

FAX: 011-26108426

REGISTERED / AD

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH**

Dated: 17/03/2015

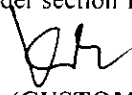
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. C/A/50588/2015-CU[DB] dated 18/02/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.


Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	C/18/2009	OMEX INTERNATIONAL, 57-C/III, G.F.EAST GURU ANGAD NAGAR, NEW DELHI-110092. Name and Address of Respondent
2		-C.C. (ICD) NEW DELHI ICD, Tughlakabad, New Delhi 110020.

Copy To

3 Advocate(s) / Consultant(s):

**K. K. SHARMA.
A-115, GROUND FLOOR,
ASHOKA ENCLAVE, PART-II,
SECTOR-37, FARIDABAD-
HARYANA**

4 Additional Party's Name & Address :

5 Bar Association, CESTAT, Delhi

6 Director Publications, Customs, Excise. I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

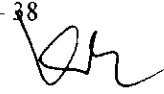
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

14 C.D.R. 15 Office Copy 16 Guard File


Asstt. Registrar(CUSTOMS Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III**

Customs Appeal No. 18 of 2009-Cus [DB]

[Arising out of Order-In-Original No. 57/2008 dated 10. 10.2008 passed by Commissioner of Customs, New Delhi.]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. Omex International

Appellant

Vs.

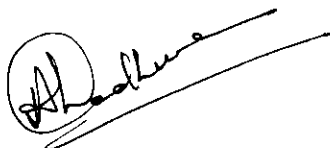
Commissioner of Customs,
New Delhi

Respondent

Appearance:

Shri K.K. Sharma, Advocate for the Appellants
Shri P.K. Sharma. DR for the Respondent

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member



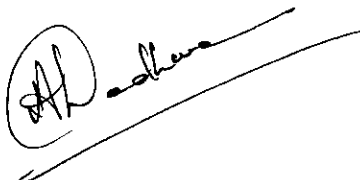
Date of Hearing : 23.07.2013
 Date of Decision : 24.04.2015
 18.02.2015

Final Order. No. 50588/15
ORDER NO. IO/ 198 /201 -Cus(Br)

Per Ms. Archana Wadhwa (for the Bench) :

As per facts on record, the appellant imported 105 pieces of assorted make old and used photocopier machines and filed a bill of entry dated 3.7.2008, claiming the classification of the same under Customs Tariff sub-heading 84433920 and declaring the value of the goods as Rs.10,13,256/-. They also produced a Chartered Engineer's certificate showing the value of the goods as Rs.13,51,080/-. However, the Revenue did not accept the declared value and found that contemporary clearances as per NIDB data would be showing the value of around Rs.19,59,937/-. Accordingly, the consignment was taken up for further inquiries.

2. The imported goods were examined and it was found that same were 105 pieces of old and used photocopier machines and different models along with their parts kept in 60 boxes. During examination it was found that two machines having model number IR 6000 and IR 330 found in place of IR-600 and IR-300 respectively. Accordingly, Revenue entertained a view that appellant mis-declared the consignment as also the value of the same and further, as the appellant was not having any license to import the said goods, the same were put under seizure on 28.8.2008.



3. It stand observed in the impugned order of the Commissioner that on verification of the prices from the market, it has come to the notice that models mentioned in the invoices were obsolete models and all these models were of 5 – 10 years old and the manufacturers have discontinued the manufacturing of the said models and hence, the prices were not available.

However, the Revenue still insisted on another Chartered Engineers certificate which was produced by the appellant showing the value of the goods as Rs.16,18,920/-. The said Chartered Engineer certificate issued by M/s. Rajesh Barman & Associates was also not accepted by the Revenue who procured another Chartered Engineers' certificate from Shri Pankaj Gupta wherein, he after examining the goods opined the value of the same as Rs.20,13,120/-.

4. The statement of Shri S C Chawla, proprietor of importing firm was recorded wherein he said that he was importing the goods for the first time and the same were purchased from the traders on the agreed upon the value. However, he agreed to discharge the customs duty on the value as disclosed by the Chartered Engineer and requested for imposition of reasonable redemption fine and penalty.

