IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Customs Appeal No. 76556 of 2018

(Arising out of Order-in-AppealNo.KOL/CUS(Port)/AA/1074-1075/2017 dated 25.09.2017 passed by Commissioner of Customs (Appeals), Kolkata

Commr.of Customs (Port), Kolkata
(15/1, Strand Road, Customs House, 2nd Floor, Kolkata-700001)

...Appellant

VERSUS

M/s R V Udyog Pvt. Ltd.
(18/1 MaharshiDebendra Road Burra Bazar, Kolkata-700007)

...Respondent

APPERANCE :
Mr. M. P. Toppo, Advocate for the Appellant
None for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER(JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No……75675/2023

DATE OF HEARING : 1st June 2023

DATE OF DECISION: 1st June 2023

PER K. ANPAZHAKAN :

The Appellant imported the goods 'EG Defective/Secondary Sheets' and filed seven Bills of Entry for clearance under self-assessment.The assessing officer re-assessed the Bills of Entry by enhancing the values and rejected the declared invoice values on the basis of higher values available on contemporaneous imports NIDB/DGOV data on 'similar goods' . The details of the Bills of entry along with the comparative chart showing the declared value and enhanced value are furnished below:

Sl.No.	Appeal File No. S5."…"/Cus (Appg)/Kol (Port)/2017	B/E No. and Date	Date of assessment	Declared value (in US$)	Enhanced value (in US$)	Assessment Order issued u/s 17(5) of CA' 62 Kol/Cus/DC/"……."/ApprgGr .IV(Port?/2017
1.	828	9613145 dt. 09.05.2017	12.05.2017	290	440	1940 issued on 02.06.2017
		961315 dt. 09.05.2017	12.05.2017	290	440	
		9653394 dt. 11.05.2017	18.05.2017	290	440	
2.	829	9363156 dt. 19.04.2017	09.05.2017	280	440	1785 issued on 26.05.2017
		9364893 dt. 19.04.2017	09.05.2017	280	440	
		9364730 dt. 19.04.2017	09.05.2017	280	440	
		9365005 dt. 19.04.2017	09.05.2017	280	440	

2. To avoid delay and demurrage charges, the said importer cleared the goods on payment of enhanced Customs Duty. The assessment order was passed under section 17(5) of the Customs Act 1962 for all the Bills of entry, as mentioned in the Table above. The Appellant filed appeals before Commissioner(Appeals), who vide order dated 25.09.2017 set aside the enhancement of values and assessed the impugned Bills of Entry at declared values. The Department is in Appeal against the impugned order.

3. In their grounds of appeal, the Appellant (Department) contended that in respect of all these seven Bills of Entry, the Respondents agreed to the enhancement of values. They also sought waiver of show cause notice and personal hearing. The Appellants cited the decision of the Tribunal in the case of Advanced Scan Support vs CC, Jodhpur, 2015(326)ELT185(Tri-Del), wherein it has been held that:

4. "When Show Cause Notice is expressy foregone and the valuation is consented, the violation of principles of natural justice cannot be alleged. In the present case, while value can be challenged but such a challenge would be of no avail as with the goods not being available and valuation earlier having been consented, the onus will be on appellant to establish that the valuation as per his consent suffered from fatal infirmity and such onus has not been discharged. Further, valuation of such goods requires their physical inspection and so re assessement of value in absence of goods will not be possible."**The case of Eicher Tractors v. Union of India (supra) cited by the appellant is not relevant here as in that case there was no evidence that the assessee had consented to enhancement of value."**

5. The Appellant also cited the decision of the Tribunal in the case of Guardian Plasticote Ltd vs CC(Port), Kolkata, 2008(223)ELT 605 (Tri-Kol), wherein it has been held that unless it was clearly endorsed that the duty arising on account of value loading was not paid under protest, it shall imply voluntary consent to the value enhancement.

6. The Appellant cited the decision of Hon'ble Supreme Court in the case of Shibani Engineering Systems 1996(86)ELT 453(S.C),wherein it has been clearly laid out that where the transaction value is ridiculously low and unrealistic of goods imported from a trader and when the price list of a manufacturer is not produced, goods can be assessed on the basis of contemporaneous imports.

8.The Respondent stated that they have agreed upon the enhanced value only to avoid demurrage, port rent,blocking of capital and fulfillment of commitment in the market for timely delivery of the goods. It doesn't mean that they have foregone their statutory right to appeal as the right to appeal is a statutory right.

7. Heard both sides and perused the appeal records.

8. In their grounds of appeal, the Appellant stated that the importer (Respondent) has agreed to the enhancement of values and hence they cannot file appeal against the value enhancement later. In support of their contention, the Appellant cited the decision in the case of Advanced Scan Support Technologies vs. CC Jodhpur [2015 (326) ELT 185 (Tri.-Delhi)]. However, we observe that the Ld Commissioner (Appeals) has given a clear findings on this objection by citing the decision in the case of Commissioner of Customs, Delhi vs. Maruti Fabric Impex reported in 2016 (343) ELT 963 (Tri.-Delhi.) The relevant para in the impugned order is reproduced below:

a. ***"5.....****As regards the first objection, we find that the provision of Section 17 does not preclude an assessee from filing an appeal against the enhancement. The issue is no more res integra and stands settled by various decisions. In the case of Digitech Photocopier v. CC, Mumbai reported as 2009 (233) E.L.T. 425 (Tri.-Del.), it was held that forced acceptance of enhanced value when goods under detention does not debar importer to challenge such value. Reference can also made to the majority decision of the Tribunal in the case of Marque Enterprises v. CC (Preventive), Amritsar reported as 2015 (329) E.L.T. 307 (Tri.-Del.), wherein it was held that in case of clearance of goods by the importer on the enhanced value so as to avoid detention and demurrage charges, the subsequent challenge of enhancement before the higher appellate forum amounts to the effect that such enhanced value was not accepted by the assessee and they cannot be stopped from contesting the same. It is a common case for the importers that on account of immediate requirement of imported goods or to avoid demurrage charges, such goods are cleared immediately on payment of duty on the enhanced value. Section 17 is to the effect that where such enhancement of value is accepted by the importer, there is no need for the Proper Officer to pass a reasoned order. This does not mean that the importer is precluded from filing appeal against the assessment order. The said section would apply only in those cases where the assessee is not aggrieved by the enhancement and has accepted such enhancement in which case the section requires that no reasoned order needs to be passed by the Proper Officer. The* *said section reflects upon the intention of the Legislature to avoid passing of the reasoned order and to unnecessary introduce litigation. As such, we find no merits in the Revenue's stand that an importer's right to file an appeal stands curtailed down on his clearing the goods on payment of duty on the enhanced value."*

b. Also in the case of K.D. Exports vs. Commissioner of Customs, Delhi-II reported in 2005 (186) ELT 526 (Tri.-Del) held as under in para 4 :

"„„„*The contention of the Revenue is that as the appellant had accepted the value assessed by the adjudicating authority, therefore, they cannot make any grievance before the Tribunal regarding enhancement. In this case the value of imported goods were enhanced on the basis of international price. The contention of the Revenue is that the assessee has not paid duty under protest nor lodged any protest at the time of assessment by the lower authorities and now cannot make any grievance before the appellate Court. We find that the appellant filed statutory appeal challenging the action of adjudicating authority before Commissioner (Appeals). Therefore, we find no merit in this contention of the Revenue that appellant accepted the value determined by assessing authority. The Revenue had not produced any evidence regarding the import of same goods at higher value. The Tribunal in the case of Mohan Sales (supra) held as under :-*

"We have perused the records and have heard the learned DR. A perusal of the records of the case makes it clear that transaction values have been rejected and the goods assessed at enhanced value. No reason for the rejection of the transaction value or enhancement of value has been indicated by the assessing authority. It is well settled that transaction values constitute assessable value under the Customs Act. If the goods have to be assessed at a different value, the transaction value has to be rejected first based on the legally permissible grounds as indicated in the Valuation Rules. The assessee should also be put on notice that their transaction value is being rejected for the stated reasons and goods are proposed to be assessed at a higher value. The circumstances that permitted such rejection and the alternative basis for fixing assessable value are specified in the Valuation Rules themselves. No such legally permissible steps are found to be taken in the present case. The assessing authority has not passed any order indicating the reason for rejecting the transaction value or fixing the value at higher level. The Commissioner (Appeals) also has

not indicated any reason warranting assessment at higher value except to state that "Since the value of the goods declared by the appellant appeared to be on lower side, these Bills of Entry were assessed finally after loading the value as per the prevalent international market price, market enquiry etc." The order does not at all indicate the particulars of any market enquiry or any transaction at the enhanced price in "international market place." No care has been taken to ascertain the relevant particulars and to incorporate them in the order. The orders are clearly unsustainable since they lack any basis. The impugned orders are, therefore, set aside and the appeals are allowed."

In view of the above decision, the impugned order is set aside and the appeals are allowed.

