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

REGIONAL BENCH- COURT NO.3

CUSTOMS Appeal No. 10726 of 2018-DB

[Arising Out Of Order-In-Original/Appeal No MUN-CUSTM-000-APP-321-323-17-18 Dated 02.01.2018 Passed By Commissioner Of CUSTOMS-AHMEDABAD]

Sedna Impex India P Ltd **...Appellant**
105,H-3, Vardhman Plaza Tower,
Netaji Subhash Place, Pitampura
Delhi-110034

VERSUS

C.C.-Mundra **...Respondent**
Office Of The Principal Commissionerate Of Customs,
Port User Buld.
Custom House Mundra, Mundra
Kutch,
Gujarat-370421

WITH

i. **CUSTOMS Appeal No. 10728 of 2018 (Sedna Impex India P Ltd)**
ii. **CUSTOMS Appeal No. 10729 of 2018 (Sedna Impex India P Ltd)**
iii. **CUSTOMS Appeal No. 12495 of 2019 (Garg Impex)**
iv. **CUSTOMS Appeal No. 12501 of 2019 (Soir International)**
v. **CUSTOMS Appeal No. 12978 of 2019 (Sedna Impex India P Ltd)**
vi. **CUSTOMS Appeal No. 12987 of 2019 (Sedna Impex India P Ltd)**
vii. **CUSTOMS Appeal No. 10464 of 2020 (Sedna Impex India P Ltd)**
viii. **CUSTOMS Appeal No. 10041 of 2020 (Sedna Impex India P Ltd)**
ix. **CUSTOMS Appeal No. 10042 of 2020 (Sedna Impex India P Ltd)**
x. **CUSTOMS Appeal No. 10043 of 2020 (Sedna Impex India P Ltd)**

APPEARANCE:
Shri Jatin Mahajan, Advocate for the Appellant
Shri Dinesh M. Prithiani, Assistant Commissioner (Authorized representative) for the Respondent

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

Final Order No._A/10397-10407 / 2023

DATE OF HEARING:16.11.2022
DATE OF DECISION:06.03.2023

The issue involved in all these appeals are identical. Therefore all these appeals are taken up together for disposal.

2. Brief facts of the case are that appellants filed various Bill of entry seeking clearances of 100% Non-Textured Polyester Lining Falling under chapter CTH 54076190 and Mix Lot of 100% Polyester Knitted Fabrics falling under CTH 60053200 of the Customs Tariff Act, 1975, originating from China and declaring the price. The original adjudicating authority considering the representation through CPGRAM issued order and rejected the value declared by the appellant and re-determined the value of goods as per NIDB data under Rules of Customs Valuation Rules, 2007 and assessed bills of entry. Therefore, Appellants challenged the assessment before the Commissioner (Appeals) and has also claimed the benefit of Notification No. 30/2004-CE dtd. 19.07.2014 as amended by Notification No. 34/2015-CE dtd. 17.07.2015. However Ld. Commissioner (Appeals) vide impugned orders-in-appeal has upheld the order of original adjudication authority. Aggrieved by the said Orders –In-Appeal the Appellants have filed theses appeals.

3. Shri Jatin Mahajan, Learned Advocate appearing on behalf of the appellant submits that the lower authorities have erred in invoking the provisions of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which is precursor for rejection of declared value. Ld. Authorities have failed to give consideration to the contracts registered by the appellant prior to causing import of the goods under consideration. NIDB data cannot be the sole ground for rejection of the transaction value without any evidence to prove that the goods under import have been undervalued.

3.1 Without prejudice to the conditions that NIDB data cannot be applied in the present case, he submits that both the authorities have grossly erred in invoking the provisions of Explanation (1)(iii)(a) to Rule 12(2) of the Rules inasmuch as the pre-condition regarding comparable commercial transaction prescribed therein is not fulfilled.

3.2 He also submits that the Ld. Adjudicating authority has itself held that since no data of contemporaneous import of identical goods was available, recourse to Rule 5 was justified holding that the value of similar comparable goods with similar characteristic, components and application was taken as reference for re-determining the value of the imported goods by the proper officer. This finding of the Ld. Commissioner (Appeals) is not supported by any evidence. It is settled law that the declared price of goods cannot be rejected only on the basis of contemporaneous data and department needs to first ascertain para-meters of quality, quantity, characteristics of both the imports i.e contemporaneous import and import by the importer. In the present matter both the authority failed to do the same.

3.3 He further submits that Ld. Commissioner (Appeals) has wrongly held that the adjudicating authority has correctly taken recourse to the value of similar goods which possess like characteristics and like component materials which enable them to perform the same function and they are commercially inter-changeable with the goods being valued having regard to the quality, reputation etc. However it is not mentioned anywhere either in the order-in-original or in the impugned order-in-appeal as to from where the original adjudicating authority as well as the Ld. Commissioner (Appeals) came to the conclusion that the imported goods and goods mentioned in the alleged data of contemporaneous import are similar in character and the

same are commercially interchangeable with regard to the quality, reputation and they perform the same function. Hence in the present matter finding of both the adjudicating authority for applying Rule 5 is incorrect.

3.4 He also argued that in the present matter goods imported by the appellant were not fabric in running length, but they were Mixed Lot of Fabrics having assorted colors and weight, the department had no jurisdiction to reject transaction value of such goods only because fresh or prime quality polyester kintted fabrics in running length were having a higher price. The action of department and orders in rejecting transaction value of the goods imported by the appellant on such ex-facie erroneous basis is therefore liable to be set aside.

3.5 He further submits that unless the price actually paid for the particular transaction falls within the exemption in Rule 3(2), the customs authorities are bound to assess the duty on the transaction value. Both Section 14(1) and Rule 3 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken on the value in the absence of any special circumstance indicated in Section 14(1) and particularized in Rule 3(2).

3.6 He also argued that in the present matter Ld. Commissioner failed to appreciate that the benefit of Exemption Notification No. 34/2015 dtd. 17.07.2015 was available on goods in question and the adjudicating authority has not dealt with the issue at all despite specific plea of the appellant .Therefore CVD charged and collected in the Bills of Entry is without the authority of law. He placed reliance on the following decisions.

- SRF Ltd. Vs. Commissioner -2015(318)ELT 607(SC)
- Commissioner Vs. Ashima Dyecot Ltd. – 2011(267)ELT 122
- Hero Cycle Ltd. Vs. Union of India -2009(240)ELT 490 (Bom.)

- Share Medical Care Vs Union of India 2007(209)ELT 321 (SC)
- M/s Artex Textiles Pvt. Ltd. Vs. Commissioner of Customs- Final order No. 50953-502954/2019 dtd. 24.07.2019
- Commissioner of Customs (Port), Kolkata Vs. Enterprise – Final order No. FO/A/75152-75176 dtd. 17.01.2019

4. Shri Dinesh M. Prithiani, Assistant Commissioner (Authorized Representative) appearing for the Revenue reiterated the findings in the order of Commissioner (Appeals) and original adjudication authority. He also submits that benefit of Notification No. 30/2004-CE dtd. 09.07.2004 is not available to the Appellant as they have never raised or intended to raise the issue for availing the benefit of the said Notification at the time of assessment of subject bills of entry or at the time of adjudication. In these case, the impugned order were passed with regards to the dispute pertaining to valuation and not about the benefit of Notification No. 30/2004-CE dtd. 09.07.2004. A fresh issue of benefit of Notification No. 30/2004 –CE dtd. 09.07.2004 is raised before the Commissioner (Appeals). As the Notification No. 30/2004-CE is a conditional exemption it is for the Assessing officer to have a look first before extending its benefit.

4.1 He also submits that in the absence of justification of the declared value by the appellants, the assessing officer had rightly rejected abnormally low declared value under Rule 12 of CVR, 2007. He placed reliance on the following decisions:

- 2016(338)ELT 44(Mad) –CC, (Exports), Chennai Vs. Prashray Overseas Pvt. Ltd.
- 2019(367)ELT 3(SC)- Century Metal Recycling Pvt. Ltd. Vs. Union of India
- 2009(235)ELT 193(SC)- Varsha Plastics Pvt. Ltd. Vs. Union of India
- 2003(157)ELT 626(SC) – Punjab Processors Pvt. Ltd. Vs. CCE
- (v) 2021(375)ELT 417 (Tri. Mum)- Kryfs Power Components Ltd. Vs. CCE, Nahva Sheva

- (vi) 2020-TIOL-1328-CESTAT-DEL- Burberry International Vs. CC
- (v) 2019(370) ELT 999 (Tri. Mum) –Shashi Dhawal Hydraulics Pvt. Ltd. Vs. CC (Import), Mumbai
- (vi) Chintan Aluminium Pvt. Ltd. Vs. CC, Kandla – Final Order No. A/11131/2019 dtd. 16.07.2019

4.2 Heard both sides and perused the records.

4.3 The dispute in the present case is regarding the valuation of the goods imported by the Appellants. The Assessing Authority re-assessed the imported goods at values higher than what was declared by the Appellants in the Bills of Entry. The revenue enhanced value as per NIDB data. We observed that the transaction value declared by the importer should form the basis of assessment unless the same is rejected, for the reasons set out in Rules of the Customs Valuation Rules. Section 14 of the Customs Act, 1962 read with Customs Valuation Rules makes it abundantly clear that transaction value in the ordinary course of commerce is to be taken as the assessable value. The Customs Valuation Rules outlines the step-by-step methodology to be adopted for re-determination of the assessable value in certain cases. The primary requirement for re-determination of the value is that the transaction value should be rejected for cogent reasons prescribed in the Customs Valuation Rules. If the transaction value is rejected, then the Customs Valuation Rules prescribes the basis for arriving at the assessable value. However, the requirement of Section 14 and the Customs Valuation Rules need to be satisfied for enhancement of value. Nothing is forthcoming from the record of the case from which the basis for such re-assessment can be made out. Rejection of declared value on Bill of Entry is a serious affair and the same could have been rejected on the basis of cogent examination of evidences and justifiable reasons. Hon’ble Supreme Court has in case of

Eicher Tractors [2000 (122) E.L.T. 321 (S.C.)] laid down very categorical as follows :

> *"6. Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation - in the course of international trade. The word 'ordinarily' necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale……. ". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1A) in accordance with the rules framed in this behalf*
>
> *7. The rules which have been framed are the Customs, Valuation (Determination of Price of Imported Goods) Rules, 1988. The rules came into force on 16th August, 1988. Under Rule 3(i) "the value of imported goods shall be the transaction value". "Transaction value" has been defined in Rule 2(f) as meaning the value determined in accordance with Rule 4. Rule 4(1) in turn states :*
>
> > *"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."*
>
> *8. Reading Rule 3(i) and Rule 4(1) together, it is clear that a mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2), namely :-*
>
> > *(a) 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;*
> > *(b) 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;*
> > *(c) 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*

(d) 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).”

9. These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs authorities are bound to assess the duty on the transaction value.

10. The respondent’s submission is that the phrase “the transaction value” read in conjunction with the word “payable” in Rule 4(1) allows determination of the ordinary international value of the goods to be ascertained on the basis of data other than the price actually paid for the goods. This, according to the respondent, would be in keeping with the overriding effect of Section 14(1). We cannot agree.

11. It is true that the Rules are framed under Section 14(1A) 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 provid.e 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).

12. 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 language 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.

13. 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 7A. 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 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.

14. It is only when the transaction value under Rule 4 is rejected, then 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.

15. The Assistant Collector in this case determined the value of the imported goods under Rule 8. The question is whether he should have determined the transaction value under Rule 4 at the price actually paid by the appellant for the 1989 bearings. Naturally, if Rule 4 applies to the facts of this case, the Assistant Collector's reasoning under Rule 8 must, by virtue of language of Rule 3(ii), be set aside.

16. The Assistant Collector appears to have proceeded on the law as it was prior to the 1988 Rules when 'special considerations' on the basis of which a transaction was held not to be an ordinary sale in the course of international trade within the meaning of Section 14(1), had not been statutorily particularised.

17. As to what would constitute such "special consideration" has been considered in several decisions of this Court. For example, a special quotation for the importer singling him out from other importers in India was held to be a special consideration in Padia Sales Corporation v. Collector of Customs, Bombay (supra) justifying the rejection of price paid as the transaction value. On the other hand in Basant Industries v. Addl. Collector of Customs, Bombay - 1996 (81) E.L.T. 195 (S.C.), a special quotation for an "old and valued customer" was upheld as not being a special.

18. The decision in Sharp Business Machines Pvt. Ltd., relied upon by the respondent is another case where the transaction value was rejected. In that case, the importer had wrongly misdescribed the imported goods and sought to defraud the Revenue by attempting to surreptitiously import items prohibited under the import policy. It was found that there was justification, in the circumstances, for rejecting the price shown in the invoice. The transaction value having been rejected, assessment of value was made on the basis of the price list of the foreign vendor.

19. Both the decisions Padia Sales Corporation and Sharp Business Machines Pvt. Ltd. were distinguished subsequently in Mirah Exports Pvt. Ltd. v. Collector of Customs - 1998 (98) E.L.T. 3. As the facts of this case are somewhat similar to the case before us, it is dealt with in some detail.

20. Mirah Exports Pvt. Ltd. along with other importers had imported bearings at high rates of discount. The declared value was rejected by the Customs authorities, on the basis of the price list of the vendors. This Court set aside the decision of the respondent authorities accepting the argument that a discount is a recognised feature of international trade practice and that as long as those discounts are uniformly available to all and based on logical commercial bases, they cannot be denied under Section 14. It appears from the judgment that a distinction was drawn between a discounted price special to a particular customer and discounts available to all customers.

21. As already noted all these cases dealt with imports made prior to the coming into force of the Rules in 1988. Now the 'special considerations' are detailed statutorily in Rule 4(2).

22. In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a misdescription of the goods imported as was the case in Padia Sales Corporation. It is also not the respondent's case that the particular import fell within any of the situations enumerated in Rule 4(2). No reason has been given by the Assistant Collector for rejecting the transaction value under Rule 4(1) except the price list of vendor. In doing so, the Assistant Collector not only ignored Rule 4(2) but also acted on the basis of the vendor's price list as if a price list is invariably proof of the transaction value. This was erroneous and could not be a reason by itself to reject the transaction value. A discount is a commercially acceptable measure, which may be resorted to by a vendor for a variety of reasons including stock clearance. A price list is really no more than a general quotation. It does not preclude discounts on the listed price. In fact, a discount is calculated with reference to the price list. Admittedly in this case discount up to 30% was allowable in ordinary circumstances by the Indian agent itself. There was the additional factor that the stock in question was old and it was a one time sale of 5 year old stock. When a discount is permissible commercially, and there is nothing to show that the same would not have been offered to any one else wishing to buy the old stock, there is no reason why the declared value in question was not accepted under Rule 4(1).

