

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10433 of 2015

[Arising Out Of OIA-AHM-CUSTM-000-APP-336-341-14-15 Dated- 17/11/2014 Passed By Commissioner of CUSTOMS-AHMEDABAD]

Reliance Industries Limited Dahej

Dahej Manufacturing Division, Po Dahej - Taluka Vagra,
Bharuch, Gujarat

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

WITH

- 1. Customs Appeal No. 10434 of 2015 (Reliance Industries Limited)**
- 2. Customs Appeal No. 10435 of 2015 (Reliance Industries Limited)**
- 3. Customs Appeal No. 10436 of 2015 (Reliance Industries Limited)**
- 4. Customs Appeal No. 10437 of 2015 (Reliance Industries Limited)**
- 5. Customs Appeal No. 10438 of 2015 (Reliance Industries Limited)**

[Arising Out Of OIA-AHM-CUSTM-000-APP-336-341-14-15 Dated- 17/11/2014 Passed By Commissioner of CUSTOMS-AHMEDABAD]

APPEARANCE:

Shri. J.C. Patel, Advocate and Ms. Shilpa Balani, Advocate for the Appellant
Shri. G. Kirupanandan, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**

FINAL ORDER NO. A / 11190-11195 / 2023

DATE OF HEARING:02.06.2023

DATE OF DECISION:02.06.2023

Raju

These appeals have been filed by Reliance industries Limited against demand of customs duty by inclusion of High Seas Sale Commission of 2% in their declared assessable value.

2. Learned counsel for the appellant pointed out that they are imported "Propane" from Abu Dhabi. They had purchased it on High Seas Sale basis from various Public Sector undertaking like IOCL, BPCL, and HPCL. They have agreement with the Public Sector undertaking under which they have agreed to purchase High Seas Sale Basis, such products at the price at which the said public sector undertakings have obtained the same from Abu Dhabi National Oil Company (ADNOC). The said agreement clearly states that there will be no premium paid and the said public sector undertaking will be selling the product on High Seas Sale Basis at the contracted price, that is a price at which they have purchased from ADNOC.

3. Learned counsel pointed out that the revenue has seeking 2% Notional Commission High Seas Sale. He pointed out that the addition of 2% High Seas Commission has been held to be irregular by the Tribunal in the case of Indian Farmers Fertilizer Co-Operative Limited.-2020 (373) ELT 530. He also relying on the circular no. 11/2010-Cus. dated 3rd June, 2010 wherein it has been held that the such addition of 2% High Seas Sale Commission is not proper.

4. Leaned AR relies on the impugned order. He points out that the appellant has failed to produce the necessary documents to establish the correctness of High Seas Sale Price.

5. We have considered the rival submissions. we find that the issue regarding addition of Notional Commission at the rate of 2% of high Seas Sale price has been examined by Tribunal in the case of Indian Farmers Fertilizer Co-Operative Limited.-2020 (373) ELT 530. In the said decision following has been observed:-

"32. *The finding recorded by the Principal Commissioner on this issue is as follows :-*

"13.6 The second issue to be decided is whether high seass sale commission of 2% is to be added in the assessable value or not. *It has seen argued that in terms of Circular No. 32/2004-Cus., dated 1-5-2004, the actual high seas sale contract price paid by the last buyer would constitute the transaction value under Rule 4 of CVR, 1988 and inclusion of commission on notional basis may not be appropriate. The Board has not approved the Mumbai Custom House practice of adding 2% notional High Sale Commission in CIF value.*

... ..

13.8 From the above analysis, it is clear that high sale commission is includable in the assessable value. The question is whether, the price at which the high seas sale is taking place between GOI and IFFCO can be considered as price at which international transfer of goods is taking place. In other words, can this price be considered as the transaction value in terms of Rule 4 or not. As already mentioned above, the price said by the GOI to IFFCO is pool price (i.e. approx. US \$ 83 per MT) and that the price paid by STE to exporter i.e. US \$ 300 per MT. The pool price is an artificial price at which IFFCO sells goods further after clearance from Customs to the farmers. As this is not the price at which the international transfer of goods has taken place, the same cannot be the assessable value in terms of the circular. In the instant case, as already analyzed above, there are two transactions involved. One is between STE and GOI and another is between GOI and IFFCO. The first high seas sale between STE and GOI is an international transfer of goods. I have already held that the service charges paid by GOI to STE are includable assessable value. There cannot be any doubt that the price at which GOI transfers goods to IFFCO cannot be accepted as transaction value. This is also the reason that IFFCO is paying duty on the price at which the goods are transferred by STE to GOI. In normal course of trade, a person selling the goods on high seas sale basis, would naturally add some commission to cover his expenses and margin in the deal with high seas sale buyer. However, in the present case, no data regarding expenses incurred by GOI (apart from declared value of the imported goods) is available as the goods have been sold at an artificial price to IFFCO. Therefore, one has to go for best judgment method prescribed in Rule 9 of CVR, 2007. It is established practice that where data regarding actual commission is not available, 2% high seas sale commission is to be added to arrive at the correct assessable value of the imported goods."

