IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2006

CORAM

THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN

W.P.No.23282 of 2006
and
M.P.No.1 of 2006

Pushpanjali Silk Private Limited,
represented by its Director,
Sanjiv Kumar Jhunjhunwala. ... Petitioner.

Vs.

1. The Chief Commissioner of Customs,
Custom House, No.60, Rajaji
Salai, Chennai - 1.

2. The Commissioner of Customs
(Port-Imports),
No.60, Rajaji Salai, Chennai-1.

3. The Assistant Commissioner of Customs
(GR. 3 & 4),
Custom House, No.60, Rajaji Salai,
Chennai-1. ... Respondents.

Petition filed under Article 226 of The Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the third respondent culminating in show cause notice No.SCN/GR3&4/529/2006 dated 07.07.2006 and quash the same and direct the respondents to release all consignments of Mulberry Raw Silk imported under Sales Contract No.IE/PSR-RS03/2005, dated 17.02.2005, in terms of the final order No.174/2006 dated 20.03.2006 of the Customs, Excise and Service Tax Appellate Tribunal, upheld by the Honourable Supreme Court on 10.07.2006.

For Petitioner : Mr. Habibullah Basha, Senior Counsel
for Ms.L.Maithili

For Respondents : Mr. V.T.Gopalan, Additional Solicitor
General, assisted by
Mr.T.S.Sivagnanam, SCGSC

O R D E R

By consent, the main writ petition itself is taken up for final disposal.

2. The petitioner is aggrieved by the third respondent's refusal to accept the declared value of the goods and the subsequent show cause notice, when the earlier identical show cause notice issued in respect of goods under the same contract has been set aside in appeal accepting the declared value.

3. The petitioner is a major importer of various varieties of raw silk through Chennai Port and has been importing huge quantities of silk from M/s. International Enterprises, Hongkong. The above purchases are made in terms of formal contracts entered into between the parties, wherein details such as total quantity of import, time limit for supply of contracted quantity, price, etc., are specifically stipulated. The goods covered under a single contract are supplied in several consignments within the time stipulated in the contract, which may extend to about a year. According to the petitioner, in view of the inherent volatility in the price of silk, it becomes necessary to fix the price for the entire contracted quantity and not leave it to the vagaries of market forces. Through negotiations, the price is fixed and stipulated in the contract itself. Therefore, notwithstanding the market price at the time of actual import, the parties to the contract are bound by the price fixed in the contract.

4. According to the petitioner, a sales contract was entered into on 17.02.2005 for supply of 2,22,000 Kgs of Mulberry raw silk of 3A and above grade. The price for the entire contracted quantity was fixed at USD 13.50 / Kg-CIF. Between 14.03.2005 and 29.08.2005, the petitioner received a total quantity of 163734.76 Kgs in 19 consignments for which separate Bills of Entry were filed. This constituted about 60% of the total contracted quantity. These Bills of Entries were finally assessed after enhancing the value to USD 13.94 / kG-CIF. Because of urgency for release of the consignments, the petitioner accepted the enhancement and cleared the goods. Under the same contract, the petitioner filed Bill of Entry No.875113 dated 15.09.2005 for clearance of 9095.10 kgs of Mulberry raw silk. This was not permitted to be cleared. While the petitioner was seeking release on provisional assessment basis, a show cause notice bearing No.(SEC.NO) SCN/ GR.3 & 4 / 7 / 2005 (MAIN NO) SCN / GR 3 & 4 / 470 / 2005 JOB NO.4602 / 2005 dated 29.11.2005 was issued to the petitioner seeking to enhance the value on the ground that there existed a higher contemporaneous price of USD 22.36 / Kg-CIF. This show cause notice was adjudicated upon by the third respondent by order dated 25.01.2006, rejecting the transaction value declared by the petitioner and fixing the value for the purpose of assessment at USD 22.36 / Kg-

