CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 85446 of 2013

(Arising out of Order-in-Original No. 111/2012 dated 29.10.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

M/s. Sri Sai Imports **Appellant**
1190, Sector-A, Pocket-A,
Vasant Kunj,
New Delhi 110 070.

Vs.

Commr. of Cus. (Imp.), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

Appearance:

Shri Arthur Prem, Consultant, for the Appellant
Shri Manoj Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. **A/87044/2019**

Date of Hearing: 23.09.2019
Date of Decision: 23.09.2019

PER: SANJIV SRIVASTAVA

This appeal has been filed by the appellant against the order in original No 111/2012 dated 29.10.2012 of the Commissioner Customs (Import), Nhava Sheva. By the impugned order, the Commissioner held as follows:

"7.1 On The basis of the foregoing, I pass the following orders:

7.1.1. I reject the declared assessable value, of US$ 1,61,380.00 pertaining to the impugned goods, under rule 12(1) of the Customs Valuation (Determination of Value of

Imported Goods) Rules, 2007 and re-determine the same at US$ 6,26,771.80 (i.e. Rs.2,61,49,646.89) in terms of rule 3 and 8 ibid r/w section 14 of the Customs Act, 1962.

7.1.2. I hold the impugned imported goods collectively valued at US$ 6,26,771.80 (i.e. Rs. 2,61,49,646.89) (re-determined assessable value) liable to confiscation under section 111(m) of the Customs Act, 1962.

7.1.3. I confirm the demand of customs duty amounting to Rs.59,72,165/- (Rupees fifty nine lakh seventy two thousand one hundred sixty five only) from Sri Sai Imports and its Proprietor Shri R.K. Sharma under proviso to section 28(1) of the Customs Act, 1962 and order the recovery forthwith.

7.1.4. I confirm the demand of interest at the appropriate rates chargeable on the customs duty amounting to Rs. 59,72,165/- from Sri Sai Imports and its Proprietor Shri R.K. Sharma on account of the delayed payment of differential duty and in terms of section 28AB of the Customs Act, 1962 and order the recovery forthwith.

7.1.5. I impose a personal penalty equal to an aggregate amount of the duty as shown in para 7.1.3 above and interest calculated on it at the appropriate rates upto the date of payment of the said duty on Sri Sai Imports and its Proprietor Shri R. K. Sharma, under section 114A of the Customs Act, 1962.

7.1.6. I impose a penalty of Rs. 5,00,000/- (Rupees Five Lakhs only) on Shri R.K. Sharma under section 114AA of the Customs Act, 1962.

7.1.7. I do not impose penalty under section 112 of the Customs Act, 1962 on Sri Sai Imports and its Proprietor Shri R.K. Sharma as section 114A clearly precluded imposition of penalty under both the sections 112 and 114A of the Customs Act, 1962.

7.1.8. I also order the appropriation and adjustment of the provisional payment of Rs. 20,30,972/- (Rupees twenty lakh thirty thousand nine hundred seventy two *only) made by Sri Sai Imports and its Proprietor Shri R.K. Sharma against the differential duty, interest and/or penalty."*

2.1 As is evident from the impugned order and the appeal filed, it is evident that this appeal has been filed by Proprietorship Concern and its Proprietor. Importers i.e. the Companies imported Brass Valve & Zinc Valves from China during the period 2007-08.

2.2 Based on the intelligence the import documents of appellant were scrutinized and it was found that the declared transaction value of the imported goods was even less than the cost of raw material i.e. Brass Scrap in case of Brass Valve and Zinc Ingots (LME price) for Zinc Valves.

2.3 In their statement recorded under Section 108 of Customs Act, 1962, Proprietor of the Companies accepted the fact about declaration of lower value than that of raw material cost.

2.4 On the basis of investigations made, the declared transaction value was rejected under the provisions of Rule 12 of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 and re-determined under Rule 8 ibid.

2.5 The redetermined value based on the cost of raw material plus 30% manufacturing cost was accepted by the appellants. They also paid part of duty voluntarily.

2.6 Show Cause Notice was issued to the importers and the concerned persons of the importing company asking them to show cause as to why-

"19.1 Extended period under proviso to Section 28(1) (b) of the Customs Act, 1962, should not be invoked.

*19.2 The declared assessable value of **$ 161380 USD** of the goods covered under the above mentioned **Bills of Entry**, should not be rejected under Rule 12(1) of the Customs Valuation (Determination of Value of Imported*

*Goods) Rules, 2007 and re-determined at **$ 626771.8 USD** in terms Rule 3 ibid read with Section 14 of the said Act, on the basis of the LME price of Zinc for the relevant period of import and value addition of 30% thereon in terms of Rule 8 of the Rules ibid.*

*19.3 The amount of Customs duty **Rs. 59,72,165/- (Rupees fifty nine Lacs seventy two thousands one hundred sixty five only)**, as detailed in Annexure "A" & "B" should not be demanded and recovered from him under Section 28(1) of the Customs Act, 1962.*

*19.4 The impugned goods, i.e., the goods imported vide above mentioned Bills of Entry detailed in the chart in Para 14 above totally valued at **$ 626771.8 USD** (re-determined assessable value as detailed in Annexure "A" & "B" to this notice) imported under the above Bills of Entry imported by them by resorting to undervaluation should not be held liable to confiscation under Section 111(m) of Customs Act, 1962 read with section 46(4) and section 14 of the said Act, and with Rule 3 and 11 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007.*

19.5 Interest at the appropriate rate should not be charged from them on the delayed payment of differential duty in terms of Section 28AB of the Customs Act, 1962.

19.6 Penalty should not be imposed on M/s Sri Sai Imports and its proprietor Shri R.K. Sharma under Section 112(a) and/or Section 112(b)/Section 114A and Section 114AA of the Customs Act, 1962.

*19.7. The provisional payment of **Rs. 20,30,972/- (Rupees twenty lacs thirty thousand nine hundred seventy two only)** made by them as detailed in Para 05 should not be appropriated against their differential duty liability arising out of the Bills of Entry. **(The remaining amount deposited by the party pertains to Bills of Entry cleared through Ballabhgarh and PPG, New Delhi)**."*

2.7 Appellant contested the show cause notice on merits. The adjudicating authorities confirmed the demand of differential duty with interest and also imposed penalties.

2.9 Accordingly appellant have preferred this appeal before Tribunal.

3.1 We have heard Shri J Arthur Prem, Consultant for the appellant and Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant, learned counsel submitted that-

i. Issue involved in the matter is no longer res-integra. The tribunal has in similar case based on same similar investigations, decided the issue setting aside the demand made by alleging similar undervaluation, for the imports made by them during approximately the same period through Nhava Sheva and ICD Mulund [S K Dhawan [2016 (344) ELT 436 (T-Mum)]. This order of tribunal has been followed by the tribunal in case of Raghav Overseas and Others [Final Order No A/86594-86607/ 2019 dated 13.9.2019]

ii. In the cases decided by the tribunal earlier same evidences were relied upon by the revenue for rejecting the transaction value and for re-determining the value of imported goods. However tribunal has set aside the demands made along with interest and penalties.

iii. Since the issues involved in those appeals and the case under consideration are exactly identical, judicial propriety demand that this bench of tribunal should the said order of tribunal be followed for deciding this appeal.

3.2 Arguing for the revenue learned Authorized Representative submitted-

i. Decision of tribunal referred to by the learned Counsel in case of S K Dhawan is distinguishable in as much as that department has not relied on the statements of the importers for determining the composition, but has gone by the declaration made by the importers in the import documents.

ii. Since the value has been determined by the revenue on the basis of prevailing prices of raw material as per the LME Bulletin etc, and the value adopted confirms to the Rule 8 of Valuation Rules (Price of Imported Goods) Rules, 2007. Hence the value so determined has to be adopted for determination of the value for determination of duty payable. [Varsha Plastic Pvt Ltd [2009 (235) ELT 193 (SC)], Mukund Ltd [1999 (107) ELT 653 (T)]

iii. Further once the fact of undervaluation has been admitted by the appellant it need not be proved again.{System & Components Pvt Ltd [204 (165) ELT 136 (SC)], K I Pavunny [1997 (90) ELT 241 (SC)]}

iv. For the purpose of valuation it is not necessary to establish whether any extra remittance has been made to the supplier or not.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 We are in agreement with the submissions made by the counsel for the appellant that the issue is squarely covered by the decision of tribunal in case of S K Dhawan [2016 (344) ELT 436 (T-Mum)] and Raghav Overseas [Final Order No A/86594-86607/ 2019 dated 13.9.2019] The distinction sought to be made by the learned Authorized Representative, do not address the crux of issue of rejection of transaction value. Without rejecting the transaction value, the application of any other rule, for re-determination of the value for the purpose of levy of Custom Duty is neither permissible nor admissible position in law as per the decision referred to by counsel for law.

