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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 70021 of 2013

(Arising out of Order-in-Original No. KOL/CUS/PORT/77/2012 dated 31.10.2012 passed by the Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Skypack Commodities Private Limited : Appellant
44, Ezra Street, 2nd Floor,
Room No: 10, Kolkata – 700 001

VERSUS

Commissioner of Customs (Preventive) : Respondent
Custom House, 15/1, Strand Road,
Kolkata – 700 001

WITH

Customs Appeal No. 75811 of 2014

(Arising out of Order-in-Original No. KOL/CUS/PORT/77/2012 dated 31.10.2012 passed by the Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Subhash Khandubhai Naik, Director, : Appellant
M/s. Skypack Commodities Private Limited
44, Ezra Street, 2nd Floor,
Room No: 10, Kolkata – 700 001

VERSUS

Commissioner of Customs (Preventive) : Respondent
Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri S.P. Siddhanta,Consultant for the Appellants

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 75558-75559 / 2024

DATE OF HEARING:14.03.2024

DATE OF DECISION: 21.03.2024

Order : [Per Shri K. Anpazhakan]

The officers of the Directorate of Revenue Intelligence (DRI), Kolkata developed an intelligence to the effect that some importers were importing Patchouli Oil by grossly undervaluing it. On the basis of this intelligence, the DRI conducted searches at the premises of M/s. National Perfumery House, 44, Ezra Street, Kolkata – 700 001 on 06.09.2005. During the course of the searches, some documents pertaining to M/s. Skypack Commodities Pvt. Ltd. (appellant herein) were found. From the documents recovered, it was noticed that during the period from 2005-06 the appellant had imported two consignments of Patchouli Oil declaring the same as "Patchouli Oil PS24 (Natural essential oil)" of Indonesian origin, from M/s.K.L.Koh Enterprises Pvt. Ltd., Singapore, the details of which are as under:

Sl No	Year of Import	Bill of Entry No. & date	Declared quantity of goods	Declared unit CIF value of the goods in US$/kg	Declared total CIF value of the goods in US$	Declared Assessable value in Rs.	Amount of duty paid
1	2005-06	232563 dt.12.05.05	10000 Kgs	3.25	32500	1441017.5	581821.00
2	-Do-	247421 dt 26.08.05	5000 Kgs	3.25	16250	717226	289585.00

2. Scrutiny of the import documents further revealed that the insured value of the goods was higher than the invoice value declared for clearance of the goods. The details of the invoice value and the insured value of the goods declared in both the Bills-of-Entry are as below: -

Sl No	Bill of entry No and date	Value declared In the invoice (U.S $)	Insured Value of the product (U.S $)
1	232563 dated 12.05.05	32500	52000
2	24721 dated 26.08.05	16250	26000

3. The officers ascertained the value of contemporaneous imports of Patchouli Oil of Singapore origin and found that in few of such imports, the value of the imported goods from the same supplier viz. M/s. K.L. Koh Enterprises Pvt. Ltd., Singapore was found to be higher than the value declared by the appellant, which is furnished below: -

Sl No.	Bill of Entry No. & date	Description of goods, and its botanical name	Country of origin	Declared unit price (CIF)	Specific gravity	Refractive Index
I	759052dt. 16.02.05 (Chennai)	Patchouli Oil iron free, Pogostemon Cablin	Singapore	33.50 US$	0.945 to 0.973 at 25 degree C	1.5050 to 1.5120 at 20 degree C
2	804075 dt.13.05.05 (Chennai)	-Do-	Singapore	33.50 US$	0.946at 25 degree C	1.5085to 1.5120 at 20 degree C

3.1 From the above, it appeared that the appellant has mis-declared the assessable value of the Patchouli Oil during the period between February 2005 and May 2005. As per the value available for contemporaneous imports, USD 33.50/- per kg. appeared to be the ordinary competitive price for the said goods. Thus, the assessable value of USD 3.25/- per kg declared by the appellant was found to be very low.

4. Accordingly, a Show Cause Notice dated 31.01.2007 was issued to the appellant demanding differential Customs Duty of Rs.81,10,775/- on the goods imported vide the above two Bills-of-Entry by adopting the CIF value of the goods as USD 33.50/- per kg.

