

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 50712 OF 2019

[Arising out of Order-in-Appeal No. CC(A)CUS/D-II/ICD/TKD/EXP/2693/2018 dated 9.11.2018 passed by the Commissioner of Customs (Appeals), New Delhi]

M/s S.D. Overseas

Through Its Proprietor
Mr. Sunil David

Appellant

Versus

The Joint Commissioner of Customs

Inland Container Depot, Tughlakabad,
New Delhi

Respondent

APPEARANCE:

Shri Gaurav Prakash, Advocate - for the Appellant

Shri Sunil Kumar, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 08.04.2022

DATE OF DECISION: 02.06.2022

FINAL ORDER NO. 50480/2022

P. V. Subba Rao

M/s S.D. Overseas¹, a proprietorship firm filed this appeal assailing order-in-appeal² dated November 09, 2018 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi whereby he upheld the order-in-original dated February 26, 2016 passed by the Joint Commissioner, Inland Container Depot³, Tughlakabad and rejected the appellant's appeal.

1 the appellant
2 Impugned order
3 ICD

2. We have heard learned Counsel for the appellant and learned Departmental Representative and perused the records.

3. The appellant had imported a consignment of Food Supplements through ICD, Tughlakabad and filed a Bill of Entry dated 04.01.2013 and the goods were cleared on 05.01.2013. Thereafter, receiving intelligence that the goods cleared by the above bill of entry were highly undervalued, officers initiated an enquiry and details of goods such as description, quantity, contemporary value etc. covered by the bill of entry were retrieved from the National Import Database ⁴ of the Electronic Data Interchange System.⁵ Further, commercial prices of the same items supplied by the manufacturer were also collected. These prices were compared and a chart was prepared as follows:

Sr. No.	Description of Goods	Quantity in Pcs.	Declared Value in INR	Value as per Cotemporary Data/Manufacturer's price list
1.	BSN Syntha 6.5 lb	512	498	770
2.	BSN True Mass 5.95 lb	168	440	1680
3.	MP Assult	400	256	590
4.	BSN Nitrix 180	240	239	530
5.	No Explode 2.2 lb	240	253	555
6.	BSN Nitrix 360	24	404	787
7.	ON 2222 Amino 320 Tab	300	317	346
8.	MT Nitrotech 4 lb	348	459	1840
9.	UL Creatine 300	600	134	162
10.	UL Muscle Juice 10.45 lb	110	504	588
11.	UN A-pack 4.4 lb	240	268	312
12.	Dy. BCAA Powder 300 Gm.	132	252	262
13.	UN A-Stak	240	301	447

⁴ NIDB

⁵ EDI

14.	ON whey SLBL	140	609	980
15.	ON Optimen 180 Tab	120	224	302
16.	GN Real Mass 6 lb	300	396	997
17.	GN Real Mass 12 lb	150	664	1884
18.	GN Glutamine 300g	480	194	487
19.	GN Qualitine 300g	100	150	319
20.	GN Super Pump Max 640g	360	253	1063
21.	GN Qualitine 300g	380	150	319

4. Statement of the owner Shri Sunil David was recorded and further investigation was carried out and a show cause notice⁶ dated 13.12.2013 was issued to the appellant calling upon it to explain as to why the declared assessable value should not be rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007⁷ and re-determined as per Rule 5 of the Valuation Rules. It was further proposed to confiscate the imported goods (which were already released) under Section 111(m) and impose penalties under Section 112(a), 114A and 114AA of the Customs Act, 1962. Differential duty amounting to Rs. 11,07,864/- was proposed to be recovered under Section 28 along with appropriate interest under Section 28AA. The Joint Commissioner, thereafter, passed the following order:

- “(i) The declared value of Rs. 17,16,392/- declared in respect of goods imported vide Bill of Entry No. 8940425 dated 04.01.2013 is rejected under Rule 12 of the CVR 2007 and is re-determined as Rs. 38,39,377/- under Rule 5 of the CVR 2007;
- (ii) Even though goods having re-determined value of Rs. 38,49,377/- are liable to confiscation under Section 111(m) of the Customs Act, 1962 but the goods are not physically available as the same were cleared by the Customs on 05.01.2013 without securing bond and/or bank guarantee. Therefore, the goods are not being confiscated