4.3 In the case of S K Dhwan, tribunal has recorded while deciding the case as follows:-

"3. Learned counsel appearing for all the appellants, after taking us through the entire case records would submit that the adjudicating authority has adopted a very novel way of redetermination of the value of the imported consignments inasmuch as the value of the basic raw material was considered for holding the charge of undervaluation based upon the statement given by Shri S.K. Dhawan who stated that valves content 70% of brass and 30% of zinc. It is his submission that the said findings of the adjudicating authority are totally erroneous as there is no test conducted on the goods imported to ascertain whether the Ball valves and Check Valves were having the content of brass and zinc as stated by Shri S.K. Dhawan. It is his further submission that the cost factor cannot be adopted for valuation, when the constituent of the imported consignments are not known; LME price cannot be relied upon as also the tariff value for scrap of brass and zinc cannot be adopted for valuation and on the face of the fact that the percentage of raw materials in the final product is taken arbitrarily. It is his submission that the department did not produce or relied upon any contemporaneous import, while appellants had produced evidences of contemporaneous import but was ignored by the Commissioner and no findings are given. It is his further submission that the findings of misdeclaration of the value are nothing but presumptions and surmises. It is his further submission that an enquiry conducted by the department on the manufacturers in India is totally one sided and never informed to the appellant. It is his submission that the enquiries conducted with the

manufacturers of such items is also vitiated as the goods imported were competing goods hence the reliance placed on such manufacturers views is of interested parties hence needs to be discarded as the adjudicating authority did not give cross-examination of such manufacturers. It is his further submission that the adjudicating authority has recorded a finding that the appellant-importers did not produce the invoice of manufacturers but produced invoices of a trading house with intent to suppress the value. He would submit that when the goods were cleared on importation, all the documents were produced and after verification only the Customs Officers cleared the consignments. He relied upon the decision of the Apex Court in the case of CC v. Prabhu Dayal Prem Chand - 2010 (253) E.L.T. 353, Ruchi Associates v. Collector - 1992 (61) E.L.T. A134 (S.C.). He also relied upon the decision of this Tribunal in the case of Radhey Shyam Ratanlal vide Final Order No. A/3972/2015/CB, dated 23-12-2015 for the proposition that contemporaneous imports were discarded, accordingly requirement of Rule 5(3) of Customs Rules were validated and the appeal was allowed. He would submit that a similar issue was decided by this Bench in the bunch of appeals in the case of Ajay Export and Ors. vide Final Order Nos. A/3446-3470/2015/CB, dated 20-10-2015, wherein it was held that contemporaneous imports price needs to be considered for arriving at the correct value.

4. Learned DR would submit that the finished goods imported by the appellant, i.e., valves which have to be manufactured wherein the cost of raw material, manufacturing cost and other costs are considered for the purpose of valuation. He would submit that the raw material price of brass scrap and zinc scrap is more than the value of the imported consignment which would indicate that there was very heavy undervaluation. He would submit that such undervaluation is confirmed by

Shri S.K. Dhawan in a statement recorded under Section 108 of the Customs Act, 1962 hence the argument put forth by the learned counsel needs to be discarded as Shri S.K. Dhawan has not retracted the statement. It is his further submission that the judgment of the Apex Court in the case of Collector of Customs v. Shibani Engineering Systems - 1996 (86) E.L.T. 453 (S.C.), specifically states the law, if transaction value of the goods imported are ridiculously low, totally unrealistic and the goods are imported from traders and price list of manufacturer are not produced, such transaction value needs to be discarded.

5. We have considered the submissions made at length by both sides and perused the records.

6. We find from the records that the issue involved is regarding the valuation of ball valves and check valves. The imports were made during the material period and the bills of entry were finally assessed.

6.1 The adjudicating authority has rejected the transaction value of the appellant-importer in the impugned orders by recording the finding that he disagree with the transaction value due to following reasons :-

(a) That the prices of the brass/zinc valves were less than the LME price of valves and scrap of brass and zinc.

(b) Statement recorded of Shri S.K. Dhawan indicated that the said valves had brass content 76% and iron content 24%, zinc content in zinc ball valves was 65% and iron content was 35%.

6.2 That undervaluation and misdeclaration has been admitted due to the fact that importers have not submitted the manufacturer invoices, catalogues from the trading house, supporting interrogation of the employees.

6.3 Opinion of the Jalandhar Central Excise Divisional Deputy Commissioner under whom many such units *existed wherein it said that value addition is 30% on the raw materials. In his own statement the value of metal brass and zinc was much higher.*

6.4 The transaction value was ridiculously low.

7. We find that the argument put forth by learned DR in support of the impugned orders and reasoning of the impugned orders for confirmation of differential duty are flawed for more than one reason.

7.1 Firstly, we find that the methodology adopted by the adjudicating authority for redetermination of the value of the imported consignments is totally on presumption and surmises. The adjudicating authority has come to a conclusion that imported ball valves contained brass content of 76% and iron content of 24%, zinc content in zinc ball valves is of 65% and iron content is of 35%. In the entire case records we are unable to find anything which indicates that the content as recorded by the adjudicating authority is supported by any evidence. The adjudicating authority has relied on the statement given by S.K. Dhawan. In our considered view this finding of the adjudicating authority is not in consonance of the law. There is nothing on record to indicate that samples were drawn from the consignment and sent for testing to Dy. Chief Chemist and Examiner of the Department to ascertain the contents of brass and zinc. It is also surprising to note that the adjudicating authority has relied upon only the statement of Shri S.K. Dhawan to hold that the valves were having brass and zinc content as mentioned.

7.2 Secondly, we find that the adjudicating authority has rejected the transaction value as filed by the appellant without any reasoning or finding. The only finding recorded by the adjudicating authority is that the said values are unrealistic and ridiculously low. To arrive at such finding the adjudicating authority has not brought on record any *contemporaneous import of the same items. The provisions of Customs Act, 1962 are very clear on this point inasmuch as in order to reject the transaction value the least that is expected is to produce any evidence of contemporaneous import of higher value. In the case in hand, it is the submission of appellant-importer they had submitted details of contemporaneous imports of the same goods and the value seems to be more or less is same as declared by the appellant-importer is not addressed to and also surprising to note that the adjudicating authority has not recorded a single sentence of finding on such contemporaneous import detail given by the appellant.*

7.3 Thirdly, we find that the adjudicating authority has come to a conclusion that there was undervaluation as the appellant-importer did not produce the manufacturer's invoice nor catalogue. In our view these findings of the adjudicating authority is totally not in consonance with the law, as these consignments were cleared by the same department when the bills of entries were filed and the documents as produced were accepted as correct at that time. If the authorities had entertained any doubt, they should have called for these documents at the time of clearance of the consignments.

7.4 Fourthly, we find that the adjudicating authority has recorded that the declared value were not actual transaction value paid or payable by the importer; are incorrect findings as they are not evidenced in any form; if the adjudicating authority has to come to such a conclusion in the impugned order there has to be a findings that the appellant-importer had paid additional amount to the exporters in some way or other with proper evidence. In the absence of any evidence it is not possible to accept the statement of learned DR that the transaction value and the declared value were not actual transaction value.

7.5 We also find strong force in the contention raised by the learned advocate for the appellant-importers that the decision of this Tribunal in the case of Radhey Shyam and Ajay Exports & Ors. (supra) are on similar set of facts wherein this Bench has recorded that contemporaneous import details if produced by the appellant-importer, refusing to look to such evidence is incorrect as the value in the contemporaneous imports were accepted by the department in respect of some importers. We reproduce the findings of this Bench in the case of Ajay Exports (supra).

"(c) We also note that the adjudicating authority has refused to look at other contemporaneous imports, which are not the subject matter of the present show cause notice on the ground that there was gross undervaluation being done by the trade. We find that if the value of contemporaneous imports were accepted and the transaction value in those case are not doubted by the revenue in the assessment orders, it is not understandable why the said values could not have been used for the purposes of comparing the same with the value of the consignments in question in these appeals. It is also said along that the Department has to first reject the transaction value and then follow the rules as laid down from rules 5 to 9 of the valuation rules in order to arrive at the value for discharge of Customs duty. From the entire records we find that this does not seen to have been done. In addition, we find that the documents which have come from the foreign source, i.e., Indian embassy, Moscow cannot bring home the charge of undervaluation in the case of Bhatia Group and Sunderlal Group as none of these documents which are relied upon and received from foreign source pertain to these groups; even as far as Ratan Lal Group is concerned these documents cannot be relied upon for the reasons set out hereinabove."

7.6 It can be seen that the above reproduced findings are squarely applicable in these cases. The reliance placed by the learned DR in the case of Shibani Engineering Systems (supra) will also not carry the case of Revenue any further as we find that in that case also in paragraph 11, the Apex Court has come to a conclusion, that the transaction value can be rejected if it is unrealistically and ridiculously low, but at the same time they had stated that the reasoning given in that case by the adjudicating authority are not acceptable to them in the absence of details of contemporaneous imports. In the case in hand, the ratio of the said judgment may not apply as it is on record that the appellant herein produced details of contemporaneous imports which was not considered by the adjudicating authority.

8. In view of the foregoing, we hold that the impugned orders are unsustainable and liable to be set aside and we do so. The impugned orders are set aside and the appeals are allowed with consequential relief, if any."

5.1 In view of the discussions as above, we set aside the impugned orders and allow the appeal filed, with consequential relief, if any.

(Order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

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