CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 85203 of 2018

[Arising out of Order-in-Appeal No: MUM-CUSTIM-SMP-27/2017-18 NCH dated 29th May 2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

Elica PB India Pvt Ltd … ***Appellant***
37/1/1 Kondhwa Pisoli Road, Pisoli, Pune – 411 060

versus

Principal Commissioner of Customs (Import-II) …***Respondent***
New Custom House, Ballard Estate, Mumbai – 400 001

APPEARANCE:

Shri A Hidayatullah, Senior Advocate with Shri Makrand Joshi, Advocate for the appellant

Shri R Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86738 / 2019

DATE OF HEARING: 20/03/2019
DATE OF DECISION: 20/09/2019

PER: C J MATHEW

The challenge in this appeal of M/s Elica PB India Pvt Ltd against order-in-appeal no. MUM-CUSTM-SMP-27/2017-18 NCH dated 29th May 2017 of Commissioner of Customs (Appeals), Mumbai-I arises from the directions issued by Joint Commissioner of Customs, Special Valuation Branch, New Custom House, Mumbai to issue demands, by invoking the extended period in section 28 of Customs Act, 1962, for recovery of differential duty attributable to inclusion of royalty in the assessable value of imports effected during 2011, 2012, 2013 and 2014 as well as to provisionally assess the goods to be imported in future which, at the end of each year, on the basis of data pertaining to value of imports and royalty paid, were to be finalised by re-valuing the goods to the extent of loading arrived at in accordance with the formula prescribed therein. The monetary implication of this order, upheld by the first appellate authority, was yet to be quantified for the previous years as on the date of filing of appeal; notwithstanding this, the first appellate authority proceeded to decide an appeal which was not compliant with the pre-deposit mandated by section 129E of Customs Act, 1962 and, following which, the present appeal was admitted for listing before the Tribunal. It would, therefore, appear that there is no grievance, as yet, in relation to past imports and, as the assessments are, presumably, provisional for the imports subsequent to the order of the Joint Commissioner of Customs, it would be premature for an appeal to be filed. Nevertheless, the first appellate authority has not paused to ascertain these aspects, including the scope for invoking the extended period for the past by an authority not subject to the directions of the adjudicator or the first appellate authority herein. All that we can gather on the validity of the action of the Joint Commissioner of Customs is that this system has been prevalent in the past, and continues to prevail, in custom houses.

2. The loading factor of 9.82%, 10.77%, 16.53% and 12.32%, for each year between 2011 and 2014, has been determined as a proportion of the royalty paid to M/s Elica SpA, in pursuance of Technical License and Trademark License Agreement dated 12 January 2011, at 3% of net sales of the products covered by the said agreement to the total value of imports effected from related suppliers. The appellant has computed the loading factor for 2015 and 2016 at 17.8% and 14.03%. Of particular interest in this order of loading is the certification of conformity of the transaction value under rule 3(3)(a) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 on goods imported from related persons in terms of rule 2(2) of the said Rules though requiring adjustment as provided for in rule 3(1) of the said Rules. It would also appear that such an exercise was undertaken in August 2011 without any addition and, being subject to review on expiry of three years, was taken up again in 2014 culminating in the impugned order. A specific finding has been recorded that the agreement for payment of royalty, though entered into after the order of 2011, had been suppressed from the customs authorities thereafter warranting the invoking of extended period since 2011 for recoveries.

3. There is no dispute on the connection between the appellant and the 'licensor' referred to in the agreement for payment of royalty. It is common ground that the supplier is one of the persons in the joint-venture that floated the appellant herein and that the agreement, referred to *supra*, is in pursuance of participation in the joint-venture. The case for loading has been made out on the premise that it is this royalty which is referred to in rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for appropriate adjustment as provided for in rule 3(1) of the said Rules. Though this proposition bears scrutiny, we are more concerned that the obligations which devolve on 'proper officer' in exercise of powers under section 17, section 18 and section 28 of Customs Act, 1962 which, in consequence of the directions contained in the order upheld by the first appellate authority, have been so excoriated as to render the subsequent exercise of jurisdiction to that of a formality.

4. The Special Valuation Branch, which undertook the exercise leading to the order impugned before the first appellate authority, has been institutionalised in the major custom house to concentrate on investigation of prices having been influenced by relationship, within the meaning of section 14 of Customs Act, 1962, between an importer and the overseas supplier. Considering its 'extra statutory' existence, its functioning is guided by, and limited to, the mandates in the various instructions issued, from time to time by Central Board of

Excise & Customs and the current variant. The order of the Joint Commissioner of Customs has two components: one pertaining to the period of review undertaken by the Joint Commissioner of Customs from 2014 to 2017 and the other pertaining to the preceding period in which it has been determined that the transaction value declared in the bill of entry does not merit acceptance.