6 SCN
7 Valuation Rules

and consequently no fine under Section 125 of the Customs Act, 1962 is being imposed on such goods;

- (iii) The differential customs duty of Rs. 11,07,864/- payable on the goods imported vide Bill of Entry No. 8940425 dated 04.01.2013 is demanded and ordered to be recovered from the importer under Section 28(8) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962;
- (iv) Penalty of Rs. 11,07,864/- (Rupees Eleven Lakh Seven Thousand Eight Hundred Sixty Four only) is imposed on the importer under Section 114A of the Customs Act, 1962. However, if the aforesaid duty along with interest payable under Section 28AA is paid within thirty days from the date of communication of this order, the amount of penalty liable to be paid under this section shall be twenty five percent of the duty so determined provided also that the benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to above.
- (v) Penalty of Rs. 2,00,000/- (Rupees Two Lakh only) is imposed on the importer under Section 114AA of the Customs Act, 1962;
- (vi) Penalty of Rs.1,00,000/- (Rupees One Lakh only) is imposed M/s Phenomenal Logistics (CHA) under Section 112(a) as well as under Section 114AA of the Customs Act, 1962."

5. There was no appeal by the Revenue against non-confiscation of the goods under Section 111(m). The appellant was aggrieved by the order-in-original passed by the Joint Commissioner and filed an appeal before the Commissioner (Appeals) who by the impugned order upheld the order-in-original. Hence, this appeal. There is also no appeal before us from M/s Phenomenal Logistics, the Customs House Agent on whom also the penalty was imposed by the impugned order.

6. Although the appeal is against the impugned order, the prayer part of the appeal is erroneously worded and reads as follows :

- “(i) Quash and set aside the impugned Order-in-Original No. 11/2016/R.R./J.C.EXP/ICD/TKD dated 26.02.2016 and ;
- (ii) pass such other further order(s) as this Hon’ble Commissioner (Appeals) may deem fit and proper.”

7. However, it is evident from the form CA-3 in which the appeal was filed that what is sought to be assailed is the impugned order passed by the Commissioner (Appeals) into which the order-in-appeal passed by the Joint Commissioner has already merged. Even otherwise, an appeal against the order of Joint Commissioner does not lie before this Tribunal.

8. We now proceed to examine the case on merits. The grounds of appeal in the case were as follows:

- (i) The impugned order is contrary to the facts and provisions of law and was passed without application of mind;
- (ii) The imported goods were of very inferior quality and had very limited expiry date and was, therefore, purchased from the supplier of the goods at lower prices. The NIDB data does not establish that the contemporaneous imports were of similar goods;
- (iii) The allegation of mis-declaration of value is not supported by cogent evidence and, therefore, the declared value should not have been rejected under Rule 12;
- (iv) The payments were made through authorized banking channel and there is no evidence to prove the allegation

by the Department. The Department failed to bring any mens rea of the appellant to avail undue benefit in the present case. There was no evidence that the appellant had any knowledge nor was there any deliberate disobedience of statutory provisions and, therefore, the penalty was wrongly imposed.

9. Reliance was placed by the appellant on the following case laws:

- (i) **Commissioner of Customs Vs. Modern Overseas⁸;**
- (ii) **Neha Intercontinental (P) Ltd. Vs. Commissioner of Customs⁹;**
- (iii) **Eicher Tractors Ltd. Vs. Commissioner of Customs¹⁰;**
- (iv) **Commissioner of Customs Vs. Polyglass Acrylic Mfg Co. (P) Ltd.¹¹;**
- (v) **Agarwal Industries Vs. Commissioner of Customs¹²;**
- (vi) **Oswal Fats & Oils Vs. Commissioner of Customs¹³;**
- (vii) **Commissioner of Customs Vs. J.D. Orgochem Ltd.¹⁴**
- (viii) **Kevlin Infotech Pvt. Ltd. Vs. Customs¹⁵**
- (ix) **Commissioner of Customs, Sea Vs. Sri Krishna Sounds and Lightings¹⁶**
- (x) **Additional Secretary to Government of India (Revisional Authority) Order No.¹⁷**

10. Learned Counsel for the appellant reiterated the above and prayed that the impugned order may be set aside and the appeal may be allowed.

8 2005 SCC OnLine CESTAT 1345

9 2006 SCC OnLine CESTAT 1102

10 (2001) 1 SCC 315

11 (2016) 13 SCC 740

12 2005 SCC OnLine CESTAT 719

13 2007 SCC OnLine CESTAT 2905

14 (2008) 16 SCC 576

15 2014 SCC OnLine CESTAT 2328

16 2018 SCC OnLine CESTAT 6475

17 214/2021/CUS (WZ)/ASRA/MUMBAI dated 26.08.2021

11. Learned Departmental Representative supported the impugned order and submitted as follows :

- (i) In view of contemporaneous NIDB data for identical/similar commodities and the contemporary commercial price list of the same items from the same supplier in imports by other importers showing much higher value, the appellants were asked to justify their low declared value and no cogent reason was given in view of which their transaction value became liable for rejection under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (ii) Appellant's defense of lower value of impugned goods because of its inferior quality is not plausible, and hence not acceptable. The quantity of the impugned goods is a matter of public health of the citizens of the country and if found inferior, their import would have been prohibited. Secondly, no declaration about such inferior quality of goods was made in the import documents or in the Bill of Entry.
- (iii) Similarly, appellant's contention that low value of goods was because of its very limited shelf life is also is not acceptable in view of the provisions of the Prevention of food Adulteration Act, 1954 (hereinafter referred as PFA Act) in terms of which the imported goods must have at least 60% of its original shelf life at the time of importation. This

provision finds mention in Para 13 of Chapter 1A (General Notes Regarding Import Policy) of the ITC (HS) Classification of Export and Import Items.

- (iv) Assessable value of the impugned goods was re-determined under Rule 5 based on contemporaneous commercial price list of the same items from the same supplier in case of imports effected by another importer. Such re-determination of assessable value of imported goods for the purpose of levy of customs duty has been upheld by various judicial fora.
- (v) In view of mis-declaration of value based on documents reflecting value other than the actual value, impugned goods were liable for confiscation under Section 111(d) and appellant was liable for penalty under Section 112/114A and 114AA.
- (vi) Rejection of transaction value under Rule 12, re-determination of assessable value under Rule 5, duty demand under Section 28(8) of the Customs Act, 1962 and imposition of penalty under Section 112/114A and 114AA were correct in law in view of suppression of actual value of goods based on documents reflection value other than the actual value.
- (vii) He relies on the following case laws :
 - (i) **Prasant Glass Works Pvt. Ltd. Vs. Commissioner of Customs, Calcutta**¹⁸
 - (ii) **Chandni International Vs. Commissioner of Customs (Import), Mumbai**¹⁹

18 1996 (87) ELT 518 (Tri.) affirmed in 1997 (89) ELT A179 (SC)

19 2003 (153) ELT 312 (Tri.-Del.)

- (iii) **Toplane Vs. Commissioner of Customs (Preventive), Kolkatta²⁰**
- (iv) **Harshita International Vs. Commissioner of Customs (Preventive), Mumbai²¹**
- (v) **Anil Kumar Tiwari Vs. Commissioner of Customs Tuticorin²²**

12. We have considered the submissions made by both sides and perused the records.

13. The primary submission of the appellant is that the data derived from NIDB cannot prove that it has mis-declared the value and, therefore, the transaction value should not have been rejected in terms of Rule 12 of the Valuation Rules. Once the transaction value is not rejected, the value cannot be re-determined as per the Valuation Rules. It is also the submission of the appellant that there is no evidence of additional consideration for sale and that it has paid for the goods only through banking channels. In the absence of any additional consideration for sale, the declared value must be accepted. It is further the submission that the NIDB data does not prove that the goods which were imported by other importers was of similar goods and the volume level and of the imports were comparable. It is also the submission that the penalty should not have been imposed upon them under Section 114A and 114AA.

14. The value of imported goods is determined under Section 14 of the Customs Act read with Valuation Rules. Duties of customs are levied on goods imported into and exported from India at the rates specified in the Schedules to the Customs Tariff Act, 1975. On

20 2009 (238) ELT 098 (Tri.-Kol.)

21 2008 (229) ELT 386 (Tri.-Mumbai)

22 2016 (344) ELT 1051 (Tri.-Chennai)

some goods, the levy is based on quantity (specific duty), and other goods it is based on value (ad valorem). If the duty is to be levied based on value, valuation for the purpose has to be done as per Section 14 which reads as follows:

Section 14. Valuation of goods. -

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:**

Provided that such transaction value in the case of imported goods shall **include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges** to the extent and in the manner specified in the rules made in this behalf:

Provided further that the **rules** made in this behalf **may provide for,-**

(i) the circumstances in which the **buyer and the seller shall be deemed to be related;**

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or **price is not the sole consideration for the sale or in any other case;**

(iii) **the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:**

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. - For the purposes of this section -

(a) "rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)

15. The non-obstante clause in sub-section 2 of section 14 gives the Central Board of Excise and Customs the power to fix tariff values for any class of goods and if fixed, the tariff value will be the value to determine the duty. This sub-section is not relevant to this case. In all other cases, the value to be reckoned for calculating the Customs duty shall be the transaction value subject to five conditions:

- a) The buyer and seller are not related.
- b) Price is for delivery at the time and place of importation, i.e., all costs up to the point of import are to be included. For instance, if the sale is on Free on Board (FOB) basis, the costs of transportation to the place of import, transit insurance, etc. will have to be added.
- c) Price is the sole consideration for sale.
- d) Some amounts indicated in the first proviso to sub-section 1 of section 14 must be included.
- e) Valuation will be as per any other conditions as may be specified in the Rules.

16. Thus, the default position is that the valuation has to be done on the basis of the transaction value and not based on any fixed value.

17. The first proviso to sub-section 1 of section 14 provides for some additions to the transaction value which are not relevant for

the present case. The second proviso to this sub-section provides for Rules to be made in this behalf to provide for:

- a) the circumstances in which **the buyer and the seller shall be deemed to be related**;
- b) the manner of determination of value in respect of goods **when there is no sale**,
- c) the manner of determination of value in respect of goods **if the buyer and the seller are related**,
- d) the manner of determination of value in respect of goods where **price is not the sole consideration for the sale**;
- e) the manner of determination of value in respect of goods in **any other case**; and
- f) the manner of **acceptance or rejection of value** declared by the importer or exporter, as the case may be, **where the proper officer has reason to doubt the truth or accuracy of such value**, and determination of value for the purposes of this section.

18. The Valuation Rules were framed as per the second proviso to sub-section 1 of section 14. It has 13 Rules in all of which Rules 1 and 2 are Preliminary Rules. Rule 3 states that subject to Rule 12, the value shall be the transaction value adjusted according to Rule 10. Rule 10 provides for certain costs to be included in the transaction value. Rule 12 provides for the proper officer to reject the transaction value if he has reason to doubt its truth and accuracy. **Thus, unless the proper officer rejects the transaction value under Rule 12, the valuation has to be**

based on transaction value as per Rule 3 with some additions, if necessary, as per Rule 10.

19. Rule 3 further provides that if the valuation cannot be done under that Rule, i.e., as per the transaction value with additions as per Rule 10, then **it must be done sequentially under Rules 4 to 9**. In other words, if the transaction value is rejected under Rule 12 and valuation cannot be done as per the transaction value under Rule 3, then it must be done sequentially under Rules 4 to 9.

20. We now proceed to examine Rules 4 to 9. **Rule 4** provides for the valuation to be done on the basis of **identical goods**. **Rule 5** provides for the valuation to be done on the basis of the value of **similar goods**. Rule 6 states if Rules 4 and 5 cannot determine the value then they must be done as per Rule 7 and thereafter Rule 8 but this sequence can be reversed at the option of the importer. In other words, if the importer so chooses, Rule 8 can be applied directly instead of Rule 7. **Rule 7** provides for a **deductive method of valuation** on the basis of prices of similar or identical goods sold in India and after making some deductions from such prices. **Rule 8 provides for a computed value**, i.e., based on the cost of raw material, cost of manufacture, reasonable profit, etc. In view of Rule 6, the importer may choose the computed value without examining the feasibility of determining value through deductive methods. **Rule 9 is a residual method** which provides for determining the value where it cannot be determined under Rules 3 to 8. Rule 10, as already discussed, provides for some costs to be added to the transaction value if the valuation is done as per Rule 3. Rule 11 requires the importer to make a declaration. Rule

12 lays down the provision for rejection of transaction value. Rule 13 provides for interpretative notes for the Rules.

21. **To sum up, valuation has to be done sequentially** as follows:

- a) If a **tariff value** is fixed by the Board, it is the value (sub-section 2 of Section 14);
- b) If no tariff value is fixed by the Board, valuation is as per the **transaction value, if necessary, with some additions** (as per the first proviso to sub-section 1 of section 14 and as per Rule 10);
- c) If the transaction value is rejected as per Rule 12 by the proper officer, valuation has to be done as per the **value of identical goods** (Rule 4);
- d) If transaction value is rejected and there is no value of identical goods, then it must be as per the **value of similar goods** (Rule 5);
- e) If transaction value is rejected and there is no value of identical goods or similar goods, the value must be determined through **Deductive method** (Rule 7)
- f) If transaction value is rejected and there is no value of identical goods or similar goods and it is not possible to determine value following deductive method, then value must be determined through **computation** (Rule 8)
- g) If the importer so chooses, computational method may be adopted without examining the deductive method first (Rule 6).

h) If the transaction value is rejected and there is no value of identical goods or similar goods and if it is also not possible to determine the value through deductive method or computational method, then value may be determined through the **residual method** by the officer following the above principles (Rule 9).

22. The next question which arises is when can the proper officer reject the transaction value. Rule 12 reads as follows:

12. Rejection of declared value. -

(1) When the proper officer **has reason to doubt the truth or accuracy of the value declared** in relation to any imported goods, he **may ask the importer of such goods to furnish further information including documents or other evidence** and if, **after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt** about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) **The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -**

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the mis-declaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) then on declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents.

23. Thus, if the officer has **reason to doubt** the truth and accuracy of the transaction value, he can call for information including documents and evidence. If the information and evidence is presented and after examining it or if no information or evidence as called for is presented, if the proper office has **reasonable belief then it shall be deemed that the value cannot be determined as per Rule 3** (i.e., based on transaction value with additions, if necessary). While the officer can, in the first place call for information and evidence if he has reason to doubt, at the second stage, he should have not just some reason to doubt but a **reasonable doubt**. If he has such reasonable doubt, then the transaction value can be rejected. The grounds on which the proper officer may raise doubts about the truth and accuracy of the transaction value have been illustrated in explanation 1 (iii) to Rule 12. The list is inclusive and not exhaustive.

24. This takes us to the next question as to whether the officer has correctly rejected the transaction value under Rule 12 and re-determined the value. Rejection under Rule 12 requires firstly that the proper officer has some reason to doubt the transaction value and after calling for additional information and investigation should

have a reasonable doubt about the transaction value. Once the officer has a reasonable doubt then it shall be presumed that valuation cannot be done as per the transaction value. In this particular case, the appellant has imported goods from a trader based in Dubai and the imported goods were food supplements. When the prices declared by the appellant were compared with the value of contemporaneous imports as per the data available in the NIDB and also as per the manufacturer's price list, there was a vast difference and in some items the declared price was half or less of the manufactured price/contemporaneous import prices. Now such a vast difference between the prices of the same commodity by the same manufacturer provided the officer a reason to doubt. Having had a reason to doubt, the owner of the appellant firm Shri Sunil David was summoned and his statements were recorded and further investigations were carried out. The explanation of the appellant before the lower authorities as well as before us is that the food supplements which were imported by it though of the same manufacturer were of very short shelf life were of inferior quality and due to expire and hence were sold cheap by the overseas supplier. The bill of entry or the supporting documents of the bills of entry presented before us do not indicate anywhere that the goods were of inferior quality and were of low shelf life as asserted by the appellant. This assertion is not supported by the documents. On the contrary, learned Departmental Representative points out poor quality goods which are due to expire could not have been imported into India without a valid license/no objection certificate from the Food Safety and Standards Authority of India.

He submits that as per guidelines issued by FSSAI No. 101/7/FSSAI/T/2010 (Part J) dated 23.3.2012 requires such a license. The importer has not produced any license or no objection certificate from the FSSAI regarding the quality and expiry date of the imported goods. He submits that not only is there no positive evidence that the imported goods were of inferior quality and were of short shelf life in any of the bills of entries or supporting documents but it is also impossible for the importer to have imported such goods without a license from the FSSAI. Therefore, the mere assertion of the appellant that they have imported inferior quality goods with short shelf life cannot be accepted.

25. At this stage is not possible for us to determine and establish whether the goods imported were indeed of inferior quality and that they had short shelf life except through documentary evidence which nowhere proves this assertion not even in the form of declaration by the importer to this effect in the bill of entry. Had the appellant made a declaration to this effect the goods should have been examined and necessary licenses from the FSSAI could have been called for from the appellant.

26. In view of the above, we find that the goods declared transaction value was correctly rejected under Rule 12 of the Valuation Rules by the original authority and such rejection were upheld by the impugned order.

27. Once the declared value is rejected under Rule 12, valuation has to be done sequentially under Rule 4, 5 etc. Rule 4 deals with value of identical goods. Rule 5 deals with the value of similar

goods. The original authority has determined the value under Rule 5 finding them to similar to the other goods which were imported. The value of the similar goods were obtained not only from other imports taken from NIDB data but also from the manufacturer's price lists. Under these circumstances, we find nothing incorrect in the order-in-original rejecting the transaction value under Rule 12 re-determining the value as per Rule 5 and demanding the differential duty along with interest and the Commissioner (Appeals) upholding the same in the impugned order. As we have found that the duty short levied was correctly demanded under Section 28, penalty imposed under Section 114A also needs to be upheld and we do so.

28. As far as the penalty under Section 114AA is concerned, it is imposable if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act. We find that the appellant has mis-declared the value of the imported goods which were only a fraction of a price the goods as per the manufacturer's price lists and, therefore, we find no reason to interfere with the penalty imposed under Section 114AA. The case laws relied upon by the learned Counsel for the appellant were all of on a different footing. Learned Counsel relied on **Modern Overseas** to assert that the onus is on the Department to prove that the invoice value does not represent the true commercial value in the international market. In this case, in our view the Revenue has discharged its liability by comparing the

declared value with contemporaneous imports as well as with the manufacturer's price list for the same goods and the difference was very large. In some cases the declared price was less than half. In the case of **Neha Intercontinental (P) Ltd.**, the factual finding of the Tribunal was that the rejection of the goods was only based on NIDB data which is not the case in the present dispute. The goods in question were food supplements and there were manufacturer's price list as well as imports by others of the same product. In the case of **Eicher Tractors Ltd.** there was a specific finding that the discount from the vendors price list was admissible which tilted the case in favour of the appellant. No such discount applied in this case. In the case of **Bharat Marketing**, the allegation of under valuation was only based on NIDB data. In the case of **Polyglass Acrylic**, the Tribunal recorded that the Department has not relied upon any contemporaneous import of similar or identical goods to justify the enhancement. None of these cases will come to the aid of the appellant because in the present case there were contemporaneous data as well as manufacturer's price list and the appellant was questioned about the difference and its submission is that it had imported inferior quality goods with short shelf life and hence the goods were sold cheap by the overseas supplier. Neither the bill of entry nor its supporting documents supported this assertion. Further, such goods could not have been imported with a short shelf life and of inferior quality without obtaining a no objection certificate in the FSSAI which has not been done in this case. The cases of **Agarwal Industries, Oswal Fats & Oils and J.D. Orgochem Ltd.** were relied upon by the appellant to assert

that assessable value can be rejected if the buyer and seller are related parties. There is no such allegation in this case and, therefore, and these cases laws are not relevant to this appeal. The case of **Kelvin Infotech** was relied upon by the appellant to assert that there was no evidence of additional consideration for sale which is also irrelevant to this case as there is no such allegation.

29. In view of the above, the appeal is rejected and the impugned order is upheld.

(Pronounced in open Court on June 02, 2022)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

RM