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

Appeal No. C/272/2010

Arising out of: Order-in-Appeal No. 26/2010 MCH/ AC/VIIC, Dated: 20.01.2010
Passed by: Commissioner of Customs (Appeals), Mumbai.

Date of Hearing: 25.10.2018
Date of Decision: 18.01.2019

COMMISSIONER CUSTOMS (EP)
MUMBAI

Vs

VIRAJ IMPEX PVT LTD

Appellant Rep by: Shri R Kumar, Assistant Commissioner AC
Respondent Rep by: Shri J C Patel, Adv.

CORAM: Ajay Sharma, Member (J)
Sanjiv Srivastava, Member (T)

Cus - Adjudicating authority relied upon the value of imported HR Steel Plates but since HR Coils and HR Steel Plates are not similar, therefore, there was no reason to doubt the truth or accuracy of the value declared by respondent - in the present case, no valid reasons have been recorded by the adjudicating authority for rejecting the declared price/transaction value of HR Coils except the contemporaneous import price of HR Steel Plates, which is not valid - no fault in the impugned order, therefore, Revenue appeal is dismissed: CESTAT [para 11]

Appeal dismissed

Case laws cited:

Rajkumar Knitting Mills Pvt. Ltd. vs. Collector of Customs, Bombay; 1998(98) ELT 292 (SC)...Para 3

Ispat Industries Ltd. vs. Commissioner of Customs - 2006-TIOL-127-SC-CUS...Para 3

rya Ship Breaking Corporation vs. Commissioner of Customs (Import) Mumbai, this Tribunal vide order No. 87206/2018 dated 16.7.2018...Para 9

Highland Liquors Pvt. Ltd. vs. CCE - 2017-TIOL-3961-CESTAT-DEL...Para 10

FINAL ORDER NO. A/85134/2019

Per: Ajay Sharma:

This Appeal has been filed by Revenue from the impugned order dated 20.1.2010 passed by the Commissioner of Customs (Appeals), Mumbai-I by which the ld. commissioner allowed the Appeal filed by the respondent herein, set aside the order passed by the Adjudicating Authority and directed that the declared price be accepted as transaction value in each case and the bills of entry be reassessed to duty accordingly.

2. In this matter the revenue wants to enhance the declared value of Hot Rolled Coils (HR Coils) on the bases of alleged contemporaneous imports Hot Rolled Plates (HR Plates). The facts of the case in brief are that the respondent herein entered into contract with M/s. Severstal Export Gmbh, Ukraine in the month of May, 2009 for import of consignment of Hot Rolled Coils (HR Coils) and bill of entry was filed on 25.8.2009 for clearing consignment of HR coils at declared price of US $ 445 per MT. The adjudicating authority doubted the import value declared by the respondent and granted personal hearing to the respondent. The goods were cleared on the basis of provisional assessments. The Appellant appeared before the adjudicating authority and made their submissions. According to the adjudicating authority since the value of similar goods is available therefore he proceeded to re-determine the value of M.S. Coils in terms of Rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[hereinafter referred to as the Customs Valuation Rules, 2007]. On the basis of date of contemporaneous import of HR Steel Plates [which according to the Adjudicating authority is similar goods], the Adjudicating Authority vide Order-in-Assessment dated 3.11.2009 rejected the declared value and direct the assessment at the unit price of USD 460 PMT. On Appeal filed by the respondent herein, the ld. Commissioner vide impugned order dated 20.1.2010 allowed the Appeal.

3. We have heard ld. Authorised Representative for the Revenue and ld. counsel for the respondent and perused the records of the case. Ld. Authorised representative on behalf of the Revenue submitted that the ld. Commissioner erred in accepting the price on the date of Contract & Letter of Credit as a transaction value instead of contemporaneous import price prevailing at the time and place of import. According to him as per section 14 of Customs Act, 1962 value of imported goods shall be transaction value of such goods when sold for export in India for delivery at the time and place of importation and therefore time and place of import is relevant date for valuation of imported goods and not the time and date of contract or agreement or Letter of Credit opening date. In support of his submission he cited the decision of Hon'ble Supreme Court in the matter of *Rajkumar Knitting Mills Pvt. Ltd. vs. Collector of Customs, Bombay; 1998(98) ELT 292 (SC)* in which the Hon'ble Supreme Court has laid down that the words 'ordinarily sold or offered for sale' do not refer to contract between the supplier and the importer, but to the prevailing price in the market on the date of importation or the date of exportation. He also relied upon the decision of Hon'ble Supreme Court in the matter of *Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai; 2006 (202) ELT 561 (SC)* = *2006-*