23. In the circumstances, production of the price list did not discharge the onus cast on the Customs authorities to prove that the value of the 1989 bearings in 1993 as declared by the appellant was not the "ordinary" sale price of the bearings imported".

Similar view has been expressed by the Apex Court again in case of Tolin Rubbers Pvt. Ltd. [2004 (163) E.L.T. 189 (S.C.)], South India Televisions [2007 (214) E.L.T. 3 (S.C.)], Motor Industries [2009 (244) E.L.T. 4 (S.C.)] etc.

4.4 We find that in the present matter neither the adjudicating authority nor Commissioner (Appeals), have pointed to such special circumstances warranting the rejection of the declared transaction value by the appellant on Bills of Entry. Further, Rule 12 of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 reads as below:

"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 misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non-declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

From plain reading of the Rule 12 it is quite evident that the word "doubt" used in the rule has to be based on cogent reasons and evidences. No cogent evidence or reason has been put forth in the present case to justify the "doubt" of the assessing officer. Clearly, for rejection of the transaction value under Rule 12, there has to be a reasonable ground and it cannot be rejected merely on the ground that similar goods have been imported at higher value without examining the applicability of Rule 5 of Customs Valuation Rules, 2007.

4.5 The enhancement of the value done by the Customs department is only on the basis of value of contemporaneous imports. In this context we

find that the relevant provisions for valuation under Customs Act are as below:

> ***Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.***
> ***Rule 12 - Explanation 1(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 imports at or about the same time in comparable quantities in a comparable commercial transaction were assessed;*
> ***Rule 5 - Transaction of value of Similar goods :-***
> *(l) Subject to the provisions of Rule 3, the value of imported goods shall be the transaction value of similar goods sold for export to India and imported at or about the same time as the goods being valued Provided that such transaction value shall not be the value of the goods provisionally assessed under Section 18 of the Customs Act, 1962.*
> *(2) The provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of Rule 4 shall, mutatis mutandis, also apply in respect of similar goods.*

From the above provisions, it is clear that if there is any doubt about the transaction value declared by the assessee, then if at all the value of contemporaneous import needs to be applied, the value of identical goods or similar goods should be applied. However, in the present case though the contemporaneous import goods were relied upon, but both the adjudicating authority failed to ascertain that whether the goods of contemporaneous imports is identical or similar to the goods of the assessee . Appellants have disputed the said comparable data on the ground that contemporaneous goods provided by the revenue is for Polyester Knitted Fabrics whereas goods imported by the appellant are of Mixed lot of Polyester Knitted Fabric (Rolls of Assorted Colors & Weight), the value of the above referred type of fabrics is low because the goods are mixed lot of fabrics of different colours and different weight and quality is not same as fresh quality polyester knitted fabrics.

4.6 We noticed that in present matter no effort was made by the adjudicating authority to ascertain quality, quantity, characteristics of the

goods of contemporaneous import. In the present import without carrying out any test to the fact that goods of contemporaneous import and the goods in question in present case are identical or similar, enhancement of the value is not legal and correct. It is also observed that other than contemporaneous import data, there is no other evidence to show that the assessee have suppressed the value.

4.7 We find that in the present case, the adjudicating authority enhanced the value as the declared value appears to be low compared to value available in NIDB data, otherwise, there is no material available. The Tribunal consistently observed that the declared value cannot be enhanced merely on the basis of NIDB data. Tribunal in the case of *Neha Intercontinental Pvt. Ltd.* v. *Commissioner of Customs, Goa* [2006 (202) E.L.T. 530 (Tri.-Mum.)] has held in the absence of rejection of transaction value, invoice value requires acceptance and when the contemporaneous import of similar goods is not established, value cannot be enhanced. In the case of *Commissioner of Customs* v. *Modern Overseas* [2005 (184) E.L.T. 65 (Tri.-Del.)] NIDB data was held to be insuffient, in the absence of clarity about various parameters. List of such decisions is unending and it is sufficient to say that NIDB data has been held to be insufficient for enhancement of value, in the absence of any other independent evidence. Admittedly in the present cases, there is no such evidence produced by the Revenue except reference to the NIDB data. In view of the discussions above, we hold that in the present case, the enhancement of value on the basis of NIDB data cannot be accepted.

4.8 Further as regard the second dispute involved in the present appeals that whether appellant are eligible for exemption Notification under Notification No. 30/2004-CE dtd. 09.07.2004 which provide exemption form Countervailing Duty (CVD), we find that identical issue has been decided by

this tribunal in the appellant's own matter of M/s Sedna Impex India Pvt. Ltd. vide final Order No. A/10106-10190/2022 dtd. 18.02.2022 wherein this Tribunal has passed the following order:

"7. We have carefully considered the submissions made by both the sides and perused the records. We find that in the present case the appellant at the time of clearance of imported goods did not avail the exemption Notification No.30/2004-CE dated 09.07.2004 which provides exemption from Countervailing Duty (CVD). In order to claim the exemption notification, the appellant challenge the Bill of Entry assessment before the Commissioner (Appeals) who has rejected the appeal on the following two grounds: -

i) The appellant has not lodged any protest at the time of assessment.

ii) The appellant has failed to fulfill the conditions of Notification No. 30/2004-CE dated 09.07.2004 as amended i.e. non taking of Cenvat Credit on inputs/capital goods.

