IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: C/1029 to 1034 & 1040 to 1043/2009

[Arising out of Order-in-Original CAO No: 114 dated 29th July 2009 passed by the Commissioner of Customs (Imports), Mumbai.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Venus Traders
Rainbow International
AL-Yaseen Enterprises
Globe International
Krishna Export Corporation
Precision Impex
BMC Spinners Pvt. Ltd.
Shivam Traders
Leela Woolen Mills
M. U. Textiles … ***Appellants***

versus

Commissioner of Customs (Imports)
Mumbai …***Respondent***

Appearance:

Shri Anil Balani, Advocate for appellant nos. 1, 4 and 5 and none for other appellants

Ms PV Sekhar, Joint Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 09/07/2018
Date of decision: 06/11/2018

ORDER NO: A/87839-87848 / 2018

Per: C J Mathew

We dispose off nine appeals by this common order as the issues involved, arising from the same order-in-original CAO no. 114 dated 29th July 2009 passed by Commissioner of Customs (Imports), New Custom House, Mumbai, are identical. The matter is before us for the second time. On the former occasion, the dispute had been remanded to enable proper valuation of the goods for determination of fine and penalties, besides placing the appellants on notice of the 'margin of profit' as computed by the adjudicating authority in a fresh decision.

2. Shri Anil Balani, Learned Counsel appears for three of the appellants while others are unrepresented. We have heard the Learned Counsel as well as Learned Authorised Representative. The issue pertains to imports of 26 consignments of 'old and used garments' which were declared as 'pre-mutilated and fumigated'. On random examination of one bill of entry no. 12032/28.10.96 of M/s

HS Overseas, it was found that the consignment comprised 'serviceable garments' as well as rags that had not been properly mutilated as per the norms permitting such clearance. In the fresh proceedings, relying upon a market survey conducted on 20th January 2007, the goods were held to be liable for confiscation under section 111(d) and 111(m) of Customs Act, 1962 and, though the goods were not available for confiscation, redemption fine of 138%/148%, as the case may be, was determined in addition to imposition of penalty of 25% of the value determined for each of the consignments.

3. The appellants challenged the validity of the market survey conducted in 2007 for determination of margin of profit in goods that had been imported in 1996 and the legality of ascertainment of assessable value of the goods through market survey that is not provided for in the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 or the successor Rules of 2007. It is the contention of Learned Authorised Representative that the manner of ascertainment did not have to be compliant with the Rules framed under section 14 of Customs Act, 1962 as the proceedings were not intended for determining duty liability but to ascertain fair redemption fine and penalty.

4. We find that proceedings initiated against most of the imports commenced even before the filing of bills of entry. In these circumstances, invoking of section 111(m) which applies to

> *'111(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;'*

does not appear to be in conformity with law. Confiscation of goods is empowered when material particulars are withheld or incorrectly recorded in the declaration which, for the purpose of section 111 of Customs Act, 1962, is the bill of entry. Therefore, whatever would be the finding on the description or value, section 111(m) is not liable to be invoked in the absence of a declaration.

5. Confiscation under section 111(d) has been invoked for import of 'old and serviceable garments' without an import licence as prescribed under chapter 2 of the Foreign Trade Policy. Want of such licence is not disputed by the appellants. Consequently, confiscation under section 111(d) of Customs Act, 1962 in the impugned order cannot be faulted. Release of confiscated goods to the importer is contingent upon fine *in lieu* imposed under section 125 of Customs Act, 1962. The redemption fine is not, in terms of the statute, permitted to exceed the market price of the goods and the undertaking of a survey is not improper. However, such a survey, more than a decade after the import and, that too, after remand was ordered by the Tribunal, does not appear to the intent of the decision of the Tribunal. The remand order is specific in directing that the margin of profit,

ascertained for computation of the fine, should be made known to the appellant. It is, therefore, the manner in which the original authority had, in the first instance, ascertained the margin of profit that was required to be supplied to the appellants. The original authority has patently failed to do so and has tried to rectify the deficiency of such ascertainment by a process that is not only bereft of validity but also inconsistent with the remand order. The Tribunal, in its remand order, had allowed determination of value of mis-declared goods. That part of the remand order appears impossible to comply with *ex post facto* in the light of the finding that

> *'4. From the examination report (only one consignment was subjected to 100% examination on first check basis), which was already on record it appeared that imports in these cases were of a mixed lot consisting of used garments and also 40% to 50% mutilated single cut garments.*
>
> *xxxx*
>
> *20. Before proceeding further it is pertinent here to state that the exact description and quantity of goods, container wise, cannot be determined at this stage since no 100% examination of all containers was done at the time of clearance of goods. At any event all the importers had agreed during the personal hearing conducted by the then Commissioner of Customs (I), that the impugned goods were either old and used garments other than rags or they were not mutilated as per the norms laid down in this regard. It is on this agreement for the nature/description of goods, that we have to proceed further in this case. As regards the margin of profit, a market survey was done whose salient features are*

as follows:'

in the impugned order.

6. Though the appellants question the margin of profit and the validity of market survey, there is no serious resistance to the ascertained value.

7. Considering the various issues and submissions made and the failure of the original authority to comply with the direction in remand to disclose the margin of profit that prompted the fine and penalty, the matter would normally have to be remitted back by another remand order. However, the paucity of evidence and the negligible scope for ascertainment at this stage deters us from doing so. In the light of the admitted failure to comply with the licensing requirements, we uphold the confiscation of the goods under section 111(d) of Customs Act, 1962. However, it is our opinion that the ends of justice would be served by reducing the redemption fine to 10% of the ascertained value and penalty to 5%.

8. With the above direction we dispose of the appeals.

(Pronounced in Court on 06/11/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as08101010*