5. We have taken note of circular no. 11/2001-Cus dated 23rd February 2001 of the Central Board of Excise & Customs and we are unable to perceive any authority conferred on the Joint Commissioner of Customs to venture into past assessments and issue directions for initiating proceedings under section 28 of Customs Act, 1962. Furthermore, the said circular envisages certain safeguards in the form of accountability at senior levels before undertaking such investigations. It is not clear if the review, undertaken on expiry of the earlier period of ascertainment, can evade compliance of such accountability. Over the years, the probable consequence of unwarranted and purposeless investigation by Special Valuation Branch on the smooth flow of regular import has led to 'fine-tuning' of the accountability mechanism and circular no. 5/2016-Cus dated 9th February 2016 of Central Board of Excise & Customs has clarified the synergy that is desired from the symbiotic relationship between 'assessing authority' and the 'investigating branch' with no dilution of the statutory predominance of the former. From all of this, we deduce

that the order of the Joint Commissioner of Customs is but tentative, and preliminary, with consequential action to be initiated in accordance with law by the ‘proper officer.’ In so articulating, we can draw no finer inspiration than the observations contained in decision of the Hon’ble Supreme Court in *Century Metal Recycling Pvt Ltd and Another v. Union of India and Others [order dated 17th May 2019 in Civil Appeal no. 5011 of 2019 arising out of Special Leave Petition (Civil) No. 33602 of 2017]* to the effect that

> *‘25. Before closing, we would observe that the Valuation Alerts, as also stated by the respondents, are issued by the Director General of Valuation based on the monitoring of valuation trends of sensitive commodities with a view to take corrective measures. They provide guidance to the field formation in valuation matters. They help ensure uniform price, smooth functioning and prevent evasion and short payment of duty. However, they should not be construed as interfering with the discretion of the assessment authority who is required to pass an Assessment Order in the given factual matrix. Declared valuation can be rejected based upon the evidence which qualifies and meets the criteria of ‘certain reasons’. Besides the opinion formed must be reasonable. Reference to foreign journals for the price quoted and exchanges etc., to find out the correct international price of concerned goods would be relevant but reliance can be placed on such material only when the adjudicator in authority had conducted inquiries and ascertain the details with reference to the goods imported which are identical or similar and ‘certain reasons’ exists and justifies detailed investigation. These reasons are to be recorded and if requested disclosed/communicated to the importer. Valuation*

> *alerts could be relied upon for default valuation computation under the Rules. (See* ***Varsha Plastic Pvt. Ltd. vs. Union of India****).'*

6. We have forayed into the order that generated the present proceedings, as well as the statutory competence, not with the purpose of deciding on the submission made by Learned Senior Counsel and Learned Authorised Representative but to determine if the circumstances in which the appellant herein was enabled to invoke the right to statutory appeal in section 128 of Customs Act, 1962 is in compliance with the law. This was necessitated as the appellant herein claimed exclusion from the obligation to comply with section 129E of Customs Act, 1962 and, having pleaded the same before the first appellate authority, was permitted to prosecute the appeal notwithstanding lack of compliance. In justification, it was pleaded that the absence of a demand, or quantification, in the impugned order, and the preceding one, precluded such compliance. In our view, this does not appear to be an order which is of detriment to the appellant herein until the statutory authority for assessment, and for recovery, initiates appropriate action. The order impugned before us has been decided by the first appellate authority on conclusion of proceedings under section 128A of Customs Act, 1962. Though section 129E of Customs Act, 1962 establishes the jurisdiction of Commissioner of Customs (Appeals) to entertain an appeal only upon deposit of a specified percentage of the duty, penalty or duty and

penalty, as the case may be subject to a ceiling of ₹ 10,00,00,000, it is seen from the impugned order that, noting the lack of compliance thereon, it has been recorded that

> *'3. The present appeal is against the order of includability of royalty in assessable value of the goods imported by the appellant and as there is no quantification of the exact duty in the impugned SVD order and in pursuance of the Para-19 (iii) of the impugned order, the assessing officers will have to issue SCNs under Section 28(4) of the Customs Act invoking suppression of facts clause for recovery of duty, interest and penalties etc. Hence, the requirement of pre-deposit under Section 129E is not applicable in the case.'*

thereby circumventing the mandate in the statute. In our view, the mandate is not contingent upon being aggrieved by an order of demand of duty or imposition of penalty but any appeal. Impliedly, the jurisdiction under chapter XV of Customs Act, 1962 is limited to fiscal detriment or consequence.

7. As no appeal can be entertained without such pre-deposit by the appellant except those arising from review by the competent authority, envisaged in section 129C of Customs Act, 1962, which, in any case, emanates from provisions other than section 128 and section 129 of Customs Act, 1962 to which alone is section 129E applicable. Effectively, there is a disbarment of appeals arising from grievance of potential detriment in an adjudication order. Therefore, the appeal should not have been entertained by the first appellate authority in the

absence of quantification of the detriment even if it give cause for grievance otherwise.

8. There can be no order for recovery of duties of customs on past imports that were finally assessed without recourse to section 28 of Customs Act, 1962. Should that eventuality occur, the 'proper officer' would, doubtlessly, issue an order quantifying the demand after following the procedure laid down in law. That could be a cause of grievance and any appeal therefrom, in compliance with section 129E of Customs Act, 1962, could be entertained by the first, or subsequent, appellate authorities.

9. We also take note that, as yet, the appellant is not aware of any action initiated on the prospective ruling on assessments of future imports, whether provisional or final. In Customs (Finalisation of Provisional Assessment) Regulations, 2018, we find that regulation 4(8) and 6(3) and 6(4) provide for consent or justification, as the case may be, on each bill of entry. For us to entertain and dispose of the appeal would tantamount to presenting the 'proper officer' from applying its mind to finalization of an assessment and, indeed, to interfere in an assessment that is yet to fructify. The order of the Joint Commissioner of Customs is also not of such detriment to the appellant as to warrant circumventing of the requirement of mandatory pre-deposit for entertaining appeals under section 128, or section 129, of Customs Act, 1962.

10. Every demand for unpaid tax/duty is not an end in itself. It must be implemented by appropriate order, and action, for recovery of such adjudicated, or confirmed, dues. The inoperability of an adjudication, or an appellate, order that upholds demand of tax/duty would render the entire exercise to be academic which tax authorities should not be wasting their time on. The proceedings initiated, and concluded, by the Joint Commissioner of Customs poses no detriment, as noted in the impugned order, till an import is effected or a notice for recovery of duties on past imports has been issued. Admittedly, these events have not taken place and the appellate authority has acted in haste to take up the appeal for disposal prematurely.

11. The Hon'ble Supreme Court has, in *M/s Tecnimont Pvt Ltd v. State of Punjab & Others [order dated 18th September 2019 in civil appeal no. 7358 of 2019 arising from Special Leave Petition (Civil) No. 27072 of 2016]*, in determining the challenge to the finding of the Hon'ble High Court of Punjab & Haryana on, *inter alia*, the question of

> *'(c) whether the first appellate authority in its right to hear appeal has inherent powers to grant interim protection against imposition of such a condition for hearing of appeals on merit?'*

12. In the context of section 62 of the Punjab Value Added Tax Act, 2005 which mandates that

> *'(5) No appeal shall be entertained, unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty-five per cent of the total amount of additional demand, penalty and interest, if any.'*

within the provision for challenge before the first appellate authority, has held that

> *'23. In respect of powers exercisable under Section 482 of the Cr. P. C. It was observed in **Sooraj Devi v. Pyare Lal and Another**, "Now it is well settled that the inherent power of the Court cannot be exercised for doing that which is specifically prohibited by the Code." The principal was followed in **Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and Another** and in **State v. K. V. Rajendran and Others**.*
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> *24. If the inherent power the existence of which is specifically acknowledged by provisions such as Section 151 of the CPC and Section 482 of the Cr.P.C is to be read with the limitation that exercise of such power cannot be undertaken for doing that which is specifically prohibited, same limitation must be read into the scope and with of implied power of an appellate authority under a statute. In any case the principle laid down in **Matajog Dobey** states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in **Kunhi** cannot go to the extent, as concluded by the High Court, of enabling the Appellate Authority to override the limitation prescribed by the statute and go against the requirement of pre-deposit. The High Court was clearly in error in answering question (c).*
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> *25. As stated in **P. Laxmi Devi** and **Har Devi Asnani**, in*

> *genuine cases of hardship, recourse would still be open to the concerned person. However, it would be completely different thing to say that the Appellate Authority itself can grant such relief. As stated in **Shyam Kishore** any such exercise would make the provision itself unworkable and render the statutory intendment nugatory.'*

13. In view of the above, we hold that an order emanating from the authority invested in Special Valuation Branch of custom houses under administrative instructions of Central Board of Excise & Customs are not orders which are capable of complying with the pre-requisites for filing of an appeal in chapter XV of Customs Act, 1962. The first appellate authority erred in taking up the appeal preferred before it despite non-compliance of section 129E of Customs Act, 1962. To hear the appeal arising from an order issued without jurisdiction would be to compound the illegality of the proceedings. Accordingly, we set aside the impugned order and remand the matter back to the first appellate authority to consider the appeal only to the extent of statutory jurisdiction conferred upon it.

(Order pronounced in the open court on 20/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*