CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 53496 of 2018 [DB]

[Arising out of Order-in-Appeal No.CC(A)/CUS/D-I/Gen./NCH/189/2018 dated 03.07.2018 passed by the Commissioner of Customs, New Delhi]

M/s.Baxter India Pvt. Ltd. **...Appellant**
2nd Floor, Tower-C, Building No.8,
DLF Cyber City, Phase-II;
Gurgaon-122002

VERSUS

Commissioner of Customs, New Delhi **...Respondent**
New Custom House,
Near IGI Airport, New Delhi-110037.

APPEARANCE:

Shri Vijay Kumar, Advocate for the Appellant
Shri Sunil Kumar, Authorised Representative for the Respondent

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 01/05/2019
DATE OF DECISION: 01/05/2019

FINAL ORDER No. 50863/2019

RACHNA GUPTA

The appellant herein is engaged in import of pharmaceutical products/health care products and devices/equipment in India. Appellant is a subsidiary company of M/s.Baxter Pacific Investments Pvt. Ltd., Singapore holding 99.99% equity shares of the Indian company and importing these goods from their related Baxter Group of companies. Appellant's case of valuation of imports made by them from their associated companies had been decided earlier by the then Dy. Commissioner of Customs, Special Valuation Branch, New Custom House, New Delhi vide Order No.10/2002 dated 29.04.2002. This order has been reviewed after expiry of each span of three years and the last order expired on 31.03.2015. It is there after that the appellant submitted the declaration as required under CBEC Manual based on the said declaration and the previous valuation orders that a fresh order No.37/2015-16 dated 19.06.2015 was passed by Dy. Commissioner of Customs (SVB), New Custom House, New Delhi. However, Review Order No. 64/2015 dated 21.09.2015 was passed directing the Department to appeal the said Order-in-Original dated 19.06.2015 before Commissioner (Appeals), New Custom House, New Delhi. In furtherance thereof an appeal was preferred by the Department, which has been decided in favour of the Department vide Order-in-Appeal No.1585 dated 04.07.2018. Being aggrieved the appellant is before this Tribunal.

2. We have heard Shri.Vijay Kumar, learned Advocate for the Appellant and Shri Sunil Kumar, ld. D.R. for the Department.

3. It is submitted on behalf of the Department that the case of valuation of imports by M/s.Baxter India Pvt. Ltd. from M/s. Baxter USA, their subsidiaries and associated companies was initially examined vide order No.10/02 dated 29.04.2002 holding that the transactions between the said parties were at arm's-length and dealings were based on commercial transaction only and there has been no influence of relationship on import valuation. The same

order got reviewed in the year 2005 vide order No.10 dated 06.12.2005, in 2008 vide order No. 15 dated 05.12.2008, in 2012 vide order No.02 dated 11.04.2012 and in 2015 vide order No.37 dated 19.06.2015. The said orders for assessment of imported goods to customs duties successively have been announced after usual checks and scrutiny. It is submitted that Commissioner (Appeals) has wrongly laid emphasis on Rule 3 (3) (b) of Customs Valuation Rules. The order is also alleged to be non-speaking as far as the expenditure for "other expenses" as claimed by the respondent importer is concerned. The order is, accordingly, prayed to be set aside and Appeal is prayed to be allowed.

4. While rebutting these arguments, it is submitted by the Department that as per Custom Valuation Rules, it is the mandate for the appellant to file a declaration in the requisite format with such documents as are required for the purpose at the time of getting the renewal of the valuation order. The previous valuation orders cannot be a ground to accept the valuation in case the directions of CBEC Manual with respect to the declarations and document at the time of subsequent renewal are not complied with. It is impressed upon that same is the fact of the present case, as has rightly been observed by the Revenue authorities as well as the Commissioner (Appeals). As such, there is no infirmity in the order, appeal is prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, we are of the opinion as follows:-

6. The issue involved in the present appeal is with respect to valuation of goods for the purpose of levy of Customs Duty on goods imported by M/s. Baxter India Pvt. Ltd. Gurgaon from their related suppliers M/s. Baxter USA and associated companies.

7. For the purpose, in case of import by any person from an overseas "related party" the valuation of goods for the purpose of assessment of Customs duty is examined by Special Valuation Branch (SVB) in Custom House to find out the influence of relationship on import valuation and whether any addition in import value is required to bring it at par with third party independent prices, as is apparent from Rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter called as CVR)

8. The admitted fact of the present case is that the import of the appellant since the year 2002 has regularly been examined by SVB after every expiry of 3 years and based upon the declaration to the effect that there is no change in the terms of the agreement with the foreign related party, mode of invoicing etc. the said SVB's order is being successively reviewed after every 3 years since 2002 till 2015. From Rule 3 it is apparent that where the buyer and seller are related, transaction value is acceptable for the customs purposes under the provisions of Rule 3 (3) (a) which reads as follows:-

> *"(3) (a) where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the*

imported goods indicate that the relationship did not influence the price."

