

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI.**

PRINCIPAL BENCH, COURT NO. II

Customs Appeal No. 52328 of 2019

(Arising out of Order-in-Appeal No. CC(A) CUS/D-II/PREV/NCH/411/2019-20 dated 14.06.2019 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s. B.B.M. Impex Pvt. Ltd.,
54, Regal Building, 2nd Floor, Connaught
Place, New Delhi-110001

Appellant

Versus

Commissioner of Customs (Preventive),
New Customs House, Near IGI Airport,
New Delhi-110037

Respondent

APPEARANCE:

Shri Aakarsh Srivastava & Shri Ashish Bansal, Advocates for the appellant.
Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50695 / 2020

DATE OF HEARING: 03.12.2019
DATE OF DECISION: 12.06.2020

ANIL CHOUDAHRY:

The issue in this appeal relates to rejection of declared value for import of Synthetic Rubber PBR Non Oil Off Grade Loose Lumps in Super Sacks Packing and consequential order of confiscation along with penalty.

2. The appellant is a regular importer and engaged in trading of- Synthetic Rubber PBR Non Oil Grade Loose Lumps in Super Sacks classifiable under Customs Tariff Heading 40021990 and also PVC Resin Powder Off Grade Suspension R 65/67 in super sacks classifiable under CTH 39042210.

3. The brief facts are that on the basis of intelligence, the Department examined the goods under import vide Bills of Entry, the details of which are as follows:-

S.No.	Bill of Entry No. & Dae	Description	Declared Value	Ass. Value
1.	2058314 date 28.07.2015	Synthetic Rubber PBR Non Oil Off Grade Loose Lumps in Super Sacks.	Rs.45.40 per kg.	Rs. 77.99 per kg.
2.	2116454 dated 03.08.2015	Synthetic Rubber PBR Non Oil Off Grade Loose Lumps in Super Sacks.	Rs. 26.81 per kg.	Rs.50.86 per kg.

4. The containers were examined, with respect to the goods, appeared to be-"White colour substance in semi-solid form", duly packed in super sacks, pasted with paper stickers marked as "NON OIL BR PCU-LITHIUM". In two of the containers the goods appeared to be- "White Colour Substance in powder "form", duly packed in Super Sacks and marked as "FORMOSA PLASTICS Made in USA". On examination of super sacks, a copy of MSDS No. PVC011, revision date 13.11.2012 and showing product name Scrap Polyvinyl Chloride/Polyvinyl Acetate Resin was found. Representative samples of each item were drawn and goods were detained.

5. The goods covered under the other Bill of Entry No. 2116454 were also examined on 03.08.2015, wherein four containers were found to contain-

"Black colour substance in semi solid form" duly packed in super sacks. The remaining two containers were found to contain "White color substance in powder form", duly packed in super sacks. Representative samples of each item was drawn for investigation.

6. Statement of Sh. Birj Bhushan Gupta, Director of the Appellant Co. was recorded on 10.08.2015 under Section 108 of the Customs Act, 1962, wherein he inter-alia stated that he had declared the goods as per his purchase invoice; that he will enquire the same from the supplier; that as per his knowledge, the goods "white powder" were not scrap/ waste which could be verified from any laboratory; that he will also produce previous B/Es in this regard; that as to "PVC Resin powder off grade suspension", he did not know about material safety data sheet (MSDS), which were found along with goods; that declaration would be verified from laboratory because that material was imported by him for the first time.

7. The samples drawn during the investigation were sent to the Central Institute of Plastics Engineering and Technology (CIPET), Murthal, Haryana, to check the nature, composition, density, ash contents and grade of the imported goods. The test report dated 08.10.2015 received from CIPET, Murthal, revealed that on the basis of the Filter Content, Moisture Content and identification of goods, the imported goods were of goods quality.

8. During the investigation, the impugned goods appeared to have been mis-declared on the basis of test report received from CIPET. Further, the impugned goods also appeared to have been under-valued on the basis of data available for the contemporaneous imports (NIDB data). Therefore, the detention of the goods was converted into seizure on 21.09.2015 under Section 110 of the Customs Act, 1962.

