IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Customs Appeal No. 76562 of 2018

Arising out of Order-in-Appeal No. Kol/Cus(Port)/AA/511/2018 dated 21.02.2018 passed by the Commissioner of Customs (Port), Kolkata.

M/s Aswini Kumar & Bros.
3266,
Gali Peepal Mahadev,
Hauz Quazi, Delhi-110006.

….Appellant (s)

Vs.
Commissioner of Customs (Port), Kolkata.
15/1, Strand Road,
Kolkata-700001.

….Respondent (s)

Appearance:
Shri H. K. Pandey, Advocate for the Appellant (s)
Shri S. K. Naskar, A. R. for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Final Order No…76956/2019

Date of Hearing:- 25.10.2019

Date of Pronouncement:-……18th December, 2019

PER SHRI P.K.CHOUDHARY:

The party in appeal against Order in Appeal No. KOL/CUS (PORT)/AA/511/2018 dated 21.02.2018 upholding Order-in-Original No. KOL/CUS/ADC/2213/ADJN (PORT)/2012 dated 26.09.2012 passed by the Additional Commissioner of Customs (Port), Kolkata.

2. The facts of the case in brief are that the appellant imported certain consignments of Ball Valves and Bibcock through Kolkata Port under three bills of entry dated 14.05.2009, 29.06.2009 and 28.07.2009. The said bills of entry were assessed by the proper Officer of Customs by value edition over the declared value in consonance with a departmental instruction. The goods so imported were cleared for home consumption.

3. On 07.01.2010, Officer of DRI, Mumbai searched the office and residential premises of the appellant and stock of goods lying in the office-cum-godown premises were seized/detained. During investigation, two proforma invoices No. TSI-090527 dated 27.05.2009 was recovered which contained value of similar item more than that declared in the invoices submitted by the appellant at the time of importation. Based on the value shown in the said proforma invoice, differential Customs Duty of Rs. 16,90,056/- was demanded along with interest at the appropriate rate and imposition of penalty under Section 112(b), Section 114(a) & (b) and Section 114AA of the Customs Act, 1962. It was also proposed to confiscate the imported goods under Section 111(m) of the Customs Act read with Section 46(4) & Section 14 of the Customs Act. In reply to the said Show Cause Notice, it was submitted that there is no one to one co-relationship with the seized goods and goods imported under said bills of entry and goods once cleared for human consumption cannot be confiscated under Section 111(m) as proposed regarding low valuation of imported goods. It was submitted that assessment once made final, cannot be subjected to re-assessment without challenging the assessment order. Further, the proposed value enhancement is not based on any evidence of extra remittance. The learned Advocate relied upon various decesions in support of his submissions. The adjudicating authority however confirmed the differential customs duty of Rs. 26, 90,050/- with applicable interest under Section 28 of the Customs Act. He also held the goods liable to confiscation with an option to redeem the same on payment of redemption fine of Rs. 30,00,000/- under Section 125 of the Customs Act. Further, a penalty of Rs. 10 lakhs was also imposed on the appellant under Section 112(a) of the Customs Act, 1962.

4. The order was challenged by filing an appeal before the Commissioner (Appeals). Learned Commissioner (Appeals) rejected the appeal filed by the appellant finding that *"DRI in course of search of the appellant's business premises has found some blank invoices in the computer of the appellant. During recording of the statement, Shri Prakash Tiwari opened his e-mail account and downloaded blank invoices. Shri Tiwari stated that he used to fill up columns of rate and value of these invoices in consultation with the importer and took printouts on the supplier's stationery. Another importer, M/s. Trading Syndicate stated that Shri Tiwari was paid for such manipulations. Further, Shri Vipin Gupta, Proprietor of the appellant avoided his appearance before DRI inspite of several summons and Show Cause Notice also could not be issued to him. In this regard, a complaint was also filed before the Chief Metropolitan Magistrate Court, Esplanade at Mumbai".*

5. Learned Advocate appearing on behalf of the appellant submitted that it is a settled position of law that assessment of a Bill of Entry is an appealable order and the department having not filed any appeal against the assessment order, the assessment is final and any demand against the finally assessed Bills of Entry are not sustainable in law. Moreover, the value is sought to be enhanced on the basis of proforma invoice which is issued by the exporter to some other importer in India and not in the name of the appellant. Any value in a proforma invoice cannot be taken as the transaction value as price quoted in proforma invoice is never the final transaction value. In the present case, the revenue has not adduced any evidence that the appellant had made any extra payment to the importer on and above the invoice value.

6. In the matter of redetermination of value, the Proper Officer must proceed consequentially from Rule 5 to Rule 8 of Customs Valuation- it has been held in various decisions that Customs Valuation Rules must be

proceeded with consequentially. Thus, rule jumping is not allowed in the eye of law. After transaction value was to be rejected under Rule 4, the Officer must proceed first to Rule 5 and then to Rule 6 and onwards. Here the Show Cause notice and the Oder-in-Original straight away jumps to Rule 8 of CVR, which is not sustainable. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Commissioner of Customs, Kolkata-Vs-South India Television Private Ltd. reported in 2007 (214) E.L.T. 3 (S.C).

7. He further submitted that goods once cleared for home consumption and not available for confiscation cannot be held liable to confiscation under Section 111(m) of the Customs Act. He relied on the Tribunal's decision in the case of Kumar Mahendra Exim Vs C C (I) , Nhava Sheva as reported in 2019 (365) E.L.T. 814 (Tri-Mumbai).

8. Learned A.R. appearing on behalf of the Department submitted that the investigation was taken on the basis of certain information regarding under valuation of Ball Valves against a number of importers at the material time. During the course of enquiry, various discrepancies were observed on the part of the importer, the CHA and the transporter. The proceeding was initiated against all of them including the importer. The appellant evaded appearance and examination by the investigating agency which supports the allegation made out in the proceeding.

9. We have heard submission from both sides and perused the appeal records.

10. We find that the present proceeding was initiated against the appellant on the allegation that the goods imported by him had been undervalued. It is on record that the bills of entry were assessed by the Proper Officer and the assessable value was determined by him and it was not challenged either by the appellant or by the department. In course of enquiry, a proforma invoice was recovered showing a different price from that as shown in the invoice

submitted at the time of import. However, it is observed that the proforma invoice is not issued in the name of the appellant. Otherwise also the price quoted in a proforma invoice cannot be held as the actual prices since the price of goods are settled after negotiation between the two parties. The revenue has not produced any document to prove that there was any extra payment made by the appellant towards purchase of the said goods. We find force in the submission of the Learned Advocate of the Appellant. Judgment of the Apex Court in the matter of Vikara International –Vs-Collector -2001 (134) E.L.T. 164(S.C) supports him.

11. The confiscation of the goods and imposition of penalty are consequential to the alleged under valuation of the imported goods by the appellant. Since we do not find sufficient grounds as required for enhancement of assessable value, imposition of redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962 and imposition of penalty under Section 112 of the Customs Act, 1962 on the appellant is not sustainable. Accordingly, the appeal is allowed with consequential relief, if any.

(Pronounced in the Open Court on……18th December, 2019.)

(P.K. Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical

T.K.