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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/513 /2007-516 /2007 - CU[DB] Date **22/11/2011**

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

To :
C.C.E. ROHTAK
SCO NO,6 SECTOR 1, ROHTAK.

C.C.E. ROHTAK Appellant

Vs

M/S SAI SALES CO. Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/494-497/ 2011 CU[DB]** dated 21.11.2011 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
M/S SAI SALES CO.
217, VIKAS TOWER, PLOT NO. 31,
COMMUNITY CENTRE, PITAMPURA,
DELHI - 110034

2. Adv. / Consult MR. PREM RANJAN KUMAR,
LGF 6/33, VIKRAM VIHAR,
LAJPAT NAGAR-IV,
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 (Haryana)
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

Date of Hearing:14.09.2011
Date of Decision: 21/11/2011

Customs Appeals Nos. 513-516 of 2007

CCE, Rohtak

Appellant

Versus

M/s. Sai Sales Corporation

Respondent

[Arising out of common Order-in-Appeal No.252-255/SSS/RTK/2007 dated 25.04.2007 passed by the Commissioner of Central Excise (Appeals), Gurgaon].

For approval and signature:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see the order for Publication under Rule 27 of the CESTAT (Procedure) Rules, 1982.

2. Whether it should 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 Departmental authorities?

Appearance: Rep. by Shri Amresh Jain, SDR for the appellant.
Rep. by Shri Prem Ranjan, Advocate for the respondent.

CORAM : **Hon'ble Smt. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Technical Member

Final Order No. C/494-497/11 Dated : 21/11/2011

Per Rakesh Kumar:

The facts giving rise to these four appeals are, in brief, as under:-

1.1 The respondent filed Bills of Entry No.12, 13, 14 & 15 dated 17.02.2006 at ICD, Kundli, for clearance of four consignments of HCH brand Chinese origin ball bearings of various types. As per the invoices, each dated 3.2.2006 of the supplier, M/s.Victory Merchantite Corporation Pvt. Ltd., the declared value of the consignments was US$35488 CIF, US$ 33615 CIF, US$ 3894 CIF and US $ 44189 CIF respectively equivalent to Rs.15,77,441/-, Rs.14,94,187/-, Rs.17,30,883/- and Rs.19,64,201 respectively and after adding 1% landing charges, the assessable value on the basis of the declared price came to Rs.15,93,216/-, Rs.15,09,129/- Rs.17,48,192/- and Rs.19,83,843/- respectively.

1.2 The department decided to value the consignments covered by the Bills of Entry No.12 dated 17.02.2006, No.13 dated 17.03.2006 @ 2 US$ per Kg. CIF and since the declared weight of these consignments was 18010 kgs. and 18710 kgs., the duty in respect of these consignments was assessed on the assessable value of Rs.16,01,089/- and Rs.16,63,319 respectively and accordingly these consignments were cleared on payment of duty amounting to Rs.5,51,468/- and Rs.5,72,903/- respectively.

1.3 In respect of other two consignments covered by the Bill of Entry No.14 and 15 dated 17.02.2006 duty was assessed on the basis of the declared CIF price and accordingly, these consignments were cleared on payment of duty amounting to Rs.6,07,136/- and Rs.6,83,302/- respectively.

1.4 Subsequently, four show cause notices, each dated 9.8.2006, were issued for rejecting the declared transaction value in respect of each of the above mentioned four bills of entry and for upward revision of transaction value based on the value of contemporaneous imports of identical /similar items as available in NIDB. Each of these show cause notices sought recovery of differential duty along with interest. The differential duty alongwith interest sought to be recovered in respect of the Bills of Entry No.12, 13, 14 & 15 each dated 17.02.2006 was Rs.2,66,030/-, Rs.3,66,797/-, Rs.4,45,458/- and Rs.3,97,934/- respectively. The show cause notices were, however, dropped by the Asstt. Commissioner.

1.5 The Asstt. Commissioner's orders were reviewed by the jurisdictional Commissioner and he was directed to file review appeals before the Commissioner (Appeals). The department's review appeals were disposed of by the Commissioner (Appeals) by Order-in-Appeal No.252-255/SSS/RTK/2007 dated 25.04.2007 by which the Revenue's appeals were dismissed. The Commissioner (Appeals) while dismissing the Revenue's appeal mainly relied upon the judgement of the Apex Court in the case of **Eicher Tractors Ltd. reported in 2000 (122) ELT 321 (SC)** observing that declared transaction value can be rejected only if the conditions specified in Rule 4(2) of the Customs Valuation Rules are not satisfied and in this case, no cogent evidence in this regard has been produced by the Department. Against this order of the Commissioner (Appeals), these four appeals have been filed by the Department.

3. Head both the sides.

4. Shri Amresh Jain, ld. SDR, assailed the impugned order-in-appeal by reiterating the grounds of appeal in the Revenue's appeal and pleaded that NIDB data shows that there were contemporaneous imports of identical or similar goods at higher prices, that in the face of this evidence, the onus to prove the genuineness of the declared transaction value shifts to the importer who has not been able to discharge this burden, that in view of this, in accordance with the judgement of the Apex Court in the case of **D. Bhoormull Vs. Collector of Customs, Meerut reported in 1993 (13) ELT 1546 (SC),** the charge of undervaluation has to be treated as proved, that the

Commissioner (Appeals) has grossly erred in not discussing and following the judgement of the Tribunal in the case of **Gira Enterprises Vs. CCE reported in 2006 (194) ELT 92,** which is squarely applicable to the facts of this case, that in this judgement, the Tribunal passed a detailed order after discussing various case laws and clearly distinguished the facts in the judgement of the Apex Court in the case of **Eicher Tractors Ltd.** and followed the judgement of the Apex Court in the case of **Raj Kumar Knitting Mills Pvt Ltd. reported in 1998 (96) ELT 292 (SC),** that the Commissioner (Appeals) grossly erred in giving finding that transaction value can only be rejected if the conditions specified in sub-rule (2) of Rule 4 of the Valuation Rules are not satisifed, as transaction value can be rejected under Rule 10 A of the valuation Rules also and that in view of this, the impugned order is not correct.

5. Shri Prem Ranjan, ld. Counsel for the appellant, pleaded that declared transaction value are genuine, that there is marginal variation between the declared transaction value and the transaction value determined based on the NIDB data, that while the respondent had imported the goods, in question, in 2006, the bills of entries relied upon by the Department are of 2005 and thus, the imports, whose prices are sought to be adopted, are not contemporaneous with the imports in this case, that there is no evidence that the quantities are

comparable and that in view of this, there is no infirmity in the impugned order.

6. We have carefully considered the submissions from both the sides and perused the records.

7. During the period of dispute, as per the provisions of Section 14 (1) of the Customs Act, 1962, where duty of customs on any goods is chargeable by reference to their value, the value of such goods shall be deemed to be the price at which such case or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the buyer and seller have no interest in the business of each other and the price is the sole consideration for sale or offer for sale. Thus, in accordance with the provisions of sub-section (1) of Section 14, the assessable value was a deemed price at which such goods ~~are~~ or like goods are ordinarily sold or offered for sale in course of international trade, for delivery at the time and place of importation and the buyers and importer and supplier have no interest in business of each other and the sale/offer for sale is not influenced by any consideration other than the price. However, sub-section (1A) of Section 14 provided that subject to the provisions of sub-section (1), the price referred to in that sub-section shall be determined in accordance with

Rules made in this behalf. As per the provisions of Rule 3 (1) of the Customs Valuation Rules, 1988 made by the Central Government, subject to Rules 9 & 10 A of the Customs Valuation Rules, the value of the imported goods shall be the transaction value and if, the transaction value cannot be determined under the provisions under Rule 3 (1), the same shall be determined by sequentially applying Rule 5 to 8 of these Rules. Rule 4(1) of the Valuation Rules provides that transaction value of the imported goods shall be the price actually paid or payable for the goods, when sold for export to India, adjusted in accordance with the provisions of Rule 9.Rule 4(2) enumerates various conditions subject to which the transaction value shall be accepted, the main conditions being that (a) the sale is in ordinary course of trade under fully competitive conditions and it does not involve any abnormal discount or reduction from ordinary competitive price or any special discount limited to exclusive agents; (b) There are no restrictions as to disposition or use of the goods by the buyers other than restrictions which are imposed or required by law or by the public authorities in India or the restriction which do not substantially affect the value of the goods and (c) the buyers and suppliers are not "related person" within the meaning of this terms as defined in Rule 2(2) and if such relation exists, the same has not influenced the transaction value. Rule 9 provides for inclusion of the cost of certain expenses incurred by buyer, which are not included in the transaction value and also the inclusion of the cost of transport of the imported goods to the place of importation, loading and handling associated with the delivery of the imported goods at the place of importation and cost of insurance. Rule 10 A of the Valuation Rules provided for rejection of the transaction value declared under Rule 10 when the proper officer has reasons to doubt the truth or accuracy of the same and in such a case, the proper officer can conduct the necessary inquiry and if warranted can reject the declared transaction value after hearing the assessee, if hearing is requested by the assessee. Thus, under the provisions of Section 14(1) read with Section 14 (1A) and Customs Valuation Act, 1988, while the assessable value of the imported goods is the price actually paid or payable for the goods as adjusted under Rule 9 of the Valuation Rules, this price has to be in accordance with the provisions of sub-section (1) of Section 14 and, therefore, the same had to be under fully competitive conditions in the transaction at arm's length, implying that any importer in India should be able to import the same goods from the same supplier in the comparable quantity at the same price and if, the transaction value represents a special or an abnormal discount which is not available to other importers, such price would not be acceptable as correct transaction value. For this reason only, sub-rule (2) of Rule 4 provided that the declared transaction value for being accepted must be the price for sale in ordinary course of trade under fully competitive conditions and the same does not involve any abnormal discount or reduction from the ordinary competitive price or incurred to the exclusion. In other words, if the difference between the declared transaction value and the price of contemporaneous imports of such goods from the same country is such that the same can be explained by the trade discounts like, quantity discount, discounts dependent upon payment terms etc. which are normally available in course of international trade or is on account of frequent price fluctuations, the declared transaction value cannot be rejected. Just on the basis of difference between the declared transaction value and the price of contemporaneous import of identical goods from the same country, the declared transaction value cannot be rejected. For rejecting the declared price, it must be proved with cogent evidence that the conditions for accepting the transaction value as given in Rule 4(2) are not satisfied – in fact an analysis of these conditions would show that these conditions are designed to ensure that the declared transaction value is in accordance with the provisions of sub-section (1) of Section 14 i.e. the transaction value represents the price at which such goods or like goods are ordinarily sold in course of international trade; the price is for delivery at the time and place of importation and the transaction is at arm's length in the sense that the buyer and seller have no interest in the business of each other and price is the sole consideration for sale. Interpreting the above provisions of Section 14 of the Customs Act, 1962 and the Customs Valuation Rules, 1988, the Apex Court in the case of **Eicher Tractor Ltd. reported in 2000 (122) ELT 321** has held that if the declared transaction value does not fall in any of the exceptions enumerated in sub-rule (2) of Rule 4 of the Valuation Rules, there is no question of rejecting the declared transaction value and determining the same under Rule 3(2) by sequential application of Rule 5, 6, 7 and 8.

6.1 Though the declared transaction value can also be rejected under Rule 10 A if the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any import, for rejecting the transaction value, there must be concrete reason, not mere suspicion. In fact, Rule 10 A supplements Rule 4(2) and covers the situations not covered under Rule 4(2) e.g. declared price of some articles imported being even less than the prevailing price of raw material, some garments of latest fashion or electronic goods of latest model being imported at a huge discount claiming to have been purchased as stocklot in a clearance sale, existence of evidence indicating payment of some amount by the importer to the supplier over and above the price mentioned in the invoice etc. In this regard, the Apex Court in para-11 of its judgement in case of **CC, Vishakhapattnam Vs. Aggarwal Industries Ltd. reported in 2011 (272) ELT 641 (SC)** has held thus –

> **" It needs little emphasis that before rejecting the transaction value declared by the importer as incorrect or unacceptable, the Revenue has to bring on record cogent material to show that contemporaneous imports, which obviously would include the date of contract, the time and place of importation, etc., were at a higher price. In such a situation, Rule 10 A of CVR, 1988 contemplates that where the department has reason to doubt the truth or accuracy of the declared value it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. Needless to add that reason to doubt does not mean 'reason to suspect'. A mere suspicion upon the correctness of the invoice produced by an importer is not sufficient to reject it as evidence of the value of imported goods. The doubt held by the office concerned has to be based on some material evidence and is not to be formed on a mere suspicion or speculation. We may hasten to add that although strict rules of evidence do not apply to adjudication proceedings under the Act, yet the adjudicating authority has to examine the probative value of the documents on which reliance is sought to be placed by the Revenue. It is well settled that the onus to prove undervaluation is on the Revenue but once the revenue**

discharges the burden of proof by producing the evidence of contemporaneous imports at a higher price, the onus shifts to the importer that the price indicated in the invoice relied upon by him is correct."

6.2 To sum up, during the period of dispute i.e. during the period prior to 10.10.07, as per the provisions of Section 14 of Customs Act, 1962 read with Customs Valuation Rules, 1988, as the same stood during that period, for rejecting the declared transaction value, either concrete evidence to prove that the conditions as provided in Rule 4(2) of Valuation Rules are not satisfied or as per the provision of Rule 10 A material evidence to doubt the declared transaction value must be produced and only in such a situation, the burden to prove the correctness of the declared transaction value will shift to the importer and if he is not able to discharge the burden of proof in accordance with the judgement of Apex Court in case **of D. Bhoomull reported in 1983 (13) ELT 1546 (SC),** the preponderance of probability in support of allegation of the transaction value not being true and correct will be treated as having been established. Mere difference between the declared transaction value and price of contemporaneous imports of similar/identical goods is not sufficient for rejecting the declared transaction value – for rejecting the declared transaction value, it must be proved with cogent evidence that the difference is due to the conditions of Rule 4(2) not being satisfied or due to existence of reasons for doubting the declared value which would justify invoking Rule 10 A.

7. In this case, we find that the department simply seeks to reject the declared transaction value on the basis of NIDB data regarding import of the similar /identical goods without giving the details of those imports – whether the goods are identical to the goods under assessment or are similar to the goods under assessment within the meaning of these terms as defined in Rule 2(c) and 2 (e) respectively of the Customs Valuation Rules, 1988 and also the difference between the quantity of the goods under assessment and the quantity of the goods imported whose value is sought to be adopted. The difference between the declared price and the price based on NIDB data may be due to normal trade discounts depending upon the quantity purchased and the terms of payment. But there is no evidence to show that the difference can not be accounted for by the normal trade discounts. There is no evidence that the Appellant have paid some amount to the supplier over and above the declared transaction value or that there were some other concrete reasons to doubt the declared transaction value which would warrant invoking the provisions of Rule 10 A. In view of this, there was no justification for rejecting the declared transaction value.

8. The department has relied upon the judgement of the Apex Court in the case of **Raj Kumar Knitting Mills (P) Ltd. reported in 1998 (98) ELT 292 (SC),** in that case, even after taking into account the quantity discount, the declared transaction value of 4,00,000 Japanese Yen per set was on much lower side as compared to the price at which the contemporaneous imports had been made and on this basis, the assessable value of the goods was enhanced to Rs.6 Lakh, which was upheld by the Apex Court. In the present cases, there is no such analysis on the basis of the quantity discount. It is not even known as to whether the goods under assessee are identical or similar to the goods with which the same are being compared.

9. In view of the above discussions, we do not find any infirmity in the impugned order. The Revenue's appeals are dismissed.

[order pronounced on ..24..|.11.|..2011....]

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

Ckp.