

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85821 OF 2020

[Arising out of Order-in-Appeal No: MUM/CUS/JSN/IMP-99/2019-20 dated 22nd January 2020 passed by the Commissioner of Customs (Appeals), Mumbai Zone - I.]

GlaxoSmithKline Asia Pvt Ltd
Patiala Road, Nabha, Punjab- 147201

... Appellant

versus

Commissioner of Customs (Imports)
New Customs House, Ballard Estate, Mumbai- 400001

...Respondent

APPEARANCE:

Shri Amay Banhatti, Advocate for the appellant

Shri Manoj Kumar, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86379/2023

DATE OF HEARING: 16/03/2023

DATE OF DECISION: 14/09/2023

PER: C J MATHEW

This appeal of M/s GlaxoSmithKline Asia Pvt Ltd, against

order¹ of Commissioner of Customs (Appeals), Mumbai-I, challenges the remand directed thus

'4.8 The appellant has not produced any evidence which may suggest that the findings/ conclusion arrived at by the OA was not correct. The only specific objection the appellants took in appeal before the Hon'ble CESTAT is as under:

"7. While examining the deductive value supplied by the importer respondent, the DC had not examined balance sheet to ascertain whether the transportation charges, manufacturing overheads, promotional expenses, selling & distribution cost and profit are correct.

8. Comparison of two vaccines "Priorix" and "Hiberix" in the impugned order showed unexplained variance w.r.t. packing cost, transportation, promotional expenses and S & D expenses. It was therefore, necessary to examine the balance sheet.

9. There was an unexplained difference of Rs. 105 in the MRP of the two vaccines when their ex-factory cost was almost same (about Rs.124), "

5. The said ground of appeal is in the nature of objection which can be relooked at by the OA. As stated herein above, the OA has recorded at para 2 & 3 of the OIO that the importers had submitted accounts including audited accounts of last three years, I think it fit and proper to remand back to the OA to examine the aforesaid objection taken by the appellant and pass a fresh order. The OA may hear the importers and give them opportunity to make any additional submissions.'

to the Deputy Commissioner (GATT Valuation Cell), New Custom House, Mumbai with submission of Learned Counsel for appellant that it

¹ [order-in-appeal no. MUM/CUS/JSN/IMP-99/2019-20 dated 22nd January 2020]

is not within the jurisdiction of the first appellate authority to do so and that the order of the original authority should not have been set aside.

2. In the light of this submission, the twists and turns in this dispute thus far may have to be borne in mind. The appellant had entered into agreement dated 1st October 2006 with M/s GlaxoSmithKline Biologicals SA, Belgium for import of 'vaccines' specified in the schedule therein which was commenced in 2007. Owing to admitted relationship of the two entities, the matter was referred to Special Valuation Branch (SVB) and, in communication dated 17th November, 2008 the declared value was held as acceptable. Appeal filed at the behest of the jurisdictional Commissioner of Customs, before the first appellate authority was dismissed by order dated 11th August, 2009. In further appeal of Revenue, order of the Tribunal dated 11th July 2018 held that the matter was required to be heard afresh by the first appellate authority for having traversed beyond the issue in appeal. The first appellate authority took note of the decision of the Tribunal and held as *supra* for a fresh decision by the original authority.

3. Learned Counsel submits that the observation that

'4.7 From the above, it is clear that OA has surmised the correctness of the price in view of the supply agreements between the supplier and the importer, the market conditions prevailing in respect of these vaccines, margin of profit and the expenses

connected to manufacturing and marketing. The transaction value in the present case have been accepted on the basis of sale of Goods to unrelated buyers in India. I find that at para 2 and para 3 of the impugned order in original the Original Authority has recorded the documents submitted by the importer which includes audited balance sheets for last three years apart from other relevant documents and accounts. It would mean that OA has scrutinized facts before arriving at the conclusion unless anything contrary is recorded in the order. In the absence of any contrary finding it is clear that OA has scrutinized all these facts before coming to conclusion.'

had disposed off the issue raised in departmental appeal before first appellate authority in affirming the correctness of the order impugned and, yet, decided to remand the matter on factual aspects raised by Revenue before the Tribunal. He relied on the decision of the Hon'ble High Court of Bombay in *Commissioner of Central & Customs, Nasik v. DJ Malpani [2010 (258) ELT 185 (Bom)]* holding that

'4. Every Tribunal and/or quasi judicial authority which in the hierarchy is subordinate to the Tribunal is bound to comply with the direction. If any party is aggrieved by an order the remedy is to prefer an Appeal. A lower authority cannot go against the order of remand issued by the higher Appellate Authority. In fact it is bound by the terms of the remand order and cannot go beyond the terms of the order of remand. Judicial discipline requires that this system which has been followed in our judicial system must be maintained by all judicial and quasi judicial authorities. However, considering the unconditional apology tendered today the directions as contained in order dated 29th September, 2006 to the extent quoted by us earlier are expunged. With the above direction petition disposed of.'

and of the Hon'ble High Court of Karnataka in *Dell International Services India (P) Ltd v. Assistant Commissioner of Income Tax, Bangalore [2016 (382) ITR 37 (Karnataka)]* holding that

'9. We observe that no proper reasoning has been given by the Tribunal for exercising the power of remand. The directions issued by this Court while remanding the matter to the Tribunal is not considered by the Tribunal in the true spirit. It was the obligation cast on the Tribunal to examine the case of the Assessee in the light of the Judgment of the Apex Court in Rotork Controls case (supra) and to come to a decision. But, remanding the matter to the Assessing Officer is in disregard to the Judgment of this Court and as such we are of the opinion that the order passed by the Tribunal is unsustainable.'

4. We have heard Learned Authorized Representative. It is seen that, except as objection to the latest order of first appellate authority, the appellant was not even a litigant or even a noticee. All appeals were entirely at the instance of customs authorities whose plea was not accepted by first appellate authority on the earlier occasion.

5. The dispute, also seen to be limited to the period of three years from January 2007, was in appeal before the first appellate authority on the ground that the original authority had not scrutinized the balance sheet for ascertaining the correctness of the 'transportation charges', 'manufacturing overheads', 'promotional expenses', 'selling and distribution cost' and 'margin of profit' intimated in the computation furnished by them to Special Valuation Branch (SVB).

6. In the first round of litigation, the first appellate authority had, instead of rendering a finding on the verification or remanding the matter for verification, had held that the transaction value was acceptable without considering the plea of the jurisdictional Commissioner of Customs on the need to ascertain the veracity of the data from the balance sheet. This had been sought for as the 'retail selling price' of the two vaccines involved, viz. 'Priorix' and 'Hiberix', was substantially higher than the 'ex-factory price' which could possibly be attributed to loading identified costs on the consumer while distancing the import transaction from those intrinsic elements. The finding of the Special Valuation Branch was based on 'deductive value', furnished by the appellant herein, approximating the import price and the non-ascertainment of correctness of the elements in the furnished computation was the flaw sought to be rectified in appeal. Hence the direction of the Tribunal to consider the plea as laid out in the appeal.

7. It is evident that facts would have to be ascertained and the only available options for the first appellate authority were to call for the balance sheet and ascertain veracity of the elements or to have such exercise undertaken. That the latter was preferred is not without jurisdictional competence and setting aside of order is pre-requisite for such re-consideration. We do not find this remand to be contrary to the decisions in *re DJ Malpani* or in *re Dell International Services*

India (P) Ltd and the only issue for consideration before us is only prejudice the appellant herein arising from remand.

8. The communication that started the dispute was not rendered within the framework of a show cause notice and any action to the detriment of an importer must comply with section 17 or section 18 of Customs Act, 1962; likewise, any recovery will take recourse to section 28 of Customs Act, 1962 with show cause notice as pre-requisite. The findings of the Special Valuation Branch (SVB) are not binding on ‘proper officer’ exercising such statutory powers and no action, unless initiated under the cited provisions, can be detrimental to the appellant herein. We see no prejudice thereby as appellant has not brought on record that any particular import to be assessed, provisionally or finally, will be impacted by mere ascertainment of the details furnished by the importer and, that too, only by reference to their own record.

9. We, therefore, find no ground for interference in the order of first appellate authority. Appeal is dismissed.

(Order pronounced in the open court on 14/09/2023)

(AJAY SHARMA)
Member (Judicial)

**/as*

(C J MATHEW)
Member (Technical)