A COMMISSIONER OF CUSTOMS, MUMBAI

v.

M/S. J.D. ORGOCHEM LIMITED
(Civil Appeal No. 5843 of 2006)

APRIL 10, 2008

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(S.B. SINHA AND V.S. SIRPURKAR, JJ.)

Customs Act, 1960; Ss.2(41), 14(1) and (1A)/Customs Valuation Determination of Price of Imported Goods) Rules,
C *1988; rr.4 to 8:*

Transactional value of imported goods – Levy of Customs duty – Dinitro Crysazine falling under Heading 2914.69 of 1975 Act and 2914.00 of 1944 Act – Assessee importing the goods in question at lesser price than the price
D *paid in earlier transaction – Transactional value of goods, as declared by the assessee, was rejected by the assessing authority – Affirmed by Appellate authority – Reversed by tribunal – Correctness of – Held: Correct – Assessing authority as also appellate authority wrongly proceeded on the basis*
E *that onus of proof was on importer – Revenue did not furnish any contemporaneous evidence to the contrary – Assessee categorically informed the assessing authority by furnishing reasons about declining the price of the goods in question in the international market – Assessing Authority declined to*
F *consider the same – Assessee relied on contemporaneous imports from the same supplier which has not been denied/ disputed by the authorities – Thus, appeal lacks merit – Customs Tariff Act, 1975 – Central Excise Tariff Act, 1944.*

The question which arose for determination in this
G **appeal was about the extent of jurisdiction of the assessing authority to discard the transactional value of the imported goods as disclosed by the importer/ assessee.**

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Revenue contended that having regard to the fact that the transactions took place between the same parties to the said bill of entry, it is not conceivable that the price of the goods in the international market had fluctuated to the extent mentioned; and that onus of proof, in a case of this nature, would be on the importer only.

Dismissing the appeal, the Court

HELD: 1.1 The assessing authority as also the appellate authority have wrongly proceeded on the basis that the onus of proof was on the importer. If that conclusion is not premised on any legal principle and the revenue having not brought on records any contemporaneous evidence to the contrary it cannot be said to have discharged its burden. (Para – 14) [206-E]

1.2 Recourse to the Rules 5 to 8 of the Customs Valuation (Determination of Price of Imported Goods) Rules are to be resorted to if the transaction value cannot be determined in terms of sub-section (1) of Section 14 of the Customs Act. (Para – 16) [207-B]

2.1 The assessee categorically informed the assessing authority that in the international market the raw material prices were declining every day. Before the said authority even instances were given in regard to the subsequent transactions to show that the 'shipper' had further reduced the prices of the goods in question. Value of the said goods, according to the respondent, was declining because of the fact that there is more supply and demand is less in the international market. Yet again the assessee by term of another letter assigned a large number of reasons how they have got the most competitive offer from the overseas principal as was explained during personal hearing. The assessing authority did not consider the said contentions and dismissed the appeal. (Paras – 17 & 18) [207-B, C, D, E]

A **2.2 In this case the importer in fact relied on contemporaneous imports from the same supplier, which has not been denied or disputed. There is, thus, no merit in the appeal. (Paras – 20 & 21) [210-B, C]**

B *Eicher Tractors Ltd. vs. Commissioner of Customs, Mumbai:* **2000 (122) E.L.T. 321 (S.C.)** and *Commissioner of Customs, Calcutta vs. South India Television (P) Ltd. :* **2007 (214) E.L.T. 3 (S.C.) - relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. C 5843 of 2006.

From the Final Order No. A/222/WZB/06.C.II. (C.S.T.B.) dated 24.2.2006 of the Customs. Excise and Service Tax Appellate Tribunal West Zonal Bench at Mumbai in Appeal No. C/973/00-Mum

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Krishna Kumar, P. Narasimha and B. Krishna Prasad for the Appellant.

Tarun Gulatgi, Nitin S. Tambwekar, B.S. Sai, K. Rajeev, Jaiveer Shergill and Ankit Goyal for the Respondent.

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The Judgment of the Court was delivered by

S.B. SINHA, J. 1. The extent of jurisdiction of the assessing officer to discard the transactional value disclosed by the importer is the question involved in this appeal which F arises out of a judgment and order dated 24th February, 2006 passed by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal), West Zonal Bench at Mumbai.

2. Respondent herein filed a bill of entry dated 27th October, 1999 for clearance of "4,5 Dinitro Crysazine". The said goods G fall under Heading 2914.69 and 2914.00 of the Customs Tariff Act, 1975 and Central Excise Tariff, 1944 respectively. The unit price of the said goods was declared at US$ 13.2 per kg.

3. Allegedly the respondent had imported the same goods from the same supplier earlier @ US$ 18.7 per kg.

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4. The Deputy Commissioner of Customs in his order dated 22nd March, 2000 opined that the transactional value declared by the importer should be rejected and Rule 5 of the GATT Valuation Rules, 1988 shall be applied ordering to load the value to US$ 18.7 per kg. It was directed that the bill of entry should be assessed accordingly.

5. On an appeal preferred thereagainst by the respondent, the Appellate Authority being the Commissioner of Customs (Appeals) affirmed the said findings in terms of his order dated 3rd August, 2000. By its judgment the appellate authority rejected the contention of the appellant that the onus was on the department to show that the invoice price was not genuine and arrived at the conclusion that since the respondent was the only importer of the said goods, they were 'the best person to obtain conclusive proof of downward pricing pattern in the international market'.

However, on an appeal preferred by the respondent thereagainst, by reason of the impugned judgment, the Tribunal allowed the same holding :-

> "3. We find that in the present case the appellant is the only importer of the goods in question and there are no contemporaneous imports. The appellant has given justifiable reasons for reduced prices of the same goods from the same importer for the subsequent imports. They have also contended that the future imports have been done at still lower prices which stands accepted by the customers. As such, we are of the view that in the absence of any on (sic) justifiable reason to reject the same and enhance the assessable value."

6. Mr. Krishna Kumar, learned counsel appearing on behalf of the appellant would contend that having regard to the fact that the transactions took place between the same parties to the said bill of entry dated 27th October, 1999, it is not conceivable that the price of the goods in the international market had fluctuated to the aforementioned extent. Onus of proof, it

A was urged, in a case of this nature, would be on the importer only. Strong reliance in this behalf has been placed on *Punjab Processors Pvt. Ltd. vs. Collector of Customs* : 2003 (157) E.L.T. 625 (S.C.).

B 7. Mr. Tarun Gulati, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment.

8. Before embarking on the question raised by the learned counsel for the parties, we may notice the relevant statutory C provisions.

9. Section 2(41), Section 14(1) and Section 14(1A) of the Customs Act, 1962, as they stood at the relevant time, read as under :-:

D "2(41) "value", in relation to any goods, means the value thereof determined in accordance with the provisions of Sub-section (1) of Section 14;

14. **Valuation of goods for purposes of assessment.** - (1) For the purposes of the Customs Tariff Act, 1975 (51 E 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 the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time F 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:

G Provided 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 or bill of export, as the case may be, is presented under section 50.

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(1A) 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.

10. We also quote hereinbelow the relevant portion of Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, as it stood at the relevant time:

"**4. Transaction value.** - (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under Sub-rule (1) above shall be accepted:

Provided that -

(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;"

11. Upon whom the onus of proof lies to establish the transaction value must be considered having regard to phraseology used in the Act and the Rules framed thereunder.

12. Rule 4 of the Rules has a direct nexus with Section 14(1) of the Act. The term used is "ordinarily". The said term has been interpreted by this Court inter alia to mean that there

A should be an "extra ordinary" or "special" situation so as to enable the competent authority to opine that the transactional value declared by the importer should be disbelieved. It is not suggested that the Customs Authorities are bound by such declaration. It, however, has to rely on contemporaneous B evidence to show that the invoice does not reflect the correct value.

13. The expression "ordinarily" may mean "normally". It has been held by this Court in *Kailash Chandra v. Union of India and Krishangopal v. Shri Prakashchandra and Ors.* [(1974) 1 C SCC 12], that the said expression must be understood in the context in which it has been used and, thus, "Ordinarily" may not mean "solely" or "in the name", and thus, if under no circumstance an appeal would lie to the Principal District Judge, the Court would not be subordinate to it.

D When in a common parlance the expression "ordinarily" is used, there may be an option. There may be cases where an exception can be made out. It is never used in reference to a case where there is no exception. It never means "primarily".

E 14. The assessing authority as also the appellate authority have wrongly proceeded on the basis that the onus of proof was on the importer. If that conclusion is not premised on any legal principle and the revenue having not brought on records any contemporaneous evidence to the contrary, we are of the F opinion that it cannot be said to have discharged its burden.

15. Rule 5 provides for determination of the transaction value having regard to the importation of identical goods 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 G at the same time as the subject goods. Where, however, there are no contemporaneous imports, the value is to be determined in terms of Rule 7 by a process of deduction as envisaged therein. Yet again an alternative mode for determination of the transaction value has been provided in Rule 7A. If none of the H aforementioned provisions can be taken recourse to, the

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authority may determine the transaction value in terms of Rule 8 of the Rules, using reasonable means consistent with the principles and general provisions of the rules and sub-section (1) of Section 14 of the Act and on the basis of data available in India.

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16. Recourse to the aforementioned Rules are to be resorted to if the transaction value cannot be determined in terms of sub-section (1) of Section 14 of the Act.

17. By its letter dated 13th November, 1999 the respondent categorically informed the Assistant Collector Customs, Mumbai, that in the international market the raw material prices were declining every day. Before the said authority even instances were given in regard to the subsequent transactions to show that the 'shipper' had further reduced the prices and they have been offering the same material @ US$ 13.50 per kg. Value of the said goods, according to the respondent, was declining because of fact that there is more supply and demand is less in the international market.

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18. Yet again the respondent by term of its letter dated 4th January, 2000 (wrongly typed as 4th January, 1999) assigned a large number of reasons how they have got the most competitive offer from the overseas principal as was explained during personal hearing. The assessing authority did not consider the said contentions. The Appellate Authority dismissed the appeal of the respondent, only stating :-

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> "I find that the appellant's contention not to consider their earlier import price for valuation of the impugned goods and to find out any other contemporary import price or conduct market survey for valuation has got no force. Since they are the only importer of the said goods they are in a better position to obtain conclusive proof of downward pricing pattern in the international market. But instead of making any attempt in this regard they expect the department to conduct market survey."

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A 19. *Punjab Processors Pvt. Ltd.* (supra) was an unreasoned order. No legal principle has been laid down therein.

One of the Hon'ble Judges therein was also a party in *Eicher Tractors Ltd. vs. Commissioner of Customs, Mumbai* : 2000 (122) E.L.T. 321 (S.C.). Therein it was held :

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> "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 C 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."

It was observed :-

> D "22. In the case before us, it is not alleged that the appellant has miss-declared the price actually paid. Nor was there a mis-description of the goods imported as was the case in Padia Sales Corporation. It is also not the respondent's case that the particular import fell within any of the situations E enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list is invariably proof of the transaction value. This was F erroneous and could not be a reason by itself to reject the transaction value. A discount is a commercially acceptable measure which may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude G discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case discount upto 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it H was a one time sale of 5 year old stock. When a discount

A is permissible commercially, and there is nothing to show that the same would not have been offered to any one else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1)."

B 20. The same principle has been reiterated recently in *Commissioner of Customs, Calcutta vs. South India Television (P) Ltd.* : 2007 (214) E.L.T. 3 (S.C.) holding :-

" Therefore, the transaction value under Rule 4 must be C the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery D 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 for offer for sale. Therefore, what has to be seen by the Department is the E value or cost of the imported goods at the time of importation, i.e., at the time when the goods reaches the customs barrier. Therefore, the invoice price is not sacrosanct. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis F of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in G that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of H value of imported goods. Under- valuation has to be

A proved. If the charge of under-valuation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege under-valuation, it must make detailed inquiries, collect material and also B adequate evidence."

In this case the importer in fact relied on contemporaneous imports from the same supplier, which has not been denied or disputed.

C 21. There is, thus, no merit in this appeal. It fails and is dismissed with costs. Counsel fee assessed at Rs.25,000/-.

S.K.S. Appeal dismissed.