

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

APPEAL NOS: C/768 & 769/2011

[Arising out of Orders-in-Appeal No: 419 (Gr IIG)/2011 (JNCH)/IMP-348 and No. 420 (Gr IIG)/2011 (JNCH)/IMP-349 both dated 23rd September 2011 passed by the Commissioner of Customs (Appeals), Nhava Sheva.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)

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

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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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Yash Corporation

... Appellant

versus

Commissioner of Customs (Import)
Nhava Sheva

...Respondent

Appearance:

Shri Anil Balani, Advocate for appellant

Shri MK Mall, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 08/08/2018
Date of decision: 11/12/2018

ORDER NO: A/ 88089-88090/2018

Per: C J Mathew

These two appeals of M/s Yash Corporation are against order-in-appeal no. 419 (Gr.IIG)/2011 (JNCH)/IMP-348 dated 23rd September 2011 pertaining to imports against bill of entry no. 755301/23.07.2010 and no. 420 (Gr IIG)/2011 (JNCH)/IMP-349 dated 23rd September 2011 pertaining to bill of entry no. 755300/23.07.2010 and no. 760469/23.07.2010 which were held liable to confiscation under section 111 (m) of Customs Act, 1962 following a finding of mis-description with consequential enhancement of assessable value and imposition of penalty under section 112 of Customs Act, 1962 that were upheld by Commissioner of Customs (Appeals), Jawaharlal Nehru Custom House, Nhava Sheva in the impugned orders.

2. While the importer contended that the 'adhesive coated jumbo rolls' were 'off cut/odd lot', the lower authorities have held these to

be of prime quality and thus mandating a higher assessable value. The report on physical examination of the goods that, though comprising of five or six different widths, numerous rolls of consistent dimensions and grades was relied upon, along with the admission of the proprietor of importer-entity, to arrive at the conclusion of mis-declaration. The detriment of enhancement of value to ₹ 17,58,372, with differential duty liability of ₹ 2,89,703, fixation of fine of ₹ 5,00,000 in lieu of confiscation and penalty of ₹ 1,00,000 and enhancement of value to ₹ 18,40,882, with differential duty liability of ₹ 3,33,790, fixation of fine of ₹ 5,00,000 in lieu of confiscation and penalty of ₹ 1,00,000 is now under challenge.

3. The primary contention of Learned Counsel for appellant is that the goods had been imported directly from the manufacturer who had also certified that the 'film' was incompatible with their deckle machines and that there is no allegation of any additional consideration being made over to the suppliers. It is also his contention that the first appellate authority had failed to take note of their submissions on the inappropriateness of the value adopted as well as the disproportionate fine and penalty that had been imposed on them. Reliance is placed by him on the decision of the Tribunal in *Sai Impex v. Collector of Customs* [1992 (62) ELT 616 (Tribunal)] that was upheld by the Hon'ble Supreme Court, in *Inderjit Singh Bawa v. Collector of Customs, Bombay* [1995 (78) ELT 122 (Tribunal)] and in

Finacord Chemicals (P) Ltd v. Commissioner of Customs, Raigad [2003 (157) ELT 537 (Tri-Mumbai)] on the strict compliance with the rules of valuation in the matter of goods that are accompanied by invoice issued by the manufacturer.

4. We have heard Learned Authorised Representative in his ardent defence of the impugned order. On perusal of the records, we find that the appellant had declared the first of the consignments as 'plain plastic film' and the other two consignments as 'adhesive coated jumbo rolls' with unit price of US \$425/kg and US \$ 450/kg respectively. Even though the manufacturer-supplier did, in their communication, clarify the nature of the goods, the appellant has not been able, either before the first appellate authority or before us, to controvert the findings that rolls were consistent dimensions in the imported consignment. In those circumstances, we are unable to accept the contention that categorisation at the manufacturer's end prevails over the physical examination that has been acknowledged by the proprietor of the importing entity.

5. There is no doubt that, following a finding of superior quality, the declared value stands on very weak foundations. However, the findings of the original authority on the value adopted, to the extent not dealt with in the impugned orders but assumed to merge therewith, lack the rigour that is mandated by Customs Valuation (Determination

of Value of Imported Goods) Rules, 2007;

6. The original authority has relied on certain bills of entry but has failed to record the details of such. The scale, source and description of import have not been examined. It would appear, from a conspicuous absence of reference in the orders of the two lower authorities, that the proceedings were not preceded by show cause notices in which the importer was placed on notice of the evidence to be used against them. The records also do not bear out any means of verifying the manner in which the enhanced assessable value has been arrived at.

7. It is also seen that the first appellate authority has discarded the contentions made on behalf of the importer that the fines and penalties are excessive. The logic of the first appellate authority in discarding this contention on the ground that the same had not been made before the original authority is incomprehensible; in the absence of a show cause notice, coupled with the impossibility of knowing beforehand the findings of the original authority, it is well-nigh impossible to expect the importer to make a submission to counter those. That could only have been raised on proceedings before the first appellate authority.

8. The appellant did present a detailed computation on the negative margin of profit arising from the imposition of excessive fine

and penalty. The first appellate authority appears to have placed more emphasis on the discretionary power to determine the quantum of fine and penalty instead of considering the computations offered by the appellant.

9. In our opinion, these flaws in the order of the first appellate authority deprives it of legality and propriety that must be rectified. In order to enable that exercise to be carried out, we set aside the impugned order and remand the matter back to the original authority for a fresh decision duly that is in consonance with section 14 and section 125 of Customs Act 1962. As it appears that no show cause notice has been issued, the appellant is at liberty to produce any evidence in the fresh proceedings to support their contention that the goods are not 'prime'.

10. Appeals are, accordingly, disposed off.

(Pronounced in Court on 11/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)

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