# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# <u>CHENNAI</u>

REGIONAL BENCH – COURT NO. III

## Customs Appeal No. 41868 of 2014

(Arising out of Order-in-Appeal C.Cus.No. 884/2014 dated 12.06.2014 passed by Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**M/s. Lakshmi Machine Works Limited** **...Appellant**
Perianaickenpalayam,
Coimbatore – 641 020.

***Versus***

**Commissioner of Customs** **...Respondent**
Chennai Import Commissionerate,
No. 60, Rajaji Salai,
Custom House,
Chennai – 600 001.

**<u>APPEARANCE:</u>**

For the Appellant : Mr. S. Murugappan, Advocate
For the Respondent : Mr. Anoop Singh, Authorised Representative

**<u>CORAM:</u>**

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)**
**HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

**<u>FINAL ORDER No. 40759 / 2024</u>**

DATE OF HEARING/ DECISION: 24.06.2024

**Order :- Per Ms. SULEKHA BEEVI C.S.**

Brief facts are that the appellant imported various items such as O Rings, Seal Kids which are required for the manufacture of textile machineries and its spares through Chennai Port. The appellant had appointed M/s. Lakshmi Japan Ltd., as their Buying Commission Agent.

It was noted by the on-sight post clearance audit group that the appellant has not included the buying commission in the assessable value for payment of customs duty. Show Cause Notice dated 21.03.2013 was issued for the period 2011-2012 (upto February 2012) proposing to demand the differential customs duty of Rs.5,74,783/- along with interest and also for imposing penalties. After due process of law, the Original Authority confirmed the duty demand and interest. Against such order, the appellant filed appeal before Commissioner (Appeals) who upheld the same. Hence this appeal.

2.1 The Ld. Counsel Shri S. Murugappan appeared and argued for the appellant. The relevant provisions under Rule 10 (1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, was adverted to by the Ld. Counsel which reads as under:-

> *"10.Cost and services. -*
>
> *(1)In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -*
>
> *(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-*
>
> *(i) commissions and brokerage, except buying commissions;……"*

2.2 It is submitted that as per the above provision, buying commission is not to be included in the assessable value for payment of customs duties. Though, the said provision was pointed out to the Original Authority and Commissioner (Appeals), the argument was not accepted alleging that M/s. Lakshmi Japan Ltd., which is the buying agent of the appellant has procured the goods as an agent and thereafter sold them to the appellant herein. The Ld. Counsel adverted to the decision of the Hon'ble Apex Court in the case of *Apollo Tyres Ltd. Vs. Collector of Customs [1997 (89) ELT 7 (SC)]* and argued that the very same issue was considered by the Hon'ble Apex Court and held that buying commission is not to be included in the assessable value.

2.3 The Tribunal in the case of *Tata Iron and Steel Co. Ltd. Vs. Collector of Customs [1993 (66) ELT 622 (Tri.)]* has held that buying commission is not to be included in the assessable value even if the buying agent issues the import invoice. The said decision was upheld by the Hon'ble Supreme Court in *[1997 (91) ELT A88 (SC)].*

2.4 The Ld. Counsel argued on the ground of limitation also. It is submitted that on the very same issue a demand notice was issued on 11.12.1990 alleging that the buying commission has to be included in the assessable value. On 21.12.1990, the appellant issued detailed reply adverting to the relevant provision contained in the erstwhile Customs Valuation Rules, 1998. Pursuant to this reply, the Department issued Letter dated 27.01.1992 informing that the demand Notice has been withdrawn and further proceedings were dropped. It is argued by the Ld. Counsel that the issue pertaining to this appeal was thus well within the knowledge of the Department from 1990 onwards and therefore the Department cannot issue the Show Cause Notice invoking the extended period alleging suppression of facts. It is prayed that the Show Cause Notice may be set aside on the ground of limitation. The Ld. Counsel prayed that the appeal may be allowed.

3. The Ld. Authorised Representative Shri Anoop Singh appeared and argued for the Department. The findings in the impugned order was reiterated. It is argued by the Ld. Authorised Representative that the appellant has not furnished necessary documents to show that M/s. Lakshmi Japan Ltd., is actually a buying agent of the appellant. Therefore, the order passed by the Adjudicating Authority as well as the Commissioner (Appeals) holding that the buying commission is to be included in the transaction value is legal and proper. It is argued by the Ld. Authorised Representative that the goods having been procured by M/s. Lakshmi Japan Ltd., and thereafter consigned in the name of the appellant, the buying commission has to be included in the assessable value. Further, the same has not been mentioned separately in the Bill of Entry which amounts to suppression of facts. It is prayed that the appeal may be dismissed.

4. Heard both sided.

5. The first issue that arises for consideration is whether the buying commission is to be included in the assessable value for payment of customs duty or not.

6. The relevant Rule under Customs Valuation Rules, 2007 has been already noticed as above. It can been seen from the provision itself, that buying commission is not to be included in the assessable value. The main argument put forward by the Ld. Authorised Representative for Department is that the appellant has not furnished document to establish that M/s. Lakshmi Japan is the buying agent of the appellant. On perusal of records, it is seen that the appellant has furnished the agreement entered into by M/s. Lakshmi Japan Ltd. and the appellant showing that M/s. Lakshmi Japan Ltd. has been appointed as their buying agent outside India. This sufficiently establishes that M/s. Lakshmi Japan Ltd. is their buying agent. Further, the appellant has furnished the commercial invoice wherein the buying commission has been mentioned separately. So also, the manufacturer's invoice has been produced showing the same price.

7. The Hon'ble Apex Court in the case of *Apollo Tyres Ltd. (supra)* had considered the very same issue and held that the buying commission is not to be included in the assessable value. The relevant paragraphs read as under:-

> ***"6.*** *Now, the agreement provides that the appellant shall have the option and right to call for the services of General for the procurement of items of equipment required for the tyre plant and for rendering services related thereto. It provides that in the case of items of equipment which the appellants call upon General to procure, General shall obtain quotations from the appropriate suppliers and submit such quotations, with its recommendations, to the appellants for final approval, and no orders may be placed by General unless final approval is accorded by the appellants. The agreement provides that such items of equipment shall be purchased directly in the name of the appellants and the appellants would pay for the same, including shipping, transportation charges and insurance premia. For the procurement services the appellants agreed to pay General 3% of the F.O.B. value of the items of equipment, the payment to be made against a consolidated invoice to be submitted by General.*

*__7.__ Clearly, this was an agreement by which General was appointed the purchasing agent of the appellants in respect of such items of equipment for the tyre plant that the appellants opted to purchase through the agency of General. The provisions aforementioned make it clear that the appellants would see the quotations submitted to General by the various suppliers and would approve the same. They provide that the purchases from the suppliers would be made by the appellants. They provide that what the appellants would pay to General was a commission or remuneration to be computed on the basis of 3% of the value of each of the items of equipment. These provisions show beyond any doubt that the value of the items of equipment was not enhanced thereby. We, therefore, cannot accept the reasoning of the Tribunal.*

*__8.__ In the circumstances, the appeal is allowed, the order under appeal is set aside and the order of the Central Board of Excise and Customs is restored.*

*__9.__ There shall be no order as to costs."*

8. In the case of *Tata Iron and Steel Co. Ltd. (supra)*, this issue was considered and it was held that even if the buying commission is included in the invoice value, the same cannot be subject to levy of customs duty. The relevant paragraph reads as under:-

*__"5.__ We have heard both sides and gone into the facts and circumstances of the case. We have perused the Letter of Credit which has been opened. Sample copy of the same has been filed and the Letter of Credit is in the name of M/s. Pechinery Electrometallurgie, Tour Manhattan, Cedex 21, 92087 Paris La defense, France. This letter of credit is a sample as we were told that all the letters of credit are in the name of the supplier and not in the name of the buying agent. For proper appreciation of the correct legal position, we feel that a perusal of the Customs Valuation Rules is very essential and as such the same are reproduced below : Rule 4(1) reads as under :-*

*"4(1) Transaction value. The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules."*

*Rule 9(1) reads as under :-*

*"9(1) Cost and Services. In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -*

