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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75416 of 2021

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/14/SIB/2021 dated 12.03.2021 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Baba Baidyanath Trading Company
(20, Round Tank Lane, Howrah-711101.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

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

WITH

Customs Appeal No.75418 of 2021

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/14/SIB/2021 dated 12.03.2021 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Big Bull Traders Private Limited
(20, Round Tank Lane, Howrah-711101.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

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

AND

Customs Appeal No.75483 of 2021

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/14/SIB/2021 dated 12.03.2021 passed by Commissioner of Customs (Port), Kolkata.)

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

...Appellant

VERSUS

M/s. Big Bull Traders Private Limited
(20, Round Tank Lane, Howrah-711101.)

.....Respondent

APPEARANCE

Shri Sudhir Mehta, Advocate for the Appellant/Party

Shri M.P.Toppo, Authorized Representative for the Revenue/Respondent

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

FINAL ORDER NO. 75811-75813/2023

DATE OF HEARING : 21 April 2023
DATE OF DECISION : 23 June 2023

Per : K. ANPAZHAKAN :

There are three appeals all filed against the Order-in-Original dated 12.03.21 passed by the Commissioner of Customs (Port). Two appeals were filed by the importer and trader who imported the goods and one appeal is by the department. Since all three appeals emanated from the common adjudication order dated 12.03.21, the same are taken up together for decision.

2. Big Bull Traders Pvt Ltd (herein after referred as Appellant 1) is a manufacturer of Tricycle and holds ICAT certificate issued by the designated agency. They are authorized to manufacture Tricycles operated by battery under Motor Vehicle Rules. Baba Baidyanath (herein after referred as Appellant 2) is a Trading Company dealing in parts of Tricycle. The Appellant 1 imported some parts of the Tricycle and procured some parts from Appellant 2, which were imported by him separately. The allegation of the department is that both the parts imported by Appellant 1 and Appellant 2 together would constitute a fully assembled Tricycle. Accordingly Show Cause Notice dated 23.05.2019 was issued to the Appellants 1 and 2 proposing to club both the imports together and to assess the goods as fully finished Tricycles, instead of parts of tricycles, as claimed by the Appellants.The said Notice was adjudicated by the Commissioner of Customs (Port) vide

Order-in-Original dated 12.03.21, wherein the adjudicating authority classified the goods imported as Tricycles under the CTH 8703840 as against the classification of 87089900, claimed by the Appellants as parts of Tricycles. Vide the impugned order, the adjudicating authority confirmed differential duty of Rs.18,91,596/- and imposed redemption fine of Rs.2 Lakhs. He also demanded interest and imposed a penalty of Rs.18,91,596/- under section 114A and Rs.2 Lakhs under Section 114AA of the Customs Act. Both the penalties were imposed jointly and severally on the Appellants.The declared value by the Appellants was accepted and the proposal in the Notice for enhancement of the value based on the comparative price of fully finished Tricycle available in NIDB data was rejected.

3. Aggrieved against the impugned order the Appellants filed the present appeals against the reclassification of the parts of the Tricycle as fully finished Tricyle and demanding duty @ 30% BCD under Sl No 526(1)(b)of Customs Notification No. 50/2017 dated 30.06.2017. The Department is on appeal against dropping the charges of enhancement of value .

4. In their submissions, the Appellant 2 stated that they have an expertise in manufacturing of electrical tricycles. They carry on the business of trading of accessories and parts of electrical tricycles. They also provide technical assistance to Big Bull Trader Pvt.Ltd (Appellant1). They have no financial relationship with Appellant 1. They received certain periodical orders from Appellant 1 for supply of few parts of Tricycles. Since these spare parts were meant specifically for Appellant 1, theyprocured them from abroad. As these procurements and indenting were done specifically for Appellant 1, they obtained payments and advance orders from them. After import, they sold and delivered various items so procured to Appellant 1. They have been selling their goods also to various other tricycle manufacturers namely Ahmed Trade Corporation (P) Ltd., T.S. Auto (P) Ltd., M/s. Malay Engineering, Mr. Partha Paul, Veera Veeners Ltd.

