

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

APPEAL NOS: C/915 to 917 & 947/2009

[Arising out of Orders-in-Original No: 94/2009/CAC/CC(I)/SHS/Gr.III and 93/2009/CAC/CC(I)/SHS/Gr.III both dated 3rd June 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 |
-
-

Rajesh Gandhi
Shri Nageshwar Enterprises
Modern Embroideries

... Appellants

versus

Commissioner of Customs (Import)
Mumbai

...Respondent

Appearance:

Shri JH Motwanit with Shri Chirag Shetty, Advocates for appellants
Shri Ahibaran, Additional Commissioner (AR) Bhushan Kamble,
Assistant Commissioner (AR) for respondent

CORAM:

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

Date of hearing: 01/01/2019
Date of decision: 25/02/2019

ORDER NO: A/85365-85368 / 2019

Per: C J Mathew

These four appeals impugning two orders-in-original of Commissioner of Customs (Import), New Custom House, Mumbai are disposed off in the present proceedings as the facts and circumstances are identical. M/s Modern Embroideries and M/s Nageshwar Enterprises had imported 'silver polyester metal yarn (1/64)' and 'polyester metallic yarn (kasab)' that was determined to be substantially undervalued leading to confirmation of differential duty and imposition of penalty on the importers, as well as on Shri Rajesh Gandhi, a partner in both the enterprises.

2. Imported goods, found in the premises of M/s Shri Nageshwar Enterprises and weighing 3084.43 kgs, declared to be worth ₹10,20,600 but valued at ₹ 44,41,986 on seizure during investigations, was confiscated but allowed to be redeemed on payment of fine of ₹11,00,000 and discharge of duty liability of ₹ 10,94,576. The value of goods imported between 2005-06 and 2007-08, invoiced at

₹2,32,30,277 was enhanced in the impugned order to ₹ 7,61,34,473 with differential duty of ₹ 1,56,18,996 besides being saddled with penalty under section 114A of Customs Act, 1962. The goods seized from the premises of M/s Modern Embroideries, with declared value of ₹ 9,23,603, was revalued to ₹ 20,02,985 with consequent differential duty of ₹ 2,64,236 recoverable on redemption of the goods by payment of fine of ₹ 5,00,000 *in lieu* of confiscation. The value of the goods imported by them in 2006-07 and 2007-08, declared at ₹71,08,076, was enhanced to ₹ 1,55,52,057 and subjected to differential duty of ₹ 21,52,729 upon redemption from confiscation on payment of fine of ₹ 31,00,000. Besides the penalty imposed on the importer under section 114A of Customs Act, 1962, the partner found himself to be liable to penalty of ₹ 2,00,000. The partner, impacted by both impugned orders, is also in appeal.

3. The case of the Directorate of Revenue Intelligence, which undertook the investigation, was that the suppliers of the imported goods had been persuaded to arrange documents evidencing prices to be far less than the market value of US \$ 30-35 per kg to support the declaration of imports effected against bills of entry no. 762622/26.04.2007, 771474/05.06.2007 and 773684/14.06.007 filed by M/s Modern Embroideries and bills of entry no. 737470/11.01.2007, 764523/07.05.2007, 776645/28.06.2007 and

784160/04.08.2007 filed by M/s Sree Nageshwar Enterprises. It was also alleged that the goods were insured by the suppliers at values that, being in excess of the values declared for import, approximated the correct market price. The show cause notice also refers to emails and facsimile messages, as evidence of participation of the appellants in the conspiracy to misdeclare the value, besides adducing information culled from the internal memory of computers belonging to certain other persons. The whole of this evidence was mapped out as a pre-planned conspiracy to evade duty on goods by suppression of the consideration paid separately to Indian representatives of the suppliers from the unaccounted consideration received from buyers of the final products manufactured out of these imports which were also invoiced at prices well below the rates prevailing in the domestic market. The confessional statement of Shri Rajesh Gandhi was considered to suffice as evidence of this conspiracy to evade duty.