We find that the appellant in principle entitle for exemption Notification as the condition of non availment of Cenvat Credit need not to be satisfied by the importer in respect of imported goods. The same has been clarified by the Central Board of Excise and Customs vide Circular No. 1005/12/2015-CX dated 21.07.2015. The same is reproduced below:-

Circular No. 1005/12/2015-CX, dated 21-7-2015

Make in India Policy — Removal of disadvantage to domestic manufacturers vis-a-vis importers

Circular No. 1005/12/2015-CX, dated 21-7-2015

F. No. 336/4/2015-TRU

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Judgment of the Supreme Court in the case of M/s. SRF Ltd. versus Commissioner of Customs. Chennai - Clarification relating to notifications No. 30/2004-Central Excise, dated 9-7-2004. No. 1/2011-Central Excise dated 1-3-2011 and No. 12/2012-Central Excise dated 17-3-2012, as amended - Regarding.

It may recalled that the Hon'ble Supreme Court, in the case of M/s. SRF Ltd. versus Commissioner of Customs, Chennai and M/s. ITC Ltd. v/s. Commissioner of Customs (I&G), New Delhi [2015 (318) E.L.T. 607 (S.C.)] relating to CVD exemption, has held that the benefit of excise duty exemption [available to final products manufactured by the domestic manufacturer, subject to the condition of non-availment of CENVAT credit of duty on inputs or capital goods used by such manufacturer for manufacture of such final products] will also be available to the importers of such final products for the purposes of CVD on the ground that the importer was not availing the credit of duty on inputs or capital goods.

2. The implication of the Hon'ble Supreme Court judgment was that all such final products when imported by manufacturer importer would have

attracted concessional excise duty as CVD, while the domestic manufacturer of such final products had to forgo input tax credit to be eligible for such concessional rate. This would put the domestic manufacturers at a disadvantage vis-a-vis imports and would adversely impact the Make in India Policy of the Government.

3. The judgment of the Hon'ble Supreme Court was examined in CBEC and it was found that there were certain errors apparent on record/interpretational issues and. with the concurrence of the Ld. Attorney General, a Review Petition/Revision Application has been filed against the same.

4. However, keeping in view the adverse implications of the aforesaid judgment on the domestic industry, legal opinion was sought from the Ministry of Law & Justice as to whether pending the aforesaid Review Petition/Revision Application, such conditions in the relevant notifications be suitably amended so as to make the intention abundantly clear (that these conditions are to be satisfied by the manufacturers of such goods and not the buyer/importer of such goods).

5. In this context, opinion of the Ministry of Law & Justice was also sought. With the concurrence of the Ld. Attorney General, notifications No. 34/2015-C.E., No. 35/2015-C.E. and No. 36/2015-C.E. all dated 17-7-2015 were issued amending the conditions in notifications No. 30/2004-C.E., dated 9-7-2004, No. 1/2011-C.E., dated 1-3-2011 and No. 12/2012-C.E. dated 17-3-2012, respectively.

6. In the above context, apprehensions have been raised about the use of the phrase of "appropriate duty". In this regard. Explanations have been inserted in the notifications No. 30/2004-C.E., dated 9-7-2004, No. 1/2011-C.E., dated 1-3-2011 and No. 12/2012-C.E., dated 17-3-2012 so as to clarify that the appropriate duty or appropriate additional duty or appropriate service tax for the purposes of the said notifications/entries includes nil duty or tax or concessional duty or tax, whether or not read with any relevant exemption notification for the time being in force.

7. It may, therefore, be noted that the domestically manufactured goods covered under these notifications/entries continue to be exempt from excise duty or subject to concessional rate of excise duty, as the case may be, as they were prior to 17th July, 2015.

8. Trade Notice/Public Notice may be issued to the field formations and taxpayers.

9. Difficulties faced, if any, in implementation of this Circular may be brought to the notice of the Board.

The above circular was issued as a consequent to the Hon'ble SupremeCourt judgment in the case of SRF LTD. VS. COMMISSIONER OF CUSTOMS,CHENNAI-2015 (318) ELT 607 (S.C.) and AIDEK TOURISM SERVICE PVT. LTD Vs. COMMISSIONER OF CUSTOMS, NEW DELHI- 2015 (318) ELT 3(S.C.). Wherein, it was held that the condition of non availment of Cenvat Credit on input/capital goods need not to be satisfied by the

