CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86388 of 2014

(Arising out of Order-in-Original CAO No. 149/2013/CAC/CC(I)/AB/Gr.I dated 20.01.2014 passed by the Commissioner of Customs (Import), Mumbai)

Viral International .... **Appellants**
331, Market Yard, Gultekdi
Pune – 411 027.

Versus

Commissioner of Customs (Import), Mumbai .... **Respondent**
New Customs House (NCH), Ballard Estate,
Mumbai– 400 001.

Appearance:

Shri Kamal Bulchandani, Advocate for the Appellant

Shri Ram 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/85805/2024

Date of Hearing: 19.04.2024

Date of Decision: 26.08.2024

PER: M.M. PARTHIBAN

The appeal has been filed by M/s Viral International, Pune (herein referred to as 'the appellants' for short) against the Order-in-Original CAO No. 149/2013/CAC/CC(I)/AB/Gr.I dated 20.01.2014 (referred to, as 'the impugned order') passed by the by the Commissioner of Customs (Import), Mumbai.

2. Briefly stated, the issue involved in the present appeal relates to the dispute regarding undervaluation of various imported consignments of white and yellow poppy seeds from Turkey during the period September, 2004 to February, 2007. Brief facts of the case are that on the basis of

intelligence received by Directorate of Revenue Intelligence (DRI), Mumbaithat the appellants are undervaluing the price of white and yellow poppy seeds, investigation was initiated. Out of the total 20 consignments of imports, in respect of 14 consignments of imports from Turkey by the appellants, it was found by DRI that the magnitude under invoicing was about 50 to 60%. A chart showing the details of Declaration No. & Date, invoice number, transaction (TR) Value in $, TR quantity in Kg., Indian value $, India quantity, difference in value $ and difference in quality, and the same was received by DRI from Turkish customs authorities. On examination of the said the data received from Turkish customs authorities and by comparison of Public Ledger & UN COMTRADE data, the DRI concluded that there was undervaluation in import of goods and proposed for redetermination of the value of imported goods, its confiscation and penalty on the appellants by issue of Show Cause Notice (SCN) dated 25.01.2012. In adjudication of the said SCN, learned Commissioner of Customs (Imports) had conformed the proposals made in the SCN. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate for the appellants at the outset has submitted that the appellants have imported poppy seeds from Turkey by filing twenty Bills of Entries (B/Es) under advance registered contracts presented to customs authorities. In respect of six consignments (6 B/Es) imported to Nhava Sheva customs seaport, the demand raised in one B/E is beyond the period of limitation and five other B/Es were provisionally assessed. In respect of fourteen consignments B/Es (14 B/Es), demand of duty in nine B/Esare beyond the period of limitation and five other B/Es were provisionally assessed. In this regard learned Advocate submitted that enhancement of the values of imports were done on the basis of documents i.e., letter dated 09.03.2007 of Embassy of India, Moscow addressed to DG, EU and External Relations and another letter of the First Secretary (Trade), Embassy of India, Moscow addressed to ADG, DRI, Delhi, such documents including the charts have not been certified; several entries in the documents showing as price in $ and quantity in Kg. were blackout, making the entries not visible. Further translation of the documents in Turkish or other language have not been provided by the customs authorities; there is no other reliable data on the basis of which the transaction value was rejected and enhancement in the price of imported goods was adopted by the department; demand of duty was solely dependent on two invoices of 2004 as received in the documents of Turkish Customs. Hence, he submitted that the impugned order any redetermination of the price of imported goods and demand of differential duty is not legally sustainable.

3.2 Learned Advocate further submits that in identical matter, the Coordinate Bench of this Tribunal in the case of *Ajay Exports Vs. Commissioner of Customs (Import), Mumbai – 2023 (12) Centax 188 (Tri.-Bom)* and *Ajay Exports and Ors. Vs. Commissioner of Customs (Import), Mumbai and Others* in Final Order No. A/3446-3470/15/CB dated 20.10.2015 in bunch of appeals, have set aside the order for confirmation of demands against redetermination of values in respect of import of poppy seeds from Turkey on similar set of investigation against one another importer, and hence the impugned order is liable to be set aside on the basis of the above order of the Tribunal.

4. Learned Authorised Representative (AR) reiterated the findings of the Commissioner of Customs in the impugned order. He further submitted that as the invoices, export declarations and comparative Chart were obtained from Turkish Customs authorities to diplomatic channels, there is a presumption that they are admissible evidence as per Section 139(ii) of the Customs Act, 1962. Therefore, he claimed that confirmation of demand of differential duty, imposition of fine and penalty by the adjudicating authority in the impugned order is sustainable.

5. Heard both sides and perused the records of the case. We have also considered the additional written submissions given in the form of paper books by learned Advocate for the appellants as well as Authorised Representative for the Revenue.

6. The short issue for determination before us regarding alleged undervaluation of imported poppy seeds from Turkey and examining whether the impugned order confirming demand of differential duty, and imposing of fine and penalty by the adjudicating authority in the impugned order is legally sustainable or not.

7. It is a fact on record that the entire demand of differential duty is on the basis of documents obtained from Turkish Customs authorities and the chart indicating that there is undervaluation of goods as concluded in the

DRI investigation. We also find that the basic issue involving rejection of declared value by the appellants importer on the basis of values available in data base maintained by Turkish customs authorities and Public Ledger prices. The very same issue have been extensively examined by the Co-ordinate Bench of the Tribunal, in a similar set of same facts of the case of Ajay Exports (supra) by determining the basic issues of valuation imported poppy seeds from Turkey in terms of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and have held that rejection of declared value is without authority of law; and the confiscation of imported goods, imposition of redemption fine and penalties have also been set aside.

8.1 We find that this issue has already been decided by the Co-ordinate Bench of this Tribunal in the case of *Ajay Exports (supra),* holding that demand of differential duty, imposition of fine and penalty etc. is unsustainable in law. The relevant paragraphs of the said order is extracted and given below:

> ***"5.*** *Clearly, the disputes straddle two valuation regimes that not only was manifested by substitution of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 but also in the schematic re-design of section 14 of Customs Act, 1962 with effect from 10 October 2007. The earlier Rules had, themselves, been put through two significant changes by insertion of rule 10A with effect 19 February 1998 and insertion of qualifying conditions in proviso to rule 4(2) for acceptance of price paid or payable as 'transaction value' for the purpose of section 14 which was, itself, intended as the norm originally in July 1988. The difference between the two regimes was the mandate of affinity with conceptual framework for adoption in assessment with prescription of actual payment or 'transaction value' as the 'gold standard' permitting deviation thereto under specified conditions of non-conformity that was transformed by featuring the erstwhile 'gold standard' as manifestation of the concept; consequently, the acceptability of the contracted price was no longer just a desirable prescription but, save in circumstances provided in the Rules, an inevitability thus aligning the statutory provisions with the Agreement on Customs Valuation (ACV) in entirety.*
>
> ***6.*** *Earlier, by amending rule 3 with effect from 7th September 2001 and incorporating further qualifications for acceptance of contracted price as 'transaction value' of imported goods, rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 acquired teeth for subjecting declared values to the test of conformity by placing importer on notice that responsibility for establishing acceptability was now shifted and, thereby, disengaging the assessment process from the rigour of compliance with the four conditions, then existing in proviso to rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, as directed by the Hon'ble Supreme Court in Eicher Tractors Ltd v. Commissioner of Customs, Mumbai [2000 (122) ELT 321*

(SC)/2000 taxmann.com 53 (SC)] at least till the new Rules came into force.

***7.** According to Learned Senior Counsel appearing for the appellant, no evidence has been adduced by customs authorities to demonstrate that the suppliers of the impugned goods were operating as a cartel and, even if that was so, such oligopoly among suppliers should, contrarily, have caused prices to be higher. It was also submitted that, on mere allegation of cartel operation, recourse was had to the residual method in adjudication and supported in the first appeal. It was further contended that the decision of the Hon'ble Supreme Court in re Eicher Tractors Ltd has held that, except by demonstrated breach of conditions in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, 'transaction value' was not liable to be rejected. The reliance placed upon the 'Public Ledger' was vehemently refuted in argument of Learned Senior Counsel as also the appropriateness of inclusion of freight in value determined by resort to the fall back option in the Rules.*

***8.** It was argued by Learned Senior Counsel that the sequential application of methods prescribed in Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 requires reasoned elaboration for discard of the method or all methods preceding the one resorted to which the orders of the lower authorities are found to be deficient in. It was also submitted that, by adopting the method prescribed in rule 7, the assessable value of Rs. 190/- per kilograms thereby would have precluded further proceedings in the matter. It was also submitted that non-recourse to values available in data base maintained by customs authorities, as must inevitably exist considering the volume of trading in the impugned goods, solely on the ground of unreliability attributable to the Indo-Turkish trade being controlled by cartels is not borne by any facts on record or earlier decisions in disputes engendered by import of such goods in the past. Reliance was also placed on the decisions of the Tribunal in SK Dhawan v. Commissioner of Customs (Import), Mumbai [2016 (344) ELT 436 (Tri. - Mumbai)], in Commissioner of Customs (Import), Nhava Sheva v. Alfa Textiles [2016 (331) ELT 104 (Tri. - Mumbai)], and in Topsia Estates Pvt Ltd v. Commissioner of Customs (Import-Seaport), Chennai [2015 (330) ELT 799 (Tri. - Chennai)].*

***9.** It was also submitted that reliance placed on the prices culled from 'Public Ledger', drawn from information on shipments effected to countries in Europe, was not in conformity with Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. It was argued that the Tribunal had, in Commissioner of Customs (General & CFS) v. Radhey Shyam Ratanlal [2017 (358) ELT 965 (Tri. - Mumbai)], held that enhancement of value without undertaking detailed deliberations for rejection of declared value is improper. Further reliance was placed on the decision in Radha V Company v. Commissioner of Customs, Mumbai [2003 (156) ELT 810 (Tri. - Mumbai)], in Kanhaiyalal & Co v. Commissioner of Customs, Pune [2004 (163) ELT 33 (Tri. - Mumbai)] and in Dhirish International v. Commissioner of Customs, Bangalore [2005 (187) ELT 94 (Tri. - Bang)]. It was further contended that reliance placed upon the decision of the Tribunal in Commissioner of Customs, Tuticorin v. Rabbani Exports [2011 (271) ELT 533 (Tri. - Chennai)/[2010] 1 taxmann.com 908 (Chennai - CESTAT)] was* *misdirected as also that on decision of the Hon'ble Supreme Court in Radhey Shyam Ratanlal v. Commissioner of Customs (Adjudication), Mumbai [2009 (238) ELT 14 (SC)/2009 taxmann.com 856 (SC)]. It was also further argued that prices in 'Public Ledger' are of goods of 99.99% purity and hence not acceptable for comparison.*

10. *Per contra, it is the submission of Learned Authorized Representative that the very fact of cartel operation in Indo-Turkish trade, in the absence of effective rebuttal by the appellants, sufficed for rejection of the declared values as not reflecting the transaction price. It was pointed out that the lack of credible contemporaneous data, owing to like blemish of similar imports of the recent past and even by the same group of importers in India, left no option but to fall back on international prices. It was submitted that the reasons for doing so had been cogently enunciated in the impugned order and urged us to accept the same.*

11. *It would appear from the details of the imports that two of the bills of entry of M/s Ajay Exports and three of those of M/s Radheyshyam Ratan Lal pertained to the period after the notification of the Customs Valuation (Determination of Value of the Imported Goods) Rules, 2007 and all others to the earlier period. In the light of the allegations and the manner in which assessment has proceeded, the distinguishment between the two regimes is of relevance only upon ascertaining that authority to venture upon the several methods of valuation - transactional or determinative - sequentially did vest in the authority empowered to finalize the provisional assessments. The substitution of the first set of show cause notices of 18th February 2008 by the fresh set of notices dated 12th March 2008, and thereby proposing rejection of the declared value solely on the ground of alleged existence of a cartel operating in Turkey for supply of 'white poppy seeds' of 99% purity, is ample demonstration of intent, though not spelt out categorically, to rely upon the first of the conditions specified in proviso to rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, viz.*

> *'….*
> *(a) the sale is in the ordinary course of trade under fully competitive conditions;*
> *…..'*

but preferring to take shelter behind that bulwark of seemingly unencumbered authority of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 which, since the amendments of September 2001, afforded latitude for rejection of declaration that had been circumscribed by the decision of the Hon'ble Supreme Court in re Eicher Tractors Ltd to identified circumstances therein.

12. *Doubtlessly, with that amendment, the grounds for rejection of transaction price were not only substantially expanded to overcome the rigid framework of the existing conditions but also were couched generally enough to preclude similar judicial intervention henceforth; however, the principle of reasonable cause espoused in re Eicher Tractors Ltd may be discarded only at the cost of conferment of limitless empowerment, and more particularly from the unabashed resort to 'residual method' of valuation insensible to the obligation of justifying discard of the preceding modes definitively, on customs authorities tasked with valuation of imported goods. Hence the enunciation in re Eicher Tractors Ltd that, unlike Customs Valuation Rules, 1963, in the successor Rules*

> *'Both Sections 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularized in rule 4(2). Rule 4(1) speaks of the transaction value. Utilization of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2)….if the transaction can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules…..*
>
> *Now the special considerations are detailed in Rule 4(2). In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a mis-description of the goods imported…It is also not the respondents case that the particular import fell within any of the situations enumerated in Rule 4(2)……'.*

leaves no room for doubt that rule 10A is a machinery provision to enable 'shifting the burden of proof' to the importer and must, therefore, be restricted by the contours of legislative intent set out in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. That the reaction to the judgement was expansion of the special circumstances reinforces the original legislative intent of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 as a statutory process by which dialogue between importer and customs authority is set in motion for the purpose of arriving at the assessable value. The limiting factors in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 must continue to be perceived as the sole validation for venturing upon rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Any other proposition would only have the effect of empowerment without corresponding accountability.

13. *Even in the amended context of rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 that applies to most of the impugned consignments, it does not suffice for those limiting factors to be drawn upon without proffering evidence of existence of such defined circumstances; mere whims or fancies cannot take the hue of revealed truth or oracular exclamation. The lack of factual evidence in the findings to sustain the contention of cartel operations impedes the consequence of rejection of declared value. Even if some suspicion of cartelization did cross the minds of customs authorities, the assessments were provisional and ample time was available for appropriate inquiry into facts to be incorporated in the notice preceding finalization of assessment. The situation obtaining in proviso to rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 has not retained that special consideration for being resorted to in consignments imported after 10th October 2007. The rejection of declared value is, thus, without authority of law.*

14. *Turning to the adoption of prices from 'Public Ledger', a survey of the several alternatives in Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 do not admit to such option. Rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, titled as the 'residual method', envisages determination using reasonable means consistent with the principles and* *general provisions of the Rules and is further qualified by restriction on adoption of a value on the basis of, inter alia, price of goods for export to country other than India which the 'Public Ledger' makes no pretence of not being. In re Kanhaiyalal & Co, it has been held*

'6. After hearing both sides and considering the matter, it is found :-
(a) the application of Rule 10A of the Valuation Rules, 1988 which reads as under : -

"10A. Rejection of declared value.—(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the value of such imported goods cannot be determined under the provisions of sub-rule (1) of Rule 4.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing, the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1)."
provides for a procedure which has to be complied with. In this case, procedure as prescribed vide Rule 10A(1) has not been complied with. Therefore, resort to Rule 10A cannot be upheld.
(b) The Tribunal in the case of Venus Insulation Products Manufacturing Co. v. CC, Goa [2002 (143) ELT 364 (Tri. -Del)] have held in Para 4.4 of this decision, as regards the application of Rule 10A and other rules especially the provisions of Rule 4, as follows : -

"4.4 We further find that the adjudicating authority has grossly misunderstood the legal provisions relating to determination of the value of the goods. He has "invoked" Rule 10A, which is not a substantive provision governing determination of value in the sequential scheme laid down under the Valuation Rules. That rule is a procedural provision, which is meant to act as an aid to determining as to whether it is clause (i) or clause (ii) of Rule 3 that will be applicable to a given case. The sequential scheme for determination of value, under the Valuation Rules, comprises Rules 3 to 8.
…
What has been broadly laid down under clause (i) of Rule 3 appears in specific terms under Rule 4(1)…. If the facts of a given case will attract any of those exceptions, the case will go out of the purview of Rule 4(1) and, in that case, the transaction value shall be determined by proceeding sequentially through Rules 5 to 8 as prescribed under clause (ii) of Rule 3. Rule 8 is the residuary provision under this scheme. Rule 9 provides for certain additions to the price actually paid or payable, to arrive at the assessable value. Rule 10 casts an obligation on the importer to declare the details of the value of the goods accurately as also to furnish such document or information as may be required by the proper officer for determination of the assessable value……

The above rule is a rule of procedure, which enables the proper officer to decide as to whether he can accept the declared value of the goods under Rule 4(1) or should proceed sequentially through Rules 5 to 8 for arriving at the value of the goods. If, even after considering the information documents/evidence furnished by the importer, the proper officer has reasonable doubt about the truth or accuracy of the declared value, it shall be deemed that the value of the goods cannot be determined under Rule 4(1). This deeming provision contained in Rule 10A has necessarily to be

> *pressed into service at the very initial stage under the sequential scheme. It has no role after the scheme has worked itself out."*
>
> *Thereafter, the Tribunal held that what was open to the proper officer under Rule 10A was to question the accuracy of the price of the goods mentioned in the documents and without arriving at any good reason for doubting the truth or accuracy of the same, not to reject the transaction value under Rule 4(1). It was not open to the Customs authorities to rely on general quotations and mere production of price list to discharge the onus cast on them to prove the existence of circumstances indicated in Section 14(1) of the Customs Act and provisions in Rule 4(2) of the Valuation Rules, resorted to rejection of the transaction value and/or the provisions of Rule 10A. Following this decision of the Tribunal, in this case also, when the 'Spice Market Weekly Bulletin and Public Ledger, UK are not found to be inapplicable, there was no reason for the Commissioner to have resorted to Rule 10A or/and rejection of the transaction value in the facts of this case,…. Infact there is no material to exit from the transaction value as depicted by the documents of the importers in the facts of this case. The procedure prescribed for such an exit permissible by Rule 10A has not been followed. Therefore, the orders of the Commissioner coming to a conclusion as regards misdeclaration of value and consequently liability for confiscation under section 111(m) cannot be upheld….'*

15. *The specific discarding of resort to 'Public Ledger' prices for reason of discord with the prescriptions of the Rules framed under section 14 of Customs Act, 1962 is no less applicable here. There is no allegation that the prices declared do not reflect the contractual consideration. There is no allegation of misdeclaration of description of the goods. The conditions precedent to invoking of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 or rule 12 of 4(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have not been duly discharged to validate shifting the burden of proof to the importer. After all, non-existence of cartel that has influenced the price, which should be no less of a critical aspect considering that qualification being of relevance in transaction between related person, cannot be evidenced out of thin air but by rebuttal of circumstances from which the existence of a cartel may logically inferred. That lack is fatal to the impugned proceedings.*

16. *Therefore, for the above reasons we find that the proceedings of the lower authorities have been undertaken on erroneous premise of law which does not even have the saving grace of proper resort to the relevant method of valuation and requires the impugned orders to be set aside for allowing the appeals."*

In view of the above decision taken by the Co-ordinate Bench of the Tribunal, we of the considered opinion, that we cannot take a different stand on the matters involving similar set of facts and circumstances.

8.2 In the Civil Appeal Diary No. 40257/2023 filed by the department against the said order of the Tribunal, the Hon'ble Supreme Court had upheld the said order of the Tribunal and dismissed the appeal filed by the department vide its judgement dated 03.11.2023.

9. In view of the foregoing discussions and analysis, and on the basis of the orders of the Tribunal and Hon'ble Supreme Court, we are of the considered view that the impugned order dated 20.01.2014 passed by the Commissioner of Customs (Import), Mumbaiis not legally sustainable and the therefore the same is set aside.

10. In the result, by setting aside the impugned order dated 20.01.2014, we allow the appeal in favour of the appellants with consequential relief.

(Order pronounced in open court on 26.08.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha