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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.231 of 2008

(Arising out of Order-in-Appeal No.Kol/Cus/CKP/93/2008 dated 19.03.2008 passed by Commissioner of Customs(Appeals), Kolkata.)

M/s. Marcus Oils and Chemicals Private Limited
(Vill.Kasberia, H.P.Link Road, Haldia-721602,
East Midnapore, W.B.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

(Custom House, 15/1, Strand Road,
Kolkata-700001.)

APPEARANCE

Shri Ashish Kumar & Ms.Shilpa, both Advocates for the Appellant (s)
Shri M.P.Toppo, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO.75616/2020

DATE OF HEARING: 14 October 2020
DATE OF DECISION: 18 November 2020

Per P.ANJANI KUMAR:

Briefly stated the facts of the case are that the Appellants, M/s. Marcus Oils and Chemicals Private Limited, have imported certain raw materials (impure Wax) and equipment, during 2002-2003 to 2006-2007, from their US-based parent company, under 35 Bills of Entry; the case was forwarded to the SVB for detailed investigations; AC, SVB issued a detailed Questionnaire dated 17.02.2003 and a Circular No. 04/2003 to the effect that pending investigation, all goods imported by the Appellant be provisionally assessed with PD

Bond and 1% EDD (Extra Duty Deposit); appellant responded to the Questionnaire on 04.01.2006; another SVB Circular No. 06/2006 was issued enhancing the EDD to *5%*; appellants, vide letter dated 28.03.2007, submitted documents such as copies of Invoices and bills of Entry, Statement of Import of goods, Certificate of CIF value of imported goods, Supply Agreement, Technology Agreement, Statement of Accounts, List of Shareholders; Vide letter dated 03.04.2007, AC, SVB sought the Appellant to submit certain "test" values to support the declared transaction value of the imported capital goods; a personal hearing in the matter was held on 24.04.2007; AC, SVB passed Order-in-Original dated 30.05.2007, and rejected the Appellant's declared transaction value; loaded the value of raw materials by 100% to 290%, after allowing quantity discount of 10%; loaded 10% on capital goods towards technology-related modifications; the Learned Commissioner of Customs (Appeals) passed Order-in-Appeal dated 19.03.2008, upholding Order-in-Original.

2. The learned counsel for the appellants submits that there are grave and manifest errors of both law and fact apparent on the face of the impugned Orders given the (a). Arbitrary reference of the Appellant's case of Special Valuation Branch (SVB) and (b) the arbitrary and whimsical loading of the transaction value without any proof of their influence of price and based on wholly incomparable data. Commissioner of Customs (Appeals) lost sight of the fact that such reference is *ex-facie* erroneous and perverse because there is nothing on record to even remotely suggest that there existed a *prima* facie justification for referring the case to the SVB for further inquiry into the declared transaction value. In fact, the Department did not even send the goods imported by the Appellant for testing to ascertain the quality/description of the goods. Ld. Commissioner of Customs (Appeals) failed to appreciate that the AC, SVB issued the Questionnaire and Circular No. 04/2003 without any jurisdiction; therefore, the Order-in-Original is founded on proceedings initiated without any jurisdiction and legal basis and is *ab initio* legally suspect and bad.

2.1. The learned counsel further submits that a reference was made to the SVB only *because "there appeared to be a prima facie case of related-party transaction influencing the transaction value of the imported goods";* Hon'ble Apex Court has observed in several pronouncements that that parties are related is no proof of influence of price; there must be mutuality of interest and evidence of influence on the price. The impugned Orders do not even disclose the date, manner and form in which the Learned Commissioner approved the reference and whether or not any reasons or justifications were disclosed in writing at the time of approving such reference. He submits that non-communication of grounds of enhancement of transaction value amounts to breach of natural justice as held in Forbo Siegling Movement Systems India Pvt Ltd Vs UOI 2013(296) ELT 443(Bombay).

2.2. The learned counsel submits also that the Appellant responded to the Questionnaire on 04.01.2006; department did not communicate to the Appellant if the responses were incomplete or partial; vide letter dated 03.04.2007, the Appellant was asked to submit certain "test" values to support the declared transaction value of the imported capital goods; the said letter did not seek any clarification, information, documents etc. pertaining to the declared transaction value of imported raw materials (impure Wax); personal hearing was held on 24.04.2007 and was attended by the Appellant's representative; the Appellant responded to the Department vide letter dated 22.05.2007; Order-in-Original was passed on 30.05.2007; for reasons best known to the Learned AC, SVB, the Order-in-Original was passed in only a weeks' time from the date of the Appellant's letter; Order-in-Original was passed without giving any opportunity without considering the documents properly.

2.3. The learned counsel submits moreover, submits that The impugned Orders fly in the very face of Rule 4(3)(a) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and settled principles of law on redetermination of value; as per the Rule 4(3)(a) of the CVR, 1988, department needs to accept the transaction value even in cases where the parties are related; before rejecting the transaction value, a duty is cast on the Department to examine the circumstances surrounding the sale and the transaction value may be rejected only if such examination indicates that the relationship between the parties influenced the price; Para 2 of Interpretative Notes to *Rule 4(3) categorically states that "such examination will only be required where there are doubts about the acceptability of the price. Where the proper officer has no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer."* He submits that the onus to prove that the price has been influenced by the relation is on the Revenue. He relies upon CC Vs Prodelin India 2006(10) SCC (280) and CC Vs Hewlett Packard Ltd 1999(108) ELT 21.

2.4. The learned counsel submits that the Original Authority rejected the Appellant's declared transaction value without a shred of evidence, let alone cogent evidence, of influence of relation on the price of imported goods; appellant submitted all the details; there is nothing on record to show that similar or identical goods were being imported at a higher price; department wrongly relied upon, the data from the Chemical Weekly Report for the following reasons.

(a). The Appellant themselves submitted the Report, available with them, to the Department in a *bona fide* manner.

(b). The Department virtually compared apples with oranges inasmuch as there is a stark difference between the goods listed in the Report and the goods imported by the Appellant in terms of quality, quantity, and period of import; the imported goods are of LDPE (Low Density Poly Ethylene) base whereas the products mentioned in the weekly are of PE (Polyethylene) base; transaction value cannot be rejected on the basis of magazines and journals as held in CC Vs Dimple Overseas Ltd 2007(220) ELT 103(CESTAT-Mumbai).

(c). the comparison is *ex-facie* devoid of law and logic; Department did not even know the quality of the imported goods as no test report was obtained at the time of import; transaction value cannot be rejected in the absence of Test Report as held in Pankaj Gandhi& Others Vs CC 2009(SCC) online CESTAT 1675.

(d). Magazines such as Chemical Weekly Report cannot be considered as evidence of contemporaneous import. In fact, impugned Orders note that the data from *the Report has been cited from "here and there without considering the time and* country of origin", that the goods listed in the Report are of superior quality and for a small quantity; Quality has an impact on value as held in CC Vs Supreme Yarn 2008 (232) ELT 650 (CESTAT-Delhi).

2.5. The learned counsel further submits that the Appellant repeatedly stated that it imported inferior/impure quality of raw materials (LDPE Wax); department arbitrarily loaded the transaction value on the assumption that the same were of superior/pure quality, without even considering it necessary or proper to obtain a test report to assess the quality of the imported goods; no clarification whatsoever was sought from the Appellant as to the relevance (or otherwise) of the Chemical Weekly Report before proceeding to rely on the Report; no opportunity of hearing in this regard was given to the Appellants.