4. Learned Counsel for appellants submits that, of the many importers who had been subjected to proceedings under Customs Act, 1962, M/s Surat Metlon Pvt Ltd and M/s IS Corporation had succeeded in their appeals before the Tribunal *vide* order no. A/86514-86516/16/CB dated 17th March 2016 and that the evidence relied upon in the impugned orders were the same that the Tribunal found to be unacceptable therein as justification to demand differential duty. He also contends that the imported goods had been

offered for assessment and, without an appeal against such assessment, the issue of show cause notice for recovery is contrary to law. It is also contended that the value adopted fails the test being contemporaneous and that reliance on rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 was improper in the light of lack of evidence that the declared value was not the transaction value.

5. From the records, it would appear that the rejection of the values declared in the bills of entry, and the consequent confirmation of differential duty emanating from re-determination of value, is based entirely on the admissions in the statements of Shri Rajesh Gandhi recorded during the course of investigations. Learned Authorised Representative points out that the decision of the Hon'ble Supreme Court in *Surjeet Singh Chhabra v. Union of India* [1997 (89) ELT 646 (SC)] holding that

'3... It is true that the petitioner had confessed that he purchased the gold and had brought it.... Since the dispute concerns the confiscation of the jewellery, whether at the conveyor belt or the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross examine the witnesses is not violative of the principle of natural justice.... The confession, though retracted, is an admission and binds the petitioner.'

not only affirms the superfluity of cross-examination that had been sought from the lower authority by the appellants but also sanctifies the reliance placed on admissions in the statements to suffice for the findings. Furthermore, according to him, the Tribunal, in *Sangeeta Metals (India) v. Commissioner of Customs (Import), Nhava Sheva* [2015 (315) ELT 74 (Tri-Mumbai)], has held that

‘5.2 A confessional statement given before Gazetted Officer of Customs under Section 108 of the Customs Act is a valid piece of evidence under the Indian Evidence Act, as held by the Hon’ble Apex Court in Romesh Chandra Mehta v. State of West Bengal [AIR 1970 SC 940] and a lot of other decisions. Further in KI Pavunny v. Asst Collector of Central Excise [1997 (90) ELT 241 (SC)], the Hon’ble Apex Court held that-

‘In a criminal trial punishable under the provisions of the IPC, it is now well-settled legal position that confession conform the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculpatory the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code.’

The Hon’ble Madras High Court in the case of Govindasamy Raghupathy [1998 (98) ELT 50 (Mad)] and the Hon’ble Apex Court in the case of Systems & Components [2004 (165) ELT 136 (SC)] have held that- ‘It is a basic and settled law that what is admitted need not be proved.’ If we apply the ratio of these decisions to the facts of the present case, the transaction values admitted in the confessional statements of the importer and the commission agent can straightaway be adopted for determination of the value which escape the assessment and

further demanded differential duty liability. The argument of the appellant that the values contained in the export declarations made before Antwerp Customs should have been taken for the basis for determination of transaction value is not tenable for the reason the actual transaction value is available in the documents retrieved which has also been admitted by the appellant. Therefore, we do not find any infirmity in the adoption of values reflected in the computer printouts and the confessional statements as the basis for demand of differential duty in respect of the 13 B/Es.'

and is justified to be applied as precedent in the present dispute. He further claims that the decision of the Tribunal that

'11.... By and large, the two statements appeared to be consistent with each other and there is no significant conflict between the two. We find that a clear admission of undervaluation of the goods is reflected in the statements given by the importer under Sec. 108 of the Customs Act. It is also on record that certain payment was made voluntarily by them during the course of investigations. Therefore, we are not impressed with the plea made by the Id. Counsel that the first statement was retracted by the importer.'

in *Rahul Ramanbhai Patel v. Commissioner of Customs (Import), Mumbai [2010 (256) ELT 424 (Tri-Mumbai)]* is even more supportive of the case of Revenue with the statements of Shri Rajesh Gandhi containing unqualified admissions that had not been retracted at any stage. He submits that the decision of the Hon'ble Supreme Court holding that

‘3..... The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner....’

in *re Surjeet Singh Chhabra* is the seal of approval to discount the attempt by Learned Counsel to discredit the statements which have been relied upon in the impugned order for discarding the declared value and also to determine the enhanced value.

6. Before we proceed to adjudge the legality and propriety of the confirmation of differential duty, the confiscation and the imposition of penalties, the preliminaries must be dealt with. These pertain to the permissibility for invoking *proviso* to section 28 of Customs Act, 1962 without challenge to the assessment effected under section 17 of Customs Act, 1962 before the goods were cleared from control of customs authorities and the extent of applicability of judicial precedent from the decisions cited by Learned Authorised Representative.

7. The Tribunal, in *re Rahul Ramanbhai Patel*, as pointed out by Learned Authorised Representative, besides examining the relevancy of statements to fasten the consequences of undervaluation, did also consider the first *supra* and followed earlier decisions to render the finding that

'6..... One of the questions of law framed by the Hon'ble High Court reads thus:-

'Whether the Tribunal was right in holding that the order of assessment on which no appeal was preferred, can be reopened by issue of fresh show-cause notice under Section 28 A of Customs Act, in the light of the apex court's decision reported in 2004 (172) ELT 145 (SC) in the case of Priya Blue Industries Ltd v. Commissioner of Customs?'

The Hon'ble High Court answered the above question in favour of the Revenue in paragraph 6 of its judgement, which is reproduced below:-

'6. With regard to question No. 1, the law is well-settled that show-cause notice under the provisions of Section 28 of the Act for payment of customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance of goods under Section 47 of the Act vide Union of India v. Jain Shudh Vanaspati Ltd [1996 (86) ELT 460 (SC)]. Therefore, as rightly held by the Tribunal, if the contention of the appellant's counsel that when the goods were already cleared, no demand notice can be issued under Section 28 (1) of the Act is accepted, we will be rendering the words "whether any duty has been short-levied" as found in Section 28 (1) of the Act as unworkable and redundant, inasmuch as the jurisdiction of the authorities to issue notice under Section 28 of the Act with respect to the duty, which has been short-levied, would arise only in the case where the goods were already cleared. In view of the clear finding with regard to the misdeclaration and suppression of value, which led to the evaluation and proposed short-levy of duty, we do not see any lack of jurisdiction on the part of the adjudicating authority to issue notice under Section 28 (1) of the Act.'

7. We are told that the SLP filed against the above decision of the High Court was dismissed by the Apex Court [Venus Enterprises v. Commissioner-2007 (209) ELT A 61 (SC)].

8. We also note that this Tribunal followed Jain Shudh Vanaspati Ltd (supra) and Venus Enterprises (supra) in Ford

India Private Limited v. Commr of Customs, Chennai [2008 (228) ELT 71 (Tri-Chennai)]. On the other hand, in the cases of Hitaishi Fine Kraft Indus Pvt Ltd (supra) and Shimnit Machine Tools & Equipment Ltd (supra), the decision of the Supreme Court in Jain Shudh Vanaspati (supra) was not considered.

9. *In the result, we reject the plea made by the ld. Counsel that it was not open to the Department to reopen the assessment under Sec. 28 of the Customs Act.'*

8. Though in a different context, the *ratio* of the decision of the Tribunal in disposing off the appeal of *Knowledge Infrastructure Systems Private Ltd & Others v. Additional Director General, Directorate of Revenue Intelligence, Mumbai [final order no. A/86617-86619/2018 dated 31st May 2018]* is that after the clearances of imported goods effected under section 47 of Customs Act, 1962, subject as it is to satisfaction of the proper officer that the goods had discharged the appropriate duty liability and were not prohibited for import, subsequent discovery of non-eligibility for such clearance, on either of these two counts, deems such clearances to have been tentative, and rectifiable, under proceedings that invoke section 28 and/or specific provisions of section 111 of Customs Act, 1962, is unequivocally applicable here.

9. In the light of this consistent stand, demonstrated in judicial precedent reiterated across time and space, the claim of the appellant

that the assessment of the impugned goods at the time of clearance precludes any remedy other than appeal is not acceptable.

10. On the second aspect, we cannot but observe that the declared value has been rejected on the basis of admissions made in statements recorded from the partner of the importer-appellants. Again, we cannot fail to observe that the statements are founded on documents and evidence unearthed by the Directorate of Revenue Intelligence from a premises other than that of the appellants. As pointed out by Learned Counsel for appellants, these very evidences, relied upon in proceedings initiated against two other importers, viz., IS Corporation and Surat Metlon Pvt Ltd, covered by the same investigation were found by the Tribunal to be wanting to establish that imports of the same commodity were undervalued and that decision thereof has been accepted by Revenue, as recorded in the adjudication order of Assistant Commissioner of Customs, CRC-I, JNCH, while disposing off the show cause notice issued for rejecting the claim for refund of pre-deposit ordered by Tribunal in the appeal. In the highest traditions of judicial consistency and discipline, we too must hold that the statements do not possess relevancy in these proceedings.

11. While doing so, we make it abundantly clear that this finding is, in our opinion, not inconsistent with the various decisions, including that of the Hon'ble Supreme Court, cited by Learned Authorised

Representative. In *re Surjeet Singh Chhabra*, the statements had been recorded from the individual who was charged with the offence of smuggling of goods whereas, by the very nature of the structuring of the importer-appellants, the statement relied upon is that of another co-noticee. Implicit in this observation of ours is the substantial, and often unbridgeable, chasm between an individual-importer and an organisational-importer; statements of an artificial person is an impossibility and statements of natural persons connected with offence allegedly committed by a legal person can only be corroborative of other evidences and never the bedrock. This opinion of ours is entirely consistent with the earlier decisions of the Tribunal in *re Sangeeta Metals (India)* and in *re Rahul Ramanbhai Patel* which clearly record the corroborative support of the statements relied upon in concatenation with other evidences. Such are not the facts and circumstances in the present proceedings where, admittedly, the statements are the sole basis of the entire proceedings. We, therefore, have no hesitation in rendering the finding that *de hors* the statements, no other evidence is on record to validate the show cause notice.

12. Nevertheless, we must also consider if the proceedings can be concluded on the basis of allegations alone; we make it amply clear that we do so only in the light of provisions pertaining to assessment of goods which place onus on importers in certain contexts and for certain purposes. Our examination below is limited only to such and

with intent to articulate the legal provisions pertaining to valuation of imported goods.

13. The show cause notice proposes to discard the declared value as a prelude to re-ascertainment of assessable value for determination of the correctness of duty assessed at the time of clearance of the goods. In the scheme of assessment to duties of customs that are leviable on *ad valorem*, the provisions of section 14 of Customs Act, 1962 are activated. Value of goods, whether viewed from the perspective of commercial practice or economic theory, is not amenable to scientific formulation and further complicated by transactions occurring across boundaries of legal jurisdictions with differing policy practices. Over the many decades since international commerce has become commonplace, customs administrations, bowing to the imperative of consistency in the larger interests of a universal market place for consumers, have negotiated an overarching framework within which the municipal laws of the various countries can contain restraints on administrative discretion in determination of value. In a manner of speaking, section 14 of Customs Act, 1962, including the Rules framed thereunder, designate the ropes of the arena within which the jousting engagement between the tax administrator and the commercial entity can produce an outcome which is consistent, equitable and acceptable to the interests of State without impeding trade. The limiting factor of, and rigid compliance with, these rules of

engagement should not be lost sight of in the face of moral outrage, or philosophical conviction, of individual tax administrators or the jurisdictions that they supervise. Judicial decisions are underpinned on this first principle and it is necessary, from time to time, for judicial bodies to reiterate this fundamental in the larger interest of disseminating legislative intent to the tax administrators. We, accordingly, do so in deciding the present dispute which, we find, has overextended the elasticity of the ropes of the arena.

14. In the scheme of valuation, it is trite that the transaction value, evident from invoices, of the goods that are imported is to be the assessable value. Not unnaturally, there are presumptions for such acknowledgement which are embodied as combinatorial expressions in section 14 (1) of Customs Act, 1962. Any transaction that lacks any one or more of the qualifications prescribed therein should, necessarily, be externed from its ambit with recourse to section 14 (2) of Customs Act, 1962 and, thereby, within the coverage of Rules framed thereunder. In the context of the present dispute, that is Customs Valuation (Determination of Value of Imported Goods) Rules, 1988. Long after the decision of the Hon'ble Supreme Court in *Eicher Motors Ltd v. Commissioner of Customs, Mumbai [2000 (122) ELT 321 (SC)]*, mandating strict compliance with the Rules, was found to be too restrictive and, at times, repugnant to tax interests, rule 10A was incorporated to enable challenge to the declared value

and requiring the importer to furnish evidence in support of their declarations. In line with the non-derogability of the fundamental concept governing the scheme of valuation, the newly incorporated rule was, to continue the allegory, limited to throwing down the gauntlet. It was for the importer to pick up the gauntlet and accept the challenge to joust. Lack of response to the notice issued under rule 10A of the said Rules clothed the proper officer with the authority to resort to the various rules sequentially in the said Rules. Doubtlessly, the invoking of rule 10 A would have to be based on some reasonable grounds, however remote, to do so. Nonetheless, the rigour prescribed in the decision of the Hon'ble Supreme Court in *re Eicher Motors Ltd* must, necessarily, be complied with thereafter. Considering the documentation, the statements of admission of the partner of the appellant-importers, the apparent practice of the vendors to insure the exports at an unduly higher value and the reference to certain other imports from the very same vendors at higher prices, the notice for rejection of the declared value would appear to be in consonance with the latitude permitted in rule 10A of the said Rules. To that extent, there can be no cavil on the part of the appellants.

15. It is clear from the records that the appellants had not been able to produce any evidence that would counter the grounds for discarding the declared value. To that extent, the declared values can be found to be unacceptable. However, the consequences of such discrediting is

not an arbitrary determination of value. The provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 require that sequential application to be apparent in such proceedings. We observe that the impugned order is bereft of such a sequential finding and has, on the contrary, fallen back on rule 6, pertaining to import of similar goods, and rule 8, the residuary provision, relying entirely upon the now discredited statements, to determine the differential duty liability. As the statements are no longer reliable, the duty liability, arising from recourse to rule 8, does not have the support of law and must be set aside. Insofar as the valuation of goods, based on applicability of rule 6 of the said Rules is concerned, it is seen that the bills of entry pertaining to those imports had not been made available to the appellants. Neither are the details of those bills available on record. It is, therefore, impossible to ascertain if these were 'similar goods' within the definition in the said Rules. The rigour articulated in *re Eicher Motors Ltd* is not in evidence in the impugned order. Consequently, the re-determination of value fails the test of law.

16. With the lack of approbation for enhancement of value, there is no offence that renders the goods liable to confiscation under section 111 of Customs Act, 1962. In the absence of justification for invoking the provisions for confiscation of goods, penalties under section 112 of Customs Act, 1962 fails in relation to the importer-appellants and

the partner of such important entity.

17. In view of the findings above, we set aside the impugned orders and allow the appeals.

(Pronounced in Court on 25/02/2019)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as28010402*