CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85412 of 2020

(Arising out of Order-in-Original No. 65/SA(65) ADG (ADJ.)/DRI, MUMBAI/2019-20 dated 27.11.2019 passed by the Additional Director General (Adjudication), D.R.I., Mumbai)

Bagadiya Brothers Pvt. Ltd. **.... Appellant**
Bagadiya Mansion, Ground Floor,
Jawahar Nagar, Raipur, Chhattisgarh- 492 001.

Versus

The Additional Director General (Adjudication), ...Respondent
Directorate of Revenue Intelligence,
New Custom House, Ballard Estate,
Mumbai- 400 001.

Appearance:

Shri R.K. Tomar, Advocate for the Appellant
Shri Krishna Murari Azad, 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/86051/2025

Date of Hearing: 08.01.2025
Date of Decision: 04.07.2025

Per: S.K. MOHANTY

Brief facts of the case, leading to this appeal, are summarized herein below:

2.1 The appellants are engaged *inter alia*, in the business of exporting iron ore. During the disputed period from April 2010 to December 2011, the appellants had exported 155 shipments of iron ore vide 281 Shipping Bills (S/Bs) to various overseas buyers. Out of these total shipments, the appellants had exported 31 shipments vide 52 S/Bs on Cost & Freight (CFR) basis, wherein M/s Bagadiya Brothers

(Singapore) PTE. LTD. (BBSPL) and the other shipping lines had arranged the vessels for transportation of the iron ore cargo from India to the destination ports in China. M/s BBSPL is the wholly owned subsidiary of the appellants and therefore, are related in terms of Rule 2(2) (i) and (iv) of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007. Out of the 31 shipments of iron ore exported under 52 S/Bs by the appellants, their overseas related company M/s BBSPL had arranged for vessels in respect of 25 shipments vide 45 S/Bs and for the remaining shipments, the vessels were arranged by other shipping lines.

2.2 In view of the fact that the appellants and M/s BBSPL are related, having some of the common directors, the department had alleged that the freight invoices had reflected the inflated value, and that upon deduction of such freight element from the CFR price of iron ore cargo, it had resulted in reduced Free On Board (FOB) value and accordingly, they had short paid proportionate export customs duty. On the basis of such understanding, the department had issued the Show Cause Notice (SCN) dated 19.10.2016, seeking for recovery of customs duty amount to Rs.79,46,753/- along with interest for the exports taken place beyond the extended period of limitation of five years, on the ground that the appellants had voluntarily deposited such amount. Further, an amount of Rs.38,86,568/- along with interest was also proposed for recovery in the SCN within the extended period of limitation of five years.

2.3 The matter arising out of the SCN dated 19.10.2016 was adjudicated by the learned Additional Director General (Adjudication), DRI, Mumbai, vide the impugned order dated 27.11.2019. In the said order, the learned adjudicating authority has dropped the SCN, insofar as it had proposed for demand/recovery of an amount Rs.79,46,753/- for the period beyond five years from the relevant date. However, the impugned order has confirmed the proposed customs duty demand of Rs.38,86,568/- along with interest, confiscated the export goods, and imposed penalties and redemption fine on the appellants.

2.4 Feeling aggrieved with the impugned order dated 27.11.2019, the appellants have preferred this appeal before the Tribunal.

3. Learned Advocate appearing for the appellants submitted that the appellants had obtained competitive freight rates from the open market. Further, he also submitted that the shipping company M/s BBSPL had hired vessels on 'time charter' basis and chartered the same vessels to the appellants on 'voyage charter' basis. Thus, he submitted that the two types of charters are not comparable inasmuch as time charter is for longer duration; whereas, the voyage charter is meant for single trip between two ports. Learned Advocate also submitted that the shipping company M/s BBSPL had not earned profit alone, out of the chartering business, but had also incurred losses, the evidence of which was submitted at the time of adjudication proceedings. He has also referred to the report submitted by the statutory auditors, clarifying the position that the appellants and their shipping company M/s BBSPL had maintained arm's length distance in the transactions. Learned Advocate further submitted that since there is no intention to evade payment of customs duty by the appellants, the extended period of limitation cannot be invoked for recovery of the alleged adjudged demands. With regard to the voluntary payments made by the appellants, as claimed by the department in the adjudication proceedings, learned Advocate submitted that an amount of Rs. Rs.2,32,05,428/- was deposited by the appellants during the course of provisional assessment of the S/Bs and since the relevant S/Bs were finalized subsequently, such payment made during the course of investigation should be construed as 'provisional payment' and as such, the appellants should be entitled for refund, if the case is ultimately decided in their favour. He further submitted that the department's stand that such amount was paid voluntarily and not under protest, would not be sustainable, in view of the fact that the impugned order confirming the adjudged demands and acknowledging payment of such amount by the appellants, were not accepted and accordingly the said impugned order was assailed against, by way of filing the present appeal before the Tribunal. Hence, learned Advocate submitted that the payments made during the course of the investigation should be considered as 'payment under protest'. Learned Advocate had stated that the S/Bs in question were finalized and in absence of challenging such final assessment under Section 128 of the Customs Act, 1962, proceedings cannot be initiated under

Section 28 ibid for recovery of the demands confirmed in the impugned order.

4. Learned AR appearing for the revenue reiterated the findings recorded in the impugned order.

5. Heard both sides and examined the case records.

6.1 We find that the learned adjudicating authority in support of confirmation of the adjudged demands, has solely based his findings on the facts that both the appellant's company and M/s BBSPL are related and that freight invoices were issued showing inflated value, which was reduced from the CFR price, in order to reduce the FOB value of the exported iron ore cargo. On the basis of such understanding, learned adjudicating authority has held that the appellants had short paid proportionate export customs duty. It is an undisputed fact that the appellants had approached various shipping lines, inviting quotation for arrangement of vessels at the lowest price for shipment of the export cargo. Based on the lowest price quoted by the shipping lines, the appellants use to finalise the contracts for shipment of the goods. This fact is evident from the statement recorded by the customs department from Shri Sunil Kumar Patni, Chief Executive Officer of the appellants company, which has been referred to at paragraph 5.2.5 in the impugned order 27.11.2019. The statement is quoted below:

> *"as and when their cargo for full shipment of iron ore was ready or about to be ready at the plot, they used to get quotes from various chartering companies including BBSPL for ocean freight fixture notes. Once they got the quotes from various chartering agencies, they finalized the lowest (best) quote. The same lowest price was communicated to M/s. BBSPL to match, if in case their price was higher than the lowest quote. If M/s. BBSPL offered/matched the lowest quote, they requested them to send a signed fixture note or else they would go with the chartering agency, which has quoted the lowest price."*

6.2 From the above statement, it reveals that the lowest rate of freight was discovered by the appellants from the open market through the tender process and thereafter, M/s BBSPL was asked to supply the vessel at such lowest prices and in the possible occurrence, where the said shipping line fails to match the lowest rate, then the appellants were at liberty to engage the other shipper, who quoted the lowest rate for carrying the transportation activity.

6.3 However, we find that the modus operandi adopted by the appellants about engagement of shipping lines, as explained in the above statement, was not at all addressed to by the learned adjudicating authority. Rather, he has proceeded to decide the case entirely based on the cost sheets for the relevant period, submitted by Shri Mahesh Aggarwal, Executive Director of the shipping line M/s BBSPL to the investigation wing of the department. We find that neither the SCN, nor the impugned order has discussed the aspects with regard to the circumstances, under which such cost sheets were prepared by them and whether the same captured the correct freight element or the inflated cost, as alleged by the department. Since, the statements recorded by the department under summons from various persons have not specifically brought out any evidence of inflated freight charges, in order to reduce the CFR price, in our considered opinion, the charges of undervaluation, with intent to evade payment of customs duty cannot be sustained.

6.4 Valuation of export goods for the purpose of levy of customs duty is contained in Section 14 ibid. It has been mandated that the price actually paid or payable for the goods, when sold for export from India for delivery at the time and place of exportation, shall be the transaction value. It has further been mandated that the buyer and seller should not be related to each other, and the price agreed upon between them and charged in respect of exportation of the goods, should be the sole consideration. The concept of 'related persons' has been defined in sub-rule (2) of Rule 2 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2017. On plain reading of both the above statutory provisions, it transpires that the concept of 'transaction value' or 'related person' has been defined in context with the 'buyer' and the 'seller' of the imported or exported goods. In the case in hand, the department had not raised any objection that the price actually paid by the overseas buyer for the benefit of the appellant as the supplier was not the actual value for consideration as 'transaction value' for the purpose of Section 14 ibid.

Since, the department had not alleged that over and above the agreed upon price, any amount has been paid by the overseas buyer on the goods exported by the appellants, the undervaluation concept cannot be brought into effect, in order to fasten the duty liability on the appellants. It is an undisputed fact that M/s BBSPL is not the 'buyer' of the iron ore exported by the appellants. Thus, the concept of 'related person' as per sub-rule (2) Rule 2 ibid, shall not be considered as relevant. The customs statute has not prescribed any stipulation that a related person cannot arrange for the vessel for the exportation of the goods. No doubt, the department is free to level the allegation of charge of inflated freight for the purposes of correct determination of FOB value, but under such circumstances, it is incumbent upon the department to prove such charges with the documentary evidences, which admittedly are absent in the present case.

6.5 The learned adjudicating authority has discarded the report submitted by M/s Price Waterhouse & Co. (PWC) on the ground that the said report no where mentions about communication from the appellants regarding the lowest price quoted by M/s BBSPL for obtaining the contract of arranging the vessels for transportation of export goods. However, on perusal of the case records, more specifically the Form No.3CEB, we find that the said form containing the report from an accountant is a mandatory requirement under Section 92E of the Income Tax Act, 1961 for reporting about the international transactions. In the Appendix-B attached to such form, it has been reported that payment of vessel/freight was considered reasonable to use the book values of international transactions as representative of arm's length price of all such transactions. With regard to the vessel freight (chartering) and vessel freight (trading), it has also been reported that the transactions are at arm's length. We find that such report was submitted by M/s PWC, based on the books of accounts duly audited by the statutory auditors. Thus, the allegation levelled in the impugned order that M/s PWC had not examined the cost-sheets prepared by M/s BBSPL and had only examined the records/documents, which were submitted by the appellants, cannot be appreciated inasmuch as, furnishing of report under the Income Tax statute on the basis of audited books of accounts is a statutory requirement and not an empty formality. Further, the payment made as per the cost sheets submitted by M/s BBSPL, is also forming a part of books of accounts and the report prepared by M/s PWC. Since, the said accounting firm has reported that the transactions are at arm's length, the said report, in our considered view, cannot be discarded without any independent evidence to the contrary.

6.6 The concept of 'time-charter' is commonly understood in the maritime trade to mean chartering of the vessel for a specified period, rather than a specific journey. On the contrary, in a 'voyage charter', the charterer is required to carry specified cargo on an agreed voyage in exchange for freight. As a charterer, M/s BBSPL had entered into agreement on time charter basis with the vessel owners and thereafter, engaged the vessel for specific journey between the originating and destination ports for the appellants. Though, the department had only examined the cost-sheets submitted by the representative of M/s BBSPL, but had not properly examined the period for which the said charterer had entered into a agreement with the vessel owners and for such long term chartering, how much freight amount was paid to them in totality during the entire period of contract to come to the conclusion that there was an element of inflated freight being charged by the charterer to the appellants. Further, from the submissions made together with the documentary evidences submitted by the appellants, we find that the charterer M/s BBSPL in respect of the disputed S/Bs had not always earned profit, rather had incurred losses in certain occasions. The said charterer though is related to the appellants, but when they incur loss in arrangement of the vessels, it cannot be said that the relationship have influenced the actual price received by the appellants from the overseas buyer, in order to evade the customs duty on export, by way of inflating the freight charges paid by the appellant to M/s BBSPL for carrying out the transportation of goods to the destination ports.

6.7 The appellants, in this case had paid an amount of Rs.2,32,05,428/- during the course of inquiry/investigation, which was considered by the department as voluntary payment. It is not in dispute that the S/Bs covering export of iron ore were provisionally assessed and was subsequently finalized by the department. Since the said amount was paid before finalization of the provisional assessment, such payments made should always be considered as 'provisional' for all practical purposes and the liability to ultimate duty is dependent on finalization of the provisionally assessed S/Bs. In other words, when the finally assessed duty is more than the provisionally assessed duty, the short fall, if any, should be adjusted from the amount deposited during the course of investigation. Thus, it cannot be said that the appellants had made voluntary payment, without any protest. Further, the appellants had not accepted the adjudged demands confirmed in the impugned order, owing to the reason that they have assailed the impugned order, by way of filing this appeal before the Tribunal. The order appealed against can be considered as payment under protest inasmuch as, the amount paid in question during the course of investigation was also a subject matter dealt with both in the SCN as well as in the impugned order.

7. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellants. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellants, with consequential relief, as per law.

(Order pronounced in open court on 04.07.2025)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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