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Email : delhi@cestat.gov.in

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

Appeal No. C/584 /2007-586 /2007 - CU[DB] Date 23/10/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S REGENT EXIM INTERNATIONAL LTD.
AG-23, SHALIMAR BAGH, NEW DELHI.

M/S REGENT EXIM INTERNATIONAL LTD. Appellant
Vs
C.C. NEW DELHI (IMPORT & GENERAL) Respondent

I am directed to transmit herewith a certified copy of Final order No. C/415-417/08-CU(DB) ~~dated .08~~ 17.10.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   C.C. NEW DELHI (IMPORT & GENERAL)
   NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult
   MR.RUPESH KUMAR
   46, BANK ENCLAVE, DELHI
3. S.D.R
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. ...draman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. Office Copy
16. Guard file

17. Sunil Gupta
18. -SUBHASH GUPTA
AG-23, SHALIMAR BAGH, NEW DELHI

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II
Customs Appeal No. 584 to 586 of 2007

[Arising out of the Order-in-Original No. 06/GS/CC/DRI/ NCH/2007 dated 28/05/2007 passed by The Commissioner of Central Excise (Adjudication), New Delhi.]

For Approval and signature :
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities? :

M/s Regent Exim International Ltd. & Ors. — Appellant

Versus

CCE, New Delhi — Respondent

Appearance

Shri Rupesh Kumar, Advocate – for the appellant.

Shri Amit Jain, Authorized Representative (DR) – for the Respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 09/07/2008.
DATE OF DECISION: 17-10-2008

Final Order No. C/415-417/08 Dated : 17/10/08

Per. Rakesh Kumar :-

M/s Regent Exim International Ltd. AG-23, Shalimar Bagh, New Delhi, (hereinafter referred to as the Appellant company) is a company engaged in import of silk fabrics and Shri Subhash Gupta and Shri Sunil Gupta are its Directors. One of their suppliers is M/s Zhejiang Cathaya International Co. Ltd., China (hereinafter referred to as M/s Zhejiang). On receipt of some intelligence about under invoicing in import of silk fabrics by M/s Purnima Enterprises, Chennai, M/s Om Fabrics, Bangalore and M/s Vedant Enterprises, Bangalore, from M/s Zhejiang, DRI searched their premises, in course of which certain incriminatory documents indicating issue of two invoices by M/z Zhejiang for each consignment of silk fabrics supplied to M/s Purnima Enterprises; M/s Om Fabrics and M/s Vedant Enterprises – one invoice showing the actual price and the other showing 30 to 35% less value for presenting to the customs authorities, were recovered. Since the Appellant company was also importing identical fabrics from the same supplier, inquiry was started in respect of their imports also, in course of which the godown and office premises of the Appellant company and residential premises of its Director Shri Subhash Gupta were searched and statements of Shri Subhash Gupta were recorded whereas he stated that his company is importing silk fabrics from various suppliers in China, including M/s Zhejiang at Chennai and Kolkata and that he had negotiated with M/s Zhejiang as a result of which his company gets 10% to 20% price concession. However, in view of adverse record of the supplier M/s Zhejiang (as they were conniving with other imports of silk fabrics – M/s Purnima Enterprises; M/s Om Fabric and M/s Vedant Enterprises) and of the Appellant company, as in June 2004 Chennai custom house had issued a show cause notice dated 30/06/04 to the Appellant company alleging duty evasion amounting to Rs. 10.40 lakhs by under invoicing and in respect of that show cause notice, they had gone to the Settlement Commission and had deposited the entire duty demanded in pursuance of the Settlement Commission's order, and also since in respect of import of silk fabrics of different qualities by the Appellant Company at Chennai and Kolkata, the declared per unit prices were lower than the alleged actual per unit transaction value, based on the invoices mentioning the actual price issued by M/s Zhejiang to M/s Purnima Enterprises; M/s Om Fabrics and M/s Vedant Enterprises, in respect of silk of quality No. 10101, 10103, 12101, 12103 and 14654 and invoices of contemporaneous imports of Chinese silk fabrics of other qualities, the Revenue has alleged that the Appellant company has wilfully misdeclared the value of the silk fabrics of various qualities imported by them from M/s Zhejiang at Chennai and Kolkata during the period from May 2003 to October 2004. Accordingly a show cause notice dated 31/08/05 was issued to the Appellants for recovery of allegedly short period customs duty amounting to Rs. 1,00,66,346/- in respect of consignments of silk fabrics cleared by the Appellant company under 24 BS/E fled at Chennai and 38 BS/E filed at Kolkata, alongwith interest on this duty, confiscation of the goods including the goods valued at Rs. 97.60 lakhs seized under panchnamas each dated 04/3/05 at Kolkata and Chennai under Section 111 (d) & 111 (m) of the Custom Act, 1962 and imposition of penalty on the Appellant company and its Directors under Section 114A/112 (a) and (b) of the Customs Act. Commissioner of Customs & Central Excise (Adjudication), New Delhi, who adjudicated this show cause notice in pursuance of the Government of India notification No. 35/2006-CUS (NT) dated 27/3/06, vide order-in-original No. 6/GS/CC/DRI/NCH/07 dated 28/05/07, has -