5. The Notice was adjudicated and the Ld. Commissioner vide Order-in-Original No. KOL/CUS/PORT/77/2012 dated 31.10.2012 (dispatched on 05.11.2012) wherein the Ld.

Commissioner has confirmed the differential duty of Rs.81,10,775/- along with interest and equal amount of duty as penalty. The goods were held liable for confiscation. However, the goods were not confiscated as the goods were not available for confiscation. A penalty of Rs.25,00,000/- was also imposed on Shri Subhash Khandubhai Naik, Director of the appellant-company.

6. Aggrieved against the confirmation of the above demands in the impugned order, the appellant-company and its Director filed separate appeals. As both appeals emanate from the common Order-in-Original, both the appeals are taken up together for disposal by a common order.

7. The appellant has *inter alia* made the following submissions: -

(i) Patchouli Oil imported by them contains less Percentage of alcohol than the Patchouli Oil imported by others and hence, the price of their Patchouli Oil was less than that of others; hence, the prices declared in the contemporaneous imports mentioned above were not comparable prices. The appellant contends that they have submitted chemical report before the authority at the time of assessment of the subject goods. Patchouli Oil is produced in various grades and the valuation of the same depends upon various elements such as alcohol content, specific gravity, Refractive Index etc. Patchouli Oil PS24 imported by them was having less alcohol content and hence the same is sold at a lesser price in the international market.

(ii) When they filed the Bills of entry for clearance of "Patchouli Oil PS24", no test has been carried out by the Kolkata Customs to find out its grade and oil content and other parameters. The Test Reports submitted by them were accepted and the goods were cleared at the declared value. If there was any suspicion of undervaluation of the goods, the department could have ascertained the correct international price of that grade of Patchouli Oil i.e. PS24. Having not done the verification of the correct price at the time of importation, the department cannot question the correctness of the declared value later.

(iii) The enhancement of value of the imported goods from USD 3.25/- per kg. to USD 33.50/- per kg. is not supported by any evidence. The appellant relied upon the decision of the Ld. Commissioner of Customs (Appeals), Chennai in *Pushpa Perfumery Products (P) Ltd. reported in 2001 (136) E.L.T. 1005 (Commissioner Appeals)* in support of their contention that enhancement of price is not sustainable without ascertaining the quality, commercial level, country of origin, grade, technical literature, test report, etc. of the contemporaneous imports, whose price was proposed to be adopted.

(iv) The officers rejected the assessable value declared by them on the value declared by the appellant for the same goods for the insurance purpose was much higher. However, there was no finding in the impugned order to reject the assessable value declared by the appellant.

After rejecting the declared assessable value, the Department has adopted the price of contemporaneous import of similar goods to enhance the value declared, without adducing any evidence to the effect that the goods are comparable. There is no evidence available on record to indicate that the Patchouli Oil imported by the appellant and the contemporaneous imports whose price has been adopted by the Department are similar in all respects.

(v) The investigation has relied on the statement of Shri Subhash Khandubhai Naik, Director, to enhace the value. However, a perusal of the statement given by Shri Subash Kandhubhai Naik reveal that he has categorically stated that it is not known as to how the other importers were importing Patchouli Oil at a price of USD 26 to 31 per kg; at no stretch of imagination the Patchouli Oil PS24 could be enhanced to a price of USD 26 to 31 per kg.; it has been alleged in the Notice that the price was influenced by personal contact of Shri Subhash Khandubhai Naik without any basis. It was stated that Shri Subhash Khandubhai Naik has visited the supplier and fixed the price over telephone and accordingly, it was alleged that a lower price was fixed by personal influence. The appellant submits that this cannot be a reason to reject the declared value and enhance the assessable value multifold.

(vi) The appellant vide their letter dated 12.12.2005 has clarified through the certificate issued by the manufacturer M/s. K.L. Koh

Enterprises Pvt. Ltd., Singapore that the price adopted by them was the correct transaction value for the Patchouli Oil PS24 imported by them.

