

REPORTABLE

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

REGIONAL BENCH- COURT NO. 1

Customs Appeal No. 10984 of 2016-DB

(Arising out of OIA-JMN-CUSTOM-000-APP-236-237-15-16 Dated-19/02/2016 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Nayara Energy Limited

Po-Khambhalia, JAMNAGAR
GUJARAT

. Appellant

VESUS

C.C.-Jamnagar(prev)

Sharda House... Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

. Respondent

WITH

Customs Appeal No. 11039 of 2016-DB

(Arising out of OIA-JMN-CUSTOM-000-APP-236-237-15-16 Dated- 19/02/2016 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Shah Coal Pvt Ltd

Centre Point, 5th Floor, Junction Of S V Road & Juhu Road,
Above Standard Chartered Bank, Santacruz (West),
MUMBAI, MAHARASHTRA

. Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House... Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

. Respondent

APPEARANCE:

Shri. P D Rachchh, Shri. Vishal Agarwal and Ms. Dimple Gohil, Advocates for the Appellant

Shri. Sanjay Kumar, Superintendent (AR) for the Respondent

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

Final Order No. 10233-10234/2025 Dated 08.04.2025

Interim Order No. I/ 9-10 /2023

DATE OF HEARING: 05.04.2023

DATE OF DECISION: 05.06.2023

SOMESH ARORA

There is a common issue involved in both the matters therefore both appeals are taken up together. The cases were initiated at the instance of DRI. The show cause notice was issued by jurisdictional preventive authority, both the advocates on being asked responded

that, they are not pressing for any proposition relating to jurisdiction of proper officer.

2. Specific facts for understanding of issue are taken up of the Appellant M/s. Nayara Energy Limited, is engaged in the manufacture of petroleum products at Vadinar and imports at Bedi port for the purpose of generating electricity to be use dcaptively. The Appellant had imported 10 consignments of coal by gearless vessels, which in the absence of sufficient draft at the Bedi Port jetty, were anchored at the anchorage within the Bedi Port. At the anchorage point, the coal was unloaded from the mother vessel to the barges by utilizing the services of floating cranes from M / s United Shippers Ltd., Mumbai and Essar Bulk Terminal. For hiring of floating cranes, the appellant agreed to pay Rs.85/MT inclusive of all expenses to M / s United Shippers and Rs.90/MT to Essar Bulk Terminal.

3. For transporting of the coal from the anchorage point to the jetty, the barge charges were fixed and these charges were treated as cost of transportation of imported coal apart from the sea freight payable to the ship owners by the department the cost of unloading of coal from the 10 mother vessels to the barges was treated as part of transportation of goods because if vessel was equipped with a crane, the same would have been done by the vessel itself. The charges paid thus, as per department were distinct from unloading, loading and were paid as transportation charges and hence includible in assessable value.

4. At the time of provisional assessment,by the department, the Assessable value was arrived at by including the FOB on goods, sea freight, insurance charges, barge charges @ Rs 45/MT for transporting the goods from the anchorage point to Bedi port jetty and unloading, loading and handling charges at the statutory rate of 1% of CIF value. The amount paid by the Appellant in terms of the floating crane charges was not separately included in the assessable value of goods.

5. The Department was of the opinion that the floating crane charges were nothing but an extended element of freight, distinct from loading, unloading operations and were required to be included in the assessable value.

6. A show cause notice dated 10.02.2015 was issued to the appellants, wherein, it was alleged that the floating crane charges should be included in the assessable value in terms Section 14 of the Customs Act, 1962 read with Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The demand raised in the notice was upheld by the adjudicating authority and thereafter by the first appellate authority.

7. Accordingly, the present appeal has been preferred before this court by both the above parties.

8. The Common Submissions made by both the advocate are as follows:-

8.1 That Rule 10 of the Customs Valuation Rules only requires that the cost of transportation of the imported goods to the place of importation to be included in the assessable value. In this, only by way of an explanation, cost of arranging barges at the place of importation is also required to be included in terms of Clause (a) of Sub-rule (2) of Rule 10. However, the said explanation does not include the cost incurred for transferring these goods from the vessels to the barges, which is part of loading and unloading of the goods. The expenses are not treated as part of either barge charges or part of freight. Therefore, the findings arrived at by the adjudicating authority that unloading of the goods from the vessel to the barges for which additional charges have to be incurred is an element of extended sea freight, are, totally misconceived and untenable.

9. That once the loading, unloading and handling charges associated with delivery of 1 goods have been statutorily fixed at 1%, no further addition on account of floating crane charges deployed for unloading of the goods can be made. Reliance in this regard was placed on the following judgments:

- Coromondal Fertilisers Ltd. vs Collector of Customs 2000 (115) ELT. 7(S.C.)
- Wipro Ltd. vs Assistant Collector of Customs 2015 (319) ELT. 177 (S.C.)
- Ispat Industries vs. Commissioner of Customs, Mumbai 2006 (202) ELT 561 (S.C.)
- Reliance Industries vs Commissioner of Cus. (Prev.)

Ahmedabad 2004 (174) ELT. 344 (Tri-Mumbai)

- Commissioner of Customs, Visakhapatnam vs. Hy Grade Pellets Ltd. 2007(211) ELT. 289 (Tri-Banglore)
- Tata Yodogawa Limited vs Commissioner of CEX. and Cus, Bhubaneswar 2001 (131) ELT. 583 (Tri-Kolkata)

10. The Appellants submitted that the provisions of Section 18(2) of the Customs Act, 1962 under which the differential duty is recoverable after finalization of provisional assessment and those of Section 28 and in particular of Section 28(4) *ibid* are mutually exclusive. The relevant date in terms of the Explanation in case of provisional assessment is when any short levy or non-levy is detected after adjustment of duty as a consequence of final assessment under Section 18 of the Customs Act, 1962. The provisions of Section 28 of the Customs Act, 1962, therefore can come into play only when there is any short-levy or non-levy which is detected after provisional assessment is finalized and adjustment of duty has already been taken place as contemplated under Section 18(2) of the Customs Act, 1962. Section 28 of the Customs Act, 1962 has, therefore, no application in respect of provisional assessment as such, as any short-levy or non-levy has yet to take place. Reliance in this regard is placed on the following cases:

- Finolex Industries Ltd. V CC reported in 2003 (159) ELT 949 (Tri);
- Sterlite Optical Technologies Ltd. v. CC, Mumbai - 2003 (55) RLT 721 (T- Mum.)
- Radiant Acrylic v. CCE, Jaipur - 2005 (66) RLT 778 (Tri.-Del.)
- Commissioner of C. Ex. & Customs, Mumbai v. I.T.C. Ltd. reported in 2006 (203) E.L.T. 532 (S.C.)
- Seraikella Glassworks Works Pvt. v. CCE Patna reported in 1997 (91) ELT497 (S.C.)

10.2 The Appellants further submitted that floating crane charges were not to be included in the assessable value, assuming that it should have been included, it cannot amount to mis-declaration in terms of Section 111(m) of the Customs Act, 1962.

10.3 Further, the issue was not only a question of interpretation as to whether these charges were to be treated as an element of extended

freight or were only to be treated as part of loading and unloading of the goods, the matter was still open before the Dy. Commissioner to include or not to include such charges, while finalizing the provisional assessment under Section 18(2) of the Customs Act, 1962. Therefore, in such a scenario the question of misdeclaration and confiscation does not arise.

10.4 The Appellants submitted that coal imported could not have been liable to confiscation or redemption fine as these goods were never available for seizure/confiscation at the time of investigations which were initiated after the goods had already been cleared.

11. Reliance in this regard was placed by the appellant on the following decisions, wherein it was held that option to pay fine would come only when the goods that confiscated are available or when there is a specific bond securing such fine in the event of certain goods being held liable to confiscation, the amount quantified towards fine can be recovered in terms of such a bond:

- CCE Vs. Raja Impex Pvt. Ltd. reported in 2008 (229) ELT 185 (P&H);
- CCE Vs. Finesse reported in 2009 (248) ELT 122 (Bom) as upheld by the Supreme Court as reported in 2010 (255) ELT A120-SC;
- Commissioner of Customs Vs. Sudarshan Cargo reported in 2010 (258) ELT 197 (Bom).

