CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 282 of 2011

[Arising out of Order-in-Appeal No: 105/MCH/AC/Gr.IV/2011 dated 22nd March 2011 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

Turakhia Ferromet Pvt Ltd … ***Appellant***
2/3 Ashok Chambers, Devji Ratansy Marg (Broach St)
Mumbai 400 009

versus

Commissioner of Customs (Import) …***Respondent***
Gr.IV, New Custom House, Ballard Estate
Mumbai 400 038

APPEARANCE:

Shri J C Patel, Advocate for the appellant

Shri AP Kothari, Additional 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/86795 / 2019

DATE OF HEARING: 12/03/2019
DATE OF DECISION: 13/09/2019

PER: C J MATHEW

This appeal of M/s Turakhia Ferromet Pvt Ltd lies against order-in-appeal no. 105/MCH/AC/Gr.IV/2011 dated 22nd March 2011 of Commissioner of Customs (Appeals), Mumbai Zone – I and pertains to the import of 'hot rolled steel plates (non-alloy)' against five bills of entry nos. 880746 to 880750/30.01.2009, under contract dated 4th December 2008 with M/s AM International, Dubai, admittedly a trader in goods manufactured by M/s Arcelor Mittal, Romania.

2. The first appellate authority had set aside the confirmation of enhancement of value from the declared US $ 400 per MT to US $ 892 per MT. This order was quashed by the Tribunal on the plea of Revenue that it had been decided *ex-parte* without hearing the departmental contentions. We take notice that the order-in-original was not preceded by a show cause notice but were assessments of the bills of entry filed by the importer and that the first order of the appellate authority had been decided *ex-parte.*

3. In the fresh proceedings, enhanced assessable value was upheld on the ground that the invoices, supplied along with the bill of entry, were not that of the manufacturer and that import of similar goods by M/s Mazgaon Dock Ltd on the same vessel from the same supplier as well as two other imports of M/s Standard Galva and M/s Bharat Heavy Electricals Ltd in December 2008 from the same supplier were priced higher than that at which the impugned imports were. The first appellate authority, in the impugned order, has relied upon the present facts and upon the decision of the Hon’ble Supreme Court in *Punjab Processes Pvt Ltd v. Collector of Customs [2003 (157) ELT 625 (SC)]* and of the Tribunal in *African Trading Co v. Commissioner of*

Customs [1993 (64) ELT 497 (T)], GR Batra v. Commissioner of Customs [2004 (170) ELT 571(T)], Chirag Enterprises v. Commissioner of Customs (EP), Mumbai [2008 (232) ELT 730 (T)], Dow Chemicals P Ltd v. Commissioner of Customs, Kandla [2008 (226) ELT 420 (Tri.Ahmd.)] and *Schokki Industries Pvt Ltd v. Commissioner of Customs, Nhava Sheva [2002 (146) ELT 462 (Tri.)* to upheld the assessment.

4. We have heard Learned Counsel for the appellant and Learned Authorised Representative at length.

5. We find that the impugned order is based on certain decisions cited therein without findings on the applicability to the facts presented by the appellant herein.

6. Though there is no provision under section 128 of Customs Act, 1962 for hearing both sides before passing of an order by the Commissioner of Customs (Appeals) and it was necessary to issue a show cause notice proposing the grounds of enhancement, unless waived by the importer, the Tribunal was magnanimous enough to allow the pleas of Revenue to be argued before the first appellate authority on their appeal. It was expected that the first appellate authority would render its decision after hearing, and considering, the submissions of both sides. It appears from the records that the first appellate authority has merely taken note of the submissions and, in

rendering its findings, has reiterated the single submission of Revenue that the invoice, unless that of the manufacturer, was liable to be rejected and as, in comparison with higher contemporaneous prices at the time of import, the least was adopted as the substitute, there was no error in the assessment.

7. The rigidity of a contract entered into by a public sector unit, such as M/s Mazgaon Dock Ltd in 14th December 2008, lacks comparability with the flexibility in re-negotiation of a contract of the appellant when the price of steel was claimed to have declined sharply. It was also contended by the appellant that M/s Mazgaon Dock Ltd had imported ‘prime goods’ whereas theirs, apparent from the contract, are ‘ex-stock’. It is also submitted that the appellant had imported a much higher quantity than the meagre quantity procured by M/s Mazgaon Dock Ltd.

8. It is also seen from the record that imports of others, cited in the order-in-original, were at much higher price than that of M/s Mazgaon Dock Ltd. Undoubtedly, the price of import by M/s Turakhia Ferromet Pvt Ltd is far lower than the price declared by M/s Mazgaon Dock Ltd on contemporaneous import from the same supplier. However, the circumstances in which M/s Mazgaon Dock Ltd entered into the contract with the supplier and the scope for flexibility arising from the declining of price of steel which may have impacted the

contract entered into by the appellant herein almost a year latter has not been considered. Furthermore, it is also on record that imports effected by others about three to four months before the impugned goods were at higher prices than even that at which M/s Mazgaon Dock Ltd. Mere reference to the financial mandate of contract, or enumeration of the contemporaneous prices, does not excuse the assessing officer from the obligation to ascertain acceptability of the claim of reduction in steel price being discernible even within the period of contemporaneous imports.

9. In view of the above, we find ourselves unable to accept the logic adopted by the first appellate authority in the impugned order. We are unable to satisfy ourselves that the imports by M/s Mazgaon Dock Ltd could be designated as 'similar' merely because of being contemporaneous. From the records of the original authority, we perceive a trend of fall in price during the said period. It would also appear that no efforts have been made by the assessing officer to ascertain the manner in which the alleged undervaluation would have been compensated to such extent as to warrant adoption of a value that was almost double that of the declared value. Such excess undervaluation, as alleged, should have been subject to serious investigation and appropriate penalties imposed if found to be so. In the absence of such, we can only deduce that the exercise of enhancement of value so undertaken was without sufficient evidence on hand.

10. In view of the above, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 13/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*