IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM APPEAL NO.57 OF 2018

Oberoi Realty Limited … Appellant

V/s.

The Commissioner of Customs (Import) … Respondent

WITH
CUSTOM APPEAL NO.60 OF 2018

Oberoi Realty Limited … Appellant

V/s.

The Commissioner of Customs (EP), Mumbai-II. … Respondent

Mr.Prakash Shah with Mr.Jas Sanghavi with Ms.Divyasha Mathur i/by Mr.Anil Balani for the Appellant.
Mr.Pradeep S. Jetly for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : NOVEMBER 28, 2018.

P.C.:-

1. These appeals involve the similar issue, though individual facts may be somewhat different. We may, therefore, record the facts in both the appeals.

2. Custom Appeal No.57 of 2018 is filed by one Oberoi Realty Limited to challenge a judgment of the Customs, Excise and

Service Tax Appellate Tribunal ("Tribunal" for short), Mumbai dated 13th December, 2017. The appellant intended to import polished marble slabs. At the relevant time, the Import-Export Policy of Government of India provided under notification dated 30th June, 2008 that the marble blocks or tiles would be free for import provided CIF value was US dollars 50 and above per square meter. In other words, import of marble blocks or tiles whose CIF value was below USD 50 would not be free to import and would be subjected to licensing condition.

3. It is not in dispute that the assessee imported a consignment of marble blocks and filed bills of entry declaring its value at 38.45 USD per square meter and assessable value of Rs.66,84,065/-. At the time of clearance of the goods the assessee agreed to pay customs duty on the notional valuation of 50 USD per square meter of the blocks. The adjudicating authority was of the opinion that the assessee had breached the conditions of import of the goods. He, therefore, while confiscating the goods offered redemption fine of Rs.22 lakhs. He also imposed the penalty of Rs.5 lakhs on the assessee.

4. The assessee carried the matter in appeal before the Tribunal. By the impugned judgment the Tribunal allowed the appeal to the limited extent of reducing the penalty to Rs.3 lakhs. The rest of the appeal was dismissed.

5. In case of Custom Appeal No.60 of 2018 similarly the same assessee had imported marble slabs and filed the bill of entry declaring the value at 38.47 USD per square meter and the total assessable value of Rs.47,45,239/-. Here also the import was hit by the notification dated 30th June, 2008. Here also the assessee offered to pay customs duty on the value of the slabs treating it's value as 50 USD per square meter. In the present case, the Adjudicating Authority ordered confiscation, offered redemption fine of Rs.13 lakhs and penalty of Rs.4 lakhs. In appeal the Tribunal however granted substantial relief to the assessee. Taking into consideration overall facts and circumstances of the case, the Tribunal reduced the redemption fine from Rs.13 lakhs to Rs.5 lakhs and penalty from Rs.4 lakhs to Rs.1 lakh.

6. With the consent of the learned Advocate for the parties, we have heard both the appeals finally at this stage. Learned counsel for the assessee in both cases submitted that there was no malafide intention on the part of the assessee in making the imports. The Government of India policy in any case did not prohibit import of the goods. If the assessee had obtained a license, the import of the marble valued less than CIF value of 50 USD would also have been permitted. The assessee, therefore, had paid the customs duty on the valuation of 50 USD per square meter. In absence of malafides, therefore, confiscation of goods and imposition of penalty was not permissible.

7. Learned counsel further pointed out that in Appeal No.57 of 2018 the Commissioner had proceeded on erroneous basis that in the letter dated 16th January, 2009 the assessee had disclosed that the marble slabs would be sold at Rs.240 to 260 per square foot. He pointed out that in the letter dated 16th January, 2009 the assessee had not made any such disclosure. The Commissioner proceeded to estimate the sale value of the marble at Rs.3,000/- per square meter on such basis and thereafter, computed the

redemption fine taking into account the profit element embedded in the import of the sale of the marble. Learned counsel additionally pointed out that the imported marble was not for sale, but for home consumption by the assessee. He further argued that under similar circumstances in Appeal No.60 of 2018 the Tribunal had reduced the redemption fine and penalty both to considerable extent.

8. On the other hand, learned counsel Mr.Jetly for the Department opposed the appeals contending that the Commissioner and the Tribunal have concurrently held that the assessee had made imports and the offer for paying the customs duty on the notional value was only in order to circumvent the restrictions of the import of the marble costing less than 50 USD per square meter. He, therefore, submitted that both appeals may be dismissed.

9. Having heard learned counsel for the parties and having perused documents on record, we see no reason for entertaining Custom Appeal No.60 of 2018. Broad facts are not seriously in

dispute. When the assessee imported marble slabs, the commodity was placed in a list of free import only as long as the CIF value was above 50 USD per square meter. Admittedly, the marble imported by the assessee was valued substantially below the said figure. The assessee's offer to pay customs duty on higher valuation was only for the purpose of bypassing the requirement of the notification. The Tribunal considering overall facts and circumstances of the case and has already given substantial relief to the assessee in the form of reduced redemption fine and penalty. No further discretionary relief would be justified.

10. In Customs Appeal No.57 of 2018, however, though back-ground facts are similar the ultimate treatment that the Tribunal granted to the assessee is somewhat different. We are, though for the reasons already recorded, find no error in the Commissioner and the Tribunal ordering confiscation of goods or even imposition of penalty. Only question is quantum of redemption fine and penalty. We may recall the Commissioner had taken the profit element as a yardstick for quantifying

redemption fine. This position according to the Commissioner emerged from the letter dated 16th January, 2009 written by the assessee. A copy of this letter is produced on record. This letter no where declares that the assessee would sell the imported marble or that the market value is between Rs.240 to 260 per square foot. Infact, the assessee pointed out the marble was not for sale at all. That being the position, we see no good reason why the yardstick adopted by the Tribunal in Custom Appeal No.60 of 2018 should not be applied to the present case also, of-course after making suitable modifications looking to the comparative value of imports. We have compared the value of the imports in both cases and the redemption fine and penalty confirmed by the Tribunal in Appeal No.60 of 2018. Going by the same yardstick and applying the valuation of the import in Appeal No.57 of 2018 and arriving at a round figure, we reduce the redemption fine to Rs.9 lakhs and penalty to Rs.1 lakh. Appeal No.60 of 2018 dismissed. Appeal No. 57 of 2018 allowed in part in above terms.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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