

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Custom Appeal No. 51338 of 2018-DB

Arising out of Order-in-Appeal No. CC(A)/CUS/D-
II/ICD/TKD/Export/1496/2017, Dated: 20.12.2017
Passed by the Commissioner of Customs, New Delhi

**Date of Hearing: 05.03.2019
Date of Decision: 17.06.2019**

**M/s ALERT ENTERPRISES
WZ-83/2, MOHAN NAGAR, NEAR PANKHA ROAD
NEW DELHI-110046**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, NEW CUSTOMS HOUSE
NEAR IGI AIRPORT, NEW DELHI- 110037**

Appellant Rep by: Shri Krishna Pratap, & Shri Priyajeet Chatterjee, Adv.
Respondent Rep by: Shri Rakesh Kumar, DR

CORAM: Anil Choudhary, Member (J)
Bijay Kumar, Member (T)

Cus - Appellant had filed BE for clearance of Hair Dryer, Hair Straightener, Hair Treatment Clipper, Shavers, Knitted Lady Tops, Tungsten Carbide Tips, (in Kgs.), Tungsten Carbide rods, Power (Balancing) wheel, (Small Balancing Wheels) and Drill Bits etc. at assessable value of Rs. 31,84,945/- - DRI, upon examination of these goods found that Power Wheel (Small (Balancing) Wheel) was misdeclared as skates whereas the items viz. Tungsten Carbide Tips, Tungsten Carbide rods and Drill Bits were not declared in the said Bill of Entry - Adjudicating authority rejected the declared value and re-assessed the same as Rs. 49,55,515/- with differential Customs duty of Rs. 6,76,200/- - confiscation was also ordered with an option to redeem the same upon payment of RF of Rs.16.50 lakhs and a penalty of Rs.6,76,200/- was also imposed - Commissioner (A) upheld the order - incidentally, as the consignment was a live one and the appellant was incurring heavy demurrage and detention charges and to meet their business obligation, they waived the written SCN and agreed to pay the duty along with RF and penalty pursuant to which the consignment was released - nonetheless, an appeal has been filed

before CESTAT on the ground that there is no estoppel in law to challenge the impugned order although duty, fine and penalty has been paid.

Held: Insofar as the mis-declared items are concerned, the appellant has submitted a letter stating that the same was a mistake on the part of the shipper and for which they are not liable to be punished; that they have accepted the value arrived under rule 7 of the Valuation Rules by conducting market survey and paid the duty - however, the market survey report has not been signed by the traders regarding the average sale price - furthermore, the shopkeepers/traders with whom enquiry was conducted have informed that the goods were of very inferior quality and hence prices of the goods would be lower than the other genuine or high quality goods sold in the market, therefore, the market survey report cannot be relied upon in view of Tribunal decision in *Scorpien International* = **2017-TIOL-2734-CESTAT-DEL** - although the appellant has paid the duty along with fine and penalty, it is evident that the lower adjudicating authority has not recorded the reason as to why he has resorted to valuation under rule 7 without exhausting provisions of s.14 and rules 3, 4, 5 of the Valuation Rules - Therefore, the order passed by the lower adjudicating authority is contrary to the Customs Valuation Rules, which was also not corrected in the impugned order by the Commissioner (Appeals) - Impugned order set aside and appeal allowed with consequential relief: CESTAT [para 6, 7, 8]

Cus - Corrigendum dated 28.9.2016 has been issued to the order of adjudicating authority and wherein the demand has been confirmed by Commissioner of Customs (Export, ICD) under Rule 5 of the Customs Valuation Rules read with Section 14 of the Customs Act - if this Corrigendum has been issued by the Commissioner of Customs then the Commissioner (Appeals) is not competent officer to hear the appeal - Further, Rule 5 of the Valuation Rules, which deals with the transaction value on the basis of similar goods, has not been properly spelt out in the said Corrigendum - adjudicating authority has also not produced the value of the similar goods to the imported consignment: CESTAT [para 7]

Appeal allowed

Case laws cited:

Shubham Impex Vs. CC, New Delhi - 2018 (359) ELT 69 (Tri.-Del.)... Para 3.1

Vijaya International Impex Vs. CC (Seaport - Import), Chennai - 2017-TIOL-4616-CESTAT-MAD... Para 3.1