buyer/importer of such goods. In view of the above circular, the appellant was entitled for exemption from CVD at the time of clearance of the imported goods in terms of Notification No.30/2004-CE dated 09.07.2004. Needless to say that, it is asettled legal position by the Hon'ble Apex Court that board circular/instructions are binding on the departmental officers. Therefore, the Assessing Officers while assessing the Bill of Entry was duty bound to verify the eligibility of the exemption Notification No. 30/2004-CE and to extend the benefit of the same. However, the Assessing Officer has not given any heed in extending the benefit of the said notification. In this fact, it cannot be expected from the appellant to lodge any protest as they have also paid duty oversightly without claiming such notifications. Therefore, we do not agree with the contention of the Learned Commissioner that since the appellant have not lodged any protest the benefit of notification cannot be given. We further note that it is a settled law in various judgments that the benefit of exemption notification can be claimed at any stage, therefore, even after clearance of goods when the exemption benefit claimed the same should be extended to the assessee. As regard, the other ground of rejection by the Commissioner (Appeals) that the appellant have not satisfied the condition of non taking of Cenvat Credit on inputs/capital goods, the very same issue has been dealt in above referred board circular dated 21.07.2015 by considering as settled legal issue by the Hon'ble Supreme Court in the case of SRF LTD. (Supra). Therefore, in the present case the appellant have imported the goods, hence, the condition of notification i.e. non taking of Cenvat Credit on input/capital goods need not to be satisfied. The lower authorities have taken support of the decision in the case of PRASHRAY OVERSEAS PVT LTD-2016 (338) ELT 44 (Mad.). This Tribunal in the case of ENTERPRISES INTERNATIONAL LTD.-2017 (346) ELT 423 (TRI.-CHENNAI).

Even after considering the judgment in case of PRASHRAY OVERSEAS PVT LTD (Supra) held that the exemption Notification No. 30/2004-CE in respect of CVD on imported goods is admissible. The relevant order in ENTERPRISES INTERNATIONAL LTD (Supra) is reproduced below: -

11. *We have carefully considered the submissions of both sides and also perused the records, case laws and the Revenue's grounds of appeal. The short issue in all these Revenue appeals against the admissibility of CVD exemption on the imported goods i.e. Silk Yarn and Silk Fabrics under Notification No. 30/2004-C.E., dated 9-7-2004 where LAA has allowed the benefit. We find that the respondents appealed against the assessment of Bill of Entries where CVD has been charged without giving the benefit of the notification. The LAA in the impugned orders while allowing the appeal has discussed the issue in detail and also relied on this Tribunal's Division Bench decisions in the case of Prashray Overseas Pvt. Ltd. (supra) and also relied Tribunal's decision in Nhava Sheva v. Ashima Dyecot Ltd. (supra) and Mapsa Tapes Pvt. Ltd. case (supra).*

12. *On perusal of the grounds of appeal already reproduced above, the Revenue's contention that LAA has not considered the Tribunal's Larger*

Bench decision in the case of Priyesh Chemicals & Metals v. CCE, Bangalore (supra) and further contended that this Chennai Tribunal's Bench decision in the case of Prashray Overseas Pvt. Ltd. (supra) relied by LAA has not attained finality as Revenue preferred appeal against Tribunal order before the Hon'ble High Court, Madras which is still pending. Revenue also contended that notification in question should have been given effect to prospectively and the condition stipulated in the notification is only for local manufacturer of goods and not for importer. We find that this very ground advanced by the Revenue has already been dealt with in detail and decided by this Tribunal Bench in the case of M/s. Prashray Overseas Pvt. Ltd. in the orders reported in 2008 (232) E.L.T. 63 (Tri.-Chen.) and 2009 (235) E.L.T. 300 (Tri.-Chennai) where the issue of grant of CVD exemption under Notification No. 30/2004-C.E., dated 9-7-2004 has been discussed and allowed appeals. The LAA has rightly relied on the Tribunal's orders (supra) which is binding on him and allowed the appeals. Merely for the reason Revenue filed appeal before Hon'ble High Court, Madras cannot be a ground to deny the benefit allowed by this Bench as no stay granted by the High Court. Therefore, once the Tribunal has already decided the issue and the decision has not been set aside and there appears to be no error on the part of the LAA relying on this Tribunal's decision. In view of Hon'ble Supreme Court relying in the case of Union of India v. Kamlakshi Finance Corporation Ltd. - 1991 (55) E.L.T. 433 (S.C.), this Bench decision is binding on the jurisdictional lower authorities and they are bound to follow the said decision. On this account alone, the Revenue's appeals are liable to be rejected.

13. *On the question of admissibility of CVD exemption, we find the Notification No. 30/2004-C.E., dated 9-7-2004 at Sl. No. 5 of table exempts excise duty on silk yarn and silk fabrics falling under Chapters 54.01 to 54.07. The proviso to the notification stipulates a condition that "nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of the CCR, 2002." This very issue was discussed in the case of Prashray Overseas Pvt. Ltd. [2009 (235) E.L.T. 300 (Tri.-Chennai). The relevant Paragraph 3 of the order is reproduced as under :-*

"3. We find that no Central Excise duty is payable on raw silk produced in India. Yarn manufactured from such silk is also exempt under Notification No. 30/2004 as no credit availed input is used to manufacture silk yarn. Therefore indigenous silk fabrics manufactured from indigenous silk yarn are exempt from Central Excise duty. Another stream in which silk fabrics get manufactured in India is using imported silk yarn. Neither party disputes that imported silk yarn was exempt from CVD during the material period in terms of Notification No. 20/2006-Cus., dated 1-3-2006. We find that the levy of CVD on imports is regulated by the following provisions of the Customs Tariff Act, 1975.

"3. Levy of additional duty equal to excise duty. - *Any article which is imported into India shall, in addition, be liable to a (1) duty (hereafter to this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article*

shall be so liable shall be calculated at that percentage of the value of the imported article."

CVD is therefore payable on imported silk fabrics at the rate central excise duty is leviable for the time being on such silk fabrics produced or manufactured in India. Additional duty is imposed on imported goods to counter balance the central excise duty leviable on like articles made indigenously, this being a measure intended to safeguard the interests of the manufacturers in India. As no duty was payable on silk yarn either indigenous or imported, indigenous silk fabrics were not subject to central excise duty during the material period in terms of Notification No. 30/04-C.E. (supra). Therefore imported silk fabrics imported during the material period need not beat any CVD. The impugned imports are eligible for the exemption contained in Notification No. 30/2004. This was also the ratio of our final order Nos. 941, 942/2008, dated 28-8-2008 [2008 (232) E.L.T. 63 (Tribunal)] in respect of the same appellants for 44 consignments imported earlier. The appeal is allowed."

14. *We find that Revenue relied on the Supreme Court's decision in the case of Motiram Tolaram v. UOI (supra) and the Tribunal's Larger Bench decision in Priyesh Chemicals & Metals (supra). In this regard the Hon'ble Supreme Court in their recent order in the case of SRF Ltd. v. CC, Chennai (supra) held that the appellants are entitled to exemption from payment of CVD under Notification No. 6/2002 and allowed the civil appeal. The relevant Paras 3 to 8 of the said Supreme Court's order is reproduced as under :-*

"3. Entry/Serial No. 122 in the Notification No. 6/2002 reads as under -

S. No.	***Chapter or heading No. or sub-heading No.***	***Description of goods***	***Rate under the First Schedule***	***Rate under the Second Schedule***	***Condition No.***
122	*5402.10* 5402.41 5402.49 5402.51 5402.59 5402.61 or 5402.69	*Nylon filament Yarn or Polypropylene multifilament yarn of 210 deniers with tolerance of 6 per cent.*	*Nil*	*-*	*20*

4. As per the aforesaid entry, the rate of duty is nil. Condition No. 20 of this Notification, which was relied upon by the authorities below in denying the exemption from payment of CVD, is to the following effect :

"20. If no credit under rule 3 or rule 11 of the Cenvat Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods."

5. The aforesaid condition is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the Cenvat Credit Rules, 2002, in respect of the capital goods used for the manufacture of these goods.

6. In the present case, admitted position is that no such Cenvat credit is availed by the appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the appellant, no such credit is admissible under the Cenvat Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the Cenvat Rules is not admissible to the appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of Ashok Traders v. Union of India [1987 (32) E.L.T. 262], wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw naphtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.

7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this court in Thermax Private Limited v. Collector of Customs (Bombay), New Customs House [1992 (4) SCC 440] = 2002-TIOL-683-SC-CUS-LB which was affirmed by the Constitution Bench in the case of Hyderabad Industries Limited v. Union of India [1999 (5) SCC 15] = 2002-TIOL-369-SC-CUS-CB. In a recent judgment pronounced by this very Bench in the case of AIDEK Tourism Services Private Limited v. Commissioner of Customs, New Delhi (Civil Appeal No. 2616 of 2001) = 2015-TIOL-23-SC-CUS, the principle which was laid down in Thermax Private Limited and Hyderabad Industries Limited was summarised in the following manner :-

"15. The ratio of the aforesaid judgment in Thermax Private Limited (supra) was relied upon by this Court in Hyderabad Industries Ltd. (supra) while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the assessee herein. In that case, the court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Section 3(1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where 'a like article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of

attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon."

(Emphasis supplied)

8. We are of the opinion that on the facts of these cases, these appeals are squarely covered by the aforesaid judgments. We accordingly hold that appellants were entitled to exemption from payment of CVD in terms of Notification No. 6/2002. The appeals are allowed and the demand of CVD raised by the respondents-authorities is set aside."

The ratio of the Apex Court's decision is squarely applicable to the present case where CVD exemption was denied under Notfn. No. 30/2004 where the proviso to the notification stipulated the condition that the exemption is not applicable if credit of duty on inputs or capital goods has been taken under CCR.

15. *Further, we find the Hon'ble Apex Court in the case of AIDEX Tourism Services Pvt. Ltd. v. CC (supra) has not only considered the cases of Thermax Private Ltd. and Hyderabad Industries Ltd. but also discussed the Apex Court's decision in the case of Motiram Tolaram v. UOI (supra). The relevant para is extracted hereinunder :-*

" ....