2.6. The learned counsel submits also that the Learned Commissioner (Appeals) upheld the OIO in a mechanical manner without independently applying his mind and without having regard to the law; the Order is a non-reasoned and non-speaking one; so far as loading of transaction value in case of raw materials is concerned, the Order-in-Appeal does not even expressly mention if the finding of the original authority is correct and merely notes in few sentences what the original authority had observed; in addition, the Order-in-Appeal does not examine or discuss if the requirements of Rule 4(3)(a) were met in the instant case; whether a *prima facie case* existed for reference to the SVB; whether the original authority has examined the circumstances to indicate influence on price and considered the evidences placed on record by the Appellant; whether the Department should have obtained a test report for the imported goods; whether the data available in the Chemical Weekly Report related to comparable goods etc; the impugned order does not even give a reasoned finding on the very first issue of whether the Appellant and the overseas supplier are related parties or not.

2.7. Learned Counsel also relied upon the following cases to support his arguments as above,

(i) Skoda Auto India Pvt. Ltd. vs. Union of India & Ors. (Bombay High Court): 2009 SCC Online Bom 1653

(ii) M/s. Dalmia Cement (Bharat) Limited vs. Assistant Commissioner of Customs & Ors. (Madras High Court): WP No.9656 of 2019

(iii) HD Motors Co. (India) Pvt. Ltd. vs. CC (CESTAT, New Delhi, Principal Bench): 2018 SCC Online CESTAT 8480

(iv) CC (Import) Mumbai vs. M/s. Sujata Verbatim Ltd. (CESTAT, Mumbai): 2016 SCC Online CESTAT 2535

(v) Walltracts (India) Pvt. Ltd. vs. CC, (CESTAT, Mumbai): 2016 SCC Online CESTAT 7458

(vi) CCE vs. Anshikha Overseas (CESTAT, New Delhi, Principal Bench): (2011) 274 ELT 546

(vii) H.T. Company vs. CC (CESTAT, Bangalore): (2007) 208 ELT 507

(viii) Gaitri Exports vs. CC (CESTAT), New Delhi Principal Bench: (2007) 220 ELT 866

(ix) N.C. John & Sons (P) Ltd. vs. CC & CE (CESTAT, Chennai): (200) 242 ELT 281

(x) Forbosiegling Movement Systems India Pvt. Ltd. vs. Union of India (Bombay High Court): (2013) 296 ELT 443

(xi) Sew Curodrive (I) Pvt. Ltd. vs. CC (CESTAT, New Delhi, Principal Bench): (2012) 284 ELT 294

(xii) HD Motors Co. (India) Pvt. Ltd. vs. CC (CESTAT, New Delhi, (Principal Bench): 2018 SCC Online CESTAT 8480

3. Learned authorised representative for the department reiterates the findings of OIO and OIA and submits that a number of opportunities were given to the appellant; appellants have delayed the proceedings; it can be seen that the questionnaire given 2003 was replied in Jan 2006 and documents were supplied in 2007 after 4 years. He further submits that in terms of Rule 3(a) of CVR, 1988, transaction value can be accepted if examination, of facts and circumstances, indicates that the relationship did not influence the price and in terms of Rule 3(b) ibid, the onus was on the importer to demonstrate that the transaction value approximated to the values ascertained at about the same time. He submits that the importer could not demonstrate the same, value was needed to be loaded.

4. Heard both sides and perused the records of the case. We find that the gist of submissions by the learned counsel for the appellants are that the department did not consider their submissions in entirety; the reasons for referring the case for SVB and re-determination of the declared values is not spelt out; the department conveniently ignored the data submitted by the appellants justifying that value adopted by them; the department has relied upon the international chemical report without actually seeing whether the items mentioned therein and the items imported are comparable in quality as well as quantity and that no test report has been obtained. The learned counsel also alleges that the order of the learned Commissioner (Appeals) was cryptic and unreasoned.