12. It was further submitted that the present case, there was neither a bond nor goods were available for confiscation. Further, this was not a case of provisional release of the goods where the goods are first seized and then released on execution of bond wherein the importer undertakes to produce the goods as and when required but a case where the goods were never available for confiscation right from the time the investigations started. In view of this, the case laws relied upon by the original authority are inapplicable and the impugned order imposing redemption fine of Rs. 2.5 lacs is totally untenable and liable to be set aside.

13. The Appellant submitted that if no differential duty is required to be paid by the Appellant under Section 18(2) of the Customs Act, 1962

as the floating crane charges are not required to be included in the assessable value, there is no question of any interest either to be payable by the Appellant under Section 18(3) read with Section 28AA of the Customs Act, 1962.

14. The Appellant also submitted that once assessments were provisional and were yet to be finalized, a demand could not have been raised under Section 28 of the Customs Act, 1962 and duty was required to be adjusted in terms of Section 18 (2) of the Customs Act, 1962. In view of this, penalty could not have been imposed under Section 114 A of the Customs Act, 1962 as this mandatory penalty can be imposed only in those cases where the duty has been determined under Sub-section (8) of Section 28 of the Customs Act, 1962.

15. The Ld. A.R. for the department supporting the impugned order relied upon the findings of the lower authorities and the detailed reasoning of the adjudicating authority which was adopted as part of its finding by the appellate authority. He particularly adopted the following reasoning as contained in paras 03.02.02. to para 03.05. of the Order-in-Original as reproduced below: -

"03.02.02. First issue to be decided here is that whether the floating crane charges paid by the noticee is an extended element of freight or not and is it distinct from unloading and loading charges covered under stevedoring work or not? I find from the statement dated 02.09.2013, wherein the noticee has stated that as the gearless vessels have no crane on board they arrange floating crane for unloading of the cargo from ship to barge and its cost is an additional cost of transportation /freight which is paid by the noticee against the aforesaid imports and therefore the same is liable to be added for computation of customs duty. Further I find that the gearless vessel is having more cargo carrying capacity compared to geared vessels and also the freight is less compared to geared vessels. The freight varies between 5-6 USD per MT. Therefore, there is a strong reason to believe that the floating crane charges are nothing but an extended element of freight. As per provisions of Section 14 of Customs Act, 1962 and also provisions made in Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the cost of transportation of imported goods

shall be included in the assessable value for computation of customs duties. Considering these facts, I hold that the floating crane charges is nothing but an extended element of freight and the same is liable to be included in the assessable value. It is also find that on introduction of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 on 10.10.2007, all the earlier decisions given by the appellate authorities in respect of barge charges and related other matters, are irrelevant for the period on or after 10.10.2007. As in Explanation to Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 clearly mentions that the Barge charges are includible the transport cost of imported goods. The text of relevant provisions of law is mentioned below:

Rule 10 (2)-

For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include-

(a) the cost of transport of the imported goods to the place of importation,

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance:

Provided that-

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods; (ii) the charges referred to in clause (b) shall be one per cent 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);

(iii) where the cost referred to in clause (c) is 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 referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii).

Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container Freight Station shall not be included in the cost of transport referred to in clause (a).

Explanation. The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charges.

In the present case, the relevant period is 2009 onwards hence, it is once again established that the floating crane charges are part of transportation cost and the same can be included in the assessable value of goods imported by the noticee.

03.02.03. I also find that the department has correctly demanded the customs duty by invoking the extended period. At no point of time the noticee approached the department for seeking any clarification on the matter knowing fully well that under the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 the said activity is covered under transportation charges. Therefore, the intention to evade the duty is also established.

03.03.01. The contention of the noticee is that the assessable value of the goods is CIF value which includes Cost, Freight and Insurance hence the cost of floating charges as part of Freight which is already included in the CIF value and they have already paid the duty on CIF value hence no demand is required. I find

that the contention of the noticee is not acceptable as the cost of Floating charges is paid by them and not paid by the supplier of the goods. Further, against this cost they have paid the less freight in comparison to the freight of geared vessel as stated in the statement of Shri Vinay Ramanlal Shah, Managing Director of noticee company recorded on 02.09.2013. Hence, this cost of Floating charges is also includable in the CIF value of the imported goods and liable for payment of customs duty.

03.03.02. The contention of the noticee that floating crane charges is part of loading and unloading charges as it is a duty of importer to make arrangement for lightarge the vessel from anchorage point. I find that the contention of the noticee is not proper and legal as the noticee himself has contended that when the vessel comes at anchorage point it is duty of importer to lightarage the vessel and for that they hired floating crane and paid the charges towards it. The cost of lightarge of vessel is includable in the assessable value of imported goods as per explanation to Rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Hence, the lightarge charges also includable in assessable value of imported goods and the floating crane charges is not a loading and unloading charges as contended by the noticee. In support of plea they cited the decision in the case of Coromandal Fertilisers Ltd. Vs. CC reported in 2000(115) E.L.T 7(SC) wherein it was held that landing charges when assessed at a percentage, customs cannot add any amount thereto on the ground that expenses for unloading were not covered in the landing charges. I find that this decision is not applicable in the present case. As it is established that the floating crane charges is part of freight and loading and unloading charges whereas the case cited by the noticee is related to addition of value in respect of landing charges.

03.03.03. It is also contended that the decision cited by them is applicable in the present case even though it is prior to introduction of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 in 2007 as the provisions of erstwhile Rule 9(2)(b) of the Customs Valuation Rules, 1988 and

present Rule 10(2)(b) ibid are same and there is no difference. I find that floating crane charges are includable in assessable value as part of transportation cost and the same is discussed in para supra Whereas, Rule 9(2)(b) of the Customs Valuation Rules, 1988 and Rule 10(2)(b) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is related to 'loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation' which irrelevant for this case. Hence, the plea of noticee in this regard regarding case are applicable in the present case is not sustainable.

03.03.04. It is also pleaded that similar issue was raised before Hon'ble Tribunal by the department in the case of Commissioner Of Customs, Visakhapatnam Versus Hy-Grade Pellets Ltd. - 2007(211) E.L.T. 289 (Tri. Bang.). In the said case, department's contention was that the floating crane charges were required to be added in the value for assessment of duty in terms of Rule 9(2)(a) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (now Rule 10(2)(a)] Relying on the decision rendered in the case of Reliance Industries Ltd. v. Commissioner 2004 (174) E.L.T. 344 (Tribunal) the department's appeal was rejected by Hon'ble Tribunal. This judgment was also affirmed by the Apex court as reported at 2008 (225) E.L.T. 337 (S.C.). I find that the facts and circumstances mentioned in the case cited by the noticee are on prior to introduction of new Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Hence, the same is not applicable in the present case as explanation under Rule 10 ibid (earlier Rule 9 of erstwhile valuation rules)was not inserted at material time.

03.03.05. It is also submitted that certain inferences have been drawn only on presumption in the SCN. For example, it has been inferred under paragraph 8 of the notice that the floating crane charge is nothing but an extended cost of freight. However, the notice does not quote any authority in support of such conclusion. I find that the director of noticee company himself stated that the floating crane charge is nothing but an extended cost of freight in his statement dated 02.09.2013 which was recorded under Section 108 of Customs Act, 1962. In number of cases it is held that the statement is valid evidence for arriving any conclusion of

the facts or case. Hence, the contention of the noticee is not acceptable for present plea. It further stated that in case of gearless vessel the freight is less compared to geared vessels. However, there is no data to substantiate the same. In any case, even if cost of transportation of goods by a gearless vessel is less due to its enhanced carrying capacity, it cannot be a reason to include cost of unloading charges which are already included in the value of imported goods. Therefore, any addition to the value will be in violation of Rule 10(4) of the Customs (Determination of Value of Imported Goods) Rules, 2007. I am not agree with the contention of the noticee that freight of gearless vessel is less than the freight of geared vessel as in the reply of noticee themselves stated that in the international market it is common that a vessel carry huge quantity charge comparatively lower than the smaller size ship. From this contention there is no need to give any substantiate data for lesser freight of gearless vessel. I also find that this fact is clear ground for inclusion of 'floating crane charges' in the freight, hence this contention of the noticee is also not tenable.

03.03.06. It is also contended that the investigation has twisted the facts actually the Managing Director in his statement dated 02.09.2013 (Paragraph 4.1(m) at page 5 of the SCN) on being asked whether he agreed that M/s. SCPL has suppressed the floating crane charges to the customs authority to evade customs duty to which he clearly replied in negative and further added that they had no intention to evade any customs duty. I find that this contention is also not acceptable as it is established during the investigation and recorded statement that they have paid the floating crane charges to stevedores and this expenses never declared with the customs authority. It is only come in to picture when the department has started investigation in the matter. Hence, no twisting of the facts was made by the department.

03.04. It is also contended that when main allegation of adding floating crane hire charge in the value itself is unlawful as discussed in para supra, question of confiscation imported goods under Section 111(m) of the Act, ibid automatically does not survive. I find that it is established that the floating crane charges is nothing but an extended part of freight and the same is liable

for included in the assessable value. I also find that it is already held that the floating crane charges are liable for inclusion of transport cost of imported goods and the same is a part of assessable value. Ongoing through Section 111(m) of the Customs Act, 1962, it is observed that if any goods which do not correspond in respect of value or any other particular with the entry made under this Act, then the goods are liable for confiscation. The commission/omission on the part of the noticee, i.e., mis- declaration in respect of value of goods in the bills of entry is squarely covered under section 111(m) of the Customs Act, 1962. However, the goods imported under Bill of Entry mentioned in Annexure A to the Show Cause Notice are already confiscated and redemption fine in lieu of confiscation imposed under Section 125 ibid vide OIO No. 09/Commr/2014 dated 23.05.2014. Hence, I cannot ordered for second time confiscation of said goods and also not imposed redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962.

03.05. As regards the interest I find that the interest is compensatory in nature, which is imposed on the assessee/importer who has withheld the payment of any tax or duty and such liability arises automatically by operation of law. Under the Customs Act, 1962, the liability for payment of interest arises in view of the provisions of Section 28AA of the Customs Act, 1962. Interest is always accessory to the demand of duty as held in case of Pratibha Processors Vs UOI - 1996 (88) ELT 12 (SC). Hence, I hold that the amounts demanded in the SCN and confirmed in this order are recoverable from the noticee together with interest at appropriate rate in terms of Section 28AA of the Act, ibid”.

16. We have considered the adversarial submissions, case law as well various arguments made before us, including the additional submissions made on behalf of M/s Shah Coal Pvt. Mumbai received on 10th April 2023. We find that the decision of the Apex Court in the matter of Coromandal Fertilizers Ltd Vs. CC cited (supra) (as well as reliance placed on Reliance Industries Ltd Vs. Commissioner reported in 2004 (174) E.L.T 344 (Tribunal)) was considered by the Commissioner in the

impugned order while recording his finding that the floating crane charges are part of the freight. We, however find that whether the floating crane charges as well as loading and unloading charges from the "mother vessels" to the barges are to be construed as part of the notional loading and unloading charges or as part of the 'freight' or 'transportation', (as the department makes it) depends upon various factors. We find that reference to loading and unloading charges in Rule 10(2)(b) refers to "loading unloading and handling charges associated with the delivery of the imported goods at the place of importation". We also find that vide Notification No. 91/2017-Cus (non-tariff) dated 26.09.2017 while inserting the Rule 2 (da) i.e. "Place of importation has defined it to mean as follows: -

"Place of importation means of the Customs station, where the goods are brought for being cleared for home consumption or for being removed for deposit in a warehouse".

Though the present matter is of 2013 and therefore prior to the period of this amendment. However, Section 7 of the customs Act, 1962 at the relevant time provided that the appointment of ports for loading and unloading can be done by the Board (by Central Government earlier). A scrutiny of the notifications issued under the aforesaid empowering Section indicates that ports were designated on the land mass for loading and unloading and not in territorial waters, therefore loading and unloading charges have to be construed accordingly at the port which is constituted at the land mass of particular State or Union territory. The contention of the parties that their notional charges of loading and unloading included the ones that were occurred at the anchorage of mother vessel or of shifting through floating crane does not appear to be correct. In *Coromondal Fertilizers case* (cited supra), the apex court was concerned with landing charges from ship to port and not from one vessel to another through third vessel (or floating crane as in this case) and held that unloading charges could not be added if the charges were already taken on notional basis. (para 3 to 9 of the decision refers). Our view of place of landing for loading and unloading being landmass of port though contrary to the reliance placed by the appellant on *Reliance Industries case* as reported in 2004(174) E.L.T. 344(T-Mumbai), gets strengthened by the decision of the same

coordinate bench of Tribunal- Mumbai, as reported in Tribunal-2004 (174) E.L.T. 379 (Tri. – Mumbai) in the matter of Essar Oil Limited vs. Commissioner of Customs Ahmedabad.

17 In which, while disagreeing with the Reliance Industries case (mentioned supra) on the limited point of place of importation, it held as follows: -

Para "7. We reproduce below relevant portions of Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 which are germane to the issue at hand:-

"9. Cost and Services :-

(1) x x x

(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these Rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation,

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation, and,

(c) the cost of Insurance:

Provided that -

(i) x x x

(ii) The charges referred to in Clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in relation to in Clause (a) plus the cost of insurance referred to in clause (c).

(iii) x x x

(3) x x x

(4) x x x"

Place of importation

Rule 9(2)(a) refers to the 'cost of transport' to the place of importation and Rule 9(2)(b) refers to "loading, unloading and handling charges" associated with the delivery at the place of importation. As such, for the resolution of the issue at hand, it is important to understand what is meant by the phrase "place of importation" which

occurs both in Section 14(1) and in Rule 9(2). Relevant portion of Section 14(1) has not undergone any amendment and hence the earlier judicial pronouncements on interpretation of the phrase 'place of importation' occurring therein are binding on this Tribunal. Some of these are noted below :-

- (1) *Prabhat Cotton and Silk Mills Ltd. v. U.O.I.* - [1982 \(10\) E.L.T. 203](#) (Guj.)

The valuation of goods on importation has to be made at the point of time and place when the goods are landed on the landmass of India and not when the ship enters the territorial waters of India.

- (2) *Shriram Fibres Ltd. v. UOI* - [1994 \(69\) E.L.T. 4](#) (Mad.)

"Place of importation" in the Section 14(1) of the Customs Act, 1962 means landmass of India and not territorial waters – "For delivery" in the same section means delivery ex-wharf and not delivery ex-ship.

- (3) *Garden Silk Mill Ltd. v. UOI* - [1999 \(113\) E.L.T. 358](#) (S.C.)

The import of goods into India would commence when the same cross into the territorial waters but continue and is completed when the goods become part of the mass of goods within the country.

These decisions were no doubt given in the context of inclusion of landing charges in the assessable value, but these are very relevant for interpreting the phrase 'place of importation' occurring in Section 14(1) of the Act as well as in Rule 9(2). We note that the Apex Court decision in *Garden Silk Mills Ltd.* (supra) is rendered by a 3 Judges Bench and hence is binding on all sub-ordinate Courts and Tribunals. Applying the ratio of the said judgment the inevitable conclusion is that the place of importation is not the anchorage point where the ship anchors but the place of unloading on the landmass of India usually called a wharf or a jetty. We find that under Notification No. 3/98 (CCP), dated 26-4-1998, the Commissioner of Customs, Ahmedabad, as per provisions of the Customs Act, 1962, has approved the landing place for unloading imported goods and has also declared the area around such places to be customs area under Section 8(b) of the Act. The Schedule to the notification is reproduced below:-

SCHEDULE

Name of the Port	Place of Loading and Unloading	Area	Limit
(1)	(2)	(3)	(4)
Vandinar Port Lat : 22.24 '20"N	(i) Ro Ro Jetty	37.3 mtr x 20 mtr = 746 mt ²	North : KPT Control Building
Long: 69.40'27E	(ii) Lo Lo Jetty	68 mtr x 20 mtr = 1360 mt ²	North: Sea Water Front
	(iii) Barge Unloading Facility.	13.4 mtr Dia Ringer Crane backed up by Sand bags	North Sea Water Front
	(iv) Back up Area	50,975 mt ²	East Approach Road

Following the ratio of the Garden Silk Mills (supra), we come to the conclusion that the notified places of unloading are indeed the 'place of importation' referred to in Section 14(1) and Rule 9(2).

Nature of Barging charges

Rule 9(2)(a) requires cost of transport to the place of importation to be added to the value whereas Rule 9(2)(b) requires loading, unloading and handling charges at the place of importation to be added to the value. The proviso (ii) to Rule 9(2) fixes the letter at '1% of f.o.b. value + cost of transport + cost of insurance'. Thus the amount of 1%, commonly known as landing charges, refer to charges representing loading, unloading and handling charges at the place of importation. On the other hand, barging charges represent cost of transportation to the place of importation, i.e. cost of carriage from the anchorage to the place of landing which is the notified place of unloading. The appellants themselves refer to these charges as transport cost in Paragraph 6 of their appeal memorandum as noted earlier. There is no dispute that these costs were incurred by the appellants themselves and not by the supplier. It is obvious, that barging charges, being cost of transport to the notified place of unloading come within the purview of Rule 9(2)(a). The contention of the appellants that barging charges are part of the charges incurred at the place of

importation within the purview of Rule 9(2)(b) is totally misplaced. In view of the Apex Court decision in Garden Silk Mills (supra) once the place of unloading is held as the place of importation, the cost of transport to such place cannot be confused with unloading charges incurred at such place. The use of the word 'to' and 'at' respectively as prefixes to the phrase 'place of importation' in Rules 9(2)(a) and 9(2)(b) clearly brings out the distinction between transport charges on the one hand and unloading and handling charges on the other. While calculating the amount for charges under Rule 9(2)(b), the 1% has to take into account the f.o.b. value, transport cost and insurance cost as the basis. Obviously, the charges under Rule 9(2)(b) do not include the transport cost itself which comes under the purview of Rule 9(2)(a)".

8. *We, therefore, hold that barge charges being part of the transport cost to the place of importation are includible in the assessable value. It would have been different if the c.i.f. price paid to the supplier had included this cost and the barge charges were incurred by the carrier and not by the importer. In such cases, the c.i.f. price would have been inclusive of barge charges and no further additions would have been required. In the present case, this was not so as the carrier carried the goods up to the anchorage only and the price paid to the supplier did not include the barge charges.*

9. *The appellants have referred interpretative notes to Rule 4 that the cost of transport after importation is not to be included in the value. Following the Apex Court decision in the case of Garden Silk Mills (supra), we have held that the place of importation is the place of unloading and hence barge charge to such places cannot be considered as cost of transport after importation. The note is meant to exclude transport charges from jetty/wharf to, a warehouse or inland container depot and not the transport charges incurred prior to the goods reaching a jetty/wharf.*

10. *The appellants as well as the D.R.s have referred to the Apex Court decision in the case of Coromandal Fertilisers Ltd. v. C.C., [2000 \(115\) E.L.T. 7](#) (S.C.). In the said case, the Apex Court had ruled that stevedoring charges and unloading charges cannot be again added to the value once and fixed percentage towards landing charges has been added. It was also a case where the importers maintained their own wharf, unloading equipment and staff for the same. The charges considered by the Apex Court in this case (vide Paras 1 and 5 of the order) were related to unloading of the goods from the ship berthed at the wharf. It did not deal with transport charges incurred in bringing goods from anchorage to the wharf. In the present case, we are dealing with a case where*

barge charges were incurred in transporting goods from the ship at the anchorage to the notified place of unloading at the jetty. Hence the ratio of Coromandal (supra) does not support the case of the appellant.

11. Revenue has placed reliance on the earlier decision of the Tribunal in the case Ispat Industries Ltd. v. C.C. (P), Mumbai - [2001 \(135\) E.L.T. 646](#). It was decided in the said case that barge charges upto Dharamtar which was notified as a place of unloading has to be included in the value. Our view is in conformity with the said decision of the Tribunal. We are unable to agree with the contrary view taken by the Tribunal in the case of M/s. Reliance (supra) that barge charges are not includible in the assessable value or that the place of importation shifts to the anchorage point in the sea. The ratio of the 3-Judge Bench of the Apex Court In Garden Silk Mills (supra) clearly defines the term 'place of importation', following which we hold it to be the notified place of unloading. Consequently, we also hold that barge charges representing the cost of transport to such place to be includible in the assessable value. The place of importation cannot shift depending on when and where the customs document are filed and signed nor can the customs value be made dependent on such eventuality. Certain customs formalities relating to boat notes, transshipment etc. have been prescribed for facilitating safe landing of the goods in the notified customs area under customs control for subsequent clearance. Such procedural provisions cannot be interpreted to shift the place of importation to a point in sea against specific judicial pronouncement to the contrary.

12. In view of our findings above, we hold barging charges to be includible in assessable value.".

18. However, we find that later in the matter of Ispat Industries Ltd Vs. CC, Mumbai as reported in -2006 (202) E.L.T. 561 (S.C), the Hon'ble Apex Court was concerned in appeal with the matter decided by tribunal of Ispat Industries as reported in 2001(135) E.L.T.646(T), with the following facts:

"The facts of the case are that the appellant is a regular importer of iron ore pellets falling under Chapter Sub-heading No. 2601.12 of the Customs Tariff Act, 1975. The present appeal relates to 14 consignments of iron ore pellets imported between 14-2-1996 to 21-2-1998. In all these cases, the mother vessel coming from abroad and carrying the cargo anchored at Bombay Floating Light (in short 'BFL'). The cargo on board the mother vessel was then examined by the

custom authorities and provisionally assessed to duty. After payment of this duty, the out of charge order was passed on the Bills of Entry permitting clearing of such goods for home consumption. After obtaining the out of charge order, the cargo was discharged at BFL from the mother vessel to the barges which then ferried the cargo to the Dharamtar Jetty.

5. It may be mentioned that the cargo could not be discharged directly from the mother vessel to the Dharamtar Jetty due to lack of draft. Hence it was discharged from the mother ship on to the barges at BFL, which carried the goods to the Dharamtar Jetty. It may further be mentioned that while Dharamtar has been approved as a place for unloading under Section 8(a) of the Customs Act, BFL has not been so approved but is only a place for anchoring the ship."

The Hon'ble court viewing the charges as transportation charges, still held the barge charges for transporting goods from mother ship to place approved under Customs Act, 1962 could not be included further in cost of transportation in erstwhile R. 9 (2) of Customs Valuation Rules (which is now equivalent to R. 10(2) of the new Valuation Rules of 2007). This, after noting the fact that while moving cargo from anchorage to other barge, permission on Bill of Entry, *inter alia*, had been granted by the proper officer. The Hon'ble Court after examining various provisions of the Customs Act in paras 12 to 13 (Including boat notes etc.), gave the following findings in paras 58 to 64:

Para"58. In the present case, the vessel had been anchored and permission by the proper officer under Section 47 after examination of the cargo had been granted after due payment, and goods were allowed to be water-borne through a Boat Note under Section 35.

59. The goods were unloaded from the mother ship on to the barge at BFL which, do doubt, had not been approved as the landing place under Section 8 of the Act. However, Section 33 permits unloading at a place other than that approved under Section 8 with the permission of the proper officer, and there is no doubt that permission had been obtained under Section 33 under the supervision of the proper officer under Section 34, and the goods were accompanied by a Boat Note under Section 35 of the Customs Act. Hence, unloading of the goods from the mother ship at the BFL was valid, since it was done in accordance with Sections 33 and 34 of the Customs Act. No doubt, the

BFL had not been approved as proper place under Section 8(a), but it was a place where the mother ship could anchor. Hence, in our opinion, there is no illegality.

60. In the impugned order dated 7-3-2001 the Tribunal has based its decision on its conclusion that the place of import was the Dharamtar Jetty and not the BFL (vide paragraphs 9 to 18 of The Tribunal's order). Without commenting on the correctness or otherwise of this view, we are of the opinion that whether we treat the place of import as BFL or the Dharamtar jetty it will make no difference to the conclusion we have reached viz. that charges for transport of the goods by barges from BFL to Dharamtar jetty cannot be included in the valuation of the goods.

61. It is not disputed that the freight upto the Dharamtar jetty had been paid by the buyer. Hence we cannot agree that additional transportation charges being the charges for carrying the goods by barges from the mother ship to the Dharamtar Jetty have to be added to the valuation. The fact that the mother ship could not come upto the Dharamtar Jetty is an extraordinary situation (due to lack of draft) and hence any extra transportation charge to meet this situation cannot, in our opinion, be added to the value of the goods.

62. The bills of lading show that the port of discharge was Mumbai Port/JNPT/Dharamtar. In the bill of entry, the FOB price, freight and insurance were shown separately in U.S. dollars. Since Dharamtar was also shown as the port of discharge, the freight charges paid by the buyer to the shippers included the charges for freight not only upto BFL but also to Dharamtar.

63. The view we are taking is in accordance with the view expressed in Halsbury's Laws of England, Fourth Edition Vol. 43(2) : Shipping and Navigation para 1707 where it is stated :

"1707. Proceeding so near to port of discharge as ship can safely get'. - In practice, the contract usually provides that the ship is to proceed to the port of discharge or so near to it as she can safely get. This provision is intended to benefit the ship owner, and its effect is to substitute another destination to which the ship may proceed. By proceeding to this other destination and delivering the cargo there, the ship owner equally completes the voyage in accordance with the terms of the contract, and is thus entitled to be paid the full freight."

64. For the reasons given above, this appeal is allowed and the impugned' order of the Tribunal as well as of the Customs authorities are set aside, and it is

held that the charges for transportation of the goods by barges from the mother ship at BFL to the Dharamtar Jetty cannot be added to the valuation of the imported goods for the purpose of levying customs duty."

19. Guided by the above decision, we find that shifting charges in the anchorage cannot be strictly considered as unloading/ loading charges at the port in view of statutory provisions and case law discussed. The question as to whether any further addition to CIF value for transportation charges is warranted or not, needs elaborate discussions and findings on various aspects and some of these, *inter alia*, are as follows: -

- a) Whether the goods at any stage prior to their landing at the final port destination were cleared for home consumption or not?
- b) Whether a permission by the proper officer had been given under Section 33 and 34 for moving the Cargo to the barge and whether the goods were accompanied by a boat note under Section 35 of the Customs Act, 1962?
- c) Whether the mother vessel by which goods arrived could or could not anchor at the main port?
- d) Whether the Jetty at which goods were eventually discharged was included or not included in the bill of lading as port of discharge.
- e) Whether who paid the consideration (even if buyer) is relevant consideration or not or any emergent situation relating to draft of the ship as mentioned in para 60 and 61 (cited supra) of the Ispat Industries case of apex court.
- f) Whether the duty demand was raised consequent upon finalization of provision assessments, if same were involved?

20. We find that elaborate discussions, on all these points is not coming forth in the impugned order, as well as in the order of adjudicating authority. We, therefore, remand the matter and direct adjudicating authority to consider all these aspects including others on point of rate/transportation cost that may be raised by the litigant

parties, to arrive at its decision, affording full opportunity to the appellants.

21. Matter is, therefore, remanded to the original authority to give findings accordingly, in the light of decision cited (supra) of Ispat Industries by Hon'ble Apex Court. Order is therefore set aside and Appeal is allowed by way of remand.

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI

RAJU

22. I have gone through the order proposed by Learned Brother Member (Judicial). However, I am unable to concur with the conclusion based on the decision of Hon'ble Apex Court in case of Ispat Industries-2006(202) ELT 561 (S.C).

23. In the above order proposed by Hon'ble Member (Judicial) reliance has been placed on the decision of Apex Court in the case of Ispat Industries Limited 2006 (202) ELT 561 (SC). In the said case, the issue before the Hon'ble court was if the charges for transporting the goods from mother ship, anchored away from the jetty, to the jetty are includible in the assessable value or otherwise. In the said case, Hon'ble Apex Court was dealing with Section 14 as it existed at the material time before 2007. During the said period Section 14 of the Customs Act, 1962 read as follows:

"Section 14. Valuation of goods for purposes of assessment:

*"(1) For the purposes of the Customs Tariff Act, 1975 or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods 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 or exportation, as the case may be, in the course of [international trade, where-*

(a) the seller and the buyer have no interest in the business of each other, or (b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale];

PROVIDED that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50;"

Prior to 2007 the Rule 9(2) of the Customs Valuation (Determination of Value of Imported Goods), Rules 1988 read as follows:

"(2) For the purpose of sub-section (1) and subsection (1A) of Section 14 of the Customs Act, 1962(52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include-

- (a) the cost of transport of the imported goods to the place of importation.*
- (b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and*
- (c) the cost of insurance*

Provided that --

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent 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

(iii) where the cost referred to in clause (c) is 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 referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Provided also that where the free on board value is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (1) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above.

Provided also that in case of goods imported by sea stuffed in a contained for clearance at an Inland Container Depot or Contained Freight Station, the cost of freight incurred in the movement of contained from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a);

From the above, it is seen that at the material time, before 2007, the Customs Valuation was done on the basis of "Deemed Value of imported goods". The deemed value was not the actual transaction value but was a value arrived at considering the import value of the like goods imported at or around the same time for delivery at the same time and place of importation in the course of international trade where the buyer and seller are not related. The decision of Hon'ble Apex Court is in respect of the provisions of law as it existed prior to 2007.

24. The Section 14(1), at the time of import in the instant case, i.e after 2007, reads as follows:

" 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, engineer-

ing, 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:**

Provided further that the rules made in this behalf may provide for,-

After 2007, the Rule 10(2) of Custom Valuation (Determination of Value of Imported Goods) Rules, 2007 read as under:

"10(2) For the purposes of sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, and shall include –

(a) **the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation;**

(b) the cost of insurance to the place of importation:

Provided that where the cost referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods:

Provided further that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (b) is ascertainable, the cost referred to in clause (a) shall be twenty per cent of such sum:

Provided also that where the cost referred to in clause (b) is not ascertainable, such cost shall be 1.125% of free on board value of the goods:

Provided also that where the free on board value of the goods is not ascertainable but the sum of free on board value of the goods and the cost referred to in clause (a) is ascertainable, the cost referred to in clause (b) shall be 1.125% of such sum:

Provided also that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods:

Provided also that in the case of goods imported by sea or air and transshipped to another customs station in India, the cost of insurance, transport, loading, unloading, handling charges associated with such transshipment shall be excluded.

Explanation:

The cost of transport of the imported goods referred to in clause (a) includes the ship demurrage charges on chartered vessels, lighterage or barge charge."

It is seen that after 2007, the concept of Deemed value was discarded and valuation was to be done on the basis of actual transaction value in terms of new Section 14 of Customs Act, 1962. The actual cost of transportation of goods was made specifically includible in value under Section 14 itself. Thus there was a significant change in the law relating to valuation of imported goods.

25. In case of Ispat Industries (supra), the Hon'ble Apex Court in the context of Section 14 as it existed before 2007, and Valuation Rules, 1988 observed as follows:

14. From a perusal of the above provisions (quoted above), it is evident that the most important provision for the purpose of valuation of the goods for the purpose of assessment is Section 14 of the Customs Act, 1962. Section 14(1), has already been quoted above, and a perusal of the same shows that the value to be determined is a deemed value and not necessarily the actual value of the goods. **Thus, Section 14(1) creates a legal fiction. Section 14(1) states that the value of the imported goods shall be the deemed 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" in Section 14(1) is of great importance. In Section 14(1) we are not to see the actual value of the goods, but the value at which such goods or like goods are ordinarily sold or offered for sale for delivery at the time of import.** Similarly, the words "in the course of international trade" are also of great importance. We have to see the value of the goods not for each specific transaction, but the ordinary value which it would have in the course of international trade at the time of its import.

15. The view we are taking in this case is in accordance with the three-Judge Bench decision of this Court in *M/s. Rajkumar Knitting Mills (P) Ltd. vs. Collector of Customs, Bombay* AIR 1998 SC, 2602. In para 7 of the said decision, it was observed thus:

"The words "ordinarily sold or offered for sale" do not refer to the contract between the supplier and the importer, but to the prevailing price in the market on the date of importation or exportation"

16. The above decision thus clearly held **that it is not the actual price mentioned in the contract between the supplier and the importer which has to be seen, but the prevailing price in the market has to be seen.** This again lends support to the view we are taking that Section 14 is a deeming provision and we have not to take specific cases for determining the value of the imported goods unless the same is in accordance with Section 14 of the Act.

