CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi- 110066

DIVISION BENCH

Appeal No. C/52849/2014, C/52905/2014

[Arising out of the Order-in-Appeal NO. IND/CEX/0001APP/52 to 53/14 dated 14.02.2014 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Indore]

Date of Hearing: 20.02.2017
Date of Decision: 09.05.2017

For Approval & signature:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

M/s Scorpian International **Appellant**

Vs.

CC, CCE & ST- Indore **Respondent**

Appearance

Shri. Manish Saharan, Advocate- for the appellant
Shri. K. Poddar, AR- for the respondent

CORAM: **Hon'ble Mr. Ashok Jindal, Member (Judicial)**
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No: 53186-53187/2017

Per Ashok Jindal:

The appellant is in appeal against the impugned orders.

2. The brief facts of the case are that the appellant is engaged in the import of various types of readymade garments, fabrics and footwear etc.

3. The appellant imported certain consignments the subject goods from China and filed bills of entry alongwith packing list for clearances on the said goods. The assessable value was declared Rs.

20,80,570/-. It appeared that the appellant is indulged in mis-declaration of quantity, description and classification of the goods with intent to evade customs duty, therefore, the physical verification of the goods on random basis in presence of the importer their authorised CHA was conducted and found mis-declaration of description of the goods in their bills of entry and therefore, 100% examination of the goods was ordered by the competent authority and the physical verification was commenced in the presence of authorised CHA and during the course of 100% physical examination, 648 packages were found in the container as per the packing list but the certain discrepancies were found on examination. As per bills of entry, the description of the goods is baby panty, baby top, mixed dyed fabrics, ladies night dress, ladies footwear, bags assorted, bra, siips whereas the description of the goods found during the physical verification was girls/women panties, girls/women tops, jeans, t-shirts (for ladies as well as gents) jackets, wind cheaters, rain coats, leggies, night dress, skirts and silicon pads, printed fabrics of polyester staple fibres, gents t-shirts of Tommy Hilfiger brand, gents footwear, ladies bags/purses((branded-fake/counterfeit goods), silicon pads, bra, girls/women panties/nipple respectively. During the course of examination, the following items were not found as declared by the importer namely bra-hooks, caps, gents footwear, gents sleepers, gents shirts, gents t-shirts, girls/ladies tops, girls/women panties, girls shorts, jackets/wind cheaters, jeans, girls T-shirts, ladies bags/purse, ladies ensembles, ladies dress, nipple pads, panty hose, plastic washing pouch, rain coats, scarves, skirts, slimfit (underwear) etc. thereafter, the representative samples of the fabrics were drawn and market inquiries were conducted. On the basis of said investigation, the declared value of the goods was enhanced to Rs. 38,09,463/- and accordingly, the differential duty was demanded, the goods were confiscated and allowed to redeem on payment of redemption fine of Rs. 7,00,000/- and penalty of Rs. 3,00,000/- was imposed on the appellant. The said order was challenged by the appellant before the Ld. Commissioner (A) who dismissed the appeals filed by the appellant. Aggrieved from the said orders, the appellant is before us.

4. The Ld. Counsel for the appellant submits that they had ordered for small quantity of goods i.e. baby shorts, panties, ladies dress, bags assorted etc. However due to mistake of the logistic and loading people at the end of supplier, some goods were found to be short and some in excess or undeclared. The value of goods has been enhanced without any basis. No reason has been given as to how the prices of goods have been enhanced. As regards excess goods, it is submitted that in fact apparent that some of the goods were found to be short and some of the goods were in excess. The excess found goods or the undeclared goods were very few i.e. some hundred in numbers and the discrepancy has happened at the end of the supplier during stuffing of the containers. It is submitted that the alleged excess and undeclared goods are not actual but due to the revenue treating the same as different goods. Some of the undeclared and excess goods are covered by the short found goods.

5. He further submitted that some of those goods have been confused with short found goods. The bra hooks and plastic washing pouches are supplied as complementary for washing bra with the main item bra. The T-shirts, Girls Knitted Top, Girls T Shirts, Ladies