This position has been reiterated in Motiram Tolaram v. Union of India - (1999) 6 SCC 375 = 1999 (112) E.L.T. 749 (S.C.), CCE v. J.K. Synthetics - (2000) 10 SCC 393 = 2000 (120) E.L.T. 54 (S.C.), Lohia Sheet Products v. Commr. of Customs - (2008) 11 SCC 510 = 2008 (224) E.L.T. 349 (S.C.) and Collector of Customs (Preventive) v. Malwa Industries Ltd. - (2009) 12 SCC 735 = 2009 (235) E.L.T. 214 (S.C.). In fact, in Lohia Sheets and Malwa Industries cases (supra), this Court was considering exemption notifications envisaging use of certain material within a "factory" and still held that an importer would be entitled to the benefit of the exemption notifications in view of Section 3 of the Tariff Act and the decisions in Hyderabad Industries and Thermal cases. As such, it is now settled that the rate of duty would be only that which an Indian manufacturer would pay under the Excise Act on a like Article. Therefore, the importer would be entitled to payment of concessional/reduced or nil rate of countervailing duty if any notification is issued providing exemption/remission of Excise duty for a like article if produced/manufactured in India.

16. We may mention that in the case of Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal & Ors. - (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.), a three Judge Bench of this Court had raised certain doubts on the correctness of the principle contained in Thermax Private Limited (supra) as well as in J.K. Synthetics (supra) and referred the matter to a larger Bench. Reference order is reported as (2005) 8 SCC 164 = 2005 (188) E.L.T. 353 (S.C.). The Constitution Bench decided the said case, which is reported as (2011) 1 SCC 236.

From the reading of paras 39 to 41 of the said judgment it becomes clear that though these cases were held not applicable to the fact situation and were distinguished, the Court did not say that the aforesaid judgments were incorrectly decided. In fact, by distinguishing the ratio of the said cases, the Constitution Bench impliedly gave its imprimatur to the principle laid down in the aforesaid judgments."

16. *In view of the above ruling by Apex Court, we are unable to accept the Revenue's plea that the Apex Court decision of SRF Ltd. and M/s. Motiram Tolaram are in direct conflict. Hon'ble Supreme Court has clearly considered all the previous decisions of Apex Court including the decision in the case of Motiram Tolaram v. UOI (supra). Therefore, the Revenue relying on the above case law and also the LB decision in the case of M/s. Priyesh Chemicals & Metals (supra) are not relevant. In view of the latest decision of Apex Court in SRF case & AIDEK Tourism Services Pvt. Ltd., the issue of CVD exemption under Notfn. No. 30/2004 on imported goods has attained finality. This Tribunal Bench decisions in the case of M/s. Prashray Overseas Pvt. Ltd. v. CC, Chennai stands confirmed by the Hon'ble Supreme Court in the above decision.*

17. *Before parting, we wish to record that the respondents repeatedly pleaded that under ICES-EDI system the Notification No. 30/2004-C.E., dated 9-7-2004 has not yet been uploaded and not figuring in the system for assessment even after a decade. This fact was already reported in this Tribunal order dated 10-8-2010 in the case of M/s. Elegant Fabric v. CC, Chennai (supra). Therefore, we bring to the notice of the Chairman, C.B.E. & C. & DG (Systems), C.B.E. & C., New Delhi to rectify and upload the said notification in the EDI system at the earliest so that the Trade need not seek every time for manual assessment of Bill of Entry or file appeal against every assessed Bill of Entry under EDI before Commissioner (Appeals) as is happening at present in the Custom House.*

18. *By respectfully following the ratio of the Apex Court decisions (supra), we hold that the respondents are eligible for CVD exemption under Notification No. 30/2004-C.E., dated 9-7-2004. In view of the foregoing discussions, we hold that there is no infirmity in the orders of LAA and the same are upheld and all the Revenue's appeals are rejected. The cross objections filed by respondent get disposed. Copy of order be forwarded to the Chairman, C.B.E. & C. and D.G. System, New Delhi.*

The above decision has been delivered considering the Hon'ble Supreme Court judgment in the case of SRF LTD. VS. .and AIDEK TOURISM SERVICE PVT. LTD Vs. COMMISSIONER OF CUSTOMS- 2015 (318) ELT 3 (S.C.), therefore, the sole reliance of the Revenue in the case of PRASHRAY OVERSEAS PVT LTD (Supra) is of no help to revenue.

8. As per our above discussion and findings and settled legal position as discussed above, the appellant are clearly entitled for the exemption Notification No. 30/2004-CE dated 09.07.2004 for exemption from CVD on the imported goods.

9. Accordingly, the impugned order is set aside. Appeals are allowed withconsequential relief.

In view of the above decisions, it is settled that the appellants are entitled for the exemption from payment of CVD under notification No.30/2004-CE.

5. In view of our above discussion and settled legal position, we set aside the impugned orders and allow the appeals with consequential relief to the appellants, if any, in accordance with law.

(Pronounced in the open Court on 06.03.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PALAK