CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85142 OF 2024

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-871 to 874/2021-22 dated 29th October 2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Jalak Exports
14, Shakti Chambers, Raghunathapura,
Surat, Gujarat-395003 … ***Appellant***

versus

Commissioner of Customs (APSC)
6th Floor, Awas Corporate Point, Makhwana Lane,
Off: Andheri-Kurla Road, Marol, Andheri East,
Mumbai – 400059 ***…Respondent***

WITH

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[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-871 to 874/2021-22 dated 29th October 2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Manoj Kumar Jain
2-A, Megh Surmeon Appartment, 1 to 7, Umra-31 Surat,
Gujrat- 395 007. … ***Appellant***

versus

Commissioner of Customs (APSC)
6th Floor, Awas Corporate Point, Makhwana Lane,
Off: Andheri-Kurla Road, Marol, Andheri East,
Mumbai – 400059 ***…Respondent***

APPEARANCE:

Shri Sanjay Singhal, 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: 86679-86680/2024

DATE OF HEARING: 06/05/2024
DATE OF DECISION: 05/11/2024

PER: C J MATHEW

This appeal of M/s Jalak Exports lies against additional detriment of absolute confiscation, exacerbating the option to redemption of confiscated goods, along with others fastened on to them, in proceedings arising from alleged overinvoicing of three lots of 'rough diamonds' from among the seven lots imported against bill of entry no. 2441859/15.03.2019; these seven lots were covered by two invoices – JS001/19 dated 12th March 2019, comprising two lots, and JS002/19 dated 12th March 2019 – with both lots in the former, of average per carat value of US$ 19 and US$ 27 ascertained by the designated 'trade panel' to be US$ 6 and US$ 15 respectively, and one in the latter, of average per carat value of US$ 11.60 ascertained similarly to be US$ 4 being of concern to customs authorities. Oddly, the proceedings before the original authority, culminating in adjudication order re-determining the assessable value of the three lots, of 12,288.95 carats, out of total weight of 27,455.93 carats declared to be valued at US$ 496859.46 (₹ 3,52,77,021.42), as US$ 112966.18 (₹ 80,20,598) instead of declared value of US$ 262145.28 (₹ 1,86,12,314.88) with for the whole as US$ 347680.36 (₹ 24685305.36) with attendant detriments, was without the preliminary of a show cause notice at the instance of the importer. This factum, together with statements of partners of the importing firm apparently admitting to having been 'short-changed', as far was value was concerned, by seller and their willingness to re-export the impugned goods was found, in order[1] of Commissioner of Customs (Appeals), Mumbai–III, to suffice for allowing the appeal at the instance of jurisdictional Commissioner of Customs for converting the confiscation to one without option of redemption.

2. It appears that, in addition to the principal issue of valuation – as determined according to 'standard operating procedure' prescribed at the Precious Cargo Customs Clearance Centre (PCCCC) for 'rough diamonds' at Bharat Diamond Bourse (BDB) that relied upon 'peer entities' for ascertainment – which may not have merited absolute confiscation, a tangential circumstance of mismatch of details in Kimberley Process Certificate (KPC) – intended for oversight of the trade from being tainted by 'conflict diamonds' – was attended to. The appeal of the importer before the first appellate authority appeared to have been prompted by confiscation of goods that could be re-

[1] [order-in-appeal no. MUM-CUSTM-APSC-APP-871 to 874/2021-22 dated 29th October 2021]

exported only by redemption on payment of ₹ 10,00,000 along with penalty of ₹ 20,00,000 under section 112 of Customs Act, 1962 and by reliance on the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai v. Mahalaxmi Gems [2008 (231) ELT 198 (SC)]*. Shri Manoj Kumar Jain is before us challenging the rejection of appeal by the first appellate authority.

3. According to Learned Counsel for appellant, they had not been put on notice of intent to convert 'conditional' confiscation into 'absolute' along with change of the cause for confiscation under section 111 of Customs Act, 1962. It was also contended that circular no. 39/2019 dated 31st August 2019 of Central Board of Indirect Taxes & Customs (CBIC) mandates tallying of weight for the purpose of Kimberley Process Certificate (KPC) monitoring. Likewise, it was argued that the sanctity of 'price discovery by auction' did not have a credible substituting mechanism as alternative.

4. Learned Authorised Representative urged acceptance of the substituted value arrived at by recourse to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 in view of opinion accorded by 'trade panel' and its acceptance thereto at that time by the appellant herein.

5. The first appellate authority enhanced the *gravitas* of confiscation but that is, by no stretch, in violation of principles of

natural justice nor in breach of procedure set out in section 128A of Customs Act, 1962. The stipulation therein is contingent upon absence of prior notice and operates with the presumption that appeal of jurisdictional authorities would be triggered by dropping of proceedings which leaves such enjoinment to be complied with only in the event of such intent on the part of first appellate authority in appeal of assessee; indeed, with foregoing of right to be issued with notice before adjudication by the original authority, it is moot if the first appellate was even required to entertain this particular plea. The proposal of the appellant-Commissioner for reversal of the redemption of impugned goods cannot be said to be anything but notice of potential outcome for undoing the unalloyed contents of the order appealed against.

6. There is no doubt that the Kimberley Process Certificate (KPC), submitted for the entire consignment, did refer only to one of the invoices; however it did match the total weight of the two lots. The limited remit of the said certificate is to suppress trade in ‘conflict diamonds’ and, indeed, notwithstanding its utility for that purpose, deprivation of title to such goods does not appear to be contemplated by law. We also find it ironic that goods which, most certainly, should end up ceasing existence, is, by the impugned order, regularised as property of the Central Government through an appellate process and, if the confiscation does sustain, condoned despite that imperfection.

We are unable to fathom the cause for such appropriation or even a proposal for securing that end. The Customs Act, 1962 does not prescribe destruction of confiscated goods which is an executive decision and confiscation does not, of itself, assure destruction. There is, thus, every possibility of ‘conflict diamonds’ ending up in the domestic market which is, doubtlessly, not contrary to law but that they these were transported across the border and hence carrying the taint of ‘conflict diamonds’ in which the Central Government would be forced as an accessory by committee constituted under section 129D of Customs Act, 1962 does not appear to have weighed with the reviewing authority. It would have been most appropriate for the goods to be repatriated to country of despatch and to be dealt with in the manner appropriate to the laws of that country than that national commitment to ban on international trade in ‘conflict diamonds’ be called into question by consequence of absolute confiscation.

7. In any case, the lack of match in the certificate is not a ground for absolute confiscation of the impugned goods. It would have been appropriate for checks to be carried out with the authority concerned instead of adopting such precipitate action. The absolute confiscation is, therefore, set aside.

8. The original authority had confiscated the goods under section 111(m) of Customs Act, 1962 which comes into play for

misdeclaration of particulars in the bill of entry. Valuation of imported goods, in accordance with section 14 of Customs Act, 1962 and with rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, is, doubtlessly, an approximation of its worth but is sanctified when determined in compliance of the statutory procedure; it is only upon the appropriateness of the method adopted or preceding procedure that re-determination may be challenged. The importer had foregone the opportunity to be placed on notice before substitution of the value and, hence cannot cry foul upon finding rendered. At best, only the computation becomes challengeable. There is nothing on record to indicate such challenge. The adoption of appraised value, while relevant for invoking rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for assessment is inappropriate as

> *'(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.'*

in *Explanation* below rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 does not tolerate such substitution.

9. In order that the consequence of misdeclared value is fairly, and only if due, visited on imports and importer as well as others, we set aside the impugned order for re-determination of value only to the extent permitted by rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The goods are not liable to be confiscated absolutely and even such confiscation, as is intended to be undertaken and subject to redemption on payment of fine, should limit itself to that portion of the goods that were misdeclared with the rest of the goods eligible for clearance for home consumption.

10. The appeals are allowed by way of remand on the terms *supra*.

(Order pronounced in the open court on 05/11/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*