CIF. This order was received by the petitioner on 27.01.2006. Challenging the above said order, an appeal was filed before the Commissioner of Customs (Appeals), who heard the matter on 06.02.2006. On 16.02.2006, in Appeal No.97 of 2006, the Appellate Commissioner set aside the order of the third respondent and allowed the appeal filed by the petitioner holding that the goods imported under the contract dated 17.02.2005 were required to be assessed on the basis of the value of USD 13.94 / Kg.CIF. Even after this order, the consignment was not cleared. The petitioner was informed that the goods were released provisionally with 50% Bank Guarantee for the differential duty between the unit price USD 13.5 / Kg. CIF and USD 22.36 / Kf. CIF. Thereafter, the petitioner moved this Court in Writ Petition No.5697 of 2006 to quash this communication dated 24.02.2006 and direct the release of goods in terms of the order of the Commissioner (Appeals). The writ petition was disposed of on 02.03.2006 directing the third respondent to release the goods in terms of order in Appeal No.97 of 2006 dated 16.02.2006 unless the department either decided not to file an appeal or failed to get an order of stay. The second respondent filed an appeal to the CESTAT. On 20.03.2006, the CESTAT rejected the appeal filed by the Revenue upholding the order of the Commissioner (Appeals) and held that the goods covered under the contract were required to be assessed at USD 13.94 per kg CIF. Again the respondents did not release the goods . They informed the petitioner that they would move the Supreme Court. Therefore, the petitioner moved this Court in W.P.No.9284 of 2006 seeking immediate release of the goods. This was disposed of directing the third respondent to follow unreservedly the order of CESTAT and to release the consignment in terms of the order of CESTAT dated 20.03.2006. The goods were released on 07.04.2006. The order passed by the CESTAT was challenged before the Supreme Court, which dismissed the civil appeal at the admission stage itself on 10.07.2006. While these proceedings were pending, the petitioner had made further imports under the same sales contract dated 17.02.2005 on various dates, the details of which are as follows:-

1. Bill of Entry No.882827 dated 28.09.2005.
2. Bill of Entry No.886036 dated 04.10.2005.
3. Bill of Entry No.897030 dated 24.10.2005.
4. Bill of Entry No.927999 dated 15.12.2005.
5. Bill of Entry No.940217 dated 05.01.2006.

In spite of the order passed by the CESTAT and this Court, the goods were permitted "only on furnishing personal bond pending decision from the Honourable Supreme Court. " Since the petitioner was incurring huge expenditure by way of demurrage, the petitioner complied with the condition and cleared the goods. Thereafter, two more Bills of Entry under the same contract were filed by the petitioner. Samples were drawn from the consignment and were sent for testing as to the correctness of the declaration. Once again, the petitioner requested that goods may be released in terms of order of the CESTAT, valuing

the goods at USD 13.94 / Kg-CIF. Once again the third respondent did not permit clearance of the goods. The petitioner brought to the notice of the third respondent the directions of this Court in W.P.No.9284 of 2006 to comply with the CESTAT order. Instead of releasing the goods, the third respondent issued communication dated 04.07.2006 calling upon the petitioner to approach him for release of the goods against a PD Bond / Bank guarantee pending issue of show cause notice. On 07.07.2006, the third respondent issued a show cause notice on the same lines as the earlier show cause notices. It is this show cause notice, which is challenged here.

5. According to the learned Senior Counsel Mr.Habibullah Basha, the show cause notice is without jurisdiction. On the same issue raised in an earlier show cause notice, in relation to goods imported under the same contract as the goods that are subject matter of the present show cause notice, the Department's stand has been rejected and so it is not open to the third respondent to again rely on the same grounds for issuing a show cause notice and refusing to release the consignment. According to the learned Senior Counsel, though it is true that normally Courts do not interfere at the stage of show cause notice, in the present case, in view of the deliberate and defiant stand of the third respondent, the show cause of notice deserves to be quashed.

6. Learned Senior Counsel Mr.Habibullah Basha, relied on 1996 (82) E.L.T. 20 (Mad.) - Union Trading Company v. Union of India where it was held that when an order is passed by the appellate authority, the lower authority cannot refuse to release the goods and that it is a clear case of the department to disregard the order of the statutory authority. All the writ petitions were allowed and directions were issued for release of goods forthwith.

7. 2006 (196) E.L.T. 400 (S.C.) - Hindustan Poles Corporation v. Commissioner of C. Ex., Calcutta, which arose out of a show cause notice was also relied on. The question was as to whether the process undertaken by the appellants amounted to 'manufacture'. The Supreme Court referred to the various decisions on the same issue and held that in view of the settled legal position, the activity of the appellants of merely joining of three pipes, one with other, of different dimensions to obtain a desired length can by no stretch of imagination be brought within category of manufacture. The Supreme Court held as follows:-

> " Before issuance of show cause notices the Revenue must carefully take into consideration the settled law which has been crystallized by a series of judgments of this Court. The Revenue must make serious endeavour to ensure that all those who ought to pay excise duty must pay but in the process the Revenue must refrain from sending of indiscriminate show cause notices without proper application

of mind. This is absolutely imperative to curb unnecessary and avoidable litigation in Courts leading to unnecessary harassment and waste of time of all concerns including Tribunals and Courts."