*(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely :*

*(i) commission of and brokerage, except buying commissions."*

*A simple perusal of sub-rule, (1) of Rule 4 and sub-rule (i)(l) of Rule 9 shows that in determining the transaction value there shall be added to the price actually paid or payable for the imported goods the cost and services to the* *extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, the value of commission and brokerage has to be added, but there is an exception the buying commission cannot be added. In the matter before us the appellants have enagaged Tata Ltd., London and Tata Incorporated, New York as their buying agents and the appellants are paying $2^1/_2$% commission as agent's fee for the services rendered by them. A copy of the sample letter of credit has been filed before us and it is not disputed that the letters of credit are opened in case of the actual foreign buyers. The appointment of Tata Ltd., London and Tata Incorporated, New York has duly been approved by the Reserve Bank of India and the said letter appears on page 8 of the paper book. The value for the purposes of assessment has to be done in terms of provisions of sub-section (1) of Section 14 of the Customs Act, 1962. Sub-section (1) and sub-section (1A) of the Customs Act, 1962 lays down that subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf. The Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 came into force with effect from 16th August, 1988 and have been amended from time to time. Rule 4 of the Customs Valuation Rules deals with the transaction value and further stipulates that the transaction value of the imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9. We have perused Rule 9(l)(i) which clearly lays down that the commission and brokerage has to be added, except the buying commission. Thus the buying commission paid by the appellants to the buying agent cannot be included. The main ground is on the basis of the issuing of invoice by the buying agent. Shri Kapil Sibal, the learned Senior Advocate had referred to the definition of invoice as given in Bouver's Law Dictionary Page 1682, Volume II, 8th edition, 3rd revision by Rawles. The definition of invoice as given in the said dictionary is reproduced below :-*

> *"INVOICE, an account of goods or merchandise sent by merchants to their correspondents at home or aboard, in which the marks of each package, with other particulars, are set forth. Marsh. Ins. 408; Dane, Abr. Index, An invoice ought to contain a detailed statement which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc.; 1 Pard. no. 248. See Graham v. Ins. Co., 2 Wash. C.C. 113. Fed. Cas. No. 5,674; Field v. Moulson, 2 Wash. C.C. 155, Fed. Cas. No. 4,770. Invoice carries no necessary implication of ownership, but accompanies goods consigned to a factor for sale, as well as in the case of a purchaser; Relker v. Ins. Co., 4 Abb. App. Dec. (N.Y.) 76. See BILL OF LADING. Invoice Price, the prime cost, or invoice of the cost. Le Roy v. Ins. Co., 7 Johns (N.Y.) 343.*
>
> *An invoice is not evidence of a sale; it is a mere statement of the nature, quantity and cost or price of the things invoiced and is as appropriate to a bailment as to a sale; Dows v. Bank, 91 U.S. 618, 23 L. Ed. 214; In re Smith & Nixon Piano Co., 149 Fed. 113.79 C.C.A. 53."*

*It is a settled law that where there is no definition of a particular word in the Act, we have to resort to law dictionary meanings. Accordingly, we have looked into the law dictionary meaning as cited by the learned Senior Advocate. The law dictionary meanings are based on various decisions of the courts. The main argument of the revenue is on the basis that invoices have been issued by the buying agent. We have perused the sample letters of credit*

> *filed before us. The same are in favour of the foreign supplier. Invoice carries no necessary implication of ownership, but accompanies goods consigned in the case of purchaser. This was so observed in the case of Dows v. Bank, 91 U.S. 618,23 L. Ed. 214. It was observed that an invoice is not evidence of a sale; it is a mere statement of the nature, quantity and cost or price of the things invoiced and is as appropriate to a bailment as to a sale. In view of these observations, we are of the view that in terms of Rule 9(l)(i) buying commission paid to the buying agent Tata Ltd., London and Tata Incorporated, New York cannot be included in the assessable value. It fully falls within the exception. Accordingly, we set aside the impugned orders and allow 177 appeals. The revenue authorities are directed to give consequential effect to this order."*

The above decision was also upheld by the Hon'ble Apex Court as reported in *[1997 (91) ELT A88 SC dated 30.04.1996]*

9. After considering the facts and also following the decisions as above, we are of the considered opinion that the buying commission is not to be included in the assessable value for payment of duty. The demand of duty cannot sustain and requires to be set aside. The issue on merits is held in favour of the appellant and against the Revenue.

10. The Ld. Counsel has argued on the ground of limitation also. It is seen that on 11.12.1990, the Department has issued demand notice on the very same allegation for earlier import made by the appellant through M/s. Lakshmi Japan Pvt. After considering the reply issued by the appellant, the Department has withdrawn the proceedings *vide* Letter dated 27.01.1992. We find that the issue was completely within the knowledge of the Department and for this reason, there are no ingredients for invoking the extended period. The Show Cause Notice in our view is time-barred. The

issue on limitation is also answered in favour of the appellant and against the Revenue.

11. From the foregoing, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any, as per law.

(Order dictated and pronounced in open court)

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| Sd/- | Sd/- |
| **(VASA SESHAGIRI RAO)** | **(SULEKHA BEEVI C.S.)** |
| MEMBER (TECHNICAL) | MEMBER (JUDICIAL) |

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