Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 10838 of 2016- DB

(Arising out of OIO-KDL-COMMR-PVRR-18-2015-16 dated 30/11/2015 passed by Commissioner of CUSTOMS-KANDLA)

Krishak Bharti Co Operative Limited **.....Appellant**
(Kribhco), A-10, Sector-1, Noida, Gautam Budh Nagar (Noida),
Noida,
Uttat Pradesh

VERSUS

C.C.-Kandla **...Respondent**
Custom House,
Near Balaji Temple, Kandla, Gujarat

APPEARANCE:
Shri B.K Singh, Advocate for the Appellant
Shri Ajay Jain, Special Counsel (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 10472 /2023

DATE OF HEARING: 21.11.2022
DATE OF DECISION: 17.03.2023

RAMESHNAIR

The issue involved in the present case is that whether there is a relationship between OMIFCO and KRIBHCO, the appellant and Government of India and due to this alleged relationship whether the import price was influenced and consequently whether the appellant is liable to pay the differential duty.

2. Shri B. K Singh, Learned Counsel appearing on behalf of the appellant at the outset submits that this is an identical case of appellant itself which has been decided by this Tribunal vide order no. A/11354-11358/2022 dated 11.11.2022. He submits that this appeal was separated due to the reason that the appellant have pressed one more issue of jurisdiction in as much as Show Cause Notice was issue by the DRI. The issue is covered by Supreme Court judgment in the case of Cannon India Ltd. However, now since issue

has been decided on merit in appellant's own case, he is not pressing the issue of jurisdiction. He prays that the appeal be decided on the same line of the Tribunal's decision vide order dated 11.11.2022.

2. Shri. Ajay Jain, Learned Special Counsel appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that on the identical issue number of Show Cause Notice were issued to IFFCO and KRIBHCO out of that some appeals of IFFCO and KRIBCO have been decided by this Tribunal vide Final Order No. A/11354-11358/2022 dated 11.11.2022. Since the identical issue and fact are involved in all the cases, in this case there is nothing more to add. For ease of reference order of this Tribunal dated 11.11.2022 is reproduced below:-

> *"9. Heard both sides and gone through the facts, documents and case laws relied upon and oral submission made during the personal hearing. We find that in the present matters issue is related to the undervaluation of goods imported by the Appellants on the grounds that seller and buyer are related to each other and that their relationship had influenced the price of goods imported.*
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> *10. Perusal of the MOU/ agreements and other records reveal that in order to meet out the fertilizer requirement in India and to ensure uninterrupted supply of fertilizer to farmers of India at a subsidized price a Joint Venture company had been formed as per the Memorandum of Understanding (MOU) dated 15.06.1993 entered in to between the GOI and the Sultanate of Oman. In terms of said MOU the companies designated by the GOI for setting up of the joint venture ammonia-urea project were M/s KRIBHCO and IFFCO while Oman Oil Company Ltd. was similarly designated by the Sultanate of Oman in pursuance of the said MOU a further MOU was signed on 30.07.1994 between the GOI, Appellant on one hand and Sultanate of Oman and the Oman Oil Company Ltd. on other. As per the said MOU dated 30.07.1994 the obligations of the GOI were to be performed through Appellants while the Sultanate of Oman would perform its obligations through Oman Oil Company Ltd. As per the said MOU the equity participation in the new JV company was 25% of KRIBHCO, 25% of IFFCO and 50% Oman Oil Company. Oman Oil company Ltd. were expected exclusive to provide natural gas to be proposed fertilizer plant under a long term supply agreement at a price determined and stated in the said MOU. Both the Appellants would be committed to purchase on FOB oman basis under a long term take-or-pay contract, on terms and conditions to be agreed upon, 100% of urea production of the*

fertilizer plant at price equal to defined calculated floor price or the market price of urea at FOB Oman, whichever is greater. The calculated floor price (CFP) of urea was defined to mean a price necessary to yield a 10% internal rate of return (IRR) on the equity investment in the fertilizer project. Appellants would be entitled to a urea sales fee at the rate of $3.50 per MT. in consideration of the sale and take-or-pay expense incurred by them. Thus in pursuance of the said MOU dtd. 30.07.1994 and the Joint Venture agreement dated 02.04.1997 was signed between Appellants and Oman Oil Co. Ltd. a new JV Company in the name and tile of Oman India Fertilizer Company LLC (OMIFCO) was formed with equity participation as envisaged in the MOU, i.e KRIBHCO -25%, IFFCO – 25% and Oman Oil Ltd. – 50%. In addition, in the Board of Directors of the new company there is equal number of Directors nominated by either side. It is evident that the GOI and Sultanate of Oman have protected their interest conceived behind MOU signed between them by way of assigning the rights and responsibilities to the entities under each. We also find from the records and details submitted by the Appellants that as per the note of discussion of the meeting held on 20.12.1999 and 27.12.1999 of the Public Investment Board of the GOI vide paragraph 8 thereof that the imports made under the projects would be on GOI account and that under UOTA the Indian Sponsors (Appellants) have been designated as agents of GOI. In OMIFCO,, though equity participation is by the Appellants and Directors are nominated by them it is evident that the real person behind the project is the GOI as far as the India side is concerned and that the entities are only agents.

