CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 87609 of 2023

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APP-737 to 739/2023-24 dated 23.08.2023 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.)

Atit Shah .... **Appellant**
GE.-402, G-Block, Bharat Diamond Bourse,
Bandra-Kurla Complex, Bandra East,
Mumbai- 400 051.

Versus

Commissioner of Customs (ASC), Mumbai .... **Respondent**
Airport Special Cargo Commissionerate
Makwana Lane, Andheri (East),
Mumbai- 400 059.

With

Customs Appeal No. 87610 of 2023

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APP-737 to 739/2023-24 dated 23.08.2023 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.)

M. Shailesh and Co. .... **Appellant**
GE.-402, G-Block, Bharat Diamond Bourse,
Bandra-Kurla Complex, Bandra East,
Mumbai- 400 051.

Versus

Commissioner of Customs (ASC), Mumbai .... **Respondent**
Airport Special Cargo Commissionerate,
Makwana Lane, Andheri (East),
Mumbai- 400 059.

Appearance:

Shri Stebin Mathew a/w Ms. Dishya Pandey, Advocates for the Appellant

Shri Ranjan Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85700-85701/2024

Date of Hearing: 16.07.2024

Date of Decision: 16.07.2024

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that appellant herein M/s. M. Shailesh & Co. had filed a Shipping Bill (S.B.) No. 8673164 dated 16.02.2021, for export of "Cut & Polished Diamonds, 1994.92 Carats", with declared FOB value of Rs.2,92,68,527/-. During examination of the said export consignment, the goods were referred to the Expert Panel Member for valuation purpose, who opined that the value stated were 40 to 45% less than the actual market rates. The appellant vide letter dated 18.02.2021 stated that the value of the goods was fair and they had no reason to sell the goods below the market value. They requested for re-assessment for a fair evaluation. Thus, the goods were referred to the Three Expert Panel Members, who after examination of the subject goods, gave an opinion that the declared values were 20% less than the market value. Accordingly, the value of the impugned goods was worked out to be Rs. 3,65,85,658/-. On the basis of the Expert Panel report, the department had come to the conclusion that the impugned goods were undervalued and mis-declared, and accordingly, the same were liable for confiscation.On the basis of such understanding, proceedings were initiated against the appellant, seeking for rejection of the declared value; re-assessment of the S/B; confiscation of the impugned goods and imposition of penalty. Proceedings were also initiated against Shri Atit Shah, partner of the appellant company, proposing for imposition of penalty. The matter arising out of the present dispute of undervaluation of exportable goods was adjudicated by the Additional Commissioner of Customs, PCCCC, Mumbai Customs Zone-III vide Order-in-Original No. ADC/SS/38/2022-23/PCCCC dated 14.11.2022. In the said order, the declared FOB value of Rs. 2,92,68,527 / - was rejected and the same was re-determined to Rs. 3,65,85,658/-;the impugned goods were confiscated, with the option to redeem the same on payment of redemption fine of Rs.10,00,000/-; imposed penalties on the appellant company under Section 114 (iii) of the Customs Act, 1962. In respect of other appellant Shri Atit Shah, the said adjudication order had imposed penalty of Rs. 10,00,000/- under Section 114AA ibid. On appeal against the adjudication order dated 14.11.2022, the learned Commissioner of Customs (Appeals), Mumbai-III vide the Order-in-Appeal No. MUM-CUSTM-APSC-APP-737 to 739/2023-24 dated 23.08.2023 (for short, referred to as 'the impugned order'), has upheld confirmation of the adjudged demands on both the appellants and rejected the appeal filed by them. Feeling aggrieved with the impugned order, the appellants have preferred these appeals before the Tribunal.

2. Learned Advocate appearing for the appellants submitted that the Expert Panel Opinion is without any legal basis inasmuch as it does not reveal the source for the market value. He further submitted that no investigation was conducted by the department to ascertain as to the exact amount paid by the overseas buyer to the appellant for export of the impugned goods. Thus, he submitted that the charges leveled for undervaluation cannot be sustained. Learned Advocate also submitted that the provisions of Section 14 ibid read with the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 shall not be applicable for the case of the appellants inasmuch as the said statutory provisions deal with determination of the transaction value for the purpose of levy of customs duty and that, since export of rough diamond does not attract payment of any customs duty, the case of the appellants falls outside the purview of the valuation provisions (supra), dealt with by the department in both the orders. In this context, learned Advocate has relied upon the order passed by this Tribunal, in the case of *Sagar Impex Vs. Commissioner of Customs Airport, Mumbai,* reported in 2017 (358) E.L.T.504 (Tri.- Mumbai) to state that initiation of proceedings for enhancement of value in respect of export goods would not be sustainable, in absence of any specific provisions being made for the said purpose in the statute.

3. On the other hand, learned Authorised Representative appearing for the Revenue reiterated the findings recorded in the impugned order and supported confirmation of the adjudged demands on the appellants.

