Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 433-434 OF 2006

M/s. Gira Enterprises & Anr. …Appellants

Versus

Commissioner of Customs, Ahmedabad …Respondent

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O R D E R

These are statutory appeals filed under Section 130(E) of the Customs Act, 1962 from the judgment and order dated 23.8.2005, passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. C/791 & 792/03/Mum.

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2. The appellants imported two consignments of "2-4-6 Tricloro 1-3-5 Triazine" aggregating 74.10 MT from China under two Bills of Entry, the cost of which is declared by the appellants to be SG $ 750/- PMT equivalent to US $ 500/- PMT. The goods were provisionally assessed and allowed clearance on 17.9.1994.

3. Subsequently, a show cause notice dated 25.9.2000 came to

be issued to the appellants by the Commissioner of Customs, Gujarat at Ahmedabad calling upon the appellants to show cause why certain action indicated therein cannot be taken against the appellants. The relevant portion of the show cause notice is as follows:-

> "Therefore, M/s. Gira Enterprises, Ahmedabad are hereby called upon to show cause to the Commissioner of Customs, Ahmedabad as to why:
>
> (I) the provisionally assessed Bills of Entry (as per Annexure 'A') should not be finalised after taking in value of US $ 1860.00 PMT CIF.
>
> (ii) The differential duty of Rs.31,53,833/-(as per Annexure 'A') should not be recovered under Section 18(2) read with Section 28(2) of the Customs Act, 1962.
>
> (iii)The goods which are liable for confiscation under Section 111(m) of the Customs Act, 1962 should not be confiscated and why fine in lieu of confiscation should not be imposed as goods has already been cleared provisionally against Bond for test and value verification.
>
> (iv) Penalty should not be imposed on M/s. Gira Enterprises, Ahmedabad under Section 114A/112(a) of the Customs Act, 1962.
>
> (v) Interest under Section 28AB of the Customs Act, 1962 should not be recovered."

4. It is also stated in the show cause notice that the goods imported by the appellants were subjected to a test in the Central Excise & Customs Laboratory, Baroda. According to the show cause notice, the chemical name of the goods was verified and it was found to be "Cyanuric Chloride" as known in the International

market. It is further stated in the show cause notice that on the basis of certain information obtained through a computer print out from the Customs House, Mumbai, the Commissioner of Customs, Gujarat noticed that a large number of Cyanuric Chloride(100) import transactions (between the months of June 1994 to November 1994) took place and the cost of the unit price in each one of those imports was US $ 1950/- PMT(CIF) as against the value declared by the appellants of US $ 500/- PMT.

5. The appellants filed a detailed reply dated 11.12.2000 wherein they disputed their liability to make any further payment as indicated in the show cause notice. The appellants also took a specific stand that a copy of the computer print out which formed the basis of show cause notice had not been supplied to the appellants.

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6. Eventually, the concerned Assistant Commissioner finalised the assessment by valuing the imported goods at US $ 1860/- PMT by an order dated 31.3.2001.

7. Aggrieved by the same, the appellants herein carried the matter in an appeal to the Commissioner of Customs(Appeals). By an order dated 8.8.2001, the said appeal was allowed wherein the

appellate authority recorded “the method of determination of the assessable value as per Rule 5 lacks specific evidence, therefore, the same is not legal and proper”.

8. Revenue carried the matter in further appeal before the Customs, Excise and Gold (Control) Appellate Tribunal. By an order dated 15.2.2002, the said Tribunal remitted the matter back to the Commissioner (Appeals). On such remittance, the Commissioner (Appeals) upheld the order of the Assistant Commissioner confirming the enhancement of the value at US $ 1860 PMT CIF. Again, the matter was carried by the appellants to the Customs, Excise and Service Tax Tribunal unsuccessfully. By an order dated 23.8.2005, which was impugned in the instant appeal, the appeal of the appellants herein was dismissed by the Tribunal.

9. It is argued on behalf of the appellant that the assessment and demand of the customs duty on the basis of the valuation of the goods at a price much higher than what was declared by the appellant to be the price paid by the appellant is without any basis in law, without any legally admissible evidence and opposed to the principles of natural justice as the only material relied upon by the Revenue i.e. copy of the alleged printout was not supplied to the appellant. Therefore, the appellant had no means of knowing as to

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whether any imports of comparable nature were made at the relevant point of time.

10. On the other hand it is argued by the Revenue that the impugned order calls for no interference.

11. Section 12 of the Customs Act, 1962 mandates that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975(51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India. Undisputedly, the goods imported by the appellants are goods which are assessable to Customs Duty under Entry 2942 of the First Schedule of the Customs Tariff Act, 1975. It is also not in dispute that the duty is an ad valorem duty. Section 14 of the Customs Act stipulates the method and manner of the valuation of the goods which are exigible to duties under the Customs Tariff Act and assessable to ad-valorem duty.

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12. Section 14 reads as follows:-

> "Valuation of goods for purposes of assessment. –
>
> (1) For the purposes of [the 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 the price at which such or like goods are ordinarily sold**, or offered for sale, for delivery at the time and place of importation of exportation, as the case maybe, 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 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;]

1 *
[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.]

2...

3..."

13. It can be seen from Section 14 that the value of the imported goods is "deemed to be the price at which such goods are ordinarily sold, or offered for sale ......". The Section further stipulates that such price of the imported goods is to be determined in accordance with the rules made in that behalf.

14. The Government of India made rules known as Customs Valuation (Determination of the Price of Imported Goods) Rules, 1988. Rule 3(i)[1] stipulates that for the purpose of the rules, the value of the imported goods shall be the transaction value. Rule 3(ii)[2] provides that where the value of the imported goods cannot be determined under Rule 3(i) then the same is to be determined in accordance with the various methods of determination (of the value

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[1] **3. Determination of the method of valuation** – For the purpose of these rules-
(i) the value of imported goods shall be the transaction value.

[2] (ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these Rules.

of the goods) provided under Rules 5 to 8 sequentially.

15. The expression "transaction value" is defined under the Rule 2(f) of the Customs Valuation(Determination of Price of Imported Goods) Rules, 1988 as follows:-

> 2(f) "transaction value" means the value determined in accordance with Rule 4 of these rules."

16. Rule 4(1) stipulates as follows:-

> "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."

17. Sub-rule (2)[3] stipulates that the transaction value of the imported goods shall be accepted subject to the various exceptions specified in the said Section, the details of which many not be necessary for the present purpose.

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[3] (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.

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule(3) below.

18. In substance, Rule 5 stipulates the next alternative procedure for determining the value of the imported goods and it reads as follows:-

> **5. Transaction value of identical goods** –
>
> (1)(a) Subject to the provisions of Rule 3 of these rules, 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.
>
> (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.
>
> (c) Where no sale referred to in clause (b) of sub-rule (1) of this rule, 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.
>
> (2) Where the costs and changes referred to in sub-rule(2) of Rule 9 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.
>
> (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."

19. In substance, Rule 5 enables the Revenue to determine the value of the imported goods on the basis of the identical imported goods of comparable import transaction. Such a procedure/course

of action is authorized notwithstanding the mandate of Rule 4(2) that the transaction value shall be accepted. Obviously, such an alternative mode of valuation is authorized as Rule 4 declares that the transaction value of the imported goods shall be the "price actually paid or payable". Necessarily the rule implies the need of determination of the price actually paid or payable.

20. It is not necessary that in every case of import the importer declares the price actually paid by him or payable by him. Therefore, if in a given case the Revenue notices identical goods have been imported by other importers in comparable transactions at a different rate (normally higher rate) then Revenue is enabled by Rules 5 to reject the valuation made by the importer and determine the "price actually paid or payable" by the importer.

21. In the case at hand, no doubt the revenue claims to have some information based on certain alleged imports made at the Bombay port at the relevant point of time that the import in question took place. According to the revenue, those imports at Bombay were declared and valued at a much higher rate than the value declared by the appellants herein. Therefore, the valuation of the goods imported by the appellant was found unacceptable. Hence, the procedure under Rule 5 was resorted to.

22. However, the respondent(revenue) did not supply the information (alleged computer print out) which formed the basis of the conclusion that the appellants herein under-valued the goods imported. In such a situation, the appellants obviously cannot and did not have any opportunity of establishing that the claim of the revenue is unsustainable in law. If the information which formed the basis for the Revenue to reject the appellant's valuation is supplied to the appellants, the appellants perhaps will have an opportunity to dispute the comparability of the import transactions allegedly contained in the computer printout on various counts may not be possible to catalogue.

23. The appellants, of course, admit that the goods imported by them are known commercially as 'Cyanuric Chloride' as specified in the show cause. Whether Cyanuric Chloride was imported at the relevant point of time by others in comparable transactions, i.e., is "a sale at the same commercial level and in substantially the same quantity" etc. is a matter to be considered on the examination of the material relied upon by the Revenue. A reasonable opportunity must be given to the appellant to demonstrate (if at all) that the transactions relied upon by the Revenue are not comparable transactions.

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24. In the absence of any material produced by the Revenue in proof of the alleged comparable imports at a higher value, the impugned order which eventually confirmed the original order of assessment by the Assistant Commissioner of Customs dated 31.3.2001 cannot be sustained for two reasons – (1) the mere existence of an alleged computer printout is not proof of the existence of comparable imports; (2) assuming such a printout exists and the contents thereof are true, the question still remains whether the transaction evidenced by the said computer printout are comparable to the transaction of the appellant. The appellant will have to be given reasonable opportunity to establish (if he can) that the transactions are not comparable.

25. The impugned order and the original assessment order are therefore, set aside. However, it will be open to the respondent(revenue) to proceed against the appellants herein pursuant to the show cause notice dated 25.9.2000 in accordance with law.

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26. The appeals are allowed accordingly.

…………………………….J.
(J. Chelameswar)

…………………………..J.
(A.K. Sikri)

New Delhi;
August 21, 2014

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