9. A Show Cause Notice was issued to the Appellant vide C. No. VIII(SB)10/Cus. Prev./A1pha/182/2015 dated 04.02.2016. The Show Cause Notice dated 04.02.2016 was adjudicated vide the impugned Order-in-Original dated 10.04.2017, wherein the adjudicating Authority ordered, inter alia, as under:

9.1 The declared values of Rs.54,79,364/- and Rs. 40,35,710/- in respect of goods imported vide Bill of Entry No. 2058314 dated 28.07.2015 and Bill of Entry No. 2116454 dated 03.08.2015 respectively were rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred to as CVR, 2007) and the same were re-determined at Rs. 79,74,593/- (Rupees Seventy Nine Lakhs Seventy Four Thousand Five Hundred Ninety Three only) and Rs. 59,05,187/- (Rupees Fifty Nine Lakhs Five Thousand One Hundred and Eighty Seven only) respectively, under Rule 4 & 5 of the Rules *ibid*, (being the value of identical/ similar goods).

9.2 The seized goods re-valued at Rs. 79,74,593/- and Rs.. 59,05,187/- in respect of Bill of Entry No. 2058314 dated 28.07.2015 and Bill of Entry No. 2116454 dated 03.08.2015 respectively were confiscated under Section 111(m) of the Customs Act, 1962. However, an option was given under Section 125 of the Customs Act, 1962 to the Appellant to redeem the seized goods on payment of redemption fine of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only).

9.3 Demand of differential duty of Rs. 12,85,013/- (Rs. 7,34,621/- + Rs. 5,50,392/-) in respect of two Bills of Entry mentioned above, was confirmed under Section 28 of the Customs Act, 1962 and ordered for recovery of the same along with interest under Section 28 AA of the Act *ibid*.

9.4 Penalty of Rs. 12,85,013/- under Section 114A of the Customs Act, 1962 was imposed on the Appellant for their willful acts of omission and commission.

10. The Adjudicating Authority passed the above orders on the basis of, inter alia, the following findings:

10.1 That the Appellant declared the description of goods imported vide Bill of Entry No. 2058314 dated 28.07.2015 as Synthetic Rubber PBR Non oil off grade loose lumps in super sacks, whereas test report from CIPET, Murthal identified the goods as Synthetic Poly Butadiene Rubber (PBR);

10.2 That the Appellant declared the value of Synthetic Rubber PBR non oil off grade loose lumps in super sacks Rs. 45.40 per kg., whereas the price available for contemporaneous imports (NIDB data) of Synthetic Rubber PBR, from same place of origin, with almost same level of import and imported during the same period of time was Rs. 103.99 per Kg; that in order to have a just and fair approach in the matter, the value of the said goods should be calculated in the range of 75-80% to the value of prime grade and arrived at Rs. 77.99/- per kg.

10.3 That the declared price for the synthetic Rubber BMB non oil off grade loose lumps in super sacks imported vide Bill of Entry No. 2116454 dated 03.08.2015 was Rs. 26.80 per kg., however, the previous imports made by the Appellant of the same product was Rs. 50.86/- per Kg. imported earlier vide Bill of Entry No. 9319794 dated 22.05.2015 and Bill of Entry No. 9592872 dated 16.06.2015.

11. Being aggrieved, the appellant filed appeal before the Learned Commissioner (Appeals), who vide the impugned order, was pleased to reject the appeal.

12. Being aggrieved, the appellant is before this Tribunal.

13. The Learned Counsel urges that the Commissioner (Appeals) have rejected the appeal in a mechanical manner and failed to appreciate the statement of Director of the appellant, who has not admitted the allegation of mis-declaration or undervaluation. Since, the statement of Director Shri Brij Bhushan Gupta is part of RUDs in the SCN, due credence and weightage ought to be given to it. It is further urged that the Department have failed to make out a case of undervaluation. The Department have not been able to show that the declared price was not the actual transaction value, since there is no allegation/ finding of any excess payment apart from the declared value by the appellant importer to his supplier. Admittedly, appellant and his supplier are not related parties.

