ANIL KUMAR ANAND

v.

COMMISSIONER OF CUSTOMS (PREVENTIVE)

(Civil Appeal No. 3138 of 2018)

APRIL 22, 2019

[SANJAY KISHAN KAUL AND HEMANT GUPTA, JJ.]

Customs Act, 1962 – s.28 – Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – rr. 3 to 5, 7 & 9 – Appellant was a regular importer of electric decorative lightings and in the process of such imports filed a bill of entry for clearance of electric decorative lightings – Enquiry was initiated to ascertain correct value of goods for purposes of customs duty – A show cause notice was issued u/s. 28 of the Act on grounds that appellant did not declare the brand of imported goods and he imported goods from its related party (M/s. 'IL' Ltd., United Kingdom), and undervalued the same with the intention of evading customs duty – Consequent to which, adverse order was passed against the appellant by the authorities under r.7 and r. 9 of the Rules – Appellants contended that the scheme of rules was not correctly understood and implemented by the competent authority – Held: Even though the imports were under the brand names 'Diyas' and 'mAntra', they were not trademarks of such nature as would make them an exclusive product and there was some mix up in understanding of a trademark protection, as the same was compared with 'patented goods' – Further, data was available, which could have been utilised to obtain the pricing for imports from the United Kingdom, of identical goods or similar goods – There was a fundamental mistake committed in the manner of implementation of the statutory Rules – Once the statutory Rules exist and provide for sequential implementation, the assessing authority has no option but to proceed in accordance with those Rules, in that manner – The concerned authority chose to ignore, in the facts of the case, Rules 3 to 5 and did not proceed 'sequentially' – Sub-r.(4) of r.3 provides that there has to be a sequential implementation of the Rules, i.e. that Rules 3 to 5 would have to be exhausted first and only in the eventuality of an inability to apply the rules would the assessing authority proceed to impose

A *Rules 7 to 9 – Therefore, matter remitted back to the Principal Commissioner of Customs to proceed afresh.*

Allowing the appeals, the Court

HELD: 1. In substance, there were two grounds for the show cause notice:

B

(a) that the appellant, knowingly, did not declare the brand of imported goods, and undervalued the same with the intent of evading customs duty;

(b) that the appellant had imported the branded goods from its related party, and had undervalued the same to evade customs duty. [Para 2][229-C-D]

C

2. In the context of the Rules, it is the submission of the appellant that the factual matrix of the present case shows that the twenty one consignments (including the one directly in question) were not imported from one source, but three different sources. Out of the three different sources, the competent authority came to the conclusion that the import from United Kingdom, from M/s. 'IL' Limited, is liable to be construed as import from a related party. Though this is sought to be disputed by the appellants, but even assuming that to be correct, it was contended that there were imports available from two other sources, from China and Spain. These suppliers are not found to be related parties. Thus, the pricing from these two sources, with requisite adjustments for the distance or any other parameter, could always be taken as the transactional value for all the goods forming part of the twenty one consignments. [Para 12][235-G-H; 236-A-B]

D

E

F

3. A further explanation offered on behalf of the appellants, in respect of the second aspect, i.e., non-declaration of the brand 'Diyas' and 'mAntra', pertaining to the consignments in question, was that the brands were not so well-known as to make a difference to the value. In fact, for the import from China, the brand 'Diyas' had been clearly mentioned. The consignments had been cleared after physical verification. In effect, the plea was that the two brands really do not attract any intrinsic market value. [Para 13][236-C]

G

H

4. It is a submission that the sequential application of Rules, thus, required the valuation to be done in accordance with Rules 3 to 5, before proceeding to the subsequent Rules, and it is not a case where valuation was not possible under Rules 3 to 5. [Para 14][236-D]

5. First taking note of the fact that electrical decorative lightings, normally, are not highly branded products, exceptions apart. It does appear that even though the imports were under the brand names 'Diyas' and 'mAntra', they were not trademarks of such nature as would make them an exclusive product. It also appears that there has been some mix up in the understanding of a trademark protection, as the same has been compared with 'patented goods'. Thus, data was certainly available, which could have been utilised to obtain the pricing for imports from the U.K., of identical goods or similar goods. [Para 18][237-A-B]

6. The irony is that if the competent authority thought that these were goods where trademark was of significance, it could not simultaneously have ignored the imports under the same trademark, from different countries, where there were no related parties. Naturally, there would have to be made adjustments for the distance from which the import was made, or the size of the consignment, if applicable, as set out in Rules 3 to 5. There was really no occasion to straightaway proceed to determine the transactional value by relying on Rules 7 to 9. There is no doubt this principle of sequential application would apply, especially in view of sub-Rule (4) of Rule 3, which provides that there has to be a sequential implementation of the Rules, i.e., that Rules 3 to 5 would have to be exhausted first, and only in the eventuality of an inability to apply the Rules would the assessing authority proceed to impose Rules 7 to 9. [Para 19][237-C-E]

7. The result of the aforesaid discussion is that both, the order of the Principal Commissioner of Customs (Preventive), Customs, New Delhi, dated 30.3.2017, as well as the order of the CESTAT, dated 6.11.2017, are liable to be set aside, and the matter remitted back to the Principal Commissioner of Customs (Preventive) to proceed afresh and thus, it is Rules 3 to 5 which

A **would have to be applied first, as it is provided for the Rules to apply "sequentially". [Para 22][238-F-G]**

Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. & Others **1988 Suppl. SCC 796 – referred to.**

Case Law Reference

B

1988 Suppl. SCC 796	**referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3138 of 2018.

From the Judgment and Final Order No. 57650/2017 dated C 06.11.2017 of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Customs Appeal No. 51117 of 2017.

With

Civil Appeal Nos. 3139, 3140 of 2018.

D V. Lakshmikumaran, L. Charanya, Aaditya Bhattacharya, Manish Rastogi, Victor Das, Ms. Apeksha Mehta, Punit Dutt Tyagi, Advs. for the Appellant.

K. Radhakrishna, Sr. Adv., Ms. Aruna Gupta, Ms. Swati Ghildyal (for Mr. B. Krishna Prasad), Advs. for the Respondent.

E The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.

1. The appellant in CA No.3140/2018, M/s. Diyas Mantra Lighting Private Limited, as well as its Directors, are aggrieved by the impugned F order dated 30.3.2017 of the Principal Commissioner of Customs (Preventive), New Delhi, as well as the order of the Customs, Excise & Service Tax Appellate Tribunal (for short 'CESTAT') dated 6.11.2017, dismissing the appeal and sustaining the order of the Original Authority, revaluing the import consignments of the appellant, numbering twenty one, for the period from December, 2012 to January, 2015.

G 2. The appellant is stated to be a regular importer of electric decorative lightings, and in the process of such imports, filed a bill of entry on 21.1.2015 at the ICD, Tughlakabad, New Delhi, for clearance of electric decorative lightings. These import consignments were of

H

brand names 'Diyas' and 'mAntra', and the enquiry proceeded to ascertain whether the goods had been correctly valued for the purposes of customs duty. On completion of the enquiry, proceedings were initiated for revaluing the current import consignment, as well as past consignments within the aforesaid window, apart from the proposal for confiscation of goods and imposition of penalties under the provisions of the Customs Act, 1962 (hereinafter referred to as the 'said Act'). A show cause notice was issued under Section 28 of the said Act, providing for recovery of duties not levied or short-levied or erroneously refunded, for any reason other than collusion or any wilful mis-statement or suppression of facts. In substance, there were really two grounds for the show cause notice:

> (a) that the appellant, knowingly, did not declare the brand of imported goods, and undervalued the same with the intent of evading customs duty;
>
> (b) that the appellant had imported the branded goods from its related party, and had undervalued the same to evade customs duty.

3. The aforesaid proceedings, as noticed, resulted in an adverse order against the appellant by the authorities, resulting in the imposition of differential duty of about Rs.9.53 lakhs for the consignment in question, and around Rs.1.23 crores for the past consignments. The goods were held liable for confiscation, and were ordered to be released on payment of redemption fine**,** with the levy of Rs.13 lakhs penalty imposed on the Directors of the appellant (appellants in CA No.3138/2018 & CA No.3139/2018). A perusal of the order shows that the valuation of the goods had been made under Rule 7 and Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred to as the 'said Rules'). It is this very method of valuation which is sought to be assailed by the appellants on a reasoning that the scheme of the Rules has not been correctly understood and implemented by the competent authority. In order to appreciate the contention of the appellants in the context of the Rules, we proceed to discuss the scheme of the Rules.

4. It is appropriate to first refer to the definition clauses under Rule 2, where, the expressions 'identical goods' and 'similar goods' are defined as under:

A "**2. Definitions.-**

(1) In these rules, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx

(d) "identical goods" means imported goods –

B (i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;

(ii) produced in the country in which the goods being valued were produced; and

C (iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the

D buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;"

....

E "**2. Definitions.-**

(1) In these rules, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx

(f) "similar goods" means imported goods –

F (i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

G (ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or

H

sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;"

5. Rule 3 provides for the value of imported goods to be the transaction value adjusted in accordance with the provisions of Rule 10. In cases where buyers and sellers are related, as alleged in the present case, the transaction value can be accepted if the relationship did not influence the price. We reproduce the relevant extracts as under:

"**3. Determination of the method of valuation.-**

xxxx xxxx xxxx xxxx

(3) (a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price,

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time.

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods:

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of rule 10 and cost incurred by the seller in sales in which he and the buyer are not related;

(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

(4) <u>if the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9</u>"

(<u>emphasis supplied</u>)

A 6. It is, thus, important to note that Rule 3(4) clearly provides that the scheme of Rules 4 to 9 is to operate "sequentially".

7. Rule 4 deals with the transactional value of identical goods, which reads as under:

B "**4. Transaction value of identical goods. –**

(1)(a)Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued;

C Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(b) In applying this rule, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

D (c) Where no sale referred to in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, adjusted to take account of the difference attributable to commercial level or to the quantity or both, shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

E

F (2) Where the costs and charges referred to in sub-rule (2) of rule 10 of these rules are included in the transaction value of identical goods, an adjustment shall be made, if there are significant differences in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

G

(3) In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods."

H 8. The aforesaid Rule envisages that the transaction value of identical goods imported at the same time as the goods valued, can be

applied. It is, of course, clarified that they should be substantially of the same quantity, as there can be variation in pricing, depending on the size of the consignment. In case identical goods sold are not found in respect of the same quantity, different quantities of identical goods can be taken into account, with adjustments made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracies of adjustment. The difference in distance, having implication on the transport cost, is another factor mentioned under the Rules. It is lastly clarified that the lowest of such value is to be used to determine the value of the goods.

9. On identical goods not being available, we have to turn to Rule 5, which is transaction value of similar goods. Rule 5 reads as under:

"**5. Transaction value of similar goods.-**

(1)Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued:

Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of rule 4 shall, *mutatis mutandis*, also apply in respect of similar goods."

10. In case determination is not possible under Rules 3 to 5, the determination would have to be made under the provisions of Rule 7 or Rule 8, as per Rule 6, provided that, at the request of the importer, the order of application of Rules 7 and 8 could be reversed. Rule 7 refers to Deductive Value, while Rule 8 refers to Computed Value. The relevant portions of Rule 7 & Rule 8 read as under:

"**7. Deductive value.-**

(1) Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India, in the condition as imported at or about the time at which the declaration for determination of value is presented, the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in

A the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions : -

xxxx xxxx xxxx xxxx

(2) If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, the value of imported goods shall, subject otherwise to the provisions of sub-rule (1), be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of ninety days after such importation.

C (3) (a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India.

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1)."

E "**8. Computed value.-**

Subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of:-

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;

F (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;

G (c) the cost or value of all other expenses under sub-rule (2) of rule 10."

11. In order to complete the reference to the Rules, for their understanding, we refer also to Rule 9, which reads as under:

H

"**9. Residual method.-**

(1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;

Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of this rule on the basis of :-

(i) the selling price in India of the goods produced in India;

(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;

(iii) the price of the goods on the domestic market of the country of exportation;

(iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;

(v) the price of the goods for the export to a country other than India;

(vi) minimum customs values; or

(vii) arbitrary or fictitious values."

12. In the context of the aforesaid, it is the submission of learned counsel for the appellant that the factual matrix of the present case shows that the twenty one consignments (including the one directly in question) were not imported from one source, but three different sources. Out of the three different sources, the competent authority came to the conclusion that the import from United Kingdom, from M/s. Inspired Lighting Limited, is liable to be construed as import from a related party.

A Though this is sought to be disputed by the appellants, but even assuming that to be correct, it was contended that there were imports available from two other sources, from China and Spain. These suppliers are not found to be related parties. Thus, the pricing from these two sources, with requisite adjustments for the distance or any other parameter, could always be taken as the transactional value for all the goods forming part B of the twenty one consignments.

13. A further explanation offered on behalf of the appellants, in respect of the second aspect, i.e., non-declaration of the brand 'Diyas' and 'mAntra', pertaining to the consignments in question, was that the brands were not so well-known as to make a difference to the value. In C fact, for the import from China, the brand 'Diyas' had been clearly mentioned. The consignments had been cleared after physical verification. In effect, the plea was that the two brands really do not attract any intrinsic market value.

14. It is a submission that the sequential application of Rules, thus, D required the valuation to be done in accordance with Rules 3 to 5, before proceeding to the subsequent Rules, and it is not a case where valuation was not possible under Rules 3 to 5.

15. As an alternative submission, it was also pleaded that even where identical or similar goods are not available, data is available, of E the value of the goods in the National Import Database ('NIDB') or the Department of Valuation database ('DOV').

16. In a nutshell, the submission really is that the valuation was possible on the basis of import from the other two countries if the brand was to be given some significance, and in the alternative, if the plea was F accepted that the brand was not of any significance, then the other imports from the U.K. of the same kind of lights could be taken into consideration. It was clarified that the endeavour was not to compare oranges and apples, but to compare apples of a particular variety with the apples of the same variety, i.e., if it was one lamp light, it was to be compared with G one lamp light. In this behalf data was available.

17. We may notice there were certain other pleas advanced, including the plea of limitation, but that is not of much significance for re-determination, on account of the conclusion we are reaching hereinafter.

H

18. We must first take note of the fact that electrical decorative lightings, normally, are not highly branded products, exceptions apart. It does appear that even though the imports were under the brand names 'Diyas' and 'mAntra', they were not trademarks of such nature as would make them an exclusive product. It also appears that there has been some mix up in the understanding of a trademark protection, as the same has been compared with 'patented goods'. Thus, data was certainly available, which could have been utilised to obtain the pricing for imports from the U.K., of identical goods or similar goods.

19. The irony is that if the competent authority thought that these were goods where trademark was of significance, it could not simultaneously have ignored the imports under the same trademark, from different countries, where there were no related parties. Naturally, there would have to be made adjustments for the distance from which the import was made, or the size of the consignment, if applicable, as set out in Rules 3 to 5. There was really no occasion to straightaway proceed to determine the transactional value by relying on Rules 7 to 9. We have no doubt this principle of sequential application would apply, especially in view of sub-Rule (4) of Rule 3, which provides that there has to be a sequential implementation of the Rules, i.e., that Rules 3 to 5 would have to be exhausted first, and only in the eventuality of an inability to apply the Rules would the assessing authority proceed to impose Rules 7 to 9.

20. Learned counsel for the respondent did endeavour to persuade us that since there were concurrent findings, this Court ought not to interfere, given the scope of appeal before this Court under Section 130E(b) of the said Act, and referred to the judgment in ***Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. & Others***[1], where it was observed as under:

> "9. ..... The decision of such a question of fact must be arrived at without ignoring the material and relevant facts and bearing in mind the correct legal principles. Judged by these yardsticks the finding of the Tribunal in this case is unassailable. We are, however, of the view that if a fact finding authority comes to a conclusion within the above parameters honestly and bona fide, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question, in our opinion, is no

[1] 1988 Suppl. SCC 796

A ground to interfere with that finding in an appeal from such a finding. In the new scheme of things, the Tribunals have been entrusted with the authority and the jurisdiction to decide the questions involving determination of the rate of duty of excise or to the value of goods for purposes of assessment. An appeal has been provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted bona fide with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 130-E of the Act."

21. We are, however, not persuaded by this argument because there appears to be a fundamental mistake committed in the manner of implementation of the statutory Rules. Once the statutory Rules exist and provide for sequential implementation, the assessing authority has no option but to proceed in accordance with those Rules, in that manner. We did put this squarely to learned senior counsel for the respondent, who really could not persuade us, or give a satisfactory answer as to why the concerned authority chose to ignore, in the given facts of the case, Rules 3 to 5, and did not proceed "sequentially".

22. The result of the aforesaid discussion is that both, the order of the Principal Commissioner of Customs (Preventive), Customs, New Delhi, dated 30.3.2017, as well as the order of the CESTAT, dated 6.11.2017, are liable to be set aside, and the matter remitted back to the Principal Commissioner of Customs (Preventive), Customs, New Delhi, to proceed afresh with the matter in accordance with our observations aforesaid, and thus, it is Rules 3 to 5 which would have to be applied first, as it is provided for the Rules to apply "sequentially".

23. We make it clear that since we have not gone into other pleas sought to be raised by the appellant, all pleas can be raised by the

appellant, as are available to the appellant in law, and the same will be dealt with on merits. A

24. The appeals are accordingly allowed, leaving the parties to bear their own costs.

B

Ankit Gyan Appeals allowed.