

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

APPEAL Nos. C/559,560/2012

(Arising out of Order-in-Appeal No. 174 & 175 (Adjudication Import)/2012(JNCH)/IMP-148 & 149 dated 30.03.2012 passed by Commissioner of Customs (Appeals), Mumbai-II, Nhava Sheva)

**Sumeet Exports (India)
Sumeet Thapar**

Appellant

Vs.

Commissioner of Customs (I), Nhava Sheva

Respondent

Appearance:

Shri Anil Balani, 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: 06.12.2018

Date of Decision: 06.12.2018

ORDER No. A/**88327-88328/2018**

Per: Sanjiv Srivastava

These appeals are directed against the order in appeal No 174 & 175 (Adjudication Import)/2012 (JNCH)/IMP-148 & 149 dated 30.03.2012, of the Commissioner Custom (Appeal) Nhava Sheva. By the said order Commissioner (Appeal) has held as follows:

"I reduce the penalty imposed on the appellant no 1 under Section 114A to Rs 2,41,673/- and hold that

appellant is entitled to avail the benefit of first proviso to Section 114A of the Customs Act. The impugned order is upheld with this modification."

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

"(i) I order that total declared assessable value of Rs 19,34,324/- of the goods imported by M/s Sumeet Exports India, Ludhiana and Shri Sumeet Thapar, active partner of the noticee firm under B/E No 831542 dated 26.03.2009 be rejected in terms of Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, read with Section 14 of the Customs Act, 1962. I order the B/E to be assessed at Rs 30,57,199/- in terms of the provisions of said rules as discussed.

(ii) I order the confiscation of the imported goods i.e. 12000 Kgs dye stuff of Chinese origin seized vide DRI F No 856(12)/LDH/2009/423 dated 09.10.2009 having revised assessable value of Rs 30,57,199/- in terms of Section 111 (m) of the Customs Act, 1962 on the ground of suppression and misdeclaration of actual transaction value thereof. However, I give the option to the importer to redeem the goods on payment of redemption fine of Rs. 2,00,000/- (Rupees Two Lakhs) under Section 125 of the Custom Act, 1962.

(iii) I order duty amount of Rs 2,41,673/- short paid by the importer at the time of import be recovered from the importer jointly and severally along with interest in terms of provisions of Section 28 (1) read with Section 28AB of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 2,50,000/- along with interest upon M/s Sumeet Exports (India) in terms of Section 114A of the Custom Act, 1962.

(iv) I impose a penalty of Rs. 50,000/- upon each one of them i.e. M/s Sumeet Exports (India) and Shri Sumeet Thapar, active Partner of M/s Sumeet Exports (INDIA) in terms of Section 114AA of the Custom Act, 1962.

(v) I refrain from imposing a penalty under Section 112A or Section 112B ibid as per proviso top section 114A of Customs Act."

2.1 M/s Sumeet Export (India) (Appellant 1), Appeal No C/559/2012 and Shri Sumeet Thapar (Appellant 2), Appeal No C/560/2012 had filed bill of Entry No 831542 dated 26.03.2009 for clearance of one consignment of disperse dyes imported by them from China on basis of invoice No 209JH1543 dated 18.02.2009 raised by the Chinese supplier. Duty due against the imported consignment was debited by the importer against the Target Plus License.

2.2 Subsequently on the basis on intelligence and information developed to effect that importers had short paid the duty on the said imported consignment by mis-declaring the value, Office and Residential premises of the importers were searched by the officers of DRI. The consignment of Disperse Dyes of China, imported against the said Bill of Entry and found in business cum office premises of the importer was detained under panchnama dated 25.04.2009 and subsequently seized vide DRI F No 856(12)LDH/2009/Pt-I/2423 dated 09.10.2009.

2.3 Investigation was undertaken and statements of various person recorded under Section 108 of Custom Act, 1962. On completion of investigations a show cause notice dated 23.04.2010 was issued to the importers alleging misdeclaration of value with intent to evade payment of duty. Show Cause Notice proposed for confiscation of goods seized demanded duty and interest and proposed penalty on the importers.

2.4 The show cause notice was adjudicated by the Additional Commissioner of Customs, JNCH as per his order referred in para 1, supra.

2.5 Aggrieved Appellants preferred an appeal before Commissioner (Appeal), which was disposed of by the Commissioner (Appeal) order referred in para 1, supra.

2.6 Aggrieved Appellants are in appeal before us.

3.1 In their appeal appellants have challenged the order of Commissioner (Appeal) stating that-

- i. The rejection of declared by them under Rule 12 of the Custom Valuation (Determination of Price of Imported Goods) Rules, 2007 was erroneous and done without any justification.
- ii. The e-mails and documents relied upon for alleging misdeclaration of value were not pertaining to them.

- iii. The values indicated in the B/E was identical with the same as in sale contract and not as held by the authorities below.
- iv. E-mail correspondences of other importers cannot be basis for charging them with mis declaration.
- v. The declared value by them compared favorably with the contemporaneous imports as per NIDB data.
- vi. The value has been determined under rule 9, without sequential application of the rules 4 to 9 in case transaction value declared was to be rejected.
- vii. Reason for enhancement as per the order of authorities below is that value declared, is lower than the value of identical goods supplied by the other suppliers.
- viii. The value declared by them as per the sale contract and supported by other documentary evidences. The sale contract gave the complete description of the goods and the same has been made the basis in the show cause notice and order in original.
- ix. Even the third party e-mails referred were of July 2007 and August 2008 whereas the imports were made by them in March 2009.

- x. They had huge balance in their Target Plus License and the officers could have simply debited the license instead of seizing the same. As there was no mis-declaration order of confiscation cannot be sustained.
- xi. Penalties under Section 114AA is not justified as the said section is not applicable in the facts of the present case.

4.1 We have heard Shri Anil Balani, Advocate for the Appellants and Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the Appellants learned Counsel stated that in the present case rejection of the declared value under Rule 12 was not justified. Nothing incriminating was recovered from them nor any confessions made. The email evidences relied upon are inadmissible as they are of third party and for entirely different period. The value declared by them was as per the sale contract. Hence there is no justification what so ever for rejection of the declared value, or for confiscation of goods. Hence the order of Commissioner (Appeal) is bad in law and needs to be set aside.

4.3 Arguing for the revenue learned Authorized Representative, reiterated the findings of the lower authorities. He justified the rejection of declared value

application of Rule 12 and for the reason of misdeclaration confiscation of goods under Section 111(m).

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

5.2 Adjudicating authority in his order in original running into 18 pages have devoted 15 pages to reproduce the averments made in show cause notice, one page in recording the submission of the noticee and thereafter recorded the findings in less than a three quarter of page as follows:

"I have gone through the documents on record and heard the Advocate of the Importer carefully.

The SCN was based upon certain relied upon documents including the email dated 13.08.08 from Yin Lifeng to Vish @ 1 Deora regarding the price of disperse dyes based on 25 Kgs carton, email dated 02.07.07 from Lovedog to Redrose and CC to Vishal @1 Deora regarding the receipt of US\$ by TT and Jihua price list CIF Nhava Sheva. The notice's advocate has in his reply dated 13.9.10 to the Show Cause Notice has not refuted these emails and the price lists of the suppliers.

It is seen that other Importers, M/s. Universal Impex also has been importing the same goods from the same country of origin as the correspondence with the suppliers shows that the goods are deliberately undervalued to evade Customs duty.

The noticee's advocate, in para 7 of the reply to the Show Cause Notice has stated that the documents relied upon in the Notice were not recovered from his client's premises and therefore cannot be relied upon in terms of Section 139 of the Customs Act. This presumption doesn't hold good since

Section 139 ibid does not debar any other material, not taken from the premises of the Noticees from being relied upon.

The notice has, knowingly, not declared the composition of goods, colour index and strength of dyes etc. in the Bill of Entry only to avoid its comparison with other goods being imported at the relevant time. But it is seen that the sale contract dated 09.01.09 between M/s. Sumeet Exports and the supplier M/s. Hangzhou Jihua Import and Export Company Ltd contains these details. This concealment of facts in the Bill of Entry, which is crucial in arriving at the value of the goods is deliberate. The Noticee has in fact, not refuted this sale contract with any evidence, but just held it to be unsubstantiated. It is found that there is huge difference between the value declared by M/s. Sumeet Exports (India) in the Bill of Entry No.831542 dated 26.3.09, and the price list and contracts of other suppliers of the same goods and the same country of origin. The value, in such circumstances has to be determined by finding out the percentage undervaluation (weighted average) and based on that, the values of import consignment under reference have to be loaded by a specific factor, defined as 'Weighted Average Multiplying Factor'. That is a valid reason to reject the declared assessable value of Rs.19,34,324/- in terms of Rule 12 of Customs Valuation Rules 2007 and redetermine the same to Rs.30,57,199/- by resorting to using reasonable means consistent with the principles and general provisions of these rules as provided under Rule 9 of Customs Valuation Rules 2007."

5.3 This order has been upheld by the Commissioner (Appeal) and the appellants are in appeal before us. We do not know what was consideration of the evidence and submissions made by the appellant which lead to rejection of the declared value by the Appellants. Rejection of declared value on Bill of Entry is a serious affair and the same could have been rejected on the

basis of cogent examination of evidences and justifiable reasons. Hon'ble Supreme Court has in case of Eicher Tractors [2000 (122) ELT 321 (SC)] laid down very categorical as follows:

"6. Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the Value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation - in the course of international trade. The word 'ordinarily' necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale.....". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1A) in accordance with the rules framed in this behalf.

7. The rules which have been framed are the Customs, Valuation (Determination of Price of Imported Goods) Rules, 1988. The rules came into force on 16th August, 1988. Under Rule 3(i) "the value of imported goods shall be the transaction value". "Transaction value" has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1) in turn states :

“The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.”

8. *Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2) namely :*

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3).”

9. *These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the*

particular transaction falls within the exceptions, the Customs authorities are bound to assess the duty on the transaction value.