17. **Hence, while determining the value of Section 14, we must never lose sight of the fact that Section 14(1) is a deeming provision which creates a legal fiction.**

.....

21. Learned counsel for the respondent, no doubt, emphasized on **Rule 9 of the Rules (quoted above), but it must be realized that Rule 9 cannot be given an interpretation which is in violation of Section 14 of the Act. After all, the rules are subservient to the Act and cannot deviate from the provisions of the parent Act.**

22. Learned counsel for the Revenue emphasized on Rule 9(2)(a) of the Rules in support of his contention that bargaining charges have also to be included in the value of the imported goods as they are also transportation charges.

23. **On first impression the submission of learned counsel for the Revenue appears to be sound, because surely the transportation by barge is also part of the transportation of the goods.** However, on a deeper analysis, we are of the opinion that the submission of the learned counsel of the Revenue is clearly untenable. **Admittedly, all the contracts entered into with the foreign sellers are either CIF contracts or FOB contracts with Bills of Lading nominating Bombay/JNPT/Dharamtar as the ports of discharge. As such the cost of transport has already been included in the price paid to the seller under the CIF contract or an ascertainable freight determined and paid by the buyer from the foreign port to the Indian port.** Hence, a further addition to the transport charges under Rule 9(2)(a) of the Customs Valuation Rules, 1988 is in our opinion clearly impermissible.

24. **If we read Rule 9(2) of the Rules independently without considering it along with Section 14 of the Act, then of course the submission of the learned counsel for the Revenue could be sustained.** However, in our opinion, Rule 9(2) has to be read along with Section 14 and it cannot be read independently. As already stated above, Section 14 creates a legal fiction and we have to see the ordinary value of the imported goods in the course of international trade at the place and time of import. This means that specific cases of import should be ignored. In fact, it is for this reason that Rules 4, 5 and 6 of the Rules have been promulgated. The actual price paid for the goods can only be taken into consideration provided the sale is in the ordinary course of trade under fully competitive conditions and the other provisions of Rule 4 are satisfied.

25. It is well-known that there are sales in which there is under invoicing or over-invoicing or for some other reasons the sale is not under full competitive conditions. In such a case, Rules 5 & 6 have to be resorted to and the actual price has not to be seen. Thus, the Rules have been created to serve the object of Section 14 which was to determine a deeming price and not the actual price of the imported goods.

26. *In our opinion if there are two possible **interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra virus the Act.***

.....

58. *In the present case, the vessel had been anchored and permission by the proper officer under Section 47 after examination of the cargo had been granted after due payment, and goods were allowed to be water-borne through a Boat Note under Section 35.*

59. *The goods were unloaded from the mother ship on to the barge at BFL which, do doubt, had not been approved as the landing place under Section 8 of the Act. However, Section 33 permits unloading at a place other than that approved under Section 8 with the permission of the proper officer, and there is no doubt that permission had been obtained under Section 33 under the supervision of the proper officer under Section 34, and the goods were accompanied by a Boat Note under Section 35 of the Customs Act. Hence, unloading of the goods from the mother ship at the BFL was valid, since it was done in accordance with Sections 33 and 34 of the Customs Act. No doubt, the BFL had not been approved as proper place under Section 8(a), but it was a place where the mother ship could anchor. Hence, in our opinion, there is no illegality.*

60. *In the impugned order dated 7.3.2001 the Tribunal has based its decision on its conclusion that the place of import was the Dharamtar Jetty and not the BFL (vide paragraphs 9 to 18 of The Tribunal's order). Without commenting on the correctness or otherwise of this view, we are of the opinion that whether we treat the place of import as BFL or the Dharamtar jetty it will make no difference to the conclusion we have reached viz. that charges for transport of the goods by barges from BFL to Dharamtar jetty cannot be included in the valuation of the goods.*

61. *It is not disputed that the freight upto the Dharamtar jetty had been paid by the buyer. Hence we cannot agree that additional transportation charges being the charges for carrying the goods by barges from the mother ship to the Dharamtar Jetty have to be added to the valuation. The fact that the mother ship could not come upto the Dharamtar Jetty is an extraordinary situation (due to lack of draft) and hence any extra transportation charge to meet this situation cannot, in our opinion, be added to the value of the goods.*

62. *The bills of lading show that the port of discharge was Mumbai Port/JNPT/Dharamtar. In the bill of entry, the FOB price, freight and insurance were shown separately in U.S. dollars. Since Dharamtar was also shown as the port of discharge, the freight charges paid by the buyer to the shippers included the charges for freight not only upto BFL but also to Dharamtar.*

(Emphasis Supplied)

26. Now I examine the observations of Hon'ble of Hon'ble Apex Court in the context of new amended Section 14 and the (Determination of Value of Imported Goods) Rules, 2007. In the year 2007, the section 14 of the Customs Act was amended. The amendment brought a significant change in the principles of valuation adopted for the purpose of charging customs duty. The concept of deemed value was discarded and instead of the deemed value, the concept of actual transaction value was incorporated in the Customs Act. A Major change in Section 14 was inclusion of the first proviso to Section 14 to specifically include in the value the cost of transportation of goods. The Customs Valuation (Determination of Value of Imported Goods), Rules 2007 were also superseded by custom Valuation (Determination of Value of Imported Goods) Rules, 2007. The new rules also mandated inclusion of cost of transportation in the assessable value.

27. I find that Hon'ble Apex Court has clearly held that prior to 2007 there is a conflict between the valuation Rules, 1988 and Section 14 of the Act, Hon'ble Apex Court observed as follows in the case of Ispat Industries (supra):

24. **If we read Rule 9(2) of the Rules independently without considering it along with Section 14 of the Act, then of course the submission of the learned counsel for the Revenue could be sustained.** However, in our opinion, Rule 9(2) has to be read along with Section 14 and it cannot be read independently. As already stated above, Section 14 creates a legal fiction and we have to see the ordinary value of the imported goods in the course of international trade at the place and time of import. This means that specific cases of import should be ignored. In fact, it is for this reason that Rules 4, 5 and 6 of the Rules have been promulgated. The actual price paid for the goods can only be taken into consideration provided the sale is in the ordinary course of trade under fully competitive conditions and the other provisions of Rule 4 are satisfied.

26. In our opinion if there are two possible **interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the former, because adopting the latter will make the rule ultra virus the Act.**

It is seen that after incorporation of first proviso to Section 14(1) the conflict noticed by Hon'ble Apex Court in para 24 and 26 of its decision in case of Ispat Industries (supra) was removed. There was no conflict in the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14 of Customs Act after 2007. After amendment in 2007, both the Section 14 as well as Custom (Determination of Value) Rules mandated inclusion of actual freight in the assessable value.

28. The decision of Hon'ble Apex Court holds that the custom value to be arrived under Section 14 is not the actual value of transaction but a deemed value. The observations of Hon'ble Apex Court are as follows:

14. *From a perusal of the above provisions (quoted above), it is evident that the most important provision for the purpose of valuation of the goods for the purpose of assessment is Section 14 of the Customs Act, 1962. Section 14(1), has already been quoted above, and a perusal of the same shows that the value to be determined is a deemed value and not necessarily the actual value of the goods. Thus, Section 14(1) creates a legal fiction. Section 14(1) states that the value of the imported goods shall be the deemed 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" in Section 14(1) is of great importance. In Section 14(1) we are not to see the actual value of the goods, but the value at which such goods or like goods are ordinarily sold or offered for sale for delivery at the time of import. Similarly, the words "in the course of international trade" are also of great importance. We have to see the value of the goods not for each specific transaction, but the ordinary value which it would have in the course of international trade at the time of its import.*

16. *The above decision thus clearly held that it is not the actual price mentioned in the contract between the supplier and the importer which has to be seen, but the prevailing price in the market has to be seen. This again lends support to the view we are taking that Section 14 is a deeming provision and we have not to take specific cases for determining the value of the imported goods unless the same is in accordance with Section 14 of the Act.*

Thus, also changed with discard of the deemed value concept in favour of Actual transaction value.

29. The Hon'ble Apex Court has also held that the transportation by barge is also part of transportation of goods , which reads as follows:

23. *On first impression the submission of learned counsel for the Revenue appears to be sound, because surely the transportation by barge is also part of the transportation of the goods. However, on a deeper analysis, we are of the opinion that the submission of the learned counsel of the Revenue is clearly untenable. Admittedly, all the contracts entered into with the foreign sellers are either CIF contracts or FOB contracts with Bills of Lading nominating Bombay/JNPT/Dharamtar as the ports of discharge. As such the cost of transport has already been included in the price paid to the seller under the CIF contract or an ascertainable freight determined and paid by the buyer from the foreign port to the Indian port. Hence, a further addition to the transport*

charges under Rule 9(2)(a) of the Customs Valuation Rules, 1988 is in our opinion clearly impermissible.

However despite holding that it is cost of transportation Hon'ble Apex Court held that the actual cost of transportation could not be added as the 'deemed value' at the port was available. It held that there was a conflict in the provision of Section 14 and the valuation Rules, 1988, therefore the cost of transportation could not be added despite there being a provision for inclusion of cost of transportation in the rules. This conflict was removed after 2007. The Hon'ble Apex Court, while interpreting Section 14 of Customs Act, as it existed prior to 2007, has held that the value to be determined under Section 14 is only a deemed value i.e. the fictional price at which such goods 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 where buyer or seller are not related persons. Hon'ble Apex Court has clearly pointed out that the price to be arrived at under Section 14 is a deemed price and not actual price. Thereafter, the Hon'ble Apex Court has held that there is no dispute that the freight up to Dharamtar Jetty has been paid by the buyer and therefore, the Hon'ble Court has come to the conclusion that the price at which such goods are sold for delivery up the Dharamtar Jetty is available in the shape of the price agreed by the importer which includes freight upto Dharmtar Jetty. In these circumstances, Hon'ble Court has held that since the CIF value for delivery at the Dharmtar Jetty is available, it can be adopted as the deemed value of such goods for the purpose of levy of Customs duty under Section 14 of the Customs Act. For making this assertion, Hon'ble Apex Court has relied on the bill of lading which shows the port of discharge as Mumbai Port/ JNPT/ Dharamtar.

30. Thus, in view of the fact that the deemed value of erstwhile section 14 was replaced with actual transaction value of goods and specific inclusion of cost of transportation was made in the Assessable value by virtue of first proviso to Section 14(1), the ratio of the decision of the Hon'ble Apex Court cannot be applied to present case. It is noticed that Hon'ble Apex Court in the case of Ispat Industries (supra) has clearly observed that transportation by barge which occurs prior to movement of barge is also part of transportation of goods(**para 23** of the order by Hon'ble Apex Court in case of Ispat Industries). In this background, it cannot be said that the activity of loading the barge is not part of transportation. The appellants too have included barge charges for movement of goods of after unloading from mother ship in assessable valuation cost of transportation.

31. Moreover, in para 26 of the order of Hon'ble Apex Court in case of Ispat Industries (supra), has stated that if there are two possible interpretations of the rule, the one that subseries the object of the parent provision and the other does not, we have to adopt the former, because adopting later will make the rule ultra-virusto the Act. In 2007, after new Section 14 of Customs Act was introduced based on actual

transaction value as cost of transportation was specifically made includible in the value in Section 14 of Customs Act, 1962. Any interpretation that excludes cost of transportation, including Loading/Unloading charges from mother ship would be ultra-virus to Section 14.

32. All the case laws relied by the appellant are for period prior to 2007 and therefore not applicable in view of changes in Section 14 of the Customs Act. In view of above the Loading/ Unloading charges incurred during movement of Cargo from mother ship to barges for further movement of cargo to jetty is includable as cost of transportation.

33. The appeals therefore deserves to be dismissed.

(RAJU)
(MEMBER TECHNICAL)

In view of above difference of opinion the matter may be placed before the Hon'ble President to nominate a third member for resolution of following difference of opinion:

- (i) Can the ratio of the decision of Hon'ble Apex Court in the matter Ispat Industries Ltd as reported in 2006 (202) ELT 561 (SC), with respect to transportation charges in the context of deemed value prescribed under Section 14 as it existed prior to 2007, be applied to imports made after introduction of new Section 14 in the year, 2007, subject to the riders indicated on determination of points indicated by Member(Judicial) in his remand orders.
or;
- (ii) Loading/unloading expenses from mother ship to barge are part of cost of transportation and includible in assessable value post 2007 under new Section 14 based on actual transaction value and therefore appeals are to be dismissed.

(Pronounced in the open Court on 05.06.2023)

SOMESH ARORA
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

PALAK

Interim Order No. 3-4/2025

DATE OF HEARING:17.03.2025

DATE OF DECISION:20.03.2025

R.MURALIDHAR

Vide the Interim Order No. 9-10 /2023 dated 05.06.2023, the Difference of Opinion was referred to third member on the following points:-

"(i) Can the ratio of the decision of Hon'ble Apex Court in the matter Ispat Industries Ltd as reported in 2006 (202) ELT 561 (SC), with respect to transportation charges in the context of deemed value prescribed under Section 14 as it existed prior to 2007, be applied to imports made after introduction of new Section 14 in the year, 2007, subject to the riders indicated on determination of points indicated by Member(Judicial) in his remand orders.

or;

(ii) Loading/unloading expenses from mother ship to barge are part of cost of transportation and includible in assessable value post 2007 under new Section 14 based on actual transaction value and therefore appeals are to be dismissed."

2. The matter was taken up for hearing today in the presence of both the sides.

3. I find that it would be important to reproduce the individual decisions of Member (Judicial) and Member (Technical) which are extracted below:

Hon'ble Member (Judicial)

"19. Guided by the above decision, we find that shifting charges in the anchorage cannot be strictly considered as unloading/ loading charges at the port in view of statutory provisions and case law discussed The question as to whether any further addition to CIF value for transportation charges is warranted or not, needs elaborate discussions and findings on various aspects and some of these, inter alia, are as follows:-

a) Whether the goods at any stage prior to their landing at the final port destination were cleared for home consumption or not?

b) Whether a permission by the proper officer had been given under Section 33 and 34 for moving the Cargo to the barge and whether the goods were accompanied by a boat note under Section 35 of the Customs Act, 1962?

c) Whether the mother vessel by which goods arrived could or could not anchor at the main port?

d) Whether the Jetty at which goods were eventually discharged was

included or not included in the bill of lading as port of discharge.

e) Whether who paid the consideration (even if buyer) is relevant consideration or not or any emergent situation relating to draft of the ship as mentioned in para 60 and 61 (cited supra) of the Ispat Industries case of apex court.

f) Whether the duty demand was raised consequent upon finalization of provision assessments, if same were involved?

20. We find that elaborate discussions, on all these points is not coming forth in the impugned order, as well as in the order of adjudicating authority. We, therefore, remand the matter and direct adjudicating authority to consider all these aspects including others on point of rate/transportation cost that may be raised by the litigant parties, to arrive at its decision, affording full opportunity to the appellants.

21. Matter is, therefore, remanded to the original authority to give findings accordingly, in the light of decision cited (supra) of Ispat Industries by Hon'ble Apex Court. Order is therefore set aside and Appeal is allowed by way of remand."

Hon'ble Member (Technical)

"30. Thus, in view of the fact that the deemed value of erstwhile section 14 was replaced with actual transaction value of goods and specific inclusion of cost of transportation was made in the Assessable value by virtue of first proviso to Section 14(1), the ratio of the decision of the Hon'ble Apex Court cannot be applied to present case. It is noticed that Hon'ble Apex Court in the case of Ispat Industries (supra) has clearly observed that transportation by barge which occurs prior to movement of barge is also part of transportation of goods(para 23 of the order by Hon'ble Apex Court in case of Ispat Industries). In this background, it cannot be said that the activity of loading the barge is not part of transportation. The appellants too have included barge charges for movement of goods of after unloading from mother ship in assessable valuation cost of transportation.

31. Moreover, in para 26 of the order of Hon'ble Apex Court in case of Ispat Industries (supra), has stated that if there are two possible Interpretations of the rule, the one that subseries the object of the parent provision and the other does not, we have to adopt the former, because adopting later will make the rule ultra-virusto the Act. In 2007, after new Section 14 of Customs Act was introduced based on actual transaction value as cost of transportation was specifically made includible in the value in Section 14 of Customs Act, 1962. Any interpretation that excludes cost of transportation, including Loading/Unloading charges from mother ship would be ultra-virus to Section 14.

