

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

APPEAL No. C/290/2012

(Arising out of Order-in-Appeal No. 152/MCH/ADC/Gr.VII C/2012 dated 05.03.2012 passed by Commissioner of Customs (Appeals), Mumbai-I)

AMES India

Appellant

Vs.

Commissioner of Customs (EP), Mumbai

Respondent

Appearance:

Shri Brijesh Pathak, Advocate, for appellant

Shri Manoj 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: 04.12.2018

Date of Decision: 04.12.2018

ORDER No. **A/88329/2018**

Per: Sanjiv Srivastava

This appeal is directed against the order in appeal No 152/MCH/ADC/ Gr-VII C/2012 dated 05.03.2012 of Commissioner Custom (Appeal) Mumbai. By the said order Commissioner (Appeal) held as follows:

"14. I have gone through the findings and observation of the lower authority and also submissions made by the Appellant. It is on record that Personal Hearing was attended by Appellant. Hence the contention that order

was ex parte is false. Further, it is also seen that the Appellant also has agreed with the examination reports of SIIB(X) and Chartered Engineers' certificate. The certificate clearly states the goods are prime and not defective. On being asked, the Appellant could not produce any more documents/ evidence from the overseas supplier as regards to their say that the subject consignment is as secondary defective seamless pipes except declaration on invoice/ Bill of Entry and letter of supplier. The plea that overseas supplier from China is a trader and not manufacturer and that the supplier could not give the details of manufacture, being trade secret as per international norms is rather frivolous. The Appellant's contentions do not hold any water.

In view of the above and lack of any evidence put forth by the Appellant, I hold that the impugned Order in Original passed by lower authority is legal and proper and needs no intervention."

1.2 Adjudicating Authority has in his order in original held as follows:

"29 On the basis of findings above, I order as follows:

- a) The declared value of the goods is rejected and the provisional assessment of goods is finalized on the basis of unit value of Rs 145.11 per kg in terms of Rule 5 of the Customs Valuation Rules, 1988.*
- b) The differential duty of Rs 5,49,851/- is confirmed and demand along with interest under proviso section 28 of the Customs Act, 1962 Under Section 28AB *ibid*.*
- c) The goods valued at Rs 29,05,392/- are confiscated under Section 111 (m) of the Customs Act, 1962. Since the goods were provisionally released against bond and Bank Guarantee,*

penalty and fine in lieu of confiscation is imposed at Rs 6,00,000/- (Rupees Six Lakhs) is imposed, which should be paid within fifteen days.

d) I imposed penalty of Rs 5,49,851/- under Section 114A of the Customs Act, 1962 on M/s AMES India.

e) As mentioned above there shall be no penalty on Shri Nilesh Chandan."

2.1 Appellant had filed Bill of Entry No 731848 dated 19.12.2006, describing the imported goods as *"Stainless Steel secondary Defective Seamless Pipes Grade 304 mix size."*

2.2 During the course of examination it was observed that the imported goods were prime and not secondary/defective as declared on the Bill of Entry. Two samples were drawn from the consignment.

2.3 The imported goods were got verified by independent Chartered Engineer *"M/s Gjattani & Co"* who inspected the goods on 08.01.2007. After physical and visual verification Chartered Engineer vide his certificate Ref No RCE/MUM/)^)/134 dated 12.01.2007 certified stating *"Stainless Steel Seamless Pipes Grade 304 "Prime & Not Defective. No physical defects/ irregularities were seen."*

2.3 Samples drawn from the consignment of imported goods was forwarded to DYCC, New Custom House Mumbai. By the Test Report dated 12.03.2007 issued

under Lab No 30/SIIB(X) dated 19.01.07, DYCC stated *"The sample is a cut piece of stainless steel pipe (non magnetic) (Nickel 7.4%, Chromium 15.1%) and it does not confirm to the specification AISI 304 types of non magnetic steel"*. In respect of second sample, Test Report dated 12.03.2007 issued under Lab No 31/SIIB (X) dated 19.01.2007, DYCC stated *"The sample is a cut piece of stainless steel pipe (non magnetic) (Nickel 7.7%, Chromium 14.6%) and it does not confirm to the specification AISI 304 types of non magnetic steel"*. DYCC also stated in both the reports that it is not possible by chemical test to state whether it is secondary/ defective seamless pipe or otherwise.