5. Appellant 2 stated that they received a Show Cause Notice dated 23.05.2019 wherein various items procured and sold to Appellant 1

were sought to be clubbed with the imports directly done by Appellant 1 at their level. In the Notice, it has been alleged that spare parts imported by them if added to the spare parts imported by Appellant 1 would together make a Tricycle in CKD condition. The Notice further alleged that Tricycles were imported in CKD condition and valuation of tricycle is proposed at Rs.33,000/- without disclosing any material for comparison.

6. The Appellants contended that they have classified the goods as parts of Tricycle under CTH 87089900. These parts were freely importable and were being sold in international market as parts. They further stated that classification of the goods is to be made on the basis of the item imported on "as is where is" basis. The goods are required to be classified in the form in which it is imported. Both the appellants have imported few spare parts only which would not make a Tricycle in CKD condition. Several parts and precision manufacturing would be needed for manufacturing of a Tricycle. It is alleged in the impugned order thatthe imports by both the Appellants had taken place at the same time.The Appellants stated that because of that a conjecture has been made by the department that both the imports when put together would make a Tricycle in CKD condition. Appellant 1 had imported certain parts for their own use and for certain parts they had to depend on Appellant 2 since these were required to be manufactured at China and that theyhave an expertise in the same they got the goods manufactured with their monogram so that it can pass the test laid down under the Motor Vehicles Act. Matching of the spare parts imported by both of themtogether is of no consequence since both these imports together would not make Tricycles in CKD condition There is no expert evidence submitted by the Deparment to establish that the import by both the Appellants together would make any Tricycle in CKD condition.

7. They stated that the assessments of the Bills of Entry were done by the process of adjudication and issuing of order under Section 17(5) of the Customs Act, 1962 by the proper officer of the Customs and

value in every case was enhanced in the adjudication proceedings. All such assessment orders were appealable orders and no appeal has been preferred by the department. Hence, the demands in the impugned order are barred by the principle of res-judicata.

8. The Appellants further stated that the adjudicating authority has relied upon Rule 2(a) of General Rules for Interpretation of the First Schedule of Customs Tariff Act, 1975 which states that:-

> *"2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled."*

The Appellant stated that Rule 2(a) is not applicable for reclassification of the goods in this case inasmuch the imported parts do not have the essential character of a complete or finished Tricycle. It requires lot of additional parts and processing to make a fully finished Tricycle. It cannot be said that parts imported by both Appellants 1 and 2 would be a complete product in un-assembled condition. Sine qua non for the CKD condition is that parts imported could be assembled by mere hand tools. In the present case, the finished goods were manufactured after subjecting the parts to variousprocesses after imports.

9. The Appellants stated that Rule 2(a) of Interpretative Rules would not be applicable to the imported goods inasmuch as under Rule 1 of the said Rules, Classification is required to be followed according to the terms of the heading and any relevant Section or Chapter Notes. If neither the heading nor the Chapter notes suffice to clarify the scope of a heading, then only the notes provided under Rule 2, 3 and 4 becomes applicable. Rule 1 gives primacy to the Section and chapter note along with terms of heading. If no clear picture emerges then only one can resort to subsequent rules.

10. It would appear from the Customs Tariff Heading 8703 parts of the vehicles are not covered therein. Rule 2(a) would not be applicable inasmuch as the items imported and presented for assessment were parts and engineering process of completion was required to be undertaken. Manufacturing of vehicle is a very high technical skill and prototype approval is required from international standard as well as state level. It cannot be done by mere fixings. In view of the facts and circumstances, import of the components cannot be treated as import in CKD condition.

11. The Appellant relied upon the decision in the case of Sony India Ltd Vs CCICD, New Delhi, 2002 (143) ELT 411 (Tri- LB)wherein it has been held that the components imported cannot be treated as complete colour T.V. set by clubbing.They cited the decision of Larger Bench in the case of New India Industries Ltd Vs Collector of Customs (73)ELT 723(LB), wherein it has been held that the goods are to be assessed for classification in the manner and condition in which the same are imported.

