CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/38/2010

(Arising out of Order-in-Appeal No. 749 (GR-VB)/2009/JNCH)/IMP-354 dated 18.12.2009 passed by Commissioner of Customs (Appeals), JNCH, Mumbai-II)

Commissioner of Customs (I), N.S. **Appellant**
JNCH, Post Uran,
Dt. Raigad,
Sheva 400 707.

Vs.

Udit Seth **Respondent**
Wester Engg. Works,
54-A, Tardeo, Near Film Centre,
Mumbai 400 034.

Appearance:

Ms. P. Vinita Sekhar, Authorised Representative for the Appellant
Shri Brijesh Pathak, Advocate for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85795/2019**

Date of Hearing: 24.01.2019
Date of Decision: 24.01.2019

PER: SANJIV SRIVASTAVA

This appeal filed by the revenue is directed against the order in appeal No 749 (Gr. VB)/2009 (JNCH)/IMP-354 dated 18.12.0229 of Commissioner Customs (Appeal) JNCH Nhava Sheva. By the said order Commissioner (Appeal) held as follows:

"That, with the above modification, the Appeal is partly allowed. The subject vehicle shall be released within 7 days of collecting reduced fine, penalty and merit duty on bike as CBU on the declared transaction value. It is also

directed that Motor Cycle as registered with RTO authorities only as CBU."

1.2 In his order in original, adjudicating authority has held as follows:

"9. In view of above findings, I order as follows:-

i. I disallowed the benefit of Notification No 021/2002-Cus Sr No 345 (1) as claimed by the importer and order that vehicle be assessed as complete vehicle new.

ii. I reject the declare value of Rs 7,58,388.21 under rule 12 of Customs Valuation (determination of Value of Imported Goods) Rule, 2007 and I re-determine the value of goods as Rs 14,68,175.73/-.

iii. Order for confiscation of the impugned goods, imported vide Bill of Entry No 763099 dated 28.01.2009, valued at Rs 14,68,175.73/- (Rupees Fourteen Lacs sixty eight thousand one hundred seventy five and seventy three paisa only), under section 111 (d) & (m) of the Customs Act, 1962. However, I give the option for redemption of said goods on payment of fine of Rs 12,00,000/- (Rs Twelve Lakhs Only), under Section 125 of the Customs Act on payment of appropriate duty.

iv. I impose a penalty of Rs 10,00,00/- (Rs. Ten Lakhs only) on the importer under Section 112 (a) of the Customs Act, 1962."

2.1 Respondent had filed Bill of entry No 763099 dated 28.01.2009 declaring the goods as "Harely Davidson VRSC CKD having registration No TBC ...." And sought clearance claiming benefit of Notification No 021/2002 Sr No 345 (1), which is applicable to motor vehicle if imported in CKD condition. The declared value was Rs 7,58,388.21. The importer also submitted a Certificate of Compliance issued by M/s Harley Davidson Europe Ltd. in compliance to the import Licensing Notes to the Chapter 87 of ITC (HS).

2.2 On the basis of investigations made revenue was of the view that goods have been misdeclared in terms of description and value and was also imported in contravention of the provisions and restrictions imposed by Policy Circular No 26 date 09.02.2004 in as much as the agency issuing the Certificate of Compliance is not amongst the ones specified. Thus in view of the misdeclaration made the revenue was of the view that goods are liable for confiscation under section 111(m) and importer (Respondent)liable for penalty under Section 112(a) of Customs Act, 1962.

2.3 Respondent waived the requirement of written show cause notice and matter was adjudicated by the Additional Commissioner after allowing personal hearing to the appellants as per the order referred in para 1.2, supra.

2.4 Aggrieved by the order of adjudicating authority Respondents preferred an appeal before Commissioner (Appeal). The appeal filed was disposed by the Commissioner (Appeal) as per his order referred in para 1, supra.

2.5 Aggrieved by the order of Commissioner (Appeals) revenue has filed this appeal.

2.6 Along with the appeal, revenue filed a stay application seeking stay on the order of Commissioner (Appeal). The stay application filed by the revenue was dismissed by tribunal vide Order No S/343/11/CSTB/C.I dated 12.08.2011.

3.1 In the appeal filed revenue has disputed the order of Commissioner (Appeal), allowing the appeal of Respondent to the extent of

i. accepting the declared value as assessable value
ii. reducing the fine and penalties imposed to Rs 50,000/-

4.1 We have heard Ms P Vinita Shekar, Joint Commissioner Authorized Representative for the Revenue and Shri Brijesh Pathak, Advocate for the respondents.

5.1 At the outset Counsel for respondent submitted that the order of Commissioner (Appeal) allowing the release of vehicle on reduce fine, penalty and declare value has not been given effect to by the department. In result the goods continue to be with the department. He produced copies of various correspondences made by him for the release of vehicle against the fine as adjudged by the Commissioner (Appeal), said correspondences are reproduced below:

By Hand Delivery / FAX : 27244822

Ref.No.SK/239/09/23/10 January, 2010

The Commissioner of Customs (Import),
JNCH, Nhava Sheva,
Dist.Raigad - 400 707.

सीमा शुल्क आयुक्त
Commissioner of Customs (Import)
22 JAN 2010
Jawaharlal Nehru Customs House, Sheva, Uran Raigad

Dear Sir,

Re: In the matter of import of Harley Davidson Motor Cycle vide Bill of Entry No. 763099 dated 28.01.2009, Commissioner (Appeals)'s Order No. 749 (Gr.VB/JNCH/2009 dated 18.12.2009 and in the matter of letter dated 13.01.2010 in F. No. S/26-Misc-95/09 VB

I refer to the above matter and I am acting on behalf of the Importer, Mr. Udit Sheth, who has placed in my hands letter dated 13.01.2010, informing him that the order passed by the Commissioner of Customs (Appeals) cannot be given effect to, since the department has decided to approach the Hon'ble CESTAT. When the order passed by the Commissioner of Customs (appeals) is binding and has not been set aside and / or stayed till date, it has to be followed and given effect to, unconditionally. These are principles of judicial discipline. My client is the actual user of the Motor Cycle and there is no commercial motive, but only personal use. My client undertakes to keep the Motor Cycle in his possession, till the Appeal, if filed, is finally heard and disposed of by the Hon'ble CESTAT, hence, any apprehension of the department, seems unjustified and hence, it is requested that immediate effect may be given to the binding order passed by the Commissioner of Customs (Appeals), without further delay, in the interest of justice.

Yours truly,

SUJAY N.KANTAWALA
ADVOCATE HIGH COURT

Udit Sheth

Western Engineering Works, 54-A, Tardeo Road, Near Film Centre, Mumbai 400034

19 September 2011

Asst. Commissioner of Custom, Import
Group VB, Jawahar Nehru Custom House
Nhava Sheava

Dear Sir,

Sub: Effect to the Appellate Order of Commissioner of Custom (Appellate)
Order of Custom, Excise and Service Tax Appellate Tribunal

I am enclosing herewith the copy of Order passed by The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, dated 12th August 2011. As per the said order the Honorable Tribunal has dismissed the Stay Petition filed by the Department.

I have to request you to kindly give the effect to the order of Commissioner of Customs (Appeal) granting relief to me and determine the revised duty and Penalty payable by me to enable me to make payment and take release of the vehicle.

I trust you will kindly do the needful at your earliest.

Yours faithfully,

Udit Sheth

Recd
20/9/2011

S. K. SHETTY B.A.LL.M.
NOTARY GOVT. OF INDIA

5.2 On the basis of the said correspondences learned counsel submitted that since the goods have not been released by the department even after dismissal of the stay application by the tribunal, till today, now the goods would have become junk and he is not interested in claiming the goods or clearing them for home consumption any more. Since he is not claiming said goods and do not intend to clear them from home consumption this appeal filed by the revenue has become infructuous and any order passed in the appeal cannot be implemented.

5.3 Taking note of the above submissions made by the Counsel for respondent and noting that the said revenue has ostensibly refused the clearance of the said goods as per the order of the Commissioner (Appeal), even after the dismissal of stay application filed by them against the said order of Commissioner (Appeal), we examine the grounds taken by the revenue in their appeal. The grounds taken by the revenue are reproduced below:

"II. Once it is found invoice3 presented before assessing authority did not reflect correct description of the foods it is to be rejected under rule 12 of the said Valuation Rules, value cannot be determined under rule 3 (1) of the said Rules, it is to be re-determining as per rule 4 to 7 sequentially. As, value of identical / similar goods could not be found from the NIDB data and as the market value cannot be obtained from the market for new vehicle, rule 4 to 7 could not invoked. One of the authentic sources for ascertaining value of motor vehicle is red book, which contains the values of motor vehicle applicable in the international market. As per Red Book Catalogue (www.redbookasiapacific.com) the price of Harely Davidson VRSCAW V-rod Model New is USD 29500. In the circumstances this being the best tool, value was redetermined using the information as provided in the said website. Commissioner (Appeals) ignored these findings and accepted importer's submission that currency was wrongly taken by Customs as USD instead of Australian Dollar; however, Commissioner (Appeals) in this regard has discussed no evidence. On the other hand, Commissioner (Appeals) accepted the declared value, without discussing on merit as regards acceptance of value. It is stated in Order-in-Appeal that appellant had produced Website details of manufacture. However no such details were made available by the importer during assessment or adjudication. Further the relevant facts like year of manufacturing, contemporary imports have also not been discussed in Order-is-A.

III. The importer submitted import value as CIF, hence there was no question of freight paid in India when goods arrived. When freight charges are not known same is to be considered as 20% of FOB as in case of Insurance charges were certificate for payment of insurance is not available, same is being considered as 1.125% of FOB as per valuation rules. The department has therefore correctly charged freight @20% on FOB arrived by the department. The Commissioner (Appeal) failed to appreciate that department has taken freight charges under the provisions of Customs Act and Valuation Rules and also erred in not discussing any violations of any rules/provisions to that effect.

IV. With regards to reduction fine and penalty, the Commissioner (Appeals) has relied upon the case of M/s. Rational Art Press reported in [2007(215) ELT 522(Tri. Mum)]. The reliance placed has been misplaced as the matter was of clearance of new motor car where re-export was permitted and there was no dispute on benefit of notification claimed and applicability of duty. In the present case the goods have been misdeclared in respect of description willfully, knowingly and by suppressing the fact that vehicle was originally a complete bike. Hence, reliance placed is not applicable in the present case. Further, imposition of fine and penalty is based on value and duty evasion of the goods. In the instant case importer has evaded duty to the tune of more than 60% on declared value itself. Further, no reasons for reducing fine/penalty has been discussed in the order."

5.4 On the issue of valuation (para II of Ground of Appeal) Commissioner (Appeals) has in para 6 & 7 of impugned order held as follows:

"6. So far as the valuation aspect is concerned, from the documents place on record, it is evident that the web-site relied by the ADC, shows prices prevalent is different Countries of Asia-Pacific region, including Australia, New Zealand, U.A.E, China, Hong Kong, India, Malaysia,

Thailand & Singapore. From the Australian Web-site option, erroneously the ADC has taken price in US & instead of Australian $. The appellant has correctly shown price e.g. of the same model of Car- Viz. BMW 3i for India, Singapore and Australia, being in respective currency prevalent in respective Country viz. INR, Singapore $, and Australian $. Moreover, freight is taken at 20% of FOB value instead of asking for average Freight for motorcycle, if shipped from U.K. to India or actual freight paid. Thus, the reason for rejecting transaction value and the manner of calculation of revised value is erroneous.

7. The appellant has also produced web-site details of the manufacturer, which shows UK retail price of the said Bike as GBP 12075, being without ABS. Applying Trade Discount of 15% the price in GBP would come to GBP 10,263/- as against Manufacturer's Invoice of GBP 10,250. The Manufacturer's Invoice at Ex-D of appeal shows an endorsement –

"Document contains the terms of contract. Sign if only wish to be legally bound by them. Attention is drawn to the terms and conditions printed overleaf and in particular to clauses which relate to acceptance of any Part Exchange Vehicle"

In view of the above endorsement, the appellant's contention vide letter dated 15.6.2009 that as per UK norms a computer generated Invoice is considered as an Actual Invoice without Stamp and Signature, is found correct. The contention that COC is of later date would not affect the manufacturer's Invoice or the transaction. There is no reason therefore to reject the Manufacturer's Invoice Value, and hence the Transaction Value is accepted."

In our view the Commissioner (Appeal) has determined the value after discussing the evidences produced before him and has in a reasonable manner arrived at the conclusions drawn by him. Revenue has in their appeal not stated why the conclusions arrived by the Commissioner (Appeal) are incorrect or the why the evidences produced before him and relied upon by him cannot be considered. In absence of any averments in the appeal discarding the evidences relied upon by the Commissioner (Appeal) we do not find any merits in the submissions made by the revenue.

5.5 In respect of para III of the ground of appeal we find that even the adjudicating authority has in his order, not even proposed addition of such charges. The issue raised in the appeal by the revenue has been raised for first time in appeal without the same being subject matter of adjudication proceedings or in appellate proceedings before the Commissioner (Appeal). In case revenue was aggrieved by adjudicating authority not proposing to add such charge to arrive at the assessable value, the correct course would have been to file appeal or cross objections before the Commissioner (Appeal). Since revenue has proceeded not to file any appeal/ cross objections before the Commissioner (Appeal) they could not have taken this ground for first time while filing the appeal before this tribunal.

5.6 On the issue of quantum of redemption fine and penalty raised by the revenue in para IV of the grounds of appeal we find that Commissioner (Appeal) has reduced the same relying on the decision of tribunal in case of rational Art Press [2007 (215) ELT 522 (T-Mum)] upheld by the Bombay High Court. Revenue has failed to establish as to why redemption fine should be more than that imposed by Commissioner (Appeal). In case of Jagdish Cancer & Research Center [2001 (132) ELT 257 (SC)] held as follows:

"11.*Whenever an order confiscating the imported goods is passed, an option, as provided under sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to sub-section (2) of Section 125, the person "shall in addition be liable to any duty and charges payable in respect of such goods". A* *reading of sub-sections (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under sub-section (2) in addition to the fine under sub-section (1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc. The order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in Mohan Meakins Ltd. v. Commissioner of Central Excise, Kochi, 2000 (115) E.L.T. 3 (S.C.) = (2000) 1 SCC 462 wherein it has been observed in Para 6 "….. **Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section.**" In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable."*

In our view the proposed enhancement of redemption fine without determining the market value of goods and the duty payable cannot be sustained.

5.7 Even otherwise this issues raised by the revenue in their appeal have become of academic interest only because as per the submissions made by the Counsel for respondent, that they are no more interested in redeeming the said vehicle.

6.1 In result the appeal filed by revenue is disposed off as per our observations made in paras 5.4, 5.5 and 5.6 above.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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