

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 01.08.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No. 1744 of 2018

Commissioner of Customs,
Chennai III Commissionerate,
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.

... Appellant

Vs.

M/s. Hine Hydraulics India Pvt. Ltd,
Survey No.6/15, 30th Feet Road,
Off Vanagaram Road, Ayanamakkam,
Chennai-600 094.
Tamil Nadu.

... Respondent

Prayer : This Civil Miscellaneous appeal is filed under section 130 of Customs Act, 1962, against the final order No.41817 of 2017 dated 16.08.2017 passed by the Honourable Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgment of the Court was delivered by SUBRAMONIUM PRASAD, J.)

Civil Miscellaneous Appeal directed against the final order No.41817 of 2017 dated 16.08.2017 passed by the Honourable Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. The respondent is an importer of hydraulic components like valves, pumps and filter etc., for the manufacture of hydraulic systems for wind industries, from their related group companies which are outside the country. The Customs Authorities, Chennai, prima facie found that the petitioner (importer) and the Foreign Supplier are related under Rule 2(2) of the Custom Valuation (Determination of Valuation of

Imported Goods) Rules 2007. The file was forwarded to SVB Custom house Chennai with the approval of the Commissioner of Customs - imports Chennai. Based on above reference and as per Board's circular No.11/2001 dated 23.01.2001 the case was registered in SVB and circular No.27/2011 - SVB dated 01.06.2011 was issued for provisional assessment of the imports with 1% extra duty deposit and the importers was requested to send their reply to the standard questionnaire along with supporting/ relied upon documents within 30 days from the date of issue of the circular. Replies were sent. The assessing authority by his order dated 21.12.2012, passed the following order:-

"The Importer M/s. Hine Hydraulics (I) Pvt Ltd, Chennai and the foreign supplier M/s.Hine Renovables & S.L.Spain, M/s.Hine Lang Fang, China, M/s.Hine Do Brasil, M/s.BP Hydraulics, UK, M/s.Hydraulics Corp,PMC, USA are related in items of rule 2(2) of Customs Valuation (Determination of value of Imported Goods) Rules,2007.

The declared invoice value of the valves,pumps, filters, manifolds, cylinders etc., and also electrical parts like connectors, glands, electric motors etc, for manufacture of hydraulic systems for the wind industries shall be accepted as transaction value under Rule 3(3)(A) of Customs Valuations (Determination of Value of Imported Goods) Rules, 2007 with check and scrutiny and adjustment and additions under rule 10(2) ibid. However, if contemporary imports at higher price are noticed, groups shall evaluate the goods under appropriate provisions. Of customs valuation rules, 2007.

The importer should make annual declarations to the undersigned regarding any change in mode of invoicing of items of agreement and relationship with the foreign collaborator.

The decision shall remain in force till the present method of invoicing remains unchanged. Any change affecting the invoice value materially, be informed to this branch suo-motu by the importer without delay.

The above decision has been taken on the basis of statements and declaration made by the importer. However, if there is any change in the method of invoicing, terms of relationship or any other material facts that would affect the valuation of goods under Customs Valuation Rules,2007 read with section 14(1) of Customs Act 1962, the importer or the concerned assigning group may inform the same to the Special Valuation Branch immediately so as to enable review of the decision in force. The imports thereafter will be assessed provisionally with Extra Duty Deposit equivalent to 1% of the assessable

value. In case, there is nay factual error or commission, the same may be brought to the notice of this office suo-motu by the importer without delay.

This order does not take in to account any suppression or mis-declaration affecting the invoice value, which shall be dealt with appropriately under the law and procedure as and when noticed.

The decision shall be reviewed as and when information additional or contrary to whatever furnished is brought to the notice of the branch.

This decision is subject to periodical review after a period of 3 years. To facilitate the prompt and timely review, the imports shall come forward with necessary data before expiry of 3 years period.

This order is operative for 3 years. On expiry of 3 years period, if no renewal is done, the order will stand expired and the assessing groups shall resort to provisional assessment with EDD equivalent 1% of assessable value.

All pending provisional assessment shall be finalized accordingly."

3. Being aggrieved, the department filed an appeal under section 129 of the Customs Act 1962, before the appellate authority. The appellate authority, set aside the order of the Adjudicating Authority and send the matter back, to the Adjudicating Authority, by observing as under:-

"From the impugned order it is seen that the Indian Company (respondent) is 100% subsidiary of Hine Renovables & SL Spain and is legally and operationally controlled by the supplier. Further it is seen that the respondent is a Spanish based company and have installed manufacturing unit in India in 2011 for manufacture of hydraulic systems, accessories and supply of the same to the wind turbine manufacturer, M/s. Gamesa India. They are the only global suppliers to Gamesa and are placed at Spain, China, Brazil, UK and US. Before their installation in India, direct supplies of assembled products have been made from their Parent Company in China. The price variation of the capital goods and components is because of the supply of assembled products to Gamesa. Whereas, the imports made by the Indian Company are SKD/CKD products which required some assembling process to make them a finished product.

It is clear from the above that it is not a simple valuation, investigation pertain to the respondent alone as they do manufacturing of hydraulic system, which is a part of wind turbine assembly and further supply the same to wind turbine assembly

manufacturer M/s.Gamesa India. It is also stated by the respondent that before setting up of manufacturing unit in India, the respondent supplied the complete hydraulic assembly from their parent company in China. Hence, the price at which such hydraulic assembly supplied by the parent company to Gamesa India then and the price at which such hydraulic assembly being supplied by the Indian Company to Gamesa India now should have been compared to ascertain the correctness of the selling price now, which the LAA did not do.

Article 19 of the "Material Supply Agreement" between the principal and Indian Company referred by the LAA states that "All payments to be made by buyer to supplier hereunder will be net of all taxes, however, designated and levied by any state, local or Government agency. With respect to applicable taxes that are imposed in a transaction of this type, including without limitation, withholding tax, buyer shall collect, report and pay to the relevant taxing authority and indemnify supplier for any liability relating to such taxes and charges" . From the above it is not clear whether the payments are to be made to the supplier based on each and every import invoice or in a consolidation manner after the sale of the manufactured goods. The wording "all payments will be net of all taxes" indicate that the payments may not be for individual purchases/supplies as the same will/shall not include the taxes leviable on the imported goods. If the above term indicates the payment to be made to the supplier on sale value of the manufactured article (net of taxes), which appears to be logically correct as per the above wordings, then the above said agreement in direct becomes the condition of sale of the imported goods.

Further the margin of profit was also not discussed by the lower authority which forms part of the Rule 3(3)(a) verification under CVR, 2007. Interpretative note to Rule 3(3)(a) of CVR 2007 states in this regard that where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period (e.g. annual basis) in sales of goods of the same class or kind, which will demonstrate that the price had not been influenced.

Another important aspect which the LAA overlooked is that M/s.Gamesa India to whom the respondent supplies the manufactured items is also covered under the SVB Investigation. While considering that investigation or after coming to know now about the respondent's supplies now, both investigation should

be looked in to to find out any influence in the pricing is there or not.

The objections raised by the department are very much valid and there is no discussion about the issues raised by the department in impugned order by the LAA. Hence, the department's objection in the grounds of appeal are justifiable.

In view of the above discussions and facts stated therein, I set aside the impugned order with the direction to the LAA to revisit the case in the light of the department's objection and the observation supra. Consequently, the department appeal succeeds".

4. The respondent filed a further appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in C/42680/2014. The Tribunal by its final order No.41817/2017 dated 16.08.2017, found that the order of remand by the Appellate Authority as unjustified.

5. The Tribunal found the Appellate authority has compared the prices of other producers like M/s.Gameasa and that the appellate authorities has come to a wrong conclusion. The Tribunal therefore, upheld the order of the original authority, which held that the price variation for capital goods and components, is because of the supply of assembled products to M/s.Gameasa Wind, whereas, the imports made by the appellant in SKD/CKD products, required some assembling process to make for the finished products.

6. The Tribunal also held that Article 19 of the agreement, appears only to be a standard clause to fix the liability for discharging Government tax and duties etc., and that it is not a condition for sale. The Appellate Tribunal also held that the grounds on which the appeal was remanded was not a part of the show cause notice nor was it raised in the appeal, filed by the department before the Appellate Authority.

7. A perusal of the impugned order does not show any perversity in the same. The Tribunal has analysed the entire facts as the final fact finalising authority and that cannot be said to be unreasonable or wrong. Article 19 of the Material Supply Agreement reads under:-

"All payments to be made by buyer to supplier hereunder will be net of all taxes, however, designated and levied by any state, local or Government agency. With respect to applicable taxes that are imposed in a transaction of this type, including without limitation, withholding tax, buyer shall collect, report and pay to the relevant taxing authority and indemnify supplier for any liability relating to such taxes and charges".

9. The conclusion arrived at by the Tribunal that Article 19 only mandates that the respondent will be liable to pay all the tax that will imposed on the transaction has nothing to do with the payment or a condition of sale is a possible view which does not require any interference. In view of the fact that the order of the Tribunal is not perverse and it is possible view, we are not inclined to interfere with the order of the Tribunal. The Civil Miscellaneous appeal is therefore dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

gsp/pkn

To

The Customs,
Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Chennai.

+lcc to Mr.Hari Radhakrishnan, Advocate, S.R.No.53311

+lcc to Mr.A.P.Srinivas, Advocate, S.R.No.52556

C.M.A.No.1744 of 2018

RJ(co)

rrs 06/09/2018

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