CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.2

CUSTOMS APPEAL NO: 89563 OF 2018

[Arising out of Order-in-Appeal No. MUM-CUSTM-SMP-48/2018-19 dated 15th June 2018 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Endress Hauser Flowtec (India) Private Limited
M-171 to M-176 MIDC, Waluj, Aurangabad – 431 136 … ***Appellant***

versus

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

APPEARANCE:

Shri T Viswanathan, Advocate for the appellant

Shri D S Mann, 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: 85399/2024

DATE OF HEARING:	19/10/2023
DATE OF DECISION:	08/04/2024

PER: C J MATHEW

The appellant, M/s Endress Hauser Flowtec (India) Private Limited, is before us with the grievance that the direction of Commissioner of Customs (Appeals), NCH, Mumbai in order[1] thus

'9 ..... modify the impugned Order-in-Original No…….passed by

[1] [order-in-appeal no. MUM-CUSTM-SMP-48/2018-19 dated 15th June 2018]

> *the Asst. Commissioner of Customs, SVB, New Customs House, Mumbai to the extent that royalty paid by the respondent is addable in the invoice value of the goods imported by the respondent under Rule 10(1)(c) of the Customs Valuation Rules, 2007. Accordingly loading of value on the issue of royalty shall be calculated by the original authority and shall be communicated to the appellant and all other concerned.'*

has, by overturning finding of the Assistant Commissioner of Customs, Special Valuation Branch (SVB) that their transacted value need not be interfered with, potential of severe detriment to them. The relationship between the parties to a Trade Mark Licence Agreement dated 10th November 2006 was the genesis of jurisdiction of the authority concerned though the addition ordered in the impugned proceedings stems from the particular aspect in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, under the mandate of *proviso* to section 14 of Customs Act, 1962, for inclusion of certain costs and services in the 'transaction value' of goods which lies within the exclusive jurisdiction of 'proper officer' referred to in section 17 of Customs Act, 1962. We, therefore, proceed to the submission of Learned Counsel and Learned Authorised Representative.

2. According to Learned Counsel for appellant, they, a fully owned subsidiary of M/s Endress + Hauser Flowtec AG, Switzerland, are manufacturers of 'flow measuring instruments' utilizing components required for production which are procured by the parent company and billed to include all other expenses and overheads. It was pointed out that, as a unit licenced under the 'hundred per cent export oriented unit (EOU)' scheme in

the Foreign Trade Policy (FTP), entitlement to exemption from all duties of customs rendered the mode of valuation to be irrelevant to assessment and, accordingly, it was directed by Deputy Commissioner of Customs, Special Valuation Branch (SVB) in order dated 23rd September 2002 that the declared value did not have to be interfered with. This, according to Learned Counsel, had not been seen as cause for cavil by customs authorities then or upon renewal in October 2005.

3. Learned Counsel submitted that even after an agreement of November 2006 with M/s Mestra AG, Switzerland for affixing of designated 'trademark' on products from January 2007 and addendum dated 25th January 2007, their application for non-interference with declared value, which drew attention to the 'trademark agreement', was approved on 23rd September 2008 implying continuance of opinion that relationship with supplier had not influenced the price and that the royalty payable under the agreement did not have impact on value for assessment. However, it was the further renewal of 13th October 2011 that came to be assailed at the instance of Commissioner of Customs in appeal filed before Commissioner of Customs (Appeals) which, having been disposed off against them, was challenged and, for having been decided *ex parte*, was remanded back by order[2] of the Tribunal for fresh decision ultimately resulting in the impugned order. He contended that direction in the impugned order is contrary to the Interpretative Notes pertaining to rule 3(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as there was no

[2] [final order no. A/85854/2017-CB dated 16th January 2017 in appeal no. C/87418/2013]

change of circumstances, either about relationship with supplier or in the royalty agreement, that could have provoked the decision to carry the issue to Commissioner of Customs (Appeals). The relationship is not an issue here and, in effect, it would appear that 'change of guard' at the level of reviewing authority prompted the dispute over exclusion of 'royalty' payable by appellant.

4. It appears to us that the impugned order has directed addition of 'royalty' which, in terms agreement for use of 'trademark' and 'logo' as indicative of conformity with standards of other products bearing 'Endress+Hauser' and 'E+H', was payable on the turnover of such goods manufactured in India. It also appears that the actual addition to be made was unknown to first appellate authority even after elapse of over a decade since the 'royalty' agreement was entered into. Impliedly, the direction of the first appellate authority is not relatable to goods under import or under proceedings for recovery of duty short-paid on import. A proceedings which does not pertain to goods under import or already imported and cleared is not a proceedings acknowledgeable under Customs Act, 1962. Neither Learned Counsel nor Learned Authorised Representative were able to evince notice under section 28 of Customs Act, 1962 for recovery of duty arising from proposed addition to declared value by recourse to rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 or for finalization of assessment under section 18 of Customs Ac, 1962 which, other than section 124 of Customs Act, 1962, should be the requisite framework for adjudication and appellate disposal. On the other hand, the