10.*The respondent's submission is that the phrase "the transaction value" read in conjunction with the word "payable" in Rule 4(1) allows determination of the ordinary international value of the goods to be ascertained on the basis of data other than the price actually paid for the goods. This, according to the respondent, would be in keeping with the overriding effect of Section 14(1). We cannot agree.*

11.*It is true that the Rules are framed under Section 14(1A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section 14(1). Both Section 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2).*

12.*Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.*

13.*That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those*

under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.

14.*It is only when the transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.*

15.*The Assistant Collector in this case determined the value of the imported goods under Rule 8. The question is whether he should have determined the transaction value under Rule 4 at the price actually paid by the appellant for the 1989 bearings. Naturally, if Rule 4 applies to the facts of this case, the Assistant Collector's reasoning*

under Rule 8 must, by virtue of language of Rule 3(ii), be set aside.

16. The Assistant Collector appears to have proceeded on the law as it was prior to the 1988 Rules when 'special considerations' on the basis of which a transaction was held not to be an ordinary sale in the course of international trade within the meaning of Section 14(1), had not been statutorily particularised.

17. As to what would constitute such "special consideration" has been considered in several decisions of this Court. For example, a special quotation for the importer singling him out from other importers in India was held to be a special consideration in *Padia Sales Corporation v. Collector of Customs, Bombay* (supra) justifying the rejection of price paid as the transaction value. On the other hand in *Basant Industries v. Addl. Collector of Customs, Bombay* - 1996 (81) E.L.T. 195 (S.C.), a special quotation for an "old and valued customer" was upheld as not being a special.

18. The decision in *Sharp Business Machines Pvt. Ltd.*, relied upon by the respondent is another case where the transaction value was rejected. In that case, the importer had wrongly mis-described the imported goods and sought to defraud the Revenue by attempting to surreptitiously import items prohibited under the import policy. It was found that there was justification, in the circumstances, for rejecting the price shown in the invoice. The transaction value having been rejected, assessment of value was made on the basis of the price list of the foreign vendor.

19. Both the decisions *Padia Sales Corporation* and *Sharp Business Machines Pvt. Ltd.* were distinguished subsequently in *Mirah Exports Pvt. Ltd. v. Collector of*

Customs - 1998 (98) E.L.T. 3. As the facts of this case are somewhat similar to the case before us, it is dealt with in some detail.

20. *Mirah Exports Pvt. Ltd. along with other importers had imported bearings at high rates of discount. The declared value was rejected by the Customs authorities, on the basis of the price list of the vendors. This Court set aside the decision of the respondent authorities accepting the argument that a discount is a recognised feature of international trade practice and that as long as those discounts are uniformly available to all and based on logical commercial bases, they cannot be denied under Section 14. It appears from the judgment that a distinction was drawn between a discounted price special to a particular customer and discounts available to all customers.*

21. *As already noted all these cases dealt with imports made prior to the coming into force of the Rules in 1988. Now the 'special considerations' are detailed statutorily in Rule 4(2).*

22. *In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a mis-description of the goods imported as was the case in Padia Sales Corporation. It is also not the respondent's case that the particular import fell within any of the situations enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list is invariably proof of the transaction value. This was erroneous and could not be a reason by itself to reject the transaction value. A discount is a commercially acceptable measure, which*

may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case discount up to 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it was a one time sale of 5 year old stock. When a discount is permissible commercially, and there is nothing to show that the same would not have been offered to any one else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1).

23.*In the circumstances, production of the price list did not discharge the onus cast on the Customs authorities to prove that the value of the 1989 bearings in 1993 as declared by the appellant was not the "ordinary" sale price of the bearings imported."*

5.4 Similar view has been expressed by the Apex Court again in case of Tolin Rubbers Pvt Ltd [2004 (163) ELT 189 (SC)], South India Televisions [2007 (214) ELT 3 (SC)], Motor Industries [2009 (244) ELT 004 (SC)] etc.

5.5 Neither the adjudicating authority or Commissioner (Appeal), have pointed to such special circumstance warranting the rejection of the declared transaction value by the Appellant on Bill of Entry. Rule 12 of Customs valuation (Determination of Price of Imported Goods) Rules, 2007 is reproduced below:

"12. Rejection of declared value. -

(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.- (1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

From plain reading of the rule 12 it is quite evident that the word "doubt" used in the rule do not refers to the doubt of a doubting Thomas, but said doubt has to be based on cogent reasons and evidences. No cogent evidence or reason has been put forth in the present case to justify the "doubt" of the assessing officer. If the case of the revenue was that contemporaneous imports were at higher price, could they have proceeded without referring to NIDB maintained by the revenue itself. Without even referring to their own database both adjudicating authority and Commissioner (Appeal) have

rejected the declared value on the basis of the certain e-mails which were not with the reference to imports under consideration.

5.6 In our view the approach of both the authorities below is fallacious and cannot be sustained, in view of the decisions of Apex Court referred above and the provisions of Rule 12 itself.

6.1 Appeals filed by the Appellants are allowed with consequential relief if any.

(Pronounced in court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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