

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA**

Date of Hearing: 6.7.2018

Date of Pronouncement: 17.09.2018

Appeal No. C/76631/2014-DB

(Arising out of Order-in-Original No.
KOL/CUS/COMMR/PORT/54/2014 dated 24.9.2014 passed by the
Commissioner of Customs (Port), Kolkata)

M/s S. Krishna & Co.

Appellant

Vs.

CC (Port), Kolkata

Respondent

Appearance

Shri B.K. Singh & Shri S.M. Akhtar, Advocates - for the appellant

Shri S.K. Naskar, AC (AR) - for the respondent

**CORAM: Hon'ble Mr. P.K. Choudhary, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)**

Date of Hearing : 06.07.2018

Date of Pronouncement: 17.09.2018

Final Order No.FO/76647/2018

Per Bijay Kumar :

The present appeal is directed against Order-in-Original No. KOL/CUS/COMMR/PORT/54/2014 dated 29.4.2014 passed by the adjudicating Commissioner vide which he has rejected the transaction value of the imported goods and enhanced the same based upon the report received after overseas enquiry report forwarded to the DRI after the detailed investigation.

2. The short fact of the case is that the appellant has imported a consignment of jute backed polypropylene carpet from Indonesia and filed Bill of Entry No. 5951708 dated 8.2.2012. The importer enclosed the invoice No. 018/UCR/1/2012 at the strength of which the said consignment was purchased from the Indonesian exporter. The scrutiny of information received revealed that the invoice value declared before Indonesian Customs was USD 31679 for 9600 Sq. Meter whereas the invoice value declared before Indian Custom was USD 20000 for 10000.4 SQM. On conversion, unit value declared before the Indonesian Customs works out at USD 3.3. SQM, in comparison with value declared before Indian Custom was USD 2.0 SQM. Thus, it appeared that the appellant has deliberately mis-declared the goods in order to evade payment of appropriate Customs duty for the imported consignment.

3. It is seen from import database that same items covered under Bills of Entry No. 2986679 dated 17.3.2011 and 3725162 dated 7.6.2011 were imported from the same supplier at unit price 3.4 per SQM. Also, from the import data base it was gathered that M/s S. Krishna & Co. imported 13 more consignments of the same item covered under Bills of Entry No. (i) 4278099 dated 5.8.2011, (ii) 4278100 dated 5.8.2011 (iii) 4446256 dated 24.8.2011 (iv) 4446258 dated 24.8.2011, (v) 4491486 dated 29.8.2011, (vi) 4491413 dated 29.8.2011, (vii) 4491415 dated 29.8.2011, (viii) 5388521 dated

6.12.2011 (ix) 5419992 dated 9.12.2011, (x) 5569916 dated 26.12.2011, (xi) 5686114 dated 9.1.2012 (xii) 5818715 dated 24.1.2012 and (xiii) 6242040 dated 13.3.2012 at a unit price of USD 2 per SQM from the same supplier of Indonesia.

4. The case was adjudicated upon resulting into enhancement of the value and imposition of penalty including interest under the various provisions of Customs Act. The appellant has challenged the same in the impugned appeal.

5. Ld. Advocate, on behalf of the appellant submits that the present show cause notice has been issued on information received by the DRI regarding the gross undervaluation of import of Polypropylene carpets with Jute Backing from Indonesia imported by the appellant. The value of the imported consignment did not pertain to the Bill of Entry in question but also for the similar goods imported under various other Bills of Entry which has been cleared in past after the final assessment thereof by the proper officer and payment of duty thereupon by the appellant. The department has not filed appeal against any of these assessments. The consignment has left the Customs boundary and entered into market. Therefore, department is debarred from raising demands after lapse of so many years. Regarding the present consignment, Id. Advocate submits that the information received from the Indonesian Customs,

