2020-TIOL-325-CESTAT-BANG

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I

Customs Appeal No. 20411 of 2019

Arising out of No. COC-CUSTM-000-APP-48-2018-19, Dated: 04.02.2019
Passed by Commissioner of CUSTOMS, COCHIN

Date of Hearing: 26.11.2019
Date of Decision: 11.02.2020

KARACHIRA COIR MANUFACTURES
R/O KARACHIRA HOUSE, THANNEERMUKKAM
P O ALAPUZHA - 688006 KERALA

Vs

THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN - 682009 KERALA

AND
Customs Appeal No. 20412 of 2019

Arising out of No. COC-CUSTM-000-APP-49-2018-19, Dated: 04.02.2019
Passed by Commissioner of CUSTOMS, COCHIN

M/s QUALITY TRADERS
NO.14/4, KALLALPARA P.O FEROKE
KOZHIKODE - 673631 KERALA

Vs

THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN - 682009 KERALA

Appellant Rep by: Mr P A Augustian, Adv.
Respondent Rep by: Mr M K Devendran, Superintendent (AR)

CORAM: S S Garg, Member (J)
P Anjani Kumar, Member (T)

Cus - The assessee-company filed BoE for clearance of goods described as PVC Laminated Sheets of different sizes, classifiable under CTH 3918 1090 - Such goods had been imported from Thailand - The Customs Broker failed to declare the complete required declaration including percentage of PVC content to ascertain the value and to compare with contemporary import price - On scrutiny, it was found that the supplier is a trader & not a manufacturer of goods - The self-assessed BoE was processed under RMS and such BoEs were selected for assessment

and examination - Upon assessment, it was noticed that the declared value was lower than the contemporary import value of similar goods - The Customs Broker was issued an online query to produce documentary evidence to confirm the value as per Rule 12 of the Customs Valuation Rules - The Customs Broker did not produce any documents and sought first-check examination - The same was permitted for BoE and samples were directed to be drawn for testing and confirming PVC content - The test report by CIPET reported PVC content to be 51% - The Revenue opined that the assessee indulged in under-valuation and mis-declaration - SCN was issued proposing to confiscate the goods u/s 111(i) and 111(o) - Penalty was proposed to be imposed u/s 112(a) & 112(b) of the Customs Act - The declared value was proposed to be rejected and re-calculated - On adjudication, such proposals in the SCN were sustained - Hence the present appeal.

Held:

In the reply to SCN, the assessee stated that the supplier of the goods is the biggest manufacturer of the subject goods, in the world - The goods were imported by the assessee under the ASEAN agreement between two sovereign states & if the Revenue has any cogent evidence to conclude that no such manufacturer exists, it should have made proper enquiry to blacklist such supplier - However, the same was not done - The Commr ***suo motu***

concluded that the raw material for the subject goods is LDPE and LLDPE and that the value is between USD 1180-1270 - Such findings are without any basis - In the test report obtained from CIPET, it is not mentioned that LDPE & LLDPE is raw material for the subject goods - The information relied on by the Commissioner is available in public domain & the same is inadmissible as evidence in law, when there is a specific test report available & which is issued by an authorised agency - The assessee also submitted a certificate from the manufacturer, stating that LLDPE and LDPE is not a raw material for the subject goods, but the same was not considered by the Commissioner - Moreover, whilst the assessee imported the goods from Thailand, the Commissioner relied upon contemporaneous imports from China PR - It is trite law, as held by the Apex Court in ***Sounds N Images vs. Collector of Customs***

that charge of under valuation must be established through proper method under law and that burden cannot be shifted to the importer whereas in the present case, the Department has failed to establish the charge of under valuation through proper methods known to the law of valuation under Customs - Hence the O-i-O in question is not sustainable & merits being quashed: CESTAT

Assessee's appeal allowed

Case laws cited:

Sounds N Images vs. Collector of Customs - 2002-TIOL-37-SC-CUS... Para 6...followed

Damehra Steels and Forgoing (P) Ltd. vs. CC, Calcutta: 1996 (84) ELT 116 (Tribunal)... Para 6

Collector of Customs, Bombay vs. Nippon Bearings (P) Ltd - 2002-TIOL-282-SC-CUS ... Para 6

FINAL ORDER NO. 20105/2020

Per: S S Garg:

Appellants have filed these two appeals against the impugned order both dated 4.2.2019 passed by the Commissioner of Customs whereby value declared by the importer has been rejected and is re-fixed under Rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and also imposed penalty of Rs.50,000/- each under Section 117 of the Customs Act on the Customs Broker.