(emphasis supplied)

33. In this connection, the Circular dated 11th May, 2004 issued by C.B.E. & C. has been referred to by the Principal Commissioner. On an analysis of the said Circular, a finding has been recorded that High Seas Sale commission has to be included in the assessable value and the only issue that needed to be decided was whether the price at which the High Seas Sale was taking place between the Government of India and the Appellant could be considered as a price at which international transfer of goods was taking place in terms of Rule 4. The Principal Commissioner noticed that the price paid by Appellant to the Government of India was a pool price of US \$ 83 per MT, whereas the price paid by the STE to the exporter was US \$ 300 Per MT. The pool price, therefore, was an artificial price at which the Appellant sold the goods to the farmers. Thus, this was not the price at which international transfer of goods took place and the same, therefore, could not be the assessable value in terms of the Circular. Thus, the price at which the Government of India transfers the goods to the Appellant cannot be accepted as 'transaction value', more particularly when in the normal course of trade a person selling the goods on High Seas Sale basis would naturally add some commission to cover his expenses. However, as there was no data regarding expenses incurred by the Government of India as the goods were sold on an artificial price to the Appellant, the best judgment method as prescribed in Rule 9 of the 2007 Valuation Rules was required to be adopted and it was an established practice that when actual data regarding commission was not

available, 2% High Seas Sale Commission could be added to arrive at the correct assessable value of the imported goods.

34. Learned Consultant for the Appellant has stated that this 2% Notional High Seas Sale Commission is being added to the assessable value only at Pipavav Port which is the port involved in the present appeal, but this notional Commission is not being added at Mundra and Kakinada Port where also urea is imported by the Appellant. It has also been pointed out that even in the case of two importers, namely M/s. Koramandal International Ltd. and M/s. Kribhco, when urea is imported from Hazira Port, this notional Commission is not added. In support of this contention, Bills of Entry of the importers have also been enclosed.

35. The Circular, on which reliance has been placed in the show cause notice and the order of the Principal Commissioner, is reproduced below :

"Circular No. 32/2004-Cus., dated 11-5-2004

Subject : Customs Valuation Rules, 1988 - Determination of assessable value for goods sold on high seas - Regarding.

Representations have been received on the Ministry to clarify the manner of determining the value of imported goods imported on high-seas-sales basis. As per the existing practice in Mumbai Customs House, the "high-seas-sale-charges" are added to the declared CIF value in terms of Public Notice No. 145/2002, dated 3-12-2002. Such "high-seas-sales-charges" are taken to be 2% of the CIF value as a general practice. In case the actual high-seas-sale Contract price is more than "the CIF value plus 2%", then the "actual Contract price" paid by the last buyer is being taken as the value for the purpose of assessment. In some of the custom houses, however, audit has raised objection stating that if, in a particular transaction, there were about three/four high-seas-sales, then high-seas-sales Service Charges @ 2% has to be added to the CIF value, for each such transaction.

2. The matter has been examined taking into account the Advisory Opinion 14.1 of the GATT. Valuation Code, which stipulates that if the importer can demonstrate that the immediate sale under consideration took place with a view to export the goods to the country of importation, then such transaction would constitute an international transfer of goods. The later transaction which led to the import would be the relevant transaction for assessment and Rule 4 of Customs Valuation Rules, 1988 would apply. Hon'ble Supreme Court, in the case of M/s. Hyderabad Industries Limited [[2000 \(115\) E.L.T. 593](#) (S.C.)] have also upheld that the Service Charges/high-seas-sales-commission (actuals) are included in the CIF value of imported goods. Therefore, it is clarified that the actual high-seas-sale-Contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988 and inclusion of commission on notional basis may not be appropriate. However, the responsibility to prove that the high-seas-sales-transaction constituted an international transfer of goods lies with the importer. The importer would be required to furnish the entire chain of documents, such as original invoice, high-seas-sales-Contract, details of Service Charges/commission paid etc., to establish a link between the first international transfer of goods to the last transaction. In case of doubt regarding the truth or accuracy of the declared value, the Department may reject the declared transaction value and follow the sequential methods of valuation under Customs Valuation Rules, 1988."

36. The aforesaid Circular refers to the practice adopted by the Mumbai Customs House to add 2% of the CIF value when goods are imported on High Seas Sale basis. The Circular clarifies that in case the High Seas Sale Contract price is more than the CIF value plus 2%, then the actual contract price paid by the last buyer should be taken for the purpose of assessment. The Circular also mentions that if the importer can demonstrate that the immediate sale under consideration took place with a view to export the goods to the country of importation, then such transaction would constitute an international transfer of goods, which transaction would be relevant for assessment under Rule 4 of the 1988 Rules. However, the responsibility to prove that the High Seas Sale transaction constituted an international transfer of goods lay with the importer who would have to furnish the entire chain of documents, such as original invoice, High Seas Sales contract, details of service charges/commission paid to establish a link between the first international transfer of goods to the last transaction and it is only in case of doubt regarding the truth or accuracy of the declared value, that the Department may reject the declared transaction value and follow the sequential methods of valuation provided for in the 1988 Rules. Thus, it is not in all cases that 2% Notional High Seas Sale Commission has to be added to the assessable value.