detriment to appellant, such as it is, in the impugned order is found to be stemming from, and erected upon, the foundation of relationship of the appellant with the supplier of components which, though without disturbance of finding that this had not influenced the sale price, offered scope for resort to 'royalty', for use of trademark and logo, as a means of undervaluing the goods. The *gravitas* of such addition, and chargeability to duty thereon, in proceedings devoid of details of imported consignments affected, amply evident from the directed remand to the original authority, throws light on the limits within which the Special Valuation Branch (SVB) has been mandated to operate. Notwithstanding this, we have a proceedings which, absent show cause notice setting out the circumstances for recovery from resort to rule 4 to 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 predicated upon relationship of buyer and seller having influenced price and with no taint upon claim to have engaged in unimpeachable cross-border trade transaction, has transfigured as authority to include payment, ascertainable only upon actual turnover of products manufactured by deploying imported goods, in assessable value at the time of import or on finalization of provisional assessments both of which fall within the statutory ambit of 'proper officer' whose finding was not before the reviewing authority at any time.

5. This curious concoction of layered thought surfacing in appellate proceedings is so bizarre as to prompt us to delve into jurisdiction that made this legally permissible. We find that the order impugned before the first appellate authority has its origins in a peculiar institution of customs

administration, *viz*., Special Valuation Branch (SVB) or GATT Valuation Cell (GVC), found in some of the older customs houses with specific remit to investigate acceptability of price declared for assessment of goods transacted between related persons. This arises from provisioning in section 14 of Customs Act, 1962 for assessable value to factor in relationship affecting price arrangement in transactions which frailty of human expression could but, in the nascent stage of harmonized approach to valuation, inadequately articulate as the norm or the deviation, and as remedies appurtenant thereto, to justify institutionalized support to assessment hierarchy. Significantly, this branch was never envisaged as substitute for the 'proper officer', under section 17 or section or section 28 of Customs Act, 1962, empowered to assess and, therefore, not empowered to fasten such enhancement to value in assessment of goods. There is also like lack of competence of the authority, ordered to comply with the direction of the first appellate authority, to assess duty under section 17 of Customs Act, 1962, to finalise assessment upon triggering of the contingency that prompted 'provisional assessment' under section 18 of Customs Act, 1962 or to recover duty short-paid under the authority of section 28 of Customs Act, 1962. At best, its advisory competence may draw attention of 'proper officer' without allowing 'quasi-judicial' determination of duty liability or recovery subsequent to clearance for home consumption to be influenced by such opinion.

6. Furthermore, from the absence of show cause notice, as well as response by or on behalf of appellant about fiscal detriment in proceedings,

we may not be wrong in speculating that such imports as may be subject to oversight of Special Valuation Branch (SVB) are, invariably, assessed provisionally for finalization to be undertaken upon completion of ascertainment by Special Valuation Branch (SVB). Therefore, at this stage, the quantification ordered by the first appellate authority may be relevant in finalization of assessment under section 18 of Customs Act, 1962 that devolves on 'proper officer' which Deputy Commissioner, Special Valuation Branch (SVB) evidently is not. As appeal has not been directed before first appellate authority against order of such 'proper officer', it transgresses the remand jurisdiction of such appellate authority to issue directions to a 'proper officer' who has yet to undertake finalization. Direction to the ostensible 'original authority' is nothing but an exercise in futility and direction to the 'proper officer', and the statutorily empowered potential 'original authority', is beyond appellate jurisdiction of Commissioner of Customs (Appeals) before whom assessment was not under challenge.

7. In these circumstances, it behoves us to focus on the competence of the reviewing authority to have gone before the first appellate authority against the opinion of the Deputy Commissioner, Special Valuation Branch (SVB) that there was no need to add the 'royalty' to assessable value. Section 128 of Customs Act, 1962 stands on two limbs – decision being that of officer below the rank of Commissioner of Customs and from such decision being cause of grievance. The author of the order impugned before the first appellate authority is certainly subordinate to Commissioner of Customs. However, as pointed out above, that opinion was not even persuasively binding on the 'proper

officer' who, as assessing authority and obliged to issue speaking order, is required to arrive at assessment uninfluenced, even if not uninformed, by external sources. Therefore, there was no cause for grievance to initiate appellate remedies. Such opportunity would have presented itself after finalization. Implicit in acknowledgement of appellate remedy against 'advisory' of Special Valuation Branch (SVB) is another round of appeal through the first appellate authority on the same goods and on the same facts which does not sit well with the principle of comity of courts. The appeal before the first appellate authority was, thus, premature. This aspect of disposal of the appeal within the scheme of Customs Act, 1962, and the role of Deputy Commissioner, Special Valuation Branch (SVB) within it, had not been evaluated by the Commissioner of Customs (Appeals).

8. Considering the legal and jurisdictional impediments noted by us *supra*, we set aside the impugned order and restore the appeal to first appellate authority to dispose off the pleas of the appellant-Assistant Commissioner in accordance with the scheme of Customs Act, 1962. Appeal is, thus, allowed by way of remand.

(Order pronounced in the open court on 08/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*