

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. C/763/2011

(Arising out of Order-in-Original No. 50/2011/CC(I) JNCH dated 29.7.2011 passed by Commissioner of Customs (Imports), JNCH, Nhava Sheva)

Foremost Marbles Pvt. Ltd.

Appellant

Vs.

Commissioner of Customs (Import), Nhava Sheva Respondent

Appearance:

Shri Jhamman Singh, Advocate, for appellant

Shri Ramesh Kumar, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 20.12.2018

Date of Decision: 20.12.2018

ORDER No. **A/88308/2018**

Per: Sanjiv Srivastava

The appeal is directed against order in original No 50/2011/CC((1), JNCH dated 29.07.2011 of the Commissioner of Customs (Imports) Jawaharlal Nehru Customs House Nhava Sheva. By the said order Commissioner has held as follows:

"ORDER

14. *In view of the above discussions and findings, I pass the following order:-*

(i) I reject the declared transaction value of Rs.83,72,355/- (Rupees Eighty Three Lakh Seventy Two Thousand Three Hundred Fifty Five only) under Rule 12 of CVR, 2007.

(ii) I re-determine the value of the goods, i.e., imported vide 05 Bills of Entry detailed at para 1 above collectively as Rs.91,94,288/- (Rupees Ninety One Lakh Ninety Four Thousand Two Hundred Eighty Eight only) as against the declared value of Rs.83,72,355/- (Rupees Eighty Three Lakh Seventy Two Thousand Three Hundred Fifty Five only) under Rule 5 of CVR, 2007.

(iii) I confiscate 561.73 MTs of 'Rough marble blocks', imported vide 05 Bills of Entry detailed at para 1 above having a collectively re-determined value of Rs.91,94,288/- (Rupees Ninety One Lakh Ninety Four Thousand Two Hundred Eighty Eight only) under Section 111(d) & 111(m) of Customs Act, 1962.

(iv) However, I give an option to the importer to redeem the goods having a total collectively value of Rs.91,94,288/- (Rupees Ninety One Lakh Ninety Four Thousand Two Hundred Eighty Eight only) on payment of fine of Rs.32,00,000/- (Rupees Thirty Two Lakh only), in lieu of confiscation under Section 125(1) of the Customs Act, 1962. In case the option to redeem the goods is exercised by the importer, the impugned goods will be released only after payment of appropriate duty as applicable. The redemption option is to be exercised by the importer within 30 days from the date of issuance of this order.

(v) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakh only) on the importer i.e. M/s. Foremost Marble Private Limited under Section 112(a) of the Customs Act, 1962."

2.1 Appellants had filed Bill of Entries as per table 1 for import clearance of Rough Marble Blocks. The goods were examined on first check basis by docks and the goods were found to be as declared.

Table 1		Details of Bill of Entries				
Bill of entry		Quantity MT	Declared Price/MT		Assessable Value' Rs	
No	Date		FO B' Euro	CIF' USD	Declared	Re-determined
3851199	21.06.11	227.82	200	332.75	3495283	3728914
3851216	21.06.11	127.45	200	317.66	1866682	2086077
3851193	21.06.11	50.90	200	317.71	745612	833121
3851558	21.06.11	75.96	200	317.86	1113242	1243299
3851209	21.06.11	79.60	200	316.48	1151536	1302877
Total		561.73			8372355	9194288

2.2 Revenue objected to the Bill of Entry on two accounts viz,

- (i) The imports were restricted and may be permitted subject to the import licensing procedures;
- (ii) The goods were undervalued on the basis of the value noticed in respect of contemporaneous import.

2.3 Since appellants had waived of the requirement of Show Cause Notice, Commissioner adjudicated the matter after affording the opportunity of personal

hearing to the appellants. The text of the order of Commissioner is as per para 1, supra.

2.4 Aggrieved by the order of Commissioner, appellants have filed this appeal.

3.1 In their appeal appellants have challenged the order of the Commissioner,

- i. In respect of valuation by placing reliance on decision of Tribunal in case of [2004 (171) ELT 334 (T-Del)], Marga Industries Ltd [2007 (216) ELT 710 (T-Del)], Pushpanjali Silk Pvt Ltd [2009 (238) ELT 135 (T-Chennai)].
- ii. For imposition of penalty relying on the decisions in case of Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)], Rajasthan Udyog [2008 (222) ELT 366 (Raj)], S B Packaging Ltd [2008 (223) ELT 360 (P & H)], Hindustan Polyester Lines [2010 (250) ELT 356 (P&H)], Hindustan Steel Ltd [1978 (2) ELT J159 (SC)]. Since they were under bonafide belief and the issue was in respect of interpretation the penalty should not have been imposed.
- iii. On confiscation and imposition of redemption fine, Commissioner has failed to cite specific provisions in support of prohibition and/ or restriction under Foreign Trade Policy hence the goods should not have been held to be liable for confiscation.

Further Commissioner has imposed excessive redemption fine without even determining the margin of profit, hence the order imposing the redemption fine is bad in law.

4.1 We have heard Shri Jhamman Singh Advocate for the Appellants and Shri Ramesh Kumar, Assistant Commissioner (Authorized Representative) for revenue.

4.2 Arguing for the Appellant learned Counsel submitted that this Tribunal has in following decisions held that there was no justification for redetermination of the assessable value in the present case as in all the cases the declared CIF value was much above the floor price prescribed by the DGFT. He relied on the following decisions-

- i. Marble Art [2013 (289) ELT 346 (T)]
- ii. Pushpanjali Silk Pvt Ltd [2009 (238) ELT 135 (T-Chennai)]
- iii. Agarwal Marbles India (P) Ltd [2017 (350) ELT 262 (T)]
- iv. R K Marble Pvt Ltd [2009 (245) ELT 383 (T-Del)]

4.3 Learned Authorized Representative, submitted that Commissioner was correct in enhancing the value of the goods imported on the basis of the values noticed in case of contemporaneous imports. He referred to para 10 to 12 of the order of the Commissioner, where Commissioner has recorded the reasons for rejection of

the declared value and for enhancement of the same. He also referred to para 8 of the order where Commissioner has specifically recorded that the goods have been imported in contravention of the restrictions imposed under the Foreign Trade Policy. He submitted that since appellant have imported the goods in contravention of the provisions of policy the goods have been rightly held to be liable for confiscation under Section 111 (d) and for the misdeclaration of value under Section 111 (m). Since the goods were rightly held liable for confiscation the redemption fine imposed too is justified. He supported the order of Commissioner in respect of imposition of penalty.

5.1 We have considered the submissions made in the appeal memo and during the course of argument of appeals.

5.2 It is settled law that the value for determination of Custom Duty in terms of Section 14 of The Customs Act, 1962 is based on the transaction value between the buyer and seller in course of international trade. It only when the transaction value is rejected or cannot be determined that value has to be determined by application of Rule 4 to 9 of Customs Valuation (determination of Value of Imported Goods) Rules, 2007. In terms of the rule 5 the value can be based on the value of contemporaneous imports. In para 11,

Commissioner has referred to following Bill of Entries to determine the value of contemporaneous imports.

Table 2: Bill of Entries for contemporaneous imports			
Bill of Entry No & Date	Quantity' MT	Unit US\$/MT	Price'
3160932 dated 08.04.2011	129.100		365
3191032 dated 12.04.2011	141.018		369
3291251 dated 23.04.2011	27.520		355
3408121 dated 04.05.2011	73.800		357

5.3 Contemporaneous imports for the purpose of Rule 5 can be those imports which are made on or about the same time. In the present case adoption of value in reference to imports made nearly two months back cannot be correct reflection of value of contemporaneous imports. When the compared imports are nearly two months old, and also no similarity has been established vis a vis the country/ place from where imported and quality and quantity the same cannot be said to be contemporaneous imports. Further no reasons have been recorded by the Commissioner for rejecting the transaction value. In case of Motor Industries Co Ltd [2009 (244) ELT 4 (SC)], Hon'ble Supreme Court after referring to its decision in case of Eicher tractors Ltd [2000 (122) ELT 321 (SC)] held as follows:

11. In the case of *Eicher Tractors (supra)* which has been relied upon by the Mr. Vellapally appearing for the assessee as also by the first appellate authority, it has been held that the transaction value has to be accepted subject to the exceptions contained in Rule 4(2) of the Rules by recording special or extraordinary reasons. Neither the adjudicating authority nor the Tribunal has recorded such reasons. Instead of referring to all the above decisions of this court, we may refer to a decision of this Court in the case of *South India Television (P) Ltd. (supra)* wherein it has been held:

".....Therefore, the transaction value under Rule 4 must be the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or for offer for sale. Therefore, what has to be seen by the department is the value or cost of the imported goods at the time of importation, i.e., at the time when the goods reaches the customs barrier. Therefore, the invoice price is not sacrosanct. However, before rejecting the invoice price the department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price

has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods. Undervaluation has to be proved. If the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the department wants to allege undervaluation, it must make detailed inquiries, collect material and also adequate evidence....."