2. Since the issue involved in both the appeal is identical and both the appellants are sister concerns, therefore, both the appeals are taken up together for discussion and disposal. The details of both the appeals are given herein below:

Appeal No.	Appellants	OIO No.	Bill of Entry	Customs Duty
C/20411/2019	M/s. Karachira Coir Manufacturers	COC-CUSTM-000-APP-48/2018-19 dt.4.2.2019	No.7062957 dt.3.7.2018	Rs.5,14,447/-
C/20412/2019	M/s. Quality Traders	COC-CUSTM-000-APP-49/2018-19 dt.4.2.2019	No.7569593 dt.9.8.2018 No.7151748 dt.10.7.2018	Rs.10,64,270/-

3. For the sake of convenience, we take the facts in the case of M/s. Karachira Coir Manufacturers.

M/s. Karachira Coir Manufacturers, No.1/607, Thanneermukkom (PO), Cherthala, Alappuzha, Kerala (IEC) No.1002008743) filed Bill of Entry No.7062957 dated 3.7.2018 for clearance of goods described as PVC Laminated sheets (PVC floor covering) different sizes weighing

26985.600 Kgs. respectively under the Customs Tariff 39181090. Goods were imported from Thailand. The importer/Customs Broker failed to declare the complete required declaration including percentage of PVC content to ascertain the value and to compare with the contemporary import price. On scrutiny, of the documents, it is found that the supplier is M/s. K.H.I. Vanich Group Co., Bangkok, appears to be a trader and not the manufacturer of the goods. The above said self-assessed Bill of Entry was processed under RMS and the said Bills of Entry selected for both assessment and examination. At the time of assessment it was noticed that the declared value appears to be low when compared to the contemporary import value of similar/identical goods, and therefore, importer/Customs Broker were issued with an on-line query to produce documentary evidence to confirm the value as per Rule 12 of the Valuation Rules. The importer/Customs Broker did not produce any documents and requested to given first check examination. Accordingly, first check examination has been given for the Bill of Entry and ordered to draw samples for testing and confirming the PVC content and the samples were tested at CIPET and the CIPET vide their report No.18146 dated 2.8.2018 reported that PVC content is 51%.

4. Since the Revenue entertained a view that the appellant has indulged in under valuation and mis-declaration, therefore, show-cause notice was issued to the importer on 27.8.2018 to show-cause as to why goods should not be confiscated under Section 111(i) and (o) and penalty should not be imposed under Section 112 (a) and (b) of the Customs Act, 1962 and the declared value should not be rejected and re-fixed under provisions of Customs Valuation Rules, 2007. Importer filed detailed reply to the show-cause notice and after following the due process, the Commissioner rejected the value declared by the importer under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-fixed at Rs.78 per kg under Rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

5. Heard both the parties and perused the records.

6. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the impugned order is not tenable in law since the valuation has not been done in conformity with the Customs Valuation Rules. He further submitted that the reason given by the Department not to accept the declared value is that M/s. KHI Vanich Group who is supplier of the goods to the appellant appeared to be a trader and not the manufacturer of goods but no reason has been given in the impugned order regarding such an allegation. He further submitted that the appellant in reply to the show-cause notice has categorically stated that M/s. KHI Vanich Group is the manufacturer of the goods and the goods supplied by them under invoice dated 24.2.2018 was allowed to be cleared through Cochin Port as per the declared value vide Bill of Entry No.5547795 dated 12.3.2018. He further submitted that the department has not given any reason to come to such a wrong conclusion. He further submitted that the impugned goods were imported under ASEAN Agreement between two sovereign states and if the department has any reason or doubt regarding the source of supply of material or supplier had committed any mistake while supplying the goods to India, appropriate steps should have been taken to blacklist the supplier for supply of goods under ASEAN Agreement than making false allegation against the appellant. The learned counsel also submitted that the other reason to reject the transaction value is that raw material for the product is Low-density Polyethylene (LDPE), Linear Low-density Polyethylene (LLDPE), etc., and the value of raw material ranges to USD 1180 to USD 1270 per Metric Tonne. Learned counsel submitted that this finding of the Commissioner in the impugned order is without any basis. Further, the report of the Central Institute of Plastic Engineering and Technology (CIPET), Cochin vide its Test Report No.18146 dated 2.8.2018 observed that PVC content is said to be 51%. However, the report does not say that the raw material of the impugned goods is LDPE or LLDPE. Learned counsel also submitted that the copy of the Test Report as relied upon in the show-cause notice has not been furnished to the appellants. Further, he submitted that the Commissioner in order to justify this finding has come to the conclusion that material available in the Public Domain says that raw material of the impugned goods is HDPE and LLDPE, etc., but the said material is not admissible as evidence. He further submitted that the details of contemporaneous import relied upon by the Commissioner to enhance the value are also not from the country of export and is from different countries and therefore, the said import cannot be considered as contemporaneous export. He further submitted that instead of accepting the contemporaneous import by the appellant earlier to the present import, the Commissioner has wrongly observed in the order that the appellant has accepted the enhanced value based on PVC content, which is factually incorrect. Learned counsel further argued that law is well settled regarding the allegation of under valuation, that unless there is a cogent evidence to prove under valuation, it is mandatory for the Customs to accept the price actually paid. Mere presumption of the investigation officer without considering the value of the contemporaneous import is not a reason to allege under valuation. If the transaction can be determined under Rule 4(1) of the Customs Valuation Rules, 2007 and does not fall under any exceptions under Rule 4(2), then valuation under subsequent Rules is out of question. Rule 4 allows for the transaction value to be determined on the basis of the identical goods and Rule 5 allows for the transaction value of similar goods imported into India at the same time. Further, as per Rule 4(3), if more than one transaction value of identical goods is found, lowest among such value shall be considered to determine the value of the goods. In support of his submissions, the learned counsel relied upon the following decisions:

