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

Customs Appeal No. 86051 of 2015

(Arising out of Order-in-Appeal No. 149 & 150 (Gr.IV)/2015 (JNCH)-Appeal-II dated 27.04.2015 passed by Commissioner of Customs (Appeals-II), Mumbai)

M/s. Agrasha Alloys Trading Pvt. Ltd. **Appellant**
333, Vyapar Bhavan, P.D'Mello Road,
Masjid (E), Mumbai 400 009.

Vs.

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

WITH

Customs Appeal No. 86052 of 2015

(Arising out of Order-in-Appeal No. 149 & 150 (Gr.IV)/2015 (JNCH)-Appeal-II dated 27.04.2015 passed by Commissioner of Customs (Appeals-II), Mumbai)

Shri Madhukant Agrawal **Appellant**
Director, M/s. Agrasha Alloys Trading Pvt. Ltd.
333, Vyapar Bhavan, P.D'Mello Road,
Masjid (E), Mumbai 400 009.

Vs.

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

Appearance:

Shri C.K. Chaturvedi, Consultant, for the Appellant
Shri Manoj Kumar, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**86722-86723/2021**

Date of Hearing: 02.08.2021
Date of Decision: 06.09.2021

PER: SANJIV SRIVASTAVA

These appeals filed by M/s Agrasha Alloy Trading Pvt Ltd. (Appellant 1) and Shri Madhukant R Agarwal (Appellant 2) are directed against order in appeal No 149 & 150 (Gr.IV) 2015 (JNCH)- Appeal-II dated 27.04.2015 of the Commissioner Customs (Appeal-II) Mumbai II. By the impugned order Commissioner (Appeal) has upheld the order in Original No 299/2014-15 dated 04.12.2014 of the Additional Commissioner Customs NS-III, Nhava Sheva against the two appellants. By the impugned order Additional Commissioner has held as follows;

ORDER

3.1 I order for rejection of the declared value of four consignments detailed as per Annexure A to the show cause notice , imported and cleared by M/s Agrasha Alloy Trading Pvt Ltd. under Rule 12 of the CVR, 2007. I order for redetermination of the value under Rule 9 of CVR, 2007 at USD 86,488/ equivalent to Rs 41,73 804/-.

3.2 I demand the total duty amount of Rs 2,04,814/- leviable on the total redetermined value of Rs. 41,73,804/-. I order for recovery of differential duty of Rs 1,03,356/- after adjusting an amount of Rs 1 01,458/- towards the Customs duty already paid at the time of clearance of goods.

3.3 I order for confiscation of the goods total weight 282.64 MTS, and redetermined value USD 86,488-/- equivalent to Rs 41,73,804/- (details as per Annexure A Lo Show Cause Notice) under section 111(d) and 111(m) of the Customs Act, 1962. Since goods were already released provisionally after taking bond and bank guarantee, I impose a redemption fine of Rs 10,00,000/- (Ten Lakhs), under section 125 of the Customs Act, 1962. This amount may be recovered from the Bank Guarantee given by the importer.

3.4 Penalty of Rs 1,03,356/- (Rupees One Lakh three thousand three hundred fifty six only) is imposed under Section 114 A of the Customs Act, 1962 on M/s Agrasha Alloy Trading Pvt. Ltd.

3.5 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section 112 (a) of the Customs /.\ct, 1962 on the M/s.Viking International , FZE.

3.6 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section112 (a) of the Customs Act, 1962 on the M/s Leberry International Pvt Ltd.

3.7 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section 112 (a) of the Customs Act, 1962 on Shri Madhukunt R Agarwal , Director of M/s Agrasha Alloy Trading Pvt. Ltd. This amount has to be recovered from the balance of Bank Guarantee amount, if any, given by the importer.

3.8 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section 112 (a) of the Customs Act, 196) on Shri Rajesh Agarwal, Director of M/s. Viking International , FZE.

3.9 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section 114AA of d1e Customs Act, 1962 on Shri Madhukant R Agarwal, Director of importing firm M/s Agrasha Alloy trading Pvt. Ltd. as the importer knowingly or intentionally made, signed and/ or used or caused to be made, signed or used declarations, statements or documents which are false or incorrect in material particular , in the transaction of the impugned import business for the purposes of evading the duty.

3.10 Penalty of Rs 1,00,000/-(Rupees One Lakh only) is imposed under Section 114AA Customs Act, .L962 on Shri Rajesh Agarwal, Director of M/s.Viking International , FZE. as he knowingly or intentionally made, signed and/ or used or caused to be made, signed or used declarations, statements or documents which are false or incorrect in material particulars, in the transaction of the impugned import business for the purposes of evading the duty.

3.11 This order is issued without any prejudice to any other action than may be taken in respect of the said goods/

noticee and/ or against any other company/ firm/ persons concerned covered or not covered under the provisions of the Customs Act, 1962 and/ or any other law for the time being in force in India."

2.1 Appellant 1 had imported four consignments of Light Melting Scrap (LMS) purchased by him on High Sea Sales basis from M/s Leberry International Pvt Ltd (LIPL) at the invoice value of US$ 185 PMT. For the clearance of these consignments he files four Bill of entries, 752673 dated 07.11.2009, 752681 dated 07.11.2009, 837343 dated 05.01.2010 and 837346 dated 05.01.2010, declaring the invoice value on the Bill of Entry.

2.2 First two Bill of Entries i.e. No 752673 & &52681, were duly assessed by the Custom Authorities, and the value on the basis of the Floor Price fixed by the Customs, was enhanced to US$ 300 PMT. These two consignments were cleared by the Appellant 1 for home consumption after payment of duty as assessed by custom authorities on the enhanced value.

2.3 Acting on the basis of intelligence that the declared value of consignments, was much below the actual value, officers of Directorate of Revenue Intelligence (DRI), seized these two consignments from the godown of M/s Hindustan Roadways, Village Valivali, Dahisar Mori, Thane Pune Road, Thane, 11/12.11.2009.

2.4 Remaining two consignments for which other two Bill of Entries i.e. No 837343 and 837346, were put on hold at the port of importation.

2.5 Thereafter investigation were done by DRI, and show cause notice issued to the appellants asking them to show cause as to why-

- Total declared value all the four consignments, US$ 53,334/- (includes 2% commission) equivalent to Rs 25,77,027/- should not be rejected and redetermined at actual transaction value of US$

86,488/- equivalent to Rs 41,973,804/- under Rule 9 of CVR, 2007;

- The total duty amount of Rs 2,04,814/- leviable on the total re-determined value of Rs 41,73,804/- should not be demanded and differential duty amount of Rs 1,03,356/- should not be recovered after adjusting Customs duty amount of Rs 1,01,458/- paid at the time of clearance under Section 28 of Customs Act, 1962.
- The goods mentioned at Annexure A (to show cause notice) for which appellant had declared value of US$ 53,334/-, equivalent to Rs 25,77,027/- and having actual transaction value of US$ 86468/-, equivalent to Rs 41,73,804/- be not confiscated under Section 111 (d) and (m) of Customs Act, 1962 read with rule 11 and 14(1) of the Foreign Trade (Regulation) Rules, 1993 and Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992, as the goods have been misdeclared with reference to value.
- Why penalties under various sections of Customs Act, 1962 (as applicable) on the various persons involved in the act of misdeclaration of value should not be imposed.

2.6 This show cause notice was adjudicated by the Commissioner as per the impugned order. Aggrieved by the order, appellants are in appeal before us.

3.1 We have heard Shri C K Chaturvedi, Consultant, for the Appellants and Shri Manoj Kumar, Deputy Commissioner, Authorized Representative for the revenue.

3.2 Learned counsel for the appellant submits that

- para 20(iii) of the show cause notice wherein it is stated –

  "M/s. Agrasha Alloy Trading Pvt Ltd. imported and cleared the consignments mentioned at Sr.No.3 & 4 of Annexure A by accepting floor price @ USD 300 PMT

fixed by Customs at Nhava Sheva and paying duty thereon. ***They are liable to pay Customs duty on this assessed and accepted assessable value @ USD 300 PMT****. It is because in the absence of transaction value of any identical or similar goods, or of necessary date under Rule 4, 5, 7 & 8 are not applicable and the value has to be determined under Rule 9 of CVR 2007."*

- if the goods are already assessed and importer has already paid the duty, why should there be any further liability if the proposed reassessment is at the same value at which the assessments have already been done. However, the adjudicating authority merely reiterates the above contention of DRI in his discussions and findings in para 2.15(ii) of the order and proceeds to re-determine the value at the floor price of HMS which is USD 300 per MT under Rule 9 of Customs Valuation Rules, 2007.
- the facts to be considered are as follows:-

  a) Goods under import and under consideration in the present matter are LMS and not HMS.

  b) Floor price of HMS fixed by the department can at best be termed as minimum customs values and arbitrary and fictitious values. Rule 9 of Customs Valuation Rules, 2007 specifically prescribes against fixing of value in terms of that Rule on the basis of minimum customs values and arbitrary and fictitious values.

  c) Rule 9(1) provides for the manner of valuation by taking into consideration prevailing international prices. As per the contemporary prices published in Metal Bulletin, the prevailing international prices are –

Goods	Prices for Week ending 19 Nov 2009	Prices for Week ending 25 Nov 2009
Heavy Melting	$ 210.83 per MT	$ 217.50 per MT

No.2 Bundles	$ 172.00 per MT	$ 172.00 per MT
No.1 Bundles	$ 165.00 per MT	$ 165.00 per MT

- In para 12 of the show cause notice, DRI states that -

  "The Customs authorities at the port of import of the said 4 consignments had fixed a floor price of USD 300 PMT for the purpose of assessment imported LMS, HMS which was the prevailing international price / contemporary import price during the relevant period. This floor price was applied wherever imports failed to produce the manufacturer's invoice of imported goods and were unable to explain the lower value of imports. Thus the said M/s. Agrasha Alloy Trading Pvt Ltd had undervalued the imports of the consignments mentioned at Sr.No.1 & 2 of Table III and Sr.No.1 & 2 of Table IV."

- the para 12 of the show cause notice is illogical for the reasons as below:

  a) The floor price of USD 300 PMT is for HMS and not LMS.

  b) This is not as per prevailing international price as can be seen from the contemporary issue of Metal Bulletin.

  c) There is no manufacturer's invoice for scrap.

  d) This is a kind of 'minimum customs value' which has no legal sanctity in terms of Rules and Regulations.

  e) This is arbitrarily applied whenever transactions are below these arbitrarily fixed values.

- In para 21 of the show cause notice, DRI states that the total duty amount leviable is Rs.2,04,814/- and that differential duty amount of Rs.1,03,356/- is to be recovered. The adjudicating authority has reproduced these figures in his order mechanically without even taking into consideration that duty amounting to Rs.2,65,198/- has already been paid by the importer (Rs.1,32,163/- + Rs.1,33,035 respectively).

3.3 Learned authorized representative reiterated the findings recorded in order and submitted,-

- DRI developed intelligence that a Mumbai based operator Shri Rajesh Agarwal was importing highly undervalued goods namely tin plates, C R Sheets, heavy/light Melting Scrap and getting them cleared through various ports in the country.
- M/s Viking International FZE through which these imports were facilitated was a bogus company set up by Shri Rajesh Agarwal, to route the payments.
- Appellants had procured the imported goods on high sea from M/s Leberry International Pvt Ltd, and declared the value of these goods at US$ 185 PMT on the basis of manipulated invoices of M/s Viking International. Importers did not produce any supporting evidence such as manufacturer invoice.
- In respect of the first two consignments they accepted the enhanced value of US$ 300 PMT.
- Investigations clearly established the act of misdeclaration of value of the goods by the appellants for which the goods were held liable for confiscation and various persons involved in the act of misdeclaration were liable for penal action.
- From the perusal of Annexure A to the Show Cause Notice, it is quite evident appellant contention in respect of payment of duty to tune of Rs 2,65,198/- is not correct. This duty which they have paid is in respect of two consignments out of the four consignments imported. The demand for differential duty is in respect of other two consignments.

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

4.2 Commissioner (Appeals) has observed as following in impugned order:

“8. I have carefully gone through the case, the oral and written submissions made. I find that in both the appeals, the appellants had paid the required pre-deposit. I, therefore, proceed to decide the case on merits. Since, both the appeals are pertaining to common Order-in-Original: hence, the same are being decided by a common order.

9. I find that the Original Authority has found that M/s. Viking International, Fujairah. (UAE) used to procure the goods viz. tinplates, C.R. Sheets, HMS. LMS etc from various suppliers based in Europe. South Africa, USA, Japan, China etc. and used to sell the same in the local market or to the various firms in India on high seas sales by issuing fabricated / undervalued invoices prepared in the Mumbai office of Shri Raiesh Agarwal on behalf of M/s. Viking International by suppressing the actual transactional value to evade customs duty. It is seen that the goods were shipped from the load ports located in Europe, South Africa. USA etc directly to Indian ports and did not touch Fujairah / 3ubai port any time during the voyage. I find that the investigations had revealed that M/s. Viking International, Fujairah, (UAE) was not having any office premises in UAE and only having a Post Box Number in UAE for communication.

10. I find that the investigation has proved that Shri Rajesh Agarwal as proprietor of M/s. Viking International has been receiving the invoiced amount in his Firm's Dubai account through banking channel and the differential amount i.e. the actual invoice vale e met the fabricated / under invoiced value was used to be received in cash and the differential amount so collected was being remitted by him to the said Dubai account through a hawaladar.

11. I find that the appellant no 1.had imported 04 consignments of LMS on high seas from M/s. Leberry International Pvt. Ltd. %USD 185 PMT (including 2% commission) on the basis of manipulated invoices issued by M/s. Viking International FZE and cleared the goods by mis-declaration of value and suppression of facts. Further, at the *time of assessment. they accepted the value of USD 300 PMT and they did not produce original invoice from the original supplier for ascertaining value for Customs Act, 1962.*

12. I find that the appellant no 2, in his statement recorded under Section 108 of Customs Act, 1962, had admitted cash transactions of an amount of Rs. One crore in last one year towards purchase of goods from M/s. Leberry International Pvt. Ltd. and M/s. Viking International FZE which indicates his awareness about the relationship between M/s. Viking International FZE and high sea seller M/s. Leberry International Pvt. Ltd.