5. We find that the appellants have filed written submissions before Commissioner (Appeals) stating that:

- The quantities reflected in chemical weekly report were always for less than metric ton whereas the appellants imported large quantities; the authority overlooked the quantity and purity and type of goods;
- Even than there was no deviation, the authority has adopted 50-190% enhancement taking highest price at which impugned goods were imported during the relevant period;
- The appellant submitted a statement showing maximum minimum rates per kg of impugned goods for relevant period in Annexure-B;
- The appellant submitted a statement showing price at which impugned goods were imported from various countries by unrelated buyers during the relevant period as Annexure-C; the prices mentioned therein approximate closely to the declared price;
- A statement of cost and selling price of imported LDPE / PE wax was enclosed as Annexure – D, taking the selling price to unrelated buyer in India as base price.

6. We find that learned Commissioner (Appeals) has given brief findings and has not discussed the above submissions of the appellant and has not given any reasons for not accepting the same. We find that the original authority as well as the appellate authority have gone only on the basis that the buy and seller are related in terms of Rule 2(2) of CVR, 1988 and proceed to judge transactions in terms of 4(3)(a) and 4(3)(b) *ibid*. The original authority has given a finding that that the onus to prove that their relationship has not affected the pricing lies on the importer in terms of the rules cited above. We find that this is not the correct proportion of law. In terms of Rule 3(a) of CVR, 1988, 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. Neither the original authority nor the appellate authority have given reasons to hold that the relation has indeed affected the price. In case, the department did the same, then the onus would have been transferred to the importer. We find that proviso under Rule 3(a)(b) states that provided that in applying the values used for comparison, due account shall be taken of demonstrate a difference in commercial levels, quantity levels, adjustments in accordance to provision of Rule 9 of these Rules and cost incurred by the seller in sales in which he and the buyer are not related.

7. We find that the original authority has given a finding that *'party has not submitted any test report with facilitations of imported goods to judge their claim that the wax imported by them is full of impurities and not refined. At the same time, I find that the department has also not got the goods tested to get the specifications and decide whether refined or not. Besides, there is nothing on record to differentiate between LDPE wax and PE wax. Even the importer has not differentiated while submitting the chemical weekly data for comparative analysis. Under these circumstances, I have no other option but to accept the minimum transaction value of polyethylene wax of the contemporaneous period available in the chemical weekly report in terms of Rule 5(3) of CVR, 1988'.* We find that the original authority has erred to the extent that though he finds that in comparison to the weekly reports, the quantities imported by the appellants are huge. Yet, he proceeds to compensate the same by 10% quantity discount. We find that this has no legal basis. First up all, it was incumbent on the department to show as to how the relation between the appellants and their overseas sellers has affected the prices. Thereafter, the submissions of the appellants were required to be considered and reasons, if any, for rejecting the same should have been recorded. We find that no discussion and findings have been given by both the authorities on the Annexures-B, C, D submitted by the appellants.

8. We also find that the appellants have taken inordinate time to submit reply to the questionnaire given by Revenue to them in 2003. Department has also not adhered to the time frame given vide CBEC circular 11/2001. In the end there was rush to complete the proceedings. Learned counsel for the appellants submits that no clarification whatsoever was sought from the Appellant as to the relevance (or otherwise) of the Chemical Weekly Report before proceeding to rely on the Report; no opportunity of hearing in this regard was given to the Appellants. As per our discussions above, we find that the submissions of the appellant have not been considered. Under the circumstances, we find that the case needs to go back to the original authority for a proper examination of all the facts of the case, the submissions of the appellants including case law in this regard and to pass a speaking and reasoned order as per law.

9. In view of the above, the appellants are directed to submit all the evidence they wish to rely upon to the original authority within four weeks of receipt of this order. The original authority is directed to consider the issue afresh, as per our observations as above, and to pass an order within further 12 weeks of receipt of the submissions by the appellant, as may be practicable to do so. The appeal is thus allowed by way of remand to the original authority.

(Order pronounced in the open court on 18.11.2020)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)
Sd/-
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

Radha/parveen