12. The Appellant referredto the decision in the case of Modi XeroxVs. Commissioner of Central Excise reported in 103 ELT page 619. In that case, components were imported from which a photocopy machine could be made. The importers made out a case that this import of various items would classify as a photocopier in CKD condition and Custom duty would be payable as a photocopy machine on CKD condition. The department contended that since the goods were imported as parts it would be assessed as parts even if this could be assembled and from which a photocopy machine can be made. The department succeeded in this case.

13. While dealing with Rule 2(a), in the said judgement of Modi Xerox, it was held that the said Rule would apply only when imported articles presented in unassembled form or assembly can be done by putting together the parts by means of simple fixing device or riveting or welding. It came to the conclusion that fax machines were not the type of goods which were normally traded or transported in knocked

down condition and therefore imports were that of the component and not of the fax machine. In the present case,the allegations made are contrary to what was held by the Tribunal in Modi Xerox case, which was upheld by Hon'ble Supreme Court. Hon'ble Supreme Court in the case of Collector of Customs v. Sony India reported in [2008 (231) ELT 385 (S.C.)] upheld the judgment of Modi Xerox and followed the same. Rule 2(a) will not apply where two different importers have separately imported components and filed separate bills of entry and further have shown that goods were also cleared as components.

14. The Appellant stated that the goods are not liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962 which are not applicable in the facts and circumstances of the present case.. The goods were not imported subject to any condition and therefore 111(o) is not applicable.

15. The bills of entry which are provisionally assessed can not be covered under Section 28 of the Customs Act which is impermissible in law. Section 28 does not apply to provisionally assessed bill of entry which requires to be finally assessed. As there was no suppression involved in this case, extended period cannot be invoked to demand differential duty. Section 114A and Section 28(4) would be inapplicable. Penalty under Section 114AA is not impossible since no bill of entry was filed with incorrect material particulars. A classification dispute will not lead to a charge of 114AA. Classification is assertion of right and it is a point of law. As held by the Hon'ble Supreme Court in the case of Northern Plastic, a dispute on classification will not be a case of mis-declaration. In the bills of entry there was no incorrect material particular given. Therefore, penalty under Section114AA not imposable.

16. The Ld A.R reiterated the findings in the impugned order.

17. Heard both sides and perused the appeal records.

18. The issues to be decided in the appeals are:

(1) Classification of the goods whether under CTH 87089900 as claimed by the Appellants or CTH 8703840 as determined by the Revenue in the impugned order

(2) Whether penalties under section 114A /114AA are imposable ?

(3) Whether confiscation of the goods and imposing redemption fine sustainable?

(4) Whether dropping of the demand on the value enhancement by the adjudicating authority is correct?

19. We observe that the main issue involved in the present appeals is the classification of the goods imported by the Appellants. The Appellants imported various Parts oftricycle (E-Rickshaw) and sought classification under CTH 87089900 of the First schedule of the Customs Tariff Act, 1975. The impugned order redetermined the classification of the goods under CTH 87038040. The relevant Tariff entries are reproduced below for ready reference:

> Chapter 87.03: MOTOR CARS AND OTHER MOTOR VEHICLES PRINCIPALLY DESIGNED FOR THE TRANSPORT OF PERSONS (OTHER THAN THOSE OF HEADING 8702), INCLUDING STATION WAGONS AND RACING CARS.
>
> Sub heading No.80 of the heading 8703 reads as follows:
>
> 8703.80 – other vehicles with only electric motor for propulsion
>
> 8703.80.40 – three wheeled vehicles
>
> Chapter 8708: PARTS AND ACCESSORIES OF THE MOTOR VEHICLES OF HEADINGS 8701 TO 8705
>
> -Other parts & accessories
>
> 8708.99.00 – Other (as declared by the appellant)
>
> This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05.