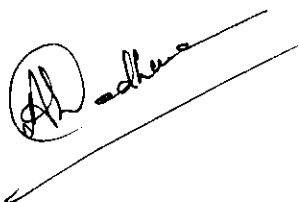
5. On the above basis, proceedings were initiated against the appellant which culminated into impugned order passed by the Commissioner of Customs vide which he enhanced the value of imported photocopier from Rs.10,13,256/- to Rs.20,13,120/-. He also confiscated the goods with an



option to the appellant to redeem the same on payment of redemption fine to Rs.5 lakhs. In addition, penalty of Rs.2.50 lakhs stand imposed upon the appellant under Section 112 (a) of the Customs Act, 1962.

The said order of the Commissioner is impugned before us.

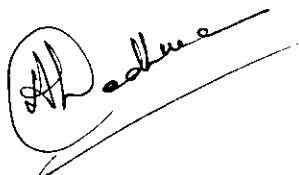
6. Learned advocate appearing for the appellant has assailed the impugned order on the point of valuation as also on the quantum of redemption fine and penalty. As regards the valuation, he submitted that there is virtually no evidence to reject the transaction value, in the absence of which the same has to be accepted. He submits that as the department was not clearing the goods and the appellant was incurring demurrage, they agreed to pay the duty on the enhanced value and cleared the good. By drawing our attention to the facts available in the file, he submits that the department was not satisfied with the first certificate of the Chartered Engineer showing the value as around Rs.13 lakhs and went on procuring another certificate from different Chartered Engineer till the value was reflected as around Rs.20 lakhs. He submits that the reliance on the said certificate is not appropriate as there is no evidence to reject the transaction value. Submits the learned advocate that the transaction value has to be first rejected on the basis of substantial evidence and once the same is found to be incorrect only then the Revenue can resort to other measures for enhancing the value. For the above proposition, learned advocate has relied upon various decisions.

A handwritten signature and initials are present at the bottom of the page. The initials 'AD' are circled, followed by a signature that appears to be 'Adhwa'. There are two horizontal lines drawn below the signature.

As regards the quantum of redemption fine and penalty, he submits that on account of non-availability of license to import the old and used photocopier; Tribunal in number of cases has reduced the fine and penalty to 10% and 5% of the value of the goods. He prays for adopting the same treatment.

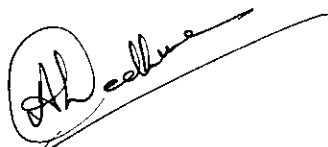
7. Learned DR, Shri P K Sharma, appearing for the revenue reiterates the finding of the lower authorities and submits that the appellants has himself agreed to pay the duty at the enhanced value. As such, he cannot be allowed to contend to the contrary. He submits that inasmuch as the goods stand examined by the department as also by various Chartered Engineers and the value stand arrived at Rs.20 lakhs approximately, the declared value of Rs.10 lakhs by the appellant cannot be adopted for the purpose of payment of duty. As regards redemption fine and penalty, he submits that the same is commensurate with the and is reasonable and does not call for any further reduction. He accordingly, prays for rejecting the appeal.

8. We have considered the submissions made by both the sides. As regards the value of the imported old and second hand photocopier, the Commissioner has increased the same based upon the Chartered Accountant's certificate. As already recorded there were 3 Chartered Engineers certificate. The first assessed the value of the goods around Rs.13 lakhs, second assessed the same around Rs.16 lakhs, whereas the three



Chartered Engineer assessed the same around Rs.20 lakhs approx. in respect of the same goods.

9. It is seen that the appellant declared the value as Rs.10,13,256/- which was also accompanied by invoices issued by the overseas supplier of the goods. Revenue has not adduced any evidence to first discard the declared value as incorrect. It is well settled law that the transaction value has to be adopted as the correct assessable value unless there is sufficient, tangible and positive evidence to show that such transaction value is not the correct value. In the present case, there is no such evidence on record to reflect upon the incorrectness of the transaction value. There is no evidence to show that the importer has paid any extra amount to the supplier of the photocopier other than the transaction value which is reflected in the invoice. As such, in our views the rejection of the transaction value without any reference to the evidence cannot be upheld. At this stage, we take note of the Tribunal's decision in the case of CCE (Preventive), Amritsar vs. Bhawana Spinning Mills [2013 (289) ELT 504 (Tri- Del)] laying down that in the absence of any contemporary imports of the goods and in the absence of any evidence adduced by the Revenue to discard declared value, enhancement of the value is not acceptable. Reference can also be made to another decision of the Tribunal in the case of New Copier Syndicate vs. CCE, Hyderabad [2009 (245) ELT 434 (Tri-Bang)] and the dismissal of appeal by the Hon'ble Supreme Court as reported in [2010 (254) ELT A 43 (SC)]. Reliance can also be placed on Tribunal's decision



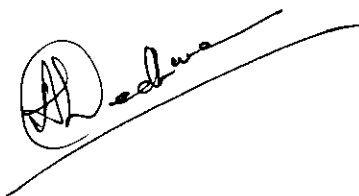
in the case of Madhu Industries Ltd. vs. CC Ahmedabad [2008 (232) ELT 575 (Tri-Ahmd) as also in the case of Digitech Photocopier vs. CC Mumbai [2009 (91) RLT 68 (CESTAT-Del)]. In the case of Sri Venkatesh Enterprises vs. CC Tiruchirapalli [2005 (192) ELT 534 (Tri-Del)] Tribunal set aside the enhancement of value of old and used photocopier based upon the Chartered Engineers certificate. Similarly, in the case of N K Enterprises vs. CC Tuticorin [2005 (190) ELT 271 (Tri-Del)] enhancement of value of old and used photocopier machines on the basis of Chartered Engineers certificate was set aside.

10. We also note that the adjudicating authority, in the impugned order has held that on verification of the price from the market it has come to the notice that model mentioned in the invoices are obsolete models and these models are around 5 – 10 years old and the manufacturers had discontinued their manufacturing and hence the prices were not available. In view of above acceptance of the fact by the adjudicating authority, the enhancement of the value based on Chartered Engineers certificate is not justified. Admittedly the photocopier in question were very old and obsolete models and the value of such old goods is dependent upon the condition of same as also upon the market acceptance of the same. It may not be out of place to observe that items like photocopier are fast moving items and their models keep on changing very fast, thus reducing the value of the old models. Further, the value of such goods could also depend upon the usage of such goods and the condition of the same.



11. It is further seen that Revenue has procured three different Chartered Engineers certificate without disclosing any reason as to why the first and the second certificate of the Chartered Engineers were not accepted by them. It is only when the third Chartered Engineer enhanced the value to the extent of Rs.20 lakhs, Revenue was satisfied and took up the matter for adjudication.

12. It is further observed in the impugned order of the Commissioner that appellant has himself accepted to pay the duty on the enhanced value and as such, is estopped from contesting the same. We do not agree with the said reasoning of the adjudicating authority. As explained by the learned advocate, such acceptance for payment of duty on the enhanced value was with a purpose to get the goods cleared and to avoid detention and demurrage charges. The fact that the appellant has challenged such enhancement before the higher appellate forum is itself indicative of the appellants non-acceptance of the enhanced value. Tribunal in the case of Digitech Photocopier has observed that appellants accepted the enhancement of the value because they have already incurred huge detention and demurrage charges and wanted to avoid further burden. Similarly, in the case of Bhawana Spinning Mills, it was observed that payment of duty at the enhanced rate under protest does not amount to acceptance of the enhanced value.

A handwritten signature in black ink, appearing to be 'S. Sharma', is written over a circular stamp. The stamp contains some illegible text and a central emblem. A long, sweeping horizontal line is drawn across the signature and the stamp.

(Ker)] and the decision of the Tribunal in the case of CC, Cochin vs. Dilip Ghelani [2009 (248) ELT 888 (Tri-Bang)]. Some further reference can be made to the following decisions, where redemption fine and penalty was reduced to 10% and 5% of value:-

1. L.K. International vs. CC (Prev) Amritsar
Final Order No. C/A/205-212/2012 Cus(DB) dated 25.6.12
2. B.E. Office Automation Products P Ltd. vs. CC (Prev) Amritsar
Final Order No. C/A/177-188/2012-Cus(DB) dated 25.6.12

Hon'ble Bombay High Court in the case of Tejus Proprietary concern of Tejus Rohitkumar Kapadia [2012 (275) ELT 175 (Bom)] has observed that Tribunal is duty bound to follow the binding precedent and further observed that the CESTAT as a judicial body, must realize the importance of doctrine of precedent as in our legal system. Deference to judgments of the Supreme Court is a matter of constitutional principle. Equally, unless Coordinate Benches of the Tribunal have due deference and regard for decisions rendered by the Tribunal, the elements of certainty and consistency in the judicial process which lie at the heart of judicial functioning would be seriously disrupted.

