CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87352 OF 2013

[Arising out of Order-in-Appeal No: 186,187/MCH/ADC/GR.VA/2013 dated 11th March 2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

Tisha International
3437/23, 1st Floor, Jahangir Building Nicholsan Road
Kashmiri Gate, Delhi - 110085 … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 87710 OF 2019

[Arising out of Order-in-Original No: 116/2016-17/CC/NS-I/JNCH dated 31st January 2017 passed by the Principal Commissioner of Customs (NS-I), Nhava Sheva-I.]

Damian International
3437/23, 1st Floor, Jahangir Building Nicholsan Road
Kashmiri Gate, Delhi - 110085 … ***Appellant***

versus

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

APPEARANCE:

Shri Pradeep Jain, Advocate for the appellant

Shri Ranjan Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85604-85605 /2024

DATE OF HEARING: 30/01/2024
DATE OF DECISION: 19/06/2024

PER: C J MATHEW

These appeals of M/s Tisha International and M/s Damian International, though arising from independent proceedings inasmuch as the latter is consequential to detriment proposed in notice that was confirmed by order[1] of Principal Commissioner of Customs (NS-I), Jawaharlal Nehru Customs House (JNCH), Nhava Sheva and the former consequent upon order[2] of Commissioner of Customs (Appeals), Mumbai having only partially accepted their plea in challenge to original authority confirming proposals in notice, are taken up together for disposal owing to congruence of factual matrix in assessment of 'ball valves/check valves/cartridges' imported by both.

2. The value declared in bills of entry no. 850694/14.07.2008, no. 865021/06.10.2008, no. 869789/11.11.208, no. 878817/15.01.2009 and no. 889226/03.04.2009 filed by M/s Tisha International for import of 'ball valves/check valves/cartridges of brass' were doubted for correctness as the relevant 'tariff value' notified for import of 'brass

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[1] [order-in-original no. 116/2016-17/CC/NS-I/JNCH dated 31st January 2017]
[2] [order-in-appeal no. 186,187/MCH/ADC/GR.VA/2013 dated 11th March 2013]

scrap' under the authority of section 14(2) of Customs Act, 1962 during the said period was found to be much higher. M/s Tisha International was issued with show cause notice dated 12th April 2011 proposing rejection of declared value of US$ 211,360 under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, re-determination at US$ 498,928.746 for recovery of differential duty under section 28 of Customs Act, 1962, along with interest thereon under section 28AB of Customs Act, 1962, and proposing confiscation of the said goods under section 111(m) of Customs Act, 1962 with attendant imposition of penalty under section 112, section 114A and section 114AA of Customs Act, 1962. The value declared by M/s Damian International in 11 bills of entry between 2007-2008 for import of similar articles was doubted similarly leading to show cause notice dated 18th July 2011 proposing that value of US 3,37,561 be rejected under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for re-determination as US $ 12,73,244 with consequential recovery of differential duty of ₹ 1,20,64,285/- under section 28 of Customs Act, 1962, along with interest thereon under section 28AB of Customs Act, 1962, and proposing confiscation of the said goods under section 111 (m) of Customs Act, 1962 with attendant imposition of penalty under section 112, section 114A and section 114AA of Customs Act, 1962.

3. The Commissioner of Customs adjudicated the notice issued to

M/s Damian International confirming re-determination of assessable value as well as recovery of duties, along with interest, and imposed penalty of like amount on the proprietor of M/s Damian International under section 114A of Customs Act, 1962. Adjudicating the notice issued to M/s Tisha International, the original authority confirmed all the proposals in the show cause notice which, on appeal before the first appellate authority, was modified to set aside the penalty imposed under section 112 of Customs Act, 1962 on the proprietor leading to the agitating of the other detriments in this appeal before us.