20. As per the reading of descriptions as provided under Import Tariff, Section Notes to Chapter XVII and Explanatory Notes to HSN/CTH 8703 and 8708, the goods imported will have the essential characteristic of e-rickshaw only when the same are assembled to create a T-shaped vehicle mounted on a chassis, whose two rear wheels are independently driven by separate battery-powered electric motors.The Appellants stated that to assemble a complete Tricycle/e-rickshaw at least 103 items are required.The Appellants stated that some of the major

components such as Front Axle, Battery Charger 48V, Wiring Harness, Tire, Front Single Horn, Speedmeter, RVM Assy (LH and RH), Tube, Front Brake Drum, Battery are not imported. These are essential parts of the e-rickshaw. Without these components, the parts imported by both Appellants even if put togetherwould not make a tricycle/e-rickshaw in CKD condition.

21. Thus, we observe that the Appellants have not imported many vital parts of the Tricycle. In the impugned order the adjudicating authority concluded that some parts which were not imported by either of the Appellants were 'minor parts'. From the description of the parts not imported mentioned above, we observe that they are essential parts without which a fully finished Tricycle will nor come into existence. The adjudicating authority has not provided any evidence in the impugned order that the goods imported by the appellants together has the essential characteristic of e-rickshaw. For Example, battery is one of the parts not imported. As per the terminology of three wheeled vehicle, the same has to be powered or there should be propulsion through a battery which provides the power to the motor in order to thrust a vehicle.CTH 8703.80 covers the vehicle propelled through motor powered by a battery. The goods imported by the appellants together if assembled will not provide the basic function of propulsion as required for the classification under CTH 870 3.So, without the battery, the Tricycle cannot be operated and hence it is one of the essential parts. Similarly, the other parts not imported are also essential to make a fully finished Tricycle. Hence, we do not agree with the findings of the adjudicating authority that the goods imported by the appellants together has the essential characteristic of e-rickshaw/Tricycle.

22. In the case of Commissioner of Customs v. Lextrix Motors Ltd. reported in 2017 (353) ELT 149 (Del.) where Hon'ble High Court has laid the emphasis on the definition of CKD kit and held as follows:

> *"When goods are imported, as in the present case, in a CKD condition, what in fact is imported is the entire vehicle. All that is required to be*

done is to assemble the various components to obtain the complete vehicle. That is why it is called a CKD kit."

23. It is observed that the goods as imported have to undergo a process and not just mere assembly of the components in order to form a complete vehicle. In this regard, the appellant places reliance on the case of Commissioner of Customs Goa v. D-Link India Pvt.Ltd. reported in 2014 (306) ELT 479 (Tri.-Mumbai), wherein the Tribunal held as follows:-

"11. *We find that Revenue wants to classify the parts imported by the respondent as unassembled or disassembled articles and to classify under their respective headings, namely integrated circuits under Heading 85.42, Diodes, resistors, etc. under Heading 85.41, printed circuit boards under Heading 85.34 by virtue of application of Section Note 2(a) of the General Rules for Interpretation. Revenue heavily relied upon the provisions of Note 2(a) of the General Rules for Interpretation of Customs Tariff Act. We find that HSN Explanatory Notes, Rule 2(a) covers the complete or finished articles presented in unassembled or disassembled condition and the same is to be classified in the same heading as the assembled article. It is usually for reasons such as requirements or convenience for handling, transportation and packing. The rule further provides that articles presented in unassembled or disassembled condition means articles, the components of which are to be assembled either by means of simple fixing devices or by reveting or welding for only simple assembly operations are involved. The Notes further provides that components shall not be subject to any further working to form complete into finished article."*

24. Thus, we observe that the goods as imported by the Appellants together are not in complete nature and require a manufacturing process in order to obtain a fully finished vehicle. As per the definition of the vehicle as discussed supra, any imported components cannot be said to be fully functional unless they achieve the basic characteristic of the said appliance/instrument.Since, the Appellants together has not imported the complete kit required for a fully finished Tricycle falling

under CTH 8703, we hold that the imported spare parts together cannot be classified under 8703. Accordingly duty cannot be demanded @ 30% by applying Sl.No.526(1)(b) of Notification 50.2017.