9. From the decisions cited above, we observe that the Respondent has agreed upon the enhanced value, it doesn't mean that they have foregone their statutory right to appeal as the right to appeal is a statutory right. Thus, the objection of the Department on this ground is not acceptable

10. Valuation of the imported goods is done as per Section 14 of the Customs Act 1962, which states that the value of the imported goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale. Further for rejection of the declared transaction value, the procedure has been laid down in the rule 12 of the CUSTOMS VALUATION (DETERMINATIONOF VALUE OF IMPORTED GOODS) RULES, 2007, which reads as under:

"12. Rejection of Declared Value:

(1)When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the

value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

13. In the instant case, we observe that the Respondent has imported 'EG Defective /Secondary Sheets' from the sole representative of the manufacturer and the invoice was raised by them. We observe that the Department has not brought in any evidence to reject the invoice value as declared by the importer. The department has resorted to rejection of the declared value and reassessment of the Bills of Entry on the basis of valuation of contemporary similar/identical goods at other ports as mentioned in NIDB/DGOV data. In this regard, we reproduce below the definitions of 'Similar' and 'Identical goods' as per CVR, 2007:

" Identical goods" means imported goods –

i. Which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;

ii. Produced in the country in which the goods being valued were produced; and

iii. Produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person,

But shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were imported directly or indirectly by the buyer no these imported goods free of charge of at a reduced cost for use in connection with the production and sale for export of these imported goods;"

"similar goods" means imported goods"

i. Which although not alike in all respects, have lake characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

ii. Produced in the country in which the goods being valued were produced; and

iii. Produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, *But shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were imported directly or indirectly by the buyer no these imported goods free of charge of at a reduced cost for use in connection with the production and sale for export of these imported goods;"*

11. We observe that the 'EG Defective Secondary Sheets' imported by the Appellant cannot be compared with similar goods. The value available in NIDB/DGOV data on similar defective goods are not comparable.

12. In this regards the Ld Commissioner (Appeals) has given a finding in the impugned order, which is reproduced below:

"I find that the respondent in its assessment order mentions the valuation of similar goods at higher side and submitted that the invoice is not a manufacturer's invoice as submitted by the appellant.

In the case of Ruby Mills Ltd. Vs. Commissioner of Customs, Mumbai reported in 2003 (161) ELT 282 (Tri – Mum) held as under:

> "2.*The valuation of similar goods is the subject matter of the decision of the Tribunal in Rejendra Mills Ltd. v. CC – 1997 (90) E.L.T. 68. In this decision, the Tribunal held that unless there was a basis for indicating the transaction value is not genuine, the value would be governed by Rule 7 of the Valuation Rules. In the case before us, there is nothing to indicate that the price declared by the importer was not genuine. The examining officer's remarks only stated that the declared value "appears low as per the conditions of machines." The goods were not subjected to examination by any panel of experts. No doubt as the departmental representative contends that Rule 10(L)(b) of the Valuation Rules requires the importer to furnish the manufacturer's invoice if asked for by the proper officer. The appellant on being so asked, stated that it did not have the manufacturer's invoice. We do not see how this can be held against it. It is difficult to expect in the case of second hand goods, that the manufacturer's invoice will travel with the consignment from the first every purchaser. In any event, there is no provision in the Act to say that in the absence of the manufacturer's invoice, transaction value cannot be accepted or is to be considered not to be genuine. There was therefore no reason for not accepting the transaction value".*

Also, the respondent has placed reliability on the NIDB data in determination of the value of the imported goods (similar/identical in nature). The value was enhanced citing higher prices of the contemporaneous imports of similar goods. However, the valuation of similar goods depends on factors such as country of origin, quantity of the goods imported, produced by the same person who produced the goods being valued, quality of the goods i.e. characteristics, composition & like component material. Moreover, the NIDB data is not exhaustive in nature as it only depicts the value at which the goods are assessed but not whether such assessed value is proposed value by the importer or enhanced value buy the proper officer. The respondent also relies on the case-law Punjab Processors Pvt. Ltd. Vs. Collector of Customs (reported in 2003 (157) E.L.T 625 (S.C.) wherein it is said that "Customs Authority can rely on contemporaneous evidence to show that the invoice is not the correct value, the importer can hardly be heard to say that its invoice value did not represent the correct value of the imported goods."

15. The valuation of similar goods depends on factors such as country of origin, quantity of the goods imported, produced by the same person who produced the goods being valued, quality of the goods i.e. characteristics, composition & like component material. Moreover, the NIDB data is not exhaustive in nature as it only depicts the value at which the goods are assessed but not whether such assessed value is proposed value by the importer or enhanced value buy the proper officer. In view of the above, we hold that the enhancement of value has been done arbitrarily. The department has not brought in any evidence to reject the value declared by the importer. Accordingly, we hold that the appeal by the department is devoid of any merits and liable for rejection'

16. In view of the above discussion. We reject the appeal filed by the department.

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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