10.1 We also find that as per the clause 2.1 of Urea Off-Take Agreement (UOTA) as regards supply and sales by the company, OMIFCO was bound to offer to supply and sell to the GOI in bulk at FOB the loading terminal one hundred percent (100%) of the actual production of urea from and after the date of commencement of production for the term and on the terms and conditions of agreement. Further, as per clause 5.1 price of urea produced after the date of commercial production the company and GOI agreed for the long term price of urea for rated capacity (initially specified manufacturing capacity) quantity and for excess quantity It had further been provided vide clause 5.1 (a) that the agreement for urea produced up to rated capacity the rates were finalized for the initial 15 years and further that vide clause 5.1 (c) 'excess urea' the price of FOB the loading terminal payable by the GOI to the company for purchase of excess urea was to be an amount equal to ninety five percent of the market price prevailing on the date of applicable bill of lading. Clearly, GOI had agreed to purchase 100% of rated production on the basis of a fixed Long Term Pricing (LTP) for 15 years. These facts would evident that there was a long term agreement as regard production and sale of urea by OMIFCO and purchase of the same by GOI. We also observed that in terms of JV agreement dated 20.02.2000 an Ammonia off-take Agreement was signed on 29.05.2002 between the IFFCO and OMIFCO. As per the said agreement IFFCO had agreed to enter into the agreement in pursuance of the JV agreement dated 20.10.2000, for purchase of the surplus Ammonia produced or to be produced at Fertilizer Plant over and the above that required for urea production. In terms of said AOTA , OMIFCO shall offer to sell to IFFCO, FOB, the loading terminal, all of the Ammonia produced from and after the date

of Commencement of production. The price at which the Amonia was to be sold to IFFCO was stated in clause 5 of the said agreement.

11. The above facts not disputed in the present matter. We find in the present matter adjudicating authority held that IFFCO/KRIBHCO as the importer and the Government of India –through the department of fertilizer, fall within the ambit of related person in terms of the Rule 2(2) (i) (ii) and (vi) of the CVR, 2007. The said provision reads as under :

> *Rule 2*
> *"(2) For the purpose of these rules, persons shall be deemed to be "related" only if -*
> *(i) they are officers or directors of one another's businesses;*
> *(ii) they are legally recognized partners in business;*
> *(iii) They are employer and employee;*
> *(iv) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;*
> *(v) one of them directly or indirectly controls the other;*
> *(vi) both of them are directly or indirectly controlled by a third person;*
> *(vii) together they directly or indirectly control a third person; or*
> *(viii) they are members of the same family.*
> *Explanation 1. - The term "person" also includes legal persons.*
> *Explanation 2. - Persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionare, however described, of the other shall be deemed to be related for the purpose of these rules, if they fall within the criteria of this sub-rule."*
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> *From the above, it is seen that in sub-clauses (i) to (viii) of Rule 2 (2) of CVR, 2007 indicates that each of these sub-clause deals with different means of establishing deemed relationship between two persons. In terms of Rule 2(2)(i) persons can be deemed to be related only if they are officers or directors of one another's business. In terms of Rule 2(2)(ii) persons can be deemed to be related only if they are legally recognized partner in business and in terms of rule 2(2)(iv) persons can be deemed to be related only if both of them are directly or indirectly controlled by the third person. In the present matter we find that department has failed to prove that as to how the Appellants on one hand and DOF, GOI on the other hand were officers or directors of one another's businesses. Thus, the condition prescribed in sub-rule 2(2)(i) is not satisfied in the instant case.*

12. The contention of the revenue also not correct in terms of Rule 2(2)(ii) on the ground that Appellants and OMIFCO are legally recognized partners in business, in as much as IFFCO/ KRIBHCO hold 50% of equity of OMIFCO and that there are two representatives of IFFCO/KRIBHCO on the Board of Directors of OMIFCO while another

Director on the Board of OMIFCO represents the GOI. We find that a company and shareholder cannot be termed as partner in the business carried on by the company. In partnership Act, 1932 "partnership' has been defined as relationship between two persons who have agreed to share profit of business carried on by all or any of them acting for all. Partnership is formed through an agreement. In the present matter there is no partnership agreement between the Appellants and OMIFCO, so they cannot be treated as legally recognized partners only because the Appellants hold 50% share in OMIFCO.

13. Further, Rule 2 (2)(vi) of CVR, 2007 states that person shall be deemed to be related only if both of them are directly or indirectly controlled by a third person. In the present matter revenue failed to show that who is the third person who controls Appellants. From the facts of the case it is also clear that none of the party involved in the present transactions controlled each other. Accordingly, based on the undisputed facts of this case the appellants and the GOI and OMIFCO are not related persons in terms of Rule 2 (2)(i), (iii) and (vi) of Customs Valuation Rules 2007.

14. It is a settled principle of law that the authority making the allegations has to prove with sufficient evidence. In the instant case, leaving alone the evidence, even reasons to entertain such a belief have not been properly brought forth or established. Therefore, we find that the impugned orders do not stand the scrutiny of law. We find that declared prices cannot be reviewed without any evidence to the effect that the relation between the appellants and sellers has influenced the declared price or to the effect that there was a flow back of money from the importer to the related supplier. Therefore, we don't find any substance to sustain the impugned orders.

15. Without prejudice, We also find that though the importer Appellants and GOI and Suppler of goods OMIFCO are related in terms of Rule 2(2) of the Customs Valuation Rules, 2007; declared value of the imported goods shall continue to be accepted as transaction value under Rule3(3)(a) of the CVR, 2007. For the sake of reference said rule is reproduced 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.*

15.1 We find that alleged relationship between the Appellants/ GOI and OMIFCO has not influenced the price of the imported goods. Urea-Off –Take agreement and Ammonia- off – Take agreement both are long term international contract finalized between two sovereign countries. From the MOUs and agreements it is also clear that rates were finalized for 15 years. Further it is evident that GOI had agreed to purchase 100% of rated production on the basis of fixed Long Term Pricing (LTP) for 15 years. These facts would evidence that there was a long term agreement as regards production and sale of goods by OMIFCO and purchase of the same by GOI/ Appellants. Further LTP for 15 years has been worked out in such a manner that the LTP was

substantially higher than the projected import prices (as per Chem-System) in the initial years of the projects. From the para 7.2 and 7.3 of the records notes of discussion in the meeting of Public Investment Board (PIB) it is clear that contemporaneous international market price trends have been taken into account while negotiating the LTP with OMIFCO. Market price has been defined in the agreement (UOTA) as the average of low and high end of FOB Middle East prices as quoted in the specified international journals. We also find that Government has issued Notification No. 4/2015 dated 16.02.2015 exempting Urea when imported into India from OMIFCO under the UOTA agreement dated 29.05.2002 from the customs duty and additional customs duty leviable under sub-section 1 of Section 3 of the Customs Tariff Act subject to condition that the importer produce the certificate to effect that the declared value is in the terms of agreed price under UOTA. The important aspect is not the exemption but the acceptance by the Government about the correctness of the price under UOTA. The goods imported in this matter have followed the said LTP price only. In the present matter impugned orders and department had not established that the price of the goods imported by the Appellants was influenced by the relationship between OMIFCO.

15.2 We also observe that in the matter of Commissioner of Customs, New Delhi vs. Prodelin India (P) Ltd. 2006 (202) E.L.T. 13 (S.C.) the Hon'ble Supreme Court held that:
28. Even assuming for argument's sake that the respondent and M/s. PC USA are related persons even in that case their transaction value is to 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.

Further we find that following decisions also support the case of the appellants.

- *Sew-Curodrive (I) Pvt. Ltd. Vs. CC. 2012 (284) ELT 294 (Tri)*
- *Gemplus India Pvt. Ltd. Vs. CCE- 2005 (185) ELT 269 (Tri.)*
- *CC Vs. Hewlett Packard Ltd. – 1999 (108) ELT 221 (Tri.)*
- *Volvo India Pvt. Ltd. Vs. CC -2005 (180) ELT 489*
- *Modi Senator (I) Pvt. Ltd. Vs. CC (Import & General), New Delhi – 2009 (247) ELT 313 (Tri. Del.). Affirmed by the Supreme Court in 2010(256)ELT A19(S.C.)*
- *Nestle India Ltd. Vs. Commissioner of Customs- 2010(252)ELT 208 (Tri. Chennai).*

16. From the forging, it is clear that even if it is assumed that the buyer and seller are related in terms of Rule 2 (2) of valuation Rules, 2007 read with explanation II of said Rule, the price at which the goods were purchased from OMIFCO is the true transaction value and not influenced by their relationship. In the present matter Department has also not produced any evidence to show that the relationship between the parties has influenced the price. Therefore, we find that

the reasons for rejecting the transaction value is not in consonance with law and therefore liable to be set aside.

17. We also find that the issue in question involved in the present case on the similar facts and MOU and agreements has also already been decided by the Chennai Bench vide final Order No. 41756/2020 dated 09.12.2020
(supra) in favour of the assessees. In view of the said order also the issue is no longer res integra, hence the we are of the view that the impugned orders are liable to set aside.

18. Since the charges of misdeclaration & undervaluation are not sustainable in law, the differential duty demand along with interest and penalties imposed is liable to be set aside.

19. Accordingly, the impugned orders are set aside and the appeals filed by the assessees are allowed with consequential relief in accordance with law.

20. As regard appeal filed by the revenue seeking to impose redemption fine on the goods in question, we find that confiscation of the goods and proposal to impose fine in the revenue's appeal is consequential to confirmation of differential duty and since we set aside the duty, interest and penalties, the grounds of revenue's appeal do not carry any substance, accordingly the revenue's appeal being devoid of any merit is dismissed. MA's also stands disposed of."

5. We, following the above order, set aside the impugned order and allow the appeal.

(Pronounced in the open court on 17.03.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

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