25. In the case of Ma Sherawali Impex v. Commissioner of Customs (Port), Kolkata reported in 2003 (162) ELT 835 (Tri.-Kolkata), wherein the Tribunal held as follows:-

> ***"5.****We have carefully considered the rival submissions and gone through the case records including the orders-in-original and the order-in-appeal and have also perused the case laws relied upon by the defence. The issues that arise for determination in all these appeals whether the impugned goods are classifiable as complete photocopier machines falling under Heading 9009.12 as held by the appellate authority or under sub-heading 9009.99 as components of photocopier as claimed by the appellants, and whether there was any mis-declaration with regard to value or the quantum of the goods imported. We observe that in all these cases the appellants herein have imported components of photocopying machines under different bills of entry and all the consignments were physically examined by the proper officer in the presence of the Chartered Engineer who have issued certificates of examination after inspection of the goods. The certificates clearly states the condition of the goods and further states that the goods imported are old and used items of components of photocopiers and are in good condition having residual life approximately of five years on normal maintenance. In all these cases, a higher value has been assessed by the Chartered Engineers as against the lower value declared by the appellants. The certificates rendered by the Chartered Engineers were also accepted by the Examining officer. We further observe that in all these cases, the original authority has noted that the importers have grossly undervalued the goods and he has enhanced the value accordingly though without any discussion. Since the appellants have contravened the provisions of the EXIM policy in importing the goods without a licence, the original authority had ordered confiscation of the goods with option to redeem the same on*

payment of fine, besides imposition of penalty. We observe that the gravamen of the Department is that the importers have imported "almost complete photocopiers" under the guise of components Examining this question, we observe that in all these cases, as noted above, the Chartered Engineers have certified that what was imported was components of photocopiers and not complete photocopiers. There is certainly difference between what is known as "almost complete photocopiers" and complete photocopiers. It is common knowledge that when photocopier is almost complete" it implies that certain parts are required for them to become complete and unless the photocopiers are complete in all respects, it cannot be said that it is fully functional. We further observe that the Commissioner (Appeals) in the impugned order has referred to the searches conducted by the DRI which revealed that original invoice from USA supplier to Singapore showed complete machines at a higher value. What is to be seen is whether importers have imported the photocopiers in full or components irrespective of what was covered by the invoice of the supplier at USA to the Singapore intermediary. Neither the particulars of the invoice nor the verification report relied upon by the lower appellate authority were furnished to the appellants with a view to giving them a chance to rebut the same, particularly when a finding is reached against them which is against the principles of natural justice. We further observe that it is not the case of the Department that there was any misdeclaration with regard to the quantities and the number of items imported. The learned Counsels for the appellants have argued that for a photocopier to become functional the activities such as fixing of the assembly unit, feeding assembly, functional gears, drum unit, developer unit, motor, Clutch lens assembly with six mirror assembly, etc., have to be undertaken and after that all the unit has to be thoroughly cleaned with petrol/K. oil and the damaged parts if any have to be replaced. He has also pleaded that items such as Control panel, top panel cover, top glass, front cover, right cover, left cover, top flat ADF/ top cover Bypass tray, apart from other miscellaneous items like screws, washers, circlips, etc., are also

required to make a photocopier complete and functional. The Revenue has not controverted this position. Further, it is also an admitted position by the Revenue itself that except in the case of import covered by three Bills of Entry, the goods were only "almost complete" photocopiers. In these three cases also. (BE No. 156088 dt. 19-12-02, Bill of Entry No. 15687 dt. 20-12-87 and Bill of Entry No. 156608, dt. 30-12-02) the Bills of Entry and the Chartered Engineer's certificates show that what was imported was old and used components of photocopiers. Therefore, in the face of the examination report of the proper officer coupled with the certificates rendered by the Chartered Engineers and the submissions made by the learned Advocates for the appellants bringing out the difference between complete copiers and almost complete photocopiers, we hold that what was imported was parts/components of old and used photocopiers and they are classifiable under sub-heading 9009.99 and not under 9009.12 as complete photocopier. In arriving at this conclusion we find support from the judgment of the Larger Bench in the case of Sony India Ltd. v. CC, ICD, New Delhi reported in 2002 (143) E.L.T. 411 (Tri. - LB) wherein it was held that components of Colour TV cannot be treated as complete CTV. It was also held therein that components of colour TV brought under different consignments over period of time cannot be clubbed as to consider them complete TV sets. We also take note of the judgment rendered by the South Zonal Bench in the case of Award Electronics v. CC, Chennai reported in 2003 (153) E.L.T. 210 (T) = 2003 (85) ECC 737 by relying upon the Larger Bench decision in the case of Sony India Ltd. v. CC, ICD, New Delhi (supra) wherein it was held that the Revenue cannot take full value of the cameras, for the parts of cameras imported."

26. Similar has also been taken by the Tribunal in the case of Award Electronics v. Commissioner of Customs, Chennai, reported in 2003 (153) ELT 210 (Tri.-Chennai).

27. The Appellants submitted that the goods imported by both of them even if put together would not fit into the description mentioned

at Sl.No.526 of Notification no.50/2017 dated 30.06.2017 wherein the duty leviableis 30% ad valorem, which reads as follows:-

S. No.	Chapter or Heading or sub-heading or tariff itesm	Description of goods	Standard rate	IGST	Condition No.
526	8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars, new, which have not been registered anywhere prior to importation, if imported, - (1) As a Completely Knocked Down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with, - (a) engine, gearbox and transmission mechanism not in a pre-assembled condition; (b) Engine or gearbox or transmission mechanism in pre-assembled form but not mounted on a chassis or a body assembly.	10% 30%	- -	- -

28. As per Sl.No.526(1)(b), the imported goods should be in the form of completely knocked down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle with the engine or gearbox or transmission mechanism in pre-assembled form but not mounted on a chassis or a body assembly will attract the standard rate of duty @ 30% ad valorem. The goods imported by the Appellants together did not have all the essential components i.e. Controller, Differential and battery which are required to form a CKD kit as per the definition of the said notification which reads as "Completely Knocked Down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle." In order to levy the duty @30% as per the notification, the condition 1(b) of Sl.No.526 of Notification no.50/2017

should be satisfied. There is no evidence that the gearbox or transmission mechanism were imported by either of the Appellants in the pre-assembled form. No engine, gear box and transmission mechanism, speed meter, electrical lining, wiper mechanism, mechanical hubs, breaking system (brake shoes, brake lining, Differential holder, extension rod, Rear Shocker, meter board, head light, batteries, Tyres and tubes are available in the imported parts by the appellants together. As per the definition of CKD kit and the explanation as per Notification No.50/2017, the same should contain all the essential components to form an entire vehicle and all that is required to be done is to assemble the same components to make a fully finished vehicle.

29. The Appellants contended that when the they imported these goods as spare parts, the proper officer assessed these goods and enhanced the valuation of the spare parts on the basis of contemporaneous imports. The proper officer was satisfied that these goods were spare parts and goods were not Tricycle in CKD condition. The proper officer enhanced the valuation of each of the items under Section 17(5) of the Customs Act, 1962. Such reassessments were all appealable orders. No appeal having been filed, it became final and binding. In these circumstances, the proceeding under Section 28 of Customs Act, 1962 would be bad in law. We observe that there is merit in the argument of the Appellant. The reassessment orders passes under section 17(5) of the Customs Act, 1962 were not challanged by the department. As held by the in the ITC case, the demands raised without challenging the assessment/ reassesment orders are not sustainable.

30. The Appellants states that the show cause notice was not issued under Section 28 of the Customs Act. Out of the 20 bills of entry 5 number of bill of entry imported by Appellant 1 and 3 bills of entry filed by Appellant 2 were provisionally assessed and on provisionally assessed bills of entry Section 28 was not applicable. Accordingly, they contended that the demand of duty under Section 28(4) of the Customs Act is erroneous. The adjudicating authority erred by holding that the declaration given in the bill of entry wrong and the goods could not held liable for confiscation

under Section 111 (m) of the Customs Act. Section 111(o) of the Customs Act was also not applicable.The adjudicating authority demanded duty from the Appellants jointly and severally and imposed redemption fine and penalty jointly and severally which is contrary to law. We find merit in the arguments of the Appellants. There is no provision of demanding duty and imposing penalty jointly and severally from the Appellants. Accordingly, we hold that the demands are not sustainable on this count also.

31. Regarding the department's appeal we find that the adjudicating authority has given a clear finding in the impugned order which is reproduced below:

> 34.2 The party has submitted in their defence that there is no basis to reassess the goods imported by them at Rs.33,000/- contrary to the Valuation Rules. There is no ground given in the Show Cause Notice for rejection of the transaction value. The NIDB data referred in the Show Cause Notice is only three instances of import of tricycle in CKD conditions. There cannot be pick and choose of data for valuation. Lowest value is required to be taken. Data should be of continuous six months period for referring to DOV data. The valuation or assessment cannot be challenged by showing a valuation of goods which is not comparable. For example, if it is assumed that 10 parts imported would be treated as a boat in CKD condition and assessed accordingly. But its value could not be seen as import of 20 parts imported in CKD condition. They further submitted that imported car without tyre without electrical fitting could be treated as CKD condition and classified as import in CKD condition but its value would not be same as of a complete car with engine, tyre, battery imported in CKD condition. The dispute of classification will not lead to a valuation dispute automatically which is so turned in this Show Cause Notice.
>
> 34.3 I find no grounds are given in the Show Cause Notice for rejection of the declared value under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules,2007 (hereinafter referred as CVR 2007). I find that the Show Cause Notice has relied upon the contemporary import of electric tricycle in CKD condition as seen from the EDI system (Reference B/E Nos.8284892 dt.02.10.18 an 8294007 dt.03.10.18) and the NIDB data propose reassessment of the impugned unit. Assessable Value

> of Electric Tricycle in CKD condition @Rs.33,000/-. There is no evidence in the Show Cause Notice to substantiate that goods imported under these two relied upon Bills of Entry, are identical or similar goods to the impugned goods imported under 20 sets of Bills of Entry in the current Show Cause Notice under adjudication.

32. We observe that the Notice proposes to adopt the value of Rs 33,000 per Tricycle as per the assessable value available for fully finished tricycle in NIDB data. There is no evidence available to establish that the goods for which value is available in NIDB and the impugned goods imported by the Appellants together are similar goods. Hence, we hold that the adjudicating authority has rightly rejected the value of 33,000 proposed in the Notice. Accordingly, we hold that the department's appeal for value enhancement is liable for rejection.

33. In view of the above discussion, we answer to the questions raised in para4 as follows:

(i) the goods imported by both the Appellants cannot be clubbed for classification purpose. The goods imported by the appellants were not in CKD condition and therefore goods cannot be classified under Customs Tariff Heading 87038040. The goods are rightly classsifiable under CTH 87089900.

(ii) .Regarding penalty imposed in the impugened order, we hold that Notice was not issued under Section 28(4) of the Customs Act and therefore penalty under Section 114A and under Section 114 AA are not applicable.provisionally assessed bill of entry could not be covered under Section 28 and 114 A of the Customs Act, 1962 and therefore imposition of penalty of Rs.18,91,596/- was erroneous inasmuch as 114A was not liable in the subject case.Section 114 AA was not applicable on the subject goods and therefore imposition of penalty of Rs.2 Lakhs on the appellant jointly and severally with M/s. Big Bull Traders is illegal and bad in law.

(iii)goods were not liable for confiscation under Section 111(m) and 111(o) of the Customs Act and the order of confiscation not sustainable.order of imposition of redemption fine of Rs.2 Lac not sustainable and is liable to be set aside.

(iv)The departments appeal for value enhancement is rejected.

34. In view of the above discussion, we allow the Appeals filed by the Appellants importers. The Appeal filed by the department is rejected.

(Order pronounced in the open court on 23 June 2023.)

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

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

sm