

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 1132 OF 2007

[Arising out of Order-in-Original No: 131/2007/CAC/CC (I)/SP/Gr VA dated 28th September 2007 passed by the Commissioner of Customs (Import), Mumbai.]

Shashi Dhawal Hydraulics Pvt Ltd

... Appellant

45 Vikas Centre, SV Road, Near Santacruz Bus Depot,
Santacruz (W), Mumbai – 400 054

versus

Commissioner of Customs (Import)

...Respondent

New Customs House, Ballard Estate, Mumbai – 400 001

APPEARANCE:

Shri T Viswanathan, Advocate for the appellant

Shri Ashwini Kumar, 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 / 86778/2023

DATE OF HEARING:	12/04/2023
DATE OF DECISION:	11/10/2023

PER: C J MATHEW

Though this appeal is before the Tribunal for the second time,
and even, in a manner of speaking, for the third time considering
disposal of application filed under section 129B of Customs Act, 1994

for ‘rectification of error apparent on record that came to be rejected, the entirety of the original cavil against order¹ of Commissioner of Customs (Import), Mumbai is not. A narrative, albeit briefly, of the facts and circumstances till now is, therefore, unavoidable.

2. The appellant, M/s Shashi Dhawal Hydraulics Pvt Ltd, was proceeded against by notice dated 26th September 2006 for recovery of ₹ 20,31,302 that had allegedly been short-paid on import of ‘David Brown hydraulic pumps’ between December 2001 and April 2003 from M/s S&H Universal, UK upon enhancement of assessable value from GBP 90 to GBP 212 apiece by adopting the value in imports effected by M/s Shashi Charu Hydraulic Pvt Ltd, a sister concern of the appellant, from the manufacturer themselves. The impugned order also held the impugned goods liable for confiscation under section 111(m) of Customs Act, 1962 while imposing fine of ₹ 20,00,000 in lieu thereof besides invoking section 112 of Customs Act, 1962 for imposition of penalties. The order² of the Tribunal disposing off the appeal³ had set aside the confiscation, as well as imposition of penalties thereon, while confirming the demand in the impugned order.

3. In appeal before the Hon’ble Supreme Court, the apparent incongruity of the finding that there was no ‘misdeclaration’ and the finding that circumstances did warrant ‘invoking of the extended

¹ [order-in-original No: 131/2007/CAC/CC (I)/SP/Gr VA dated 28th September 2007]

² [final order no. A/87852/2018 dated 6th November 2018]

³ [customs appeal no. C/1132/2007]

period' afforded by section 28 of Customs Act, 1962 was the bedrock of the plea of the appellant as it also was in the application before the Tribunal referred to *supra* prior to recourse of appellate remedy provided for in section 130E of Customs Act, 1962.

4. Upon this submission, the Hon'ble Supreme Court remanded the matter back to the Tribunal thus

'12. We need not make any other comments in the matter, but in the totality of circumstances, deem it appropriate that the question of availability of extended period be examined by the Tribunal with reference to the facts of the case and the law applicable. We also do not deem it necessary to delve into the findings of the Tribunal with reference to the fact that there was no mis-declaration so as to justify confiscation or redemption fine, because the preliminary issue herein would be as to whether the elements of the Proviso to Section 28 had been existing in the first place, which would be decided independent of the findings/observations of the Tribunal in the second impugned order dated 17.07.2019.

13. In view of the above, the impugned orders are modified to the extent that Appeal No. C/1132/2007 stands restored; and the question as to whether the extended period in terms of the Proviso to Section 28(1) of the Act of 1962 is available in this matter or not is remitted for consideration of the Tribunal in accordance with law. The parties shall stand at notice to appear before the Tribunal on 17.03.2023.'

to circumscribe the present proceedings accordingly.

5. We have heard Learned Counsel for the appellant and Learned

Authorized Representative at length on the limited issue of ‘bar of limitation’ in section 28 of Customs Act, 1962 and the extent to which a finding on section 111(m) of Customs Act, 1962 operates concurrently. The issue for consideration, therefore, is the acceptability of facts relating to the import and assessment under section 17 Customs Act, 1962 that, on their own, would merit restricting the demand, if any, under section 28 of Customs Act, 1962 to the normal period of limitation and, if not, the legality of distinguishing ‘suppression/misrepresentation’ and ‘misdeclaration’ for independent consequences.

6. It is well-settled that invoking of the extended period, as empowered by

‘Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.’

in section 28 of Customs Act, 1962, is to be determined by facts on record. The impugned order has clearly elaborated on the transactions that a ‘sister concern’ had had with the manufacturer from whom the supplier of the appellant had sourced the impugned goods and that the

variation in the transacted prices was within the knowledge of the authorized persons of the appellant-importer. The framework for valuation of imported goods for such difference in price to have the consequence of resort to rule 5 to rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was also then existing. Invoking of the 'extended period' for recovery of 'import duties' that had been 'short-paid' was contingent upon establishing that 'suppression/misrepresentation' – not of the value, necessarily, but of aspects that would have influenced invoking of the impugned Rules – had occurred even as the transacted price may not have been exceeded but which, however, owing to

'Provided that—

- (a) the sale is in the ordinary course of trade under fully competitive conditions;*
- (b) the sale does not involve any abnormal discount or reduction from the ordinary competitive price;*
- (c) the sale does not involve special discounts limited to exclusive agents;*
- (d) objective and quantifiable data exist with regard to the adjustments required to be made, under the provisions of rule 9, to the transaction value;*
- (e) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -*
 - (i) are imposed or required by law or by the public authorities in India; or*
 - (ii) limit the geographical area in which the goods may be resold; or*

- (iii) *do not substantially affect the value of the goods;*
- (f) *the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;*
- (h) *no part of the proceeds of any subsequently resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and*
- (h) *the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.'*

in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 may not be acceptable as the assessable value.

7. The matter was heard and disposed off in 2018; then Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had been in operation for over a decade. The present dispute, as legacy of the erstwhile framework for valuation, had been evaluated accordingly, and not by the rigidity of mandate for acceptance of the 'declared value', save in specified circumstances, that is the hallmark of the contemporary Rules. It, therefore, remains to determine in the remand proceedings, if any additional facts thereto have been placed by the appellant. We do not find any such leaving only the issue of concurrence of findings on 'confiscation' and 'limitation' – arising

from independent provisions in Customs Act, 1962.

8. In the erstwhile framework wherein acceptance of 'declared value' as 'transaction value' could be jeopardized by the latitude of deviating circumstances, determination of consequent duty liability did not necessarily imply misdeclaration of value and it could well be the inexorable purpose of rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 that may have given rise to 'short payment' owing to the transactional circumstances having been 'suppressed' at the time of assessment with its own consequence. With the imposition of fine for redemption of goods that were not available for confiscation having been frowned upon in the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc [2009 (248) ELT 122 (Bom)]* and the Hon'ble High Court of Madras in *Visteon Automotive Systems India Ltd v. CESTAT, Chennai [2018 (9) GSTL 142 (Mad)]*, relied upon by Learned Authorised Representative, merely observed that the decision of the jurisdictional High Court does not apply to the case of the appellant before them, we are bound by the decision in the former to set aside the charging of redemption fine under section 125 of Customs Act, 1962. There is no evidence on record that the value declared by the importer is incorrect. Had the circumstances which prevailed prior to 1998, depicted in the decision of the Hon'ble Supreme Court in *Eicher Tractors Ltd v.*

Commissioner of Customs, Mumbai [2000 (122) ELT 321 (SC)], and in accord thereof, be found to have justified the invoking of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for re-determination of the assessable value by addition to the extent of concealed price of procurement, it would well have been within the scheme of law to confiscate the goods by resort to section 111 of Customs Act, 1962. The fresh determination would have been a consequence of non-compliance with section 14 of Customs Act, 1962 and rule 4 (2) of the said rules arising from deliberate misrepresentation of the 'transaction value' in filing bill of entry.

9. Section 111(m) of Customs Act, 1962 may be invoked only upon material particulars being misdeclared and this detriment is in addition to duty liability determined under section 28 of Customs Act, 1962. For such confiscation to be correct in law, it is necessary that the circumscribing circumstances must exist; the 'value' itself has not been established as 'misdeclared' even if the said 'value' was placed on record for assessment without making known the circumstances in which the same goods had been procured from the manufacturer at higher price. That was the consequence of the special framework, deviating from the Agreement on Customs Valuation (ACV) that was adhered to only in the subsequent Rules, and the incorporation of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 setting the two apart. A finding on inapplicability

of confiscation did not necessarily extend to ‘suppression/misrepresentation’ deployed for enhancement of value for assessment.

10. The legislative intent of compartmentalization of the two is evident in the incorporation of section 114A in Customs Act, 1962 that empowered imposition of penalty in consequence of such ‘suppression/misrepresentation’ and explicitly excluding recourse to the penalty consequential to ‘misdeclaration’ in proceedings for recovery of ‘short paid’ duty. We, therefore, find ourselves unable to accept the submission of the appellant that relief from confiscation amounts to relief from being subjected to the ‘extended period’ for recovery of duty under section 28 of Customs Act, 1962.

11. As no new facts pertaining to circumstances in which the parallel transaction with manufacturer of the impugned goods was not tantamount to ‘suppression/misrepresentation’ is on record and the non-applicability of the re-determined value is not in dispute in these proceedings, we find no reason to set aside the demand on ground of limitation.

12. Appeal is, accordingly, dismissed.

(Order pronounced in the open court on 11/10/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)