32. *All the case laws relied by the appellant are for period prior to 2007 and therefore not applicable in view of changes in Section 14 of the Customs Act. In view of above the Loading/ Unloading charges incurred during movement of Cargo from mother ship to barges for further movement of cargo to jetty is includable as cost of transportation.*

33. *The appeals therefore deserves to be dismissed."*

4. The Learned Advocate appearing on behalf of the appellant submits that the Hon'ble Member (Technical) has pointed out about the changes made in Section 14 subsequent to 2007 by way of amendment effective from 10th October, 2007, and has also emphasised on proviso to Section 14 (after amendment) to come to a conclusion that "*costs of transportation to the place of importation*" would also include the charges paid by the appellant for utilizing the services of Floating crane hired by the appellant. He has also held that the ISPAT INDUSTRIES VS. COMMISSIONER OF CUSTOS, MUMBAI-2006 (202) ELT 561 (S.C.) cannot be applied in the present case, since, Section 14 has been amended. The Learned Advocate submits that in WIPRO LTD. VS. ASSSITANT COLLECTOR OF CUSTOMS-2015 (319) ELT 177 (S.C.), it is held that except for the fact that earlier un-amended Section 14 was based on "*deemed value*" and the subsequent amended Section 14 w.e.f. 10.10.2007 was based on "*transaction value*", more or less, the provisions remain the same when read with the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007)(Customs Valuation Rules, 2007). Relying on this case law, the learned Advocate submits that the Hon'ble Member (Technical) is in error coming to the conclusion that unloading of the cargo by way of floating crane the same would amount to transportation. He submits that the Hon'ble Member (Judicial) has considered all the statutory provisions and case law of Ispat Industries and has recommended that factual details are required to be verified before coming to a conclusion as to whether the Floating Crane Charges would amount of transportation cost so as to add the same to the Assessable Value. Further, the appellant had also contested the fact that the goods were cleared on provisional

basis and in terms of Section 18 (2) of the Customs Act, 1962, the provisional assessment was required to be finalized. The differential duty, if any, was recoverable under that provision. Therefore, the appellant had also contested the issue on the ground that the present proceedings could not have been initiated without finalization of the provisional assessment by directly relying on Section 28 of the Customs Act, 1962 to make the demand. The Hon'ble Member (Judicial) has also considered the same and brought into his para 19 (f) of his order.

4.1 In view of this submissions, he prays that the appeal may not be dismissed as held by Hon'ble Member (Technical), but remanded to the Adjudicating authority as held by the Hon'ble Member (Judicial).

5. Learned AR relies on the detailed findings of the Hon'ble Member (Technical) and supports his findings that in view of the amended *Section 14*, the Floating Crane Charges are required to be treated as transportation cost requiring the appellant to include the same for arriving at the Assessable Value. Therefore, he submits that the matter may not be remanded as has held by the Hon'ble Member (Judicial), but the appeal may be dismissed as held by Hon'ble Member (Technical).

6. Heard both sides and pursued the oral and written submissions made before me by both the sides.

7. The main issue to be decided in this case is as to whether the Floating Crane Charges incurred by the appellant toward unloading of the coal, is required to be added as freight/transportation cost to the assessable value for paying the Customs Duty. In case if it is held that these charges are on account of freight/transportation, then Assessable Value is required to be arrived at after adding such charges as has been canvassed by the Revenue and as held by Member (Technical)

7.1 On the other hand, if as the appellant submits that these charges have been incurred purely on account of the unloading of the cargo by using the floating crane, which cannot be equated to transportation/freight cost, such cost

are required to be taken as unloading cost only.

7.2 The relevant portion of Rule 9 (2) of the Customs Valuation Rules reads as under:-

“Section 9(2) in The Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

(2)For the purpose of sub-section (1) and sub-section (1-A) of Section 14 of the Customs Act, 1962 (52 of 1962), and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include –

(a)the cost of transport of the imported goods to the place of importation;

(b)loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c)the cost of insurance :[Provided that –

(i)where the cost of transport referred to in Clause (a) is not ascertainable, such cost shall be twenty percent of the free on board value of the goods;

(ii)the charges referred to in Clause (b) shall be one per cent, of the f.o.b. value of the goods plus the cost of transport referred to in Clause (a) plus the cost of insurance referred to in Clause (c) ;

(iii)where the cost referred to in Clause (c) is not ascertainable, such cost shall be 1.125% of f.o.b. value of the goods :

Provided further that in the case of goods imported by air, where the cost referred to in Clause (a) is ascertainable, such cost shall not exceed twenty per cent of the f.o.b. value of the goods :Provided also that where the f.o.b. value of the goods is not ascertainable, the cost referred to in Clause (a) shall be twenty per cent. of the f.o.b. value of the goods plus cost of insurance for Clause N above and the cost referred to in Clause (c) shall be 1.125% of the f.o.b. value of the goods plus cost of transport for Clause (iii) above] [Substituted by G.S.R. (i) 9 (E), dated 5th July 1990 [Vide Notification No. 39/90-Custom (N.T.), dated 5th July 1990 (w.e.f. 5th July 1990) for the provisions an amended by G.S.R. 851 (E), dated 10th August, 1988 [vide Notification No. 58/88-Custom (N.T.), dated 10th August, 19988] and Notification No. 71/89 (N.T.)-Custom, dated 19th December, 1989.]”

7.3 As per appellant, the unloading charges already get included in the 1% under Section 9(2)(b) above. Therefore, as per appellant in such a case, these charges are not required to be included to arrive at the assessable value.

7.4 I find that the Hon’ble Member (Judicial) has gone into the case law of Ispat Industries (cited supra) and has held that its applicability or otherwise to the present case would be subject to conducting various factual checks as has been listed by him in para 19 (a) to (f) of the Interim Order. At para 19 (f) he has also considered the point of finalization of provisional assessment raised by the appellant and has directed this to be verified.

7.5 On the other hand, the Hon’ble Member (Technical) has gone by the amended provisions of Section 14 w.e.f 10th October 2007 to come to a conclusion that there is no need to verify any factual details. As per him the proviso to Section 14 (1) clarifies without doubt that the charges paid towards floating crane are required to be treated as transportation cost and hence are required to be added to arrive at the assessable value. I find that he has not

given any finding on the stand taken by the appellant towards provisional assessment not been finalized and the demand was directly raised under Section 28 of Customs Act, 1962. However, as noted above the Hon'ble Member (Judicial) has considered this point and as has directed this fact also to be checked.

7.6 I find that in the present case in order to come to the conclusion as to whether the floating crane charges can be termed as transportation cost or not, the same would require to go into factual details. I also find that in the Wipro Case cited by the Appellant, the Supreme Court has viewed that the amendment per se to Section 14 (1) on its own is not bringing in any material change except for the mode of arriving at the value which was based on '*deemed value*' earlier and change to '*transportation value*' w.e.f 10.10.2007. A harmonious reading of the Section 14 (1) prior to 2007, subsequent to 2007, read with Valuation Rules, 2007, clarifies this. Therefore, simply based on the amended provision of Section 14 (1) alone, the matter cannot be decided. The Hon'ble Member (Judicial) has gone into various factual details gone into by the Hon'ble Supreme Court in ISPAT INDUSTRIES, which he has recorded and has rightly felt that they are required to be checked even in the present case.

8. Therefore, I am in agreement with Hon'ble Member (Judicial) and hold that the matter is required to be remanded to the adjudicating authority to undertake necessary verification of the points highlighted by him at Para 19 (a) to (f) and as per the directions given by him at Para 20 and Para 21 of the Interim Order.

9. The matter is to be placed before the regular Division Bench to pass necessary order.

(Pronounced in the open court on 20.03.2025)

(R.MURALIDHAR)
MEMBER (JUDICIAL)

Majority decision

Date of Hearing : 08.04.2025
Date of Decision :08.04.2025

PER: SOMESH ARORA

In view of the majority order, appeal is allowed by way of remand for conducting, inter alia, verification on points (a) to (f), above.

2. Appeal allowed by remand

(Pronounced in the open court on 08.04.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(SATENDRA VIKRAM SINGH)
MEMBER (TECHNICAL)

Prachi