9. Thus, rule 3 (3) (a) provides that where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the proper officer of customs has no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the proper officer of customs may have previously examined the relationship, or he may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

10. In this case the valuation of goods imported by M/s. Baxter from the related Companies has been examined number of times since 2002 and it was found that the relationship has not influenced the price, hence the declared value will be accepted under Rule 3 (3) (a). The examination of valuation of goods under subsequent Rules (4) to (9) is not applicable.

[ONCE IT IS ESTABLISHED UNDER RULE 3 (3) (a) THAT RELATIONSHIP HAS NOT INFLUENCED THE PRICE, THE EXAMINATION UNDER RULE 3 (3) (b) NOT REQUIRED]

11. Commissioner (Appeals) while rejecting the Review of the order has relied upon Rule 3 (3) (b), it reads as follows:-

> *(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.*
>
> *(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;*
>
> *(ii) the deductive value for identical goods or similar goods;*
>
> *(iii) the computed value for identical goods or similar goods:*
>
> *Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;*
>
> *(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.*
>
> *(4) if the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9.*

12. The bare perusal makes it clear that Rule 3 (3) (a) & 3 (3) (b) provide different means of establishing the acceptability of a transaction value. As it was appreciated by Tribunal, Delhi in the

case of **Commissioner of Customs vs. Srithai Super Wire India Ltd. reported as 2017 (357) ELT 912 (Tri.-Del.),** wherein it was held as follows:-

> *"Interpretative Notes to Rule 3(3) explain that Rule (3)(3)(a) and Rule 3(3)(b) provide different means of establishing the acceptability of a transaction value. Rule 3(3)(b) of the Valuation Rules provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a 'test value' previously accepted by the proper officer of customs and is therefore acceptable under the provisions of Rule 3. Thus, under Rule 3(3)(b) of the Valuation Rules, a responsibility is cast on the importer to prove that their declared invoice values are not influenced by the relationship between the buyer and seller by means of providing evidences in respect of transaction value/deductive value/computed values of imports of identical or similar goods made by other importers and assessed by the department. From the order dated 1-2-2013, I find that the respondents in their reply to SVB questionnaire submitted that the Foreign Supplier does not supply the same goods to other buyers in India and the subject goods are exclusive custom made products as per specifications provided in purchase order. The Foreign Supplier in its declaration also confirmed that they are not selling the same goods to any other buyer in India or in other countries. The respondents in their reply to appeal filed by the department and in their appeal filed before Hon'ble CESTAT have stated that they do not have any data in respect of transaction value/deductive value/computed values of imports of identical or similar goods made by other importers, thus, they are unable to demonstrate fairness of their declared invoice values under Rule 3(3)(b) of the Valuation Rules. In view of these facts, it is clear that since the respondents are unable to provide any information regarding transaction value/deductive value/computed values of imports of identical or similar goods made by other importers, provisions of Rule 3(3)(b) are not attracted."*

13. Similar are the facts of the present appeal as are discussed above. Thus, it becomes clear that Rule 3 (3) (b) cannot be made applicable while deciding the transaction value in the present case. The findings of the Commissioner (Appeals) are, therefore, opined to be without any legal basis. Hon'ble Supreme Court in the case of **Commissioner, Customs, New Delhi vs. Prodelin India Pvt. Ltd. reported in 2006 (202) ELT 13 (SC)** has held as follows:-

> *"Importer and its foreign collaborator even if assumed to be related persons their transaction value is to be accepted provided that the examination of circumstances of sale of imported goods indicate that relationship did not influence price and importer demonstrates that declared value of goods being valued, closely approximates to value for identical or similar goods - Rules 2(2)(i), 2(2)(iv), 4(3)(a) and 4(3)(b) of Customs (Valuation) Rules, 1988. [paras 27, 28]"*

14. There is nothing on record nor even a finding that the relationship of importer and exporter has influenced the price. Thus, jumping to Rule 3 (3) (b) was not at all relevant. We are of the opinion that order to that extent is not sustainable. The value has also been rejected on the ground of gross profit of the appellant during the financial year 2011- 12, 2012-13 and 2013-14 is 52.52%, 52.37%, 59.84% of operating income respectively whereas the other expenses "during the same period are in the range of 96.47%, 125% and 108.32% thereof, but no explanation to the same has been made another ground to reject the transaction value but we are of the opinion that in furtherance of Rule 3 of CVR Rules profit margins is not a factor to reject the

transaction value if all conditions under Rule 3 (3) (a) are fulfilled. As already mentioned above that the appellant has fulfilled the said conditions, thus, this second ground of rejection as taken by Commissioner (Appeals) also cannot sustain to reject the transaction value. Otherwise also from the data as produced on record it is apparent that operating profit margin of Baxter is less than the average of similar companies, which again establishes that relationship has not influenced the price of goods imported by M/s. Baxter from their related companies.

15. In view of entire above discussion, we hold that Commissioner (Appeals) has committed an error, while ignoring Sub-Rule 3 (3) (a) of Rule 3 CVR for Determination of Value Rules and while jumping upon Rule 3 (3) (b) thereof. The another ground is also opined to be erroneous. The order under challenge is accordingly, set aside. As a result, appeal stands allowed.

[Operative part pronounced in the open Court]

(C.L. MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita