CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 86769 of 2018

[Arising out of Order-in-Appeal No: 362 & 363(Adjn.(I)/2018(JNCH) Appeal-II dated 28th march 2018 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Surendra R Choudhary … ***Appellant***
1st Floor, 347/49, Samuel Street, Vadgadi,
Mumbai - 400003

versus

Commissioner of Customs(Import) ***…Respondent***
Jawaharlal Nehur Port Trust, Nhava Sheva,
Tal: Uran, Dist: Raigad

Customs Appeal No: 86773 of 2018

[Arising out of Order-in-Appeal No: 362 & 363(Adjn.(I)/2018(JNCH) Appeal-II dated 28th march 2018 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Synthetic Colour Chem … ***Appellant***
1st Floor, 347/49, Samuel Street, Vadgadi,
Mumbai - 400003

versus

Commissioner of Customs (Import) ***…Respondent***
Jawaharlal Nehur Port Trust, Nhava Sheva,
Tal: Uran, Dist: Raigad

APPEARANCE:

Shri Anil Balani with Shri Rohan Balani, Advocates for the appellant

Shri Manoj 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/ 86841-86842 / 2019

DATE OF HEARING: 15/03/2019
DATE OF DECISION: 13/09/2019

PER: C J MATHEW

We dispose off two appeals filed against order-in-appeal no. 362 & 363 (Adjn (I)/2018 (JNCH)/Appeal-II dated 28 March 2018 of Commissioner of Customs (Appeals), Mumbai-II by M/s Synthetic Colour Chem Industries and, its partner, Shri Surendra R Chaudhary, challenging the enhancement of value of 'crystal melamine' imported from M/s Petrochemicals Corporation as well as the confiscation, redemption fine and penalties imposed.

2. Briefly, the facts, as stated by Learned Counsel for appellant is, are that the appellant-firm, acting as indented agents, procured hundred metric tons of the said goods for M/s Shlok Chemicals who, being disinclined to accept the consignment, did not file bill of entry for the same after arrival in July 2008. It transpired from the investigations that the *pro forma* invoices issued for the impugned consignments indicated the value of € 1137 per metric ton. Finally, the appellant herein was persuaded to accept the consignment for a value of € 800 per metric that in pursuance of which the shipper

issued fresh documents and, armed with ‘no objection’, the ‘import general manifest’ was amended and bill of entry filed.

3. Proceedings are initiated against the appellant-firm and the partner which culminated in rejection of the declared value of ₹ 1,09,81,689.60 for assessment which was then enhanced to ₹ 1,54,34,090 to be levied to duty of ₹ 33,21,880 (increase of ₹ 9,58,291), confiscation of the goods under section 111 of Customs Act, 1962 for redemption on payment of ₹ 25,00,000 and imposition of penalties of amount equal to the differential duty under section 114A of Customs Act, 1962 and on individuals. On appeal, the impugned order expunged the reference to section 28 for confirming the demand of duty and set aside the penalty imposed under section 114A of Customs Act, 1962 to be substituted with penalty of ₹ 2,00,000 under section 112 of Customs Act, 1962 while reducing the redemption fine to ₹ 7,00,000 and the penalty imposed on Shri Surendra R Chaudhary under section 114AA of Customs Act, 1962 to ₹ 2,00,000. Aggrieved by this, the appellants are before us.

4. Narrating the circumstances supra, it is the contention of Learned Counsel that the circumstances of investigation undertaken by agencies against the original importer had impeded the scope for willing buyers to come forward and clear the consignment. It is his contention that the value negotiated with the supplier represented the

'transaction value' contemplated in section 14 of Customs Act, 1962 and, in the absence of any other evidence of additional consideration, the mandate of law required acceptance of the declaration for computation of duty liability. Reliance is placed in the decision of the Hon'ble Supreme Court in *Choudhary Ship Breakers v. Commissioner of Customs, Ahmedabad [2010 (259) ELT 161 (SC)]* which held that the price paid by an imported to the seller is to be the transaction value for valuation of goods. Reliance is also placed on the decision of the Tribunal in *Gilani Exporter Corporation v. Collector of Customs, Bombay [1996 (83) ELT 409 (Tribunal)]*, in *Excel Glasses Ltd v. Commissioner of Customs, Trichy [2004 (166) ELT 496 (Tri-Bang)]* and in *VK Industrial Corporation Ltd v. Commissioner of Customs (Import), NCH, Mumbai [2014 (308) ELT 700 (Tri-Mumbai)]* to reinforce this argument.

5. It was also contended by Learned Counsel that, in the above circumstances of procurement, there was no scope for invoking section 111 of Customs Act, 1962 and, consequent, order of redemption. The substitution of the penalty under section 114A of Customs Act, 1962 with that under section 112 of Customs Act, 1962 without placing the appellant on notice was also challenged. He also argued that the imposition of penalty under section 114AA is limited to the documents submitted before customs authorities.

6. Learned Authorised Representative relies upon the documents submitted by the office of the shipper in Mumbai which included *pro forma* invoices issued to M/s Joy Petrochem Pvt Ltd and M/s Satish Chemical India Pvt Ltd for sale of the same goods at € 1135 per metric ton. It was also pointed out that the statement of the partner had admitted that this was the sale price agreed upon between the original buyer and the supplier.

7. We take note that the impugned order has approved the enhancement of the declared value from €800 to € 1135 to confirm the recovery of differential duty of ₹ 9,58,291 over that which would have been liable on the declared value. However, the reference to section 28 of Customs Act, 1962 has been expunged. No appeal is on filed by Revenue against this, or any other, modification. It would appear that the pendency of the goods for assessment required recourse to the statutory provision invoked by the original authority which is intended for duty that has not been paid, short-paid or has been erroneously refunded. None of these situations can apply to a bill of entry that is pending for assessment. Furthermore, with the withdrawal of recourse to section 28, the identical circumstances permitting the invoking of section 114 A of Customs Act, 1962 could no longer be cited.

8. It is seen that the bill of entry was filed by the appellant upon failure of the consignee in the original bill of lading to do so. There is

nothing on record to evidence that this was pre-arranged mechanism to overcome the duty liability arising from the terms of the original sale. Nor do we find any evidence that the goods would ultimately come into the possession of the original importer. It would, therefore, appear that the transaction entered into by the appellant-firm herein was as an unwilling substitute. The reality of commercial consideration does not preclude the reduction in price arising in the circumstances.

9. While such may be the negotiated value, it cannot be disputed that the whole of it was conducted after the importation of the goods. Hence, the qualifications entailed upon acceptance of declaration as ‘transaction value’ is compromised; the price is no longer one at the time and place of importation. Naturally, in the circumstances, recourse will have to be had to Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

10. No evidence has been placed on record by the appellants herein that the value adopted does not represent that which the supplier offered goods for sale to India including to the original importer. The sole counter of Learned Counsel is that the negotiated price at which the goods were offered to the appellant is the sole consideration. The decision of the Hon’ble Supreme Court in *re Choudhary Ship Breakers* was rendered in the context of the agreement between the

shipper and the importer being conditional upon the damage to the vessel before landing and, hence, cannot be disassociated from its acceptability as being at the time and place of importation. The decision in *re Gilani Export Corporation* set aside the enhancement with reference to section 23 of Customs Act, 1962 which applies when the remission of duty is envisaged. In *re Excel Glasses Ltd*, the Tribunal was convinced of the acceptability of the reduced price of the 'high sea sale' transaction which took place about one year after the shipment arising from diversion of the ship for an unduly long time. In *re VK Industrial Corporation Ltd*, the Tribunal noted the conformity of the declared price with the prevailing international prices and the absence of any evidence of contemporaneous imports at higher prices. The facts in the present dispute do not conform to any of the situations presented in the decisions cited by Learned Counsel. Therefore, the impugned order cannot be faulted for accepting the enhanced value.

11. There is no evidence on record that the negotiated price has been contrived to evade duties of customs. In the circumstances of being close to a distress sale, the absence of willing buyers for goods under investigation and there being no evidence of additional consideration, the finding of mis-declaration cannot be sustained. The reason for confiscation under section 111 (d), to be invoked for importer prohibited goods, has not been disclosed by either of the

lower authorities and, on the basis of our findings supra, there is no scope for confiscation under section 111 (m) of Customs Act, 1962. Consequently, the imposition of redemption fine set aside and penalty under section 112 of Customs Act, 1962 fails.

12. The concurrence obtained from the shipping agent in India has nothing to do with assessment under section 17 or section 18 of Customs Act, 1962. There is no allegation that the amendment to the 'line' in the Import General Manifest has been obtained by submission of any fraudulent documents; indeed, there is no dispute on the propriety of filing a bill of entry by the appellant-firm. There is, thus, no scope for invoking section 114AA of Customs Act, 1962.

13. Accordingly, we uphold the impugned order only to the extent of enhancement of value. All other detriments are set aside.

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

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*