TIOL-127-SC-CUS **in which the Hon'ble Supreme Court has laid down that actual price mentioned in the contract between supplier and the importer not to be seen, but the prevailing prices in the market to be seen. Ld. counsel for the Appellant reiterated the findings recorded in the impugned order and prayed for dismissal of these Appeals.**

4. In order to appreciate the issue involved in this Appeal, it is necessary to go through Section 14 of the Customs Act, 1962 relating to valuation of goods, which is extracted as under:-

"Section 14. Valuation of goods. - For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf :

Provided further that the rules made in this behalf may provide for,-

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :
Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. - For the purposes of this section -

(a) "rate of exchange" means the rate of exchange

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;
(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).
Valuation is covered by Section 14 of the Customs Act. The value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Section 14 stipulates that the value of imported goods shall be transaction value of the goods i.e. the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Clause (iii) of first proviso to Section 14 stipulates that the rules made in this behalf may provide for acceptance or rejection of value declared by the importer or exporter as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value and determination of value for the purpose of this section.
5. Rule 12 of the Customs Valuation Rules, 2007 deals with rejection of transaction value which is extracted as under:-

12. 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 transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(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).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(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.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include –

(a) The significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

The valuation of imported goods is required to be done in terms of Section 14 ibid read with the Customs Valuation Rules, 2007. The transaction value of imported goods can be rejected only as per the provisions of Rule 12 ibid. Now we have to see whether in the facts of the present case, the value can be rejected under Rule 12 ibid. As per Clause (iii) of explanation under Rule 12, if contemporary import of identical or similar goods is noticed at the higher price, invoice value can be rejected and same can be determined under Rule 5 to 9 of the Rules. The said rule 12 ibid provide for proper officer seeking clarification from the importer to provide further information to satisfy the correctness of the declared assessable value. In the present case, the respondents did submit the invoice, irrecoverable LC and supporting contract documents with reference to the impugned consignments. Nothing more is required with the importer to further substantiate the value. Merely because the assessee failed to submit any payment certificate or Bill of Exchange, the Assessing officer rejected the value declared by the respondent/assessee. The Assessing officer has to give valid reasons in order to reject the declared value and thereafter to proceed with the re-assessment, after due enhancement. Explanation (1)(i)(iii)(a) in Rule 12 appears to have applied by the adjudicating authority in the present case. As per case records, the assessing officer having noticed higher value of contemporaneous import of HR Steel Plates, raised the doubt regarding the correctness of declared value. The legal provisions mentioned in the Explanation clearly stipulates that the contemporaneous value should be significantly higher for identical or similar goods at or about the same time,

in a comparable commercial transaction. We find in the present case due examination about this crucial aspect has not been done by the assessing officer and comparison based on the contemporaneous import is not proper.

6. We have to see whether the HR Steel Plates, with which the adjudicating authority has compared the HR Coils, are really similar goods in terms of definition of similar goods. "Similar goods" are defined in clause (f) of Rule 2 which is as under:-

"2(f) "similar goods" means imported goods –

(i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods."

7. We are in complete agreement with the finding of the ld. Commissioner that there is nothing in the order of the Adjudicating Authority whether the HR Steel Plates and HR Coils perform the same function and whether they are commercially interchangeable. The relevant extract of the impugned order passed by the ld. Commissioner is as under:-

" xxx xxx xxx

There is no finding in the impugned order whether the HR Steel Plates and HR Coils perform the same function and whether they are commercially interchangeable. In fact the opposite is true: Both are employed for different purposes and they are not commercially interchangeable. For instance, auto industry extensively uses HR coils (and not HR Steel Plates) and it would not be commercially expedient to substitute plates for the job. Nearly 60% of HR Coils are subjected to cold rolling to form into CR Coils, which are subsequently processed and cut to required sizes and shapes before putting to use. Plates are normally already made to size and have minimum width of 2500 mm. (In fact, in the list of similar imports in paragraph # 8.3 of the impugned or5der, all plates have width of minimum 2500mm.) Minimum width of 2500 mm essentially requires rollers of that size, resulting in more capital cost. The HR Coils range in width from 1000 mm. Further, the plates have specific length also. So,

each plate has to be manufactured like a batch process (unlike manufacturing HR Coils in a continuous process), which further adds to the cost. So, especially when the manufacturing cost will be different and the price may not be comparable, even of the material is the same.

4.2 Apart from not recording a finding whether the HR Steel Plates and HR Coils perform the same function and whether they are commercially interchangeable, there is also no other finding or justification recorded by the adjudicating authority at all for treating the two similar.

4.3 Thus it is seen that HR Plates and the HR Coils could not have been treated similarly and hence no sufficient reason really existed to doubt the declared value.

4.3 Even if it is presumed that the HR Plates are similar to HR Coils, one has to follow guidelines given in the statutory Interpretative Notes to the Valuation Rule 5. The AC did not follow the statutory guidelines inasmuch as he did not consider such factors as differences in commercial levels, quantities imported, nature of relationship (of course, purely commercial) of the appellant-importer with the supplier, etc. For instance this appellant has submitted during hearing that he has been importing from the same supplier since many years and submitted numbers of bills of entry in support of his contention. If it is also, he stands benefited by the judgment of the Supreme Court in the case of Basant Industries v. Addl. CC, Mumbai [1996 (81) E.L.T. 195 (S.C.)] = 2002-TIOL-275-SC-CUS , wherein the Court said (vide paragraph #4 of the judgment),

"It is essential to bear in mind the fact that in the business world, considerations of relationship with the customer are also a relevant factor."
The appellant-importer had contracted with the foreign supplier for supply of the goods during March and May 2009, when the contracted prices were in tune with the LME prices. The impugned orders acknowledged the two contracts in the very first paragraph.

5.1 As regards the difference of US $ 15 pMT in the HR Coils contracted for import from two different suppliers within about a month, the appellant attributed the difference to such factors as follows:

(i) The average weight per coil of imports from M/s Duferco SA (made in Ukraine) is about 7-8 MT (to be cleared under b/e # 904752). So the percentage of wastage (due to discarding beginning and end portions) in such small coil is considerably more than in larger coils such as those imported from SeverSta (and to be cleared under the b/e # 908521). Therefore, the small coils sell cheaper than larger coils.

(ii) The quality of coils imported from Sever Stal is better (being a much larger mill) than those imported from Duferco.

(iii) The appellant had contracted for import of 5000 MT from Duferco and for 3650 MT from SeverStal. So they got a better deal from Duferco (@ 385 pMT).
In my opinion, not only the difference of US $ 15pMT but also the genuineness of prices themselves are satisfactorily explained by the appellant.

5.2 Thus the AC could not have, even after entertaining the doubt under Rule 12, derived the value of the imported goods on the basis of value of HR Steel Plates without considering all these aspects."
8. HR Coil and HR Steel Plates cannot be said to be similar or identical goods. If the revenue is rejecting the value declared by the respondent, then they are bound to prove beyond reasonable doubt that the goods compared with are similar goods or identical goods. In our view HR Coils and HR Plates cannot be termed as one and the same for the purpose of contemporaneous value. Both the goods are different in nature and therefore the values relied upon by the Department for enhancement of declared value is not legally sustainable. It is not the case of revenue that it is either a Hawala transaction or remittance of additional consideration by the respondent to the exporter, over and above the declared transaction value. The value declared by the respondent was to be remitted through the banking channel.

9. In an identical matter involving similar facts, in *Appeal No. C/406/11 titled as Arya Ship Breaking Corporation vs. Commissioner of Customs (Import) Mumbai, this Tribunal vide order No. 87206/2018 dated 16.7.2018* allowed the Appeal filed by the assessee/importer. The relevant extract of the said order is as under:-

"3. The learned Counsel for the Appellant submits that both the lower authorities failed to appreciate the fact that the Appellant had imported the goods against a contract backed by letter of credit. He further submitted that in arriving at the enhancement of declared value, the original adjudicating authority erred in treating HR Coils and HR Plates as one and the same for the purpose of contemporaneous values. He submitted that both the said goods are different in nature and therefore the values relied upon by the Department for enhancement of the declared values is erroneous and not legally sustainable. It is his further submission that the department also failed to produce any evidence, with regard to additional consideration remitted by the appellant, over and above the declared transaction value. In support of these contentions he relied upon various decisions on the issues which are part of the appeal memorandum.

4. The learned for the Revenue supported the impugned order.

5. Having considered the facts of the case, the rival submissions and case laws placed on record we find that the imported goods namely HR Coils cannot be compared with HR Plates as has been done by both the lower

authorities for enhancement of the declared transaction values. The learned Counsel for the appellant has also pointed out that at para 8.3 of the order-in-original, where a table of contemporaneous import with description of goods etc. shows that in respect of HR Coils the lowest value declared was USD 385 PMT and the values declared by the appellant are higher than the said values. We agree with the said submission. We also note that Revenue has failed to establish the payment of any additional consideration over and above the declared transaction value. Having gone through the decisions relied upon by the appellant, we are of the opinion that the said decision(s) squarely covers the issue before us and the rejection of transaction value and enhancement of the same by the lower authority is not legally sustainable. Therefore, the values declared by the Appellant have to be accepted.

6. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, if any."

During the course of hearing the ld. counsel for the respondent has produced the copy of the Order-in-Assessment dated 3.11.2009 in Arya Ship Breaking Matter (supra) and we find that the Adjudicating authority in that matter and in the present case are the same and on the very same date both the Orders-in-Assessment were passed. The evidence relied upon by the Adjudicating Authority in both the matters is also identical and the date of import and the price declared are almost close in both the matters. In that matter also the Adjudicating authority while relying upon the contemporaneous import of HR Plates re-determined the unit price of HR Coils @ USD 460 per MT.

10. In another similar matter involving Section 14 of the Customs Act and Customs Valuation Rules, this Tribunal in the matter of *Highland Liquors Pvt. Ltd. vs. CCE, New Delhi; 2018 (360) ELT 539 (Tri-Del.)* = *2017-TIOL-3961-CESTAT-DE* allowed the Appeal filed by the assessee and while accepting the transaction value as declared by the assessee, held as under:-

"13. As per the scheme of valuation under the Customs Act, 1962, as per Section 14, the transaction value is required to be accepted for assessment purposes except in circumstances, outlined in Rule 3 (earlier Rule 4) of the Customs Valuation Rules. Unless the price actually paid for the transaction falls within the exceptions, Customs authorities are bound to assess the duty on the transactional value. This position of law is well settled by the Hon'ble Supreme Court in the case of Eicher Tractors v. CC, Mumbai - 2000 (122) E.L.T. 321 (S.C.) = 2002-TIOL-06-SC-CUS in which the Hon'ble Apex Court observed as follows :

"Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2) namely :-

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which-

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;
(b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3)."
14. In the present case, we find that the adjudicating authority has not recorded any specific reason for disregarding the transaction value, other than the suspicion that values are misdeclared as seen by comparison with various other bills of entry, as is cited in the show cause notice. Hence, we conclude that rejection of the transaction value was not strictly in terms of the provisions of Customs Act read with the Customs Valuation Rules as held by the Hon'ble Apex Court."
11. From the case records we find that the revenue has failed to establish its claim on the basis of contemporaneous import. The major factor which prompted the learned Commissioner to set aside the order-in-assessment passed by the Adjudication Authority was that in arriving at figure of US $ 460 PMT the Adjudicating Authority relied upon the value of import of HR Steel Plates and since HR Coils & HR Steel Plates are not similar, therefore there was no reason to doubt the truth or accuracy of the value declared by the respondent. According to us the Adjudicating Authority has erred in rejecting the declared price/transaction value of the goods imported by the respondent by taking recourse to Rule 12 of Customs Valuation Rules, 2007. Section 14 of Customs Act, 1962 as well as Custom Valuation Rules, 2007 do not sanction such a method, as adopted by the Adjudicating Authority, for redetermination of assessable value. The declared price/transaction value is required to be accepted unless there are valid reasons for rejection of such value as provided in Customs Valuation Rules. In the present case no valid reasons have been recorded by the Adjudicating Authority for rejecting the declared price/transaction value of HR Coils except the contemporaneous import price of HR Steel Plates, which is not valid. Therefore, we find no fault with the impugned order and the Appeal filed by Revenue is accordingly dismissed.

(Pronounced in Court on 18.01.2019)