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

Appeal No. C/664/2012

Arising out of Order-in-Original No. CCP/ADJ/APSS/01/2012, Dated: 29.03.2012
Passed by Commissioner of Customs (Prev.), Mumbai

Date of Hearing: 16.01.2019
Date of Decision: 16.01.2019

DEGMARK ENGINEERING CORPORATION
404, DALAMAL CHAMBERS
NEW MARINE LINES
MUMBAI-400020

Vs

COMMISSIONER OF CUSTOMS (PREVENTIVE)
NEW CUSTOM HOUSE, BALLARD ESTATE
MUMBAI-400001

WITH

Appeal No. C/665/2012

Arising out of Order-in-Original No. CCP/ADJ/APSS/01/2012, Dated: 29.03.2012
Passed by Commissioner of Customs (Prev.), Mumbai

HARESHLAL BHATIA
611, 6TH FLOOR, DALAMAL CHAMBERS
NEW MARINE LINES, MUMBAI 400020

Vs

COMMISSIONER OF CUSTOMS (PREVENTIVE)
NEW CUSTOM HOUSE, BALLARD ESTATE
MUMBAI-400001

Appellant Rep by: Shri Anil Balani, Adv.
Respondent Rep by: Ms Trupti Chavan, AR

CORAM: D M Misra, Member (J)
Sanjiv Srivastava, Member (T)

Cus - A SCN was issued to assessee alleging that they had willfully misdeclared the value of goods imported by them - Entire case of under valuation made out in the present proceedings is that assessee had supplied the goods imported by them to DESU at much higher price than the price declared by them on Bill of Entry - The scheme of valuation as adopted by Commissioner is contrary to the Scheme of Section 14 of Customs Act, 1962 r/w the Customs Valuation Rule, 1988 - The said scheme has been considered by Apex Court in series of case and the law as emerge from the said decisions is that transaction value in the course of international trade is the assessable value - In case the transaction value cannot be determined or found not to be the true transaction value, the valuation has to be done by application of valuation rules, Rule 5 to 8 in seriatim - Without rejecting the transaction value in course of international trade in just and reasonable manner he could not have applied the rule 5 to 8 - Further in case he was able to reject the transaction value then also he had to determine the transaction value by application of rules 5 and 6 first before coming to rule 7 - Higher value charged by assessee at the time of sale of imported goods cannot be reason for rejection of transaction value in course of international trade - In absence of any just and reasonable cause for rejection of transaction value, the order of Commissioner cannot sustain: CESTAT

Appeals allowed

Case laws cited:

Eicher Tractors Ltd - 2002-TIOL-06-SC-CUS...Para 3.2

Armstrong World Industries (I) Pvt Ltd. - 2015-TIOL-288-CESTAT-MUM...Para 3.2

PNP Polytex Pvt Ltd - 2013-TIOL-1405-CESTAT-MUM...Para 3.2

Om International -2013-TIOL-1358-CESTAT-DEL...Para 3.2

Imperial Lites [2013 (298) ELT 228 (T)...Para 3.2

Mangali Impex Ltd - 2016-TIOL-877-HC-DEL-CUS...Para 3.2

FINAL ORDER NOS. A/85715-85716/2019

Per: Sanjiv Srivastava:

These appeal is directed against the Order in Original No CCP/ADJ/APSS/01/2012 dated 29.03.2012 of the Commissioner Customs (Preventive) New Custom House Mumbai.. By the said order Commissioner held as follows:

"a. I order that M/s Degmak Engineering Corporation should pay an amount of Rs 5,92,378/- (Rupees Five Lakhs Ninety Two Thousand Three Hundred and Seventy Eight Only) demanded and recoverable under Section 28(1) of the Customs Ac, 1962, which shall be paid forthwith.

b. I impose following penalties under Section 112(a) of the Customs Act, 1962 on

i) M/s Degmak Engineering Corporation Rs 1,00,000/- (Rupees One Lakh only)

i) Shri Ashok T Bhatia Rs 60,000/- (Rupees Sixty Thousand only)

i) Shri Hareshlal Bhatia Rs 60,000/- (Rupees Sixty Thousand only)"

2.1 A show Cause notice dated 15.02.1999 was issued to the Appellants alleging that they had willfully misdeclared the value of goods imported by them under Bill of Entry No 4741 dated 10.02.1994. The notice proposed for (a) recovery of differential duty of rs 5,92,378/- under section 28(1) along with interest; (b) penalty under Sections 112(a) & (b) and/ or Section 114A of the Customs Act, 1962.

