**Ganesh Overseas and ors. Vs. Cc**

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**SooperKanoon Citation** : sooperkanoon.com/28290

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** May-28-2002

**Reported in** : (2002)(82)ECC630

**Judge** : N T C.N.B., K Kumar

**Appellant** : Ganesh Overseas and ors.

**Respondent** : Cc

**Judgement** :
1. These three appeals arise from and are directed against a common order in original No. 30/Commr/99-APP dated 31.12.99 passed by the Commissioner of Customs, Gujarat, Ahmedabad.

2. The impugned order was passed in respect of the consignment (476753 pcs.) of different sub-models of Condenser Microphone WM-034. Upon a finding that the value of the Microphones had been mis-declared, the impugned order confiscated the goods for violation of the provisions of Section 111 (m) of the Customs Act. However, an option was given to the importer to redeem the microphones on payment of fine of Rs. 15 lakhs.

The order also enhanced the assessable value of the goods from Japanese Yen 0.75 per piece to US $ 0.1230 per piece for purpose of levy of customs duty and confirmed differential duty demand of Rs. 12,19,341.

Penalties were also imposed on the importing firm M/s. Shri Ganesh Overseas, its Proprietor Shri Tarak S. Shukla, Sh. Bhagavatiprasad Anil Kumar Vasant alias Ketan Vasant, Shri Harsh Anil Kumar Vasant alias Tikubhai Vasant and Shri Dilip A. Goplani.

3. The present appeal for the importer has been filed by Shri Ketan Vasant as Power of Attorney holder of Prasad Gaurishankar Shukla, successor-in-interest of Shri Tarak S. Shukla, after the demise of Shri Tarak S. Shukla. The prayer in the appeal is to accept the declared value for the purpose of assessment and to set aside the confiscation of the goods. There is no challenge to the penalty imposed on the firm and its Proprietor Shri Tarak S. Shukla as it has been stated that the penalty imposed on them has abated upon the death of Proprietor on 11.3.2000. The appeal has also sought quashing of the demand for interest. The other appeals are directed against the imposition of penalties on them.

4. Brief facts, relevant for the decision of the appeals are that M/s.

Shri Ganesh Overseas filed bill of entry No. 6859/98 dated 30.10.98 for clearance of a consignment of "electrical spare parts" before the Customs authorities at Air Cargo Complex, Ahmedabad. The goods were invoiced by M/s. Matsumoto & Co. Ltd., Japan. The invoice declared them as "ELECTRIC SPARE PARTS" condenser, Microphone" "M/s. Matsushita brand". The invoice also mentioned the sub-models and number of pieces, all of WM-034 model. According to the invoice the value of the consignment was Rs. 1,25,537 @ Japanese Yen 0.75 per piece. The consignment consisted of 16 sub-models. Details of the consignment are as under:- HONKOMAGOME BUNKYO-KU TOKY JAPAN Tokyo 12 Oct 1998SHIPPER : Matsumoto & Co., Ltd. MARKS & NOS Matsumoto Bldg. No. 563-Chome SHRI GANESN OVERSEAS 7399 Honkomagome Bunkyo-Ku Tokyo AHMEOABAD VIA MUMBAI Japan C/NO.1-25 G725, Shabri Aprt, Near Managemnet Enelave, Vasurpur, Ahmedabad, Gujarat 380015 (India) 101, Shiv Leela Apartment, Alibhai Premji Rd. Grant Rd. (B) Mumbai-400007SHIPPED : From Japanese Airport to Ahmedabad (Gujarat) Airport Via Mumbai Airport (India), Per Aircraf "XXXXXXXX" dated XXXXXXX B/L XXXXXXXXPAYMENT : D/A Bases of 45 days through your Banker's M/s. H.D.F.C. Bank Mlthakhalt, 6th Road, Ahmedabad (Gujarat) DESCRIPTION QUANTITY UNITPRICE AMOUNT

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5. The goods were seized by the Customs authorities based on information that they had been under-valued. During inquiries, Shri Tarak S. Shukla, Proprietor of the importing firm, which filed the bill of entry for the clearance of the goods, almost disowned the import and stated that he had not imported any consignment and that he had merely filed bill of entry as directed by Shri Ketan Vasant and that the entire negotiations and arrangement for the supply had been made by Shri Ketan Vasant and that he had been paid Rs. 90,000 by Sh. Ketan Vasant for filing papers and delivery of the goods from the Customs. He also stated that Shri Tikku Bhai Vasant had helped him to obtain delivery order from M/s. Lemuir Air Express.

6. The inquiries carried out by the Customs authorities showed that model WM-034 is for telephone and other applications. Enquiries with M/s. National Panasonic indicated that two of the models under import i.e. WM-034DH and WM-034CZ have been sold at the dealer price of Rs. 90 per piece by M/s. National Panasonic at Ahmedabad. Upon enquiry, M/s.

National Panasonic's representative also stated that WM-034 is the largest quantity microphone made in the world and the price of the series ranged from "US $ 0.15 per piece to US $ 0.20 per piece depending upon customer ordering quantity, specifications etc." They also clarified that "the suffix after WM-34 signify the series and the particular usage i.e. for general use or any specific use. Also pin type or non-pin type. It also signify the sensitivity of the microphone." It was further stated that "the price may change if the suffix change for a particular series as the customer requirement is very specific in accordance with circuit requirement the factory fix the price based on the qty." The enquiry also collected information about imports of microphones by the other parties in India. After the enquiry, notices were issued purposing to enhance the declared value for the purpose of assessment to custom duty, confis(sic)n of the goods etc. Even though the appellants contested the charges the adjudication proceedings culminated in the passing of the impugned order.

7. The revision of the assessable value to US $ 0.1230 per piece has been done in the impugned order based on the price of imports of M/s.

Matsumita brand sub-model WM-034 MZ by M/s. Webel Communications. The appeal objects to this on the ground that sub-model 034 MZ is not one of the sub-models under import in the present consignment and therefore its price cannot be treated as the value of comparable goods. The second objection is that the imports of M/s. Webel Communication are not comparable in time to the present consignment inasmuch as the two consignments imported by M/s. Webel were on 4.4.98 & 3.2.99. The learned Counsel for the appellant emphasized during hearing that Rule 8 of Customs Valuation Rules relied upon by the Commissioner for enhancing the value did not permit the application of the value of one variety of goods to the value of another variety of goods. The Counsel also relied on the decision of this Tribunal in the case ot Navnit V.Shroff v. Commissioner of Customs (ACC), Mumbai in support of this submission. It was also stressed during hearing that according to the evidence of M/s. National Panasonic, Ahmedabad (relied upon by the Departmental authorities itself) "suffix" after WM-034 signify the series and the particular user and the price may change if the suffix change for a particular series. It was also pointed out that prices may be determined based on the specific type required by customer. During the hearing of the case, learned Counsel for the appellant pointed out that model imported by M/s. Webel Communication was not one of the models mentioned in the product literature relied on the by the department. Nor is it one of the sub-models under import by the appellant. The learned Counsel, felt that that model would be specially made (customised) for Webel. He, therefore, submitted that the price of the Webel model could not constitute a reasonable basis for determining the value of the models under import as they are not comparable goods.

8. With regard to the imposition of penalties it has been submitted that the role played by Shri Ketan Vanant was only one of helping the importer in arranging the supplies, determining the sale price and there is no evidence that he had arranged for the supply of goods at mis-declared prices. As regards the role of Shri Tikkubhai Vasant it was submitted that he has only helped the appellant importer to get delivery of the goods from M/s. Lemuir Air Express and he was to help in

selling the goods at Delhi after clearance from customs. He had no involvement with the Customs clearance of the goods at all. Based on these facts, the learned Counsel submitted that Shri Ketan Vasant and Tikkubhai Vasant had not violated any customs provisions permitting the imposition of penalties on them.

9. The learned Counsel also submitted that no occasion for demand of interest has arisen in the present case since the goods had not been cleared at all. He also pointed out that the goods had been cleared under provisional assessment before they were seized and, therefore, there was no justification for their confiscation or imposition of penalty. He relied on the decision of this Tribunal in the case of S.Patnaik v. Commissioner of Customs in support of the submission that penalty is not imposable when the assessment was provisional. Learned Counsel's submission is that the goods should be released to the importer after assessing them to the Custom duty at the transaction value, since the charge of mis-declaration of value remains unestablised.

10. Learned SDR has contested the submissions made on behalf of the appellants. She has contended that this is a clear case of smuggling of goods by mis-declaring their value. She also pointed out that all the circumstances of the case pointed in that direction. The importer was benami, and the invoice was suspect. The entire imports and customs clearances were being managed by persons from behind the scenes and the importer had no connection with the import. His name was only being used by Shri Ketan Vasant and Tiku Bhai Vasant to get the undervalued goods cleared through customs. She submitted that in these circumstances, Customs authorities were right in rejecting the invoice value.

11. With regard to the valuation of the goods, learned SDR contended that it is clear from the literature on the goods that WM-034 model was used in telephone and the suffix only distinguished certain sub-models based on their features. All the same, it remains that WM-034 sub-models are similar. The appellant's submission regarding price variation depending upon the variation in sub-model, according to the learned SDR, is based only on the evidence tendered by M/s. National Panasonic. It is not based on any import data. Learned SDR emphasized that it was not open to the appellants to raise this argument since their own import

of 16 sub-models are being made without any price variation whatsoever depending upon sub-model. All the sub-models have been invoiced at the same price. The learned SDR pointed out that the Microphone imported by M/s. Webel Communication are also of WM-034 model. Therefore, going by the fact that the goods compared with are also similar goods, their price could be adopted for valuation. The learned SDR pointed out that the other option for the department was to assess the goods at the declared value, even though it is clear that the declared value is ridiculously low and the import is benami and the importer does not carry out his legal obligation of filing invoice and other documents in support of the declared value. Learned SDR relied on the decision of the Apex Court in the case of Commissioner of Customs v. Shivani Engineering Systems in support of her contention that the procedure adopted by the adjudicating authority in the present case could not be faulted. Learned SDR also pointed out that Rule 8 of the Valuation Rules permitted of reasonable flexibilty.

She referred to Note (2) to Rule 8 in support of this contention.

Learned SDR pointed out that the flexibility permitted under Rule 8 encompassed variation in country, variation in model etc. She also pointed out that the case of Navnit V. Shroff has no application to the present case inasmuch as in that case different prices were declared for different models while in the present case only one price has been declared for one model.

12. It is clear from a perusal of the records of the case and submissions made by both sides that in respect of goods in issue the importer has failed to discharge his responsibilities under Section 46 of the Customs Act. Sub-section (4) of that Section stipulates that the importer while presenting a bill of entry sha(sic) the foot of the bill of entry make a declaration as to the truth of its contents and shall in support of such declaration, produce to the proper officer invoice if any, relating to the imported goods Further, in terms of Rule 10 of Customs Valuation Rules, 1988, the importer is also required to furnish invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer. This rule also provides for requirement (or any other information, document etc. In the present case, instead

of produc(sic)atisfactory evidence in support of the declared value, the importer has disowned the transaction and has stated that he was only holding himself out as the importer at the behest of Shri Ketan Vasant who had arranged the import of the goods, and had paid the appellant for clearing the goods from customs. In these circumstances, the customs authorities were entirely justified in rejecting the declared value and invoice value. As to the correctness of the method adopted for valuation, it is not in dispute that the value adopted was of the same model of microphone. Even though much is being made of the evidence of M/s. National Panasonic that price of microphones varied depending upon the sub-model of the microphone, that evidence is no reason for rejecting the comparable value. The appellants themselves were importing a large consignment of about 5 lakhs pieces at a common unit value for different sub-models. There is no substance to the grievance that Webel imports were not contemporaneous. The appellant's Bill of Entry was filed in Nov. 98. The second import by Webel was within three months of this on 3^rdFeb. 99. Further, Webel's earlier import in April '98 was also at the same price. Therefore, the action of the Customs authorities in adopting the value of microphone imported by M/s. Webel cannot be faulted. A perusal of note to Rule 8 also makes it clear that that rule provides for flexibility in the application of the norms of the earlier Rules of Valuation. Finally, necessity has dictated the course resorted to by the Adjudicating authority. The value declared by the importer was ridiculously low. This is clear from the available records relating to import of various models, local sale price of similar model microphone (Rs. 90 per piece dealers price) etc.

The appellant's actions were clearly intended to defraud revenue by misdeclaring the value of the goods and to get them cleared by paying much less duty than due. The purpose of Sections 14, 111 and 112 of the Customs Act and Customs Valuation Rules is to prevent loss of revenue and to punish offending goods and persons. Therefore, the provisions relating to valuation have to be applied in order to serve that purpose. We are satisfied that in the peculiar facts and circumstances of the present case, the valuation carried out in the impugned order is reasonable, fair and just.

13. Coming to the penalties imposed on the appellants, it is clear that the real and de facto importer of the goods was Shri Ketan Vasant. M/s.

Ganesh Overseas and its Proprietor Shri Shukla had only filed papers with the customs as directed by him. In these circumstances, the adjudicating authority was right in holding him as the master mind behind the fraud and in imposing penalty on him. Shri Tikkubhai Vasant was also actively involved in getting the goods taken delivery of from M/s. Leimure Air Express and he was also to sell the goods after customs clearance in Delhi. Therefore, he was also clearly abeting the commission of the offence. Therefore, he was required to be penalized.

We do not find the redemption fine (Rs. 15 lakhs) or the penalties (Rs. 5 lakhs on Shri Ketan Vasant & Rs. 1 lakh on Tikubai Vasant) imposed also to be severe in the light of the market value of the offending goods (Rs. 3.21 crores), the duty sought to be evaded (over Rs. 12 lakhs) and the deliberate nature of the offence. We are also not able to accept the submission of the appellant that since the goods had been provisionally cleared it was not permissible to impose any fine or penalty and that this issue remains covered by the decision of this Tribunal. Section 18 relates to provisional assessment of goods. This Section applies to cases where some further information is required for the correct assessment of the goods. This section clearly has no application to a deliberate act of mis-declaration of value or to frauds. The decision of this Tribunal covers instances of provisional assessment made in terms of Section 18 and not cases involving deliberate mis-declaration of value of goods to evade payment of duty.

Therefore, that decision of the Triubnal has no application to the facts of this case.