4. According to the Learned Counsel for the appellant, the adjudicating authority, and the first appellate authority, respectively had erred in affirming the proposal for rejection of the declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 merely by relying on the 'tariff value' of 'brass scrap' fixed by Central Board of Excise and Customs (CBEC) in exercise of authority under section 14(2) of Customs Act, 1962 which was neither recognized as a benchmark in the provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 nor was, in any way, similar to the impugned goods. It was further pointed out that both the lower authorities had erred in affirming the substituted value by recourse to rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 inasmuch as re-valuation, under the empowerment in rule 3(4) of Customs Valuation (Determination of

Value of Imported Goods) Rules, 2007 mandated sequential application of the rules following thereon which had been observed in its breach in a very casual manner. It was also submitted that corporate entities were not intended to be subjected to proposed penalties as section 112 stipulates acts of omission and commission which an artificial person is incapable of. Reliance was placed on the decision of the Hon'ble Supreme Court in *Century Metal Recycling Pvt Ltd v. Union of India [2019 (367) ELT 3 (SC)]* to elaborate on this submission. It was further pointed out that re-determination of value on the basis of information available on the London Metal Exchange (LME) had been rejected by the Hon'ble Supreme Court in *Commissioner of Customs, New Delhi v. Prabhu Dayal Prem Chand [2010 (253) ELT 353 (SC)]* . It was alleged that the reasons adduced for not having taken recourse rule 4, rule 5 and rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 are not tenable as the factual foundations were not evidenced. Furthermore, it was argued that the emphasis placed, by the original authority in adjudicating upon the dispute of M/s Damian International and by the first appellate authority in disposing off appeal of M/s Tisha International, on the purported admission of undervaluation coupled with voluntary deposit of differential duty to conclude that no further effort to comply with rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was warranted is contrary to the scheme of valuation in section 14 of

Customs Act, 1962 for which reliance has been placed on the decision of the Tribunal in *Rajesh Gandhi v. Commissioner of Customs (Import), Mumbai [2019 (366) ELT 529 (Tri.-Mumbai)]*.

5. On the other hand, Learned Authorized Representative submitted that rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had been rightly invoked in circumstances of 'brass scrap' being traded at prices much higher than finished articles impugned here. It was further submitted that the appellants had been directed by the 'proper officer' concerned to produce specified documents which, if forthcoming, could have precluded recourse to rejection of declared value but those were not made available. It was pointed out that valid reasons had been offered for proceeding directly to rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

6. The limited issue in this appeal is conformity of findings on valuation in the impugned orders with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. We take note that the appellants had been placed on notice by the respective adjudicating authorities of reasons to surmise undervaluation from the substantial gap between the 'tariff value' of 'brass scrap', as notified by the Central Board of Excise & Customs (CBEC) under the authority of section 14(2) of Customs Act, 1962, and a finished product made out

of prime material. That the said 'tariff value' of 'brass scrap' was not realistic indication of market trends had not been challenged either by the appellant herein or by any importer of 'brass scrap' and, though value of 'brass scrap' and finished goods could not have been inferred from the value of prime material obtained from the London Metal Exchange (LME), the finding that 'declared value' of the impugned goods may not represent 'transaction value' is not exactly far-fetched especially when the 'tariff value' is not used for substitution or for computing but solely for the purpose of rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It is also on record that the appellant had had adequate opportunity to displace the presumption of non-acceptability of the declared value but that opportunity had not been availed. Rejection of declared value in these circumstances, cannot be held as flawed.

7. Nonetheless, such rejection did not suffice for completion of adjudicatory responsibility. In terms of rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the proper officer was further obliged to proceed sequentially through rule 4 to rule 9 thereof and take recourse to a particular rule only when an immediately preceding rule failed to apply. The discard of applicability of rule 4 and rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 by the 'proper officer' in both proceedings under section 28 of Customs Act, 1962 was not founded

on proper scrutiny of availability of such information but solely on account of disinclination, from point of view of practical convenience, to do so. That is not appropriate discharge of responsibility devolving on the adjudicating authorities taking recourse to section 28 of Customs Act, 1962. Furthermore, it is noticed that, in the dispute by M/s Tisha International, the first appellate authority has not rendered a finding on the plea that disregard of procedure has jeopardized the survival of the computed value. The adjudicating authority in the matter of M/s Damian International, and the first appellate authority in the matter of M/s Tisha International, approved recourse to rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 by reference to the domestic market despite the requirement of such computation to be arrived at as

> *'8. ……. the sum of:-*
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> *(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;*
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> *(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;*
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> *(c) the cost or value of all other expenses under sub-rule (2) of rule 10.'*

therein.

8. It would appear that the lower authorities had not considered the specificity of elements making up ‘computed value’ with no pretension to eliciting of such necessary information. Needless to say rule 8 of the said rules is subject to rule 3 of the said rules and, therefore, any substituted value should also not be in dissonance with the conceptual framework of ‘transaction value’ set out in section 14 of Customs Act, 1962. The computed value does not inspire confidence of being unimpeachable on that count either. The lower authorities had failed to guided by the rigour of the Interpretative Notes appended to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and in particular to

> *‘Note to rule 8*
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> *1. As a general rule, value of imported goods is determined under these rules on the basis of information readily available in India. In order to determine a computed value, however, it may be necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside India. Furthermore, in most cases, the producer of the goods will be outside the jurisdiction of the proper officer. The use of the computed value method will generally be limited to those cases where the buyer and seller are related, and the producer is prepared to supply to the proper officer the necessary costings and to provide facilities for any subsequent verification which may be necessary.*
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> *2. The "cost or value" referred to in clause (a) of rule 8 is to be determined on the basis of information relating to the*

production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.

3. The "cost or value" shall include the cost of elements specified in clauses (1)(a)(ii) and (1)(a)(iii) of rule 10. It shall also include the value, apportioned as appropriate under the provisions of the relevant note to rule 10, of any element specified in rule 10(l)(b) which has been supplied directly or indirectly by the buyer for use in connection with the production of the imported goods. The value of the elements specified in rule 10(1)(b)(iv) which are undertaken in India shall be included only to the extent that such elements are charged to the producer. It is to be understood that no cost or value of the elements referred to in this paragraph shall be counted twice in determining the computed value.

4. The "amount for profit and general expenses" referred to in clause (b) of rule 8 is to be determined on the basis of information supplied by or on behalf of the producer unless the producer's figures are inconsistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India.

5. It should be noted in this context that the "amount for profit and general expenses" has to be taken as a whole. It follows that if, in any particular case, producer's profit figure is low and his general expenses are high, the producer's profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in India and the producer *accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on his sales of the imported goods because of particular commercial circumstances, his actual profit figures should be taken into account provided that he has valid commercial reasons to justify them and his pricing policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur for example, where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in India and accept a low profit to maintain competitivity. Where the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the producer of the goods.*

6. The "general expenses" referred to in clause (b) of rule 8 covers the direct and indirect costs of producing and selling the goods for export which are not included under clause (a) of rule 8.

7. Whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis with reference to the circumstances involved. In determining the usual profits and general expenses under the provisions of rule 8 sales for export to India of the narrowest group or range of goods, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of rule 8 "goods of the same class or kind" must be from the same country as the goods being valued.'

therein.

9. In the light of our findings *supra,* we have no hesitation in holding that re-determination of 'assessable value' has been undertaken in breach of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and has proceeded whimsically after rejection of declared value as transaction value. There has been no effort to ascertain availability of 'transaction value' of 'identical goods' or 'similar goods' contemporaneously imported. It is worth noting that the appellants, too, had failed to adduce evidence of these and, thus, disabuse the presumption that such imports had not taken place. The resort to computed value under rule 8 of the said rules is entirely at variance with the Interpretative Notes to the said Rules. In these circumstances, it is only appropriate that the disputes are restored to the original authorities for subjecting the respective show cause notices to a proper disposal in accordance with the framework stipulated in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Accordingly, the two appeals are allowed by way of remand after setting aside the impugned orders.

(Order pronounced in the open court on 19/06/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*