4. Heard both sides and perused the records of the case.

5. Levy of customs duties on the dutiable goods is contained in Section 12 *ibid*. It has been mandated that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975. If the goods are classified under the said Act of 1975, then the question of determination of value of goods arises and for such purpose, Section 14 ibid read with the Rules, 2007 shall be applicable for determination of the value for the purpose of levy of customs duty. The goods exported outside the country are leviable to customs duty, if provided in the Second Schedule to the Act of 1975. The product 'Rough diamond' falling under

Chapter heading 7102 is not finding place in the said Schedule. Since, the product in question has not been specifically itemized in the said schedule and no rate of duty has been prescribed for the same determination of value as provided in Section 14 ibid read with the Rules, 2007 shall not be applicable inasmuch as the value is required to be determined only for the purpose of levy and collection of customs duty and not otherwise. Therefore, ordering for rejection of declared value and re-assessment of the S/B is contrary to the statutory provisions. Similarly, applicability of Section 113(i) ibid for confiscation of goods and imposition of penalties under Section 114 (iii) and 114AA ibid also do not arise inasmuch as the said statutory provisions deal with the situation only when there is violation or contravention with regard to the declaration made on the value of the goods. Since, correct determination of value of goods is required only for the purpose of levy and collection of customs duty; and that export of rough diamond does not attract payment of any customs duty, in our considered view, the said penal provisions shall not have any application to the product in question exported by the appellant.

6. We find that the original order dated 14.11.2022 had referred to the comments/reports submitted by the Expert Panel Members, in order to reject the declared value of export and for re-determination of the same. Both the authorities below have not furnished any reference with regard to the competency of the Expert Panel for submission of any report. Further, the said reports were also not supplied to the appellants and the reference viz., number and date of such reports were also not disclosed in the respective orders. Furthermore, we also find that there is no coherence between the Export Opinion obtained by the department inasmuch as the Single Expert Member had confirmed that the value stated by the appellant is approximately 40 to 45% less than the market rates; whereas, the Three Expert Panel Members had confirmed that the declared value on the average are 20% less than the market value as on 17.02.2021. Further, on reading of the extracted portion of the reports as mentioned in the original order, we find that no specific averments were made by those Expert Panel Members as to how they arrived at the figure that the declared value is 20% - 40 to 45%. We also find that both the said reports are not authoritatively concluded that the declared value in respect of the export goods is less than the actual value prevailing in the market. The said fact is evident from the respective reports inasmuch as the phrases "approximately" and "average" have been used for issuance of

the certificates. In other words, the Expert Panel chosen by the department were not sure about the manner of determination of the actual value, for which there must have been laid down norms, by the established body for the diamond trade, which can be universally acceptable. Therefore, we are of the considered view that the Expert Panel reports relied upon by the department cannot be hold good for rejection of the declared value of export.

7. We find that the department had not brought on record any evidence to show that the appellants had received towards the export proceeds any amount over and above the price indicated in their commercial invoice. On the contrary, we find that the appellant had raised the invoice No.29/2020-21 dated 15.02.2021 on the overseas buyer towards sale of the impugned goods, total amounting to Yuan 2,636,904/-, which was duly received through the approved banking channel by them. We have perused the Bank Realization Advices issued by Kotak Mahindra Bank, in remitting the exact invoice amount to the appellant. Thus, it cannot be said that the appellant had undervalued the goods exported by them.

8. With regard to the charges leveled for confiscation, mis-declaration, under valuation etc., of export of rough diamond, we find that the issues are no more *res integra*, in view of the order passed by the Tribunal in the case of *Sagar Impex (supra).* The relevant paragraphs in the said order are extracted herein below:

> *"**3.** … This Tribunal in dealing with this dispute on the former occasion had specified the manner in which the valuation of the goods was to be arrived at. The contention of the appellant that the so-called 'trade panel' is no expert body would appear to be borne out by the lack any description of their qualifications in the impugned order and by the differing values that appear at different points in time in relation to the dispute. There is also no indication that the report of the 'trade panel' had been made available to the appellant. The adoption of the value recommended by the 'trade panel' would, therefore, not be in consonance with the directions of the Tribunal.*
>
> ***4.** The adjudicating authority has enhanced the value to that recommended by 'trade panel' but he yet appears not be without doubts about this value for, in spite of allowing redemption of the confiscated diamonds on payment of fine of ₹10,00,000, apprehension is entertained that valuable foreign exchange would still be lost. The inevitable conclusion is that the adjudicating authority was himself unsure of the value adopted.*
>
> ***5.** It is admitted that there is no revenue involvement in the dispute and that no duties are liable to be collected on the declared or enhanced value. In these circumstances, the initiation of proceedings to reassess*

the value is, itself, questionable. The scheme of the Customs Act, 1962 envisages declarations as a pre-requisite for assessment and collection of duty. Value, and valuation provisions in the Act and Rules framed thereunder, are relevant and applicable solely for achievement of this end. The confiscation provisions do not admit to proceedings that are unrelated to the objective of the Customs Act, 1962. It is quite clear from the findings of the original authority that an enhancement of value by customs authorities in the shipping bill or bill of entry does not carry with it the concomitant obligation to repatriate or remit the differential value from, or to, the buyer, or supplier, respectively. In the circumstances, the disallowance of exports even after imposition of redemption fine is not justified by law. There is no ban on export of diamonds and no authority is vested in the Commissioner of Customs to disallow an export in the absence of a ban. The impugned order is vitiated by arbitrary and unauthorised exercise of power.

6. *We do not find any justifiable reason for the adjudicating authority to accept the value recommended by 'trade panel' and there is also no finding to sustain the invoking of Section 113(i) of Customs Act, 1962 viz.*

> ***'SECTION 113. Confiscation of goods attempted to be improperly exported, etc.*** *- The following export goods shall be liable to confiscation :-*
>
> *xxxxx*
>
> *(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77.'*

7. *In view of the above, we find no grounds to sustain the impugned order. Consequently, it is set aside and the appeal is allowed."*

9. In view of the foregoing discussion and analysis, we do not find any merits in the impugned order, insofar as it has upheld the adjudication order and rejected the appeal filed by the appellants. Therefore, the impugned order is set aside and the appeals are allowed in favour of the appellants.

(Operative part of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha