CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 1276 of 2009

(Arising out of Order-in-Original No. 138/2009 CC (I) JNCH dated 09.09.2009 passed by Commissioner of Customs (Import), Nhava Sheva)

Mohd Shahid Qureshi **Appellant**
121, Sheriff Devji Street,
4th floor, Room No.32,
Mumbai 400 003.

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

AND

Customs Appeal No. 1277 of 2009

(Arising out of Order-in-Original No. 138/2009 CC (I) JNCH dated 09.09.2009 passed by Commissioner of Customs (Import), Nhava Sheva)

M/s. Elite Overseas **Appellant**
Aminabai Chawl, Room No.5,
Halao Pool Road, Kurla,
Mumbai 400 070.

Vs.

Commissioner of Customs (I), Nhava Sheva **Respondent**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

Appearance:

Shri Neerav R. Mainkar, Advocate, for the Appellant
Shri Bhushan Kamble, Assistant Commissioner (Authorised Representative) for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**85907-85908/2020**

Date of Hearing: 28.01.2020
Date of Decision: 28.01.2020

PER: SANJIV SRIVASTAVA

These appeals are directed against Order in Original No 138/2009 CC (I) JNCH dated 09.09.2009 of the Commissioner Customs (Import) Nhava Sheva. By the impugned order Commissioner has held as follows:

1. *"Shri Shahid Qureshi is the actual importer and owner of the imported goods.*

2. *He declared value is rejected and re-determined at Rs.17,71,562/-. .*

3. *The imported goods are confiscated u/s 111(d) & 111(m) of Customs Act, 1962. However, the importer shall have, u/s 125 ibid, an option to redeem the goods within a period of 30 days from the receipt of this order on payment of fine of Rs.4,50,000/- (Rupees four lakh fifty thousand only).*

4. *There shall be no order for confiscation in respect of the consignments already cleared earlier.*

5. *There shall be a penalty of Rs.1,75,000/- (Rupees one lakh seventy five thousand only) on the actual importer Shri Shahid Qureshi under Section 112(a) of the Customs Act, 1962.*

6. *There shall be a penalty of Rs.1,00,000/-(Rupees One Lakh only) on M/s. Elite Overseas under Section 112(b). As penalty is already imposed on the firm, there is no question of imposing any penalty separately on M/s Ahmed Mohd Idris Ishaque, Proprietor of M/s. Elite Overseas firm., as has been held in the case of AAREM CHEMICALS Vrs. CCE {1999(114) ELT-3/SC)}."*

2.1 On the receipt of intelligence that certain unscrupulous importer were illegally importing various items in name of dummy IEC holders, by undervaluing/mis-declaring the same, investigations were initiated by the Rummaging and Intelligence division of Mumbai Preventive Commissionerate. Initial investigations revealed that one such dummy IEC No 0307099971 obtained in the name of M/s Elite Overseas was being used. It was also ascertained that one consignment covered by B/E No 668842 dated 04.11.2008 was awaiting clearance from JNCH port. Same was seized on 17.11.2008. The goods were later examined and inventorized under Panchanama on 12.02.2009 they were found to tally with the invoice/packing list & B/E. Representative samples were also drawn.

2.2 In his statement Shri Shahid Qureshi stated that:

i. The address mentioned in IEC Ie. Aminabai Chawl Room No 5, Haloo Pool Road, Kurla Mumbai 400070, exists.

ii. That he had along with Shri Ahmed Mohd Idris Ishaque, Proprietor of M/s. Elite Overseas (IEC No. 0307099971) invested the money needed for importation of these consignments from China. Imports were made in the name of M/s Elite Overseas.

iii. M/s. Elite Overseas is not registered with the Sale Tax Department and they have not paid any sales tax on the sale of the goods till date. They had not paid any Income Tax also in the name of M/s. Elite Overseas.

iv. All the related works including sum investment i.e. contacting and placing orders to overseas suppliers, engaging the CHA, engaging the transporter, storing the goods and selling the goods into the local market has been done by Shri Shahid Qureshi only.

v. In other words, Shri Shahid Qureshi has used the IEC of M/s Ahmed Mohd Idris Ishaque, Proprietor of M/s. Elite Overseas (IEC No. 0307099971) for a money consideration of Rs 10,000/- per container.

