

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

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50019 of 2020

(Arising out of order-in-original No. 14-15/2019-Comm.CE(Prev.) dated 08/14.08.2019 passed by the Commissioner of Customs (Prev.), Jodhpur).

M/s Tradewell

Through Smt. Sonal Jain
C-6, Indrapuri Colony, Lal Kothi
Jaipur-302015.

Appellant

VERSUS

Commissioner of Customs (Prev.)

NCR Building, Statue Circle
C-Scheme, Jaipur-302005.

Respondent

AND

Customs Appeal No. 50020 of 2020

(Arising out of order-in-original No. 14-15/2019-Comm.,CE(Prev.) dated 08/14.08.2019 passed by the Commissioner of Customs (Prev.), Jodhpur).

Pankaj Jain

C-6, Indrapuri Colony
Lal Kothi, Jaipur-302015.

Appellant

VERSUS

Commissioner of Customs (Prev.)

NCR Building, Statue Circle
C-Scheme, Jaipur-302005.

Respondent

APPEARANCE:

Ms. Nisha Bineesh, Advocate for the appellants
Shri Sunil Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos.50096-50097/2022

DATE OF HEARING: 09.12.2021
DATE OF DECISION: 08.02.2022

P. ANJANI KUMAR:

The appellant, a proprietary concern, have imported Paper Cup machines and Blankets from China. Directorate of Revenue Intelligence, Zonal Unit, Delhi (DRI) conducted searches on various premises of the appellant and on conclusions of the investigations issued show cause notices, No. 62/2016 and No.34/2017 dated 20.12.2016 and 13.07.2017 respectively, alleging that the appellants have undervalued the imported goods. Both the show cause notices came to be adjudicated vide Order No.14-15/2019 dated 14.08.2019 by Commissioner of Customs (Preventive) Jodhpur, and held as follows-

(i) has rejected the transaction value in respect of paper cup machines imported vide 24 Bills of Entry, totally valued at Rs.12,83,01,348 and re-determined the value of blankets imported vide Bills of Entry No.6773013 dated 16.09.2014 and 7151082 dated 22.10.2014; held the goods liable for confiscation; imposed penalty of Rs.1,71,61,806/- on the appellant concern under Section 114A; penalty of Rs. 25 lakhs under Section 114A on the company and a penalty of Rs.20 lakhs on Pankaj Jain, Authorized Representative.

(ii). confiscated the goods valued at Rs.64,08,566/- imported vide Bill of Entry No.9553280 dated 12.06.2015 and Bill of Entry No.2002700 dated 23.07.2015; imposed penalty of Rs.5 lakhs under section 112 of the Customs Act,1962 on M/s. Trade well(importer-appellant) and Rs.2 lakhs on Pankaj Jain Authorized Person of the importer (appellant). Hence, these appeals C/50019/2019 and 50020/2019 filed by the company and the proprietor Shri Pankaj Jain, respectively.

2. Ms. Nisha Bineesh, Learned Counsel for the appellants, submits that the lower authority has relied on the following, in order to

allege mis-declaration of the total number of 298 imported paper cup machines and blankets.

- (i). two Proforma invoices having the same number with different descriptions without seal or signature of the importer, supplier nor the Appellant. Also has not been correlated with the Bills of Entry,
- (ii). 8 blank papers,
- (iii). e-mails alleged to have been retrieved from a computer without observing the procedure under Section 138C of Customs Act 1962, and
- (iv). retracted statements of persons who were neither examined, not even produced for cross examination, nor made co – noticees. The statements were not substantiated by corroborative evidence.

3. Learned Counsel submits also that it was alleged that the Appellant has declared imported Paper Cup Machines as 'TW-L12' instead of 'DB L-12' model; this allegation was made without investigation into the difference in characteristics, quality and value of the two models; the department has not made out a case by differentiating the two models in terms of declared value; it also did not discharge its onus with sufficient justification about the distinguishing features, differentiating both the models and how it would affect the value; the Appellant had explained, to the lower authority, difference and characteristics between the two models with reference to the impugned model; hence, rejection of declared value and its redetermination has no legal sanctity and the case of mis-declaration fails; further, the submission that the model was specially modified by the supplier as per their requirement was not considered; Customs has

not proved anything to show that by declaring the model number as TW L-12 instead of DB L-12, the Appellant had gained undue benefits.

4. Learned Counsel submits further that Proforma invoice cannot be the basis for redetermination of value of imported goods, especially in the absence of their co-relation with Bill of Entries, seal/signature of noticee or supplier; the SCN is based on two Proforma Invoices bearing same number; the value and description of goods differ in the invoices and it casts doubt on the veracity of such a document; another Proforma invoice No. DB 20120607 dated 07.06.2012, though referred in the SCN, was not relied upon; the two proforma invoices have no seal or signature of the supplier or the Appellant; in the following cases, it was held that differential duty cannot be demanded on the basis of proforma invoice.

(i). Amarjit Enterprises vs. CC (import), Mumbai (2019)370 ELT 1569 (Tri-Mumbai).

(ii). CCE Pune – I vs. S.S. Engineers, 2014 (313) ELT 429 (Tri. Mumbai).

(iii). Golden Agro Corporation vs. CC, Jaipur-I, 2017 (354) ELT 655 (Tri. Del)

(iv). Suyog Extrusions vs. CC (import), Mumbai, 2007 (213) ELT 524 (Tri. Mumbai).

(v). Ramana International vs. CC, Nhava Sheva, 2005 (180) ELT 368 (Tri. Mumbai).

5. Learned Counsel further submits that much reliance is placed on a WhatsApp messages said to have been retrieved from a mysterious SAMSUNG 4G LTE mobile; it is not known how such a mobile had come in the hands of the investigation officers, as the source is also

not explained; recovery of such mobile is not mentioned in any of the panchanama or statements; when the very genuineness of the mobile phone is in dispute, any information alleged to have been retrieved from it has no evidentiary value, more so when a serious allegation like mis-declaration is alleged; moreover, the data said to have been contained in the phone was not retrieved without following the procedures as required under Section 138C of the Customs Act.

6. Learned Counsel submits that no evidence to prove transaction of amount over and above the declared rate has been put forth; it is settled law that unless and until no remittance of money is proved, undervaluation cannot be established. She also submits that Customs Declaration of three Freight Forwarders cannot be relied upon as they lack the seal or signature of the foreign supplier or the seal of the Customs; they were not procured through the Consulate; they are rather private documents and the person who executed the same was also not cross examined. Relies on ruling in **Kainya & Associates Pvt. Ltd. Vs. CC (import, Mumbai), 2006 (204) ELT 72 (Tri- Mumbai)** and in **CC, Bombay vs. East Punjab Traders, 1997 (89) ELT 11 (SC)**, that when the authenticity of photocopies of documents itself is suspected, the presumption under the Customs Act, 1962 is not available, especially when the documents do not seem to have been obtained by the Customs from the Customs authorities abroad; hence, the declaration cannot be relied upon for loading the assessable value.

7. Learned Counsel submits lastly that no market survey was done and no comparison of the prices with contemporaneous import

price; principles laid down for rejection of declared value and redetermination of assessable value, has not been observed in this case; she relies upon **Tele -brands (India) Pvt. Ltd. vs. CC (import), Mumbai, 2016 (336) ELT 97 (Tri-Mumbai)** and submits that this case is the authority deciding all the issues related to the present case. We find that various issues on appreciation of evidence etc. raised in the present appeal are discussed in detail by the coordinate bench at Mumbai in that case and settled in the appellant's favour.

8. Learned Counsel also contends that the officers of Directorate of Revenue Intelligence are not proper officers and have no jurisdiction to issue show cause notice as held by the Hon'ble Supreme Court in the case of **Canon India Judgement – 2021 (376) ELT 3 (SC)**. She also submits that – i) Madurai bench of Madras High Court in W.P. No.10186 & 10187 of 2014 vide order dated 16.03.2021; ii) Mumbai Bench vide Final Order No. A/ 87107/2021 dt. 09.11.2021 in respect of Dhiren Enterprise Vs CC Mumbai and iii) vide Final Order No. A/87096/2021 dt. 09.11.2021 in the case of Apex International Vs CC Mumbai, have relied upon the Apex Court's decision in Canon India cited as above. She also submits that various High Courts and Benches of this Tribunal have followed the judgment of *Canon India* by the Apex court and held that officers of DRI are not proper officers for the purposes of Section 28 of the Customs Act, 1962, and thus SCN was issued beyond Jurisdiction.

9. Learned Authorised Representative, appearing for the respondent department, reiterates the findings in OIO and submits, inter alia, that

(i). Existence of the Proforma invoice No.DB2012319 dated 19.03.2012, one of the evidence in this case is beyond doubt as the same was recovered through a proper procedure under Panchanama dated 23.12.2015, from the premises of M/s. Trade well; the second Proforma invoice No.DB-20120607 / 07.06.2012 was recovered during search of the residence of Shri Raghuveer Swami, an associate of Shri Pankaj Jain during the concerned period, on 31.03.2016 under Panchanama; he admitted the fact of importing the 4 machines mentioned in the said Proforma invoice at the rates mentioned therein; adjudication authority has discussed in detail both the relevance and existence of Proforma invoices; submissions made by the appellant are false and baseless; investigation clearly established that the machines declared as "TW-L12" were actually "DB-L12" and the same were mis-declared to facilitate the undervaluation; Proforma Invoice no. DB 2012319 05.05.2012 was related to imports effected vide Bill of Entry No.7362395/11.07.2012, as the Commercial invoice had same invoice no. as "DB2012319".Case against M/s.Tradewell was booked by the DRI in December 2015; DRI has never conducted the valuation of the goods (paper cup machines) through Shri Dwarika P. Gupta, Chartered Engineer; it appears that some fabricated documents have been submitted by the appellant.

(ii). The Samsung 4G LTE phone was submitted by Shri Pankaj Jain voluntarily during recording of his statement dated 23.05.2016 in an enquiry w.r.t. undervaluation of Paper Cup machines by M/s. Jain & Sons, Jaipur; validity of data retrieved from mobile (Samsung 4G LTE) has been discussed by adjudication authority; Investigation against both the firms are related to undervaluation in import of paper cup machines, hence it is incorrect on the part of the appellants to contend that the

Samsung 4G LTE phone was recovered during investigation of another matter; When the Samsung 4G LTE phone has been voluntarily submitted by Shri Pankaj Jain during his statement dated 23.05.2016, the contention of disowning the same is absurd and the unauthorized use of the phone, if any, has to be proved by the owner himself.

(iii). adjudication authority has allowed the cross examination and considered the findings of the same wherever it was deemed necessary and proper; department is not supposed to give any explanation why the DTDC has not replied the emails of the appellants.

(iv). The case of the department is not solely based upon the customs declaration; there were supporting documents and its corroboration with other documents alongwith other documentary and oral evidences proves the department's contention.

(v). It is incorrect to say that the WhatsApp chat has not been made RUD to SCN; Proper date and time of the WhatsApp chat is reflected in the retrieved data (RUD-74); printouts of the email were tendered by the concerned persons, hence they are not digital records as they had not been obtained by the DRI in digital form; the phone was in possession of Shri Pankaj Jain and was being used by him, hence any information retrieved from it has evidential value; the identity of the phone w.r.t. IMEI no. was established by the DRI; as contents of the phone, emails etc have been accepted by the persons concerned, no separate certificate under section 138C is required.

(vi). From the investigation and documents recovered during investigation it has been proved that Shri Tarun Baid was a Hawala operator who transferred the money through Hawala for Shri Pankaj; adjudication authority has discussed that Proforma invoice No.DB2012319/19.03.2012 had details of T/T of USD 8580 already made and adjustment of USD 800 and balance of USD 20200.

(vii). Shri Raghuveer Swami started importing the Paper Cup Machines separately in his firm; he admitted the undervaluation & paid the differential duty along with interest and penalty; being an associate of Pankaj Jain and being in similar trade, he was competent to give reliable statement.

(viii). 10 customs declarations had been received by the freight & forwarding agencies from shippers in China via email and the same has been submitted by the representatives of the freight forwarders under Section 108 of the Customs Act, 1962; learned counsel of the appellant has failed to submit any convincing reason why these freight forwarding agencies who were working for the importer would submit any fake and concocted documents while they were working for the importer; when the supplier was hand in gloves with the appellants, it was not possible for DRI to get these documents from them, particularly when they are based in China; Freight & forwarding agencies were also working for the importer had a key role in the whole import; any document voluntarily submitted by them has equal evidential value as if they were submitted by the supplier; details mentioned in the customs declarations were cross matched with imports and the investigation has been able to pin point the relevant BOFs having the precise details and the importer failed to produce any contrary evidence during investigation.

10. Learned authorised representative relies upon the following rulings: -

- *Slotco Steel Products Pvt. Ltd. 2010 (253) ELT 542 (Tri.-Del.)*
- *Beauty Dyers [2001 (136) ELT 349 (Tri.-Chennai)*
- *K.I. Pavunny 1997 (90) ELT 241 (SC)*
- *Surjeet Singh Chhhbra 1997 (89) ELT 646 (SC)*
- *Auto Control Pvt. Ltd. 1999 (111) ELT 96 (Tribunal) affirmed by Hon'ble Apex Court 2006 (199) ELT A127 (SC)*
- *Safe Exports Pvt. Ltd. 2015 (329) ELT 71 (Ker.)*
- *D. Bhoormull 1983 (13) ELT 1546 (S.C)*
- *Naresh J. Sukhwani 1996 (83) 258 (SC)*

- *Orson Electronics Pvt. Ltd. 1996 (82) ELT 499 (Tribunal) affirmed by Hon'ble Apex court 1997 (93) ELT A133 (SC)*
- *Sangeeta Metals India 2015 (315) ELT 74 (Tri.-Mum.)*
- *Copier Force India Ltd. 2008 (231) ELT 224 (Tri.-Chennai)*
- *Mettur Spinning Mills Ltd. 2009 (246) ELT 705 (Tri.-Chennai)*
- *Bharathi Rubber Lining & Allied Services 2018 (362) ELT (Tri.-Mumbai)*

11. Heard both sides and perused the records of the case. The issue that requires consideration in the instant appeal is as to whether documents in the form of computer printouts / extracts of WhatsApp messages/ images and load port documents/papers submitted by the shipping agents are, admissible as evidence and, if so, whether they conclusively establish the allegation of undervaluation as alleged by the department. We find that the main evidence put forth by the Revenue in the impugned case is in the form of –

- (i) copies of proforma invoices recovered from different premises (third party).
- (ii) uncertified load port documents submitted by the shipping agents (in India).
- (iii) WhatsApp messages etc. alleged to have been recovered from the mobile phone.
- (iv) Statements of individual persons.

12. The appellants have vehemently opposed the genuineness of the evidence, claiming that the same is not procured in a legally tenable manner and contents thereof are not examined by observing due process as per Section 138C of the Customs Act, 1962; the statements recorded were retracted. Coming to the proforma invoices recovered, it has been the allegation of the department that Proforma Invoice No.DB2012319 dated 19.03.2012 relates to Bill of Entry

No.7362395 dated 11.07.2012 and Proforma Invoice DB No.20120607 dated 07.06.2012 pertains to Bill of entry No.7741855 dated 23.08.2012. Learned Counsel for the appellant have argued that on comparison of the proforma invoices recovered during the searches, with the commercial invoice supplied along with Bills of Entry, are not matching and there is a difference in the models and the same was not established by the department, and that the department has simply alleged that the appellant has declared imported paper cup machines as TW-L12 instead of DBL-12 model. Ld. Counsel for the appellant submits that the proforma invoice cannot be the basis for redetermination of value of imported goods, especially in the absence of their correlation with Bills of Entry, seal/signature of the noticee or the supplier. Ongoing through the impugned order, we find that Ld. Adjudicating authority has observed in para 7.5.5 of the impugned order, as follows:

“Interestingly, all these details including the model number of the machines, were missing from the imported commercial invoice bearing the same number as filed along with Bill of Entry No.7362395 dt. 11.07.2012.”

13. We find that having accepted that there is difference in the models as mentioned in the proforma invoices and the commercial invoice, Learned Adjudicating authority proceeds to confirm the value reflected in the proforma invoice, relying on the statement dt. 20.6.2017 of Shri Raghuveer Swamy (an outsider). We find, further the Learned Commissioner takes a peculiar stand that *nevertheless, once the notice is issued alleging such a serious charge based on certain sets of evidences, the onus to prove otherwise shifts upon the importer and they were under obligation to rebut the allegation with cogent*

documentary evidence to substantiate their claim and corroborate with evidence, which they have failed to do. Rather, importer has questioned the allegation and evidences on mere technical grounds. We find such argument by the adjudicating authority is not only specious but also not legally tenable. The allegations, if any, have to be proved by the Revenue authorities alleging the same. It is incorrect to say that the appellant has to disprove the allegations with cogent evidence. Such an argument runs against the settled position of law and as such the same is not acceptable. We find that Tribunal in the case of CCE, PUNE-IVs S.S. Engineers 2014 (313) ELT 429 (Tri. – Mumbai observed that-

7. We do agree with the observations of the adjudicating authority that proforma invoice has no legal sanctity in the eyes of law and same cannot be basis for the demand of differential duty. It is also an admitted fact that these proforma invoices were not accepted by the buyers and no payment was made by the buyers to the respondent as per these proforma invoice. Therefore, the question of demand of differential duty does not arise. Accordingly, Revenue's appeals deserve no merit, hence it is dismissed.

14. We find that proforma invoice is only an offer letter and does not conclusively establish the transaction. We find that Courts and Tribunals have consistently held that proforma invoices cannot be evidence, at least in themselves. What is material is the transaction value. Revenue is required to prove with evidence that the payments over and above, the price reflected in commercial invoices are actually made. In the instant case the same is absent. Moreover, we find that the adjudicating authority himself observes that there is a difference in the particulars mentioned in proforma invoice, and the invoices submitted along with bills of entry. Therefore, we are of the view that in the facts and circumstances of the case, proforma invoice cannot be a basis for rejection of transaction value, alleging undervaluation.

15. Another set of evidence that the department relies upon - the WhatsApp messages claimed to have been retrieved from a Samsung mobile. The appellants submit that the recovery of the mobile is not recorded in any of the Panchanama or statements, and that the data was not retrieved following due process of law under Section 138C of Customs, Act, 1962. The adjudicating authority observes that the said mobile was submitted by Shri Pankaj Jain, during the course of recording of his statement in another case, against M/s Jain and sons, Jaipur; the chats show that Shri Jain was in constant contact with Chinese supplier, especially with Ms Kitty Jiang, Sales Manager of M/s Zhejiang New Debao Machinery Co. Ltd., and Shri Tarun Baid, the alleged Hawala operator; he accepted the use of the said phone and that one of his employees Shri Omprakash Sharma used the mobile for some time and Shri Sharma denied that he used the phone. Also the Learned adjudicating authority does not deny the explanation of the appellant, but avers that Shri Jain submitted his telephone voluntarily, and if it was misused, it was for Shri Jain to prove the same. Learned adjudicating authority says that the data was retrieved under Panchanama and was copied on to a pen drive. However, the authority finds that the phone was submitted by Shri Jain, and the fact was never retracted. We find that such negative evidence, would in no way serve the purpose of allegations levelled. It is for the Revenue to prove that the phone was recovered from/ submitted by Shri Jain. The fact thereof must have been recorded under a Panchanama, which is a public document. It is not the case of the department that as regards the seizure and retrieval of data from the phone, the procedure laid down under Section 138C of the Customs Act, 1962 was followed, so as to

show the evidentiary value of the same. We find that the learned adjudicating authority gives similar finding in respect printout of emails. He finds that these are printed on paper and were submitted by the persons concerned under proper Panchanama and thus are not electronic records but paper records. We find that this argument is neither logical nor convincing.

16. Learned Adjudicating authority relies upon the IMEI details of the phone obtained and call data of records to establish that the mobile in question was used by Sri Pankaj Jain. He also relies on fact that mobile contains personal and family photographs of Shri Pankaj Jain. However, it is not the case of Revenue or the adjudicating authority that such electronic evidence was retrieved following the procedure laid down under Section 138C of the Customs Act. We find that even if cell phone is submitted by Shri Pankaj Jain and the computer printouts were submitted by concerned persons, the provisions of Section 138C are still obligated. On a plain reading of Section 138C, it is seen that the sub-section does not differentiate between the extracts of printouts taken by the officers or submitted by concerned persons or parties. Therefore, we find that the evidentiary value of such printouts is lost in the bargain, looking into the fact that data available in electronic form is prone to manipulation.

17. The adjudicating authority further relies upon the documents forwarded by freight forwarders after obtaining the same from their master in China. Appellants have taken serious objection to the documents urging that same have not been obtained through official channels, through overseas customs network. We find that documents

have not been authenticated by Customs authorities at the respective port of export. Interestingly, Learned Commissioner finds that the importer is correct in pointing out that documents in question have not been directly obtained from a Chinese shipper and that these have not been verified from the Chinese Customs. However, he proceeds to rely upon the documents finding that the freight forwarders confirmed the receipt in his e-mail of customs declaration / commercial invoice / packing list on the basis of declarations given in China, and that the documents have been submitted, well recorded in the statement. Interestingly, improbable dates such as 20:18:13, 15:22:55, 17:14:07, 12:03:47 are seen. We also find that some of the documents relied upon by the department are but blank pages with a signature purportedly to be in Chinese containing no information. Ongoing through the e-mails, as submitted by Ld. Counsel, the format of emails at some places is different from the normal mails sent. These aspects do cast a shadow of doubt on the nature of evidence.

18. Appellants have contended that the goods were initially assessed and cleared by the customs authorities and later on investigation was taken up by D.R.I., and there was no proposal in the SCN to reject the transaction value declared and without first rejecting the value already taken for the assessment, the value cannot be redetermined; that no data of contemporaneous imports has been relied upon. We find that Ld. Adjudicating authority finds that this is not a case of appraising of Bills of Entry wherein the firstly declared value is to be rejected and thereafter sequentially consideration of the rules of the Customs Valuation (Determination of value of Imported Goods)

Rules 2007 is to be undertaken. These are the provisions to be followed at the time of importation, that situation has long gone. In the instant case, the investigation has revealed the actual transaction value based on cogent evidences. Therefore, the actual price taken being the transaction value under Section 14 of the Customs Act, 1962, we find that the observations of the Learned Commissioner are very curious. Once the goods are assessed and cleared, there was no reason for rejecting the declared value and redetermining the same following the CVR, 2007 sequentially. First of all, the declared transaction value needs to be rejected and the value requires to be redetermined in terms of CVR, 2007, and it was incumbent upon the investigation and the adjudicating authority to show reasons for rejection of the declared assessable value and the results as to how the price adopted for rejecting the value is determined. This is a settled principle of valuation as held by this Tribunal as well as various Courts. Therefore, we are not inclined to accept contention of the Learned Adjudicating Authority.

19. We find that Learned Counsel for the appellant have relied upon the Apex Court judgment in the case of Canon India and other High Court decisions and this Tribunal, holding that officers of DRI are not proper officers for the purposes of Section 28 of Customs Act, 1962 and hence show cause notice issued, lacks jurisdiction and, on this ground, the impugned order requires to be set aside. As per our discussion above, we find that the show cause notice and the OIO are not maintainable and that the OIO is liable to be set aside, we are of the considered opinion that we need not deliberate on the issue of Jurisdiction and the same can be kept open.

20. We find that learned authorised representative has relied upon various cases to support their arguments. We find that in the facts and circumstance of the cases, they are not applicable in view of our discussions as above.

21. In view of the above, we find that the impugned order and show cause Notice are not maintainable on merits. Accordingly, the impugned order is liable to be set aside. We set aside the same with consequential relief, if any, as per law. In the result both appeals i.e., C/50019/2019 and 50020/2019 are allowed.

(PRONOUNCED ON 08.02.2022).

(Anil Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)