(a) upheld the allegation of misdeclaration of value against the Appellant company ;

(b) confirmed the duty demand of Rs. 1,00,66,346/- against the Appellant Company under Section 28 (1) of the Act alongwith interest on this duty under Section 28AB of the Act ;

(c) held the goods covered by 24 B/Es filed at Chennai and 38 B/Es filed at Kolkata as liable for confiscation under Section 111 (d) & (m) of the Act and since only the goods valued Rs. 97.60 lakhs seized vide Panchnama dated 04/3/05 were available for confiscation, the same were confiscated with option to be redeemed by the Appellant Company on payment of redemption fine in lieu of confiscation of Rs. 20 lakhs ; and

(d) imposed penalty of Rs. 1,00,66,366/- on the Appellant company under Section 114A of the Act, and penalty of Rs. 25 lakhs on Shri Subhash Gupta under Section 112 of the Act. No penalty was imposed on Shri Sunil Gupta.

1.1 It is against the above order that these appeals have been filed.

2. Heard both the sides.

2.1 Shri Rupesh Kumar, Advocate, the learned counsel on behalf of the Appellants, made the following submissions :-

(i) It is an admitted fact that nothing incriminating was found in course of search of the Appellant company's office and godown and residential premises of Shri Subhash Gupta, Director of the Appellant company, suggesting fraud or under invoicing, or that the values declared by the Appellants were not representing true transaction value.

(ii) Annexure A to the show cause notice refers to clearances of silk fabrics of quality No. 10101, 12101, 11216, 10103, 14654, 11206, 13255, 12103 and 12108 made through Chennai Port under 24 bills of entry and Annexe B to the show cause notice refers to clearances of silk fabrics of quality No. 10101, 10103, 12101, 11206, 11216, 14654, 13255, 12408 and 60219 made through Kolkata Port under 38 bills of entry and differential duty has been demanded by loading the declared invoice price in these bills of entry. But there is substantial difference in time when the goods covered under the above bills of entry, were imported by the Appellant company and the date of the invoice of imported goods whose value has been adopted by the Department

(iii) None of the situations stipulated in rule 4 (2) of the Custom Valuation Rules, exist in the facts of the present case. Therefore, the transaction value of the goods cannot be rejected and the same has to be accepted. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in case of **Eicher Tractors Ltd. vs. Commissioner of Customs** reported in **2000 (122) E.L.T. 321 (S.C.).**

(iv) The Commissioner has erred in holding that the time difference between the imports made by M/s Vedant Enterprises, M/s Om Fabrics and M/s Purnima Enterprises on one hand and by the Appellant company on the other hand, varies between 3 to 6 months and this much time gap is permitted within the acceptable limits in interpreting the meaning of the word – 'contemporaneous'. This finding of the Commissioner is contrary to the facts and data available on record.

(v) The Commissioner has erred in applying the evidences collected by the DRI in respect of imports of silk fabrics, made by M/s Om Fabrics, M/s Purnima Enterprises and M/s Vedant Enterprises from M/s Zhejiang to the imports made by the Appellant company from M/s Zhejiang, despite the admitted fact that the Appellant was not in anyway related with M/s Zhejiang.

(vi) The allegation in the show cause notice that –" on being instructed by M/s Regent Exim International Ltd. the said invoice of lower value were fabricated by the Chinese supplier – M/s Zhejiang (para 12 (iii) of the show cause notice), is totally arbitrary and without any basis.

(vii) The statement of Shri Subhash Gupta that by negotiation with the suppliers he got 10% to 20% price reduction cannot be construed as admission of under invoicing. Payment to Chinese supplier were always made as per the sale invoices raised by them and the same were always negotiated through bank.

(viii) The imports of identical goods whose value is sought to be adopted for determining the assessable value of the goods imported by the Appellant company, are not contemporaneous. In fact, in a number of cases, contemporaneous imports of identical goods by others are at lower prices.

(ix) All the bills of entry, covered by the show cause notice were properly examined by the respective custom house with regard to valuation and only in some stray cases where the assessing officer felt that the value was on lower side, the Appellant were directed to pay duty at higher value. The department has never challenged the said assessment orders. Therefore, in view of Hon'ble Supreme Court's judgment in case of **M/s Priya Blue Industries vs. Commissioner of Customs (Prev.)** reported in **2004 (172) E.L.T. 145 (S.C.)** the Department is now precluded from raising any dispute on valuation.

(x) The entire duty demand and penal proceedings are based on assumptions and presumptions, without any tangible evidence. There is no misdeclaration of value by the Appellant company. Hence there is no case for confiscation of any goods or imposing penalty on the Appellants.

2.2 Shri Amit Jain, the learned Departmental Representative made the following submissions -

(i) In view of the reputation of the suppliers – M/s Zhejiang, of abetting the under voicing by issuing two sets of invoices to M/s Purnima Enterprises, M/s Om Fabrics and M/s Vedant Enterprises, and also in view of past record of the Appellant company of evading custom duty by misdeclaring the value, the imports of silk fabrics by the Appellant company from M/s Zhejiang have to be looked at with suspicion.

(ii) Shri Subhash Gupta in his statement has admitted that by negotiation with his supplier - M/s Zhejiang, he was able to get special discount and that if the Department loads the value, he is ready to pay the differential duty.

(iii) Looking to the dubious background of the Importer – the Appellant company and the suppliers, even circumstantial evidence is sufficient for proving the allegation of under invoicing. As held by Hon'ble Supreme Court in case of **South India Television** reported in **2007 (214) E.L.T. 3 (S.C.)**, strict rules of evidence do not apply to adjudication proceedings though adjudicating officer has to examine the probative value of the documents relied upon by the Department.

(iv) The 20% discount claimed by the Appellant company is not genuine discount but deliberate under invoicing.

(v) In view of Hon'ble Supreme Court's judgment in case of **Asian Paints (India) Ltd. vs. CCE, Bombay** reported in **2002 (142) E.L.T. 522 (S.C.)**, duty demand can be raised under Section 28 of the Customs Act, even if the assessment has been finalized.

3. We have carefully considered the submission made from both the sides. The Appellants have raised preliminary objection that since in respect of all the 24 B/Es filed at Chennai custom house and 38 B/Es filed at Kolkata custom house, in respect of which the duty demand has been raised, the assessments have been finalized, in some case, even by loading the declared assessable value by the respective customs authorities, these assessments, in view of Hon'ble Supreme Court's judgment in case of Priya Blue Industries (Supra) cannot be re-opened and a fresh duty demand cannot be raised, as those assessments have not been reviewed or modified in appeal. We do not agree with this contention as in this case the duty demand based on the allegation of wilful misdeclaration of value of the goods has been raised under proviso to Section 28 (1) of the Customs Act and if the

Appellant's contention is accepted, the proviso to Section 28 (1) of the Act would become redundant.

4. Coming to the main point of dispute, the allegation against the Appellant company and its Directors is that they have misdeclared the transaction value in connivance with the foreign supplier M/s Zhejiang of China and on this basis invoking Rule 10A Of the Customs Valuation Rules, 1988 readwith Rule 3 thereof, the declared transaction value is sought to be rejected and the same is sought to be determined under Rule 5 of the Valuations Rules.

4.1 Rule 10A Of the Customs Valuation Rules, 1988, empowers a proper officer of Customs to conduct inquiry, if he has reasons to doubt the truth or accuracy of the value declared in relation to any imported goods and reject the declared value and proceed to determine the same by sequentially applying Rule 5,6,7 and 8 of the Valuation Rules, if after inquiry with the importers and considering other evidence, he still has reasonable doubt about the truth or accuracy of the declared transaction value. Now what is the "reasonable doubt"? In this regard it is worthwhile looking at the reasons for adding Rule 10A to the Customs Valuation Rules, 1988 vide notification 10/98-Cus (NT) dated 19/2/98, as given in the Ministry's Circular No. 13/98-Cus dated 09/3/98. The relevant portion of the circular is reproduced below –

> "2… as per Rule 4 of the Customs Valuation Rules, the transaction value, i.e. the price actually paid or payable for the goods when sold for export to India, as adjusted in accordance with provisions of Rule 9, has to be accepted, except where the situation provided in Rule 4 (2) and 4 (3) exists. If none of these circumstances prevail, the rules do not permit the rejection of declared value, if such a value is supported by an invoice from the seller.
>
> 3. Several instances have been brought to the notice of the Board, wherein the invoices produced in support of the declared values have been found to be manipulated but on the face of it, the transaction value (i.e. the invoice price) is projected to be true and correct. In some cases, even a manufacturer's invoices have been found to be substantially lower than the prevailing international market price.