B. Since the goods appear to have been imported by a person actual (importer) using the IEC of some other person and mis-declaring / suppressing the facts, at least, to that extent, there exists reasonable doubt about the correctness of declared value within the purview of Rule 12 of Customs Valuation Rules, 2007 read with Explanation appended thereto; the declared value also appeared to be very low. The importer also failed to produce manufacturer's Invoice or any other document to prove the correctness of the value declared. Therefore, a team of officers of N.S.P.U along with the representative of the CHA and the Importer/IEC holder, conducted market enquiry in respect of the value of the said goods. The prices were ascertained from three different shop owners namely

a. M/s. Noor Lights, Shop no. 1,2 & 3, 123 Channel, Asia Shopping Mall, Opposite Al Kadri Dargah, Musafirkhana Road, Mumbai 400001
b. M/S. Azmal Collection, Shop no. 58/59 BMC Building No.5, S.S. Musafirkhana Road, Mumbai- 400001, Tel- No. 66589312.
c. M/s. Y2K Collection, BMC Building No.1. Ground Floor, Shop No. 7, Opp. Municipal Dispensary, S.S. Musafirkhana Road, Mumbai 400001, Tel 65215778

2.4 The highest of prices ascertained by market survey conducted in the presence of the IEC holder and representative of CHA was taken for determination of the assessable value as per the deductive method.

S No	Description	Unit	No	1-Rs	2-Rs	3-Rs	Assessable value	
							Ascertained	Declared
1	Rice Light 180 Bulbs	Pc	1500	75	80	77	51789.00	24433.92
2	Rice Light 160 Bulbs	Pc	3900	63	68	70	117819.00	57572.42
3	Rice Light 100 Bulbs	Pc	5680	37	40	34	98053.00	52044.25
4	Rice Light 50 Bulns	Pc	2700	30	25	28	34957.00	12369.67
5	Rice Light36 Bulbs	Pc	8000	24	22	25	86315.00	24433.92
6	Rice Light 24 Bulbs	Pc	600	20	18	16	5179.00	1313.32
7	Rice Light 16 Bulbs	Pc	10000	14	12	15	64736.00	14762.16
8	Rope Light * Mtrs	Roll	240	210	240	235	178164.00	30542.14
9	Hair Bow	Grs	1500	19	22	24	38117.00	22479.21
10	Plastic Pen	Doz	3680	200	184	192	292981.00	67804.13
11	Garment Button (Metal)	Kgs	2960	1450	1500	1475	129472.00	50904.00
12	Plastic Picnic Table	Pcs	200	4	3	2	308515.00	85925.15
13	Raw Material Chain (Imitation Jewellery)	Mtrs	168800	53	45	60	9788.00	1924.17
14	Mini Plastic KeyChain Light.	Doz	378	690	750	735	57012.48	46129.00
15	Induction Cooker I Ltr	Pcs	160	145	130	150	51789.00	20361.60
16	Mini Decorative Stone	Kgs	800	1200	1150	1100	60600.00	22906.80
17	Mosquito Racket Bat	Doz	125	325	300	360	116641.00	13377.57
18	Mini Plastic Torch	Doz	830	4700	4800	4750	49446.00	4031.60
19	Slim Belt	Doz	22	250	300	275	31073.00	10886.40
	Total						**1771562.00**	**575085.97**

2.5 On the basis of the ascertained assessable value at Rs 17,71,562/- as against declared assessable value of Rs 5,75,085.97, the total duty payable on the said consignment was determined as Rs 4,54,086.55/-.

2.6 Further investigations revealed that in the past by adopting similar modus operandi, two import consignments of similar goods from China had been cleared in the name of M/s Elite Overseas. The total declared value of the consignment cleared in the past was ascertained as Rs 7,51,788/-.

2.7 A show cause notice dated 06.05.2009 was issued under Section 124 of the Customs Act, 1962 to the appellants asking them to show cause why the goods imported against the B/E no 668842 dated 04.11.2008 and against two bill of entries in past, should not be confiscated under Section 111(d) and 111(m) of the Customs Act, 1962, read with section 7 & 11 of the Foreign Trade (Development and Regulation) Act, 1992, Rule 2 (c), 12 & 14 of the Foreign Trade (Development and Regulation) Rules, 1993, and para 2.12 of the Foreign Trade Policy, 2004-2009, and penalties should not be imposed on them.

2.8 The show cause notice was adjudicated by the Commissioner as per the impugned order. Aggrieved by the order Appellants have preferred this appeal before CESTAT.

3.1 We have heard Shri Neerav R Mainkar, Advocate for the appellants and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellants learned counsel submits that-

a. Permitting the use of IEC for bringing goods of other is not a violation of Customs Act, 1962 as have been held in following decisions-

- R Mohandas [2016 (336) ELT 399 (Ker)]
- Gopal Agarwal [2015 (326) ELT 593 (T-Del)]

b. In case of J D Orgochem Ltd [2008 (226) ELT 9 (SC)], it has been held that the burden of proof to show that the declared transaction value is misdeclared lies on the revenue, even if the declared transaction value is not binding on the revenue.

Revenue should discharge the said burden by producing the contemporaneous evidence.

c. Penalty could not have been imposed both on the proprietor and proprietorship concern as have been held by the tribunal in case of Tapi Textiles Pvt Ltd [2016 (339) ELT 83 (T-Mum)] and Saccha Saudha Pedhi {2015 (328) ELT 609 (T-Mum)]

3.3 Arguing for the revenue learned authorized representative submitted as follow:

a. Importer has agreed with the prices ascertained during the market survey he also stated that he is ready to pay the duty, redemption fine and personal penalty.

b. The adjudicating authority has rightly rejected the transaction value in terms of Rule 12 of the Customs Valuation Rule, 2007 and re-determined the value in terms of Valuation Rule 7 & 9 of the Customs Valuation Rules, 2007.

c. Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 which state that no person shall make any import or export, except under an Import-Export Code number granted by Director General or the officer authorized by the Director General in this behalf in accordance with the procedure specified in this behalf by Director General;

d. Section 11 of Foreign Trade (Development and Regulation) Act 1992, which states that no import or export shall be made by any person except in accordance with the provisions of this Act, and

e. Section 12 of the Foreign Trade (Regulation) Rules 1993 provides inter alia that on imposition on any customs port of any goods the importer shall in the Bills of Entry or any other document prescribed by the rules made under the Act, 1962, state the Importer Exporter Code number allotted to him by the competent authority. Hence goods are liable for confiscation under Section 111 (d) and Section 111 (m) as it is established that goods are under invoiced and

f. Para 2.12 of Foreign Trade Policy 2004-2009 states that no import or export shall be made by any person without an IEC number unless specifically exempted. Therefore the goods so imported become prohibited goods as defined in section 2(33) of the Customs Act, 1962 read with above mentioned sections of FTDR & FTP and hence the said goods are liable for confiscation under Section 111 (d) and also under Section 111 (m) of Customs Act, 1962, as it is established that goods are under invoiced.

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

4.2 The case under consideration is in respect of the imports made-

- Making use of the IEC of some other person,
- Undervaluation of the goods

4.3 Commissioner has recorded the role of the two appellants in the present case in his order stating as follows:

(1) Shri Shahid Qureshi is the actual importer and owner of the imported goods; the facts coming out of the investigation, as stated in Para - 2 above, amply establish it. Shri Qureshi also claims to be so. I hold the same.

(2) Shri Shahid Qureshi did not use or did not have his own IEC for importing the impugned goods; he used the IEC code No. 0307099971 of M/s. Elite Overseas., belonging to and obtained by as its proprietor, Shri Ahmed Mohd Idris Ishaque for a consideration of 10,000/- per container (Para 2(6) above refers]. This is in violation pl Section 46(4) of the Customs Act, 1962, Section 7 & 11 of Foreign Trade (Development & Regulations) Act, 1992 read with Rule 2(c) and 14 of Foreign Trade (Regulations) Rules 1993, read with Para 2.12 of Foreign Trade Policy 2004-09, read with Section 11 of Customs Act, 1962 rendering subject goods liable to confiscation under Section 11l(d) of the Customs Act, 1962.