Dohler India Limited Vs. CC, Pune - 2017 (357) ELT 1129 (Tri.-Mum)... Para 3.1

Eicher Tractors Vs. CC, Mumbai - 2002-TIOL-06-SC-CUS... Para 3.1

Bansal Industries Vs. CC, Chennai - 2002 (147) ELT 967 (Tri.-Chennai)... Para 3.1

Pushpak Metal Corpn. Vs. CC, Kandla, - 2014 (312) ELT 381 (Tri.-Ahmd.) ... Para 3.1

CC Calcutta Vs. South India Television - 2007-TIOL-126-SC-CUS... Para 3.1

Scorpion International Vs. CCE & ST, Indore - 2017-TIOL-2734-CESTAT-DEL... Para 7

FINAL ORDER NO. 50777/2019

Per: Bijay Kumar:

This appeal assails the order dated 20.12.2017 passed by the learned Commissioner (Appeals), Customs, Delhi by which he has rejected the appeal filed by the appellant while upholding the order passed by the primary adjudicating authority.

2. The brief facts of the case are that the appellant is importer and had filed a Bill of Entry No. 5716639 dated 21.6.2016 for clearance of imported goods viz. Hair Dryer, Hair Straightener, Hair Treatment Clipper, Shavers, Knitted Lady Tops, Tungsten Carbide Tips, (in Kgs.), Tungsten Carbide rods, Power (Balancing) wheel, (Small Balancing Wheels) and Drill Bits etc. at assessable value of Rs. 31,84,945/-. On examination of these goods by the DRI, it was revealed that the Power Wheel (Small (Balancing) Wheel) was misdeclared as skates whereas the item, viz. Tungsten Carbide Tips, Tungsten Carbide rods and Drill Bits were not declared in the said Bill of Entry. The adjudicating authority rejected the declared transaction value and reassessed the value of imported goods at Rs. 49,55,515/- with differential Customs duty of Rs. 6,76,200/- payable by the appellant under the provisions of Section 14 of Customs Act, 1962 (for short, Customs Act) read with Customs Valuation (Determination of Imported Goods) Rules, 2007 (for short, Valuation Rules). The adjudicating authority also confiscated the imported goods under Section 111(l) and 111(m) of the Customs Act with option to redeem the same on payment of redemption fine of Rs. 16,50,000/- under Section 125 of the Act *ibid.* Further, a penalty of Rs. 6,76,200/- was also imposed under Section 112(a)(ii) of the Customs Act. The Commissioner (Appeals) uphold the above

order passed by the adjudicating authority in the impugned order and hence this appeal before us.

3. Learned Advocate on behalf of the appellant submits that the imported goods were examined by the SIIB officers and on verification of these goods the item, Tungsten Carbide Tips, Tungsten Carbide Rod and Drill Bits were found not to be declared and power (Small Balancing Wheel) were found to be mis-declared. As the consignment was live and was incurring heavy demurrage and detention charges and also to meet the business obligation and commitment, the appellant waived the written Show Cause Notice and agreed to pay the duty as determined by the adjudicating authority along with the redemption fine and penalty. The consignment was, accordingly, released by the Customs.

3.1 However, the learned Advocate contests on the following grounds:

(i) That, there is no estoppel in law to challenge the impugned order even after the duty, penalty and redemption fine have been paid by the appellant;

(ii) That, the mis-declaration of skates, as held by the primary adjudicating authority, is bad in law on account of the fact that the skates and power balancing wheel is one and the same but for the minor difference in the nomenclature of the product. Merely, having the neutralised function the power balancing wheel does not seem to be going out of the general nomenclature of skates. The adjudicating authority had also concluded that the prices declared for power balancing wheel and skates were found aligned to NIDB data but the various arguments raised on this issue by the appellant, had not been discussed in the impugned order. The Department itself has concluded that the declared assessable value on power balancing wheel was in line of law with the NIDB data and hence their revaluation in terms of Rule 7 is against Valuation Rule. The reliance was placed on the decision of *Shubham Impex Vs. CC, New Delhi - 2018 (359) ELT 69 (Tri.-Del.)* and *Vijaya International Impex Vs. CC (Seaport - Import), Chennai - 2018 (359) ETL 270 (Tri.-Chennai) = 2017-TIOL-4616-CESTAT-MAD*. In these two cases, it has been held that transaction value was required to be accepted unless there is valid reason for rejection of the declared price. The learned Commissioner (Appeals) has not considered these decisions and upheld the order passed by the lower adjudicating authority contrary to the provisions of Customs Act and Valuation Rules.

(iii) That, the original adjudicating authority has erred in rejecting the entire transaction value and decided to opt for the valuation on the market survey report under Rule 9, which is also illegal. Reliance was placed on the decision of *Dohler India Limited Vs. CC, Pune - 2017 (357) ELT 1129 (Tri.-Mum)* wherein it is held that assessing authority required to apply Valuation

Rules sequentially and also to record the reasons for rejection of the each rule before proceeding to next. Further, denial of access to the documents of contemporaneous import value, was in complete violation of principles of natural justice. The learned Advocate also placed reliance on the judgement of Hon'ble Supreme Court in the case of *Eicher Tractors Vs. CC, Mumbai - 2000 (122) ELT 321 (SC)* = **2002-TIOL-06-SC-CUS** to this effect;

(iv) That, the confiscation of imported goods under Section 111 of Customs Act was bad on the ground that the appellant, had in their own assessment, declared the value which was found to be in comparable with NIDB data and, therefore, it cannot be alleged that there was a deliberate mis-declaration on the part of the appellant. Reliance was placed on the decision of *Bansal Industries Vs. CC, Chennai - 2002 (147) ELT 967 (Tri.-Chennai)* and *Pushpak Metal Corpn. Vs. CC, Kandla, - 2014 (312) ELT 381 (Tri.- Ahmd.)* and on the decision of Hon'ble Apex Court in the case of *CC Calcutta Vs. South India Television - 2007 (214) ELT 3 (SC)* = **2007-TIOL-126-SC-CUS**;

(v) That the undeclared goods, which were found to be contained in the consignments imported by the appellant was due to mistake on the part of the shipper. The shipper has also issued a letter dated 4 October, 2016 stating that these items were stuffed in the container by mistake and raised supplementary invoice for the items placed in the container with a request to appellant to get the goods released from the Customs Department and sale them on their behalf.

(vi) That, the redemption fine imposed on the appellant under Section 125 of the Customs Act was bad in law as the same was imposed on the sole ground of mis-declaration. Learned Commissioner in the impugned order failed to discuss the same and passed the order without proper appreciation of the submissions made by the appellant. Also the imposition of penalty under Section 112(a)(ii) was contested on the ground that there was no deliberate mis-declaration and undervaluation by the importer. In view of above submission of learned Advocate that the impugned order is not sustainable and required to be set aside in appeal.

4. Learned Authorised Representative on behalf of the Revenue reiterates the findings contained in the impugned order.

5. We have gone through the submissions made by both the sides and also perused the case record.

6. We find that in this case there has been mis-declared items in addition to declared goods imported by the appellant. These goods were Tungsten Carbide Tips, Tungsten Carbide Rod and Drill Bits the reason for which has been given by the appellant that these were by mistake committed on the part of the shipper and for which they are not liable to be punished. In fact, a letter has

been also submitted by the appellant stating that this was mistake on the part of the shipper and not by the appellant. However, the appellant has accepted the value and paid the duty granted on the behest of shipper regarding the other item for which the Customs valuation was arrived under Rule 7 of the Customs Valuation Rules by conducting the market survey. It is on record that the market survey was conducted on 1.9.2016 in presence of importer as well as the CHA. The market enquiry report indicates as under :

"MARKET ENQUIRY REPORT"

"As directed, conducted market enquiry in respect of Hair Dyers. Hair Straightner, Hair Clipper, Electric Shaver, Knitted Lady Tops, Tungestun Carbide Tips and Tungesten Carbide Rod for the samples provided in respect of Bill of Entry No. 5716639 dated 21.06.2016 from Retail/Whole Sale Market market i.e. Sadar Bazar and Chandni chowk and Jama Bazar Area on 31.08.2016. During the course of market enquiry visited many shops for ascertaining the rates of aforesaid items but nobody willing to give anything in writing. However, the visiting cards were also taken during the course of market enquiry which are pasted in paper and duly signed by undersigned and importer. The Average Retail selling price found as per the verbal discussion of different items are detailed below:-

Sr.No.	Description of the goods found	Avg. Retail Sale Price per piece
1.	<i>Hair Dryer</i>	300
2.	<i>Hair Straightner</i>	300
3.	<i>Hair Treatment Clipper</i>	250
4.	<i>Shaver</i>	200
5.	<i>Knitted Lady Tops</i>	85
6.	<i>Tungsten Carbide Tips (in Kgs.)</i>	1900/Kg
7.	<i>Tungsten Carbide rod (in Kgs)</i>	1900/Kg

It is pertinent to be mentioned that rates of item at Sr. No. 6 & 7 depending upon the quality of the goods. On being shown the samples shopkeeper has informed that the said goods of very lower quality and hence the price of respective goods is lower to other genuine or high quality goods sold in the market. The above said rates were taken in presence of representative of

CHA and as per verbal discussion only, however, the shop owner has refused to give anything in writing."

7. From the perusal of this market survey report, it is evident that the survey was conducted at various places who deals with the items imported namely, Sunil Trading Co. Sadar Bazar, Delhi, Balaji Store, Sadar Bazar, Delhi, Sunil Trading Co., Chawla Market, Sadar Bazar, Delhi, Global Overseas, Jama Masjid, Delhi, Modern Machinery Tools, Jama Masjid, Delhi and Super India Tools Store, Jama Masjid, Delhi. However, it is important to point out here that none of these traders have signed market survey report regarding average sale price. Also it is on record of the market enquiry report that the shopkeepers who were enquired regarding price of these goods have stated that the goods were of very inferior quality and hence price of these goods would be lower than the other genuine or high quality goods sold in the market. Thus, the market survey report cannot be relied upon in view of the decision of this Tribunal in the case of *Scorpion International Vs. CCE & ST, Indore - 2017 (357) ELT 1093 (Tri.-Del.) = 2017-TIOL-2734-CESTAT-DEL*, wherein it is held as under:

"9. We further find that the goods on physical verification found different as per declaration made by the appellant and the value has been enhanced on the basis of market survey, as no market survey report has been placed on record. In that circumstances, the value adopted by the adjudicating authority can be said to the true value of the goods. It is brought on record by the adjudicating authority, some market survey has been conducted. In that circumstances, report of market survey is required to provide to the appellant in the interest of justice for adjudication. In that circumstances, we set aside the impugned orders and remand matter back to the adjudicating authority to decide the issue afresh after providing the copy of market survey to the appellant defend their case, thereafter, the adjudicating authority shall pass an adjudication order in accordance with law."

It is the contention of the appellant that they have not been provided with the market enquiry report although the same was conducted in their presence. Having conducted market survey even in the presence of importer and CHA, there is a need for independent survey report to the importer. Therefore, the ratio laid down on this judgment is squarely applicable in this case. We find that in this case the appellant has also contested the enhanced value based on the market survey report. Although, the appellant had paid the duty along with fine and penalty on account of urgency of clearance of the imported goods. It is also evident from the record of the case that the lower adjudicating authority has not recorded the reason as to why he has resorted to the valuation under Rule 7 without the exhausting provisions of Section 14 of the Customs Act and also without exhausting the application of Rule 3, 4 and 5 of

Custom Valuation Rule. Therefore, the order passed by the lower adjudicating authority is in contrary to the Customs Valuation Rules, which was also not corrected in the impugned order by the Commissioner (Appeals). We also find that the Corrigendum dated 28.9.2016 has also been issued wherein it is stated as under:

"I re-determine the value of the goods amounting to Rs. 49,55,515/- (Rs. Forty Nine Lakh Fifty Five Thousand Five Hundred Fifteen only) in respect of Bill of Entry No. 5716639 dated 21.6.2016 under Rule 5 of the Customs Valuation (Determination of Value of Imported Goods), Rules 2007 read with Section 14 of the Customs Act, 1962. I confirm the re-determined duty of Rs. 11,85,925/-. Since the importer has already paid duty of Rs. 5,09,725/-, the differential duty amounting to Rs. 6,76,200/- is to be paid by the importer."

It is evident from the Corrigendum that the demand has been confirmed by Commissioner of Customs (Export, ICD) under Rule 5 of the Customs Valuation Rules read with Section 14 of the Customs Act. We find that if this Corrigendum has been issued by the Commissioner of Customs then the Commissioner (Appeals) is not competent officer to hear the appeal. Further, Rule 5 of the Valuation Rules, which deals with the transaction value on the basis of similar goods, has not been properly spelt out in the said Corrigendum. The adjudicating authority has not produced the value of the similar goods to the imported consignment which is subject matter of this proceeding.

8. Accordingly, we set aside the impugned order and allow the appeal. The appellant will be entitled to consequential benefits as per law.

(Pronounced in open Court on 17.6.2019)