

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

CUSTOM APPEAL NO. 828 OF 2007

(Arising out of Order-in-Appeal/Original No. 75/2007CAC/CC(I)
/SP/Gr. 28 dated 31.05.2007 passed by the Commissioner of Customs
(Import) Mumbai)

M/s. Amarjeet Enterprises : **Appellant**
6-A, Laxmi Nivas, 355, V.P. Road,
Mumbai, Maharashtra

VS

The Commissioner of Customs (Import) : **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001

Appearance

Shri S.N. Kantawala, Adv for Appellant

Shri Sanjay Hasija, Supdt.for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 05.03.2019
Date of decision : 02.08.2019

ORDER NO. A/86333/2019

Per : P Anjani Kumar, Member (Technical)

Heard both sides and perused the records of the case.

2. Briefly stated the facts of the case are that Central Intelligence Unit of New customs House, Mumbai have intercepted goods, i.e. Automotive Consumables imported by the Appellants, i.e. M/s. Amarjeet Enterprises. The Officers have drawn representative samples of 5 items and have conducted the market survey to ascertain the

correct value of the goods. Goods have detained for alleged under valuation. On a writ petition i.e. 1577/2007, filed by the Appellants, Hon'ble High Court Mumbai inter alia directed that the goods should be warehoused under Section 49 of Customs Act, 1962; Show Cause Notice be issued within 4 weeks and adjudicated within 4 weeks of the reply by the Appellants. Accordingly, the Show Cause Notice dated 26.04.2007 was issued. It was confirmed by Order in Original dated 05-06-2007, wherein the imported goods were revalued and duty of Rs. 27,69,401 was confirmed alongwith penalty of Rs.25,00,000 and redemption fine of Rs.30,00,000, on the basis of the market survey conducted by the department, was passed.

3. Learned Counsel for the Appellants submits that there was no mis-declaration in respect of the imported goods. The Adjudication order confirmed the duty on the basis of market survey in respect of Stop Leak (Brand Abro), Putty (Brand Abro) and Shellac (Brand Versachen); the value of Stop Leak (Brand Morse) was arrived on the basis of export value of a local manufacturer and the value of G.P. Paste (Brand Chemico) was arrived at on the basis of Proforma Invoice issued to M/s. Ashu Automarts by the foreign supplier. He submits that the market inquiry were conducted behind the back of the Appellant; export price should not be relied upon for valuing a import consignment and that no Bill of Entry details were provided to actually show that goods have been imported by M/s. Ashu Automarts and the letters sent by the Appellants to M/s. Ashu Automarts were returned with remarks that no such company exists at the said address. The Adjudicating Authority has rejected the value on presumption only and revenue did not put forth any evidence to reject the transaction value. The impugned goods were partially damaged. However, the Adjudicating Authority did not consider the report of M/s. SGS, and independent agency that 40% of the goods were in damaged condition. Though the Appellants relied upon import of similar / identical goods by M/s. Auto Stores, which was adjudicated, the authority has rejected the same as not reliable. All the statements of the Appellants were exculpatory.

3.1. The Learned Counsel further in his written submissions submits that the market enquiry report relied upon by the SCN was never furnished to them; the importer or his representative was not part of the enquiry. He submits that the adjudication order accepts the facts that the goods were found as declared with respect to description, quantity, brand and country of original; the only discrepancy was about the country of original in respect of paste. He also submits that Custom valuation rules 1988 was not followed systematically and correctly while re-determining the value. Rules 4, 5, 6 and 7 and 7A (as per Rule 6A) were not sequentially followed by the Adjudicating Authority. He further submits that the Appellants have declared correct value and department has not discharged its burden to prove the under-valuation. They produced copy of Bill of Entry No.738179 dated 15.01.2007 filed by M/s. Ami Impex to the Adjudicating Authority; the import was nearest to the import by the Appellants; an item i.e. gasket shellac imported by M/s. Ami Impex was valued at 0.006 USD/pc, whereas they declared a price of 0.06 USD /pc though they imported 17280 pcs as against 3168 by M/s. Ami Impex. The adjudicating authority has blindly rejected their claim. He relied upon (i) Saccha Souda Pedhi 2015 (321) ELT 348 (Tri-Mumbai) wherein it was held that while conducting market enquiry should have been co-opted; in the absence of the same, the evidentiary value of the enquiry report is suspect and (ii) Hi-tech Fertifood Pvt Ltd 2016 (334) ELT 432 (Tri-Mum) and Hon'ble Mumbai High Court in the case of Nirmal Seeds Pvt Ltd WP 1643/2017 say that when specific reliance is placed on certain documents or statements cross examination of the same should be given.

4. Learned Authorised Representative for the Department has reiterated findings of OIO and submitted written brief highlighting the reasons for fixing a particular value for each of the impugned goods. He relied upon the following cases:

- (i). MYTRI Enterprises 2004 (174) E.L.T. 389 (Tri. Mumbai)
- (ii). *Sanjay Chandiram* 1995(77) ELT 241 (SC)
- (iii). *Universal Synthetics* 2000(117) ELT 534 (SC)
- (iv). *Prashant Glass Works* 1996 (87) ELT 518 (Tri)

- (v). *Prashant Glass Works 1997 (89) ELT A179 (SC)*
- (vi). *Agfa Gevaert India Ltd 1985 (21)ELT 510 (Tri)*
- (vii). *Multimetal Ltd 2002 (144) ELT 574 (Tri-Mum)*
- (viii). *Pan Asia Enterprises 1995 (79) ELT 322(Tri)*

5. We find that Learned Commissioner has found that the value of 5 of the 7 items imported was mis-declared and required re-determination. Learned Commissioner has relied upon the market enquiry in respect of 3 items; in respect of 1 item he relied upon the export price of a product manufactured in India and in one case he relied upon a Proforma Invoice given by the foreign supplier to M/s. Ashu Automarts. The Appellants submits that the Learned Commissioner did not accept the values of contemporaneous import submitted by them; he also did not accept the prices of the item for which they have produced invoices. Learned Commissioner has given various reasons for not accepting the same. The crux of the findings of the Commissioner was that in those cases the department confiscated the goods and the same had gone through adjudicating proceedings; the authenticity of the bills produced by the Appellants is suspect etc.

6. However, the main contentions of the Appellants are that the Appellant was not party to the market enquiry; copy of the report was not provided by him and that the Commissioner has not proceeded sequentially in terms of Customs Valuation Rules. We find that Commissioner has heavily relied on the market enquiry which was not done in the presence of the either the Appellants or their representative. The copy of the market enquiry report was not given to the Appellants. We find that for this reasons the Order in Original suffers from a serious lacuna. As submitted by the Appellants we find that the Tribunal in the case of *Saccha Souda Pedhi (supra)* has held that market enquiry cannot be conducted without the involvement of the Appellants and that such market enquiry loses evidentiary value. We find that the Tribunal observed that

We note that if contemporaneous value of imports were available at US \$ 900 PMT then re-determination of value should have been done either under Rule 4 or Rule 5 of Customs Valuation Rules, 1988, which has not

been done and which clearly shows that department has not done the re-determination on the basis of value of contemporaneous of imports. The very fact that re-determination has been done under Rule 8 clearly shows that the basis for re-determination is not contemporaneous value of imports. A copy of the market inquiry report is available on record which we have perused. The said market inquiry report is not signed by anyone including the officer of the Customs and the representative of the respondent. Therefore, the same cannot be accepted as a valid piece of evidence. While conducting the market inquiry, a representative of the importer should have been co-opted. Thus the evidentiary value of the so-called "market inquiry" itself is suspect. Further, we note that the lower appellate authority while considering the valuation done by the assessing authority has relied upon the decision of the Apex Court and the Tribunal in similar circumstances and has come to the conclusion that the loading of value done by assessing authority is without any basis. Therefore, we see no reason to interfere with the said order. Accordingly, we reject the appeal filed by the Revenue.

7. We also find that the Appellants contended that the Learned Commissioner has not discharged the burden of proof of valuation. We find that Commissioner has brushed aside the contemporaneous value of some items provided by the Appellants. The Commissioner's contention was that such goods were seized and were subjected to adjudication and therefore he was not considering those values. We find that the Learned Commissioner has not analysed the values therein taken in such adjudication of identical / similar goods. We find that for that reasons also the adjudication order suffers from infirmity. The Commissioner, having rejected the transaction value, ought to have proceeded sequentially through the Rules 5, 6 and 7 etc, before resorting to Rule 7A. We also find that no such reasoning has been

given as to why the Commissioner required to take the help of Rule 7A. Learned Commissioner has also not cross examined the officers who conducted market survey or the personal of SGS who examined the impugned goods and certified that a portion of the cargo is damaged. We find that Ld. Commissioner could have gone in to the valuation of contemporaneous imports from NIDB or any other source or she could have examined the values arrived at in such bills of entry provided by the appellants. This was all the more important as the imports were at about the same time and were of similar products. We find that Tribunal in the case of Ramdev Traders 2018 (359) E.L.T. 431 (Tri. - Chennai) observed that

No doubt, the appellant had based their assessable value on invoice price of US\$ 0.75 per piece. However, no grounds have been evidenced for rejecting the said declared value as not being transaction value. Even so, instead of following the sequences laid down in the Valuation Rules for redetermination of value, the department, for some reason, found it appropriate to work out the assessable value on the basis of market prices of the impugned item obtained through market enquiry. The enhancement is then certainly not based on sufficient reasons for rejection of transaction value and redetermination of value thereupon being based on contemporaneous imports of identical goods. The so called "voluntary statement" of the importer has, in any case, been subsequently retracted. The finding of lower authority that "value of Rechargeable Lamp PRL 228 admitted by Shri R. Bharath Kumar in his voluntary statement recorded under Section 108 of the Customs Act, 1962 also coincides with the value found in NIDB data", is certainly not the accepting manner of arriving at assessable value. There are spate of Tribunal's decisions against setting aside enhancement of declared value on the basis of NIDB data. In the event, we are of the considered opinion that the impugned order upholding the enhancement of the assessable value of

the imported goods cannot sustain and will have to be set aside in toto which we hereby do. Appeal is allowed.

8. Learned Commissioner could have come to a conclusion after analysing any other evidence in support of market enquiry before arriving at a conclusion. We do not find any mention of the efforts made by Commissioner to have a look at the contemporaneous imports and as to why she was resorting to Rule 7A of CVR. We find that Tribunal in the case of Golden Agro Corporation Vs CC, Jaipur-I 2017 (354) E.L.T. 655 (Tri. - Del.) observed that

In the case of these goods, the revenue again enhanced the value based on market enquiry. The Revenue further contends that market enquiry was made in the presence of Shri Deepak Agarwal, the proprietor of the importer firm. However, the presence of Shri Deepak Agarwal, the proprietor, cannot make difference to the fact that there is no systematic data of market enquiry available and further market enquiry alone cannot become the basis of enhancement of the value unless the results of the market enquiry are corroborated by independent evidences which could be contemporary imports or manufacturer's price list, which again needs support by the specific written declaration from manufacturer. Further, when it is a case of enhancement of value, Revenue needs to make an investigation on the differential payments made by the importer to the supplier from where the goods are received. The impugned order also discards the details of bill of entry dated 20-7-2011 produced by the importer indicating the clearance value of the pocket scale @ Rs. 68 per pc, and in the case of present imports, the price declared is Rs. 71 per pc. The rejection in the impugned order of the said evidence is more in the nature of arbitrary, when revenue has not come out with any other cogent evidence (other than market enquiry) to sustain the enhancement of the

value for these goods. Therefore, following Hon'ble Supreme Court decision in case of M/s. Eicher Tractors (supra) and CESTAT decision in case of M/s. Sara Electro Acoustics Pvt. Ltd. (supra) enhancement of value here is not sustainable.

9. We find also that the commissioner's reliance on export price of a product i.e. Stop Leak for determining the value of an imported product is against the established principles of valuation and hence not acceptable. In respect of GP Paste also Commissioner relies upon the Proforma Invoice of foreign supplier, without going in to the details like the quality, make, quantity supplied, purchase, bill of entry, actual invoice etc. Such an act suffers from the same infirmities which Learned Commissioner herself has pointed out in the claim of the appellants in respect of values of different products in question. We are of the opinion that the values of disputed items were arrived at without following the CVR and without giving any cogent reasons for arriving at such a value. We are of the opinion that such a valuation has neither statutory backing nor legal acceptability. In view of the ratio of the cases cited above, we find that such a OIO is not maintainable.

10. In view of the above, it is seen that the Ld. Commissioner has erred in rejecting the transaction value and in fixing the value of the impugned goods. As the appellants were not made part of market enquiry; copy of the report was not provided to them and values of contemporaneous imports of identical/similar goods were not considered/examined, we find that the impugned order is full of infirmities and as such is not sustainable under Law. Therefore, we set aside the impugned order and allow the appeal in *toto*.

(Order pronounced in open court on 02.08.2019)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

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