4. In a recent study conducted by valuation Directorate on import of Tinplate and Tinplate Waste, it was seen that if the computed value of tinplate price is worked out, the minimum price of tinplate from Europe and America should not be lower than U.S. $ 750 – 800 PMT, whereas declared values have ranged from U.S. $ 607 to 642 PMT .... Similar under invoicing has been noticed in regard to imports of ball bearings, plastic raw materials etc.

5. In absence of any specific evidence to reject the declared value, at times, these values have to be accepted.

6. Thus, in order to enable a fair determination of the transaction ~~custom~~ value of imported goods and in consideration of these practice which have been found to be prevalent with reference to some commodities which under scores the need to provide a ground for rejection of the declared value based on existence of "reason to doubt" and to give effect to the Ministerial decision referred to above, the new Rule 10A has been added to the Customs Valuation Rules, 1988."

Thus, Rule10A is to be invoked in the cases where the circumstances indicate under invoicing, but Rule 4 (2) cannot be invoked. In other words, Rule 10A supplements the conditions laid down in Rule 4 (2) for acceptance of the declared transaction value. Another thing which is clear from the Ministry's circular about the scope of Rule 10A is that there must be concrete basis for having 'reason to doubt' or 'reasonable doubt' about the declared transaction value – it cannot be based on mere suspension based on adverse past record or bad reputation of an importer or a foreign supplier. In our view the Rule 10A can be invoked in situations like – there being evidence of invoice manipulation, the importers claiming to have got an abnormal discount which is against the normal trade practices, the declared transaction value is much lower than the transaction value of the contemporaneous imports of identical or similar goods in comparable quantity and the importer is unable to give any satisfactory explanation for this or some electronic goods of latest model have been imported as stock lot by declaring a very low value etc, which create doubt about the declared transaction value.

5. The main basis for exercising reasonable doubt about the declared transaction values and rejecting the same by invoking Rule 10A is -

(a) record of the supplier - M/s Zhejiang in abetting import under invoicing in import of silk fabrics by M/s Vedant Enterprises, M/s Om Fabrics and M/s Purnima Enterprises by issuing parallel set of invoices ; and

(b) adverse record of the Appellant company – a case of under invoicing having been booked against them in the year 2004 in which they approached the Settlement Commission and paid the duty of Rs. 10.40 lakhs in pursuance of the Settlement Commission's order ;

The Commissioner after rejecting the declared transaction value in respect of imports of silk fabrics by the Appellant company from M/z Zhejiang at Chennai and Kolkata during May 2003 – October 2004 period, as detailed in Annexure A & B to the SCN, by invoking Rule 10A of the Customs Valuation Rules, 1998 has determined these assessable value under Rule 5 of the Valuation Rules.

5.1 There is no dispute about the fact that in course of search of the office and godown premises of the Appellant company and search of the residential premises of Shri Subhash Gupta, no documents of the type recovered from the premises of M/s Om Fabrics, M/s Purnima Enterprises and M/s Vedant Enterprises – i.e. parallel sets of invoices and correspondence of the imports with the supplier showing that the actual value of the goods imported was higher than the value declared, were recovered. There is no statement of Shri Subhash Gupta or Shri Sunil Gupta admitting the allegation of under invoicing. All Shri Subhash has stated in his statements is that he had negotiated with the supplier to bring down the price. We also find that the SCN nowhere alleges that the declared transaction values for different varities of silk fabrics imported by the Appellants from M/s Zhejiang, were same as the transaction values declared for those varieties by M/s Om Fabrics, Purnima Enterprises and M/s Vedant Enterprises – if this had been so, the same would have been the basis for exercising reasonable doubt about the declared transaction values of the Appellant company and rejecting the same. We, therefore, have no hesitation in holding that just because M/s Zhejiang had abetted under-invoicing by M/s Om Fabrics, M/s Purnima Enterprises and M/s Vedant Enterprises by issuing parallel sets of invoice, it cannot be presumed that they had done so for their every customer in India and just because a case of under invoicing had been booked by Chennai, Custom against the Appellant company in the year 2004, which had been settled by the Settlement Commission, it can not be presumed that the Appellant company had indulged in under invoicing during subsequent period also.