13. I find that the appellant no 1 itself had accepted the value @ USD 300 PMT for the two consignments mentioned at Serial No 3 and 4 in Annexure A to SCN and paid the duty accordingly and cleared the goods. I find that the appellant No 2, in his statement recorded under Section 108 of the Customs Act, 1962 has admitted the fact that the two consignments mentioned at Sl No 3 and 4 in Annexure A to SCN had been assessed to Custom duty @ US$ 300 PMT. I find that during the personal hearing Shri C K Chaturvedi, Consultant and Shri Madhukant Agarwal (the Appellant No 2) informed that for the sake of expediency they had agreed to value of loading @ US$ 300 PMT."

4.3 Undisputed fact, is that the Appellant 1, has imported four consignments of LMS, for which four bills of entries have been filed by him. Out of these the Bill of Entries filed during the month of November, 2009 were duly assessed by the Customs and the declared value was enhanced from US$ 185 PMT to US$ 300 PMT. Appellants have agreed to the enhancement of the value and paid the duty as assessed.

4.4 These two consignments were after clearance from customs were detained and seized by the DRI, and after investigations, these two consignments along with the other two consignments for which the bill of entries were filed in January 2010, were proposed for confiscation for misdeclaration of the value, stating that appellant had accepted the enhance value, so the charge of misdeclaration of invoice value stand established against them. The admission made by the appellant in respect of two bills of entries filed in November 2009, has been used against them to establish the charge of misdeclaration against them.

4.5 The two consignments in respect of which the duty was already paid on the assessed value as enhanced were also confiscated along with the other two consignments. The action of confiscation of the goods which have been cleared on payment of duty as assessed, are proposed for confiscation, for the reason that appellant have admitted to enhancement of value.

4.6 The matter do not rest here, while enhancing the value, the show cause notice takes into account all the four consignments, and enhances the value of all four consignments from US$ 53,334/-, equivalent to Rs 25,77,027/- and having actual transaction value of US$ 86468/-, equivalent to Rs 41,73,804/-. On the enhanced value of all four consignments the duty has been demanded as per the show cause notice at para 21 (ii) which is less than the total duty paid by the Appellant on the two consignments imported in November 2009. The said para of the show cause notice is reproduced below:

(ii) the total duty amount of Rs. 2,04,814/- leviable on the total re-determined value of Rs 41,73,804/- of goods covered under the Bills of Entry (as enumerated in Annexure A) should not be demanded and differential duty amount of Rs 1,03,356/- should not be recovered after adjusting Customs duty amount of Rs 1,01,458/- paid at the time of clearances under Section 28 of the Customs Act, 1962."

4.7 The demand made as per the show cause notice has been mechanically confirmed by the adjudicating authority and upheld by the Commissioner (Appeal), without taking into account the fact that the total duty paid by the appellant on two consignments cleared by them was Rs 2,65,198/- for which the Tr-6 Challans, No 10247825 dated 10.11.2009 and No 10247102 dated 10.11.2009 have been produced by the appellants. If the total duty determined on the four consignments is on enhanced value of Rs 41,73,804/- is less than the total duty already paid by the appellants, then what the case of revenue is. There appears to be gross misapplication of mind by the authorities concerned. This issue needs to be reconsidered by the authorities below and proper speaking order needs to be passed.

4.8 Further while reconsidering the issue on the above aspect, the authorities need to establish the charge of misdeclaration by referring to various evidence produced by the appellant to establish that prevailing international price of the LMS at the relevant time was as per their declared value. In any case appellants were always entitled to ask for a speaking order, for enhancement of the value of the consignments imported in November 2009, in terms of Section 17 (5) of the Customs Act, 1962.

4.9 In our view the entire issue of misdeclaration of value needs to be reconsidered by the authorities below and proper speaking order giving proper reasoning for the enhancement of value needs to given, just acceptance by the importer of the enhanced value in import of some consignment, solely cannot be ground for establishing the charge of misdeclaration against him.

4.10 In view of the discussions as above, we are not able to sustain the impugned order to the extent of the appeals filed by these two appellants and remand the matter for reconsideration to original authority.

5.1 The appeals are allowed and the matter remanded back to the original authority for reconsideration of matter against the two appellants before us in light of the observations made in this order.

5.2 Since the matter is quite old, the adjudicating authority in the remand proceedings should decide the matter within three months of receipt of this order.

(Order pronounced in the open court on 06.09.2021)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu