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

**Appeal Nos.C/86398 & 86399/2018**

**PRABHAT STEEL TRADERS PVT LTD**
**KAVI COMMERCIAL LTD**

**Vs**

**COMMISSIONER OF CUSTOMS (IMPORT-I) MUMBAI**

**Date of Decision: 25.1.2019**

**Appellant Rep by: Shri T Viswanathan, Adv.**
**Respondent Rep by: Ms PV Sekhar, Joint Commissioner (AR) & Shri Manoj Kumar, Assistant Commissioner (AR)**

**CORAM: C J Mathew, Member (T)**
**Ajay Sharma, Member (J)**

**Cus - Appellants imported 'Trapezoidal roof profiles' claiming classification as 'parts of structures' under heading 7308 9090 of CTA - Revenue held that the goods are appropriately classifiable under heading 7210 4100 of CTA, 1975 and apart from demanding differential duty also held that the goods attract anti-dumping duty imposed by notification 02/2017-Cus(ADD); valuation also disputed - demand confirmed, therefore, appeal before CESTAT.**

**Held:**

**Valuation - Section 14 of the Customs Act, 1962 - 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 appears to be an opportunistic recourse without respect for law conferring the authority to assess duties of customs - Notification 38/2015-20 dated 05.02.2016 issued u/s 3 of the FTDR Act, 1992 r/w the FTP 2015-2020 by the DGFT prescribes the 'minimum import price' but the same is intended to ensure that only goods conforming to acceptable threshold of quality is brought into the county - by no stretch can such threshold prescription be presumed to be the 'tariff value' in section 14(2) of the Customs Act, 1962 nor can it don the mantle of 'best judgment' mentioned in the Customs Valuation Rules, 2007 - governing Rules make no reference to empowerment of any authority outside those in the Customs Act, 1962 for its implementation - Bench, therefore, has no hesitation in holding that the recourse to 'Minimum Import price' as the substitute for transaction value is patently bereft of legality and propriety: CESTAT [para 5, 6]**

**Classification - Of the two headings proposed in the SCN and the corrigendum, adjudicating authority has found heading 7210to be of better appeal - appellant had also offered an alternative heading 7216 9100 i.e.**

**'angles, shapes and sections cold-formed or cold-finished from flat rolled products' -headings are structured in such a way that these are parallel descriptions of the two modes of 'rolling' with physical properties alone varying - Bench concludes 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 - There is no evidence to support the claim that the goods are utilized exclusively in erection of structures but absence of material to conclude so mandates the ascertainment of fitment within the alternative classification that is sought - non-applicability of classification as claimed in the bills of entry cannot be held to be deliberate and, therefore, there is insufficient justification for confiscation and the imposition of penalties proposed in the SCN - demands set aside along with order for confiscation and penalties - classification confirmed under heading 7216 9100: CESTAT [7, 12, 13, 14, 15]**

**Appeals allowed**

***Bharat Forge & Press Industries (P) Ltd v. Collector of Central Excise [1990 (45) ELT 525 (SC)]...Para 10***

***Commissioner of Central Excise, Bhubaneswar-I v. Champdany Industries Ltd - 2009-TIOL-104-SC-CX...Para 10***

***Densons Pultretaknik v. Commissioner of Central Excise - 2003-TIOL-46-SC-CX...Para 10***

***Plasmac Machine Mfg Co Pvt Ltd v. Collector of Central Excise -2002-TIOL-455-SC-CX ...Para 10***

**FINAL ORDER NOS.A/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 Rs. 44,81,016 and Rs. 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 Rs. 44,57,307 and Rs. 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 steals in coils or not in coils whether or not with metallic substrate of zinc, aluminium-sync 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)]* = *2009-TIOL-104-SC-CX*, *Densons Pultretaknik v. Commissioner of Central Excise [2003 (155) ELT 211 (SC)]* = *2003-TIOL-46-SC-CX* and *Plasmac Machine Mfg Co Pvt Ltd v. Collector of Central Excise [1991 (51) ELT 161 (SC)]* = *2002-TIOL-455-SC-CX* 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 predetermined 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)**