8. 2006 (199) E.L.T. 209 (Guj) - Topland Engines Pvt. Ltd., v. Union of India was also relied on, wherein it was held that the issuance of show cause notice by the department refusing to implement the Tribunal's order is not legal.

9. Learned Additional Solicitor General Mr.V.T.Gopalan, took notice on behalf of the respondents and would submit that there is huge time gap between the first Bill of Entry and the latest Bill of Entry, in respect of which, the present show cause notice has been issued. Admittedly, the prices of silk had gone and in those circumstances, the petitioner cannot be heard to say that the transaction value for the latest import should be the same as the transaction value for the earlier import, when during that period, the price of silk had gone up. Learned Additional Solicitor General would also submit that when all over the country, other importers have paid duty for the same goods at a higher value, the petitioner cannot peg the department to accept the value of 13.95 USD / Kg. CIF. (2004) 3 Supreme Court Cases 440 - Special Director v. Mohd. Ghulam Ghouse was referred to and it was submitted that normally, this Court should not restrain the statutory authorities from proceeding further after issuance of the show cause notice and writ petitions challenging show cause notice, should not be entertained as a matter of routine, on the other hand, writ petitioner should rather be directed to respond to the notice.

10. Rules 3, 4, and 8 of Customs Valuation (Determination of Price of Imported goods) Rules 1988 (Rules in short) are as follows:-

It is on the basis of these Rules that the imported goods shall be valued.

3. Determination of the method of valuation: For the purposes of these rules -

(i) subject to rules 9 and 10A, the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of clause (i), the value shall be determined by proceeding sequentially through rules 5 to 8 of these rules.

4. Transaction value: - (1) The transaction value of 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.

(2) The transaction value of imported goods under sub-rule(1) above shall be accepted:

Provided that -

(a) the sale is in the ordinary course of trade under fully competitive conditions;

(b) the sale does not involve any abnormal discount or reduction from the ordinary competitive price;

(c) the sale does not involve special discounts limited to exclusive agents;

(d) objective and quantifiable data exist with regard to the adjustments required to be made, under the provisions of rule 9, to the transaction value.

(e) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -

(i) are imposed or required by law or by the public authorities in India;

or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(f) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(g) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(h) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3) (a) where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following value ascertained at or about the same time -

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods.

Provided that in applying the values used for comparison, due to account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;

8. Residual method: - (1) Subject to the provisions of Rule 3 of these rules, where the value of imported goods cannot be determined under the provisions of any of the proceeding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and on the basis of data available in India.

(2) No value shall be determined under the provisions of this rule on the basis of -

(i) the selling price in India of the goods produced in India;

(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;

(iii) the price of the goods on the domestic market of the country of exportation;

(iii a) the cost of production other than computer values which have been determined for identical or similar goods in accordance with the provisions of rule 7A.

(iv) the price of the goods for the export to a country other than India;

(v) minimum customs values; or

(vi) arbitrary or fictitious values.

11. It is not disputed that the goods imported under the latest Bill of Entry forms part of the contract dated 17.02.2005. Even in the impugned order, there is a reference to this, as seen from the following lines:-

> " As stated in para (1) supra, goods covered by both the bills of entry have been imported at a unit price of USD 13.50 / Kg based on a contract signed approximately 16 months prior to shipment of the subject goods."

12. The earlier show cause notice dated 29.11.2005 reads thus:-

> " 9. Further the Apex Court, in the case of M/s.Rajkumar Knitting Mills (P) Ltd., vs. Collector of Customs, Bombay [1988 (98) ELT292 (SC)] has held that:- Valuation (Customs) – Relevant date- Contract between buyer and seller may have a bearing in governing inter se relationship between the two but relevant date for determination of value for assessment of customs duty is the date of importation or exportation and not the date of contract-Similar goods imported by another importer from the same supplier at about the same time (difference of about a week only between the dates of shipment and dates of arrival of goods in the two imports).
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> In the case of M/s.Vikram International vs. Collector of Customs, Kandla [2000 (124) ELT 731 (Tribunal)] has held that burden of proof to show under valuation on the department but, once the department is able to place evidence of contemporaneous imports at higher price, the burden shifts to the assessee to establish that Proforma Invoice pice will still be the actual price for purposes of Section 14 (1) (a) of Customs Act, 1962 – In absence of any plausible explanation about the supplier not revising the price to the level of prevailing price, much lower price shown in proforma invoice not acceptable – Section 14 of Customs Act, 1962.
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> 10. And whereas it appears that the declared transaction value merits rejection in view of the prevailing higher contemporaneous unit price at about USD 22.36/Kg. (average) at (or) about the same period. It appears that the value may not be determinable under subsequent Rules in terms of Rule 3 (2) of CVR, 1988, in the absence of any evidences of imports to determine the value under Rule 5, 6 and quantifiable date with details to arrive at the value under Rule 7 and 7A of CVR, 1988. Therefore, the value has

to be re-determined under the residuary Rule by adopting Rule 8 of CVR, 1988, without recourse to quantity covered by the contract vis-a-vis the quantity covered by this bill of entry.

11. Considering the urgency of the issue and representation pending in this regard, instead of provisional release, M/s.Pushpanjali Silk Pvt.Ltd., Bangalore, are hereby directed to show cause to the undersigned within fifteen days from the date of receipt of this Notice as to why:-

(i) the declared invoice value of USD 13.5/Kg. Which is based on the contract price entered into in February 2005, should not be rejected; and

(ii) Unit value of USD 22.36/Kg (CIF) should not be adopted under Rule 8 of CVR, 1988, by adopting the contemporary import price;

12. The importers are further called upon to produce at the time of showing cause all the evidence, documentary or otherwise upon which they intend to rely in support of their defence."

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13. The present impugned show cause notice reads thus:-

OFFICE OF THE COMMISSIONER OF CUSTOMS (PORT)
CUSTOM HOUSE, NO.60, RAJAJI SALAI
CHENNAI 600 001

Dated: 07.07.2006

SHOW CAUSE NOTICE UNDER SECTION 124 OF THE CUSTOMS ACT, 1962

SHOWCAUSE NOTICE SECTION NO.SCN/GR3-4/12/2006
SHOWCAUSE NOTICE MAIN NO.SCN/GR3-4/529/2006

JOB NO.5581/2006

Despatched on 07.07.2006

Sub: Import of Mulberry raw silk by M/s.Pushpanjali Silk (P) Ltd., Vide Bills of entry No.230770 dated 5.6.06

and 239300 dated 19.6.06 - mis-declaration of Value -Drawl of adjudication proceedings - Issue of SCN-Reg.

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M/s.Pushpanjali Silk (P) Ltd., Bangalore, filed the EDI bills of entry No.230770 dated 5.6.06 and 239300 dated 19.6.06 through their CHA M/s.Viknesh Travel & Cargo Pvt.Ltd., for assessment and clearance of 'Mulberry Raw Silk 20/22D with CIQ 3A Grade & above' of China origin. The details of the respective invoice, quantity of goods supplied there under and the value thereof in respect of the two bills of entry are as below:-

B/E.No.& Date	Invoice No.& date	Quantity (Kgs.)	Invoice Value USD (CIF)
230770 05.06.06	IE/JR06/06 dt. 30.04.06	16,169.47	218287.85

B/E.No.& Date	Invoice No.& date	Quantity (Kgs.)	Invoice Value USD (CIF)
239300 19.06.06	IE/JR07/06 dt. 16.05.06	17,811.39	240453.77

The above referred two invoices have been raised by the supplier M/s.International Enterprises, Hong Kong, for supply of the subject goods at unit price of SD 13.5/Kg based on contract No.IE/PSR-R503/2005 dated 17.02.05.

2. Both the importer and the CHA had subscribed to a declaration as to the truth of the contents of the bill of entry as provided under Section 46 of the Customs Act, 1962, that the information furnished was true, complete and correct in every aspect, that they have not received any other document or information showing different price, value, quantity or description of the goods and that if at any time they receive any document showing a different state of fact bearing on valuation, they would immediately make the same known to the Commissioner of Customs.

3. The goods were examined and samples were drawn and sent for test. On testing it has been confirmed that the goods are Mulberry Raw Silk 3A grade as declared. As stated in para 1 supra, goods covered by both the bills of entry have been imported at a unit price of USD 13.50/Kg based on a contract signed approximately 16 months prior to shipment of the subject goods. However, higher

contemporaneous import values were noticed in NIDB data in respect of goods of similar nature of Chinese origin imported through Bangalore Custom House as given below:-

Sl.No.	B/E.No.& Date	Description/Grade	Unit Price (approx) USD/Kg.	Quantity imported
1.	122046/ 30.05.06	Mulberry raw silk 20D-3A/4A grade	29.77	8814.43 Kgs
2.	121817/ 26.05.06	Mulberry ra silk 20/22D-3A/4A/5A grade.	29.76	9069.36 kgs.
3.	120652 / 6.5.06	Mulberry raw silk 20/22D-3A/4A grade	35.09	9042.49 kgs
4.	120832 / 9.5.06	Mulberry raw silk 20/22D-3A/4A grade.	35.60	9612.51 kgs.

The contemporaneous import price noticed for the item at about USD 29.30/Kg. (approx) (the least contemporaneous value noticed in respect of goods of similar nature) is considerably higher than what has been declared in the impugned bills of entry. The declared unit price of USD 13.5/Kg., therefore, appears to be low and not acceptable, in view of the higher contemporaneous prices prevailing at the 'time' and 'place' of import of the impugned goods, at (or) about the same period. Further the goods are being imported from China, but the supplier is from Hong Kong. Therefore, the suppliers are not manufacturers. The price cannot be static for a period of 16 months as the goods is agricultural products. Further, it appears that the international price of mulberrry raw silk are at variance and considerably higher than the prices declared by the importers. From the above it appears that the import prices declared by the importer are not in harmony or even approximate or close to the prevailing international prices.

4. In terms of Sub Section (1) of Section 14 of the Customs Act,1962, the international price prevailing at the time and place of importation shall be the basis of valuation for levy of Customs duty. Further sub section (1A) of Section 14 of the Customs Act, 1962, provides for determination of value of imported goods in accordance with Customs Valuation Rules, 1988, subject to the provisions of sub section (1). Hence, it appears that provisions under sub-ordinate

subsection (1A) can not override the provisions under main sub section (1) of Section 14 of the Customs Act, 1962. In the instant case, the unit value of USD 13.5/Kg based on the contract has been declared as transaction value under Rule 4 of the Customs Valuation Rules, 1988, enacted under the sub-ordinate sub section (1A) of Section 14 of the Customs Act, 1962. However, this unit price is not the international price prevailing at the time and place of importation as envisaged under the main subsection (1) of Section 14 of the Customs Act, 1962 and hence the said declared transaction value under Rule 4 of the Customs Valuation Rules, 1988 is not acceptable. In other words the declared transaction value merits rejection as it does not meet the statutory requirement of main sub-section (1) of Section 14 of the Customs Act, 1962.

5. Further the amended Sub-rule 2 of Rule 4 of CVR, 1988, reads as follows:- rule 4 (2): the transaction value of imported goods under sub-rule (1) above shall be accepted:
Provided that -

a) The sale is in the ordinary course of trade under fully competitive conditions;

b) The sale does not involve any abnormal discount or reduction from the ordinary competitive price;

c) The sale does not involve special discounts limited to exclusive agents;

d) Objective and quantifiable data exist with regard to the adjustments required to be made, under the provisions of Rule 9 to the transaction value;

Hence it appears that as per the amendment to Sub-rule 2 of Rule 4 of CVR, 1988 (notification 41/2001 (NT) dated 7.9.01) the prescribed conditions in the proviso there under may not be met by such contract prices and therefore the declared invoice/transaction value may not be acceptable under Rule 4(2) of CVR, 1988. In the instant case they have furnished a contract-dated 17.2.05 that is about 16 months old. Therefore, the contract price does not appear to represent the transaction value at this point of time.

6. The Notices vide their letters dated 29.6.06 and 30.6.06 have referred to the Order of the Honourable High court of Madras in W.P.No.9284 of 2006 and Final Order No.174 of 2006 dated 20.3.2006 of the Honourable CESTAT, Chennai, and have contended that the goods are required to be assessed at USD 13.94/Kg. (CIF) and clearance permitted accordingly. However, it appears that the orders of the Honourable CESTAT and Honourable High Court referred to by the Noticee refer to earlier and separate consignments for a single bill of entry and hence the ratio of the said orders cannot be made applicable in

the present imports.

