CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86913 OF 2013

[Arising out of Order-in-Appeal No: GOA/CUS/GSK/26-27/2013 dated 22nd March 2013 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.]

Frederick Trevor Figueiredo
House No 2318, Ward No. 3, Vidhyanagar, Gogol
Margao, Goa … ***Appellant***

versus

Commissioner of Customs, Central Excise & Service Tax
ICE House, EDC Complex, Patto Plaza, Panaji
Goa …***Respondent***

APPEARANCE:

None for the appellant

Shri Bhushan Kamble, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 86248 /2022

DATE OF HEARING: 15/02/2022
DATE OF DECISION: 15/02/2022

PER: C J MATHEW

The narrow compass of this dispute, pending for substantially long time, having been instanced by the radical alteration of detriment, as originally determined, prompted us to dispose off appeal against order-in-appeal no. GOA/CUS/GSK/26-27/2013 dated 22nd March 2013 of Commissioner of Central Excise & Customs (Appeals), Goa with the assistance of Learned Authorized Representative even in the absence of representation on behalf of the appellant. Though the impugned order did take note of the impugned goods having been cleared for home consumption on terms, even if tentative from the subsequent challenge, directed by the adjudicating authority and it may not have escaped his attention that the consequence thereof negated breach of pre-requisites in the import that led to the dispute, it did not appear to deter offer of resolving the dispute by setting the clock back, as it were, through either erasure of entry for clearance under section 46 of Customs Act, 1962 or by erasure of import itself. We have no doubt that best of intentions was uppermost in his mind while overlooking the physical and legal impossibility of both the two options as would be apparent from dwelling briefly on the facts and circumstances leading to the impugned order.

2. Mr Frederick Trevor Figueiredo, after a sojourn of quarter of a century in the United Arab Emirates (UAE), decided it was time to harken to the call of the land of his ancestors and return to his native Goa. It must have appeared most reasonable to him that the most economical shipment of his *chattels personal* would be through

Mormugao and, as far as he was concerned, his 2004 model ‘Harley Davidson’ motorcycle was part and parcel of his moveable effects. Obviously, he was not privy to the mysteries of officialdom that not only had a different perspective on ‘conveyance’ but further contrived to ensure that either his household goods, along with the ‘motorcycle’, be imported with a stopover at Mumbai or that he, oblivious of the exclusion afforded to him in the policy, effect shipment of the ‘motorcycle’ separately through Mumbai. Not that it mattered, as proceedings were initiated by customs authorities for confiscation of the ‘Harley’ owing to ineligibility for that privilege of exclusion from not having stayed outside India for a continuous period of two years and also for misdeclaration of value.

3. Import of ‘motor vehicles’ including ‘motorcycles’, - both new and used - is stringently regulated by policy notes no. 1 and 2 below the table in chapter 87 of Schedule I-Import Policy in ITC (HS), 2012 appended to Foreign Trade Policy 2012-2017. Most of the several pre-requisites prescribed therein are intended to ensure that the vehicle would, beyond the ‘point of no return’, *i.e.*, customs clearance, pass muster under the Motor Vehicles Act, 1988 because a vehicle landed in Indian territory is no vehicle unless and until registered; the confining of port of import to Mumbai, though, does not appear to be and is possibly for some reason that only policy-makers are privy to. Therein lies the tale of Mr Figueiredo and the art of motorcycle clearance!

4. Policy note 3 below the table in chapter 87 of Schedule I-Import Policy in ITC (HS), 2012 appended to Foreign Trade Policy 2012-2017 was conceived as the saving grace for persons like him 'coming to India for permanent settlement after two years continuous stay abroad provided the car has been in the possession of the individual for a minimum period of one year abroad' being excused from compliance with all, and each of those, stipulated pre-requisites which would have been the end of the story but for two disruptions that, if it were not of personal anguish to the appellant, verged on the farcical.

5. It was determined by the proper officer of customs that the owner of the impugned 'Harley' did not fulfil eligibility criteria owing to recent short visits home that reduced actual continuous residence abroad to less than the prescribed two years. Consequently, he was held to be subject to conditions in policy note 1 below the table in chapter 87 of Schedule I-Import Policy in ITC (HS), 2012 appended to Foreign Trade Policy 2012-2017 which, including the illegality of import through Mormugao, he had no reason to be familiar with. That sufficed for the original authority to invoke section 111(d) of Customs Act, 1962, as well as section 111(m) of Customs Act, 1962 on the finding that the declared value of ₹ 5,43,591 was incorrect, to warrant confiscation of the 'Harley' which was offered for redemption, in terms of section 125 of Customs Act, 1962, on payment of fine of ₹

3,00,000 as also imposition of penalty of ₹ 1,00,000 under section 112 of Customs Act, 1962. Differential duty on ₹ 49,446, added to arrive at value of ₹ 5,93,036 which was held to be assessable value on a similar import effected in Mumbai for GBP 7897.30 *vide* bill of entry no. 3509374/16.05.2011, was also ordered to be recovered. Clearance on payment of redemption fine and re-assessed duty was also to be conditional upon production of certificate of compliance with permissibility to operate on Indian roads.

6. The importer, not unnaturally aggrieved, appealed against the adjudication terms. The jurisdictional Commissioner of Customs was also aggrieved by the disavowal of the restrictive framework of import manifested in offer of redemption and, thereby, allowing 'prohibited goods' to be cleared for home consumption. In the meanwhile, the 'Harley' was cleared for home consumption; presumably after complying with conditions in the adjudication order as possession of the motor cycle was not resumed for any breach and, in all probability, registered by the motor vehicle authority, which may be inferred from the lack of interest in entering appearance for disposal of the appeal before us. It is in this factual matrix that the order of the first appellate authority must be perceived.

7. It would appear that the first appellate authority had ruled in favour of Mr Frederick Trevor Figueiredo for it was offered that all

payments made by him would be refunded subject to the ‘Harley’ being re-exported; alternatively, Mr Frederick Trevor Figueiredo could have the assessment and clearance effected at Mumbai and, thus, legitimize the import. Anyone familiar with Virgil would surely have recalled that timeless quote *‘timeo Danaos et dona ferentes’* for it, effectively, put the stamp of approval on the ineligibility of the vehicle for exclusion from the conditions available to individuals on transfer of residence. Furthermore, it also overruled the redemption, at place of import, offered to Mr Frederick Trevor Figueiredo by the adjudicating authority.

8. Yet, this begs the question of manner of implementing the impugned order and we need not be overly concerned with the side that emerged victorious in proceedings before the first appellate authority. There is no provision in Customs Act, 1962 for undoing an entry made under section 46 of Customs Act, 1962 and, more so, as the goods have been permitted to be cleared for home consumption. Time cannot be turned back, even by Commissioner of Customs (Appeals), to undo a breach, if any; the breach may be regularized by confiscation and possession of regularized imports restored by resort to section 125 of Customs Act, 1962. The option of erasing the import at Mormugao for regularizing through import at Mumbai is a non-starter. The other alternative of erasure of shipment from the United Arab Emirates (UAE) by re-export was not an issue in appeal before

the first appellate authority; he had, before him, an appeal for ruling that the ‘Harley’ was a legitimate import at Mormugao and another for the ‘Harley’ to be declared as ‘prohibited’ for import to deny option of redemption. The decision in the impugned order has moved in a third direction much like a surgeon distracted during the course of surgery. Furthermore, it did not appear to have crossed his mind that, unlike other imports, ‘motor vehicles’ are registered and forgo their previous identity thus precluding any attempt at removal from the state of registration except by consent of registered owner. We need not dilate further on this misadventure.

9. We turn to the issue of eligibility for exclusion from the stringent policy notes applicable to ‘used motor vehicles’ that has been denied for not having resided abroad continuously for two years immediately preceding the import; ‘short visits’ by Mr Frederick Trevor Figueiredo was held to be the impediment. The qualification in policy note 1 below the table in chapter 87 of Schedule I-Import Policy in ITC (HS), 2012 appended to Foreign Trade Policy 2012-2017 prescribing ‘two years’ has not defined ‘continuous’ and Baggage Rules, 1998 did provide for condonation of shortfall within permissible limit. Other household goods of Mr Frederick Trevor Figueiredo were cleared despite the stipulation for condonation in identical conditions in Baggage Rules, 1998; such differential treatment could have been accorded judicial approval solely if the

policy notes *supra* was unequivocally dissimilar. Nothing on record establishes any ground for this discriminatory detriment. It is on record that circular no. 96/95 of Government of India in Department of Revenue dated 29th August 1995 issued from F no. 497/8/95-Cus VI makes it clear that the 'continuous stay' is similarly condonable in the event of 'short visits' being impediment. Surprisingly, the lower authorities appear to have overlooked this crucial clarification.

10. Consequently, the import of the 'Harley' cannot be said to have violated policy note 1 below the table in chapter 87 of Schedule I-Import Policy in ITC (HS), 2012 appended to Foreign Trade Policy 2012-2017 and the confiscation under section 111(d) of Customs Act, 1962 does not have authority of law.

11. It is also seen that the value declared by the appellant had not been accepted by the original authority and was revised by adoption of the lowest of the values in an assessed bill of entry filed at Mumbai port. The finding in order-in-original that

> *'19. As the price declared by the importer under Rule 3 of Customs Valuation Rules, 2007, was not accepted by the Department and for determining the correct price the sequential method cannot be applied as the imported goods are old and used goods and since, the value of the imported goods i.e. Motor Cycle, "Harley Davidson" acceptable to the Customs was not known to the Customs & Importer has declared value of A.E.D. 30,900 or Rs. 5,38,209 (DV) or*

Rs.543591(AV). The Mumbai, Port being the only Port through which used Motor Cycles can be imported, the documents pertaining to the said Bill of Entry filed in this Custom House were forwarded for determination of its Fair Value acceptable to Customs. Now, the DC, Apprg. Gr. VB, Mumbai, has sent the copies of seven Bills of Entries of Motor Cycle "Harley Davidson" which have been assessed at Mumbai Customs. I find that assessing officers has ascertained the assessable value of the subject imported motorcycle at Rs593035.90 which is based upon the assessable value of similar imported goods described as "Used Personal Motor Cycle-Make Harley Davidson 2006 model LSTFI Fat Body Fuel Inject CH No 5HD1BXBI46YG74648, cleared vide B/E No. 3509374/ 16.05.2011 by Mumbai Customs. Considering the fact that the importers had not provided supporting documentary evidences like manufacturer's invoice for claiming the depreciation benefits for the subject goods, I reject their claim of availing depreciated value for charging Customs Duty. I find no infirmity in the assessment of value of the goods at Rs.5,93,036/-(Five Lakhs Ninty Three thousands Thirty Six) for levying Customs Duty under the Customs Tariff and hold that the same ie Rs.5,93,036 has been correctly assessed by the assessing officers on basis of supporting documents received from Mumbai Customs.

In view of above facts, I hold that, the said motor cycle has been imported in violations of the ITC provisions as mentioned above and therefore the same is liable for confiscation under Section 111(d) of the Customs Act, 1962 and the importer has knowingly contravened the ITC provisions and improperly imported the said motorcycle and is, therefore, he is liable for imposition of penalty under Section 112(a) of the Customs Act, 1962.'

appears to have followed the sequence in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

12. To ascertain that the value of ‘used’ motorcycles, imported under such circumstances, recourse has to be had to the rules referred to in *proviso* to section 14(1) of Customs Act, 1962; this transaction is one in which there is no buyer or seller which, however, operates also to negate all contemporaneous imports enumerated in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 leaving only rule 8 of the said Rules implying that original cost be adopted after adjusting for depreciation. As the original authority had failed to invoke and assess the goods in accordance with the appropriate provision of Customs Valuation (Determination of Value of Imported Goods) Rule, 2007, we set aside the enhancement of value.

13. Accordingly, we allow the appeal with consequential benefit including the duty on the differential value as enhanced by the original authority.

(Operative Part of the Order Pronounced in Open Court on 15th February 2022)

(ANIL CHOUDHARY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*