37. In this connection, it would be pertinent to refer to the decision of the Supreme Court in *Wipro Ltd. v. Assistant Collector of Customs* [[2015 \(319\) E.L.T. 177](#) (S.C.)]. The issue that arose for consideration was regarding the constitutional validity of proviso (II-i) to Rule 9(2) of the 1988 Customs Valuation Rules. It was contended that the proviso was not only ultra vires Section 14(1) and Section 14(1)A of the Customs Act, but was also violative of Article 14 and Article 19 of the Constitution. The High Court had upheld the validity and the writ petition was dismissed. The Supreme Court observed that a conjoint reading of the provisions of Rules 3 and 4 of the 1988 Customs Valuation Rules would make it clear that the value of the imported goods has to be the transaction value and in cases where the transaction value cannot be determined, such a value has to be determined by resorting to Rules 5 to 8 in a sequential order. Thus, normally the value of imported goods has to be the transaction value, which means the price "actually paid" or "payable" for the goods imported. Only when such a value cannot be determined, that resort to Rules 5 to 8 in a sequential manner has to be taken. Once the transaction value is arrived at, adjustments to this value has still to be made in accordance with the provisions of Rule 9. Only thereafter, the exact "transaction value" gets determined on which customs duty is to be paid. Rule 9 deals with "cost of service". It lays down that in determining the transactional value, cost of certain services is to be added to the price actually paid or payable for the imported goods as mentioned in "(a)" to "(e)" of sub-rule (1) of Rule 9. Rule 9 was amended in the year 1989 by notification dated 19th December, 1989. The proviso appearing below sub-rule (2) of Rule 9 was substituted with the following proviso :

"Provided that -

(i)Where the cost mentioned in clause (a) are not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii)Where the charges mentioned at clause (b) are not ascertainable, such charges shall be one per cent of the free on board value of the goods;

(iii)Where the cost mentioned at clause (c) are not ascertainable, such cost shall be 1.125% of free on board value of the goods :

Provided further that in the case of goods imported by air, where the cost mentioned in clause (a) are ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods."

38. *The said proviso underwent a further modification in 1990. Clause (ii) of first proviso mandated addition of 1% of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c).*

39. *It is on the strength of this proviso that even when the actual handling charges were mentioned and that too fixed by the International Airport Authority at Rs. 6998/-, the Customs Authorities still added a further sum to the value of goods, being 1% free on board value of the goods. The Appellant was aggrieved by this addition and it is this addition that was the cause for filing a writ petition in the High Court.*

40. *The Supreme Court examined the unamended provision of Section 14 of the Customs Act as also the provision amended in the year 2007. It noticed that under the unamended provision, the principle was to find out the valuation of goods "by reference to the value" and it introduced a determining/fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are "ordinarily sold". However, under the amended provisions, the valuation was based on the 'transaction' price namely, the price "actually paid or payable for the goods". It is in this context, that the Supreme Court observed :*

"(26) On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

(27) In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs through in the length and breadth of the scheme so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments actually made or to be made as the condition of the sale of imported goods".

... ..

(31) In contrast, however, the impugned amendment dated 5-7-1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of

insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultra vires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

... ..

(34) In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

... ..

(36) We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 5-7-1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."

41. *It will be appropriate to reproduce Section 14 of the Customs Act, that was amended on 10th October 2007 and it is as follow :*

"Section 14. Valuation of goods. - (1) *For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are*

not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

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

42. *The Supreme Court noticed the change in the principle that had been brought about in Section 14(1) of the Act in paragraph 22 judgment of Wipro Ltd. and they are as follows :*

"(22) The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

(23) As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case."

43. *Thus, what has to be seen under Section 14(1) of the Customs Act as amended in 2007 is the transaction value of the goods imported or exported for the purpose of Customs duty and transaction value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of Section 14 also makes it clear that the price actually paid or payable for the goods will not be treated as 'transactional value' where the buyer and the seller are related to each other. As per the first proviso to the amended Section 14(1), certain charges are to be added in the transaction value of the imported goods.*

44. *It needs to be noted that the Circular dated 11th May, 2004 was issued during the period the unamended Section 14 of the Customs Act was in force. Thus, while there was scope for addition of notional charges in the assessable value under the unamended Section 14 of the Customs Act, but*

after the actual sale price concept was introduced in the year 2007 on the basis of GATT guidelines and Section 14 of the Customs Act was amended in 2007, any inclusion of notional charges seems to have lost its relevance and only actual cost incurred by the buyer is required to be considered.”

5.1 In view of the above, it is apparent that addition of 2% High Seas Sale on Notional Basis Cannot be sustained.

6. As regards, the objection raised by the revenue regarding the genuineness of the transactions price and failure of the appellant to produce the documents, we find that same has no merit. The documents that the Commissioner (appeals) has sought the invoice which is always produced at the time of filing of bill of entry. The agreement between the public sector undertaking and the appellant is also produced before the Commissioner (Appeals), therefore the objection raised by the learned AR cannot be sustained.

7. In view of the above, the appeals are allowed, impugned orders are set aside.

(Dictated and pronounced in the open Court)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI