CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 63 OF 2011

[Arising out of Order-in-Appeal No: 323 & 324(GR.III)/2010(JNCH)/IMP-302 & 303 dated 26th October 2010 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Sumilon Industries Ltd
Delhi Gate, Vairagini Wadi, Surat, Gujrat – 395 003 … ***Appellant***

versus

Commissioner of Customs (Imports)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 64 OF 2011

[Arising out of Order-in-Appeal No: 323 & 324(GR.III)/2010(JNCH)/IMP-302 & 303 dated 26th October 2010 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Sumilon Industries Ltd
Delhi Gate, Vairagini Wadi, Surat, Gujrat – 395 003 … ***Appellant***

versus

Commissioner of Customs (Imports)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

APPEARANCE:

Shri Rahul Gajera, Advocate for the appellant

Shri Deepak Sharma, 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: 86059-86060/2025

DATE OF HEARING: 02/01/2025
DATE OF DECISION: 05/06/2025

PER: C J MATHEW

M/s Sumilon Industries Ltd filed bills of entry no. 629564/12.08.2009 and no. 716686/12.10.2009 for import of 23760 kgs and 24072 kgs respectively of 'dyed embroidery thread' and the 'proper officer' of customs loaded assessable value from US$ 5.40 per kg to US$ 6 per kg. Following clearance of goods after paying the re-assessed duty, the importer filed appeal before Commissioner of Customs (Appeals), Mumbai – II who, *vide* impugned order[1], rejected challenge thereof owing to which these appeals are before us.

2. It is seen that the first appellate authority had placed reliance upon the decision of the Tribunal in *Utkal Commercial Corporation v. Commissioner of Customs (Port), Calcutta [2001 (137) ELT 439 (Tri.-Kolkata)]* and in *Refex Refrigeration Ltd v. Commissioner of Customs (Seaport-Import), Chennai [2009 (248) ELT 579 (Tri.Chennai)]*, affirming competence of assessing authority to take recourse to the higher invoice price of 'identical goods' imported - from the same supplier, of same origin and at the same time in the same port –

[1] [order-in-appeal no. 323 & 324(GR.III)/2010(JNCH)/IMP-302 & 303 dated 26th October 2010]

contemporaneously, while discarding the reliance placed by the importer on the decision of Hon'ble Supreme Court in *Eicher Tractors Ltd v. Commissioner of Customs, Mumbai [2000 (1222) ELT 321 (SC)]* which was followed in several decisions of the Tribunal.

3. It is noted in the impugned order that the value had been enhanced by relying upon two bills of entry of M/s Pragati Dyeing & Printing Mills Pvt Ltd, for import, from M/s HMEI Thread Co Ltd, China, filed in July and August 2009. According to Learned Counsel for appellant, those bills of entry had been assessed provisionally and, compounding this, the 'proper officer' had not issued the order mandated under section 17(5) of Customs Act, 1962 justifying so. It was submitted that, instead of directing the proper officer to make good the deficiency, the first appellate authority merely affirmed the findings basis *ex post facto* communication dated 18th October 2010 received from Assistant Commissioner of Customs, Group III.

4. Learned Authorized Representative submitted that lodging of protest at the time of loading is not evidenced by any document. Learned Authorized Representative also pointed out that lack of such protest had been narrated in communication noted in the impugned order. It is also submitted that the reasons for enhancement suffice within the scope of rule 12 and rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Reliance

was placed by him on the decision of the Tribunal in *Guardian Plasticote Ltd v. Commissioner of Customs (Port), Kolkata [2008-TIOL-119-CESTAT-KOL]* on the validity of protest, if any, and he placed further reliance on the decision of the Tribunal in *Refex Refrigerants Ltd v. Commissioner of Customs (Seaport- Import), Chennai [2009 (248) ELT 579 (Tri.-Chennai)],* and in *Sharma Trading Company v. Commissioner of Customs, Delhi [2017 (346) ELT 507 (Tri.-Del.)],* on the validity of enhancement on the basis of prices of identical imports. Reliance was placed on the decision of the Hon'ble Supreme Court in *Connectronics & Cables P Ltd v. Commissioner of Customs (Adjudication), Mumbai [2015 (324) ELT 699 (SC)]*.

5. It is seen from the records that the ‘proper officer’, under section 17 of Customs Act, 1962, re-assessed the goods to higher duty than that assessed in the bill of entry filed under section 46 of Customs Act, 1962. The appeal, filed thereupon, made note of the lack of any justification and proposed, with the support of case law, that the enhancement was invalid. The first appellate authority affirmed the enhancement in assessment proceedings despite absence of ‘speaking order’ stipulated in section 17(5) of Customs Act, 1962 and solely by acceptance of justification offered by the Assistant Commissioner in impugned communication.

6. On perusal of the case law, relied upon by the Learned

Authorized Representative, in support of enhancement effected by 'proper officer', it is seen that the decision, in *re Guardian Plasticote Ltd*, pertains to imports effected when the erstwhile Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 was in vogue. The decision in *re Refex Refrigerants Ltd* was an interim order on application for waiver of pre-deposit and hence does not offer itself as a binding precedent. It is also seen that the decision in *re Sharma Trading Company* pertains to June 2003 and precedes operation of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In *re Connectronics & Cables P Ltd*, the Hon'ble Supreme Court had, and in confirmation of the remand ordered by the Tribunal, remitted the matter back to the Commissioner of Customs for ascertainment of factual submission that the goods were not identical. On the other hand, we take note that the first submission of both, respondent in appeal before the first appellate authority as well as Learned Authorized Representative before us, is the absence of protest implying acceptance thereof of the loading herein and foreclosure, thereby, of any further challenge. The law, in

> *'17. Assessment of duty.*
>
> *xxxxx*
>
> *(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in*

> *writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.'*

of Customs Act, 1962, leaves no room for doubt that 'proper officer' is obliged, except in circumstances of importer confirming acceptance in writing, to issue an order explaining the reasons for any enhancement. Discharge of duty liability is not acceptance in writing and may be attributable to the control that customs authorities have over the importer between entry for clearance and clearance for home consumption. The legislated intent cannot be diluted on the submission that acquiescence by action is a substitute for confirmation in writing. The 'proper officer' was obliged to offer justification for the enhancement.

7. The justification alluded to in the impugned order is not relevant inasmuch as it had been issued more than a year after assessment of the bill of entry. Not only is the 'proper officer' who undertakes the enhancement of duty liability an adjudicator, and, thereby, as *functus officio*, precluded from being called upon to justify assessment but also, in the instant case, the elapse of time even raises a question of it being exercise of responsibility mandated by section 17(5) of Customs Act, 1962. The justification offered before the first appellate authority is not relevant in law and, consequently, has to be discarded. The appeal, thus decided on facts and on material not validly available before the first

appellate authority and sufficient to discard it for not being legal and proper. In view of the above, we set aside the impugned order and remand the matter back to the original authority for compliance with section 17(5) of Customs Act, 1962.

8. Accordingly, the impugned order is set aside to allow the appeals by way of remand.

(Order pronounced in the open court on 05/06/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*