7. Above all the Apex Court, in the case of M/s.Rajkumar Knitting Mills (P) Ltd., vs. Collector of Customs, Bombay [1998 (98) ELT 292 (SC)] has held that:- "valuation (Customs) – Relevant date – contract between buyer and seller may have a bearing in governing inter se relationship between the two, but relevant date for determination of value for assessment of customs duty is the date of importation or exportation and not the date of contract" – Apex Court had further held that "the words ordinarily sold and offered for sale do not refer to the contract between the supplier and the importer but to the prevailing price in the (international) market on the date of importation".

8. In the case of M/s.Vikram International vs,. Collector of Customs, Kandia [2000 (124) ELT 731 (Tribunal)] the Tribunal has held that burden of proof to show under-valuation is on the department but, once the department is able to place evidence of contemporaneous imports at higher price, the burden shifts to the assessee to establish that proforma invoice price will still be the actual price for purposes of Section 14 (1) (a) of Customs Act, 1962. In the absence of any plausible explanation about the supplier not revising the price to the level of prevailing price, much lower price shown in proforma invoice is not acceptable under Section 14 of Customs Act, 1962.

9. In view of the above, the declared transaction value which is based on a contract entered into 16 months prior to this present imports, and as the prevailing contemporaneous unit price is at about USD 29.30 / Kg. (average) at the time and place of importation during June' 06 appears to be not acceptable. It appeared that the value might not be determinable under subsequent rules in terms of Rule 3 (ii) of CVR, 1988, in the absence of evidence of imports to determine the value under Rule 5, 6 and quantifiable data with details to arrive at the value under rule 7 and 7A of CVR, 1988. Therefore, the value has to be determined under the residuary Rule by adopting Rule 8 of CVR, 1988, without recourse to quantity covered by the contract vis-a-vis the quantity covered by these bills of entry.

10. Therefore you are called upon to show cause to the undersigned within fifteen days from the date of receipt of this show cause notice as to why:-

(i) The declared invoice value of USD 13.5/Kg., which is based on the contract price entered into in February 2005, and not the prevailing price in June '06 should not be rejected; and

(ii) Unit value of USD 29.30/Kg (CIF) should not be adopted under Rule 8 of CVR, 1988, by adopting the prevailing contemporary import price at the time (May-June'06) and place of importation.

11. The importers are further called upon to produce at the time of showing cause all the evidence, documentary or otherwise, upon which they intend to rely in support of their defense.

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14. It will be seen that the contents of the show cause notices dated 29.11.2005 and 07.07.2006 are almost identical. Against the earlier show cause notice, an appeal was filed and the appellate authority noted that there is no allegation that the contract price between the supplier and the buyer is obtained under extraneous situations or there was any extra flow of money in the transaction through authorised or unauthorised channels. The only ground on which the declared price had not been accepted is because of higher contemporaneous prices prevailing at the time and place of import of the impugned goods. The appellate authority found that the lower authority had not challenged the correctness of the contract price, but had felt that the contract price dated 17.02.2005 which was about seven months old, is not acceptable and would merit rejection, since it is not the prevalent international market price. The only difference between the earlier show cause notice and the present show cause notice is that in the earlier show cause notice, the contract price was refuted because it was seven months old, whereas, with the passage of time the same contract price is 16 months old. The appellate authority rejected the contention of the revenue and held as follows:

> " ... In the present case, the imports have been made within the contract period. The department has not challenged the contract price for its correctness, or found that the goods have been supplied beyond the contracted amount. In fact earlier clearance has been permitted as per the contract price. There is no allegation that the appellants paid to the supplier more than the contracted value. This being so the contract price cannot be discarded. The lower authority has tried to create two categories of prices to fit this situation, i.e., 'contract price' and 'market price'. He has then gone on to hold that the contract price is not a price in the ordinary course of trade under fully competitive conditions but is subject to certain conditions as stipulated in the contract and hence the same is liable for rejection. This stand is not correct. Market price for different class and categories of buyers differ for the same goods. The price of a commodity when sold on contract, or to a distributor, or to an OE user, or to buyers of huge lots, or to a final consumer etc. may all vary for the same goods from the same seller. All these may have different 'market prices'. Any attempt to standardize these

values to one 'market value' stating the provisions of Rule 4 (2) of the Valuation Rules will fail. The judgments cited by the appellant are relevant in this regard.

The attempt of the lower Authority to treat a contract as being ipso facto ineligible to be treated as the transaction value, even if the declared transaction value had been arrived at purely on commercial considerations, and to have it subjected to a 'market test' for contemporaneous values with every import is not supported by law, as made clear by the relevant portion of the 'Eicher Tractor' judgment cited above. The proper officer can challenge a declared transaction value as provided for under rule 10 A of the Valuation rules, not for the pre-mediated reason that it is a contract price, but because the price is unacceptable for the reasons set out in rule 4 (2) of the Valuation Rules and this should be applicable for the entire contract goods. It cannot be that a part of the goods are permitted at one price and the other parts at different other comparable prices, using the said Rule. Before doing so he would have to compare the contract price with similar other prices, and the conditions of the other contracts, or bring out how the prices of other buyers are relevant to the case. However, once having accepted a contract price, and permitted the clearance of goods, it would hold good for the entire contracted quantity unless omissions or commissions having a bearing on the value are subsequently shown, and then this value would have to be adopted for the earlier clearances as well under the same contract. There is hence merit in the appellants contention that when out of a total 277 Mts covered under the contract dated 17.02.2005, the appellant had imported and cleared 164 MTS (60% of the entire contracted quantity) at the price of US$ 13.94 / Kg. CIF, the sudden enhancement of the value to US$ 22.36 / Kg. CIF was not warranted.

In view of the above discussion and the facts and legal positions stated therein the lower authority's order is set aside and the appeal is allowed for the transaction value of US$ 13.94 / Kg-CIF accepted by the appellant. " (Emphasis supplied)

15. In the appeal filed against the order of Commissioner (Appeals), CESTAT held as follows:-

" ... We are of the considered view that the apex Court's ruling was rightly followed by learned Commissioner (Appeals) in the present case. The subject goods were imported in terms of a contract indicating USD 13.50 as the unit price agreed between the contracting parties. The

import was made within the contracted period. The department has no case that any amount over and above the contracted price was paid by the importer to the supplier, nor is it their case that the importer was "related" to the supplier or that the price paid was influenced by any extra-commercial considerations. In the circumstance, there is no valid reason to reject the transaction value of the goods under Rule 4 (1) read with Section 14. This is particularly so, as the appellant has not established that any of the special circumstances particularized under Rule 4(2) existed in this case."

" We have already held that there is no valid reason in this case to reject the declared value of the goods. The question now is what is the 'declared value'. What was declared in the Bill of Entry was USD 13.5 per kg. But, subsequently, the assessee agreed to a marginal enhancement to USD 13.94 per kg. Thus the declared value stood modified as USD 13.94 per kg. on account of the assessee's voluntary acquiescence. It was this value (USD 13.94 per kg.) which has been accepted by the lower appellate authority as the basis of the assessable value of the goods. In view of the apex Court's ruling in Eicher Tractors (supra) and the Tribunal's decision in Andhra Sugars (supra) and Agarwal Industries (supra), we have to sustain the order of learned Commissioner (Appeals). In the result, the Revenue's appeal gets dismissed".

The civil appeal filed against this order has been dismissed by the Supreme Court. On the very same basis and for the same reasons, the present show cause notice has been issued.

16. In the orders of the appellate Authority and CESTAT extracted above, clear reasons are given why the value declared in the Bill of entry cannot be rejected. It is only by acquiescence that the petitioners paid USD 13.94 per kg-CIF.. The impugned order shows that the value has to be determined under Rule 8. The circumstances under which Rule 8 can be invoked for valuation of imported goods has been considered in (2005) 3 Supreme Court Cases 265 – Commr. of Customs v. Bureau Veritas. There the goods imported were oil rigs which was subject to volatile fluctuation in price. The contract was entered into in January 1999, the import was in May 2000.

"16. The ambit and method of rule 4 was elaborately dealt with by this Court in Eicher Tractors Ltd. vs. Commr. of Customs.

17. It is true that the Rules are framed under Section (1) and are subject to the conditions in Section 14 (1). Rule 4 is in fact directly relatable to Section 14 (1). Both

Section 14 (1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14 (1) and particularised in Rule 4 (2).

18. Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4 (2). 'Payable" in the context of the langugage of Rule 4 (1) must, therefore, be read as referring to "the particular transaction" and payability in respect of the transaction envisages a situation where payment of price may be deferred.

19. That Rule 4 is limited to the transaction in question is also supported by the provisions of the other rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7-A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8.

'using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs act, 1962 (52 of 1962) and on the basis of data available in India.'

If the phrase 'the transaction value' used in Rule 4 were not limited to the particular transaction then the other rules which refer to other transactions and data would become redundant.

20. It is only when the transaction value under Rule 4 is rejected, that under Rule 3 (ii) the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules. Conversely, if the transaction value can be determined under Rule 4 (1) and does not fall under any of the exceptions in Rule 4 (2), there is no question of

determining the value under the subsequent rules."

17. In the present case, in respect of goods imported earlier but covered by the same contract, the appellate authority had found that there is no reason to reject the transaction value; and the goods had been cleared earlier on the basis of a particular contract price, so it would hold good for the entire contracted quantity, unless certain factors, which are having a bearing on the value, are subsequently shown, in which case that value would have to be adopted for the earlier clearances as well. In the present case, even in the impugned order, no mention of omission or commission or allegation that the transaction value does not reflect the contract value has been made. Therefore, for the goods covered by the same contract and imported within the contract period(viz., within 3rd September 2006) two different values cannot be adopted. Each consignment covered by each Bill of Entry forms part of the goods supplied under one single contract dated 17.02.2005. The reasoning of the appellate authority as well as the CESTAT with regard to the earlier Bills of Entry are equally applicable to the present case. In spite of that, the third respondent has chosen to issue the show cause notice in defiance of the earlier decision of the CESTAT in respect of goods cleared under the same contract.

18. With regard to the same petitioner, in respect of imports under the same contract, it has been held that the contract value alone will be the transaction value. This order of the appellate authority has now become final. The present import is within the contract period. The reasons given in the earlier show cause notice have been rejected outright. The same reasons are given in the present impugned notice. If that is so, I do not see why again and again the petitioner should be called upon to show cause as to why the value fixed by the department should not be accepted. The attitude of the department deserves reproach.

19. It was contended that the show cause notice ought not to be quashed and that if the petitioner is allowed to import as per old value, it would be detriment to national interest. In 2004 (3) SCC 440 [cited supra] relied on by the respondent, it was held that the writ petitions challenging show cause notice should not be entertained unless exceptional circumstances warrant it. This indeed is a special case. There is a contract dated 17-02-2005, the period of contract expires in September 2006. Goods forming part of the contract have been imported in stages. The goods imported under the earliest bills of entry were allowed to be cleared, on payment of duty at USD 13.94 per kg-CIF voluntarily by the petitioner though the declared value was USD 13.50 per kg-CIF. In respect of goods imported a few months later, 7 months after the contract to be precise, a show cause notice was issued calling upon the petitioner to pay duty at an enhanced rate. The proceedings pursuant to the show cause notice ended in favour of the petitioner. The Department fought all the way

upto the Supreme Court. Now sixteen months after the contract, when goods are imported under the contract and within the contract period, the Department raises the same objections, refusing to accept the order passed earlier that the declared value must be accepted. Considering the history of this case, and since the respondents have hedged and stalled at every stage, it would be futile to ask the petitioner to respond to the show cause notice.

20. It is in these circumstances, I feel that the petitioner need not reply to the show cause notice, since the show cause notice deserves to be quashed. The show cause notice is totally without jurisdiction and therefore stands quashed.

21. The writ petition is allowed and the department shall release the goods as expeditiously as possible, on the value fixed by the CESTAT with regard to the earlier imports covered by Bills of Entry under the same contract dated 17.02.2005. No costs. Consequently, connected Miscellaneous petition is closed.

sbi/ab/gms/glp

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Chief Commissioner of Customs,
   Custom House, No.60, Rajaji
   Salai, Chennai - 1.

2. The Commissioner of Customs
   (Port-Imports),
   No.60, Rajaji Salai, Chennai-1.

3. The Assistant Commissioner of Customs
(GR. 3 & 4), Custom House, No.60, Rajaji Salai,
   Chennai-1.

+ one cc to M/s. L. Maithili, Advocate sr no. 33862
+ one cc to Mr. T.S. Sivagnanam, SCGSC (SR NO. 34005

JP(CO)
NM(02.08.2006)

W.P.No.23282 of 2006