2.4 The samples were thereafter forwarded to VJTI, Matunga, Mumbai on 29.03.2007 for determination of chemical composition and their opinion regarding grade of steel. VJTI in their Test Report dated 16.04.2007 stated *"The sample S S Secondary defective seamless pipe 304 is not in accordance with AISI (American Iron & Steel Institute) Designation System and that the % of composition tested are: 1) Carbon=0.058%, 2) Chromium=17.24%, 3) Nickel = 8.03%, 4) Molybdenum = 0.3%."* Subsequently on 11.06.2007 clarification was sought from VJTI with regards to JIS Grades in respect of the said samples. By their letter dated 15.06.2007 they suggested S303 grade of JIS Standards.

2.5 Further investigations were carried on and statement of Shri Nilesh Chandan, Partner in importer firm was recorded under Section 108 of Customs Act, 1962.

2.6 Importer vide his letter dated 09.02.2007 stated that supplier could not produce any further evidence in support of their declaration about the goods, for the reason that supplier has expressed its inability to disclose the name of the principal as it is trade secret in the international market.

2.7 Thereafter a show cause notice dated 15.06.2009 was issued to the importer (Appellant), holding them liable for misdeclaration of imported goods as defective goods. The show cause notice thus proposed to reject the declared value under Rule 10A and assess the goods as prime quality goods by determining the value by application of Rule 5 of Custom Valuation Rules, 1988 by adopting the price of contemporaneous imports of similar goods.

2.8 The show cause notice has been adjudicated by Additional Commissioner of Customs (EP) New Custom House Mumbai vide his order referred in para 1, supra.

2.9 Aggrieved importers preferred an appeal before Commissioner (Appeal) which was disposed off as per order in appeal referred in para 1, supra.

2.10 Aggrieved appellants have filed this appeal before us.

3.1 In their appeal appellant's have assailed the order of Commissioner (Appeal) stating-

- i. Appellate proceedings have been conducted in routine and stereotype manner, resulting in gross miscarriage of justice.
- ii. Order has been passed without taking into consideration the evidence placed on record by them in memo of appeal.
- iii. They had never admitted to the department stand as held by the Commissioner (Appeal).
- iv. The findings to effect that they could not produce any more evidence/ document from the overseas supplier are completely incorrect and contrary to records.
- v. Redemption Fine of Rs 6 lakhs has been imposed in arbitrary manner and penalty could not have been imposed.

4.1 We have heard Shri Brijesh Pathak, Advocate for the Appellant and Shri Manoj Kumar, Assistant Commissioner Authorized Representative for the Revenue.

4.2 Arguing for the Appellant, learned Counsel submitted that in the present case apart from the

Chartered Engineer visual examination and inspection report no other evidence has been produced by the revenue on basis of which it can said that the goods imported were not as per the declaration made by them. Even the test reports obtained from Deputy Chief Chemist CRCL Mumbai in respect of the two samples support their claim. Also the test report from VJTI Matunga obtained by the revenue is contrary to the stand taken by the revenue. The contract and letter of the supplier dated 06.01.2007 also endorse the view that the imported goods were defective. Lower authorities have proceeded to decide that matter contrary to the evidences available on record. They also rely on the decisions as follows to support their contentions:

- i. Mehta Steel Corporation [2002 (150) ELT 188 (T-Mum)]
- ii. Shankar Trading Co [1999 (106) ELT 456 (T)]
- iii. Opus Technologies [2004 (168) ELT 72 (T-Chennai)]
- iv. Saraswati Repowering Works [2004 (168) ELT 258 (T-Mum)]

4.3 Arguing for the revenue learned Authorized Representative reiterated the orders of lower authority and stated that the chartered Engineer Certificate after visual inspection and examination of the goods clearly

state that the goods were of prime quality and not defective. He submitted that the VJTI has also stated that the goods confirmed to S303 of JIS. He submitted that these evidences clearly showed that goods imported were misdeclared and hence their value was rightly rejected by application of Rule 10A. Thus determination of value of imported goods by application of Rule 5 on the basis of contemporaneous imports cannot be faulted with.

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

5.2 Entire case of the revenue has been made on the basis of:

- i. Examination Report dated 05.01.2007 carried out by the officers of SIIB (X)
- ii. Report/ Certificate of Inspection Ref No RCE/MUM/0607/134 dated 12.01.2007
- iii. The Dy C C Mumbai Test Report No 1 vide Lab No 30/SIIB 9X) dated 19.01.2007 and No 2 Lab No 31/SIIB (X) dated 19.01.2007.
- iv. Test Report of VJTI vide Reference No TST/6/Met-292/2007/306/07 dated 16.04.2007.
- v. Statement of Shri Nilesh Chandan, Partner in the importing firm.