(vii) The appellant contends that the Bills-of-Entry have been finally assessed and the Department has not challenged the final assessment order. They relied upon the decision of the Hon'ble Supreme Court in the case of *Collector of C.Ex., Kanpur v. Flock (India) Pvt. Ltd. [2000 (120) E.L.T. 285 (S.C.)]* wherein it has been held that the demand cannot be raised without challenging the final assessment of the Bills-of-Entry.

(viii) The appellant submits that in case of price mis-declaration and under-valuation, the onus is cast upon the Revenue to prove the same. In this case, the Department has failed to discharge this burden as they have not brought in any evidence to prove the mis-declaration of the value by the appellant. In this regard, the appellant placed their reliance on the decision of CESTAT, Chennai in the case of *Gupta Exports v. Commr. of Cus., Chennai [2002 (146) E.L.T. 361 (Tri. – Chennai)] which has been upheld by the Hon'ble Supreme Court as reported in 2003 (157) E.L.T. A150 (S.C.).*

(ix) The appellant further submits that one of their sister concerns M/s. Imperial Fragrances Pvt. Ltd., Kolkata has imported Patchouli Oil, STD and Patchouli Oil Pure SPX from the same manufacturer viz. M/s. K.L. Koh Enterprises Pvt. Ltd., Singapore under Bill-of-Entry No. 276058 dated 20.03.2006. Against this import, the Customs initiated proceedings vide DRI F.No. 97/KOL/APP/2006/Pt.1/2766 dated 03.11.2006. In the said case also, the Show Cause Notice dated 03.11.2006 was issued by DRI and the proceedings were later dropped by the Ld. Addl. Commissioner vide his Order-in-Original No. KOL/CUS/ADC/65/09 dated 05.03.2009, after going through the copy of "International Business Information Service". The documents submitted in that case proves that different grades of Patchouli Oil such as Patchouli Oil pure, Patchouli Oil good, Patchouli Oil Pure SPX, Patchouli Oil STD and Patchouli Oil Iron Free have different values. Accordingly, the appellant submitted that the valuation of one grade of Patchouli Oil cannot be the basis for the assessable value of other grades of Patchouli Oil.

(x) Accordingly, the appellant submits that the demand of differential duty based on contemporaneous imports in this case is not sustainable.

(xi) The appellant Shri Subhash Khandubhai Naik, Director of the appellant company submits that there was no deliberate violation of any of the provisions of the Act on his part, warranting penalty on him. Penalty is ordinarily imposed only in cases where there is a deliberate defiance of law; in this case, they have furnished all the relevant information in the Bills-of-Entry at the time of its original assessment; investigation has also not brought in any evidence to substantiate the claim of deliberate defiance of law by the appellants. Hence, he submits that no penalty imposable on him. Reliance is placed on the decision of the Hon'ble Supreme Court in *Hindustan Steel Ltd. V. State of Orissa AIR 1970 (SC) 253-1978 (2) ELT (J159)* wherein it was observed that the discretion to impose penalty must be exercised judicially. As there is no evidence available regarding any deliberate violation of law by the Director, he prayed for setting aside the penalty imposed on him.

8. The Ld. Departmental Representative reiterated the findings in the impugned order.

9. Heard both sides and perused the appeal documents.

10. We observe that the appellant has imported the goods namely, “Patchouli Oil PS24" vide Bills-of-Entry dated 12.05.2005 and 26.08.2005. No samples were drawn at the time of importation of the goods. The goods were assessed and no questions were raised about the assessable value declared by the appellant. Subsequently, on the basis of investigation initiated by DRI at the premises of M/s. National Perfumery House and based on the documents recovered from the said premises, an investigation was initiated against the appellants. Scrutiny of the documents recovered from the said premises revealed that the insured value of the goods was higher than the invoice value declared by the appellant for the purpose of clearance of the goods. The assessable value declared by the appellant in the said two Bills of Entry were rejected on the ground that the insured value of the

product was higher than the value declared in the invoice. Subsequently, differential duty was demanded from the appellant based on the price available on contemporaneous import of similar goods.

10.1 We observe that the value declared by the appellant for insurance purpose has no relevance for the purpose of assessment of customs duty. There is no evidence on record produced by the investigating officers to the effect that the appellant had actually paid the insured value for the purpose of importation of the impugned goods. Thus, we observe that there was no basis for rejection of the declared value by the Department.

10.2 We observe that the value of Patchouli Oil depends on various parameters such as alcohol content, specific gravity and Refractive Index of the Patchouli Oil. The appellant submits that the alcohol content in the Patchouli Oil varies from 32% to 2%. However, the investigation has not brought in any evidence to show that the contemporaneous import price whose price had been relied upon in this case to demand differential duty, has the same alcohol content, specific gravity and refractive index as that of the goods imported by the appellant. Accordingly, we hold that rejection of the declared price by the appellant is legally not sustainable.

10.3. We observe that the appellant submitted letter dated 12.12.2005 wherein the importer clarified that the value declared by the appellant in the Invoices are true and correct. The investigation has not disputed the correctness of the contents in the letter or its genuineness. Accordingly, we observe that the appellant has established that the value declared by them at the time of importation of the goods is genuine and correct and there is no reason to doubt its correctness.

10.4. We observe that Patchouli Oil of different grades were imported by M/s. Imperial Fragrances Pvt. Ltd., a sister concern of the appellant-company, from the same manufacturer in Singapore, under Bill-of-Entry No. 276058 dated 20.03.2006. Proceedings were initiated by DRI and a Show Cause Notice dated 03.11.2006 was issued to them on the ground of under valuation of the goods imported. The proceedings were later dropped by the Ld. Addl. Commissioner vide his Order-in-Original No. KOL/CUS/ADC/65/09 dated 05.03.2009, after going through the copy of "International Business Information Service". The documents submitted in that case proves that different grades of Patchouli Oil such as Patchouli Oil pure, Patchouli Oil good, Patchouli Oil Pure SPX, Patchouli Oil STD and Patchouli Oil Iron Free have different prices in the international market. Accordingly, we find that the price of one grade of Patchouli Oil cannot be the basis for rejection of the assessable value declared in respect of other grades of Patchouli Oil.

10.5. In view of the above discussions, we hold that the quality of Patchouli Oil depends on different chemical factors including alcohol contents. The imports imported by the appellant has been assessed and customs duty has been demanded at the time of importation of the goods. The assessments have not been challenged and they became final. Subsequent to its clearance, factors such as higher value adopted for insurance cannot be a reason for rejection of the assessable value declared. In respect of the two Bills of Entry, the assessable values declared by the appellant have been accepted by the Customs authority after being satisfied with the test report. We observe that there is no finding in the impugned order to reject the assessable value declared by the appellant based on the higher price declared for insurance purpose. After rejecting the declared assessable value, the Department has adopted the price of contemporaneous import of similar goods to enhance the value declared, without adducing any evidence to the effect that the goods are comparable. There is no evidence available on record to indicate that the Patchouli Oil imported by the appellant and the contemporaneous imports whose price has been adopted by the Department are similar in all respects. Accordingly, we hold that the demand of differential duty along with interest confirmed in the impugned order is not sustainable and accordingly, we set aside the same. Since, the demand of duty is not sustainable, the question of imposing penalty on the appellant importer does not arise.

11. With regard to imposition of personal penalty on Shri Subhas K Naik, the appellant submits that imposition of huge penalty of Rs. 25,00,000/- is not warranted in the matter in as much as there is neither any contumacious conduct or deliberate violation of statute in order to enable the department to invoke penal provisions. We observe that there is no finding in the impugned order regarding the role played by the appellant in the alleged under valuation. It has been alleged that Shri Subhash Khandubhai Naik has visited the supplier and fixed the price over telephone

and accordingly, the lower price was fixed due to his personal influence. In view of the discussions, the allegation of under valuation is not substantiated. Accordingly, we hold that penalty imposed against the Director of the appellant-importer cannot be sustained and the same is accordingly set aside.

12. In view of our above discussion, we hold that the rejection of assessable value under the above two Bills-of-Entry is legally not sustainable. Accordingly, we set aside the differential duty along with interest and penalty confirmed in the impugned order. We also set aside the penalty imposed on the Director of the appellant-company.

13. In the result, the appeals filed by the appellants are allowed.

(Order pronounced in the open court on **21.03.2024**)

Sd/-	Sd/-
(K. ANPAZHAKAN)	**(ASHOK JINDAL)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Sdd