

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench – Court No. – I

Customs Appeal No. 30394 of 2017

(Arising out of Order-in-Appeal No. VIZ-CUSTM-000-APP-099-16-17 dt.28.12.2016 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Visakhapatnam)

M/s Elkem South Asia Pvt Ltd

307/308, B-Wing, BSEL Tech Park, Sector 30-A,
Vashi, Navi Mumbai, Maharashtra – 400 705

.....Appellant

VERSUS

Commissioner of Customs

Visakhapatnam - I

Port Area, Visakhapatnam,
Andhra Pradesh – 530 035

.....Respondent

Appearance

Shri R. Krishnan, Consult Jurists, Advocate for the Appellant.

Shri V.R. Pavan Kumar, AR for the Respondent.

**Coram: HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)**

FINAL ORDER No. A/30057/2026

Date of Hearing: 13.10.2025

Date of Decision: 30.01.2026

[Order per: A.K. JYOTISHI]

M/s Elkem South Asia Pvt Ltd (hereinafter referred to as appellant) are a 100% owned subsidiary of a foreign company viz., Elkem AS Norway (hereinafter referred to as the principal). They are acting as exclusive dealer/reseller/agents for the principal for distribution and sale of Elkem Micro Silica (EMS for short) in South Asia viz., India, Sri Lanka, Nepal, etc. They have been importing EMS from their principal through different ports and the fact of them being 100% subsidiary of the principal and therefore, being a related person was disclosed to the Customs department Special Valuation Branch (SVB), Mumbai. The SVB allowed the import on the basis of invoice value i.e., transaction value from the year 2000 onwards. However, in respect of certain imports made through Visakhapatnam Port, the concerned Appraising Officers assessed the duty based on higher value on the basis of third party imports by another consumer viz., M/s Vesuvius

India Pvt Ltd. The appellant paid the duty under protest. The assessment vide 21 Bills of Entry (BoE), which was kept provisional, was finalized vide Order dt.02.05.2016 and certain amounts were also refunded, which was paid on account of extra duty deposit. The appellants, thereafter, appealed against the said order before the Commissioner (Appeals), who, vide Order dt.28.12.2016 (impugned order), rejected the appeal and upheld the assessment order. The appellants are in appeal against the said order of the Commissioner (Appeals) (Impugned Order).

2. Learned Advocate for the appellant has made various submissions. His main thrust is on the fact that while there is no denial that they are 100% subsidiary of the principal from whom they have imported the goods and therefore, they are related person, however, merely because they are related person, their transaction value cannot be rejected. He has also emphasized the fact that based on various submissions and factual details, the SVB had already decided the matter in the past where department accepted their transaction value as a basis for demanding customs duty. He has also submitted that in the impugned order, the authority has not properly appreciated the factual details, leading to erroneous conclusion. His another limb of argument is that the 'contemporaneous price adopted for loading on their declared value is based on import by one single company covered under one single BoE and it cannot be considered as 'contemporaneous price' in view of the statutory provisions under Customs Valuation Rules. He has further argued that when the SVB has already finalized their order holding that the transaction value/ invoice value is acceptable for the purpose of valuation and the same was in effect in respect of some of the imports, ignoring the same even during the currency of the said order is a gross disregard to the order passed by SVB.

3. Learned AR, on the other hand, has reiterated the findings of the Commissioner (Appeals) in the impugned order.

4. Heard both sides and perused the records.

5. The issue involved in this appeal is whether the department was correct rejecting the transaction value and in re-determining the assessable value by relying on certain contemporaneous prices or otherwise. We find that the Original Assessing Authority has taken into consideration the order

of the SVB dt.13.04.2011, as also, the order dt.30.01.2015. The authority felt that the SVB order was valid up to 20.01.2013 only, which is not factually correct as it was valid for three years. Further, the authority took into consideration the observation in the SVB order dt.30.01.2015, wherein again it was held that the invoice value of the goods imported by the importer from the foreign supplier was not influenced by the relationship. However, it was also noted in the said order that if contemporaneous imports at higher prices are noticed or there exist reasons other than the influence of relationship to doubt the invoice value, the Assessing 'Group' may evaluate the value of the imported goods under the appropriate provisions of the applicable Valuation Rules. Apparently, under this additional observation of SVB, Assessing Officer has re-determined the value because according to the department, higher contemporaneous import price of similar/identical goods was available. Insofar as the observation that it was due for review on 20.01.2013 is factually wrong as the order dt.13.04.2011 was valid for three years and there was no such observation made in the SVB order as was made later in the order dt.30.01.2015. Therefore, 10 BoEs were clearly covered under the earlier order as imports have been made prior to 12.04.2014.

6. Insofar as the reviewed SVB order dt.30.01.2015 is concerned, while holding that the invoice value has not been influenced by the relationship, it was also observed that the Appraising Officer may, based on certain fact, re-evaluate the value. Further, the observation of the Appraising Officer that appellant agreed for enhancement of unit price is not factually correct as the duty was admittedly paid under protest in support of which, the appellants have submitted certain letters. The Appraising Officer also observed that the discounts allowed by the principal appeared to be typically due to the fact that the importers being sole distributor of the product of the principal in India and that the cost incurred in distribution of product in India appeared to have been factored in working out the supply price extended to the importers. It was also considered that the declared value in respect of 21 consignments was in huge variation with the contemporaneous price and therefore, cannot be said to represent true transaction value in terms of Rule 3(1) of the Customs Valuation (Determination of the Price of Import Goods) Rules, 2007 (hereinafter referred to as the Rules) read with section 14 of the Customs Act, 1962 (hereinafter referred to as the Act) and

therefore, rejected the said transaction value. After rejecting the transaction value, he proceeded sequentially through Rule 4 to 9 of the Rules to determine the value of goods and after rejecting Rule 4 & 5 as well as Rule 7 & 8 and adopted Rule 9 for determining the assessable value.

7. We note that first of all, while there is no denial that they are related person being 100% subsidiary, however, to SVB has already examined all these aspects and has also noted that such relationship has not influenced the price. Therefore, the discounts allowed to them were normal considering the nature of activities they were reselling the product and incurring certain expenditure on overheads, etc. However, the Appraising Officer has taken recourse to the additional observation to re-determine the assessable value primarily on the ground that there exists contemporaneous price for the similar goods, which is substantially higher. We find that for being a contemporaneous price, there has to be comparison between same class of buyer and the imports are also comparable in terms of quantity and value. Proviso to Rule 3(b), inter alia, provides that in a sale between related persons, the transaction value shall be accepted whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time and it provides that in applying the values used for comparison due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule 10 and cost incurred by the seller in sales in which the buyer and seller are not related. The appellants have mostly tried to demonstrate that the value adopted as contemporaneous cannot be considered as contemporaneous, inasmuch as the quantum of import made by the third party is significantly less in terms of quantity and value. We have perused the data furnished by them, which indicates that while the appellant imported close to 4,27,750 Kg of goods, the third party i.e., M/s Vesuvius India Pvt Ltd has imported only 40,000 Kg. Further, M/s Vesuvius India Pvt Ltd is an actual user of the said material in their factory and not a reseller and comparison has been made based on only one BoE and applied to all the 21 BoEs for loading purpose by the department. Thus, it is obvious that while the appellants are a dealer/distributor, the contemporaneous price of actual consumer, who has clearly imported a much smaller quantity and also has been applied, does not belong to same class of buyer. We also note that Rule 4 of the

Rules provides method for computation of value of identical goods. This also provides that where no sale referred in clause (b) of sub-rule (1), is found, the transaction value of identical goods sold at a different commercial level or in different quantities or both, are required to be adjusted to take into account the difference attributable to commercial level or to the quantity or both and shall be used, provided that such adjustments shall be made on the basis of demonstrated evidence, which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustments leads to an increase or decrease in the value. We find that in this case, clearly the adoption of contemporaneous value of the third party is not sustainable with the provisions of the Rules.

8. Therefore, we find that since the SVB has already taken into consideration the declared assessable value being correct i.e., the transaction value has been rightly adopted for discharge of customs duty, the Assessing Officer's reliance on certain observations in the SVB order dt.30.01.2015 is not correct for rejecting the transaction value as it is clearly held that the value declared has not been influenced by the relationship between the appellant and the principal. The SVB has taken into account various factors in the case of related transaction including variations in price and non-inclusion of certain elements, etc., and thereafter came to the conclusion whether the transaction value is acceptable or not. Therefore, once having decided that transaction value is correct, its rejection by the Appraising Officer, per se, is not sustainable despite having made certain observation in this regard by the SVB in the order dt.30.01.2015. Moreover, even for the sake of argument it is accepted that the Appraising Officer was free to re-determine the assessable value by rejecting the transaction value, having regard to the fact that certain so called 'contemporaneous price' was in existence and by applying the said contemporaneous price, this adoption itself is also not correct and tenable on two grounds. Firstly, while the goods are identical/similar, the appellants and the third party are not in the same class of buyers. Secondly, there is demonstrable difference between the quantity of import made by the appellants as well as the third party. Further, the difference in the value declared is not substantial considering that the importer/appellant is required to undertake resale of the said consignment, which involves various overheads and costs and therefore, it falls within the reasonable margin and permissible discount. This aspect has

been examined by the SVB itself and they have made an observation that the relationship has not influenced the import price. Therefore, in the factual matrix, the Appraising Officer could not have adopted the value of third party as contemporaneous price for the purpose of loading/redetermining the assessable value of the appellant. We also note that the appellants had contested the loading and adoption of contemporaneous price and paid the duty under protest.

9. In view of the same, we do not find the Order of the Commissioner (Appeals) sustainable and is accordingly, set aside.

10. Appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the Open Court on 30.01.2026)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)