

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NOS: C/86398 & 86399/2018

[Arising out of Order-in-Original CAO No: 38/2017-18 dated 28th February, 2018 passed by the Commissioner of Customs (Import-I), Mumbai.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)

Hon'ble Ajay Sharma, Member (Judicial)

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| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : Yes |
| 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : Yes |
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Prabhat Steel Traders Pvt Ltd
Kavi Commercial Ltd

... Appellants

versus

Commissioner of Customs (Import-I)
Mumbai

...Respondent

Appearance:

Shri T Viswanathan, Advocate for appellants

Ms PV Sekhar, Joint Commissioner (AR) and Shri Manoj Kumar,
Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Hon'ble Ajay Sharma, Member (Judicial)

Date of hearing: 02/01/2019

Date of decision: 25/01/2019

ORDER NO: 85194-85195/2019

Per: C J Mathew

These two appeals of M/s Prabhat Steel Traders Pvt Ltd, challenging the levy of differential duty of ₹ 44,81,016 and ₹88,29,940 arising from enhancement of assessable value and application of anti-dumping duty, and of M/s Kavi Commercial Ltd, challenging the levy of differential duty of ₹ 44,57,307 and ₹ 87,27,564 attributable to similar enhancement of value and application of anti-dumping duty, along with penalties imposed under section 112 and section 114AA of Customs Act, 1962 as well as the redemption on confiscation subject to payment of fine, are disposed of by this common order owing to the issues being identical. Briefly, the

appellants imported ‘trapezoidal roof profiles’ claiming classification as ‘parts of structures’ in heading no. 7308 9090 of the First Schedule to Customs Tariff Act, 1975 against various bills of entry between December 2016 and January 2017 which was, instead, classified under heading no. 7210 4100 of First Schedule to Customs Tariff Act, 1975 with the resultant differential duty of 2.5%.

2. The proceedings that culminated in the impugned orders were initiated after the goods had been cleared for home consumption but available at their respective premises. The penal provisions were invoked for obscuring the descriptions in the bills of entry by false declaration to escape scrutiny under the liberalised ‘risk management system’ of clearances. The allegations against the appellant are multi-layered; the change of classification, besides the detriment of differential rate, burdened the goods with anti-dumping duty imposed by notification no. 2/2017-Cus (ADD) dated 11th January 2017 on

‘pre-painted, painted, colour coated or organic coated flat steels in coils or not in coils whether or not with metallic substrate of zinc, aluminium-syn more any other substrate coating, excluding plates of thickness 6 MM or more’

falling under, inter alia, heading no. 7210 of First Schedule of Customs Act, 1962 to the extent of the difference between the landed value and US \$ 849 in three of the bills of entry filed by each of the importers and, in the bills of entry pertaining to the period prior, the

imported goods were valued at US \$643, the ‘minimum import price prescribed in notification no. (as amended) effect from 5th February 2016. The imported goods that were available in the possession of the appellants, having been seized during investigations, were confiscated and allowed to be redeemed on payment of fine.

3. Arguably, there are taints on the proceedings that has also been brought on record by the appellants and to which we must, doubtlessly, allude. Following the issue of show cause notice proposing re-classification with attendant detriment and penalty, and after receipt of the response to the notices, the issuing authority compromised its competence with a corrigendum proposing an alternative classification that was adopted in the impugned order and enhancement of value. Not only is this attempt to fill perceived gaps by afterthought deplorable but is also sufficiently demonstrative of initiation of proceedings without proper application of mind. Furthermore, the inability to stand by the classification proposed initially points to inconsistency and lack of certainty that is anathema to a responsible and responsive tax administration. Compounding these potentially grievous frailties is cavalier brushing aside of two critical submissions of the appellants: that a bill of entry filed prior to the impugned imports had been subject to query thus precluding allegation of suppression and that an alternative classification, under

heading no. 7216 9100 of First Schedule to Customs Tariff Act, 1975 founded on judicial decisions, is more appropriate than that proposed initially in the show cause notice. The former was discarded by claiming jurisdictional imperviousness and the latter by denying the admissibility of mere argument of convenience. The prompting for the corrigendum is, thereby, made apparent.

4. We do not propose to go into the applicability of the notification that imposed the anti-dumping duty as the plea of the appellants is limited to the inappropriateness of the classification in the impugned order. Nevertheless, in the circumstances of the impugned order finding the goods to be of 'galvanised iron' in the impugned order, reliance on the heading to the exclusion of the restrictive description in the same table is questionable and we may, yet, be obliged to subject it to ascertainment of pertinence if the classification in the impugned order is upheld. To that, we shall turn presently. Before we do so, the 'minimum import price' adopted as value in the impugned order must be threshed as the consequence would be a travesty of the law of valuation.

5. Valuation of imported goods is governed by section 14 of Customs Act, 1962. It is now trite that application of prescribed rate of duty to the transaction value is the very foundation of the tax. The consequence of discarding of the declared value for non-conformity

with the various aspects that together validate the transaction value is the ascertainment of the most proximate substitute thereof by sequential application of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 framed under the authority of section 14 of Customs Act, 1962. Even in circumstances that do not admit amenability of any of the specified rules, 'best judgement' by the 'proper officer' in the residuary provision cannot be substituted by that of anyone else, let alone that of a statutory instrument. The sole exception to this statutory prescription of ascertainment of value will apply if, in exercise of powers, the Central Government were to promulgate 'tariff value' under section 14 (2) of Customs Act, 1962. Here, we find no pretence that such 'tariff value' has been prescribed. The enhancement of value to 'minimum import price', the provenance of which is not cited, whether deliberately or by oversight, for determination of differential duty in the impugned order is appears to be an opportunistic recourse without respect for the law conferring the authority to assess duties of customs.

6. The indexing of notification no. 38/2015-20 dated 5th February 2016, as amended in October and December of the same year, that has been invoked *in lieu* of ascertainment of value under the prescribed Rules suffices to outline its purpose and limits. That instrument was issued under section 3 of Foreign Trade (Development & Regulation)

Act, 1992, read with Foreign Trade Policy 2015-2020, by the Director General of Foreign Trade. Prescription of 'minimum import price' is intended to ensure that only goods conforming to acceptable threshold of quality are brought into the country; effectively, by requiring a licence for import of ineligible goods, a regime of open-ended quantitative restriction is imposed on the trade by exclusion of privilege of 'open general licence' to such goods. Lack of license invites the detriments, including compensatory fines, that visit importers of prohibited goods. Strangely, it is this limited instrument, mothered by a statute with no claims to be in pursuance of Article 265 of the Constitution, that has been proposed, and employed, for valuation of the impugned goods. Also by no stretch can such threshold prescription be presumed to be the 'tariff value' intended in section 14 (2) of Customs Act, 1962; nor can it don the mantle of 'best judgement' of Customs Valuation (Determination of Value of Imported Goods), 2007. The governing Rules make no reference to empowerment of any authority, outside those in Customs Act, 1962, for its implementation. We, therefore, have no hesitation in holding that the recourse to 'minimum import price' as the substitute for transaction value is patently bereft of legality and propriety.

7. It now remains for us to examine the classification adopted in the impugned order. Of the two headings proposed in the show cause

notice, original and corrigendum, the adjudicating authority has found

*‘corrugated flat rolled products of iron, of a width of 600 mm
or more, otherwise plated or coated with zinc’*

under heading no. 7210 of First Schedule to Customs Tariff Act, 1975 to be of better appeal. We are, therefore, not obliged to look into that proposed in the pre-corrigendum show cause notice. In the normal course, such a dispute is resolved by subjecting the revised classification to scrutiny and confirmed, if appropriate, or reverted to the declared without considering a third description even if more pertinent. However, in the present instance, the appellant had, in the impugned proceedings, pleaded for adoption of heading no. 72169100, i.e. ‘angles, shapes and sections cold-formed or cold-finished from flat rolled products’ as an alternative affording us the latitude to do so.

8. We have heard Learned Counsel for the appellant and Learned Authorised Representative at length.

9. The primary claim on behalf of the appellants is that the imported goods are not ‘flat rolled products of iron or steel’ as the leeway of ‘corrugation’, afforded by note 1(k) in chapter 72 of First Schedule to Customs Tariff Act, 1975, cannot be said to include ‘trapezoidal’ profile. According to Learned Counsel, the literature

available on the subject makes it abundantly clear that corrugated profile has been available for more than a century while trapezoidal profile is of recent deployment in the construction of structures. He contends that the corrugation of flat sheets involves a second rolling unlike cold-forming and pressing by which trapezoidal sheets are manufactured. He claims that the consumption targets are also entirely different and that trapezoidal sheets are used only for roofing. He also submits that the sinusoidal curve that characterises, and defines, corrugation is not consistent with the shape of the trapezoidal.

10. On the other hand, Learned Authorized Representative contends that the appellants had sought the residuary sub-heading of a general heading in the bills of entry were residuary nature and that conformity with the more specific heading in the impugned order is the prescriptive mandate of the General Interpretative Rules for justification of which, he places reliance on the decision of the Hon'ble Supreme Court in *Bharat Forge & Press Industries (P) Ltd v. Collector of Central Excise [1990 (45) ELT 525 (SC)]*. The decisions of the Hon'ble Supreme Court in *Commissioner of Central Excise, Bhubaneswar-I v. Champdany Industries Ltd [2009 (241) ELT 481 (SC)]*, *Densons Pultretaknik v. Commissioner of Central Excise [2003 (155) ELT 211 (SC)]* and *Plasmac Machine Mfg Co Pvt Ltd v. Collector of Central Excise [1991 (51) ELT 161 (SC)]* laying

emphasis on '*generalia specialibus non derogant*' were also relied upon to emphasize the submission.

11. Undoubtedly, of the two headings, the one in the impugned order is more specific. *A priori*, that description would not stretch beyond fitment to sheets of uniform flatness; however, the chapter note does allow 'corrugated sheets' to be considered as 'flat rolled' probably because of the similarity of process of conversion. The literature adduced by Learned Counsel does draw a distinction between 'corrugated' and 'trapezoidal' with functional dissimilarities in evidence. They are, therefore, not amenable to interchangeable denomination in common parlance. The deliberate inclusion of 'corrugated' in 'flat rolled' could well have encompassed the distinct and separate 'trapezoidal' had legislative intent determined so as both were in use by the trade when the tariff was enacted.

12. Moreover, the sinusoidal curve that distinguishes 'corrugated' products in the Explanatory Notes to the Harmonised System of Nomenclature is not restricted to 'hot rolled products' as insisted upon by Learned Authorized Representative. The headings are structured in such a way that these are parallel descriptions of the two modes of 'rolling' with physical properties alone varying. Therefore, we arrive at the firm conclusion that the impugned order has not classified the impugned goods under the most appropriate heading and is not any

more valid than that claimed in the bills of entry by the appellants. In the face of such certain conclusion from a scrutiny of the headings, judicial decisions cited by Learned Authorized Representative that were not rendered in identical circumstances can provide only a general guidance.

13. As we have premised *supra*, a residual description fails in comparison with a more specific heading. The appellants have, themselves, preferred their acknowledgement of classification under heading no. 7216 9100 of the First Schedule to the Customs Tariff Act, 1975; the product is presented in a regular shape and has been manufactured from 'flat rolled sheets' that have been so cut to a pre-determined length before being subjected to 'trapezoidal' forming. There is no evidence to support the claim that the goods are utilized exclusively in erection of structures; that may well be true but absence of material to conclude so mandates the ascertainment of fitment within the alternative classification that is sought. The goods do conform to that description and, consistent with the Explanatory Notes referred *supra*, we concur with that alternative classification.

14. Amidst the confusion that is manifest in the show cause notice, and the impugned order, the non-applicability of the classification claimed in the bills of entry cannot be held to be deliberate. There is, therefore, insufficient justification for confiscation and the imposition

of the penalties proposed in the show cause notice.

15. For these reasons, we set aside the demands, the confiscation and the penalties in the impugned order while confirming the classification of the goods to be under heading no. 7216 9100 of First Schedule to Customs Tariff Act, 1975.

(Pronounced in Court on 25/01/2019)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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