiscation of 68.4 MTs of Tin Sheet/Coils seized from the company premises valued at Rs.15,64,525/- (CIF), 31.6 MTs of Tin Sheet/Coils already sold, valued at Rs.7,22,792/- & 48.851 MTs of Tin Sheet covered under B/E No.404351, dated 20.06.2002 valued at Rs.11,20,005/- (CIF) *u/s* 111(d), (l), (m) of CA, '62 & 67.13 MTs of Tin Free Sheets Sec/Def valued at Rs.8,59,776/- used for concealing the Tin Coils (S/D) *u/s* 119 of CA.'62.

However, I give an option to the importer to redeem the above mentioned goods on payment of a redemption fine of Rs.10,00,000/- [Rupees Ten Lakhs only].

I impose a penalty equivalent to the duty demanded along with interest payable thereon,on M/s. Baburam Premchand *u/s* 114A OF THE Customs Act,'62 in respect of past clearances. I imposed a penalty of Rs.1,00,000/- (Rupees One Lakh only) on M/s. Baburam Premchand *u/s* 112(a) of the Customs Act,'62 in respect of the live consignment covered under B/E No.404351, dated 20.06.2002".

7. Against such order, the appellants had earlier preferred an appeal as Appeal No.C/00344/2003/MAS before the Tribunal and vide Final Order No.1260/2006, the matter was remanded to the adjudicating authority. The relevant portion of the Final Order is as under:-

"The classification ordered under CTH 7210.90 in respect of goods covered by Bill of Entry No.404351, dated 20.06.2002 is appropriate. The argument of the appellants that copies of bills of entry relied on had not

been furnished to them before enhancing the assessable value of the consignments of Tin Sheets imported by them and the same was violation of principles of natural justice carries considerable force. Principles of natural justice require that the assessee be put to notice of all the information relied on before deciding any allegation against the assessee, especially to raise assessable value whereby his duty liability also gets enhances. The penal liabilities including fine on the appellants are linked to the quantum of value suppressed. So also the interest liability confirmed in the impugned order. With the value being enhanced, profit comes down and so also should the fine. The Tribunal, in M/s. Al-Falah (Exports) Vs. CC. Surat reported in 2006 (198) E.L.T.343 (Tri.-LB), decided that paying the duty due before issue of SCN subsequently confirmed in the order entitles the assessee to waiver of related penalty and interest thereon. However, it was held that penal liabilities not related to duty liability are not affected by payment of duty amount before the issue of SCN. The adjudicating authority is bound to follow this ratio. The judicial authorities cited by appellants do not disapprove imposing of penalties under section 114(A) and Section 112(a) on an importer for different transactions.

It was decided in M/s. Orion Systems Vs CC, Cochin – 2005 (192) E.L.T.1117 (Tri.-Bang), was upheld by the Apex Court that the requirement that when bill of entry relied upon by the department to enhance value was not available on record, it could not be concluded that the goods imported on such bill of entry were identical to the goods imported by the assessee. In view of the above ratio, it is essential that the importer is given an opportunity to contest the proposal to enhance the value of the impugned goods by furnishing him copies of the bills of entry relied upon. As the duty, penalty, fine, interest etc., depend on the assessable value to be determined, the impugned order is set aside and the matter remanded to the Commissioner for adjudicating the allegations afresh in the light of our various observations above. Of course, the appellants will be given adequate opportunity of being heard before such adjudication".

8. After *de novo* adjudication, the order dated 25.03.2008 was passed by the adjudicating authority against which the present appeal is filed. The operative portion of the *de novo* adjudication is as under:-

(a) I reject the declared value for the goods covered under Bs/E No.11630 & 11612 both dated 27.05.2002 and 389691, dated 16.04.2002 and 404351, dated 20.06.2002 (live consignment).

(b) I fix the value of the goods @ USD 465/MT for goods of Belgium origin covered under Bs/F No.389691, dated 16.04.2002 and 404351, dated 20.06.2002 and @ USD 475/MT for goods of Germany origin covered under Bs/E No.11630 & 11612 both dated 27.05.2002 under 6 of the Customs Valuation Rules, 1988.

> (c) I demand the differential duty amount of Rs.7,43,752/- on both dated 27.05.2002 and 389691, dated 16.04.2002 under proviso to section 28(1) of Customs Act, 1962 along with applicable interest under section 28AB of the Customs Act, 1962.
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> (d) I order levy of duty amount of Rs.7,79,287/- on 48.851 MTs of Tin Sheets covered under B/E No.404351, dated 20.06.2002 (live consignment) on merits.
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> (e) I appropriate an amount of Rs.6,89,000/- & Rs.3,38,000/- deposited by M/s. Baburam Premchand towards the duty liability for the past clearances and live consignment respectively.
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> (f) I confiscate 68.4 MTs of Tin Sheets/Coils valued at Rs.15,64,525/- (CIF) seized from the company premises under section 111(d), (l) & (m) of Customs Act, 1962. However, it all the importers to redeem the goods on payment of fine of Rs.3,50,000/- [Rupees Three Lakhs and Fifty Thousand only) under section 125 of the Customs Act, 1962.
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> (g) Since 31.6 MTs of Tin Sheets/Coils valued at Rs.7,22,793/- already sold and the same are not under Customs custody, I do not pass any order for confiscation.
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> (h) I confiscate 48.851 MTs of Tin Sheets valued at Rs.11,20,005 /- (CIF) covered under B/E No..4045, dated20.06.2002 under section 111(d),(l)& (m) of Customs Act, 1962. However, I allow the importers to redeem the goods on payment of fine of Rs.2,50,000/- [Rupees Two Lakhs and Fifty Thousands only] under section 125 of the Customs Act, 1962.
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> (i) I confiscate 67.13 MTs of Tin Free Sheets Seconds/Defective valued at Rs.8,59,776/- used for concealing the Tin Coils (Seconds/Defectives) under section 119 of Customs Act, 1962. However, I given an option to the importers to redeem the above mentioned goods on payment of fine of Rs.2,00,000/- (Rupees Two Lakhs only) under section 125 of the Customs Act, 1962.
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> (j) I impose a penalty equivalent to the duty demanded along with interest payable thereon on M/s. Baburam Premchand under section 114A of the Customs Act, 1962 in respect of past clearances.
>
> (k) I impose a penalty of Rs.8,00,000/- [Rupees Eight Lakhs only] on M/s. Baburam Premchand under section 112(a) of the Customs Act, 1962 in respect of live consignment covered under B/E No.404351, dated 20.06.2002".

9. The arguments put forward by learned counsel Shri N. Viswanathan are summarized as under:-

(i) The department has enhanced the value based on certain contemporary imports of similar goods. The appellant was not been supplied with details of these contemporaneous imports which are stated in the show-cause notice. The Tribunal by its Final Order, dated 11.12.2006, remanded the matter with specific direction to furnish copies of such bills of entry of contemporaneous imports, which are the basis for enhancement of the value. It is stated in the SCN itself that details of contemporaneous imports of identical goods are not available. The department has merely given a table showing some figures which is said to be value/price of contemporaneous import of similar goods. The appellant has not been supplied with any of such details in spite of specific direction of the Tribunal. Hence, the re-determination of duty merely on some figures given in the show-cause notice is highly arbitrary.

(ii) The department has proposed in the show-cause notice to classify the quantity of 100 MTs of goods imported under various Bills of entry as Tin Sheets/Coils (Second/Defective) of width 600 mm under CTH 721090. However, the duty has been demanded treating these goods as virgin TFS sheets/Coils.

(iii) The entire proceedings are bad and unsustainable in law as imported goods by earlier Bills of Entry were examined and cleared by proper officers of Customs.

(iv) The original authority has observed in his order that the minimum floor price of USD 465/MT for import of TFS has been fixed by the Ministry of Commerce and that if the import price was lower, license is required for import of goods. No such averments have been made in the show-cause notice issued to the appellant. These observations are beyond the show-cause notice.

(v) The confiscation of defective materials of 67.130 MTs of TFS Coils alleged to be used for concealing the Tin Sheets (Secondary/Defective) under section 119 of the Customs Act and imposition of redemption fine is not proper and legal. The above quantity of goods were not at all seized by DRI officers as these goods were not physically available for confiscation. The redemption fine imposed in this regard cannot sustain.

(vi) With regard to the confiscation of 16.5 MTs of goods seized at the appellant’s factory, it is submitted by learned counsel that the Mahazar was drawn for 68.4 MTs and this included 16.5 MTs of the materials. This submission of the appellant was rejected by the adjudicating authority as seen noted in para 24 by saying that the Mahazar was drawn based on the particulars available on the packages furnished by the overseas supplier. This finding is *per se* wrong and incorrect as there is no evidence to this effect on record. The officers while taking possession of the goods at the time of seizure have to examine the goods and cannot proceed on the basis of overseas suppliers information especially when the case of the DRI is that the goods have been misdeclared.

(vii) The reliance placed by the adjudicating on the NML report is not correct as it is stated in the report that the same is provided merely on visual examination of the sample goods. The demand of differential duty, confiscation cannot sustain.

(viii) Without prejudice to the above submissions, it is stated by the Ld.Counsel that appellant paid the entire duty before issue of show-cause notice and, therefore, the benefit of reduced penalty under section 114A ought to have been extended by the original authority. A huge penalty of Rs.8 lakhs has been imposed in the *de novo* adjudication order as against Rs.1 lakh imposed in the earlier round of litigation. This would clearly exhibit the bias and prejudice against the appellant only for the reason that the appellant requested to supply copies of the bills of entry showing the contemporaneous value of the imports relied for enhancement of value.

(ix) The learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of *M/s. Canon India P. Ltd., Vs CC* reported in *2021 (34) S.C.* and the decision of the Hon'ble jurisdictional High Court in the case of Quantum Coal Energy P. Ltd. Vs Commissioner reported in Writ Petition (MP) No.10186-10187 of 2014 judgment dated 16.03.2021 to argue that the officers of DRI have no power to issue show-cause notice for demand of duty under section 28 of the Customs Act, 1962.

10. The learned Authorised Representative Shri S. Balakumar appeared for the department. He supported the findings in the impugned order.

11. Heard both sides.

12. At the outset, it has to be stated that the Tribunal vide its earlier Final Order, dated 11.12.2006 had remanded the matter with specific direction to supply copies of the details regarding the contemporaneous imports of similar goods which has been made the basis for enhancing the value of the imported goods and for re-determining the duty. In spite of such specific direction, the department has not provided the evidence regarding contemporaneous imports. In para 25, the original authority has discussed this issue, which is noteworthy and reproduced as below:-

> *"In view of the misdeclaration of the goods, the value declared in the import documents cannot be taken as the transaction value for the purpose of assessment in terms of section 14(1) of the Customs Act, 1962 and the value declared in the subject four bills of entry are to be rejected. Consequently, the value has to be determined as per the provisions of the Customs Valuation Rules, 1988. <u>In the absence of identical imports the value was enhanced on the basis of contemporaneous price of similar goods under Rule 6 of Customs Valuation Rules, 1988</u> and accordingly the value adopted at USD 465/MTs for the goods imported vide Bills of Entry No.389691, dated 16.04.2002 and 404351, dated 20.06.2002 and at USD 475/MT for the goods imported vide Bills of Etry Nos.011630 & 011612 both dated 27.05.2002 under Rule 6 of Customs Valuation Rules, 1988. The value has been arrived/adopted under Rule 6 of the CVR, 1988 on the basis of contemporaneous imports of similar goods as detailed below:-*

B/E No. & date	**Description of goods**	**Overseas supplier**	**Unit Price (USD) PMT**
398572/28.05.2002	TSSD	Euroferco NV Belgium	465
400157/04.06.2002	-do-	-do-	465
407039/02.07.2002	-do-	-do-	465
389055/10.04.2002	-do-	Sehgal GMBH, Germany	475
393031/03.05.2002	-do-	-do-	475

13. Undisputedly, the department admits that there are no details of identical imports available for re-determination of the duty. They proceeded to enhance the value on the basis of contemporaneous price of similar goods imported. A table is also seen furnished with regard to the details of the bills of entry of the similar goods imported. Apart from this table, even after remand and repeated requests by the party, the department has not been able to furnish the details with regard to these bills of entry which according to them are contemporaneous imports of similar goods. It is not explained by the department how these goods are similar or akin to the goods imported by the appellant. When the department themselves say that the goods are not identical but only similar they should put forward evidence to show the nature and description of the goods imported vide these bills of entry. Apart from the table given above, there is no document to show that these figures pertain to actual contemporaneous imports of similar goods. Indeed, it is iniquity on the part of the department to rely upon the details in the table without supplying supporting documents to the appellant. The department should at least be able to explain from which source they have obtained the figures in the above table. Even after several stages of litigation, the department has not been able to throw any light on these aspects. It is also pertinant to note that appellant has raised this contention in the very first stage itself . We have to conclude that the enhancement of value of goods merely on the basis of figures given in the table of the Show-cause notice has no legal basis.

14. We, therefore, hold that the enhancement of value of the goods as well as re-determination of duty/differential duty cannot sustain and requires to be set aside, which we hereby do.

15. The appellant has put forward contentions challenging the confiscation of goods as well as imposition of redemption fine and penalty. As we have set aside the enhancement of value, duty demand, the order of confiscation of goods as well as imposition of

redemption fine and penalties cannot then sustain. The same are set aside. On merits the appellant succeeds.

16. The learned counsel has also put forward arguments challenging the jurisdiction of DRI to issue the show-cause notice. He relied on the decision of The Hon'ble Apex court in the case of *M/s. Canon India P. Ltd., (2021-TIOL-123-SC-CUS-LB)* wherein it was held that DRI officers are not the proper officers to issue show-cause notice demanding customs duty under Section 28 (4) of the Customs Act, 1962. The said decision has been followed by the Hon'ble Apex Court in the case of *CC, Kandla vs M/s.Agarwal Metals and Alloys* in Civil Appeal No.3411/2020, dt.31.8.2020. In the present case, the goods imported vide earlier Bills of Entry, dated 27.05.2002 and 16.04.2002 were cleared for home consumption after payment of duty by the appellant. By the above show-cause notice, the DRI proposes to re-classify the goods and re-assess the duty. The order of confiscation is only in consequence of such re-assessment. To this extent, the show-cause notice is hit by the principle of law laid in the judgment of the Hon'ble Apex Court. As regards the live consignment seized by DRI since the bill of entry is not yet assessed, and the demand is not as contemplated under section 28 of Customs Act,1962, the same is not hit by the principle laid down in the Apex Court judgment.

17. From the discussions made above, we set aside the impugned order. The appeal is allowed with consequential reliefs, if any.

(Pronounced in the open court on **13th October, 2021**)

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

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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