2.2 The show cause notice was adjudicated by the Commissioner vide his order in original No CCP/ADJ/ACB/20/2000 dated 20.09.2000. By the said order Commissioner confirmed the demand of duty along with interest. He also imposed penalties on the noticees.

2.3 This order was challenged before Tribunal and tribunal has vide its order No A/606 to 612/WZB-2005-C-II dated 02.06.2005 decided the case remanding the matter back to adjudicating authority. While remanding the matter tribunal observed:

"2. The ld. Counsel for the appellants submitted that the Commissioner has utterly failed to record his findings on the issue raised by the appellants that different goods were supplied to DESU other than those imported by the Appellants. The appellants have imported the scrap and the goods were sub standard and there was no remittance to the Dubai suppliers because of the rejection of the goods. This fact has been overlooked by the Commissioner and he has recorded no findings thereon. Both the sides agree that since the Commissioner has failed to record findings on this vital issue. It would be necessary to remand the case for fresh adjudication for recording specific findings on this issue and other issues to be raised before him after affording reasonable opportunity of hearing to the appellants."

2.4 Commissioner has by the impugned order adjudicated the matter in remand proceedings. He has held as stated in para 1, supra. Aggrieved Appellants have filed this appeal.

3.1 We have heard Shri Anil Balani, Advocate for the Appellant and Ms Trupti Chavan Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellants, learned counsel submitted that:

i. Commissioner has in his order failed to appreciate that the assessable value for determination of Customs duty is determined on the basis of transaction value and without rejection of transaction value other valuation rules cannot be applied. He relied upon the following decisions.

(a) Eicher Tractors Ltd [2000 (122) ELT 321 (SC)] = 2002-TIOL-06-SC-CUS

(b) Armstrong World Industries (I) Pvt Ltd. [2015 (317) ELT 324 (T)] = 2015-TIOL-288-CESTAT-MUM

(c) PNP Polytex Pvt Ltd [2015 (318) ELT 649 (T)] = 2013-TIOL-1405-CESTAT-MUM

(d) Om International [2014 (299) ELT 245 (T)] = 2013-TIOL-1358-CESTAT-DEL

(e) Imperial Lites [2013 (298) ELT 228 (T)]

ii. In this case number of RUD's were not supplied to them them and were also not available with the department. Hence the case could not have been further processed.

iii. Adjudicating Commissioner was not having the jurisdiction to adjudicate this case in view of order of Hon'ble Delhi High Court order in case of *Mangali Impex Ltd [2016 (335) ELT 605 (DEL)] = 2016-TIOL-877-HC-DEL-CUS*.

3.3 Learned Authorized Representative reiterated the findings of Commissioner.

4.1 We have considered the submissions made in the appeal and by both the parties during course of arguments alongwith the impugned order.

4.2 Entire case of under valuation made out in the present proceedings is that Appellant 1 had supplied the goods imported by them to DESU at much higher price than the price declared by them on Bill of Entry. Para 9(i) of the Show Cause Notice shows the extent of undervaluation by tabulating the declared value against the value at which the goods were supplied to DESU. Para 9(i) is reproduced below:

"9(i) A brief chart showing the extent of variation on the basis of values in the overseas suppliers invoice and its value equivalent in Indian Currency and the sale value as per the purchase order of M/s Delhi Electric Supply Undertaking of a few items as example given below would amply clarify this point:

B/E No & Invoice No	S No	Description	Value declared in US$	Equivalent in Indian Rupees	Sale value as per purchase order of DESU (Rs)
1	2	3	4	5	6
4741/10.12.94 & S 340045/4 dated 03.02.94 of Crexmico USA	1	SS CHF 6M6-15	3.65	115.15	5950
	2	SS CHF 6M6-15	3.60	113.80	5750

4.3 In para 8, 8.1 and 8.2 and 8,3 Commissioner observes as follows:

"Now I proceed to take up the above issues one by one. As regards issue No (a) the investigating agency, on the basis of scrutiny of records and the investigations into imports made by M/s Degmak Engineering Corporation has relied upon the evidences such as Purchase order, Bill of Entry and Sales Invoice. Examination of these evidences and all other facts and records that are material for determining the correct value of imported goods leads to the conclusion that there was an inexplicable vast difference between the values of the impugned imported goods declared by M/s Degmak Engineering Corporation before the Custom Authorities at Mumbai Airport at the time of importation and the actual sale value of the imported cargo, which had been ultimately supplied by and sold to M/s Delhi Electric Supply Undertaking. A comparative chart showing the vast difference in values declared by M/s Degmak Engineering Corporation in respect of the imported check valve, in the Bill Of Entry No 4741 dated 10.02.1994 and Invoice No S-340045/4 dated 03.02.1994 of the overseas supplier M/s Creximco International's (Foreign Supplier as compared with the values in the quotation dated 03.09.1993 of the same overseas company a telex message dated 20.04.1993 of the same company is given herein as below:

