

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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75706 of 2019

(Arising out of Order-in-Appeal No.KOL/CUS(PORT)/AA/2062/2018 dated 12.12.2018 passed by Commissioner of Customs(Appeals), Kolkata.)

M/s. Trading Syndicate
Proprietor – Shri Mohinder Goel
(G-89, Naraina Vihar, New Delhi-110028.)

...Appellant

VERSUS

Commissioner of Customs(Port), Kolkata

.....Respondent

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

APPEARANCE

Shri H.K.Pandey, Advocate 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 RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75733 / 2021

DATE OF HEARING : 27 August 2021
DATE OF DECISION : 16 November 2021

P.K. CHOUDHARY :

The facts of the case in brief are that the appellant is engaged in the business of imports and exports. In the normal course of business, he imported "Ball Valves" made of metal like Zinc and Brass during the period 2009-10 through Kolkata Port. Pursuant to an investigation conducted by Mumbai DRI against various importers of such items, a Show Cause Notice dated 05.07.2010 was issued alleging under-valuation of the imported goods. The Adjudicating authority rejected the declared assessable value and accepted the re-determined assessable value and held the goods liable for confiscation under Section 111(m) of the Customs Act, 1962. The differential duty of

Rs.13,19,538/- was confirmed in respect of two consignments imported under Bills of Entry No.509039 dated 03.12.2009 and 511166 dated 14.12.2009 under Section 28(8) along with applicable interest. Penalty of Rs.13,19,538/- was imposed under Section 114A on M/s.Trading Syndicate and a penalty of Rs.1,80,00,000/- was imposed separately on the proprietor. Redemption Fine of Rs.5.00 Lakhs has also been imposed in respect of goods confiscated under Bill of Entry No.516628 dated 11.01.2010. On appeal, the learned Commissioner(Appeals) upheld the Order-in-Original and rejected the appeal before him. Hence the present appeal before the Tribunal.

2. Shri H.K.Pandey, learned Advocate appearing on behalf of the Appellant reiterated the grounds of appeal and submitted that the reliance on the statements of co-appellants against the appellant is uncalled for and cannot be relied upon against the appellant. It is his submission that the lower authorities have erred in not appreciating that the methodology followed in the Show Cause Notice in arriving at the enhanced value has been to arrive at the re-determined price, based on prices of presumed percentage composition of materials, that too, based on the prices quoted in some bulletins, which has been consistently discarded by the Courts in various decisions. He further submits that the statement of the proprietor Shri Mohinder Goel was recorded under duress, threat and pressure and the methodology is entirely faulty and the evidences relied upon are legally and factually unsustainable. The very basis for determination of value lacks legal validity inasmuch as arriving at the value on the basis of unknown material contents and unknown material percentage is not tenable. Learned Advocate further submitted that assessment of a Bill of Entry is an appealable order and the department having not filed appeal against any assessment order, the assessment is final and any demand against the finalized assessed Bills of Entry is 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 in the name of the appellant. Any value in 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 over and above the invoice value.

3. In the matter of re-determination of value, the proper officer must proceed sequentially from Rule 5 to Rule 8 of Customs Valuation as has been held in various decisions that Customs Valuation Rules must be proceeded with sequentially. Once transaction value was to be rejected under Rule 4, the Officer must have proceeded first to Rule 5 and then to Rule 6 and onwards. He further submitted that goods once cleared for home consumption and not available for confiscation cannot be held liable for confiscation under Section 111(m) of the Customs Act, 1962. He relied on the Tribunal's decision in the case of Kumar Mahendra Exim Vs. CC (I), Nhava Sheva as reported in 2019 (365) E.L.T. 814 (Tri-Mumbai).

4. Shri M.P. Toppo, learned Authorized Representative appearing on behalf of the Department submitted that the investigation was undertaken 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.

5. Heard both sides through video conferencing and perused the appeal records.

6. We find 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.

7. 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, proforma invoice 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.13,19,538/- 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 home 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 decisions in support of his submissions.

8. 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 the 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 price 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.

9. 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 114A on M/s.Trading Syndicate and under section 114AA on Shri Mohinder Goel, proprietor of M/s.Trading Syndicate is not sustainable. The appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in the open Court on 16 November 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJU)
MEMBER (TECHNICAL)