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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/148 /2009 - CU[DB] Date **21/07/2011**

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

To :
M/S H.K.INTERNATIONAL,
9 K.M. STONE,CHANDIGARH ROAD,
HISSAR, (HARYANA)

M/S H.K.INTERNATIONAL, Appellant
Vs
C.C. (ICD) NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/326/ 2011 CU[DB]** dated 14.07.2011 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. (ICD) NEW DELHI
ICD, TUGHLAKABAD,
NEW DELHI 110020.

2. Adv. / Consult
MR.PIYUSH KUMAR,ADV
B-25,LAJPAT NAGAR-III,N.DELHI-24.

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)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT NEW DELHI

COURT-II

Appeal No.C/148/09

Arising out of OIO No.67/2008, dt.19.12.08

Passed by: Commissioner of Customs, New Delhi

For approval and signature:
Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, 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?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
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

Appellant/s	...	M/s. H.K. International
Represented by	...	Ms. Reena Rawat
		Vs.
Respondent/s	...	CC (Tughlakabad) New Delhi
Represented by	...	Shri Sonal Bajaj, SDR

CORAM:
MRS. ARCHANA WADHWA, MEMBER (JUDICIAL)
MR. MATHEW JOHN, MEMBER (TECHNICAL)

Date of Hearing :02.06.11
Date of ~~Decision~~:
Pronouncement: 14-07-11

Final ORDER No. C/326/11

Per: Mrs. Archana Wadhwa:

Vide his impugned order Commissioner of Customs has confiscated the 37.00 MT of mixed fatty acid imported by the appellant on the findings of mis-declaration of the description of the goods as also the value, with an option to the appellant to redeem the same on payment of redemption fine of Rs.2 lakhs. In addition he has rejected the assessable value of US$ 185 per MT declared by the appellant and has enhanced the same to US$ 420 per MT and has accordingly confirmed customs duty of Rs.2,88,441/-. Penalty of equal amount stands imposed on the applicant under the provisions of Section 114A of the Customs Act, 1962.

2. As per facts on record the appellant filed a bill of entry on 10.10.06 declaring the goods as mixed fatty acids and the assessable value of the same as US$ 185 per MT CIF. The two containers of 37.00 MT of mixed fatty acids were examined by the officers and three representative samples were obtained from the same. The goods were put under seizure on the reasonable belief that the same have been mis-declared in respect of value and description. The goods were subsequently released provisionally on execution of a bank guarantee.

3. The report of Central Revenue Control Laboratory in respect of the three samples is to the effect that the same are having characteristics of fatty acids, whether it is dutiable or not is not clear as it is having such high FFA. The Revenue also conducted investigation and recorded the statement of two indenting agents wherein they admitted that the prevailing prices of palm fatty acids distillate is around US$ 440 PMT.

The statement of Shri Raghuvar Dayal, Proprietor of the appellant company was also recorded wherein he admitted to pay duty on the higher value adopted by the Revenue in as much as the goods were incurring demurrage etc.

4. On the above basis proceedings were initiated against the appellant proposing rejection of the transaction value, adoption of the higher assessable value, the resultant confirmation of demand of duty, confiscation of the goods and imposition of penalties. The said show cause notice resulted in passing of the impugned order by Commissioner.

5. After going through the order of the Commissioner we find that he has basically relied upon the following evidences.

> "a) *There was general intelligence that the importers of 'PFAD' and 'Palm Acid Oil' were mis-declaring the description and value of the imported goods and were evading payment of custom duty.*
>
> b) *Sh. Rakesh Kumar, an indenting agent for Palm Fatty Acid Distillate for various importers in India and several Malaysian firms, in his voluntary statement dated 03.11.2006, inter-alia, stated that the prices of PFAD (Palm Fatty Acid Distillate) was around US$ 340 PMT in the Malaysia; that the landed cost of PFAD in India was around US$ 440 PMT which included US$ 340 PMT for the goods, US$ 50 PMT for drumming and US$ 50 PMT as freight charges; that the local importers and traders asked him to arrange the invoices at price in the range of US$ 180 PMT for mixed acid oil and US$ 210 PMT for PFAD; that accordingly, he contacted the suppliers in Malaysia to issue invoices in the range of US$ 210; and that the suppliers agreed on invoicing those goods at that rate with the condition that the difference of invoice rate and actual rate would be sent to them in advance.*
>
> c) *Sh. Anil Kumar Arora, the other indenting agent in his voluntary statement dated 6.11.2006, inter-alia, stated that the prevailing price of PFAD (Palm Fatty Acid Distillate) which at the time of import was being declared as Mixed Fatty Acid (MFA) by the Indian importers was around US$ 320 to 350 PMT in Malaysia; that the landed cost of PFAD in India was around US$ 430 to 440 PMT; that on the request of Indian importers in India, he used to ask the suppliers in Malaysia to issue invoices in the range of US$ 210 to 220 PMT for PFAD and US$ 180 to 190 PMT for MFA; that the suppliers used to issue invoices for the consignments on these prices; that the PFAD and the mixed*

fatty acid which were being so declared by the importer, were one and the same thing; that he received US$ 3 to 5 PMT as commission for the deals brokered by him.

d) *As per the monthly export price bulletin of Palm Fatty Acid Distillate (FOB) US$/TONNE) issued by the Malaysia Palm Oil Board, the average price of Palm Fatty Acid Distillate during the year 2006 was US$ 345 PMT (FOB). If valuation of the same is conducted as per the valuation Rules, 1988 then 20% of the FOB is to be added as freight which comes to US$ 69 and the total comes to US$ 414/PMT and insurance @ 1.125% comes to US$ 3.88 and thus the CIF value comes to US$ 417.88 PMT. Therefore, the average actual price in US$ of Palm Fatty Acid Distillate comes to US$ 420 PMT (CIF).*

e) *Representative samples were drawn from the containers imported under bill of entry No.540998 dated 10.10.2006 and were sent to Central Revenue Control Laboratory (CRCL), New Delhi for chemical test and analysis. CRCL in their test reports reported that the goods covered by the above bill of entry were having the characteristics of Fatty Acid.*

f) *Sh. Raghuvar Dayal, Proprietor of M/s. HK International in his voluntarily statement dated 26.12.2006 recorded under Section 108 of the Customs Act, 1962 has interalia stated that his firm M/s. HK International is engaged in import and trading of Mixed Acid Oil and Mixed Fatty Acid; that first import in his firm was started in the last period of 2004; that they imported 2 containers of Mixed Fatty Acid against bill of entry No.540998 dt.10.10.06; that the landing cost of Mixed Fatty Acid was on much higher side and that it would be about US$ 420 PMT; that market value of their product i.e. Mixed Fatty Acid was enhanced and he accepted voluntarily to pay the duty at enhanced assessed value @ US$ 420 PMT."*

6. Learned advocate appearing for the appellants have strongly contended that neither of the indenting agents, in their statements have referred to the fact of import of the fatty acids by the appellant or the fact of undervaluation by them. The said statements are generally in nature and cannot be made the basis for enhancing the assessable value. Similarly the average price of the fatty acid as reflected in export price bulletin issued by Malaysia Palm Oil Board cannot be made the basis for enhancing the value as has been held in various decisions of the Tribunal. The report of the chemical examiner only refers that the goods have the characteristics of fatty acids. The goods having been described by them as mixed fatty acids match with the said report and as such there can be no charge of mis-declaration of description of the goods. As

regards the statement of Shri Raghuvar Dayal, it stands contended that the said deponent has nowhere accepted the fact of under valuation. He only agreed to pay duty at the enhanced value so as to get the release of the goods and to avoid further demurrage charges.

7. Learned advocate has also placed reliance on various decisions of the Tribunal laying down that in the absence of any evidence reflecting upon the under valuation of the goods, the transaction value has to be adopted.

8. After going through the evidences relied upon by the Commissioner, we fully agree with the learned advocate for the appellant that the said evidences are in the nature of general evidences and not relatable to the import made by the appellant. The statements of the two indenting agents are general in nature indicating that the landed price of the fatty acids is around US$ 440. In neither of the statements the said indenting agents have admitted that the goods imported by the appellant were invoiced ~~from~~ on the lower side. On the other hand the appellants have strongly contended that they entered into ~~a negation~~ negotiation with the supplier of the goods, who agreed to supply the same at US$ 185 PMT. There is no evidence recording any extra payment to the supplier. We also do not find any investigations made by the Revenue at the suppliers' end. In these circumstances, it is difficult to uphold the contention of the Revenue.

9. The Tribunal in the case of **Jindal Strips Ltd. Vs. CC New Delhi** reported in **2001 (133) ELT 570 (Tri. – Del.)** has held that the transaction value has to be accepted as the correct assessable value

unless there is an evidence to the contrary. It was also observed that the London Metal Exchange Bulletin prices cannot be accepted as basis of valuation in the absence of corroborative evidence of contemporaneous imports. The said decision stands approved by the Hon'ble Supreme Court, when the appeal filed by the Revenue their against was rejected, as reported in 2003(156) ELT A385 ~~2003 ELT a 38~~. Similarly in the case of **Pawan Goel Vs. CC New Delhi** reported in **2001 (135) ELT 1425 (Tri. - Del.)**, it was held that theoretical price based on LME bulletin cannot be made basis without corroborative evidence. We find that the legal position is well settled and we do not find any need to multiply the precedent decisions.

10. In as much as in the present case, there is no direct evidence indicating that the price reflected on the invoice is not the correct transaction value, we do not find any justifiable reasons to uphold the charge of the Revenue. Accordingly the impugned order is set aside and appeal is allowed with consequential relief to the appellant.

(Pronounced in Court on 14-07-11)

(Mathew John)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

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