12. As mentioned above, no special or extraordinary reasons have been recorded for rejecting the transaction value. It is settled law that unless transaction value is rejected for extraordinary or special reasons, the same has to be accepted.

5.4 Thus we are inclined to agree with the appellants that rejection of the transaction value in this case and enhancing the value of the imported goods on the basis of so called contemporaneous imports cannot be justified in this case. Similar view has been expressed by the tribunal in case of Marble Art [2013 (289) ELT 346 (T)], Pushpanjali Silk Pvt Ltd [2009 (238) ELT 135 (T-Chennai)], Agarwal Marbles India (P) Ltd [2017 (350) ELT 262 (T)], R K Marble Pvt Ltd [2009 (245) ELT 383 (T-Del)].

5.5 In respect of the violation of the provisions of Foreign Trade Policy, Commissioner has in para 8 of his order recorded as follows:

"8. The importer i.e. M/s. Foremost Marble Private Limited has again imported 'Rough Marble Blocks' vide Bills of Entry

detailed at para 1 above. As per the DGFT Notification No.36/2009-2014 dated 31.03.2010 and under Foreign Trade Policy 2009-2014, Import of Rough Marble Blocks is restricted and may be permitted for import subject to the import licensing procedures and at the floor price of US\$ 275 PMT (minimum unit floor price prescribed by DGFT). It is seen that the entire quantity of the goods covered vide 05 Bills of Entry detailed at para 1 above have been imported without any specific license. As the import of the impugned goods is restricted, such importation without possessing the valid import license is in violation of the provisions of the [FTP 2009-2014](#), thereby, rendering the impugned goods liable to confiscation under Section 111(d) of the Customs Act, 1962 read with Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (the FTDA, 1992, for brevity)."

5.6 We do not find any challenge to the said findings recorded by the Tribunal. DGFT Notification No 36/2009-2014 dated 31.03.2010, clearly states about the restrictions and requirement of license for the import of "Rough Marble Blocks". The relevant paragraphs of the said Notification are reproduced below:

"NOTIFICATION NO. 36/2009, DT. 31/03/2010

Policy for issue of import licences of Rough Marble Blocks for the Financial year 2010-11.

S.O. (E) In exercise of powers conferred under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 2.1 of the Foreign Trade Policy, 2009-14, the Central Government hereby makes the following amendments in Schedule-I (Imports) to the ITC (HS) Classifications of Export and Import Items:

2. *Import Licensing Note No. (2) inserted at the end of Chapter 25, will be amended to read as follows:*

(A) A number of representations have been received from the various Associations of marble manufacturers/processors for review of the regime governing import of marble. The matter has been considered carefully by the Government. The following Policy provisions will henceforth be applicable for import of Rough Marble Blocks for the financial year 2010-11. This Policy will supersede earlier Policy /Guidelines for issue of import licences of Rough Marble Blocks.

(B) Attention is invited to EXIM Code Nos. 25151100 and 25151210 indicated in Schedule-1 (Imports) of ITC (HS) Classifications of Export and Import Items. As per the provisions contained therein, import of Marble and Travertine - Crude or Roughly trimmed and merely cut, by sawing or otherwise, into blocks of a rectangular (including square) shape is restricted and subject to import licensing procedures.

(C) The applications for import licence for import of rough marble blocks under the above mentioned EXIM Codes will be considered in the following manner: -

I. Eligibility of the units will be decided based on the following two criteria:

(a) Units who have installed marble gangsaw machine (except 100% EOUs and units in SEZ) on or prior to 23.10.2009. The marble gangsaw machine shall be in the name of the applicant only. No gangsaw on "Lease Basis" shall be considered for the purpose of allocation of import entitlement.

The Units should have been in operation for 5 years prior to 1st April of the current licensing year, 2009-10.

(b) All eligible units as per (a) above should have indigenous sales turnover of processed marble slabs/tiles only, of Rs. 1.00 Crore (Rupees one Crore only) and above in each of the previous five financial years (i.e. for the financial years 2004-05 to 2008-09).

II. Floor Price-

It is further clarified that these licences for import of crude or roughly trimmed marble blocks or Merely cut, by sawing or otherwise into blocks of a rectangular (including square) shape shall be subject to a floor price of US\$ 275 per Metric Tonne (MT), which shall be endorsed on all licences.

III. Entitlement:

The total import of Rough Marble Blocks under EXIM Code Nos. 25151100 and 25151210 will be subject to a ceiling of 3 lakh MT for the whole of the licensing year, 2010-11. Eligible unit will be entitled for an import licence on the basis of average indigenous sales turnover of processed marble slabs/tiles only, in the previous five financial years. The quantity so calculated will however be subject to the following overall ceiling: -

(a) Unit having one marble gang saw machine will be entitled for a maximum licence of 3,000 MT of rough marble blocks;

(b) Units having more than one marble gang saw machine will be entitled for a maximum licence of 3000 MT of rough marble blocks for the first gang saw machine, and 1500 MT of rough marble blocks for each of the additional marble gang saw machines.

IV. All licences shall be subject to actual user condition.

V. In this regard, Licence holders shall file monthly returns regarding imports made by them, to the concerned Regional Authority of DGFT.

VI. The eligible applicants may file an application (after the applications are so invited for the said licensing year) in the form given in 'Aayaat Niryaat Form' together with all relevant documents, to the concerned Regional Authority of DGFT. The eligibility of the applicants with respect to para 2(C)I above shall be decided principally based on verification/certificate from the concerned State Government. RA concerned would forward the applications of eligible applicants to DGFT, HQ for further consideration. For verification of the eligibility and entitlement, the RA shall be guided by Policy Circular No.20 (RE-08)/2004-09 dated 16.7.2008, Policy Circular No.25 (RE-08)/2004-09 dated 8.8.2008 and Policy Circular No. 12/2009-14 dated 23.10.2009 regarding the required documents, with appropriate timelines.

3. This issues in public interest."

5.7 From the reading of above notification it is quite evident, that it provides for entire scheme of licensing of import of Marble Blocks. It not only provides for the scheme of licensing but allows the license to be issued subject to actual user condition. It also provides for a mechanism of application for grant of license and also for monitoring of the imports made in terms of the license. By undertaking the imports of Rough marble Blocks, without proper import license appellants have contravened the provisions of Foreign Trade Policy read with Foreign Trade Regulation Act, 1993 and thus have

rendered the goods liable for confiscation under Section 111(d) of the Customs Act, 1962. Same view has been expressed by the tribunal in case of Agarwal Marbles India (P) Ltd [2017 (350) ELT 262 (T)], R K Marble Pvt Ltd [2009 (245) ELT 383 (T-Del)].

5.8 Thus the order of the Commissioner confiscating the goods cannot be faulted with. Commissioner has after confiscating the imported goods allowed them to be redeemed by the importer on payment of redemption fine of Rs 32,00,000/- (Rupees Thirty Two Lakhs only). In our view the redemption fine is not very excessive and we uphold the same.

5.9 In the arguments appellants have relied upon various decisions, to argue against the penalty imposed, In the present case there is deliberate contravention of the provisions of the Foreign Trade Policy. Licensing requirements cannot be a matter of interpretation. In his order Commissioner has while recording the personal hearing stated *"During the personal hearing, Shri Nimesh Suchde stated that the importer is not able to obtain license because the DGFT is not issuing the licenses. Earlier they had license and imported accordingly. In order to keep the business running, they are continuing import."* This submission made before the Commissioner itself shows that the appellants were aware of the licensing requirement, and had

deliberately/ knowingly violated the same by continuing to import the said goods without obtaining the license. We do not merit in any submission of the appellants that they were acting under bonafide belief or the issue was in relation to interpretation of taxing statute. The decisions relied upon by the appellants do not serve their cause because none of the decisions says that in case of deliberate violation of the policy penalties should not be imposed. Even in the decisions referred by the appellant i.e in case of Agarwal Marbles India (P) Ltd & R K Marble Pvt Ltd, supra, Tribunal has upheld the imposition of penalty. In our view the penalty of Rs 10,00,000/- (Rupees Ten Lakhs only) imposed by the Commissioner in his order is not excessive and needs to be maintained.

6.1 In result we allow the appeal filed to the extent of modifying the order of Commissioner in relation to enhancing the value of imported goods. Apart from the said modification the order of Commissioner is upheld. The appeal is disposed off accordingly.

(Pronounced in court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)