although mentions the Bill of Entry in question, however, the quantity imported does not matches with the one declared in the Bill of Entry. In the report submitted by the Indonesian Customs, the quantity declared is 9600 SQM. However, before the Indian Customs the impugned invoice the same is 10,000.4 SQM. Also the classification of the goods reported by Indonesian Custom is under CTH Heading No. 57033020 whereas the classification of the goods imported in the present consignment is under Heading 5702429000. As stated earlier, imported goods by the appellant under the aforesaid Bill of Entry was classified under Heading 57033020 for the quantity of 10,000 SQM and, therefore, the information made by the Indonesian does not match with the information accepted by the Indian Customs such as the quantity and nature of the goods (having separate classification). The presumption of truthfulness of the document can be rebutted if the information given by the relied upon document did not match with the information verified by the Indian Customs.

6. Ld. Advocate also submits that assuming without admitting that letter written by the acting Director of Ministry of Finance of the Republic of Indonesia, is a document received under Section 139 of Customs Act and the same is admissible evidence, Section 139 talks about raising presumption of the documents unless contrary is proved. As the nature of imported goods and quantity is not

matching with the information furnished by the Indonesian Customs, general presumption cannot be raised. Ld. Advocate further submits that the impugned goods, being polypropylene carpet with jute backing depends upon the quality of the goods. It is essential for ascertaining the correct value for the imported carpet first one will have to ascertain the quality of the carpet. Unless the quality of the impugned goods i.e. carpet is examined vis-a-vis the goods for which information has been sent by Indonesian Custom the same Indian Custom transaction value for the imported consignment cannot be rejected by the department. In this case, there is no other corroboration or any other evidence such as appellant having paid an amount over and above the invoice value to the Indonesian exporter, the department has no case of mis-declaration. To this effect, the Id. Advocate relied upon the Hon'ble Tribunal's decision in the case of **CC, Amritsar Vs. Kalsi Machinery** – 2011 (264) ELT 368 (Tri.-Del.).

7. Ld. Advocate further impresses upon that two previous Bills of Entry which has been relied upon by the Revenue assuming it to the identical product imported by the appellant themselves in the year 2011 is not appropriated. From the description given in the Bill of Entry, it cannot be presumed that those were pertaining to identical products as the carpet imported may have the different quality and nature. Therefore, it cannot be presumed that those were identical

products. The very essence of the definition of similar or identical goods in the Customs Valuation Rules is that the product should be of the same quality and characteristic. The department has not made any effort to establish the goods were of identical/similar as per the definition in Custom Valuation Rules, 2007. No evidence of any extra remittance made by the appellant has been procured by the department. Therefore, the charge of mis-declaration cannot be vested upon the importer.

8. The Id. Advocate also states that in the impugned order-in-original, the adjudicating authority as re-assessed value of goods in sub-para 3 of operative part of the order is Rs. 50,11,633/- under Section 17 of the Customs Act, 1962. The perusal of the Section 17 makes it clear that the re-assessment done by the adjudicating authority in the instant case is without the sanction of law as Section 17 does not contains any provision for re-assessment of Bill of Entry wherein the goods have already been cleared from the Customs area. Section 17(1) provides for the self-assessment of the goods imported by the importer. Section 17(2) provides that the proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or exported goods or part thereof.

9. Ld. Advocate also submits that where the assessment relates in short levy or non-levy, the only option with the Department is to issue a show cause notice under Section 28 of Customs Act, 1962 within the period specified therein. In support of that, he relies upon the decision of Hon'ble Supreme Court in the case of **Priya Blue – 2004 (172) ELT 145 (SC)**. Even assuming that in this case demand was raised under Section 28 *ibid*, the notice was issued after a period of one year. It could be relevant to mention here that the date of passing the Bill of Entry was 13.3.2012 and therefore, the show cause notice under Section 28 was required to be issued before 12.3.2013. However, the show cause notice has been issued on 13.10.2013 which was received by the appellant on 25.10.2013. Thereafter, a corrigendum to the show cause notice was issued by the department on 29.11.2013 which was received later. Thus, the entire demand is time-barred under Section 28 of the Act.

