CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86220 OF 2020

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-NCH-650-651/2019-20 dated 27th November 2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Wadhumal and Sons
271, Yusuf Meherali Road, Masjid Bunder,
Mumbai – 400003 … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 86221 OF 2020

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-NCH-650-651/2019-20 dated 27th November 2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Harish Dilip Enterprise
271, Yusuf Meherali Road, Masjid Bunder,
Mumbai – 400003 … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 86222 OF 2020

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-NCH-650-651/2019-20 dated 27th November 2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Dilip Daryanani
271, Yusuf Meherali Road, Masjid Bunder,
Mumbai – 400003 … ***Appellant***

versus

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

AND

CUSTOMS APPEAL NO: 86223 OF 2020

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-NCH-650-651/2019-20 dated 27th November 2019 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Haresh Daryanani
271, Yusuf Meherali Road, Masjid Bunder,
Mumbai – 400003 … ***Appellant***

versus

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

APPEARANCE:

Shri Prakash Shah, Advocate with Shri Mihir Mehta, Advocate for the appellants

Shri Ashwini Kumar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85881-85884 /2023

DATE OF HEARING: 11/11/2022
DATE OF DECISION: 11/05/2023

PER: C J MATHEW

The issue in these appeals, assailing order[1] of Commissioner of Customs (Appeals), Mumbai Zone-III upholding the rejection of value

[1] [order-in-appeal no. MUM-CUSTM-AMP-NCH-650,651/2019-20 dated 27th November 2019]

declared in 21 nos. bills of entry for clearance of| ‘PVC sheeting’ and enhancing it to US $ 1010 per metric ton by recourse to rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, with consequent differential duty of ₹ 21,37,924 and ₹ 6,39,664 to be recovered under section 28 of Customs Act 1962 from M/s Wadhumal & Sons and from M/s Haresh-Dilip Enterprises respectively and confiscating goods of M/s Wadhumal & Sons and M/s Haresh-Dilip Enterprises valued at ₹ 1,48,84,626 and ₹ 42,97,263 under section 111(d) and section 111(m) of Customs Act, 1962 but ordered for redemption on payment of fine of ₹ 15,00,000 and ₹ 6,00,000 while imposing penalty under section 112(a) and section 114AA of Customs Act, 1962 on all the appellants, is the legality and propriety of the manner in which assessable value has been enhanced.

2. According to Learned Counsel for appellant, based on price of US $ 51/kg of ‘PVC sheeting’ contracted with suppliers in China, 16 nos. bills of entry and 5 nos. bills of entry, describing the impugned goods as ‘mixed size/stock lot’ and declaring the assessable value to be US $ 510 per metric ton, were filed by M/s Whadumal & Sons and M/s Haresh – Dilip Enterprises respectively. In the proceedings thereafter, according to him, the declared value was rejected under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-determined to be US $ 1010 per metric ton for the entire consignment despite physical inspection of one lot

alone. Narrating the apparent cause thereof, he submitted that customs officers undertook market survey at Bhendi Bazar by showing the samples drawn from the lot referred *supra* and the retail sale price of ₹ 116.50 per kg was ascertained. It was also submitted by him that representative samples were forwarded to the Institute for Chemical Technology (ICT) for testing and the characteristics of the samples, pointing towards the inferior stock imported, was reported upon which was not considered by the adjudicating authority. It is contended that the customs officers also obtained evidence, in the former statements of the two individual appellants herein, of the goods being of ‘prime’ quality.

3. He further submitted that the adjudicating authority had, incorrectly, invoked rule 9, read with rule 7, of Customs Valuation (Determination Value of Imported Goods) Rules, 2007 and that the rejection of declared value on the basis of propositions that were not backed by acceptable evidence should be set aside. Learned Counsel relied upon the decision of the Hon’ble Supreme Court in *Century Metal Recycling Pvt Ltd v. Union of India [2019 (367) ELT 3 (SC)]* and of the Tribunal in *CMR Nikkei India Pvt Limited v. Commissioner of Customs, Ahmedabad [2022-VIL-566-CESTAT-HM-CU]* to contend that any acceptance on the part of the importer does not absolve the assessing authority from re-determining the value in accordance with statutory requirements. It is contended by him that

the market survey, claiming the sanctity of the prescriptions in rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, would not pass muster as evidence of actual sale on the ascertained prices was not made available. Furthermore, it is his submission that the customs authorities could not, in the absence of other controverting evidence, have discarded the test results which establishes that the impugned goods were not of 'prime' quality. It is also contended that the reliance placed by the adjudicating authority on the statements of the two individual-appellants in the present proceedings was inappropriate in the absence of compliance with the requirement of section 138B of Customs Act, 1962.

4. According to Learned Authorised Representative, it is very clear from the examined packages that the value declared in the bills of entry could not be accepted. It is contended that the market survey had been conducted in a proper manner and by exhibiting the representative samples of the impugned goods. It is further submitted by him that the individuals concerned with the import had admitted that the goods were of 'prime' quality and, therefore, justifying rejection of the declared value with re-determination thereto in accordance with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

5. Admittedly, the re-determined value was based on market

survey, claimed to have been conducted in the presence of customs broker, with traders who had been given an opportunity to examine the same. Thereafter, the ascertained retail price was abated by 56% to arrive at the assessable value. The process was, according to the adjudicating authority, not unfair and that the voluntary agreement to pay duty at the higher assessable value of US $ 1010 per metric ton is testimony to the correctness of the computation.

6. In appeal before the first appellate authority, the contention relating to the tests conducted on the representative samples was rejected on the ground that the appellants had not furnished any other test results from eminent institutions. The failure on the part of the first appellate authority to ascertain the outcome of the tests carried out at the instance of the customs authorities, and which allegedly was not communicated to the appellants herein, jeopardises the finding on the quality of the goods. Furthermore, the reliance placed by the original authority on statements of the co-noticees who, for obvious reasons, could not be subject to the test of relevancy prescribed in section 138B of Customs Act, 1962 cannot but lead to evaluation of facts and circumstances after discarding the admission therein. In the light of these breach of procedure, the rejection of the declared value by the original authority is liable to be set-aside.

7. The lower authorities proceeded on the assumption that the

impugned goods are of 'prime' quality but, nonetheless, relied upon alternatives in valuation that are not consistent with the finding for it is inconceivable that similar goods, of 'prime' quality, were not being imported and the sweeping declaration of non-availability is not borne by any record of search for such. It would not be out of place to suggest that the lower authorities appear unsure of the their own conclusions inasmuch as determination, and approval thereof, in accordance with the residual rule 9 was not allowed to stand on its own but placed alongside rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Each of the rules therein are, even if intended to be sequentially applied, mutually exclusive and subject only to declaration of standard in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

8. Though rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 permits latitude of

> *'using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India…'*

recourse thereto is circumscribed by the absolute embargo on determination on the basis of 'the selling price in India of the goods produced in India' or, inter alia, 'arbitrary or fictitious values' from which it may be inferred that the reference to rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was intended to accord sanctity in circumstances of invalidation on either of these grounds. As rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is to be invoked only upon inability of ascertained under any of the preceding rules, the concatenation of the two itself is not permissible in law.

9. It is clear from the manner in which the re-determined value has been computed, and from specific assertion of the market survey being confined to imported goods, that it is based on prices obtaining for domestically produced articles. The valuation under rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 fails on this ground. Likewise, rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 requires adoption of the value of identical or similar imported goods sold in India as the base for computation of unit price. There is nothing on record to evidence that the market survey was confined, unarguably, to imported goods without which the re-determination thereof fails the test of law.

10. For the above reasons, we set aside the impugned order and allow the appeals with consequential relief.

(Order pronounced in the open court on 11/05/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*