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

REGIONAL BENCH - COURT NO.2

## CUSTOMS APPEAL NO.76822 OF 2018

(Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/19/2018 dated 21.2.2018 passed by Commissioner of Customs (Port), Customs House, Kolkata)

**M/s. Shree Creations Pvt. Ltd.**
4C, Chetan Seth Street,
"Sikaria Tower" 2nd Floor, Kolkata 700 007.

**...Appellant**

*VERSUS*

**Commissioner of Customs (Port)**

**.....Respondent**

Customs House, 15/1, Strand Road, Kolkata -700 001.

**APPEARANCE**
Shri Arijit Chakraborty, Advocate and Shri Amit Kumar, Advocate for the Appellant (s)
Shri A.K. Singh Authorized Representative for the Respondent (s)

**AND**

## CUSTOMS STAY APPLICATION NO. 76279 OF 2018
(ON BEHALF OF THE APPELLANT)

**WITH**

## CUSTOMS CROSS OBJECTION NO. 76988 OF 2018
(ON BEHALF OF THE RESPONDENT)

**IN**

## CUSTOMS APPEAL NO. 77457 OF 2018

(Arising out of Order-in-Original No. KOL/CUS/COMMR/PORT/19/2018 dated 21.2.2018 passed by Commissioner of Customs (Port), Customs House, Kolkata)

**Commissioner of Customs (Port)**

Customs House, 15/1, Strand Road, Kolkata – 700 001. **...Appellant**

*VERSUS*

**M/s. Shree Creations Pvt. Ltd.**
4C, Chetan Seth Street,
"Sikaria Tower" 2nd Floor, Kolkata 700 007. **.....Respondent**

**APPEARANCE**
Shri A.K. Singh Authorized Representative for the Appellant (s)
Shri Arijit Chakraborty, Advocate and Shri Amit Kumar, Advocate for the Respondent (s)

**CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)**
**HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)**

**FINAL ORDER NO.75805-75806/2021**

DATE OF HEARING : 27 October 2021
DATE OF DECISION :16 December 2021

**P.V. SUBBA RAO**

These two appeals were filed by the assessee and Revenue assailing the same order in original dated 21.2.2018[1] passed by the Commissioner of Customs (Port), Kolkata whereby 25 bills of entry filed by the assessee which were provisionally assessed under Section 18 (2) of the Customs Act, 1962 were ordered to be finalized at the value declared in the Bills of Entry but the goods were confiscated under Section 111 (m) and were allowed redemption under Section 125 on payment of redemption fine of Rs. 90 lakhs. Penalties were also imposed under Section 112 (a) and 114AA upon the importer. The operative part of this order was as follows :-

> "(i) I order the finalization of Provisional Assessment under Section 18 (2) of the Customs Act, 1962 in respect of Bills of Entry Nos. 2664896 dated 21.09.2015, 2841915 dated 07.10.2015, 2949338 dated 16.10.2015, 3100416 dated 30.10.2015, 3230620 dated 12.11.2015, 3230619 dated 12.11.2015, 3230624 dated 12.11.2015, 3579280 dated 14.12.2015, 3579822 dated 14.12.2015, 3579858 dated 14.12.2015, 3666482 dated 21.12.2015, 3666610 dated 21.12.2015, 3758281 dated 30.12.2015, 3810839 dated 05.01.2016, 3850993 dated 08.01.2016, 3979345 dated 20.01.2016, 3978633 dated 20.01.2016, 4007532 dated 22.01.2016, 4007199 dated 22.01.2016, 4181409 dated 08.02.2016, 4181407 dated 08.02.2016, 4313461 dated 19.02.2016, 4396390 dated 26.02.2016, 4394604 dated 26.02.2016, 6253308 dated 05.08.2016 and the imported items will be correctly held to be Embroidery

[1] **Impugned order**

Beads/Stones (Plastic content of Acrylic/ABS/PS & ABS/ABS & PMMA – as reported by CIPET) ;

(ii) I order confiscation of the imported goods under Section 111 (m) of the Customs Act, 1962 but allow the said importer to redeem the goods on payment of redemption fine of **Rs. 90,00,000/-** (Rupees ninety lakh) under Section 125 of the Customs Act, 1962 ;

(iii) I impose penalty of **Rs. 10,00,00/-** (Rupees ten lakh) under provision of Section 112 (a) of the Customs Act, 1962 on the said importer ;

(iv) I impose penalty of **Rs. 10,00,000/-** (Rupees ten lakh) under provision of Section 114AA of the Customs Act, 1962 on the said importer".

2. The appellant imported goods described as "Embroidery Beads/Stones" vide the 25 bills of entry filed between September 2015 and August 2016 and the bills were provisionally assessed and samples of the imported goods were sent for testing into the Central Institute of Plastics Engineering and Technology, Haldia (CIPET) and in the test memos two questions were asked :

(i) nature of composition of constituent material

(ii) whether hardener/filler is used? If yes, type of hardener/filler used and its ratio with respect to the other constituent material.

3. The appellant has declared the imported goods in the bills of entry as "Embroidery Beads/Stones" and CIPET gave reports describing the goods as Embroidery Beads/Stones (plastic content of acrylic/ABS/PS & ABS/ABS & PMMA). The Director General of Valuation of CBIC had,by letter dated 22.06.2015, given instructions regarding suspected undervaluation of imports of plastic/resign stones and beads and provided unit price range of raw materials of beads. In this letter DGOV further clarified in paragraph 13 that "price taken in above paragraphs of this alert

is only an illustration for the purpose of comparison of import price to price of raw materials used in the manufacturing of resultant product and it does not include any manufacturing cost or other overheads. **In no case that price can be considered as minimum base price for the purpose of assessment of plastic products**. The customs formation need to resort to appropriate rules of valuation for re-determination of value for the assessment purpose, in cases where the declared value is rejected under Rule 12 of the Valuation Rules, 2007. In paragraph 14, it further mentions "each case should be examined on its merits for acceptance or otherwise of the declared value. **When there are reasons based on the information obtained during scrutiny of the documents for doubting the truth and accuracy of declared value the field formation may take necessary steps, consistent with the Customs Valuation Rules, 2007 for rejection or acceptance of the declared value, as the case may be, at the time of assessment of such goods"**.

4. Pursuant to the above letter of Director General of Valuation, the SIB of the Commissionerate of Customs (Port), Kolkata issued Office Note dated 03.09.2015 in which it has calculated and determined the prices of Beads/Stones on the basis of the prevalent price of various polymers (RUD 1 of the show cause notice). It has been alleged in the show cause notice that importer has mis-declared the value and accordingly the assessment was proposed at a higher value. It was also proposed in the show cause notice to confiscate the imported

goods under Section 111 (m) and impose penalty upon the appellant under Section 112 (a) of the Customs Act. No proposal was made in the show cause notice to impose penalty under Section 114AA. The findings of the learned Commissioner in paragraphs 9 to 12 of the impugned order were as follows :-

> "9. I have gone through the case records and the submissions made by the said importer. Two main issues are to be decided. The first is regarding the finalization of the Provisional Assessment as per proviso of Section 18 (2) of the Customs Act, 1962. The second is whether the goods imported vide the said 25 Bills of Entry are liable for confiscation under Section 111 (m) of the Customs Act, 1962 and whether penalty is to be imposed as per Section 112 (a) and/or Section 114AA of the Customs Act, 1962.
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> 10. I find that in the Office Note dated 03.09.2015 issued by the SIB, Custom House, Kolkata vide F. No. 121-37/2015 SIB (Port) values of different items including ABS have been fixed without explicitly indicating the country of origin of the goods, contemporary prices of the imported items, value addition breakups, reference Bills of Entry. It is well established fact of law that a uniform price for import cannot be set by Customs authorities in this manner. The department has relied upon Directorate General of Valuation – DGOV Ref. F. No. Val/TECH/61/2012 letter/alert dated 22.06.2015. This DGOV letter clearly states that the Custom Houses should exercise due diligence in carrying out assessment and examination of such goods and that the values indicated in the alert are only an illustration for the purpose of comparison of import prices to price of raw material used in the manufacturing of the resultant product and it does not include any manufacturing cost and other overheads. In no case such price/s given can be considered as minimum base price for the purpose of assessment of plastic products.
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> 10.1 Also, the value should have been proposed to be determined by proceeding sequentially in accordance with Rule 4 to Rule 9 of the Customs Valuation Rules, 2007 which was not done in this case.
>
> 10.2 Therefore, redetermination of value is not possible in this case and consequently no duty can be demanded as the Customs Valuation Rules were not properly applied.
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> 11. However, on the other hand it has been proved conclusively through test reports received from CIPET, Haldia that the goods imported were actually "**Embroidery Beads/Stones (Plastic content of Acrylic/ABS/PS & ABS/ABS & PMMA)**" whereas the goods mentioned in the said Bills of Entry were only "**Embroidery Beads/Stones**". Therefore, this is a case of clear mis-declaration done deliberately to evade payment of higher applicable duty on ABS and the various other plastic content combinations as found. The above said SIB Office Note and DGOV letter/alert dated 22.6.2015 on the basis of which the department issued the subject SCN, though not relied upon in this adjudication, is

generally indicative of the undervaluation in this case. There is no scope for any further re-test as CIPET is a Government recognized testing agency under Ministry of Chemicals & Fertilizers. I find that the test results were given to the importer-noticee as RUD-3 of the SCN and later they were given the copies of the Test Reports by Custom House, Kolkata through letter – F. No. S206 (Misc)-43/2016A Gr. – II dated 21.3.2017. The importer had declared the impugned goods in all the 25 Bills of Entry simply as "**Embroidery Beads/Stones**" which is a deliberate and willful act of suppression and mis-representation with malafide intent as said above.

12. The importer made an incorrect declaration before the Customs authorities with an intention to misguide the assessing officer and defraud the revenue. Moreover, if the importer was unsure of the composition of the impugned goods, he should have subscribed to a declaration before the proper officer, that he was unable, for want of full information, to furnish all the particulars of the goods required, in view of the proviso to Section 46 (1) of the Customs Act, 1962, but the importer did not do so and cannot claim refuge under the veil of ignorance as an after thought. Therefore, he is liable to be penalized under Section 114AA of the Customs Act, 1962 for deliberate mis-declaration of the import details in the said 25 Bills of Entry.

5. Assessee's appeal is filed assailing the confiscation of the goods, imposition of fine and penalty. Revenue's appeal is filed on the ground that the Commissioner has wrongly ordered finalization of the bills of entry as per the declared value instead of ordering valuation as per the show cause notice and ordering recovery of the appropriate amount of customs duty. It is also asserted in the Revenue's appeal that the amount of redemption fine imposed by the Commissioner was less than 10% of the value and needs to be enhanced and a higher quantum of penalty needs to be imposed under Section 112 (a) and 114AA of the Customs Act, 1962, commensurate with the value of the confiscated goods. The stay application has also been filed by the Revenue seeking of stay of the operation of the impugned order. The cross objections were filed by the importer in the Revenue's appeal.

6. We, find the following four issues are to be decided :-

(1) whether the assessment of the bills of entry filed by the appellant/importer as per the declared value was correct or whether the value should have been enhanced as proposed in the show cause notice ;

(2) whether the confiscation of the goods under Section 111 (m) of the Customs Act, 1962 was correct and if so, whether the redemption fine of Rs. 90 lakhs imposed by the Commissioner is correct ;

(3) whether the imposition of penalty of Rs. 10 lakhs under Section 112 (a) is correct and adequate or it needs to be set aside or enhanced ;

(4) whether the imposition of penalty of Rs. 10 lakhs under Section 114AA of the Customs Act, 1962 on the importer is correct and adequate or it needs to be enhanced or set aside.

7. Of the four issues, as far as the imposition of penalty under Section 114AA is concerned, we find that no such proposal was made in the show cause notice dated 27.02.2017 and, therefore, the same needs to be set aside and we do so.

**<u>Valuation and assessment of duty</u>** :-

8. The appellant had described the goods which it imported as "Embroidery Beads/Stones" and the test reports received from

CIPET, Haldia showed that they were Embroidery Beads/Stones (plastic content of acrylic/ABS/BS &ABS, ABS & PMMA). The Commissioner observed in the impugned order that the test results from CIPET mis-match of the description of the goods provided in the bills of entry by the importer. From a plain reading of the two descriptions, it is clear that the description in the test report is only more elaborate and describes the composition of the goods. It nowhere says that the imported goods were not Embroidery Beads/Stones, therefore, by no stretch of imagination can the importer's action be called mis-declaration of the goods. For instance, if a consignment is described as shirts and on testing we found to be shirts made of cotton or polyester it does not mean that they were mis-declared. While assessing the bill of entry, if the assessing officers were not satisfied with the description and wanted more details, they could have sought there from the importer. It is evident from the test report and the description of the goods as recorded in the impugned order itself that the goods were exactly as they were described. Coming to the rejection of the declared value and re-determination of the value as proposed in the show cause notice, it is based on :

(a) the Circular of DGOV (Directorate General of Valuation), and

(b) Office Note of the SIB of the Commissionerate.

9. We find that the Office Note of the SIB is based on the DGOV Circular. It does not deal with the specific importer or import consignments in dispute. The DGOV Circular categorically

holds that if there are reasons to doubt the truth and accuracy of the declared values, valuation has to be done as per the Customs Valuation Rules, 2007. In the show cause notice no reason has been given to doubt the truth and accuracy of the declared value.

10. DGOV's letter also clarified that in no case can a price be considered as minimum base price for assessment. The relevant paragraphs are as follows :-

> "(v) The concerned appraising group should conduct market enquiry periodically, to ascertain the relationship between declared prices and market retail prices. In cases where the assessing officer has doubt that the cost of raw material of the imported goods is more than that of the declared value of the goods, the officer shall take necessary steps consistent with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 including Rule 7 of ibid Rules.
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> 13. The price taken in above paragraphs of this alert is only an illustration for the purpose of comparison of import prices to price of raw material used in the manufacturing of resultant product and it does not include any manufacturing cost and other overheads. In no case that price can be considered as minimum base price for the purpose of assessment of plastic products. The customs formations need to resort to appropriate rules of valuation for re-determination of value for the assessment purpose, in cases where the declared value is rejected under the Rule 12 of the Valuation Rules, 2007.
>
> 14. Each case should be examined on its merit for acceptance or otherwise of the declared value. When there are reasons based on the information obtained during scrutiny of the documents for doubting the truth and accuracy of the declared values; the field formation may take necessary steps consistent with the Customs Valuation Rules, 2007 for rejection or acceptance of the declared value, as the case may be, at the time of assessment of such goods.

11. We find from the findings of the learned Commissioner that he was correct in coming to the conclusion that transaction value in these cases cannot be rejected and assessment cannot be finalized as per the Office Note of the SIB. Valuation has to be

done as per Section 14 of the Customs Act, 1962, i.e. as per the transaction value and if there is reason to doubt the truth and accuracy of the transaction value the reason has to be recorded and after rejecting the transaction value, the correct value should be determined as per the Customs Valuation Rules. There is not even a suggestion in the show cause notice that the transaction value of the imported consignments was not correct or there was relationship between the buyer and seller or that there was any additional consideration for sale or the value was manipulated in any other manner. Therefore, the learned Commissioner was correct in accepting the value declared by the importer and ordering finalization of the provisional assessment accordingly.

**Confiscation of the goods under Section 111 (m) and imposition of redemption fine** :-

12. Learned Commissioner has, in the impugned order, held that the appellant has mis-declared the goods and the description of the goods in the bills of entry was "Embroidery Beads/Stones" whereas they were found to be "Embroidery Beads/Stones (Plastic content of Acrylic/ABS/PS & ABS/ABS & PMMA) in the test report. The proposal for confiscation under Section 111 (m) in the show cause notice was on the ground that there was mis-declaration of value. Paragraph 12 (ii) of the show cause notice reads as follows:-

> "12 (ii) The subject goods should not be confiscated under Section 111 (M) of Customs Act, 1962 for mis-declaration of value as mentioned above".

13. Since, there was no mis-declaration of value as has been correctly found by the learned Commissioner, the confiscation of the goods cannot be sustained on another ground that the description of the goods did not match with that in the test report. We further find that the description of the goods in the test report was only an elaboration of the description already given in the bills of entry and nothing else. This cannot be called a mis-declaration of the description of the goods. Therefore, confiscation of the goods under Section 111 (m) and imposition of penalty under Section 125 cannot be sustained and need to be set aside.

**Imposition of penalty under Section 112 (a)** :-

14. The penalty under Section 112 (a) is imposable for acts or omission which render goods liable for confiscation under Section 111. Since we found that the confiscation cannot be sustained neither can be the penalty under Section 112 (a).

**Penalty under Section 114AA of the Customs Act** :-

15. In the impugned order the penalty of Rs. 10 lakhs was imposed upon the importer under Section 114AA but no such proposal was made in the show cause notice and, therefore, it is beyond the show cause notice and cannot be sustained and the same is liable to be set aside. We further find that no mis-declaration of goods or value has been established in the present case and for this reason also penalty under Section 114AA cannot be sustained.

16. In view of the above, we find that the impugned order cannot be sustained and needs to be set aside and we do so. The impugned order is set aside and the importer's appeal is allowed with consequential relief, if any. Revenue's appeal is rejected. The stay application filed by the Revenue stands disposed of. The Cross Objection filed by the importer in Revenue's appeal also stands disposed of.

(Order pronounced on 16/12/2021).

Sd/

**(P.K.CHOUDHARY)**
**MEMBER(JUDICIAL)**

Sd/
**(P.V. SUBBA RAO)**
**MEMBER (TECHNICAL)**