S. No	Item No (part No) of Valve & Spares	Value as per Invoice & B/E ($)	Value as per quotations	Value as per Telex in $
1	SS-CHF6 M6-15	3.60	53.84	78.95
2	SS-CHF6M6- 100	3.65	57.21	81.20
3	302-13KCHS- 15	12.00 Per Pkt	5.05 per piece	14.05 per piece
4	302-13KCHS- 100	15.00 Per Pkt	4.90 per piece	13,90 per piece
5	SSK-CHS-VI	15.00 Per Pkt	6.30 per piece	15.30 per piece

8.1 I find that at no stage of investigation the above difference has been explained or controverted by either Mr. Ashok T. Bhatia or Mr. Hareshlal T. Bhatia. Apart from above, there is also vast difference in assessable value declared by M/s. Degmak Engineering Corporation in the Bill of Entry and the actual sale value of the goods to Delhi Electric Supply Undertaking which is given below : -

B/E No & Invoice No	S. No	Description	Value declared in US$	Equivalent in Indian Rupees	Sale value as per purchase order of DESU (Rs)
1	2	3	4	5	6
4741/10.12.94 & S 340045/4 dated 03.02.94 of Crexmico USA	1	SS CHF 6M6-15	3.60	113.60	5750
	2	SS CHF 6M6-100	3.65	115.5	5950

8.2 Here also, I find that neither Mr. Ashok T. Bhatia nor Mr. Hareshlal T. Bhatia were able to explain the difference. Infact Mr. Hareshlal T. Bhatia in his statement dated 01.10.1997 had refused to give his clarification on the said difference. The only logical conclusion is that there was no base or ground to substantiate the declared value of the impugned imported goods. It is quite clear that low value was declared by M7s. Degmak Engineering Corporation arbitrarily with the ulterior motive to evade payment of Customs Duty. Reasonable opportunities were given to M/s. Degmak Engineering Corporation and to S/Shri Ashok T. Bhatia and Hareshlal Bhatia, however, they have failed to produce any records, explanation or justification for unusually vast differences in the value declared to Custom authorities in the bills of entry, as per Creximco's invoice filed by them and the prices at which the goods were finally sold by them to Delhi Electric Supply Undertaking. The value in Bill of Entry was comparatively very much low and the said goods were sold at substantially higher prices. M/s. Degmak Engineering Corporation, Shri Hareshlal Bhatia and Shri Ashok T. Bhatia had colluded together with an intention to defraud the government of its legitimate due in form of Customs duty. The noticees had willfully suppressed and misdeclared the values for the purpose of assessment in respect of the consignment imported by them to Custom authorities in the bill of entry filed at the time of importation. Therefore, the value declared by M/s. Degmak Engineering Corporation was not the correct value as envisaged and required under Section 14(1) of Customs Act, 1962. In terms of Rule 10(a) of Customs

Valuation Rules, 1988, the declared value cannot be accepted as correct "transaction value" under Rule 3(1) & 4(1) of Customs Valuation Rules, 1988. Therefore, as per Rule 3(ii) of the Customs Valuation Rules the values are required to be determined by proceeding sequentially through Rule 5 to 8. Rule 5 & 6 cannot be applied to the present case since identical goods or similar goods were not imported from same supplier and same were not available in the local market. Also the department did not notice the import of said goods in India by other importers. The transaction value of identical and similar goods were not available, the reason being that the Check Values and Spares to be used in liquid fuel circuit/gas turbine (imported equipment) are highly specialized parts for highly specialized imported equipment and the Check Values & Spares had been imported as per the specification and drawings given by Delhi Electric Supply Undertaking. This is evident from a letter F.No. ST/FE/44/93-94 dated 28.12.1998 from the Additional C.P.O (Legal), Delhi Vidyut Board addredded to the Marine and Preventive Department wherein it has been stated that

goods supplied by M/s. Degmak Engineering Corporation under Purchase Order ST/FE/44/92-93/502 dated 04/07.10.1993 were used in the equipment imported from France. The said goods were procured from M/s. Degmak Engineering Corporation as per specification/descriptions made available by the original manufacturer of the plant. Further, the Additional C.P.O. (Legal) stated that M/s. Degmak Engineering Corporation supplied material as per their specification and that no other technical specification of material catalogue, pamphlets, operation manual labels infrastructure of original manufacturer (overseas supplier) were submitted by M/s. Degmak Engineering Corporation. From the above said letter of Additional C.P.O. (Legal), Delhi Vidyut Board, it is clear that department had rightly inferred and not resorted to Rule 5 and 6 for the purpose of valuation of goods. As per Rule 6A the determination of value where the transaction value is not available is required to be carried out under provisions of 7(2) of Customs Valuation Rules where by the value of imported goods shall be based on the unit price at which the imported goods are sold in India subject to deductions mentioned in the said Rules. In fact the department has rightly applied Rule 7(2) read with Rule 7(1) of Customs Valuation Rules, 1988 for working out the values in respect of purchase order (as mentioned in annexure A-1 to the Show Cause Notice). In view of deliberate suppression and misdeclaration of values of the cargo imported by M/s. Degmak Engineering Corporation with the intention to evade Customs duty the department has rightly invoked the proviso to Section 28(1) of Customs Act, 1962 to recovery the customs duty for the extended period of five years. After working out the assessable value (as mentioned in annexure A-1 to show cause notice) the differential duty recoverable was calculated by the department (as mentioned in annexure A to show cause notice) and is as below : -

S.No.	*Assessable Value & Duty Particulars*	*P.O. No.ST/FE/44- 93/502 dated 04/07.10.1993 (Amout in Rs.)*	*Relevant Annexure in Show Cause Notice*
1	*Assessable Value worked out as per Rule 7*	*5,47,818/-*	*A,A-1*
2	*Assessable Value declared by importer*	*22,428/-*	*A-2*
3	*Suppression of Value (1-2)*	*5,25,390/-*	*-*
4	*Total duty payable*	*6,17,665/-*	*A-1*
5	*Actual duty paid*	*25,287/-*	*A-2*
6	*Total duty recoverable*	*5,92,378/-*	*A*

8.3 Shri Anil Balani, Advocate vide his reply dated 25.11.1999 and during the course of personal hearing on 23.02.2000 had stated that the assessable value can not be loaded on the basis of quotations and cited the cases 1998 (98) ELT 3 (SC) = 2002-TIOL-284-SC-CUS, 2000 (115) ELT 674 (Trib) & 1999 (112) ELT 227 (Trib). I find that the duty was not demanded by the department as per M/s. Creximco International quotations. The assessable values had been worked out in respect of Purchase Order No. ST/FE/44/92-93/502 dated 04/07.10.1993 by applying 7(2) read with 7(1) of the Customs Valuation Rules, 1998 and thereafter the differential duty recoverable had been calculated taking into account the value suppressed and actual duty paid by M/s. Degmak Engineering Corporation. Thus, department did not rely upon the quotation values. Quotation values were considered only to show the vast differences in values between Creximco's telex, quotation and invoice. The case laws cited by Shri Anil Balani in this context were irrelevant since the differential duty was not demanded on the basis of quotation. Accordingly, the then adjudicating authority had correctly found that differential duty of Rs. 5,92,378/- (Customs Duty-4,46,582/- + Additional Customs Duty-1,45,796/-) wh,ch was short paid was recoverable from M/s. Degmak Engineering Corporation under proviso to Section 28(1) of Customs Act, 1962 along with interest under Section 28AB.

4.4 The scheme of valuation as adopted by the Commissioner is contrary to the Scheme of Section 14 of the Customs Act, 1962 read with the Customs Valuation Rule,1988 (As they existed at time of importation). The scheme of Section 14 of the Customs Act, 1962 has been considered by the Apex Court in series of case and

the law as emerge from the said decisions is that transaction value in the course of international trade is the assessable value. In case the transaction value cannot be determined or found not to be the true transaction value, the valuation has to be done by application of valuation rules, Rule 5 to 8 in seriatim. We are referring to following two decisions of the Hon'ble Apex Court on the subject.

Garden Silk Mills [1999 (113) ELT 358 (SC)] = 2002-TIOL-19-SC-CUS-LB

"5. Section 12 of the Customs Act, 1962 (hereinafter referred to as "the Act") provides for the levy of duty of customs on the goods imported into or exported from India at such rates as may be specified under the Customs Tariff Act, 1975. Prior to its amendment in 1988, Section 14 of the Act read as follows :

"14. Valuation of goods for purposes of assessment.

- (1) For the purposes of Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be :

(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale :

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date of which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50.

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf."
6. By an amendment in 1988, a new provision subsection (1A) has been incorporated in Section 14, after deleting clause (b) of sub-section (1). The new sub-section (1A) stipulates that subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf. Pursuant thereto Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 have been framed. Post 1988, therefore, the value of the imported goods has to be determined in accordance with the rules which, according to the respondents, are based on the GATT Valuation Code (also called Article VII of the General Agreement on Tariff and Trade) which was adopted in 1979. With these Rules, however, we are not concerned in the present case because all the goods were imported prior to the incorporation of sub-section (1A) of Section 14 of the Act.

7. On behalf of the appellants .....

8. On a careful analysis it is evident that the principles of valuation incorporated in Section 14(1)(a) of the Act therein show that :

(a) the price is a deemed price;

(b) at which such or like goods are ordinarily sold or offered for sale;

(c) for delivery at the time and the place of importation or exportation;

(d) in the course of international trade;

(e) where the seller and the buyer have no interest in the business of each other and

(f) the price is the sole consideration for the sale or offer for sale.
9. This Section clearly indicates that it is not the price stated in the CIF contract which alone is to be accepted as being the value of such goods for the purpose of Section 14 of the Act. The said Section requires determination of the value of the imported goods. The appellants are right in contending that this is a deeming provision. The value of such goods is to be deemed to be the price at which such goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. The price of the imported goods, in other words, has to be determined in respect of import of those goods for delivery at the time and place of importation. It appears to us that the word "delivery" must necessarily mean the point of time when the goods can be physically delivered to the importer. In other words, "delivery" and "discharge" are not synonymous. As we shall presently see, merely by the shipper discharging the goods at the port of import does not ipso facto give the importer a right to take the delivery thereof."

Eicher Tractors Ltd [2000 (122) ELT 321 (SC)] = 2002-TIOL-06-SC-CUS

"10. The respondent's submission is that the phrase "the transaction value" read in conjunction with the word "payable" in Rule 4(1) allows determination of the ordinary international value of the goods to be ascertained on the basis of data other than the price actually paid for the goods. This, according to the respondent, would be in keeping with the overriding effect of Section 14(1). We cannot agree.

11. It is true that the Rules are framed under Section 14(1A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section 14(1). Both Section 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2).

12. Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.

13. That Rule 4 is limited to the transaction in question is also supported by the provisions of the other Rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these rules and subsection (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India." If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other Rules which refer to other transactions and data would become redundant.

14. It is only when the transaction value under Rule 4 is rejected, then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules.

15. The Assistant Collector in this case determined the value of the imported goods under Rule 8. The question is whether he should have determined the transaction value under Rule 4 at the price actually paid by the appellant for the 1989 bearings. Naturally, if Rule 4 applies to the facts of this case, the Assistant Collector's reasoning under Rule 8 must, by virtue of language of Rule 3(ii), be set aside."

4.5 In view of the law clearly laid down by the Apex Court, we are not in position to agree with the findings of Commissioner on the issue of under valuation. Without rejecting the transaction value in the course of international trade in just and reasonable manner he could not have applied the rule 5 to 8. Further in case he was able to reject the transaction value then also he had to determine the transaction value by application of rules 5 and 6 first before coming to rule 7. Higher value charged by the appellants at the time of sale of imported goods cannot be reason for rejection of transaction value in course of international trade.

4.6 Commissioner has in para 13.1 of his order heavily relied upon his own order in original No CCP/ADJ/SR/10/2008 dated 30.03.2009 in case of Flowfast. The said order of Commissioner has been set aside by the *Tribunal vide order No A/86402-86406/2018 dated 06.03.2018*, stating that

"5. We find that the declared value for the purpose of import has been rejected on the ground that M/s Degmak Engineering Corporation and M/s Flow Fast Engineers 9India) are related. It is seen that there is no charges to the effect that the foreign supplier and the Indian importer are related. The only charge in the proceedings is that the Indian importer is related to the intermediary through whom the goods are supplied to DESU. We find that the same cannot be a reason for rejecting the transaction value and consequently application of Customs Valuation Rules for revision of assessable value cannot be sustained."

4.7 In view of the above discussions and absence of any just and reasonable cause for rejection of transaction value, we are not in position to sustain the order of Commissioner.

6.1 Impugned Order of Commissioner Customs (Preventive) to the extent it pertains to two appeals under consideration is set aside and the appeals allowed.

(Order pronounced in the open court)