13.1 It is further urged that the Hon'ble Supreme Court in the case of Century Metal Recycling Private Limited Vs. Union of India (2019) 6 SCC 655, have held that reason to doubt the valuation under Rule 12 of the Valuation Rules, should be reasonable, based on certain definite reasons. In the facts of the present case, there is no reason assigned for rejecting the transaction value, which is required to be followed and accepted. As per mandate of Section 14 of the Customs Act. As per Rule 12 (iii) (a) read with Explanation-1, "the proper officer shall have powers to raise doubts on the truth or accuracy of the declared value on certain reasons, which may include significantly higher value, at which similar or identical goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed".

13.2 It is further urged that the Court Below have erred in invoking Rule 12 (iii)(a), because the goods (as per NIDB) being relied upon were neither of same quantity nor of similar quality. The NIDB Data, being relied upon by

the Department (RUD 6 in the SCN) is for 45,236 kg. of Synthetic Rubber PBR-Rubber (Polyvinyl Rubber), whereas the imported goods covered under the aforementioned Bills of Entry totally amounted to 76,567 Kgs. and is for Synthetic Rubber PBR Non Oil Off Grade Loose Lumps. Further, the quality of good shown in the NIDB Data is not Known regarding its grade. Thus, Rule 12 have been wrongly invoked. Further, it is a normal trade norm that with increase of quantity, the price decreases. In the present case, NIDB Data, being of different quantity and quality of goods, cannot be relied upon to reject the transaction value in the appellants case.

13.3 It is further urged that the department has itself rejected the transaction value and have relied on NIDB data showing the value of product as Rs. 103.99 per kg. and thereafter re-determined the value as Rs. 73.99 per kg., calling it a "just and fair approach". No details of the just and fair approach to arrive at the enhanced value has been provided to the appellant, resulting in gross violation of the principle of Natural Justice.

13.4 Further, it is urged that the court below have gravely mis-interpreted the 'Test Report' of Central Institute of Plastic Engineering and Technology, Murthal, Haryana. The said report nowhere states that the goods are not as declared as in the Bill of Entry or that they are not "PVC Resin Powder Off Grade Suspension R 65/67". The lab report has simply given an opinion on composition of the goods. Further, no evidence has been adduced by the court below to arrive at the price suggested by it for PBC Resin Powder Off Grade Suspension R 65/67.

13.5 It is further urged that the court below erred in re-assessing the value of Synthetic Rubber BMB Non Oil Off Grade Loose Lumps, on the basis of previous imports made by the appellant, by relying on the assessed value whereas the declared value in those Bill of Entry is the same as declared

value in the present bills of entry. It is relevant to mention that the goods imported vide earlier Bill of Entry No. 9319794 dated 22.05.2015 and the Bill of Entry No. 9592872 dated 16.05.2015, which have been relied upon by the Department and in respect of which, the declared value was rejected and enhancement was made without any reasonable basis. The Appellant have challenged the assessment before the Commissioner (Appeals), who was pleased to set aside the assessment order, remanding the matter to the Adjudicating Authority for a redetermination in accordance with law by passing a speaking order. Learned Counsel further informs that pursuant to remand, the Adjudicating Authority/ Deputy Commissioner of Customs (import) have passed assessment order No. 36/2018/SKG/DC/Import/ICD/TKD dated 31.07.2018, by which the declared value has been accepted and passed the following operating order:-

ORDER

I order to re-assess the Bills of Entry Nos. (1) 9319531 dated 22.05.2015, (2) 9319794 dated 22.05.2015, (3) 9492906 dated 08.06.2015, (4) 9524919 dated 10.06.2015, (5) 9592872 dated 16.06.2015, (6) 9667958 dated 23.06.2015 and (7) 9670523 dated 23.06.2015 on the declared value under section 17(4) of the Customs Act, 1962 in compliance to the aforesaid Commissioner (Appeal) Order without prejudice to any other action which may be taken under this Act.

13.6 The Learned Counsel further informs that the said adjudication pursuant to remand has been accepted by the department, as informed by the Deputy Commissioner of Customs (Review) to the Assistant Commissioner of Customs, as recorded in para 4 of the remand order and have been pleased to grant the refund with respect to the Bills of Entry referred to hereinabove. It is further urged that under the facts and circumstances, the issue is no longer res integra and the impugned order is fit to be set aside with consequential benefits.

14. Learned Authorized Representative for Revenue has relied upon the impugned order and has further placed reliance on the following case laws.

(i) Atmaram Agarwalla Vs. Collector of Customs 1992 (60) E.L.T. 217 (Cal.)

(ii) Techno Marketing Vs. Commissioner of Customs, Kolkata 2004 (164) E.L.T. 113 (Tri.- Del)

(iii) Varun Overseas Vs. Commissioner of Customs, New Delhi 2011 (273) E.L.T. 271 (Tri.- Del.)

(iv) Bipin M. Pujara Vs. Commissioner of Customs 1999 (107) E.L.T. 298 (Cal.)

(v) Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd. 2007 (214) E.L.T. 3 (S.C.)

(vi) Commissioner of Customs, Vishakhapatnam Vs. Aggarwal Industries Ltd. 2011 (272) E.L.T. 641 (S.C.)

15. Having considered the rival contentions we find that the case of undervaluation has been made by the Department on two of the three types of goods imported by the appellant vide the Bills of Entry in dispute, namely:-

a. Synthetic Rubber PBR Non Oil off Grade Loose Lumps in Super Sacks

b. Synthetic Rubber PBR BMB Non Oil off Grade Loose Lumps in Super Sacks

a. For Synthetic Rubber PBR Non Oil off Grade Loose Lumps in Super Sacks

The appellant declared it at Rs. 45.40 per kg, however the Ld Adjudicating Authority referred to the price of contemporaneous imports (NIDB data) which was Rs. 103.99 per kg and thereafter in the name of a just and fair approach, re-determined it at 75% of the NIDB data, which comes to Rs. 77.99 per Kg. We find force in the contention of Ld Counsel for the appellant that the NIDB data cannot be relied upon by the Department, as it is for different quantity and quality of goods, since it is for 45,236 kg of Synthetic Rubber PBR (CTH40022000), whereas the appellant goods are 76,567 kg of Synthetic Rubber PBR Non Oil off grade loose lumps (CTH 40021990). We also find force in their contention that the so called just and fair approach adopted by the Ld Adjudicating Authority is arbitrary. No reason how he arrived at this figure to re-determine the value at 75% of the NIDB data.

b. Synthetic Rubber PBR BMB Non Oil off Grade Loose Lumps in Super Sacks

The appellant declared it at Rs. 26.81 per kg, however the Ld Adjudicating Authority re-determined its value to Rs. 50.86 per kg based on the appellants own previous imports vide Bills of Entry Nos. 9319794 dated 22.05.2015 and 9592872 dated 16.06.2015. We find force in the contention of Ld Counsel for the appellant that this was the 'loaded value' and not the declared value. The appellant had filed appeal against the said value loading, before the Ld. Commissioner (Appeals), and pursuant to remand, it back to the Assessing Officer have accepted the declared value, which is the same in the Bills of Entry under dispute. This Assessment Order has been accepted by the Department and thus the issue stands settled in favor of the appellant.

16. We also find that the CIPET Test Report supports the correct description of the impugned goods in the Bills of Entry, which is rather more detailed than mentioned in the CIPET Report and thus there is no

misdescription. We also find that there is no admission of Appellant admitting to undervaluation, or of any extra financial consideration apart from the declared transaction value, paid to the overseas supplier. Further, there is no evidence that the appellant and overseas supplier are related parties or that the invoice value was not the transaction value. The Department has failed to show any contemporaneous evidence of higher price, and thus the transaction value cannot be rejected, as held by the Hon'ble Apex Court in Commissioner Central Excise Vs. Sanjivani Non Ferrous Trading Pvt. Ltd. (2019) 2 SCC 378 and Commissioner of Customs Vs. South India Television Pvt. Ltd (2007) 6 SCC 373.

17. In view of the above, the allegation of undervaluation cannot be sustained. The impugned order is set-aside.

18. Therefore, the appeal is allowed with consequential benefits.

(pronounced on **12.06.2020**)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)