- Sounds N Images vs. Collector of Customs: 2000 (117) ELT 538 (SC) = 2002-TIOL-37-SC-CUS

- Damehra Steels and Forgoing (P) Ltd. vs. CC, Calcutta: 1996 (84) ELT 116 (Tribunal)

- Collector of Customs, Bombay vs. Nippon Bearings (P) Ltd.: 1996 (82) ELT 3 (SC) = 2002-TIOL-282-SC-CUS

7. On the other hand, the learned AR defended the impugned order.

8. After considering the submissions of both the parties and perusal of the material on record, we find that in the show-cause notice the Revenue has alleged that the supplier of the goods M/s. K.H.I. Vanich Group Co., Bangkok appears to be a trader and not the manufacturer. For this allegation, in the show-cause notice, Revenue has no basis because the appellant has given the invoices issued by the said supplier and has submitted in the reply to the show-cause notice that the said supplier is the biggest manufacture of the impugned goods in the world. Further, we find that the goods have been imported by the appellant under ASEAN Agreement between two Sovereign States and if the Department has any cogent evidence to come to the conclusion that no such manufacturer exist, then they should have made proper enquiry to blacklist such a supplier but the same has not been done at all. Further, we find that the Commissioner on its own has come to the conclusion that the raw material for the impugned goods is LDPE and LLDPE and the value of raw material ranges from UDS 1180 to USD 1270 per metric tonne without any basis. He has observed in the impugned order that it is available in the Public Domain that LDPE and LLDPE are the raw material for the impugned goods. Further, we find that even in the test report obtained by the Revenue from CIPET, Cochin, it is not mentioned that LDPE and LLDPE is the raw material for impugned goods. The information relied upon by the Commissioner available in the Public Domain is not admissible as evidence in law when there is a specific test report available of authorized agency. Further, the certificate issued by the manufacturer which is also on record, shows that LDPE and LLDPE is not the raw material for the impugned goods but the same has not been considered by the Commissioner. Further, we find that in the present case, the appellant has imported the material from Thailand whereas the Commissioner has relied upon the contemporaneous imports from China which cannot be considered as contemporaneous import at all. Further, we find that the appellant himself earlier imported the same product vide Bill of Entry No.5547795 dated 12.3.2018 and declared its value which was accepted and the goods were cleared from the same port. Instead of considering the same as contemporaneous import, the Commissioner has relied upon imports from China. Further, we find that the Hon'ble Supreme Court in the case of Sounds N Images cited supra held that the charge of under valuation must be established through proper method under law and that burden cannot be shifted to the importer whereas in the present case, the Department has failed to establish the charge of under valuation through proper methods known to the law of valuation under Customs. Similarly, in the case of Damehra Steels and Forgoing (P) Ltd. cited supra, the Tribunal held that "It is well settled principle of law that whenever the charge of under-invoicing is laid against the importer, it is the duty of the authorities to make necessary investigation with regard to price at which the goods of like kind and quality were being imported, charge of under-invoicing has to be supported by evidence by producing contemporaneous import of like kind goods." In the present case, instead of collecting the proper data regarding the price at which the goods of the like kind and quality are being imported, the department resorted to Rule 9.

9. In view of our discussions above, we are of the considered view that the impugned orders re-fixing the price than the price declared by the importer is not sustainable in law and therefore, we set aside the impugned order by allowing the appeals of the appellant with consequential relief, if any.

(Order was pronounced in Open Court on 11.02.2020)