CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87859 OF 2013

[Arising out of Order-in-Original No: COMMR/PMS/ADJN/02/2013-14 dated 23rd April 2013 passed by the Commissioner of Customs, CSI Airport, Mumbai.]

J B and Brothers Pvt Ltd
Amber Palace, 1st and 2nd Floor, Timbliawad,
Nanpura, Surat - 395001 … ***Appellant***

versus

Commissioner of Customs
CSI Airport, Awas Corporate Point, Makwana Lane
Andheri-Kurla Road, Andheri (E), Mumbai - 400059 ***…Respondent***

APPEARANCE:

Shri A K Prabhakar, Advocate for the appellant

Shri Manoj Kumar, Deputy 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 / 86963 /2021

DATE OF HEARING: 08/09/2021
DATE OF DECISION: 06/10/2021

PER: C J MATHEW

The dispute in this appeal of M/s JB and Brothers challenging order-in-original no. COMMR/PMS/ADJN/02/2013-14 dated 23rd

April 2013 of Commissioner of Customs, Chhatrapati Shivaji International Airport, Mumbai arises from the re-classification of 15 nos. 'rough diamonds' weighing 32.710 carats and valued at ₹45,13,353, imported *vide* bill of entry no. 001601/12.10.2012, as 'cut and polished diamonds' with consequent enhancement of value to ₹50,39,664 by recourse to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and duty liability of ₹1,03,817 on assessable value of ₹54,37,881. In addition, the confiscation of the impugned goods under section 111(m) of Customs Act, 1962, that were allowed to be redeemed on payment of fine of ₹10,00,000, and the imposition of penalties of ₹2,00,000 under section 112 of Customs Act, 1962 and ₹1,00,000 under section 114A of Customs Act, 1962 are sought to be set aside.

2. Opinion of Gemological Institute of India (GII) was sought on sample of six diamonds drawn and proceedings were proposed to be initiated upon their report of 23rd October 2012 that four of these were 'heat processed heat treated (HPHT) Type IIa' with other two being 'cut and polished diamonds' which was concurred with in the report of Trade Panel Members dated 31st October 2012 along with recommendation for enhancement of value.

3. It is contended by Learned Counsel for the appellant that the said diamonds had been worked on to craft 'brilliant cut round

diamonds' of 58 facets that was exported *vide* shipping bill no. 000224/24.06.2013 which suffices to discredit the findings in the impugned order. According to him, the enhancement of value without invalidating the invoice is not tenable in view of the decisions of the Tribunal in *Surbhit Impex Pvt Ltd v. Commissioner of Customs (EP), Mumbai [2012 (283) ELT 556 (Tri-Mumbai)]* and in *Bata India Ltd v. Commissioner of Customs, Chennai [2009 (233) ELT 381 (Tri-Chennai)]*. The findings of the adjudicating authority are also challenged for not having considered photographic evidence of the goods as presented and the description by the GIA India Laboratory Pvt Ltd, who had also rendered opinion on the samples at their request, as 'semi-polished blocked diamonds' in their report dated 19th December 2012. The resort to rule 9 without sequenced application of other methods prescribed in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is also questioned to challenge the enhancement along with the submission that no evidence of additional consideration has been adduced to discredit the declared value. It is contended that the failure to consider circular no. 35/2009-Cus dated 26th December 2009 of Directorate General of Export Promotion (DGEP) taints the findings in the impugned order. Reliance was placed on the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai v. Mahalaxmi Gems [2008 (231) ELT 198 (SC)]*.

4. Learned Authorized Representative emphatically draws upon the findings to defend the impugned order and further contends that description in the Kimberly Process Certificate is not sufficient evidence of the condition of the diamonds in view of the instructions contained in circular no. 53/2003-Cus dated 23rd June 2003 of Central Board of Excise & Customs.

5. In terms of notification no. 12/2012-Cus dated 17th March 2012, both ‘rough diamonds’ and ‘diamonds including lab grown diamonds – semi processed, half cut or broken’ are exempted from duty on import. The goods were entered for import on the claim for classification against heading no. 7102 3100 of First Schedule to Customs Tariff Act, 1975 attracting ‘nil’ rate of duty but was ordered for re-classification against heading no. 7102 3910 of First Schedule to Customs Tariff Act, 1975 with duty liability of 2% for demanding differential duty.

6. The impugned order is categorical in its finding of re-classification that the reports of Gemological Institute of India and Trade Panel Members as well as that of GIA India Pvt Ltd were clear that the goods did not conform to the declaration. It is also seen that the circular no. 35/2009-Cus dated 29th December 2009 of Director General of Export Promotion was discarded with the finding that

> *'3.11 The importer has relied upon the DGEP's Circular No. 35/2009 dated 29.12.2009 which states that "polishing a single or a few small facets will not transform rough diamonds into polished diamonds and make these fall of the KPCS radar and that semi-cut diamonds and their import or export remains subject to the requirements of the KPCS" and contended that based on the said clarification, the goods are to be classified as Rough Diamonds. I have examined this contention and I find that the impugned goods do not fall in this category in view of the clear cut opinion of approved Trade Panel Members and reports from GII and GIA, both recognized laboratories in the field of Diamonds, suggesting that the impugned goods cannot be classified as Rough Diamonds.'*

and the Kimberly Process Certificate too with the finding that

> *'3.12. Further, the contention of the importer that the authorised Officer at the port of shipment certified the classification of the goods under Tariff Heading 7102.31 and classified the goods as Rough Diamonds-for the purpose of international trade and also that the impugned goods are 'Rough Diamonds' as declared by them in the Bill of Entry as the goods were accompanied by the Kimberley Process Certificate. In this regard, I find that the Central Board of Excise and Customs vide Circular No.53/2003-Cus dated 23.06.2003 has prescribed the procedure to be adopted while importing Rough Diamonds. It has clearly prescribed that Rough Diamonds cannot be imported without a valid Kimberley Process Certificate issued by the Competent Authority of the exporting country. The said Circular, at Para 8 has further clarified that under KPC Scheme, the goods are not always physically inspected by the certifying authority at the time of issuance of KP Certificate, and therefore this*

aspect should be kept in mind while inspecting the import and export consignments. Therefore, merely presenting a KP Certificate along with the imported diamonds do not automatically classify the goods as Rough Diamonds and it is left to the Customs Department to verify as to whether the goods are Rough Diamonds or Cut & Polished Diamonds.'

7. The report of GIA Pvt Ltd, relied upon by the importer, was also considered to have justified discarding of the declaration as 'rough diamonds' with the finding that

'3.9 Thus, both the GII and GIA have opined that the impugned goods cannot be classified as Rough Diamonds. Further I find that the definition of 'Blocked Diamonds' as available on the website of the American Institute of Diamond Cutting Inc. i.e. on www.diamondschool.com is "a blocked diamond is one in which all eight crown mains (facets) including the table is fully cut and polished".

8. While the impugned goods may not be 'rough diamonds' as mined and may have undergone working before its import, the reports do not conclusively establish that these were 'cut and polished diamonds' on which duty liability was to be fastened. Furthermore, the contention of the appellant that the stones had been exported after final cutting and polishing is not controverted. Such exports of imported goods are eligible, under chapter X of Customs Act, 1962, to drawback of duties paid on their import. It does not appeal to reason that intention of evading duty of mere ₹1,03,817 prompted misdescription in the bill of entry. Coupled with the inadequate

evidence of the goods conclusively being ‘cut and polished diamonds’, this strikes at the very foundation of the proceedings initiated against the appellant and the culmination thereof.

9. For the above reasons, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 06/10/2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*