M/S. SIDDACHALAM EXPORTS PRIVATE LTD. A

v.

COMMISSIONER OF CENTRAL EXCISE DELHI-III

(Civil Appeal No. 810 of 2007)

APRIL 1, 2011 B

[D.K. JAIN AND H.L. DATTU, JJ.]

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988: rr.4 to 8 – Valuation of goods – Allegation that value of goods entered for exportation was C *wrongly declared and thereby undue drawback amounts claimed by exporter – Department sought for market opinion regarding the value of goods – Held: The procedure prescribed u/s.14(1) of Customs Act and particularized in r.4 has to be adopted to determine the value of goods entered* D *for exports – Ordinarily, the price received by the exporter in the ordinary course of business is to be taken to be transaction value for determination of value of goods under export, in absence of any special circumstances indicated u/s.14(1) and r.4(2) – The initial burden to establish that the* E *value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect, lies on the Department – Therefore, once the transaction value u/r.4 is rejected, the value must be determined by sequentially proceeding through rr.5 to 8 – In the instant case, neither the* F *adjudicating authority nor the CESTAT dealt with the matter as per the procedure prescribed under the Act – At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Department erroneously resorted to a market enquiry –* G *Matter remitted to adjudicating authority for consideration afresh – Customs Act, 1962 – ss.14(1), and 114.*

Customs Act, 1962: s.130E(b) –Scope of – Discussed.

 H

A The case of Revenue was that the appellant-exporter misdeclared the value of goods entered for exportation and claimed undue drawback amounts. The authorities drew samples of the goods and forwarded the same to one M/s. Skipper for their opinion regarding their market B value. On 12.3.2003, one 'P' claiming to be an authorized representative of M/s. Skipper submitted the valuation letter opining that the goods in question were export surplus and export rejected garments having poor quality of fabric and market value of said goods ranged between C Rs.40 to Rs. 70 per piece. Based on the said report, the custom authorities arrived at the total value of the consignments and the admissible drawback of Rs. 3,56,328 as against the claim of Rs. 49,57,536. The appellant was issued a notice to show cause as to why the drawback amount should not be reduced/disallowed D and penalty under Section 114 of the Customs Act be not imposed on it. On 7.12.2004, 'P', the authorized signatory of M/s. Skipper submitted another letter to the Commissioner (Adjudication Bench) stating that their earlier letter dated 12.3.2003 should not be relied upon for E any purpose in as much as the same was prepared by the Customs authorities, and he was merely asked to transcribe his signature on the same. It was further stated that he was neither shown any goods nor any documents. On 14.12.2004, the exporter replied to the F show cause notice denying all the allegations contained therein. The exporter also questioned the authenticity of the report dated 12.3.2003 submitted by M/s Skipper. The Commissioner dropped the proceedings against the exporter, and allowed the drawback as claimed by the G exporter. The CESTAT allowed the appeal of Revenue and also levied a penalty of Rs.5 lakh each on the exporter and its Director respectively. The instant appeal was filed challenging the order of the CESTAT.

H

Allowing the appeal and remitting the matter to the adjudicating authority, the Court

HELD: 1. It is trite law that the amplitude of an appeal under Section 130E(b) of the Customs Act, in relation to the rate of duty of customs or to the value of goods for the purposes of assessment, is very wide but it is equally well settled that where the CESTAT, a fact finding authority, has arrived at a finding by taking into consideration all material and relevant facts and has applied correct legal principles, the Supreme Court would be loathe to interfere with such a finding even when another view might be possible on same set of facts. Nevertheless, if it is shown that the conclusion under challenge is such as could not possibly have been arrived at by a person duly instructed upon the material before him i.e. the conclusion is perverse or that the CESTAT has failed to apply correct principles of law, the Supreme Court is competent to substitute its own opinion for that of the CESTAT. The decisions of both the authorities below were unsustainable. Neither the Commissioner nor the CESTAT has examined the issue before them in its correct perspective and as per the procedure contemplated in law for determination of the value of the goods for exportation. [Paras 14 and 15] [706-E-H; 707-A-B]

Nanya Imports and Exports Enterprises vs. Commissioner of Customs, Chennai (2006) 4 SCC 765; *Varsha Plastics Private Limited and Anr. vs. Union of India and Ors.* (2009) 3 SCC 365; *M/s. Builders'Association of India vs. State of Karnataka and Ors.* (1993) 1 SCC 409 – referred to.

2. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) rules, 1988 has to be adopted to determine the

A value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods
B under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect, lies on
C the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. [Para 16] [707-C-E]

Commissioner of Customs (Gen), Mumbai vs. Abdulla
D *Koyloth* JT 2010 (12) SC 267 – relied on.

3. In the instant case, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT has dealt with the matter as per the procedure
E prescribed under the Act. At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of contemporaneous exports of identical
F goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the Commissioner and interestingly he,
G acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said concern. Observing that in the absence of any other independent evidence relating to market enquiry,
H

there was no other corroborating evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated by show cause notice. Similarly, it is manifest from the CESTAT's order that revenue's appeal was accepted mainly on the ground that report of M/s Skipper was worthy of credence and the exporter had failed to produce any evidence to establish that export value stated in the shipping bills was the true export value. Both the said authorities have failed to apply the correct principles of law and therefore, their orders cannot be sustained. [Para 19] [709-B-G]

Om Prakash Bhatia vs. Commissioner of Customs, Delhi **(2003) 6SCC 161;** *Bibhishan vs. State of Maharashtra* **(2007) 12 SCC 390 – referred to.**

Case Law Reference:

(2006) 4 SCC 765	**Referred to**	**Para 12**
(2009) 3 SCC 365	**Referred to**	**Para 12**
(1993) 1 SCC 409	**Referred to**	**Para 13**
JT 2010 (12) SC 267	**Relied on**	**Para 16**
(2003) 6 SCC 161	**Referred to**	**Para 17**
(2007) 12 SCC 390	**Referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 810 of 2007.

From the Judgment & Order dated 14.09.2006 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. C/893/05.

Ramji Srinivasan, D.P. Mohanty, Somanadri Goud, Zeyaul Haque (for Parekh & Co.) for the Appellant.

A Rashmi Malhotra, Sunita Rani Singh, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Challenge in this civil appeal, under
B Section 130-E(b) of the Customs Act, 1962 (for short "the Act"), is to the judgment and order dated 14th September, 2006 delivered by the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT") whereby it allowed the appeal preferred by the revenue, the respondent herein. Consequently,
C the customs duty drawback (Rs. 49,75,536/-) claimed by the appellant under the scheme of duty drawback, incorporated in Chapter X of the Act, read with Customs and Central Excise Duties Draw-back Rules, 1995 (as amended) got disallowed on the ground of mis-declaration of value of the goods entered
D for exportation.

2. The facts, material for adjudication of the present appeal, may be stated thus:

The appellant viz. M/s Siddachalam Exports Pvt. Ltd.,
E (hereinafter referred to as "the exporter") was engaged in the exports of ready-made garments, engineering goods, handicrafts, woollen garments, leather goods, etc. On 24th February, 2003, the exporter filed seven shipping Bills (Nos.J-903000127-129 and J-903000131-134) for export of goods
F declared as 'ladies tops' valued at Rs. 390/- per piece and 'denim shirts' valued at Rs.417/- per piece consigned to one M/s Zao Jainyo Overseas, Moscow, Russia at a total FOB value of Rs.4,14,63,360/-. The exporter claimed a duty drawback of Rs.49,75,536/-.

G

3. Based on secret information that the afore-mentioned goods had been over-valued with the intention of claiming undue draw-back amounts, customs authorities carried out 100% examination of the consignment on 26th February, 2003;

H

drew samples, and forwarded the same to one M/s Skipper International for their opinion regarding their market value.

4. On 27th February, 2003, Mr. Sanjeev Jain, director of the exporter company was also examined, and in his statement recorded under Section 108 of the Act he stated that the goods covered by the shipping bills were not manufactured by his company, but were supplied by one Mr. Gupta. Payments to Mr. Gupta in respect of the goods were made through cheques. He, however, did not remember the address or contact number of Mr. Gupta. Mr. Jain also stated that the goods covered by the seven shipping bills were purchased @ Rs.150/- to Rs.350/- per piece, however, he had not seen the invoices for the same.

5. Vide letter dated 5th March, 2003, the exporter requested for provisional release of the goods on execution of bond and bank guarantee. On 12th March, 2003, one Pankaj, claiming to be an authorised representative of the said M/s Skipper International submitted his valuation letter, opining that samples of 'ladies tops' and 'denim shirts' were export surplus and export rejected garments having poor quality of fabric and stitching, and the market value of the said goods ranged between Rs. 40/- to Rs. 70/- per piece. Based on the said report, the customs authorities formed the opinion that the total value of the consignments was Rs. 56,04,000/- as against the declared FOB value of Rs. 4,14,63,360/- and the admissible drawback should be Rs.3,56,328/- as against the claim of Rs.49,57,536/-. The consignments in question were seized under Section 110 of the Act. However, subsequently the goods were released provisionally on execution of bond and bank guarantee by the exporter.

6. On 11th September, 2003, Assistant Commissioner of Customs (SIIB), ICD, Tughlakabad, New Delhi issued a show cause notice to the exporter, inter-alia, alleging that the FOB value of the goods covered under the seven shipping bills had been grossly mis-declared by artificially inflating it, thereby

A rendering them liable for confiscation under Sections 113(d) and/or (i) of the Act. The exporter was asked to show cause as to why the draw back on goods covered under shipping Bills No. J903000134 and J903000129 dated 24th February, 2003 should not be reduced to Rs. 3,56,328/-; draw back amounting B to Rs. 29,90,280/- on goods covered under the remaining shipping bills should not be disallowed, and penalty under Section 114 of the Act should not be imposed on the exporter.

7. On 7th December, 2004, the said Pankaj, authorised C signatory of M/s Skipper International submitted another letter to the Commissioner (Adjudication Bench) stating that their earlier letter dated 12th March, 2003 should not be relied upon for any purpose in as much as the same was prepared by the Customs authorities, and he was merely asked to transcribe his signature on the same. It was further stated that he was D neither shown any goods nor any documents.

8. On 14th December, 2004, the exporter replied to the show cause notice denying all the allegations contained therein. The exporter also questioned the authenticity of the report dated E 12th March, 2003 submitted by M/s Skipper International.

9. The Commissioner of Central Excise, Delhi-III adjudicated on said show cause notice vide Order-in-Original dated 31st January, 2005. Relying on the decisions of the F CESTAT, wherein the market enquiries conducted by the revenue in the absence of and without notice to the exporter had been held to be invalid, the Commissioner dropped the proceedings against the exporter, and allowed the draw back as claimed by the exporter. The Commissioner held as follows:

G "In the light of above decisions of Hon'ble Tribunal, I find that the enquiry conducted from M/s Skipper International, in the absence of and without any notice to the exporter company or its Director, cannot be assigned any evidential weightage as it does not depict if the identical garments H had ever been purchased by M/s Skipper International for

the given prices. So, being the evidence and the relevant law, it has to be held that there had been indeed no market enquiry to establish the present market value. Further, Mr. Pankaj, authorized signatory of M/s Skipper International, has retracted his statement he made in his certificate dated 12.03.2003 by which he had given present market value of the samples shown to him.

In view of this conclusion, and in the absence of any other independent evidence relating to market enquiry, I fail to find corroboration from any other independent evidence as far as the aspect relating to the present market price and inflating of FOB value are concerned."

10. Being aggrieved, the Revenue preferred an appeal before the CESTAT. As afore-mentioned, the CESTAT, vide the impugned judgment, has allowed the appeal filed by the Revenue, observing thus:

"9. We find merit in the appeal of the revenue. The basic issue in this case was whether the declared export prices were mis-declarations on account of being over-valuation of the goods under export. The second issue was whether the Present Market Value of the consignments were as indicated by M/s Skipper International, thereby denying draw back amount. While the defence of the respondent is that the export price has been realized, the declared value remains entirely unsubstantiated. The opinion of M/s Skipper International, who saw the samples is based on the observation that "these samples of Ladies Tops and Denims Shirts are export surplus and export rejected garments having poor Quality of fabric and stitching". There is no contest raised against the finding regarding poor quality of fabric and stitching. It is upon this finding that M/s. Skipper International reached the conclusion that the garments were 'export rejects'. The valuation was also on that basis. Instead of contesting the factual position noted about the samples, the exporter has chosen to attack the

competence of the opinion giver. This is not acceptable for two reasons. The first is that the quality of stitching and fabric would be evident to any one familiar with garment trade and cannot be ruled to be beyond the ken of an export surplus dealer. There is no rocket science involved in as certainly quality of fabric or stitching of a garment. Therefore, the attack on the opinion giver is entirely misplaced. It is also because the opinion itself is not flawed. Secondly, M/s Skipper International was dealing in (sic.) export surplus garments, therefore, it had expertise in the market valuation of such goods. If fabric and stitching are of poor quality, certainly, the items would not be having the price of prime quality export garments as declared by the exporter.

10. Another entirely unacceptable aspect in the appellant's conduct is that it has refused to place on record the material which it should be in possession of to substantiate the values declared. The appellant is a merchant exporter and has purchased the garments, valued over `4 crores from the market. It is to be expected that the appellant would have taken care to place the order for the goods on competent manufacturers or traders along with proper specification regarding material, make, and size and those manufacturers or traders would give the appellant proper invoices and other documents. Instead of producing such evidence, it has chosen to state that procurement is through one illusory Gupta, whose particulars are not known to the appellant. Such abnormal vagueness can only be attributed to an effort to cover up inconvenient facts. It is well settled that a person in the possession of clinching evidence on an issue in dispute cannot hope to succeed by withholding that evidence. Therefore, the Commissioner was clearly in error in faulting the revenue for relying upon the opinion of M/s Skipper International and not carrying out investigations on the lines indicated by Shri Jain. The particulars supplied by Shri Jain were not reliable at all and

was intended only to mislead. Further, issuance of some cheques is no satisfactory evidence about the correct value of the consignments."

Accordingly, the CESTAT confirmed the reduction of draw back claim in case of consignments covered by Shipping Bill Nos. J-903000134 and J-903000129 to Rs. 3,26,328/- and denial of draw back claim amounting to Rs.29,90,280/- in relation to other consignments as contemplated in the show cause notice dated 11th September, 2003. The CESTAT also levied a penalty of Rs. 5 lakhs each on the exporter and its Director, Mr. Sanjeev Jain, respectively.

11. Hence, the present appeal by the exporter.

12. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the exporter, while assailing the impugned judgment, contended that the Revenue has failed to discharge the onus placed on it in as much as it has failed to establish that the exporter had mis-declared the value of the export goods as was held in *Nanya Imports & Exports Enterprises Vs. Commissioner of Customs, Chennai*[1]. Learned counsel contended that the show cause notice was vitiated as it was based solely on the opinion of the said Pankaj, authorised signatory of M/s Skipper International, who had not even examined the goods in question. Learned counsel asserted that the procedure for determining value of goods has to be in terms of Sections 2(41) and 14 of the Act, read with Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (for short "the 1988 Rules"). Relying on *Varsha Plastics Private Limited & Anr. Vs. Union of India & Ors.*[2], learned counsel argued that the 1988 Rules having been framed to maintain uniformity and certainty in the matter of valuation of goods, which is a matter of procedure, these Rules have to be adhered to strictly. It was also contended that the

1. (2006) 4 SCC 765.
2. (2009) 3 SCC 365.

A CESTAT has erred in law in levying penalty on Mr. Sanjeev Jain who was not even made a party to the appeal filed by the Revenue.

13. Per contra, Ms. Rashmi Malhotra, learned counsel
B appearing on behalf of the Revenue strenuously urged that the impugned judgment deserves to be affirmed, and the CESTAT rightly did not consider the effect of retraction by M/s Skipper International, as the same was not dealt with by the Commissioner as well. Learned counsel urged that the exporter
C cannot be allowed to urge this ground at this stage, as the same was not raised by it before the CESTAT. In support of the contention, decision of this Court in *M/s Builders' Association of India Vs. State of Karnataka & Ors*[3]. was pressed into service. According to the learned counsel, since the retraction was tendered after twenty one months of the
D submission of original report, it had lost its efficacy and, therefore, had no bearing on the authenticity of the report.

14. It is trite law that the amplitude of an appeal under Section 130E(b) of the Act, in relation to the rate of duty of
E customs or to the value of goods for the purposes of assessment, is very wide but it is equally well settled that where the CESTAT, a fact finding authority, has arrived at a finding by taking into consideration all material and relevant facts and has applied correct legal principles, this Court would be loathe
F to interfere with such a finding even when another view might be possible on same set of facts. Nevertheless, if it is shown that the conclusion under challenge is such as could not possibly have been arrived at by a person duly instructed upon the material before him i.e. the conclusion is perverse or that the
G CESTAT has failed to apply correct principles of law, this Court is competent to substitute its own opinion for that of the CESTAT.

15. Having bestowed our anxious consideration to the facts

H 3. (1993) 1 SCC 409.

at hand, we are constrained to observe that the decisions of both the authorities below are unsustainable. In our opinion, neither the Commissioner nor the CESTAT has examined the issue before them in its correct perspective and as per the procedure contemplated in law for determination of the value of the goods for exportation.

16. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the 1988 Rules has to be adopted to determine the value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. (See: *Commissioner of Customs (Gen), Mumbai Vs. Abdulla Koyloth*[4].)

17. In *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi*[5], while dealing with a similar case of fraudulent drawback claim by deliberately over-invoicing ready-made garments, this Court rejected the plea of the exporter that Section 113(d) of the Act was not applicable to the facts of that case as the goods were not prohibited goods; (ii) the exporter was required to declare the value of the goods expected to be received from the overseas purchaser and not the market value of such goods in India and (iii) since in that case, no duty was payable on the export, Section 14 of the Act could not be applied to determine the value of the goods. It was, inter-alia, held that the definition of "prohibited goods" in Section 2(33) of the Act indicates that if the conditions prescribed for import

A or export of the goods are not complied with, it would be considered to be "prohibited goods". It was held that for determining the export value of the goods, it is necessary to refer to the meaning of the word "value" as defined in Section 2(41) of the Act and the same must be determined in B accordance with the provisions of sub-section (1) of Section 14 of the Act. The Court observed thus:

> "...For determining the export value of the goods, we have to refer to the meaning of the word "value" given in Section 2(41) of the Act, which specifically provides that value in C relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14.
>
> ....
>
> D Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and E the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to F be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly G stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported."

18. The opinion expressed in *Om Prakash Bhatia* (supra) H has been reiterated by this Court in *Bibhishan Vs. State of*

Maharashtra[6]. It has been held that the definition of "prohibited goods" in the Act is a broad one and the said provision not only brings within its sweep an import or export of goods which is subject to any prohibition under the Act, but also any of the law for the time being in force.

19. In the present case, as stated above, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT has dealt with the matter as per the procedure prescribed under the Act. At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of contemporaneous exports of identical goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the Commissioner and interestingly he, acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said concern. Observing that in the absence of any other independent evidence relating to market enquiry, there was no other corroborating evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated vide show cause notice dated 11th September 2003. Similarly, it is manifest from the CESTAT's order that revenue's appeal has been accepted mainly on the ground that report of M/s Skipper International was worthy of credence and the exporter had failed to produce any evidence to establish that export value stated in the shipping bills was the true export value. In our opinion, both the said authorities have failed to apply the correct principles of law and therefore, their orders cannot be sustained.

20. Resultantly, for the reasons as enumerated, the appeal

A is allowed; the orders passed by the CESTAT and the Commissioner are set aside and the matter is remitted back to the adjudicating authority for fresh consideration in accordance with law, after affording adequate opportunity of hearing to the exporter. The entire exercise, in terms of this B order, shall be completed within six months from the date of receipt of a copy of this judgment. Needless to add that we have not expressed any opinion on the merits of the opinion rendered by M/s Skipper International or on the conduct of the exporter in not adducing any evidence in support of the export C value stated in the shipping bills in question.

21. In the facts and circumstances of the case, the parties are left to bear their own costs.

D.G. Appeal allowed.