5.2 A reasonable doubt about the declared transaction value can be exercised if the declared transaction value is much lower than the price of contemporaneous imports of identical or similar goods in comparable quantities, after taking into account the normal price fluctuations and normal trade discounts, for which the importer is unable to give any valid explanation.

5.2.1 However in this case, on going through Annexure A (imports made through Chennai under 24 bills of entry) and Annexure B (imports made through Kolkata under 38 bills of entry) to be show cause notice, we find that –

(a) while the imports have taken place during May 2003 to October 2004 period, throughout this period, uniform prices for various qualities of silk fabrics have been adopted and,

(b) in some cases the invoice price of imports of a particular variety of silk fabrics imported by the Appellant company from M/s Zhejiang, at a particular time has been applied to the imports of the same variety during much earlier period without considering the factors like price fluctuation or difference in quantity imported.

5.2.1 For example the import price of quality No. 10101 had varied from U.S. $ 0.95 per metre in June 2003 to U.S. $ 1.32 per metre in December 2004 as per the import prices declared by the Appellant company. But the Department seeks to value all the imports of quality No. 10101 during June 2003 to October 2004 period at the rate of U.S. $ 1.32 per metre. Similarly price of quality No. 12101 had varied from U.S. $ 1.23 per metre in September 2003 to U.S. $ 1.80 per metre in June 2004 but the Department on the basis of an import invoice of August 2004 seeks to enhance the assessable value of the import of this quality throughout during the period from September 2003 to June 2004 to U.S. $ 1.90/- per metre. Similarly the Appellant company imported 7585 metres of silk fabrics quality No. 11206 and filed B/E No. 168125 dated 28/07/03 for its clearances declaring its price as U.S. $ 0.95 per metre. The Department, however, seeks to load the price to U.S. $ 1.1 per metre on the basis of the Appellant's own B/E No. 181558 dated 07/2/04 under which 5025 metres of same quality of fabrics was imported ignoring the difference in time of imports and difference in quantity. We find that assessable value in respect of import of other qualities of fabrics have also been loaded in a similar manner. Though these points had been raised by the Appellant company in reply to the show cause notice, and the Appellant company also pleaded that the prices of silk fabrics fluctuate frequently, the Commissioner in the impugned order has dismissed this plea of the Appellants observing that the imports made by the Appellant company and the imports whose value is sought to be adopted, have to be treated as contemporaneous in view of Tribunal judgment in case of **P.K. Himatsinkes & Co.** reported in **1986 (81) E.L.T. – 350 (T)** and **Chandan International vs. CC (Importers)** reported in **2003 (133) E.L.T. – 312 (T)**. We do not agree with this view as the imports made with time gap of six to 12 months cannot be called contemporaneous and hence comparable and that too when the price of the commodity keeps on fluctuating. The Tribunal in case of **Kedia Vanaspati Ltd. vs. Commissioner of Customs, Visakhapatnam** reported in **2006 (205) E.L.T. 372 (Tri. – Bang.)**, relying on Hon'ble Supreme Court's judgment in case of Eicher Tractors Ltd. vs. CCE (Supra) has held that since international price of commodities always fluctuates due to various reasons, the contracts entered at different times would indicate different prices and for this reason, the declared transaction value can not be rejected and that it is well settled that transaction value cannot be rejected unless the exceptions enumerated in Rule 4 (2) of the Customs Valuation Rules, 1988 warrant rejection.

6. Thus in this case, on the basis of the evidence on record against the Appellant, we do not find any justification for exercising reasonable doubt about the declared transaction values and rejecting the same by invoking Rule 10A of the Valuation Rules. The impugned order does not discuss any evidence to prove that the declared transaction values do not satisfy the criteria for acceptance of the transaction value as laid down in Rule 4 (2) of the Valuation Rules.

7. In view of the above, the rejection of declared transaction value in respect of imports of various qualities of silk fabrics, made by the Appellant company at Chennai and

Kolkata, confirmation of duty demand under Section 28 (1) of the Customs Act, 1962 and confiscation of the goods under Section 111 (d) and 111 (m) of the Act, are without any basis.

8. The impugned order is, therefore, not sustainable and the same is set aside. The appeals are allowed.

(Pronounced in open court on 17.10.08)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK