

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87887 OF 2013

[Arising out of Order-in-Original No: 82/2013/CAC/CC(G)/PKA-CFS (M)(I) dated 28th June 2013: dated passed by the Commissioner of Customs (General & CGS Mulund), Mumbai.]

D R Soneta & Sons

Room No. 32, 3rd Floor, Pilamai Building,
12/14 Vajukotak Marg, Ballard Estate, Mumbai 400001

... Appellant

versus

Commissioner of Customs (General & CFS Mulund)

New Customs House, Ballard Estate, Mumbai - 400001

...Respondent

APPEARANCE:

Shri Ashwini Kumar, Advocate for the appellant

Shri Sydney D'Silva, Additional Commissioner (AR) for the respondent

WITH

CUSTOMS APPEAL NO: 87986 OF 2013

[Arising out of Order-in-Original No: 82/2013/CAC/CC(G)/PKA-CFS (M)(I) dated 28th June 2013: dated passed by the Commissioner of Customs (General & CGS Mulund), Mumbai.]

Vishal K Agarwal

Krish International, 8/16 Banda House, Shop No.4
Narayan Dhuru Cross Lane, Mumbai - 400003

... Appellant

versus

Commissioner of Customs (General & CFS Mulund)

New Customs House, Ballard Estate, Mumbai - 400001

...Respondent

APPEARANCE:

Dr Sujay Kantawala, Advocate for the appellant

Shri Sydney D'Silva, Additional Commissioner (AR) for the respondent

AND

CUSTOMS APPEAL NO: 88611 OF 2013

[Arising out of Order-in-Original No: 82/2013/CAC/CC(G)/PKA-CFS (M)(I) dated 28th June 2013: dated passed by the Commissioner of Customs (General), Mumbai.]

Sunil Dutt Prem Prakash Ahuja

Reva Technology LLC, Post Box No. 39923,
Deira, Dubai UAE

... Appellant

versus

Commissioner of Customs (General & CFS Mulund)

New Customs House, Ballard Estate, Mumbai - 400001

... Respondent

APPEARANCE:

Shri R K Tomar, Advocate for the appellant

Shri Sydney D'Silva, Additional 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 / 85497-85499 /2023

DATE OF HEARING:	10/10/2022
DATE OF DECISION:	27/03/2023

PER: C J MATHEW

It was Groucho Marx, who, induced, and most certainly, by provocation that had nothing to do with something as mundane as levies, famously said

‘I wanted to beat him up to an inch of his life but I did not have a measuring tape’

2. Nonetheless, there could be no more succinct declaration of legislative intent of the particular levy in this dispute, viz., anti-dumping duty, under the authority of section 9A of Customs Tariff Act, 1975 read with rules 18 and 20 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, that, as an exception to impost on all goods of a class, in charging duties that are country-specific - of production and/or of export and/or even supply – and/or producer/exporter - specific, however justifiable the consequence is and however morally outraged the tax collector be, the assessment is to be characterized by nothing short of the most rigorous application. Anything less, and the tax collector would be foraying into the domain of the designated authority or usurping that of the Central Government. With this *caveat*, we may proceed to examine the circumstances in which the dispute came to be.

3. Before us are three appellants, including customs broker and overseas supplier on whom penalties have been imposed, impugning order¹ of Commissioner of Customs (General), Mumbai in relation to import of ‘measuring tapes’ against eight bills of entry filed between November 2007 and December 2009 which, if sourced from China,

¹[order-in-original no. 82/2013/CAC/CC(G)/PKA-CFS (M)(I) dated 28th June 2013]

would have been leviable to duties in notification no. 147/03-Cus dated 7th October 2003, 50/08-Cus dated 21st April 2008 and 49/09-Cus dated 15th May 2009 for the relevant period in time.

4. The case of customs authorities, charging deliberate mis-declaration of origin as Malaysia with intent to evade the 'anti-dumping duty (ADD)', alludes to the complexity of the impugned transaction itself as cause for suspicion and to the sufficiency of discarding of certificate that, even if originating with the competent authority, does not purport to go beyond self-declaration. Implicit in this 'apple of Sodom' hypothesis leading upto the show cause notice is the acknowledgement that while, to all external appearances, the documentation submitted with the bills of entry may, in themselves, be 'rosy', investigation has exposed the unpalatably 'bitter' mesocarp.

5. It would appear that investigations, cofounded by the bouncing back of email query from the server address of the purported seller, M/s Adikem Petangor SDN BHD Malaysia, contained in the 'trade material' furnished by M/s Krish International (proprietary concern of Mr Vishal K Agarwal), sought intervention, of M/s Hero Ventures SDN BHD Malaysia, said to be specialists in providing information on incorporated entities in that country, who could not trace the existence of such manufacturer there. Thereupon, the examination of the consignment imported against bill of entry no. 341446/22.12.2009,

said to contain 'measuring tapes', of 'COLT', 'ZOOM' and 'MARKSMAN' brands confirmed correctness of description but, impelled by valuation alert no. 02/2009 dated 25th March 2009 of Directorate General of Valuation on the steep retail price of 'measuring tapes of steel and fiber glass' to initiate survey of market price of the very goods on sale by a local distributor, was found to be undervalued. Further investigations, including statement of the importer, established that representative of the purported supplier offered the impugned goods through M/s Reva Technologies LLC, Dubai, said to be the sole distributor, for shipment from Singapore accompanied by certificate of origin issued by Dubai Chamber of Commerce. Investigators also took further initiative to send letters, by courier and Express Mail Service, to the purported supplier and return of these with endorsement of 'address not found' was adduced as further evidence of doubts about the transaction. The same importer had cleared consignments against bills of entry no. 325542/06.11.2007, no. 327344/31.01.2008, no. 33066/13.10.2008, no. 337219/08.06.2009, no. 337967/17.07.2009, no. 339776/05.10.2009 and 340637/18.11.2009 and in none of these, including the consignment under seizure, did the importer furnish country of origin certification issued by Malaysian authorities ostensibly, and as reported by the Dubai supplier, owing to there being no such requirement for shipment from Singapore. Investigations through

officials channel with Companies Commission of Malaysia was also said to have established that such entity did not exist there.

6. The value declared in the bills of entry were US\$ 0.54 per dozen for '3 metre' tape, US\$ 0.72 per dozen for '5 metre' tape, US\$ 3.00 per dozen for '15 metre' tape and US\$ 4.50 per dozen for '30 metre' tape and it was also reported that the importer raised local invoices on local purchasers merely for book adjustment. Based on investigations that was held to suffice for rejection of value declared in the bills of entry and from lack of wherewithal for recourse to rule 4, rule 5, rule 7, rule 8, rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was resorted to in conjunction with report of market inquiry of 7th January 2010, 11th April 2011 and 13th April 2011; thus, declared value of ₹ 67,12,897.78, in these eight bills of entry, was enhanced to ₹ 4,84,19,531 with consequent differential duty of ₹ 1,00,45,588 at the applicable rate of duty in addition to 'antidumping duty (ADD)' of ₹ 3,80,17,585 by application of US\$ 4.19 per kg on 'steel tapes' and US\$ 4.10 per kg on 'fiber glass tapes' as per notification no. 147/03-Cus dated 7th October 2003 that was to continue, under the authority of successor notifications, after review till 14th May 2015. The recovery of this determination under section 28 of Customs Act, 1962, along with applicable interest under section 28AB of Customs Act, 1962, confiscation of imported goods under section 111(d) and

section 111(m) of Customs Act, 1962 while allowing the goods under seizure valued at ₹ 72,44,940 to be redeemed on payment of fine of ₹ 10,00,000, and imposition of penalties under section 114A and section 114AA of Customs Act, 1962 on Mr Vishal K Agarwal and under section 112 on the ‘customs broker’, M/s DR Soneta & Sons, and on Mr Sunil Dutt Prem Prakash of M/s Reva Technology in order of Commissioner of Customs, ICD/CFS (Mulund)² has brought these three appellants before us.

7. Learned Counsel for appellants relied upon the certificate of origin issued by Dubai Chamber of Commerce, cargo clearance permit dated 9th December 2009 issued by Singapore Customs and the container tracking report to contend that these sufficed to establish the goods as having originated from other than China. He further argued that, as the demand pertaining to past consignments is traceable to extrapolation from the seized imports that, in the light of the submissions thereto, could not be of Chinese origin, the proceedings should be dropped *in toto*. He contended that the confirmation of demand and other detriments were sought to be justified from varied, and unconnected, aspects that are not even circumstantial, viz., that a seized pamphlet showed the product as ‘made in China’, that the purported manufacturer did not exist, that cash had been seized at the premises of the importer and that statements of buyers in India were

²[order-in-original no. 82/2013/CAC/CC(G)/PKA-CFS (M)(I) dated 28th June 2013]

damaging enough; according to him, the last two are not germane to the contour of the dispute on source of the impugned goods and the statements of the buyers, Mr Chetan Shah, Mr Sharad Doshi and Mr Hussain Bootwala, did not meet the test of relevance prescribed in section 138B of Customs Act, 1962 in view of retraction during cross-examination. It was also pointed out that the consignment at ICD, Tughlakhabad, referred to by the adjudicating authority, originated from an entirely different source while that at Jodhpur from the same supplier had been accepted without demur to be immunized from anti-dumping duty. The adoption of market survey prices as valid for rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was disputed by Learned Counsel. On behalf of the customs broker, it was contended that they had merely filed documents furnished to them and that none of the statements pointed to any wrong doing on their part. For the overseas supplier, reliance was placed on the decision of the Tribunal in *Seville Products Ltd v. Commissioner of Customs, Ludhiana*³, to question jurisdiction to impose penalty.

8. In support of his contention that an inappropriately conducted market survey cannot be the basis for resort to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for discarding declared value, Learned Counsel placed reliance on the

³ [2021 (378) ELT 291 (Tri-Chan)]

decisions of the Tribunal in *Amarjeet Enterprises v. Commissioner of Customs (Import), Mumbai*⁴, which attained finality owing to dismissal of appeal of Revenue by the Hon'ble Supreme Court, and in *Sanjay Kumar Agarwal v. Commissioner of Customs, Mumbai*⁵. On the issue of impropriety of revisiting completed assessments as well as charging of suppression, Learned Counsel placed before us the decision of the Tribunal in *Tele Brands (India) Pvt Ltd v. Commissioner of Customs (Import), Mumbai*⁶ and in *Commissioner of Customs, Amritsar v. Jyoti Industries Ltd*⁷. According to him, the decision of the Tribunal in *Jabs International P Ltd v. Commissioner of Customs (Import), Mumbai*⁸ supports his contention that previous imports of the same appellant was a good indication of the ruling transaction value. Relying upon the decision of the Tribunal in *Gautam Ferro Alloys v. Commissioner of Central Excise, Ranchi*⁹, which was upheld by the Hon'ble Supreme Court, he submitted that reliance placed by the adjudicating authority on document unrelated to the transaction for alleging mis-declaration is not in accordance with law.

9. According to Learned Authorized Representative, it has been proven beyond doubt that the purported manufacturer in Malaysia was

⁴ [2019 (370) ELT 1569 (Tri-Mumbai)]

⁵ [2016 (331) ELT 81 (Tri-Mumbai)]

⁶ [2016 (336) ELT 97 (Tri-Mumbai)]

⁷ [2005 (188) ELT 88 (Tri-Del)]

⁸ [2016 (338) ELT 723 (Tri-Mumbai)]

⁹ [2021 (377) ELT 776 (Tri-Kolkata)]

non-existent and that the impugned order has also validly concluded that the documentation, including certificate of origin issued merely on the declaration of the Dubai supplier, was not acceptable and, especially, as the goods did not carry the name of the manufacturer as mandated under the legal metrology statute. He placed reliance on the market inquiry reports to urge upholding of the rejection of the declared values along with the enhancement of assessable values in the eight bills of entry. He contends that intent of concealing the origin was apparent in designating the unit of consignment in numbers and not weight on which anti-dumping duty is applied. He submitted that reliance placed on the imports at Jodhpur did not come to the assistance of the appellant as the issue of 'country of origin' was not in dispute there.

10. According to Learned Authorised Representative, the challenge to the discarding of cross-examination in the adjudication order does not have much bearing on the outcome in view of the order of the Tribunal in *Ravi Jagota v. Commissioner of Customs, Amritsar*¹⁰. He placed reliance on the decision of the Tribunal in *Ratan Exports & Industries Ltd v. Commissioner of Customs, Chennai*¹¹, in *Converge Labs Software Tech Pvt Ltd v. Commissioner of Central Excise, Gurgaon*¹², in *MV Chidambaram and Others v. Collector of Customs,*

¹⁰ [2006 (198) ELT 234 (Tri-Del)]

¹¹ [2000 (123) ELT 808 (Tribunal)]

¹² [2009 (242) ELT 18 (Tri--Del)]

*Madras*¹³ and in *Success Engineering v. Commissioner of Customs, Kandla*¹⁴.

11. The proceedings, culminating in recovery of differential duty and anti-dumping duty on ‘measuring tapes made of steel’ and ‘measuring tapes made of fiber glass’ from the principal noticee, has had a curious passage commencing, as it did, with alert issued by Directorate General of Valuation on the steep under-invoicing of such goods from several countries including Malaysia, on which, as yet, anti-dumping duty was not contemplated then before going on to render the finding that the impugned goods did not originate in Malaysia. It is rather complex as the empowerment to impose ‘definitive anti-dumping duty’ under

*‘SECTION 9A . Anti- dumping duty on dumped articles. —
(1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.*

Explanation.

For the purposes of this section, - -

(a) “margin of dumping”, in relation to an article, means

¹³ [1987 (29) ELT 601 (Tribunal)]

¹⁴ [2007 (215) ELT 220 (Tri-Ahmd)]

the difference between its export price and its normal value;

- (b) *“export price”, in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensator arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);*
- (c) *“normal value”, in relation to an article, means –*
 - (i) *the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or*
 - (ii) *when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either –*
 - (a) *comparable representative price of the like article when exported from the*

exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

- (b) *the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):*

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.'

of Customs Tariff Act, 1975 is contingent upon price differential between landed cost in India and price at source and is specific to permutation and combination of country of manufacture/export/manufacturer/ supplier; the essential difference between assessment to basic customs duty and subjecting goods to anti-dumping duty is that, in the former the presumption of transaction value may be disrupted while, in the latter, is the unvarying certainty of the declared value being the transaction value. Consequently, and in the light of this special deviation from the norms of assessment, anti-dumping duty is triggered by, and only by, the permutations and combinations set out

in the notification issued in exercise of power under section 9A of Customs Tariff Act, 1975.

12. In the context of the notification resorted to in the adjudication order, it has to be clearly established that the impugned goods were produced in China. That is the test which the impugned order must overcome to exclude setting aside of the anti-dumping duty devolving on the importer. That the import is covered by invoice of M/s Reva Technologies, Dubai indicating the goods to be of Malaysian origin, backed by certification to that effect issued by Dubai Chamber of Commerce, is on record. That the bill of lading covers the shipment of the impugned goods from Singapore is also on record. It is also on record that importer has claimed that M/s Adikem Petangor SDN BHD Malaysia is the manufacturer. To discard all of these, and ironically stemming from a valuation alert that 'measuring tapes' originating from Malaysia were grossly underpriced, report of M/s Hero Ventures SDN BHD Malaysia, confirmed subsequently from Companies Commission of Malaysia, was relied upon to hold that such supplier did not exist in that country. The certificate of origin was discarded on the finding that the contents therein had not been verified by the issuing authority. While it could conceivably be inferred from these that the goods may not have originated in Malaysia, that does not suffice to bring the impugned goods within the ambit of the notification unless Chinese origin can be established.

13. The investigators, thereupon, placed reliance on the unearthing of pamphlet, cataloguing the brands of the imported goods and claiming these to have been sourced from China, at the premises of the importer and statements of three local sellers of these goods asserting the brands to be of Chinese origin besides citing the disproportionately high local prices and transactions in cash as evidence of the real origin of the impugned goods and concerted efforts to erase the possibility of tracing the source. We, however, find that the ‘incriminating’ pamphlet was not in the intercepted consignment and that, containing, as it does, the name of an allegedly non-existent entity in Malaysia, its evidentiary value for purpose intended by the adjudicating authority is suspect. Local traders can hardly be accepted as authoritative sources for establishing origin and the transaction allegedly entered into between these traders and the importer may have relevance for proceedings under some other statute without any bearing on conformity with the conditions for imposition of the definitive anti-dumping duty.

14. On the other hand, the appellant has produced ‘container tracking report’ evidencing shipment of the box from Malaysia. The bill of lading clearly evidences shipment from Singapore. It does not behove the legal status of the adjudicator, as well as the legality of the adjudication, to discard certificate of origin issued by a competent authority under relevant provisions of the statutory instrument

permitting such certification. In the light of evidence *supra*, the deficiency in establishing the movement of the goods from China to Malaysia remains unfilled. There is, thus, no valid grounds for holding that the goods did originate from China and, thereby, liable to the anti-dumping duty.

15. The adjudicating authority has, on the basis of the very same evidence, found it appropriate to reject the declared value under rule 12 and for resorting to rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to arrive at revised value for assessment. Though Learned Counsel sought to assail the appropriateness of the rejection, we prefer to examine the correctness of the method adopted for enhancement of the value.

16. It would appear from

‘9. Residual method.-

(1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;

Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of

importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of this rule on the basis of -

- (i) the selling price in India of the goods produced in India;*
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;*
- (iii) the price of the goods on the domestic market of the country of exportation;*
- (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;*
- (v) the price of the goods for the export to a country other than India;*
- (vi) minimum customs values; or*
- (vii) arbitrary or fictitious values.'*

of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 that the impugned order, akin to so many others, have drawn upon the perceived scope of title therein to adopt an over generalised interpretation of the empowerment. The computation has, unabashedly, drawn upon a market enquiry as the basis for determination but it certainly did not occur to the adjudicating authority that the necessity of reflecting market prices proximate to

the imports has compromised the conclusion. It is, again, unambiguously clear that the market price in India shall not be the basis for determination of value under rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The re-determined value in the impugned order is, therefore, not consistent with law and must be set aside. The appropriateness of invoking rule 12 of the said Rules is, thus, relegated to an academic exercise.

17. In the light of findings *supra*, the impugned order has erred in concluding that the impugned goods should be subjected to levy of differential duty and anti-dumping duty and the extrapolation thereto onto the past consignments is no less untenable; consequently, the confiscation of the goods lacks statutory sanctity as also the penalties imposed on the importer and the other two appellants connected with the intercepted consignment.

18. The impugned order is set aside and appeals allowed.

(Order pronounced in the open court on 27/03/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)