Top (Knotted) has been included to be undeclared items. The assessing officers appear to have confused with these items. All these items are in-fact baby tops. The ladies bags alleged to be mis-declared are covered by the description of goods 'Bag Assorted'. Even there is shortage of 'Bags Assorted'. The ladies dress, ladies ensemble alleged to be undeclared are covered by the short found 'Ladies Night Dress'. All panties are alleged to be undeclared are infact covered by the description of baby panties which were found to be short. The 'Nipple Pad' and 'Sillicon Pad' are same items. Further there is shortage of Sillicon Pads. The panty hose and stocking are same items and therefore, the undeclared panty hose be considered against shortage of stockings. As regards undeclared goods which were found to be very few, the appellant submits that the M/s White Horse Co., China (the foreign supplier) vide their letter dated 23.08.2013 has clarified that due to mis-communication with the logistic and loading persons, some goods pertaining to different consignment ordered by the different buyer got loaded in the Appellant's container by mistake. He further submitted that the value has been ascertained on the basis of market survey but there is no mention of any market survey report. Only the prices claiming to have been obtained from market survey has been mentioned in the chart. There is no indication from which market the said market survey was conducted. From which dealers/shop keeper/traders, the said prices were taken. Whether there was any declaration given by the said parties. Whether the said parties were competent to give the said prices which have been relied upon by the department in respect of goods imported by the appellant. It is pertinent to submit that comparison can be made between equitable situations. In the absence of quality of the goods in the market inquiry report, the same cannot be compared with the imported goods. Moreover, in the absence of origin of the imported goods and the goods as per the said to be market survey, no comparison could be made, therefore, the market survey value is without any evidence. He relied on the decision of *M/s JD Orgachem Ltd. (2008 (226) ELT 9 (SC).* He also relied on the decisions *of M/s Siddachalam Exports Pvt. Ltd. 2011 (267) ELT 3 (SC).* He further submitted that the redemption fine cannot be imposed on the appellant, as the goods were never placed under seizure and goods were not cleared by the customs without execution of any bond. To support his contention, he relied on the decision of *M/s Shiv Kripa Ispat Pvt. Ltd. reported in 2009 (235) ELT 623 (Tri.-LB).* He submitted that there was no intention to the appellant to evade duty of any malafide intention by mis-declaring the goods, therefore, no penalty is imposable on the appellant. To support his contention, he relied on the following decisions:

i*)* *Hindustan Steel Ltd. Vs. State of Orissa- 1978 (2) ELT (J 159) (SC).*

ii) *Sumeet Industries ltd. Vs. Commissioner of Central Excise, Surat 2004-(164) ELT 335.*

iii) *Godrej Soaps Ltd. Vs. Commissioner of Central Excise, Mumbai- 2004 (170) ELT 335.*

iv) *Asian Paints (India) ltd. Vs. Commissioner of C. Ex. Hyderabad-I- 2004 (167) ELT 224.*

6. The ld. AR opposed the contention of the Ld. Counsel and submits that during the course of investigation, the appellant accepted the differences in quantity, classification, description and value and also stated that he was understood the offence and the consequences thereof and they do not want any formal show cause notice and it was a different consignment which was ordered by other buyer, and was loaded wrongly in the container, is nothing but an afterthought. The goods were found mis-declared in parameters such as description, specifications, classification, valuation, quality and quantity. Even some undeclared goods were also found, therefore, the declared value has been rightly rejected under Rule 12 of the Customs Valuation Rules, 2007 read with section 14(1) of the Customs Act, 1962. The appellant submitted the invoices of a trader and not from a manufacturer, therefore, the declared value by the importer do not represent the correct transaction value. It is further submission that the appellant failed to submit any reliable documents on the basis of which correct transaction value can be ascertained. More over some undeclared goods have also been found for whom there is no declared transaction value. Accordingly, the value was determined on the basis of market inquiry. The appellant is liable to pay differential duty. In that circumstances, the impugned orders is to be upheld in the light of the decision of Hon'ble Apex Court in the case of *Maharashtra State Board of Secondary and Higher Education Vs. K.S. Gandhi & Ors. [(1991) 2 SCC (716).* He further submitted that the penalty has been imposed under Section 112 (a) of the Customs Act, 1962 of improper importation of goods by the appellant as the appellant failed to make the proper declaration in respect of the goods with an intent

to evade payment of customs duty , therefore, the consequence of penalty will flow automatically. In that circumstances, the impugned order is to be upheld.

7. Heard both the sides and considered the submissions.

8. We find that in this case during the course of physical verification, the goods were not found as declared. Therefore, the appellant contended that it is an inadvertent mistake of the supplier of the goods. In that circumstances, the revenue has alleged that it is an afterthought. We find that in that such situation, the malafide intention of the appellants are missing. As the appellant has placed order to the foreign supplier and he has filed the bills of entry as per the packing list and declaration made by the supplier in invoices. The appellant is not known about the correct declaration, description, quantity and value of the goods. It is a fact on record that the appellant has declared the description, quantity and value of the goods as per the invoice/ packing list, therefore, the benefit of doubt goes in favour of the appellant that it is an inadvertent mistake of the supplier by non supplying the goods as per the invoice/order/ packing list. In that circumstances, the goods cannot be held liable for confiscation and consequently, the penalty is not imposable on the appellant.

9. We further find that the goods on physical verification found different as per declaration made by the appellant and the value has been enhanced on the basis of market survey, as no market survey report has been placed on record. In that circumstances, the value adopted by the adjudicating authority can be said to the true value of the goods. It is brought on record by the adjudicating authority,

some market survey has been conducted. In that circumstances, report of market survey is required to provide to the appellant in the interest of justice for adjudication. In that circumstances, we set aside the impugned orders and remand matter back to the adjudicating authority to decide the issue afresh after providing the copy of market survey to the appellant defend their case, thereafter, the adjudicating authority shall pass an adjudication order in accordance with law.

The appeals are disposed off in the above terms.

(Order pronounced on 09.05.2017)

V. Padmanabhan **Ashok Jindal**
Member (Technical) **Member (Judicial)**

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