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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/424 /2007-426 /2007 - CU[DB], C/162-167/09, C/226-228/09, C/64-67/2010

Date **27/06/2011**

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

To :
VARUN OVERSEAS
3767-68, PARMANAND STREET,
DARYAGANJ, NEW DELHI

VARUN OVERSEAS Appellant

Vs

C.C.E. DELHI IV Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/272-287/ 2011 CU[DB]** dated 22.06.2011 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.E. DELHI IV
NEW CGO COMPLEX, NH-IV,
FARIDABAD, HARYANA 121001.

2. Adv. / Consult MR. A.K.MISHRA, CONSULTANT,
B-25, LAJPAT NAGAR-III,
NEW DELHI – 110 024.

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.

DIVISION BENCH

Customs Appeal No.C/424 to 426/2007
Customs Appeal No.C/162 to 167/2009
Customs Appeal No.C/226 to 228/2009
Customs Appeal No.C/64 to 67/2010

(Arising out of Order-in-Appeal No.19-21/Cus/Appl/DLH-IV/2007 dt. 13.04.07 passed by the CCE(A), Faridabad)

For approval and signature:

Hon'ble Mr.M.V.Ravindran, Member (Judicial)
Hon'ble Mr.M.Veeraiyan 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?	Yes
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.Varun Overseas — Appellant

Vs.

CC, Delhi-IV — Respondent

Present for the Appellant: Ms.Reena Rawat, Advocate
Present for the Respondent:Shri Sonal Bajaj,SDR

Coram:Hon'ble Mr.M.V.Ravindran, Member (Judicial)
Hon'ble Mr.M.Veeraiyan, Member (Technical)

Date of Hearing: 22.06.2011
Date of Decision: 22.06.2011

Final **ORDER NO.** C/272-287/11

PER: M.VEERAIYAN

All these appeals filed by the same importer involve a common issue and therefore are being disposed of by this common order. In fact appeals Nos.C/424 to 426/07 were heard yesterday for a while and after hearing that several appeals of identical nature were pending, we directed the Registry to list these appeals today.

2. Heard both sides.

3. The appellants are importing bearing of different sizes from different suppliers of china and filed bills of entry from time to time. The appellants also imported Borosilicate Glass Tubes/Rods and the valuation dispute are covered under appeals Nos.C/64/10 to C/67/10.

4. The appellants declared certain prices for the imported goods and the assessing authority enhanced the values for the purpose of assessment based on prices of contemporaneous imports of goods claimed to be identical/similar. The appellants paid duties under protest on enhanced value and taken clearances of the consignments. However, they have been agitating that such enhancements have been made arbitrarily and without issue of speaking orders which were in violation of procedure prescribed by the Board vide circular No.16/2003-Cus dt.17.3.03. They filed the appeals before the Commissioner (Appeals). Several appeals were filed by them before the Commissioner (Appeals) in 2007, 2008, 2009 and 2010, challenging the assessments so made and Commissioner (Appeals) has upheld the orders.

5.1 Learned Advocate for the appellants, referring to the grounds of appeals (which are similar in all these appeals) submits that the bills of entry were assessed without following the procedure prescribed under Customs Valuation Rules. The declared transaction values have been rejected without giving any valid reason. They have taken clearances on payment of higher duty under protest to avoid demurrage, container retention charges, interest, ground rent and other incidental costs. The Commissioner (Appeals) also placed reliance on a few bills of entry relating to contemporaneous imports and the copies of the same were not supplied to the appellants nor particulars of the consignments such as brand, specification, quantum of import have been incorporated in the order. It was submitted that the Commissioner (Appeals) have discarded the evidence relating to import of identical/similar goods which have been imported by other importers at prices less than the prices declared by the appellants.

5.2. Ld.Advocate also submits that in an identical situation, the Tribunal, in their own case, vide final order C/148/11 dt.15.4.11 in customs appeal No.133/07 set aside the order and remanded the matter for fresh consideration.

6. Ld.SDR on the other hand, supported the orders of the Commissioner (Appeals). He submits that the enhancement of values was based on contemporaneous import prices. The Commissioner (Appeals) has clearly recorded that the appellants asked for issuing speaking order only after the getting the goods released. If the appellants really wanted to get speaking orders about the loading of the values of the imported goods, they should have protested and asked for such orders before getting the goods released from the customs authorities.

7.1. We have carefully considered the submissions from both sides and perused the records. It is the department's contention that there are imports of identical/similar goods which are comparable to the goods imported by the appellants and the values of comparable goods are on the higher side. The appellants invariably declared lower values and the same were enhanced. The appellants paid the duty under protest and cleared the goods and sought for issue of speaking orders which requests were not acceded to. Thereafter, they filed appeals before the commissioner and the same were rejected on the ground that the enhancements have been made on the basis of values of comparable goods. For example, in the case relating to C/424/07, department seems to have relied upon contemporaneous higher import prices covered by bills of entry dated 3.10.06, 9.1.06, 23.1.06, 19.7.06 relating to imports by others. Similarly, in the case dealt with in Appeal No.C/162/09, the department claims to have relied upon values of comparable goods covered by bills of entry dated 23.6.08, 21.7.08, 23.7.08, and 7.10.08. Similarly, in respect of case dealt with in C/44/10, department claims to have relied upon the value of comparable goods covered by bills of entry dt.29.10.08, 3.11.08, 22.11.08 and 5.12.08. Similarly values of comparable goods have been relied upon in cases covered by other appeals.

7.2. If the above submission of the department is true, then the appellants are continuously importing and declaring the values much lower than the value of comparable goods. The enhancement of the assessable value by the assessing officers without issue of speaking orders, filing appeals before the commissioner and thereafter appeals before the Tribunal are routinely followed. May be this arrangement is not convenient to the importers. Alternatively, it could mean that unjustifiably loading of values is being done and the importer-appellants are put to undue harassment repeatedly.

8.1 The Board vide circular No.16/03-Cus dt.17.3.03 has prescribed guidelines for enhancing/loading the invoice prices, which are as follows,:

"It has come to the notice of the Board that the Customs field formation(s) are arbitrarily enhancing the invoice value of imported goods without giving a speaking order. Under Rule 10A of Customs Valuation Rules, 1988, the Customs Officer may reject the declared value in cases where under-valuation is reasonably suspected, based on evidence of contemporaneous prices. Such prices are being made available by the Directorate of Valuation through the weekly transmissions of NIDB data and monthly Valuation Bulletins.

It may not be out of place to mention here that the proper officer should follow the procedure laid down under Rule 10A of Customs Valuation Rules, 1988 to satisfy himself about the possible under-valuation. He should then intimate the importer in writing the ground for doubting the truth or accuracy of the value declared in relation to the goods imported and also provide a reasonable opportunity of being heard, before rejecting the declared value.

In view of the above, all the officers in your jurisdiction may be intimated that where declared value is rejected, an appealable order should be issued to the importer after following the due process of law."

8.2 There are also instructions by the Board vide Circular NO.91/2003-Cus, dated 14.10.2003 stipulating that only in the event of importers accepting enhancement of value in writing, there is no need for issue of speaking order. If there was really undervaluation, we do not find the hurry with which clearances are allowed repeated without proper investigation.

8.3 The above guidelines/instructions are aimed at avoiding arbitrary rejection of the declared assessable value and enhancing the value and to ensure when there is enhancement either the assessment is done enhancing value after getting written consent of the importer or a speaking order is issued. These guidelines take into consideration both revenue interest and the principle of natural justice.

9. In the present case, assessing Authorities appear to be flouting the guidelines and directions of the Board and merrily and causally and enhancing the assessable values. Such violations by the assessing officers have been too frequently noticed in the appeals before us, though in some of the cases relating to the present appellants, speaking orders have been issued.

10.1 In the present case, the appellants claim that they have paid duty on the enhanced value to avoid delay and other charges like demurrage and container retention charges etc. If this is true, the said practice cannot be continued for years. It has not been made clear whether during the period in dispute, they have passed on the additional duty burden to the consumer or not. This issue may arise in the event of claim of refund in the context of unjust enrichment angle. However, this issue is not before us in the present set of appeals and the issue is only whether the enhancement of value is correctly done or not.

10.2 Typical letter of protest given by the appellants reads as follows:

"We imported a consignment as per particulars mentioned above. In this case declared invoice/transaction value based on manufacturers' commercial invoice submitted with the bill of entry was discarded and value after loading was adopted without disclosing any reasons therefor. No opportunity to defend the case was afforded. No evidence of any contemporaneous import was given to us. Even personal hearing was also not afforded. All norms of natural justice were ignored. No order-in-original was issued. Consequently more duty was illegal extracted from us than the normal amount leviable on the goods under import. Accordingly WE CALIM REFUND OF EXCESS DUTY CHARGED FROM US.

We lodge our protest over this issue. We invite your attention to Board's circular No.16/2003-Cus dt. 17.03.2003 (F.No.467/09/2001-Cus.V) as amended from time to time. The Apex Court in their ruling published vide 1996 (87) ELT 19 (SC) held that Board's circulars are binding on the field formations. Besides your attention is also invited to sub-section (5) of Section 17 of the Customs Act, 1962. You are, therefore, requested to issue your order-in-original together with attested copies of all evidence relied upon at the time of adjudication at the earliest so that appeal under Section 128 of the Customs Act, 1962 may be submitted before the appropriate authority well in time."

10.3 In such a situation, we fail to understand how the assessing authorities avoided issuing speaking orders, in the process flouting guidelines of the Board.

11. The Commissioner (Appeals) upheld the orders of the assessing authorities, the finding of the Commissioner (Appeals) in a typical case is as follows:

"The appellants have further stated that no personal hearing was afforded to them and no speaking order was passed before loading the values of the goods. I find that the appellants had submitted letter dated .7.9.2006 in Appeal nO.55/2006, letter dated 19.10.2006 in Appeal NO.57/2006 and again letter dated 19.10.2006 in Appeal No.58/2006 for issuing the speaking order only after getting the goods released, as evident from the copy of the said letter submitted to the Assistant Commissioner of Customs, Ballabgarh (placed on record). If the appellants really wanted the speaking order about for such orders before getting the goods released from the Customs authorities and their above letters asking fro such speaking orders after getting the goods released, rather show that the appellants were interested in getting the goods released even on the enhanced value and the said letters were an eyewash and had no meaning once the delivery of the goods was taken by the appellants without asking for such speaking orders. The value loading was done by the Customs authorities with

the full knowledge of the appellants and they had even paid the customs duty on the said enhanced value."

12. We find that the original assessment orders passed by the assessing authorities are in gross violation of the procedure prescribed by the Board and the also in clear violation of principles of natural justice. The Assistant/Deputy Commissioners have failed to issue speaking orders inspite of request for such order by the appellants. The Commissioner (Appeals) upholding the assessment orders on the ground that requests for issue of speaking orders were made after the clearance of the goods and therefore no violation of principles of natural justice cannot be approved.

13. In view of the above, orders of the Commissioner (Appeals) and the assessment orders in so far as the same related to enhancement of the assessable values are set aside and the matter remanded to the original authority to issue a speaking orders after disclosing the relevant materials relied for enhancement of the values and after granting reasonable opportunity of hearing to the appellants. We clarify that we have not expressed any opinion on the merits of the case.

14. It is also surprising that neither side brought to notice of the Tribunal the pendency of several appeals on identical issue pending when the appeal No.C/133/07 was disposed of by the Tribunal on 15.4.2011.

15. Appeals are allowed by way of remand.

16. As the procedure adopted by the Commissioner (Appeals) and assessing authorities provides futile grounds for avoidable litigation, and the same are in violation of the guidelines issued by the Board, we deem it appropriate to direct the registrar to forward a copy of this order to the Chairman of CBEC for his consideration and appropriate action as deemed fit.

(Operative portion of the order pronounced in the open court after completion of hearing)

(M.V.RAVINDRAN)
MEMBER (JUDICIAL)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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