5.3 From the examination of the above evidence we find that the reports mentioned at i. & ii. Which have been drawn on the basis of visual examination and inspection of the consignment are the only evidence wherein it has been stated that goods imported are prime goods. However these report, fall short of stating that these goods are of prime quality confirming to the specified standards as declared. Whereas in the test reports given by the Deputy Chief Chemist CRCL Mumbai, it has been specifically stated-

"The sample is a cut piece of stainless steel pipe (non magnetic) (Nickel 7.4%, Chromium 15.1%) and it does not confirm to the specification AISI 304 types of non magnetic steel".

"The sample is a cut piece of stainless steel pipe (non magnetic) (Nickel 7.7%, Chromium 14.6%) and it does not confirm to the specification AISI 304 types of non magnetic steel".

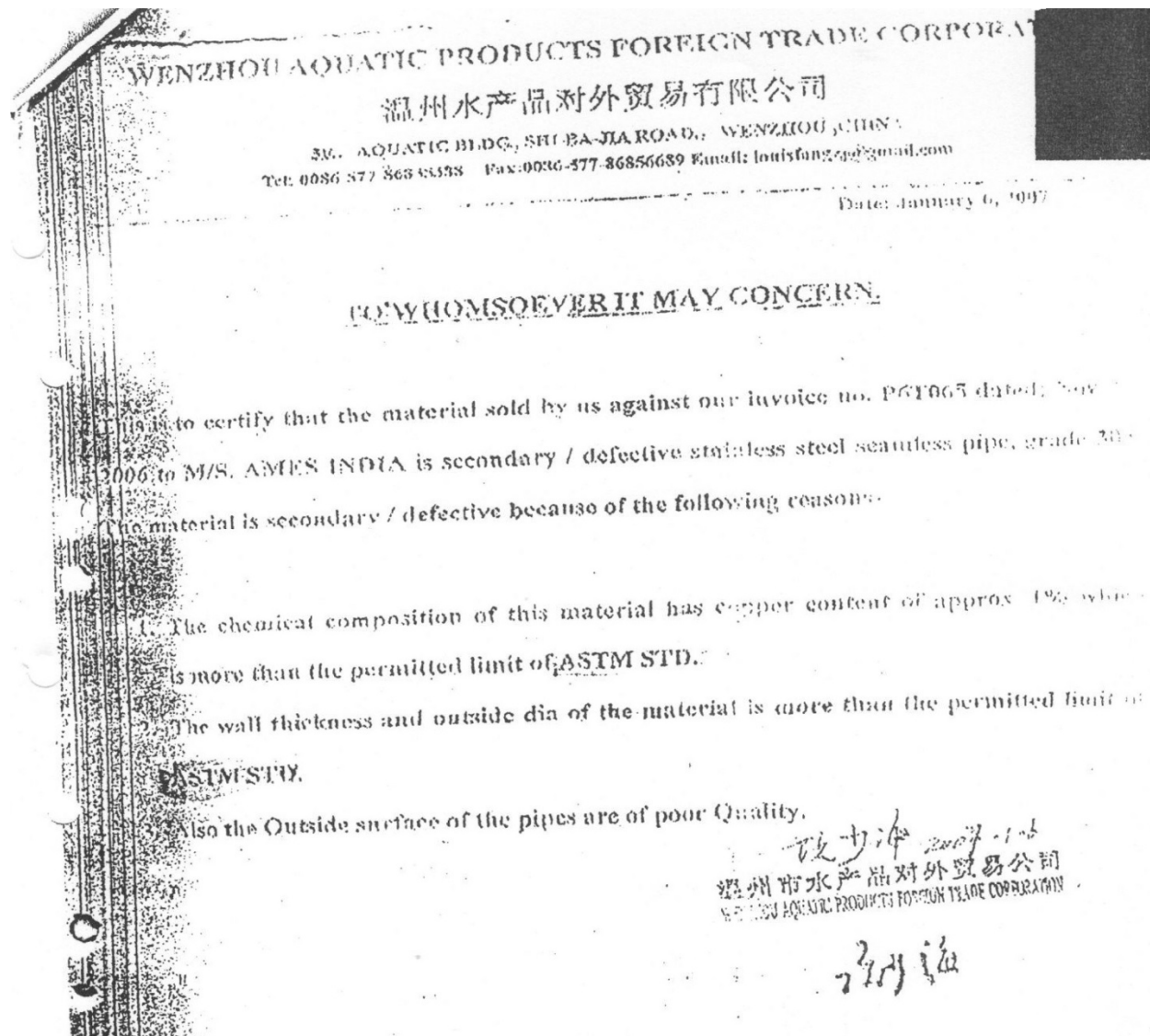
These two test reports are enough to certify that the goods do not confirm to prime quality goods of AISI 304.

Same view has been expressed by the VJTI in their report dated 16.04.2007 wherein it has been stated that-

"The sample S S Secondary defective seamless pipe 304 is not in accordance with AISI (American Iron & Steel Institute) Designation System and that the % of composition tested are: 1) Carbon=0.058%, 2)

Chromium=17.24%, 3) Nickel = 8.03%, 4) Molybdenum = 0.3%."

5.4 Appellants have on the basis of the invoice and contract with the overseas supplier made the declaration on the Bill of Entry. Appellants have also produced a certificate dated January 6, 2007 from the overseas supplier reproduced below:



5.5 Hon'ble High Court of Delhi has in case of Indian Steel Corporation [1982 (10) ELT 877 (Del)] held as follows:

"14. Now, the next question relates to the value of the goods. The Customs Act, Sections 14 and 15, prescribe

*the methods of determination of value. The combined effect of these sections is that the value is the price at which the goods in question are on the date the bill of entry is presented ordinarily sold or offered for sale for delivery at the time and place of importation, in the course of international trade. The Customs have valued the goods at \$ 2650 per M.T. on the basis of several invoices of the same suppliers and one or two of the Japanese producers. These rates vary from \$2050 to \$2650 per M.T. and are for prime quality steel. **It is true that the Salem Steel Plant analysed a few samples out of the five consignments and reported that the goods in question were of prime quality. But, if the invoices of the Samissa & Co., are to be relied upon, then it is difficult at this stage to discard the statement in the invoices respecting the petitioner that the goods were defectives and were valued at a lesser price. But the petitioner himself agreed to sell the goods at 15,000/- P.M.T. on 15-3-1982 which is exclusive of increased rate of taxes. I, therefore, fix the value at Rs. 15,000/- per M.T. provisionally.***

5.6 In view of the above evidences we are not in position to agree with the claim of revenue that the goods are prime quality goods confirming to AISI 303/304. If the manner in which revenue has proceeded to hold the defective stainless steel pipes to be of prime quality on the basis visual inspection report we have no doubt that there can be many more tragedies akin to Bhopal Gas Tragedy in this country. Can such defective pipes which do not confirm to the prescribed standard be used for the same purpose for which certified prime

goods of that standard are used. Revenue has further gone on to value the said goods as prime quality goods of the same standard to which the test report of Deputy Chief Chemist CRCL is itself contrary. The approach of revenue is definitely erroneous and cannot be sustained.

5.7 Tribunal has in case of Bansal Industries [2002 (147) ELT 967 (T-Chennai)] held as follows:

"11. We have considered the submissions made by both the sides and come to a conclusion that the Department has not chosen to refer the matter to the 3rd expert since there was difference of opinion between the scientists of NML and the experts of IIT, Madras who had given reports favourably to the assessee. We also find that the reports given by scientists of NML who have found various defects though not of much significance. Therefore the goods cannot be said to be of prime quality and some of the goods were found to be of 3rd quality by the scientists of NML. We also observe that the lots were not of uniform sizes and dimensions and there are no contemporaneous imports and the Department has not categorically found that the transaction value was not acceptable under Rule 4(1) and they have not given any reasons. The revenue has also not found that the imported goods were covered under mischief of Rule 4(2) of the Customs Valuation Rules, 1988 and until goods are covered in the exception as contained in Rule 4(2) of the Customs Valuation Rules, the transaction value is binding under Rule 4(1) and cannot be discarded. We therefore find force in the submission made by the Id. Consultant Shri K.L. Rekhi assisted by Shri A.S.

Sundararajan. Their case is fully covered by the judgment rendered by the Tribunal in the case of CC, Calcutta v. Bharat Teachest Industries (supra) and the Apex Court judgment rendered in the case of Eicher Tractors (supra). Since there is no mis-declaration the goods are also not liable for confiscation under Section 111(m) of the Customs Act. We, therefore, set aside the redemption fine of Rs. 10 lakhs imposed under Section 125 of the Customs Act, 1962. Since there is no mis-declaration or suppression from the Department no penalty can also be imposed on them in view of the judgment rendered by the Apex Court in the case of HMM Ltd. (supra) under Section 112(a) of the Customs Act, 1962. We also set aside the order of enhancement of unit price of Tin Free Sheets and Tin Plates in terms of Rule 8 of the Customs Valuation Rules, 1988."

5.8 Thus we do not find merits in the order of Commissioner (Appeal) and Adjudicating Authority upholding the charge of misdeclaration against the appellant. Since we do not uphold the charge of mis declaration itself other issues raised in appeal and during course of arguments are not taken up.

6.1 In view of above we allow the appeal filed by the Appellant with consequential relief if any.

(Pronounced in court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)