(3) The declared value is liable for rejection for reasons stated in Para 3 above; I reject the same. The goods are unbranded and of Chinese Origin Consumer Goods and do

not carry specification like Model No., MRP and Make etc. It is, therefore, not possible to ascertain their value from NIDB, based on the contemporaneous import; Rules 4 & 5 of Customs Valuation Rules cannot be made applicable in this case. "For similar reasons, Rules 7 & 8 are also inapplicable. In the SCN value has been sought to be determined on the basis of market inquiry under Rule 7. But, I think, quoting of Rule 7 is inappropriate in this case as there is nothing on records that the goods compared with were 'similar goods' as defined u/r 211) of the Valuation Rules (and if it were so, Rule 5 itself would have been applicable) and that they were imported within a period of 90 days of the importation of the impugned goods). The value, therefore, has to be determined u/r 9 ibid. The way the value has been determined through marker inquiry is, in fact, the 'best judgment' assessment u/r 9 in line with the ratio of Rule 7. I accept the same and re-determine the value at Rs. 17.71,562/-. At this point I make it clear that non-quoting /mis-quoting of rule does not vitiate the proceedings, as has been held by Hon'ble Supreme Court in the case of CCE Vs Pradyumna Steel Ltd. (1996 (82) ELT 441 (SC)]. Thus the goods were heavily under-valued making them liable for confiscation u/s' 111(m) of C A, 62.

(4) There is a proposal in the SCN to confiscate the goods imported vide Bills of Entry No. 95311 dtd. 11.08.2008 and 835997dtd 21.05.2008 valued at Rs. 4,00,2147- and Rs. 3,51,574/- respectively (total valued at Rs. 7,51,788/-), by Shri Mohd Shahid Quereshi misusing the IEC of M/s. Elite Overseas. The legal position is : when the goods are seized, the possession /custodian of the goods is with the department though the ownership continues to be with the party and when they are confiscated, both the ownership and the custody vest with the Govt. These goods have already been cleared and are not available, may be even with the importer himself, nor is there any bond or security against the same; they are

neither available for confiscation, nor can any fine in lieu of confiscation be imposed in respect of these consignments. judgments in the cases of Sun Exports Vs CC [2008(228)ELT 5451T - M] and CC Vs. Kiran Jewels [2008 (230) ELT 627 (T - M)} refer.

(5) For the above acts rendering the imported goods liable for confiscation, Shri Mohd. Shahid Qureshi has become liable for penal action under Section 112 la). Once penalty is imposed under section 112 (a) under the facts and circumstances of the case, I do not consider it necessary to impose penalty also under section 114 AA separately.

(6) Shri Ahmed Mohd Idris Ishaque knowingly allowed Shri Mohd Shahid Quereshi to use the IEC of M/s. Elite Overseas for a monetary consideration of Rs. 10,000/- per container, He is, therefore, liable for penalty u/s 112(b) of CA. 62."

4.4 The above findings of Commissioner are in line with the order of Tribunal in the case of Sacha Saudha Pedhi [2015 (328) ELT 609 (T-Mum)], wherein tribunal has state as follows:

*"**9.** From the above factual position that is based on confessionary statements of Shri Bhumish Shah and Shri Ashok Raghuveer Goyal and also the documents recovered from Shri Bhumish Shah which was accepted by him, it is clear that the appellant M/s. Saccha Soudha Pedhi has undervalued the goods and evaded differential duty. As regard the stand taken by Shri Ashok Raghuveer Goyal at the time of cross examination that he is not authorized person, it is observed that the statement of Shri Ashok Raghuveer Goyal was recorded on 20 March 2001, whereas cross examination was conducted on 27-1-2006, that is after more than 5 years which is clearly afterthought. Shri Ashok Raghuveer Goyal was not prevented from retracting his statement immediately after recording his statement, therefore all his averments made during cross examination is clearly afterthought and statement given by him on 20 March 2001 hold good and the same was legally and correctly relied upon by ld.*

Adjudicating Authority. Moreover, he has provided various documents related to this case and categorically admitted undervaluation. He has in pursuance of his interrogation has also deposited Rs. 10 lakhs toward duty. From the statement it is clear that he was actively involved in all the activities of the appellant M/s. Saccha Soudha Pedhi therefore reliance of his confessionary statement cannot be disputed at all. Similarly as regard anything contrary to the statement of Shri Bhumish Shah submitted by him during cross examination after 5 years is also clearly afterthought and the same cannot be taken into account for the purpose of the defence of the appellant. Apart from admission of Shri Bhumish Shah and Shri Ashok Raghuveer Goyal in their statements and documentary evidence recovered from Shri Bhumish Shah the price of the goods indicated in the public ledger clearly suggests that the appellant has grossly undervalued the spices imported by them. As regards appellant's plea in appeal that there is no reliance on price of contemporaneous import, we are of the view that once the witnesses admitted the undervaluation and accepted the actual price contained in the fax messages of foreign supplier, then the said admitted price become the transaction value. In such case there is no need to resort to price of contemporaneous import. In view of the above factual position and discussion thereupon we hold that the valuation of the goods determined by the ld. Adjudicating Authority is legal and correct and consequently the differential demand of custom duty on such value and corresponding interest and penalties imposed under Section 114(a) of Customs Act, 1962 is also upheld."

4.5 In view of the above we uphold the manner of determination of value as adopted by the Commissioner in case of these goods which are unbranded, without any MRP or any specifications affixed on them. Further we also note that the Importer IEC holder has in his statement admitted that the goods have been undervalued and has accepted the value as determined by the department using the deductive method. He was party to the market enquiries and surveys and also has admitted its authenticity and correctness. In our view in present case revenue has successfully discharged the burden to show that the declared transaction value was not the actual transaction value as per the Section 14 of the Customs Act, 1962. Thus the decision of Hon'ble Supreme Court in case of J D Orgochem Ltd [2008 (226) ELT 9 (SC)], would not help the case of appellants.

4.6 From the findings as noted above and recorded by the Commissioner we are in agreement with the observations made by the Commissioner to the effect that for various acts of omission and commission leading to the Confiscation of the goods the penalties are imposable on the appellants. We also note that-

- Shri Shahid Qureshi has in fact sought to clear the said goods by misdeclaring the value, thereby evading the payment that should have been levied in respect of these goods. For his act of misdeclaration the goods became liable for confiscation under section 111 (m) of Customs Act, 1962. Since the goods have been held liable for confiscation under section 111 (m), penalty under section 112 (a) on the person whose act of omission and commission has rendered these goods liable for confiscation is a natural consequence as per the scheme of Custom Act, 1962. However taking into account all the circumstances and the fact that valuation has been done taking the highest of the value assessed during the market enquiry and also the fact that appellant had suffered huge demurrage etc., the penalty calls for reduction.
- Shri Ahmed Mohd Idris Ishaque, Proprietor of M/s. Elite Overseas (IEC No. 0307099971), who had obtained the IEC in the name of his firm and has permitted the use of the same by Shri Shahid Qureshi for the purpose of monetary gain (Rs 10,000/- per container), a fact which has been admitted by the appellants. Since the goods imported making the use of his IEC have been held liable for confiscation under section 111 (m), penalty under section 112 (b) on the person whose act of omission and

commission has rendered these goods liable for confiscation is a natural consequence as per the scheme of Custom Act, 1962. However taking into account all the circumstances and the facts of the case, the penalty calls for reduction, more so over when we propose to reduce the penalty imposed on the person who has actually imported the goods.

4.7 In view of the fact as above we reduce the penalties imposed on the appellants as follows:

i. Penalty Under Section 112(a) imposed on Shri Shahid Qureshi is reduced from Rs 1,75,000/- to Rs 70,000/-.

ii. Penalty Under Section 112(b) imposed on M/s Elite Overseas is reduced from Rs 1,00,000/- to Rs 40,000/-.

5.0 In view of the above the appeals filed are partially allowed modifying the impugned order as indicated in para 4.7. Apart from the above modifications the impugned order is upheld.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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