10. It is on record that the goods have been confiscated under Section 111(m) of the Customs Act, 1962. The department has not been above to prove any mis-declaration by the appellant. As there is no evidence to suggest that any extra money was paid to the supplier. In this regard, the Id. Advocate relied upon the decision of the Tribunal in the case of **Sony Impex Vs. CC – 2006 (202) ELT 486 (Tri.-Kol.)**.

11. The Id. Advocate also contested the penalty imposed on the appellant under Section 114A and 114AA of the Customs Act is not sustainable. Ld. Advocate also submits that price declared to the Customs Authority of exporting country is of no consequence to that of Indian Customs. It is quite possible that the exporter in order to claim extra benefit, which is not uncommon, might have inflated the price in their own country. This aspect has not been enquired upon by the Indonesian Customs. So it is absolutely incorrect to rely on the report received from Indonesian Customs.

12. The Id. DR has supported the impugned order and stated that the appellant had indulged into mis-declaration of the value of the imported consignment which is evident from the report received from the Ministry of Finance of Republic of Indonesia which confirmed that in respect of same Bill of Lading number and date and the invoice the value declared is to the extent of Rs. 3.4 USD. However, the importer has declared price of USD 2,000/- PSM before the Indian Customs in order to evade the customs duty after DRI investigation.

13. We have heard the rival contentions and also considered the appeal record. The issue in the present appeal is as to whether the consignment imported by the appellant was undervalued or not. In this regard, we find that the Department has solely relied upon the

information received from the overseas source i.e. from the Ministry of Finance of Republic of Indonesia, sent to the First Secretary (Commerce), High Commission of India in Singapore. We have perused the aforesaid report and the same is reproduced as under :

“Subject : Confirmation of goods supplied by UNIVERSAL CARPET & RUGS

In response to your letter number COIN/SIN/IND/2012-13 dated 17 April, 2013, kindly be informed that based on our database, there is an exportation to M/s S. Krishna and Co. with invoice number 018/UCR/1/2012 dated 19.1.2012.

For your information, the exportation has been done accordingly with our export registration, however there are some different information compared to this of our database as follows:

1. Bill of Lading No. & Date JJKTCCU12010045 dated 23.1.2012
2. Invoice Value USD: 31,679
3. Customs House Code : INCCU
4. Item Description : Carpet
5. CTH: 5702429000
6. Quantity : 9,600 Square Meter

Thank you for your kind attention and cooperation.”

It is evident from the letter above that the Bill of Lading No. and invoice No. are same but the Customs Tariff Heading and the quantity is different. The Revenue has not taken any further clarification regarding the mismatch from the Indonesian authority, who have supplied the same and straightway applied the same with the consignment of imported goods. The adjudicating authority has not got this further clarified as to why there is a difference in

classification as well as in the quantity of the consignment imported. Merely on this basis, the valuation for the imported carpet cannot be enhanced. The valuation of consignment is required to be done as per the provisions of Section 14 of the Customs Act, read with the Customs Valuation Rules. Further, we have perused the decision in case of **CC, Amritsar Vs. Kalsi Machinery Co. (P) Ltd.** filed in the paper book in appeal copy which is relevant to the facts of the case and the operative portion of the order is as under:

“7. On the question of manner of receiving documents from Customs formations of a foreign country, through diplomatic channel by the Indian investigators, the procedure cannot be imposed by Indian Custom authorities. The document received through diplomatic channel has been duly countersigned by the officials of the assisting foreign country. Therefore, we have no reasons to doubt, the documents relied upon by the Custom department. As per the invoice forwarded by the First Secretary, Belgium the value of the consignment declared by the exporter appears to be 19,000 Euros. The price declared by the respondent to the Indian Customs which is as per the invoice produced by them is 10,000 Euros. Apparently, both cannot be simultaneously correct, which one is to be believed depends upon other circumstantial evidence. The respondent have claimed that they have paid only 10,000 Euros and there was no advance payment of 8,000 Euro as mentioned in the invoice produced and relied upon by the Custom department. There is no investigation regarding the payment actually made in respect of the transactions. The Director of the respondent-company no doubt in his statement dated 18-11-04 assured that they will take up the matter with the foreign supplier. The department appears to have not recorded any further statement. Further, there is a glaring discrepancy in the documents relied upon by the department. While the invoice annexed to the report of the German authorities refers to 040/08/2002, dated 30-8-2002, the report by the German authorities and forwarding letter of the First Secretary, Indian Embassy of Belgium referred to Invoice

