
(2023) 04 CESTAT CK 0049

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No.10122, 10122 Of 2014

Ghasiram Gokulchand And Others

APPELLANT

Vs

C.C-Jamnagar

RESPONDENT

Date of Decision : 28-04-2023

Acts Referred:

Customs Valuation Rules, 1988 — Rule 2(f), 3(1), 4, 4(1), 4(2)
Customs Act, 1962 — Section 14, 14(1), 14(1A), 14(2), 18(1)
Sale Of Goods Act, 1930 — Section 26, 32, 37, 40, 42, 64A(1)
Indian Contract Act, 1872 — Section 62

Citation : (2023) 04 CESTAT CK 0049

Hon'ble Judges : Raju, Member (T);Somesh Arora, Member (J)

Bench : Division Bench

Advocate : Rahul Gajera, Bina D. Jani

Final Decision : Allowed

Judgement

Raju, Member (T)

1. These appeals have been filed by Ghasiram Gokulchand and Ghasiram Gokalchand Ship Breaking Yard against finalization of provisional assessment under section 18(1) of the Customs Act, 1962.

2. Learned Counsel for the appellant pointed out that the vessel M.V. Montevideo arrived at the Alang Shipyard on 07.11.2012. An MoA dated 05.11.2012 was entered between M/s Ace Exim Private Limited (seller) and M/s Alang Auto & General Engineering Company Private Limited (Buyer) for purchase of vessel at USD 17,28,000/- and LDT declared in the said MoA was 4999.20 MT. The said ship was boarded on 09.11.2012 by Customs officers and entry inward was granted on the same day. During boarding of the vessel, the surveyor M/s Pinnacle Marine Services reported that the LDT of the vessel was 4999.20 MT. The said survey report also reported presence of approximately 575 MT of cement concrete stored on the ship. Another survey was conducted by Murlidhar Shenvi Insurance Surveyors and their report dated 18.11.2012 ascertained the

weight of cement concrete as 507 MT.

2.1 On 22.11.2012 the appellant entered into a MoA with Ace Exim Private Limited (seller) for purchase of said vessel for the purpose of demolition / breaking up @ US \$ 15,90,930/-. The said MoA determined the LDT of vessel as 4999.20 less 507 MT cement concrete and net LDT of 4485.20.

2.2 On 24.11.2012 the IGM filed was amended with a name of new buyer.

2.3 The Appellant sought clearance of the goods at USD 15,90,930/-appearing in the MoA dated 22.11.2012 between Ace Exim Private Limited and the appellant. The Revenue assessed the goods on the basis of MoA dated 05.11.2012 entered between Ace Exim Private Limited and the earlier buyer namely Alang Auto and General Engineering Company Private Limited of USD 17,28,000/-. The provisional assessment was finalized at transaction value of USD 17,28,000/- mentioned in the MoA dated 05.11.2012 rejecting the value declared by the appellant of USD 15,90,930/- agreed on the MoA between the appellant and the Ace Exim Private Limited vide MoA dated 22.11.2012. The appeal filed by the appellant before Commissioner (Appeal) was rejected. Aggrieved by the said order, the appellants are in appeal before Tribunal.

2.4 Learned Counsel relied on the decision of Hon'ble Apex court in case of Chaudhary Ship Breakers 2010 (289) ELT 161 (SC) in which it has been held that the factum of actual payment of price in terms of agreement between parties cannot be ignored while determining the value of vessel under Section 14 of the Act. Reliance was placed on the decision of Tribunal in the case of Jai Bharat Steel Industries 2005

(192) ELT 792 which was upheld by the Hon'ble Apex Court as reported in 2016 (340) ELT A 138 (SC). Learned Counsel argued that sine the transaction value is available under Rule 4(1) of the Customs Valuation Rules then there is no question of determination in any subsequent rule. He further argued that the genuineness of MoA dated 22.11.2012 has not been doubted by any authority and therefore, the value prescribed therein should be accepted as the transaction value for the purpose of

assessment. He also relied on the decision of Hon'ble Apex Court in the case of Rai Metal Works 2010 TMI 160 SC to assert that the cases where genuineness of agreement between parties was not questioned by Revenue the price declared in the agreement has to be accepted.

3. Learned Authorize Representative relies on the impugned order. He relied on the following decisions:

- Malvi Ship Breaking 2009 (233) ELT 360 (Tri.Amd)
- Lucky Steel Inds. 2006 (201) ELT 510 (Tri Mum)
- Gujarat Ship Trading 2005 (182) ELT 429 (Trim Mum)

- Orjet Intermediates P.L. 2016 (344) ELT 366 (Tri. Amd.)

4. We have considered the rival submissions. We find that in the instant case, after inspection, a variation in net LDT was noticed. The original MoA mentioned LDT of 4999.20 MT and the MoA entered between the appellant and Ace Exim Private Limited contains net LDT as 4485.20MT. In the case of Chaudhary Ship Breakers (supra) Hon'ble Apex Court has observed as follows:

"13. At the outset, we may note that the decision of the Tribunal in *Atam Manohar* (supra) was questioned by the revenue before this Court in Civil Appeal No. 146 of 2004 [2009 (233) E.L.T. 145 (S.C.)]. While allowing the appeal and setting aside the order of the Tribunal primarily on the ground that the addendum was a self-serving document, the Court observed thus:

"We may also point out that in this case we are basically concerned with the genuineness of the addendum to the MOA dated 13th April, 1999. If one looks at the said addendum, we find that the date on which the said addendum stood executed is not given. Further, when did the addendum stand incorporated in the MOA. We do not find the date on which the clause stood inserted in the MOA. Further, the said addendum does not give any reason for reduction in the price from US \$ 9,70,960.23 to US \$ 8,70,960.23. Further, the most clinching factor to be seen is that the said addendum appears to have been executed at the request of the buyer. In our view, this is a self-serving document. In this connection, it may also be noted that the MoA dated 13th April, 1999 states that the vessel is bought on "as is where is" basis. If that be the case, we do not know on what basis the value of the vessel stood reduced from US \$ 9,70,960.23 to US \$ 8,70,960.23. Lastly, it is stated on record that one of the items was not in a working condition and by way of damages, the price stood reduced. It is not so stated in the addendum. If it is the case of damages, then, surely it would have been so stated in the addendum."

14. It is manifest that the Court expressed the view that where the price of the vessel had been reduced by way of an addendum to the original agreement, the acceptance of the revised price would depend on the genuineness of the said addendum. In other words, the Court laid greater emphasis on the genuineness or otherwise of the addendum and not on the factum of absence of a provision in the original agreement for reduction of price for the reasons stated in the addendum, as held in the case of *Guru Ashish Ship Breakers* (supra), relied upon by the Tribunal in the present case.

15. According to Section 14(1) of the Act, assessment of customs duty under the Customs Tariff Act, 1975 is to be made on the value of the goods imported. Unless the value of the goods is fixed under the sub section (2) of Section 14, the value has to be determined under sub-section (1) of the said Section. The value, as per Section 14(1), as it stood prior to its amendment with effect from 10th October 2007, 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 in the course of international trade. The word "ordinarily" is clarified in the Section itself, which describes an "ordinary" sale as one "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...". According to Section 14(1A) price of imported goods is to be determined in accordance with the Rules framed in this behalf. Under Rule 3(1) of the 1988 Rules, the value of the imported goods shall be the "transaction value". Transaction value has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1), in turn, states that "the transaction value of the 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." It is clear from a conjoint reading of Rule 3(1) and Rule 4(1) that the adjudicating authority is bound to accept the price actually paid or payable for the goods as the transaction value, except where exceptions enumerated in Rule 4(2) are attracted, which is not the case here. It is, therefore, manifest that both Section 14(1) and Rule 4 provide that in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2) of the 1988 Rules, the price paid by an importer to the seller in the ordinary course of commerce is to be taken as the transaction value for the purpose of valuation of goods.

16. Having regard to the afore-stated legal position, the controversy at hand narrows down to the question whether the transaction value of the vessel is to be price mentioned in the original MOA or the reduced price indicated in the addendum. We are of the opinion that in light of the statutory provisions, the factum of actual payment of the price in terms of the addendum cannot be ignored while determining the value of the vessel under Section 14 of the Act. We may, however, hasten to add that in such a situation the genuineness and the necessity of reduction in the price are required to be scrutinised very carefully.

17. As afore-stated, in the instant case, the Tribunal has not examined the genuineness of the addendum, and has proceeded to reject the appeal of the appellant on the short ground that there was no provision for price variation in the original MOA. We may, however, add that the Commissioner (Appeals) did examine the cogency of the reasons for price reduction though he was not convinced to accept the same."

From the above it is quite apparent that so long as the transaction value is real and there are reasons for any change in the transaction value and the MoA is genuine then the price declared therein should be accepted.

5. In the case of Jai Bharat Steel Industries reported in 2005 (192) ELT 792 relied upon by the learned Counsel in para 13 to 15 following have been observed:

"13. Memorandum of Agreement in all these cases reflected the terms of the contract. The addendums by which the stipulation of the reduced price was substituted in the Memorandum of Agreement briefly recorded the reasons for

such reduction. The reduction in price was done, as observed above, before the delivery was taken. The terms of the Memorandum of Agreement indicated in all these cases that the title in the ship was to pass on delivery thereof to the buyer. To illustrate, in Clause 6 of the Memorandum of Agreement dated 28-10-97 in the case of The Bharat Ship Breakers Corporation, it was stipulated :-

"The vessel with everything belonging to her shall be at sellers' risk and expenses until is delivered to the buyers, but subject to conditions of this contract. The vessel with everything belonging to her shall be delivered and taken over as she is at the time of delivery, after which the sellers have no responsibility for possible faults or deficiencies of any description, as the sale purchase is definite and outright and without inspection of the vessel and is only (subject Sic?) to the condition of MOA and description of the vessel as per clause 18."

13.1 Various provisions in the MOAs deal with the physical delivery of the vessel right from issuing notice in advance as to when it is expected to arrive at the port of delivery, till the actual delivery, on as is where is basis "complete virtually intact with everything on board" including the items specified. Provisions are made for breaking the vessel at buyer's risk and expense after delivery against the release of the purchase price in accordance with the terms of the letter of credit to the sellers, so as to enable them to instruct their agents at the port of delivery as well as the Master of the vessel for providing the beaching assistance. The buyers had an option to cancel the agreement or to seek appropriate reduction in the purchase price in the event of the vessel suffering marshal damage due to any reason before delivery. If the buyers were not able to open the letter of credit or to take delivery in the manner specified due to any of the reasons stated in the MOA over which they had no control, the agreement was to be considered as null and void and the letter of credit was to stand immediately released to the buyers.

13.2 Thus, delivery of the vessel was of paramount importance and it is evident, from the stipulations of the MOA in all these matters, that the title in the ship passed at time of its delivery to the buyer. These arrangements are in consonance with the provisions of Section 26 of the Sale of Goods Act, 1930, that unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. They are also in consonance with Section 32 which provides that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. Under Section 42 of the said Act, the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. A buyer has a right to examine the goods

under Section 40 where he has not previously examined them and he is not deemed to have accepted them unless and until he had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. If a wrong quantity of goods is delivered and the buyer who had option to reject them, accepts the goods so delivered, he shall pay for them at the contract rate (Section 37). Therefore, in cases where the goods are not offered at the place of delivery as per the description in the agreement, there would arise a scope for negotiating for a reduced price, if different from the contract price, if the buyer chooses not to reject them and conveys it to the seller of the desire to accept them at the negotiated price. Thus, the price fixed in the MOA, though ordinarily binding on the parties, is not inflexible and is subject to any change that the parties to contract may mutually agree.

13.3 As provided by Section 3 of the Sale of Goods Act, 1930, the provisions of Indian Contract Act, 1872 would apply to such transactions. Section 62 of the Contract Act provides that if the parties to the contract agree to substitute a new contract or to rescind or alter it, the original contract need not be performed. This means that if the parties have agreed to a different price than the one which was stipulated in the original contract, the buyer cannot be compelled to pay the price originally stipulated after the parties have mutually agreed to substitute a reduced price by altering the original contract. Apart from the parties mutually altering the price stipulated in the original contract by novatio there is also a statutory provision contained in Section 64A(1) of the Sale Goods Act, 1930 which contemplates increase or decrease in contract price depending upon the variation in the duty of Customs or Excise on goods [Section 64A(2) of Sale of Goods Act].

14. It is thus clear that that the price originally fixed in the MOA was not inflexible and it could be varied by mutual agreement of the parties to the contract. In other words, the parties were free to negotiate the price originally fixed and bring about a variation in the original contract in which event they will not be held bound to the terms of the original contract and the altered terms will now bind them. In the facts of the present appeals, all the reductions in prices have been made in writing signed by both the parties to the original contract and there is no doubt expressed against the genuineness of such addendums nor is there any material on record on the basis of which the validity of the addendums can be doubted. It is recorded in the addendums that the reduced price was mutually agreed upon between the sellers and buyers for the reasons mentioned in the addendums. In some cases, the purchase price was reduced because differences and discrepancies were noticed in the vessel which was described in the MOA.

15. The fact that the vessels were sold on "as is where is basis" did not preclude the parties from varying the price originally stipulated by mutual agreements. It appears that before the delivery was taken discrepancies and excess removals

etc. were noticed and on negotiation the prices were reduced by mutual agreement, as reflected in the addendums executed by both the parties bringing about the alterations in the original contract while retaining all other terms and conditions thereof. It was before taking of the delivery that the buyers could have exercised their right to reject the goods if they were not as per the specifications stipulated in the memorandum of agreement. The "as is where is basis" clause did not preclude them from examining the vessel to find out whether they were really being delivered the ship on "as is where is" basis described in the MOA. The particulars which were given about the vessel in the MOA, were required to be verified notwithstanding clause "as is where is" clause and if discrepancies/removals were found in those particulars, their option to reject the goods was not taken away by such a clause. In other words, what was agreed to be supplied on "as is where is" basis, was required to be delivered on that very, "as is where is" basis. The reduction in price cannot, therefore, be faulted by reference to the "as is where is" clause and there was no embargo on the parties to bring about an alternation in the price of the goods in question notwithstanding with such clause."

6. The Revenue has relied on the decision of the Tribunal in the case of Great Eastern Shipping Co. Ltd. (*supra*). It is seen that the said decision relates to the relevant date for determination of rate of duty and tariff valuation. In the said case, it has been held that the rate of duty and tariff valuation applicable on date of entry inward would apply. It is noticed that in the instant case, there is no tariff valuation involved but it is valuation on the basis of transaction value and thus in the said decision it is not applicable to the facts of this case. In the case of Lucky Steel Industries (*supra*) relied on by the Revenue in para 17 following has been noted:

"17. In a nut-shell it is held that any reduction in price mutually agreed upon by the parties to the contract prior to the date of import will be relevant and taken into consideration for the purpose of determining assessable value under Section 14 of the Customs Act, 1962. However, if there is any variation in price after the date of import the same shall not be relevant for the purpose of determining assessable value under Customs Act unless the reduction is on account of facts that the goods are not the ones which have -been contracted for or that there has been serious breach of the terms of the contract which makes the contract void/voidable. In the latter case the new/reduced price under the new/revised contract will be admissible, provided its in conformity with the value as defined under Section 14 of the Customs Act read with the Valuation Rules."

It is seen that the acceptance of original declared price is dependent on the fact that there is no variation in the nature of goods which had been contracted. In the instant case, it is seen that the LDT of the goods appearing in the original MoA is different from the LDT mentioned in the later MoA in these circumstances, the decision of Tribunal in the case of Lucky Steel Industries may not be applicable.

7. Similarly in the case of Malvi Ship Braking (supra) relied on by the Revenue, it has been clearly held that there was no discrepancy in the list of items agreed upon and the items actually reported as seen from the surveyor report. The fact in the instant case is different and therefore, the said decision also has no applicability in the instant case.

8. In the instant case, we find that the genuineness of the MoA dated 22.11.2012 has not been doubted. It is also noted that the LDT mentioned in the MoA dated 05.11.2012 between Ace Exim Pvt. Ltd. and Alang Auto & Gen. Engg. Pvt. Ltd. was not found to be correct when the surveyor boarded vessel. The MoA dated 22.11.2012 contains a different a LDT which is lower by 507 MT. In these circumstances, we hold that the decision of Hon'ble Apex Court in the case of Chaudhary Ship Breakers (supra) will apply. Since the new MoA dated 22.11.2012 has not been found to be incorrect or fabricated and there was variation in the specification of the goods imported, the Revenue cannot reject the price mentioned in the MoA dated 22.11.2012. In view of the above, we do not find any merit in the impugned order. The same is set aside and appeal is allowed.