

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87211 OF 2017

[Arising out of Order-in-Original No: CAO 23/RT/PC/2016-17 dated 31st March 2017 passed by the Commissioner of Customs (Import –I), Mumbai.]

Karim Jaria
901, B Wing, Bianca Apartments, Yari Road, Versova,
Andheri (W), Mumbai – 400053

... Appellant

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

...Respondent

WITH

CUSTOMS APPEAL NO: 87212 OF 2017

[Arising out of Order-in-Original No: CAO 23/RT/PC/2016-17 dated 31st March 2017 passed by the Commissioner of Customs (Import –I), Mumbai.]

Crown Lifters
104, Raheja Plaza, Shah Industrial Estate
Behind Fun Republic Cinema, Veera Desai Road
Andheri (W) Mumbai – 400053

... Appellant

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

...Respondent

WITH

CUSTOMS APPEAL NO: 87739 OF 2017

[Arising out of Order-in-Original No: CAO 23/RT/PC/2016-17 dated 31st March 2017 passed by the Commissioner of Customs (Import –I), Mumbai.]

Karim Jaria, Director
Crown Lifters Pvt Ltd, 104, Raheja Plaza,
Shah Industrial Estate, Behind Fun Republic Cinema,
Veera Desai Road, Andheri (W) Mumbai – 400053

... Appellant

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001 **...Respondent**

AND

CUSTOMS APPEAL NO: 87741 OF 2017

[Arising out of Order-in-Original No: CAO 23/RT/PC/2016-17 dated 31st March 2017 passed by the Commissioner of Customs (Import –I), Mumbai.]

Crown Lifters Pvt Ltd
104, Raheja Plaza, Shah Industrial Estate
Behind Fun Republic Cinema, Veera Desai Road
Andheri (W) Mumbai – 400053 **... Appellant**

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001 **...Respondent**

APPEARANCE:

Shri T Chirag Shetty, Advocate for the appellants
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 / 85324-85327/2022

DATE OF HEARING:	15/12/2021
DATE OF DECISION:	12/04/2022

PER: C J MATHEW

These appeals of M/s Crown Lifters, M/s Crown Lifters Pvt Ltd, Shri Karim Jaria and Shri Karim Jaria, Director of M/s Crown Lifters Pvt Ltd, impugning the confiscation of imported 'cranes', recovery of differential duty thereon and imposition of penalties under section 112 and under section 114AA of Customs Act, 1962, bring the dispute initiated by show cause notice dated 10th September 2012 before the Tribunal for the second time with re-adjudication, that was ordered on the former occasion, not altering the culmination thereof except to the extent of reducing the penalties imposed on the importers and the individual. The proceedings pertain to nine 'used cranes' of varying specifications imported between 11th February 2005 and 12th February 2007 by M/s Crown Lifters, a partnership that was dissolved in 2007, and five consignments of 'used cranes' imported by M/s Crown Lifters Pvt Ltd, of which Shri Karim Jaria was the Managing Director, between 23rd January 2008 and 23rd February 2010. During the investigations, ₹ 1,50,00,000 had been voluntarily deposited towards differential duty on which turns one of the principal claims in the appeal along with dispute on valuation arising from re-determination of assessable value by recourse to rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 for the first set of imports and rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for the second set of imports that placed reliance entirely on

admission of the individual-appellant herein during the investigations.

2. The appellants herein, along with others, were proceeded against after investigations claimed to establish that the values declared in the bills of entry had apparently followed the convention of applying a rate of ₹ 19 to ₹ 34 per kilogram for 2005-07 and ₹ 40 per kilogram for the period thereafter to the weight of each of the 'used cranes', as admitted by the customs house agent, instead of the actual procurement price, as admitted to by the individual appellant in his statements and held to be in conformity with ascertained market values, and the differential value transmitted to the respective suppliers through one Brijesh Manilal Gala, a facilitator of illicit movement of funds. Hence the value was proposed to be enhanced to the full extent of the alleged payment – through banking and illicit channels – by recourse to rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 for the imports effected by M/s Crown Lifters and rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for the imports effected by M/s Crown Lifters Pvt Ltd. The order-in-original no. 12/2014/CAC/CC(I)/AB/Gr.V dated 31st January 2014 and the *de novo* adjudication order impugned herein re-determined the respective assessable values to ₹ 6,41,35,050 and ₹ 2,67,62,450 instead of ₹ 2,58,19,285 and ₹ 1,27,07,511 declared in the bills of entry, and conceding that the sequential application of various methods

prescribed in the respective Rules was not possible, as the actual transaction value, in place of the declared price transmitted through banking channels, and evidenced by the confessional statements of the principal official of the importing entity for which the authority of the decision of the Hon'ble High Court of Calcutta in *Sandip Agarwal v. Collector of Customs* [1992 (62) ELT 528 (Cal)] and the reiteration of the decision in *Eicher Tractors Ltd, Haryana v. Commissioner of Customs, Mumbai* [2001 (1) SCC 315] by the Hon'ble Supreme Court in *Motor Industries Co Ltd v. Commissioner of Customs* [2009 (244) ELT 4 (SC)] was cited. Curiously, in both the orders impugned then and now, the payment of ₹ 1,50,00,000 made during the investigations and its adjustment towards the duty liability on imports of M/s Crown Lifters are merely narrated in much the same way as the impugned show cause notice did and, in response to the claim of the noticee that the demand pertaining to the nine consignments stretched beyond the extended period permitted in section 28 of Customs Act, 1962, the adjudicating authority observed that

'53. During the proceeding, the noticees no. 1, 2 & 3 has submitted that the Show Cause Notice issued on 10.09.2012 is time barred in relation to the 9 consignments imported by M/s Crown Lifters as the same was issued beyond the period of limitation of 5 years and therefore the proposal to adjust the amount towards duty in respect of such consignments is illegal. It is also submitted that the present proceeding may be limited only to the 5 cranes imported by M/s Crown Lifters

Pvt Ltd. I find that in Para 14(xi) of the show cause notice it is mentioned that the amount voluntarily deposited by noticee no. 3 during the course of investigation is adjusted against the duty and interest payable on the cranes imported by M/s Crown Lifter which are beyond 5 years.'

3. Narrating the events leading to the *de novo* proceedings on the disposal of the dispute by the Tribunal on the earlier occasion with specific directions on acceptability of inculpatory statements to be predicated upon challenge in cross-examination and on the disposition of the amount deposited by the importer during the course of investigations, it is contended by Learned Counsel for the appellants that the order of the Tribunal had been observed in its breach by the adjudicating authority. Learned Authorized Representative drew attention to specific portions of the impugned order rendering clear findings that are impliedly, and considering the framework of adjudicatory proceedings, in line with the directions of the Tribunal. In the light of the challenge and the counter-challenge, we are required to first examine the compliance with the earlier directions and to determine the outcome of the dispute on merit only upon ascertainment of conformity of the impugned order with those directions.

4. Though the operative portion of the impugned order does hold that

'55.....

(iv) I accept the voluntary payment of Rs 1,50,00,000/- (Rs. One Crore Fifty Lakh only) made by Shri Karim Kamruddin Jaria during the course of investigation, as indicated in para 7 of the show cause notice towards differential duty and interest, due thereon.....

xxx.....'

we find no such proposal in the show cause notice which has only taken notice of the deposit made voluntarily and its attribution to the imports under investigation covering both the extended period as well as those beyond. Therefore, the inclusion *supra* in the order of the adjudicating authority must be set aside for having travelled beyond the proposal in the show cause notice.

5. The factual matrix of the deposit is contained in the narration of the adjudicating authority thus

'53.1.1 The amount was paid voluntarily during investigations as per the statements given and value stated therein. In their letters dated... along with the pay orders..., it is categorically mentioned by noticee no. 3 that the payments favouring the Commissioner of Customs, Mumbai are submitted voluntarily and unconditionally towards the Customs duty evaded by them as per the details in a statement). The Pay order and cheque... Were immediately submitted by noticee no. 3 on the next day of the statement dated 19. 11. 2010 in which he confessed the undervaluation of the cranes and import. Pay orders of the total amount... were submitted over the period of 7 months from 20. 11. 2010. He had ample time at this disposal to protest over coercion/persuasion, if any, by DRI for the said payment but

he did not. He had given his next statement on 19.0 7.2012 almost after one and half years. He neither during that intervened period nor during the statement dated 19.0 7.2012 has murmured any single word about the alleged coercion for payment....'

before going on to conclude, on the basis of circumstances therein, that the said deposit was not limited to imports effected during the period of limitation permitted by section 28 of Customs Act, 1962. The Tribunal, in the face of contention of the appellant, had directed that

'7..... But in the present case the deposit actually arises on persuasion. In fact the appellant has alleged coercion. In fact we agree with the reliance on the case of Photokina (supra). This judgement relied on the Honourable Court of Madras decision in the case of Pilmen Agents (Private) Limited 2000 (12 6) ELT 79 (Mad). Therefore we hold that the amount deposited cannot be appropriated as being duty and interest payable for the period beyond 5 years. It has to be proved that the amount deposited by the appellant during the investigation and before the issue of show cause notice is not the amount of duty which pertains to cranes imported within 5 years of the date of SCN.'

from which it can be deduced that the impugned order, with its elaboration, is not in breach of that direction.

6. We have held *supra* that the 'acceptance' of the voluntary payment is beyond the framework of the proceedings as determined by the proposals in the show cause notice and, with that having been set aside, the Tribunal lacks jurisdiction to address retention of such amount for any purpose, including as restitution towards duty

that has been short-paid. Nonetheless, the finding in the impugned order that this payment of duty was voluntary, and even despite being beyond the period of limitation and in the absence of any threat or coercion from customs authorities, does throw some light on the *bona fides* of the importer who, indeed, was not under legal obligation to do so. The prevailing practice of assessment on the basis of weight which has seemingly been followed by M/s Crown Lifters is also on record. There has been no ascertainment of the actual purchase price of each of the nine ‘used cranes’, which surely must be available considering that these were sourced at auctions, by the adjudicating authority. The initiation of proceedings for confiscation under section 111(m) of Customs Act, 1962 and penalties under section 112 and section 114AA of Customs Act, 1962 must be viewed through that prism.

7. Clearance of goods for home consumption, in exercise of authority under section 47 of Customs Act, 1962 and subject to satisfaction of ‘proper officer’ that the goods are not prohibited and that the correct duties have been levied, attains a finality thereby that can be disturbed only upon subsequent finding that the goods are prohibited or that short-payment of duty has occurred with the latter to be re-opened only within the stipulated time-frame. There is no allegation of the goods being prohibited and, indeed, recourse to confiscation under section 111(m) of Customs Act, 1962 repudiates that contingency. The discharge of correct duty liability is a

determination of rate of duty, under section 12 of Customs Act, 1962, and value determined in the manner prescribed in section 14 of Customs Act, 1962. The first is not in dispute as far as the impugned goods are concerned and the show cause notice has not proposed recovery of duties of customs on goods imported by M/s Crown Lifters; valuation, under the authority of section 14 of Customs Act, 1962, is limited to assessment. In the glaring absence of proposal in the present proceedings for levy of differential duty, recourse to valuation merely for the purpose of resorting to confiscation is to transform it from penal consequence to cause of action. Hence, it would appear that confiscation is disproportionate detriment and without any justification to cause such detriment. Consequently, confiscation of nine 'used cranes' imported by M/s Crown Lifters fails along with the penalties arising therefrom.

8. However, as recovery of differential duty has been proposed for the subsequent imports, M/s Crown Lifters Pvt Ltd is not immune to consequence of evasion of duty liability in the event of undervaluation being established. The sole evidence of misdeclaration of value appears to be the admission in the statement of Shri Karim Jaria and the confessional statement of the illicit fund mover, Shri Brijesh Gala. As in the case of the earlier imports, the actual price of each of the five 'used cranes' has not been ascertained. Reliance on statements alone is too fragile a foundation to build a case of undervaluation;

such depositions are reliable only with corroborative support. In the absence of corroboration, test of cross-examination is of essence, as mandated by section 138B of Customs Act, 1962, for relevancy. This was the crux of the direction

‘7.1 We find that the whole case of undervaluation is essentially based on statements are certain people and the confessional statement of Shri Karim Jaria. However, the statements to not corroborate with each other... We are unable to appreciate these gaps in the proceedings.

7.2 The Counsel contended that cross-examination of persons whose evidence was relied upon such as Shri Brijesh Gala, was not allowed. In his findings the Commissioner simply brushes aside the request by stating that he does not find any compelling reasons for offering the cross-examination. The Commissioner relies on various judgements to state that cross-examination is not a matter of right. We find that the reliance placed on these judgements is misplaced and misunderstood.... The Commissioner cannot rely on the judgements without first recording specific reasons for not allowing the cross-examination. In our view Shri Brijesh Gala is a crucial link in illegal transfer of money abroad and therefore deny the cross-examination without recording any reasons is violative of the principles of natural justice and must be right....’

in the remand order of the Tribunal.

9. Surprisingly, the adjudicating authority, in clear breach of discipline that should govern quasi-judicial proceedings, has chosen to criticise the outcome of the appeal preferred before the Tribunal thus

‘53.1..... Hon’ble CESTAT while distinguishing the case law of India Cements (Supra) has not gone into merit the allegation by noticees no. 3 & 4 about statements under

coercion and register their observations on the basis of the appellants (noticees) contention about the said coercion. The observations are thus sub-silentio in respect of the merits of the contentions put forth by the appellants that their statements were made under coercion...'

10. The remand order is unambiguous in placing the onus on the adjudicating authority to justify denial of any request for cross-examination. The adjudicating authority appears to have turned this decision on its head with his observation that

'49. During the hearing proceedings, the noticee no. 1, 2 & 3 submitted for the cross examination of noticee no. 4, Shri Brijesh Gala and Sr. Intelligence Officer of DRI (name not mentioned) and noticee no. 4 has made submissions for the cross examination of noticee no. 3, Shri Vikram Janghani, partner in M/s Dharamdas & Co (CHA 11/100) and the assessing officers.

49.1 I have examined the submissions of noticees no. 1, 2 & 3 for the cross examination. The said submissions are tendered without specifying any grounds/reasons under which the cross examination of the persons as requested by them would be helpful to prove their innocence....'

before going on to reject all the requests.

11. It was after going through the re-determination of value, the confiscation and the imposition of penalty that the Tribunal found it fit to reject all the conclusions in the order impugned therein for want of credibility of the statements relied upon in the absence of cross-examination. That order of remand, and its contents, had not been

challenged by Revenue in appeal. In such circumstances, it was gross impropriety on the part of the adjudicating authority, and subordinate to the Tribunal, to allege failings in the remand order - the exclusive privilege of the constitutional courts - and reflects his determined obduracy to stand by the first adjudication order. Furthermore, the order now impugned has not relied upon any evidence to corroborate the statements upon which the first adjudication was based. Neither has there been any attempt at ascertainment of the actual transaction value other than by way of the 'confessional statements' of the noticees purportedly being corroborated by the operator of 'illicit fund transfer' and whose cross-examination, sought for specifically in the *de novo* proceedings, was peremptorily discarded with the specious contention that the deposition merely supplemented the confession of the noticees. A more blatant case of violation of the principles of natural justice may yet have to surface and is, thereby, clear contravention of a specific direction in the remand order.

12. While we find no reason to disapprove the rejection of request for cross-examination of some investigating officials and of persons whose statements had not been relied upon for initiation of proceedings, the finding of the adjudicating authority that the statement of Shri Brijesh Gala, despite being corroborative of the confessions in the statements of the noticees, was not of such relevance as to warrant cross-examination is unacceptable. More

so, in the absence of any other evidence to support the allegation of undervaluation and which has not relied upon the authority of the several methods prescribed in the Rules framed under section 14 of Customs Act, 1962. We, therefore, are constrained to hold that the re-determination of assessable value by resort to rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 is not in accordance with law. The re-assessment, recovery of differential duty and confiscation of 'used cranes' imported by M/s Crown Lifters Pvt Ltd in the impugned order fails.

13. Accordingly, we set aside the order for confiscation of the 'used cranes' imported by both entities under section 111 (m) of Customs Act, 1962 along with the consequential penalties under section 112 of Customs Act, 1962. We also set aside the penalties imposed on the noticees under section 114AA of Customs Act, 1962 as also the recovery of differential duty under section 28 of Customs Act, 1962 from M/s Crown Lifters Pvt Ltd.

(Order pronounced in the open court on 12/04/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)