No. 04/08/2002, dated 30th August, 2002. This discrepancy was sought to be explained as a clerical mistake. As the only evidence relied upon for enhancing the value is this document and since there is no other corroboration or admission by the respondent regarding undervaluation, the discrepancies cannot be ignored. Therefore, we do not find any valid reason to interfere with the decision of the Commissioner (Appeals).

8. Appeal is, therefore, rejected. Cross-objection is also disposed off.”

In the fact of the present case is quite similar and thus the ratio laid down in the case *supra* is squarely applicable. The Department should have tried to obtain the price for the contemporaneous import and admitted to enhance the value, if found correct. It is also a fact that in respect of 13 Bills of Entry which was finally assessed and the clearance was effected, the Department tried to enhance the price based on the data received from overseas sources as well as from the two Bills of Entry imported by the appellants. It is the contention of the Department that the price of the similar goods should therefore had been applicable in all the past cases as well. It is a common knowledge that the jute backing polypropylene carpet are of the different types and quality may be superior or inferior and therefore without the sample being analyzed by the competent authority, it cannot be concluded that the goods are same or similar quality for want of specific information. Moreover, in all the cases the assessment has already been finalised and the consignment has been cleared. Reopening of such cases without the proper identification of the goods in respect of quantity and quality will be

contrary to the provisions of the Customs Act, 1962. In this regard we refer to the following case laws :

- i) ***Puja International Vs. Collector of Customs, New Delhi*** – 1995 (76) ELT 69 (Tribunal), wherein it was held that :

Valuation (Customs) - Imports made by another firm relied on by department not in respect of similar goods and hence, not contemporaneous evidence - Proforma invoice confirming price of invoice value to be accepted as a whole and not in part - Value of goods to be determined based on invoice value in view of discrepancy with reference to issuance of quotation from supplier and in absence of detailed enquiry brought on record by department - Section 14(1) of Customs Act, 1962. “

In the present case, there is an information received from the overseas sources which are not tallying with respect to classification of the goods and even for the quantity of the goods imported by the appellant. This discrepancy was never investigated further and the same was made applicable to the present and past imported consignment which is contrary to the aforesaid decision of the Hon'ble Tribunal. It has been held by the Hon'ble Supreme Court in the case of ***Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd.*** – 2007 (214) ELT 3 (SC) that :

“Valuation (Customs) - Under-invoicing - Casting suspicion on invoice produced by importer not sufficient to reject it as evidence of value of imported goods - Under-valuation has to be proved by evidence or information about comparable imports - For proving under-valuation, if Department relies on declaration made in exporting country, it has to show how such declaration was procured - Strict rules of evidence do not apply to adjudication proceedings though adjudicating officer has to examine

probative value of documents on which reliance is placed by Department - Value in export declaration may be relied upon for ascertainment of assessable value under Customs (Valuation) Rules, 1988 and not for determining the price at which goods are ordinarily sold at the time and place of importation - Sections 14(1) and 14 (1A) of Customs Act, 1962 - Rule 4 ibid. [para 6]”

15. Having not followed the procedure under Section 14(1) and 14 (1A) read with Customs Valuation Rules by the Adjudicating Authority and rejecting the transaction value without the contemporaneous price, the demand confirmed by the adjudicating authority in the impugned order is not sustainable. We, therefore, set aside the same and allow the appeal.

(Pronounced in Court on 17.09.2018)

Sd/

(P.K. Choudhary)
Member (Judicial)

Sd/

(Bijay Kumar)
Member (Technical)