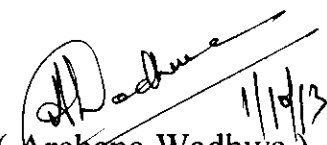
In terms of said decision of the Bombay High Court, the precedent decisions of the Coordinate Benches have to be given due respect and are required to be followed unless the same are specifically deviated from by giving suitable reasoning. In ^{those} ~~those~~ cases also, it is seen that matter needs to be referred to Larger Bench for consideration of the disputed legal issues. Inasmuch as in the present case, all the Coordinate Benches have taken a

categorical view of imposition of redemption fine of 10% and penalty of 5% of the value of imported goods, we find no justification to take a different view. It may not be out of place to mention here ^{that} in some of the cases, the importers were repeatedly violating the EXIM policy provisions. In spite of that, the Tribunal imposed redemption fine and penalty of 10% and 5% of the value only. Some of the Tribunal's decision also stand upheld by the Hon'ble High Courts.

15. In view of the above, we set aside the impugned order as regards the enhancement of the value. However the imported goods are confiscated with an option to the appellant to redeem the same on payment of redemption fine of 10% of the value of the goods and penalty of 5% of the value of goods is upheld.

16. The appeal is disposed of in the above terms.

(Pronounced in the open court on)


(Archana Wadhwa)
Member(Judicial)

separate order written
(Manmohan Singh)
Member(Technical) *31.3.2014*

Custom Appeal No.C/18/2009-CU[DB]

M/s Omex International

Per Manmohan Singh.

1. M/s Omex International has come in Appeal before the Tribunal against the Order-in-Original No. 57/2008 dated 10.010.2008 passed by the Commissioner of Customs, New Delhi, enhancing declared value of Rs.10,13,256/- to Rs.19,59,937/- based on Chartered Engineer's Certificate and contemporaneous evidence of clearances as per NIDB Data and also levying redemption fine and penalty. The goods imported were 105 Pcs. of old and used Photocopy Machines of different model along with their parts kept in 60 boxes. These photocopiers were imported without any licence as required under Para 2.17 of Exim Policy 2004-2009. Land Port Chartered Engineers Certificate of origin regarding valuation and condition of old and used photocopier machine as required under CBEC Circular No. 4/2008 dated 12.02.2009 was also not furnished. Those photocopier machines were seized and confiscated resulting in levy of duty as well as imposition of redemption fine of Rs.5,00,000/- and penalty of Rs.2.50 Lakhs under Section 112A of the Customs Act, 1962.

2. Ld. Member Judicial, in her Draft Order while setting aside the impugned order against enhancement of the value, did not disagree to impose redemption fine and penalty but reduced the same to 10% and 5% of the value declared. This order does not stand to reason since imposition of reduced redemption fine and penalty was due to confiscateability which remained undisturbed due to proved



mis-declaration. Accordingly setting aside of enhancement of assessable value runs counter to the above reduced imposition. The value has been enhanced by Commissioner based on Chartered Engineer Certificate provided by importer himself and further once it was proved that importation was without licence and were seized and confiscated requiring proper imposition of redemption fine and penalty to make such importation unviable and prohibitive. This follows that there was mis-declaration and import of the offending goods without licence required under EXIM policy.

3. Arbitrary reduction of redemption fine and penalty by Tribunal was criticised by Apex Court CC, Mumbai Vs. Mansi Impex 2011 (270) E.L.T. 631 (S.C.) in the following language:

On appeal being filed before the Tribunal at the instance of the respondents, the tribunal has interfered with the aforesaid orders passed by the Commissioner only on the ground that in other cases, redemption fine has been reduced to 20% and the penalty has been reduced to 5% and following that order passed by the Tribunal in some other cases, an order was passed by the Tribunal in the present case also for reducing both the redemption fine as also the penalty to 20% and 5% respectively. We find that the said order passed by the Tribunal is arbitrary and whimsical, for no reasons have been recorded specifically as to why in these particular cases it should be reduced to 20% and 5% and determination of quantum to be paid as redemption fine and penalty should be dependent on the facts and circumstances of each case. In the case of Commissioner of Customs (Import) Vs. Stoneman Marble Industries, reported in 2011 (264) E.L.T. 3 (S.C.), it was held by this court that a standard formula cannot be laid down for imposition of redemption fine and penalty.

4. At this stage, we may also appropriately refer to a three Judges' Bench decision of this Court in Jain Exports Pvt. Ltd. Vs. Union of India, reported in 1993 (66) E.L.T. 537 (S.C.). In the said decision this Court held that the quantum of the redemption fine would



depend on the facts and circumstances of each case and no hard and fast rule can be laid down in that behalf. While rejecting the contentions of the assessee/appellant in that case that the imports had acted in good faith and bona fide and therefore assessee is entitled to claim entire redemption fine to be waived, this Court held that even in such cases the fixation of quantum of redemption fine would depend on the totality of the facts and circumstances of the case.

4. Learned judicial member held that because Tribunal has passed orders ordering reduction in the past, it was opted to follow the similar decisions noting that Bombay High Court Judgment in Tejas Proprietary concern of Tejas Rohit Kumar Kapadia 2012 (275) E. L. T. 175 (Bom.) required following of the judicial discipline. Reliance was placed by learned member in the case of Navpad Enterprises Vs. C.C., Cochin 2009 (235) E. L. T. 376 (Tri. Bang.) for drawing above conclusion.
5. The reasoning and finding recorded by the learned judicial member being not according to law as stated by Supreme Court in above case and facts on record, I record my separate order in the following paragraphs.
6. 105 Pcs. of old and used Photocopy Machines of different model alongwith their parts kept in 60 boxes were imported without licence required under Exim policy. Examination by the Custom showed presence of two machines having Model No. IR 6000 and IR 330 in place of IR600 and IR300. Misdeclaration of description was proved. So also the consignment was undervalued. This is obvious that misdeclaration usually results in misdeclaration of value.



7. There was significant variation in the valuation made by the Chartered Engineer in respect of the imported goods. While one such valuation was Rs.13 Lakhs, the other was around Rs.16 Lakhs. Due to such inconsistency, a certificate from Shri Pankaj Gupta was produced indicating the value of the import as Rs.20,13,120/-. This is on record. Chartered Engineer's Certificate were produced by the importer only who did not rebut the same. Therefore there was no reason to disagree with such certificate. There was also reference to NIDB data. But learned judicial member adopted transaction value on the premise that there was no evidence to show that importer had paid any extra amount to the supplier. This does not appeal to reason when there was admitted misdeclaration of description of goods as well as value thereof. Learned member's finding that above Certificate were procured by the Department is without any evidence on record. Mere reliance on judgments shall not serve purpose of law since decision in each case depends on its facts situation and the case to be governed by the citation should be within the four of the judgment relied.

8. The reason stated in the draft order that since Tribunal in some of its earlier decisions has reduced the Redemption Fine and penalty to 10% and 5% respectively does not mean that the said percentage becomes a bench mark for future. Counsel in grounds of appeal himself have referred cases where redemption was 25% of value and penalty was 15% of the value. Such approach of Tribunal was not appreciated by Hon'ble Supreme Court in the judgment of M/s



MansiImpex(supra). A decision based on fact situation is normally fact oriented and cannot be equated with other fact situation.

9. Therefore on the basis of factual matrix of the case, evidence on record and following Supreme Court Judgment in Mansi Impex case (supra), I am of the firm view that proved mis-declaration relating to description and valuation of the offending import without licence under EXIM Policy provisions, calls for confirmation of the adjudication consequence. I hold accordingly.


31.3.2014
(MANMOHAN SINGH)
MEMBER (TECHNICAL)

K. Gupta

P. T. O.

- 17 -

Difference of Opinion

Whether on assessable value as determined in adjudication by the revenue is to be set-aside and redemption fine and penalty are to be reduced to 10% and 5% respectively as held by Learned Member (Judicial).

OR

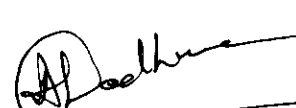
Whether the valuation as enhanced by revenue based on Chartered Engineer's Certificate are to be upheld as importations have taken place without licence and no land port Chartered Engineer's Certificate has been produced and further redemption fine and penalty as ordered by Commissioner is to be upheld as held by Member (Technical).


31.3.2014
(MANMOHAN SINGH)
MEMBER (TECHNICAL)


1/4/14
(ARCHANA WADHWA)
MEMBER (JUDICIAL)

K. Gupta

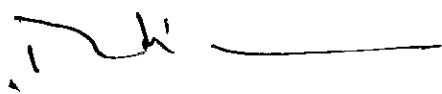
(Pronounced)


4.4.2014

4/4/14

Date of Hearing/order – 12/12/2014

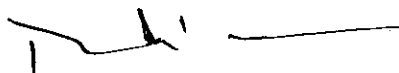
Per. Rakesh Kumar :-

The appellant, a proprietorship concern, imported a consignment of 105 old and used photocopier machines of assorted make and filed a bill of entry dated 03/07/08 for their clearance. The declared value of the goods, as per the supplier's invoice, was Rs. 10,13,256/-. Since there was no Chartered Engineer's certificate alongwith the supplier's invoice, the appellant produced a certificate dated 11/07/08 of the Chartered Engineer M/s Rajesh Burman and Associates who estimated the value of the goods as Rs. 13,51,080/-. It appears that the Department was of the view that the Charter Engineer's report does not contain the required details and ^{hence} the same was not acceptable. The Chartered Engineer M/s Rajesh Burman was asked again to give his opinion and ^{he} after examining the goods 100% gave an opinion dated 01/09/08 giving the value of the goods as Rs. 16,18,920/-. Since the Department was of the view that in view of the NIDB data, the value of the goods is much higher, the opinion of another Chartered Engineer Shri Pankaj Gupta was obtained and accordingly on the basis of his opinion dated 18/09/08 the value of the goods was determined as Rs. 20,13,120/-. The Department seeks to charge Customs duty on the goods on the basis of this value. Since, the photocopiers were old and used and no import licence had been produced, it was also proposed to confiscate the goods under



Section 111 (d) of the Customs Act, 1962 besides confiscation under Section 111 (m) for mis-declaration of value and imposition of penalty on them under Section 112 ibid. The appellant waived the issue of show cause notice. The matter was adjudicated by the Commissioner vide order-in-original dated 10/10/08 by which he rejected the declared transaction value and ordered the assessment of duty by adopting the value as Rs. 20,13,120/- based on the opinion of Chartered Engineer Shri Pankaj Gupta. He also ordered confiscation of the goods under Section 111 (d) and 111 (m) of Customs Act, 1962 with option to be redeemed on payment of redemption fine of Rs. 5,00,000/-. Beside this, he imposed penalty of Rs. 2.50 lakhs on the appellant under Section 112 (a) of Customs Act, 1962. Against this order of the Commissioner, this appeal has been filed.

2. The matter was heard on 23/07/13. While Hon'ble Member (Judicial) observing that since the goods are old and used photocopier machines of assorted make, 5 to 10 years old and as per the market inquiry such models are no longer manufactured and since no evidence has been produced by the Department, to justify the rejection of the declared transaction value, the declared transaction value has to be accepted, set aside the impugned order with regard to enhancement of the assessable value. However, she upheld the order of confiscation of the goods and imposition of penalty on the appellant on the ground of import without import licence, but reduced the redemption fine to 10% of the value of the goods and the penalty



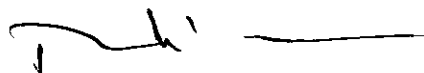
to 5% of the value of the goods and in this regard she relied upon the judgment of Hon'ble Kerala High Court in the case of **CC, Cochin vs. Office Devices** reported in **2009 (240) E.L.T. 336 (Ker.)** and also the Tribunal's decisions in the cases of **CC, Cochin vs. Dilip Ghelani** reported in **2009 (248) E.L.T. 888 (Tri. - Bang.)**, and **L.K. International vs. CC (Preventive) Amritsar** (vide final order No. C/A/205-212/12 - Cus dated 25/06/12). However, Hon'ble Member (Technical) in a separate order dated 31/3/14 recorded by him held that the declared transaction value is not acceptable and that the Commissioner has correctly enhanced the transaction value to Rs. 20,13,120/-. He also held that there is no justification for reducing the redemption fine to 10% of the value and penalty to 5% of the value.

3. Accordingly, on account of difference of opinion between Member (Judicial) and Member (Technical), the following point of difference has been referred to the undersigned for decision :-

"Whether assessable value as determined in adjudication by the revenue is to be set aside and redemption fine and penalty are to be reduced to 10% and 5% respectively as held by Learned Member (Judicial).

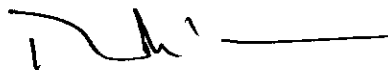
Or

Whether the valuation as enhanced by revenue based on Chartered Engineer's Certificate are to be upheld as importations have taken place without licence and no land port Chartered Engineer's Certificate has been produced



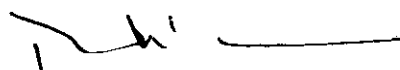
and further redemption fine and penalty as ordered by Commissioner is to be upheld as held by Member (Technical)."

4. Heard both the sides in respect of point of difference.
5. Shri K.K. Sharma, Advocate, the learned Counsel for the appellant, pleaded that the order-in-original itself records that the goods imported are photocopiers of asserted models which are obsolete and are 5 to 10 years old and that the manufacturers have discontinued their manufacturing and hence their prices are not available, that when the goods are old and used, 5 to 10 years old and are obsolete models, enhancement of their value based on NIDB data is not justified at all, that the NIDB data is not relevant at all for determining the value of the goods, in question, which are old and used and that of obsolete models, that other than NIDB data, there is no evidence to indicate the declared transaction value is not correct, that the Chartered Engineer had initially assessed the value of the goods as Rs. 13,51,080/- which was subsequently ^{revised} ~~reduced~~ to Rs. 16,18,920/-, that even this value was not accepted by the Department and another Chartered Engineer was appointed who valued the goods as Rs. 20,13,120/- and it is this value which has been adopted by the Department, that the rejection of the declared transaction value and adopting of Rs. 20,13,120/- as the correct transaction value is arbitrary, that in view of these circumstances, Member (Judicial) has correctly held that there is



no justification for rejection of the declared transaction value, that as regards redemption fine and penalty there is no allegation of the Department that the appellant is a repeat offender, that in this regard the Member (Judicial) has correctly reduced the fine and penalty to 10% and 5% respectively following the judgments of Hon'ble Kerala High Court in the case of **CC, Cochin vs. Office Devices** (supra) and also the Tribunal's decisions in the cases of **CC, Cochin vs. Dilip Ghelani** (supra), **L.K. International vs. CC (Preventive) Amritsar** (supra) and **B.E. Office Automation Products Ltd. vs. CCE, Gurgaon** reported in **2014 (300) E.L.T. 486 (P&H)**, that no calculation of the profit margin of the imported ^{goods} based on the market price of the goods and the landed cost of the goods has been given by the Department to justify imposition of higher redemption fine and that in view of this, it is the order recorded by Member (Judicial) which is correct.

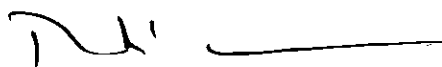
6. Shri Pramod Kumar, learned Jt. CDR, defending the impugned order pleaded that it is the order recorded by Member (Technical) which is correct. He pleaded that the importers themselves had produced the Chartered Engineer's certificate which had earlier ordered the value of the goods as Rs. 13,51,080/- and subsequently 100% on examination of the machines reversed the value to Rs. 16,18,920/-, that when the appellant themselves in a statement given under Section 108 of the Customs Act, 1962 had accepted the value determined by the Department, they cannot plead that the value given by the



Chartered Engineer is not correct and the declared should be accepted, that the Apex Court in a series of judgment has held that quantum of redemption fine must be sufficiently high to mop up the entire margin of profit as nobody should be allowed to make profit by importing any goods in contravention of the Exim policy, that in this case the appellant had imported a consignment of 105 old and used photocopiers without any licence, while the import of old and used photocopier, as per the Exim policy requires an import licence, and that, in these circumstances, it would not be correct to reduce the redemption fine and penalty. He, therefore, pleaded that it is the order recorded by Member (Technical) which is correct.

7. I have considered the submissions from both the sides and perused the records.

8. Coming first to the question as to whether the declared value of goods can be accepted in terms of the provisions of Section 14 of the Customs Act, 1962, the undisputed facts in this case are that – (a) 105 old and used photocopiers are 5 to 10 year old, (b) the same are of asserted model and (c) as per the market inquiry itself these models are obsolete and are no longer manufactured. The declared transaction of the value of the goods is Rs. 10,13,256/- and the Department wants to reject the same and enhance it to Rs. 20,13,120/- based on the Chartered Engineer's report on the ground that as per the NIDB data the declared value is too low. In my view for determining the value of



the old and used capital goods, which are of obsolete models, the NIDB data is not relevant at all as no two consignments of second hand goods and that too of obsolete models would be comparable. The value of a consignment of second hand machines would depend upon the years for which the machinery has been used, present condition and also whether the model is obsolete or whether such machines are still being manufactured. In this case as per the facts recorded in the impugned order-in-original, market inquiry indicated that the models of the photocopiers are obsolete models and the manufacturers have discontinued the manufacture of these models. If this is so, a supplier may sell such old and used goods of obsolete model even at throw away price.

9. During the period of dispute, as per the provisions of Section 14 of the Customs Act, 1962, for the purpose of Customs Tariff Act, 1975 or any other law for the time being in force, the value of the imported goods shall be the transaction value of such goods, that is to say, the price actually paid or payable of the goods when sold for export to India for delivery at the time of importation, where the buyer and seller are not related person and price is the sole consideration for sale subject to other such conditions as may be specified in the Rule made in this behalf. In this case, it is not the allegation of the Department that the appellant and the foreign supplier were related person or that there were circumstances as enumerated in the proviso to sub-Rule (2) of Rule 3 of the Customs Valuation Rules, 2007 on



account of which the declared transaction value cannot be accepted. Another situation in which the declared transaction value can be rejected is that covered by Rule 12 of the Cenvat Valuation Rules when the proper officer has reason to doubt the correctness of the declared transaction value. But Rule 12 of the Cenvat Valuation Rules also provides that if after inquiry by the proper officer, the proper officer doubts the correctness of the declared transaction value and rejects the same, he is required to intimate the importer about rejection of the declared value after ^{giving} ~~giving~~ reasonable opportunity of being heard. But no such inquiry has been done in this matter. Merely on the basis of NIDB data ^{which} ~~which~~, as discussed above, is not relevant in this case, the declared transaction value could not be rejected. Therefore, on the issue of valuation, I agree that the decision of Member (Judicial).

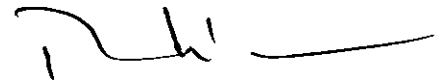
10. As regards of quantum of redemption fine and penalty, it is settled law in the cases of import of restricted goods without import licence, the quantum of redemption fine should be sufficiently high to ^{neutralise} ~~cancel~~ the entire margin of profit. Member (Judicial) has reduced the fine to 10%. According to the Department it should be ^{50%} ~~50%~~ of the declared value. However, if the Department seeks imposition of higher redemption fine, the evidence of higher profit margin should be produced in form of landed cost of the goods and the market price of the goods but no such evidence has been produced. In view of this, I agree with the decision of Member (Judicial) regarding reduction of

12-4-11

redemption fine and penalty and in my view the redemption fine of 10% of the value and penalty of 5% of the value is sufficient.

11. The points of difference stand answered as above.

(Dictated and pronounced in open court.)



(Rakesh Kumar)
Member (Technical)

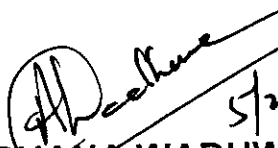
PK

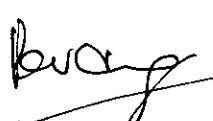
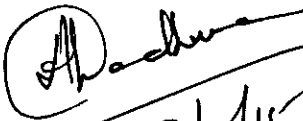
FINAL ORDER No. 50588/2015

Per: Archana Wadhwa:

In view of the Majority Order, the impugned order is set aside as regards enhancement of the value of the imported goods. However, confiscation of the same is upheld and the redemption fine is reduced to 10% of the value of the goods and penalty to 5% of the value of the goods.


B.S.V. MURTHY
MEMBER TECHNICAL


ARCHANA WADHWA
MEMBER JUDICIAL
5/2/15

(Pronounced)

18/2/15

18/2/15