CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21246 of 2018

(Arising out of Order-in-Original No. BLR-CUSTM-AIR-002-2018-19 dated 28/04/2018 passed by Principal Commissioner Of Customs, BANGALORE)

Commissioner Of Customs
(Air Cargo)
OFFICE OF THE PRINCIPAL COMMISSIONER
OF CUSTOMS,
AIRPORT & AIR CARGO COMPLEX,
AIR INDIA SATS AIRFREIGHT TERMINAL,
KIAL, DEVENAHALLI
BANGALORE - 560300

Appellant(s)

VERSUS

M/s. Auro Led
No.6A,lavelle Mansion,
1/2,lavelle Road,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

WITH

Customs Appeal No. 21247 of 2018

(Arising out of Order-in-Original No. BLR-CUSTM-AIR-002-2018-19 dated 28/04/2018 passed by Principal Commissioner Of Customs, BANGALORE.)

M/s. Auro Led
Unit No. 207, 356/20, 2nd Floor,
Esteem Plaza, 13th Cross
(near Bashyam Circle), Sadashiva Nagar
BANGALORE - 560080
KARNATAKA

Appellant(s)

VERSUS

Commissioner Of Customs
(Air Cargo)
OFFICE OF THE PRINCIPAL COMMISSIONER
OF CUSTOMS,
AIRPORT & AIR CARGO COMPLEX,
AIR INDIA SATS AIRFREIGHT TERMINAL,
KIAL, DEVENAHALLI
BANGALORE - 560300

Respondent(s)

WITH

Customs Appeal No. 21248 of 2018

(Arising out of Order-in-Original No. BLR-CUSTM-AIR-002-2018-19 dated 28/04/2018 passed by Principal Commissioner Of Customs, BANGALORE.)

Shri Brijesh Patel
Partner of M/s. Auro Led
Unit No. 207, 356/20, 2nd Floor,
Esteem Plaza, 13th Cross
(near Bashyam Circle), Sadashiva Nagar
BANGALORE - 560080
KARNATAKA

Appellant(s)

VERUS

Commissioner Of Customs
(Air Cargo)
OFFICE OF THE PRINCIPAL COMMISSIONER
OF CUSTOMS,
AIRPORT & AIR CARGO COMPLEX,
AIR INDIA SATS AIRFREIGHT TERMINAL,
KIAL, DEVENAHALLI
BANGALORE - 560300

Respondent(s)

AND

Customs Appeal No. 21249 of 2018

(Arising out of Order-in-Original No. BLR-CUSTM-AIR-002-2018-19 dated 28/04/2018 passed by Principal Commissioner Of Customs, BANGALORE.)

Shri Udit Patel
Partner of M/s. Auro Led
Unit No. 207, 356/20, 2nd Floor,
Esteem Plaza, 13th Cross
(near Bashyam Circle), Sadashiva Nagar
BANGALORE - 560080
KARNATAKA

Appellant(s)

VERUS

Commissioner Of Customs
(Air Cargo)
OFFICE OF THE PRINCIPAL
COMMISSIONER OF CUSTOMS,
AIRPORT & AIR CARGO COMPLEX,
AIR INDIA SATS AIRFREIGHT TERMINAL,
KIAL, DEVENAHALLI
BANGALORE - 560300

Respondent(s)

APPEARANCE

Shri G. Shivadass, Sr. Advocate of SHIVADASS AND SHIVADASS LAW CHAMBERS, for the Appellant

Shri P. Gopakumar, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, JUDICIAL MEMBER
HON'BLE MR. C. J. MATHEW, TECHNICAL MEMBER

Final Order No. 20074-20077 / 2022

Date of Hearing: 02/03/2022
Date of Decision: 02/03/2022

Per : C. J. MATHEW

Two distinct issues on valuation and of restriction on importation conflate in the proceedings of a single show cause notice culminating in the impugned order, confirming demand of duty of ₹ 1,63,93,479/- and ₹ 1,71,631/- under section 28 of Customs Act, 1962 in the first of which order-in-original no. BLR-CUSTM-AIR-002/2018-19 dated 28th April 2018 of Commissioner of Customs, Bangalore has substituted ₹ 21,54,25,872/- declared as value of imports of 500 mm x 500 mm 'LED panels' effected against 16 bills of entry filed between March and May 2017 with a 'best judgement' determination of ₹ 27,06,46,820/- and, in the other, from re-determination of value of 1 nos. 500mm x 1000mm 'LED display' imported against bill of entry no. 579691/28.06.2018 by addition of 'cost of service' under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to ₹ 7,36,236/-. The import of multiple consignments has also been held to have breached the mandate of Bureau of Indian Standards (BIS) certification. The appeal of the importer against confiscation of goods, under section 111 of Customs Act, 1962, with attendant fine as condition of redemption and imposition of penalties under section 114A and section 114AA of Customs Act, 1962 along with the enhancement of assessable value, the two appeals of the partners, S/shri Brijesh Patel and Udit Patel, against the penalties imposed on them under section 112 of Customs Act, 1962 and the appeal of Revenue against the dropping of ₹ 7,49,80,179 owing to non-adoption of the payment schedule in 'Collaborative Framework Agreement (CFA)' as fixed income stream to the supplier in China proposed in the show cause notice as 'assessable value' are taken up together for disposal in this common order.

2. In his narration of the background, Mr G Shivadass, Learned Senior Counsel appearing for the importer and the partners, informed that. having been contracted along with M/s DNA Entertainment Network, by Board of Control for Cricket India (BCCI) to undertake screen display during the cricket tournament styled as Indian Premier League (IPL), the joint venture entered into a tri-partite agreement, designated as the

'Collaborative Framework Agreement (CFA)', with M/s Shenzen Lamp Technology Company Ltd, China for supply of LED panels, of particular specifications, along with specified accessories which, when assembled, would be deployed at the venue of matches and to be retained thereafter for five years to be used in specified events before being returned to overseas supplier. To further demonstrate the nature of the transaction as one of mere transfer of possession temporarily, he highlighted the pre-mature termination clauses and the fixed return payment stream of US$ 5,800,000 over a period which could, by no stretch, be construed as price of the goods comprising, as it does, of the financing costs and the return on investment of the supplier. He further informed that, following the placing of order on 13th March 2017, the supplier intimated, *vide* letter dated 15th March 2017, of their inability to ship 3370 nos. of '1200 mm x 1000 mm panels' contracted in the agreement and offered a scaled down version of '500 mm x 500 mm panels' at US$ 750 apiece which, upon acceptance for supply of the same number of pieces and invoiced for US$ 2,732,171.60, had been imported against 16 bills of entry.

3. He clarified that, though such panels as contemplated for supply in the 'Collaborative Framework Agreement (CFA) were required to be compliant with Bureau of Indian Standards (BIS) certification, the scaled down versions, actually imported, were below the threshold size of 32 inch to which the mandate attached. This, according to him, had been ascertained by the importer as is evident in the advice of M/s Trio Technologies, a recognized laboratory for certification of compliance with standards, and which enabled customs authorities to permit clearance under section 47 of Customs Act, 1962 on responding to specific query raised during processing of bills of entry. It was informed that, after commencement of investigations, they had obtained further opinion of M/s TUV Rheinland and Ministry of Electronics & Information Technology (MEITY) on the applicability of Electronics and Information Technology (Requirements for Compulsory Registration) Order, 2012 and were intimated that only screen size over 32 inches was intended to be covered. It was also informed that, in order to facilitate release of seized goods, necessary certification, as prescribed, had been obtained on 1st November 2017.

4. Mr Shivdass submitted that the other consignment proceeded against for misdeclaration of value had been imported against bill of entry no. 579691/28.06.2018 for clearance of 1 nos. 'P8.33 LED display 500 mm x 1000 mm' on declared value of US$1223 which the show cause notice proposed to enhance to the extent of value of services in the separate invoice even though they had demonstrated that the billed activity had no nexus with the import and the sample had been sent back after testing. These, he contended, were the three disputes raised in the post-clearance investigations which commenced on 24th May 2017 with seizure of the panels that had been assembled for use during the event and stored thereafter for further use in future.

5. According to him, the adjudicating authority had, even while rejecting the proposal in the show cause notice for adopting the entirety of the fixed revenue payment stream in the 'Collaborative Framework Agreement (CFA)' as the assessable value, erred in re-determining duty liability based on an earlier import of different specification by adjustment of that value downwards in proportion to the reduced physical dimensions of the impugned goods. He submits that, while rejection of the proposal in the show cause notice could not be faulted, the significant distinction of the product imported earlier from the impugned goods rendered the comparison logically, and legally, odious. He also argued that the 'Collaborative Framework Agreement (CFA)' had ceased to be a valid contract with no bearing on the import of the impugned goods. Reliance was placed on the decision of the Hon'ble Supreme Court in *Eicher Tractors v. Commissioner of Customs, Mumbai [2000 (122) ELT 321 (SC)]* and of the Tribunal in *Commissioner of Central Excise, Bangalore v. CMC Ltd. [2016 (343) ELT 929 (Tri-Bang)]* to discredit the procedure adopted by the adjudicating authority for re-determination of value. Insofar as the second issue of valuation is concerned, he contends that the impugned order had erred in not taking into account their submissions that the billed services had nothing to do with the imported goods and which, being entirely related to post-import installation, does not meet the stipulation contained in rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for sustainability. He points out that the impugned order had, insofar as the first dispute is concerned, also travelled beyond the show cause notice to adopt a value

which was not proposed therein. According to him, no reliance should be placed, even as pre-cursor of the two invoices issued for the transaction, upon a *pro forma* invoice as the prescription of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had to be conformed to without reference to the invoicing method. On perusal of the impugned order, we find that it is rule 3 of the said Rules that has been relied upon for inclusion of cost of services in the assessable value.

6. According to the Learned Authorized Representative, the narration of Learned Senior Counsel leaves no room for doubt that, insofar as specification of standards is concerned, the impugned goods were not compliant at the time of importation and the post-clearance certification demonstrates that their original contention of non-applicability is not tenable. He further informed that the investigating authority had taken the assistance of a certifying entity, M/s TUV SUD South Asia Pvt Ltd, which, being reported in the adjudication order thus

> *'26.1 There are many test reports and opinions on record which are placed by the Investigation and the Noticee. The main rival contentions are in relation to seize. It is alleged by the investigation that the goods are of size beyond 32" as the units are of 500 mm x 1000 mm. The examination of the cargo under Mahazar proceedings by shri Lokesh Employee No.E-5482, who is a Project Manager of M/s. TUV SUD South Asia Pvt. Ltd. And the report furnished them, was placed on record in support of the contention. Shri Lokesh stated that "though there are two panels put together as one visual display unit, the same cannot be considered as two separate units as they are driven by a single power supply unit which is connected serially to one another, the size on one Panel is diagonally 43 inches and 19 inches horizontal and 39 inches vertical; one LED unit with power supply unit approximately weighs 45 kgs; the total visual display unit consists of 16 tiles measuring 10 inches by 10 inches and 14 inches diagonally; these individual tiles are only components and does not have the ability to function independently; Shri Lokesh has stated that this product is not covered under BIS 616 and that it squarely falls under as per IS 13525 (IT category) (requiring compulsory registration with the BIS) as the said product does not have a tuner card and the inspected product has only the feature of displaying the input signal."*
>
> *26.2. M/s. Auro LED contested the proceedings of mahazar and the Report of M/s. TUV SUD and also requested for cross-examination of Shri Lokesh. During cross-examination of Shri Lokesh, they established that Shri Lokesh has not actually switched on the units to see whether the individual units can function separately or not. The main noticee offered to demonstrate that the individual display units can function independently. They have enclosed a video in CD to demonstrate the function of the units imported by them in support of their contention that the individual units are of size below 32" and do not require BIS Certification. It was seen during the cross-*

examination, the Noticee tried to refute the finding of the representative of M/s. TUVSUD that the individual panels cannot function independently. It is seen that even when they are assembled as a VDU of 1000 mm x 1000 mm, the units of 500 x 500 mm can function independently as they are having individual power supply units. But the point to be noted is that even in such demonstration; the panels of 500 mm x 500 mm were presented in assembly of 4 measuring 1000 mm x 1000 mm. In all, it is demonstrated that the 500 mm x 500 mm can function independently but the intention demonstrated was only to use as 1000 mm x 1000 mm Screen by assembly of 4 units of 500 mm x 500 mm.

26.3. The main contention is that the 500 mm x 500 mm being smaller in size, the same are not required to be complied with the safety requirements of ISI 3252. However, it is to be appreciated that the Noticee on behalf of the supplier has presented all the documents and the Test Report to BIS who have eventually issued the Registration for the goods without holding that the goods do not fall under the category of those covered in MEITY CRO. Thus, the final test of applicability of MEITY CRO resulted in the BIS issuing registration to the supplier for the supply of goods of the description P8.33 (Outdoor Fixed LED Screen) making it clear that the goods are liable for Registration. It is to be noted that on application by the Noticee on behalf of the supplier, BIS has not returned the application stating that the goods do not require BIS Registration and are not covered in MEITY CRO though the goods are made of 500 mm x 500 mm panels and each of them function individually.

26.4. The above fact of BIS granting the registration to the same item which was imported, holds in favour of the allegation made in the Show-Cause Notice that the goods are liable for BIS compliance and registration. The noticee contested that the goods do not require the BIS Registration and compliance of BIS Standards ISI 3252: 2010 on many grounds. I shall examine these contentions.'

places the issue in proper prospective and that, insofar as the value of goods imported against the 16 bills of entry is concerned, it is common ground that the impugned order is flawed. He highlighted the obvious infirmity in the finding of the adjudicating authority that

'27.2. The Noticee vociferously contested the allegation during the investigation as well as in response to the Show Cause Notice. They submitted that though there were deliberations that eventually resulted in the signing of the agreement by all the parties, the agreement was not implemented; As they were under the impression that things would go as per Collaboration Framework Agreement, they had not arranged immediate funds for buying from alternate source; they were forced to agree for a price of USD 750 for P8.33 LAMP design; Unilumin assured that the CF Agreement would be amended accordingly, as per ***their letter dated*** *15.3.2017. Since, Unilumin assured that they would review the agreement and as product was required urgently, the noticee signed the agreement and dispatched the same to Unilumin; If the noticee had not agreed to the terms dictated by Unilumin, Unilumin would not have supplied the material; As Unilumin failed to supply the noticee with the product agreed upon,*

in order to ensure that there was no uncertainty left in the Noticee's mind, Unilumin issued letter dated 15.3.2017wherein they admitted the fact that they could not supply the agreed product, they would be supplying scaled down version; the price of which would be USD 750 and the terms of agreements would be amended after IPL; in the above backdrop, Unilumin cannot enforce the agreement as it stands. Therefore, the agreement is void. However, they supplied the P 8.33 LAMP LED display screen of 3370 numbers as per P0; the invoices have been issued; the price declared by them is fair on the basis of their earlier imports as well as contemporaneous import prices.

…..

27.7. From the sequence of events that culminated in signing of the Agreement by the parties on 11.3.2017; raising of the Purchase Order by the Noticee on 13.3.20 17 and the imports that ensued from 28.03.2017, it prima facie appears that the imports are carried out in pursuance of the Collaboration frame work Agreement. Shri Udit Patel, Partner of M/s. Auro LED, the main Noticee in his statement dated 31.5.2017, admitted that the goods have been imported as per the Collaboration Agreement; amount is to be paid to M/s. Unilumin in 8 fixed returns in next three years. He has also submitted a letter dated 15.3.2017 addressed to Mr. Brijesh Patel wherein the price has been agreed at US$750. I have examined his statement and the letter dated 15.3.2017 issued by Unilumin submitted by him during proceedings of recording of the statement. Firstly, there are inconsistencies in his statement and the letter. The said Letter was addressed to Shri Brijesh Patel. The agreement was entered into by the parties on 11.3.2017. The Noticee raised Purchased Order for the goods at a price of US$ 750 on 13.3.2017. Be that it may, there is no communication by email with regard to price reduction to 750 till there was seizure by DRI. The said letter dated 15.3.2017 was also not found in any documents seized from the premises. The said communication was suo moto submitted by Shri Udit Patel during the proceedings of recording of his statement. The authenticity of the said communication also appears questionable. Firstly, it was not signed by any signatory of the Agreement but issued in pursuance of the agreement. Further, if the rate was revised by the supplier on 15.3.2017, the Noticee could not have raised the Purchase Order with a Price of US $ 750 per Sq. Mtr on the supplier before such date, i.e., before 15.3.2017. The Purchase Order is dated 13.3.2017. Indeed, as the Purchase Order was raised on the Supplier by the Noticee for US $ 750 per Sq. Mtr, there was no need for any communication reducing the price for US $ 750. Further, the agreement was for consideration called as 'Fixed Return" payable over a period of time. The communication, if any, should be in relation to reduction of such 'Fixed Return' and not for unit price. Alternatively, as Shri Brijesh Patel contended, once the purchase order is raised(for US $750 per Unit), the agreement became void, there was no need to issue any communication by M/s. Unilumin to M/s. Auro LED. It is also seen that the letter dated 15.3.20 17 submitted by Shri Udit Patel does not speak about what was the price agreed upon and from what price the price is reduced to US $750. Hence, communication dated 15.3.2017 is not a credible communication in view of the above inconsistencies.

27.8. The investigation placed reliance on the Collaboration Agreement. The Noticee contested the same on many grounds. Firstly, they stated that the Collaboration Agreement was for a different product called "Usurface 5". It is stated that the investigation has

> *failed to appreciate that the Collaboration Agreement is for different design which is not supplied by Unilumin. To say this, they have relied on the mails dated 17.2.20 17 in which .Shri Peter Yang of Unilumin wrote to Shri Udit Patel asking him to" check the diagram of their design for IPL Tender. For time saving, it is based on Usurface Design". There is a big inconsistency in the mail to relate it to the present consignments. Firstly, IPL tender process was over by then and the importers team (Auro LED and DNA Networks) were already granted the IPL Contract. Prima facie, the said email and the U Surface S design may not be related to the consignments at all. Shri Udit Patel replied for the email stating 'The Cabinet design is good. Brightness needs to be 7500 Nt cant compromise on that'. On 20.2.2017 peter Yang once again wrote mail to Udit Patel to 'check the spec sheet of P8.33 perimeter display for IPL Project'. Udit Patel replied 'Hi Peter, this is much helpful. It is to be noted that the item referred to in the last mails is P8.33 Perimeter Board. In the subsequent emails there is no reference to the product called "Usurface S'. It is to be noted that there was no averment by Shri Udit Patel in his statement that the product covered under the Collaboration Agreement and the product imported are different. It is to be also observed that shri Brijesh Patel also not mentioned such a thing in his statements. It is only after the SCN is issued, for the first time in their submissions, the noticee is talking about the agreement being in respect of another product. Very importantly, the agreement does not talk about the description and Model Number of the Product at all.'*

in support of his contention that the appeal of Revenue for confirmation of differential duty on the value proposed in the show cause notice for the goods imported against 16 bills of entry should be allowed.

7. Having heard both sides and perused the records, it would appear that the present proceedings must determine breach, if any, of certification standards which, admittedly, had ceased to be of import by the time of issue of show cause notice, the appropriate approach to the dispute over valuation of goods imported against 16 bills of entry and the correctness in inclusion of the value of the invoice for services in the assessable value of the goods.

8. It is not in doubt that the goods imported against 16 bills of entry were presented for clearance without any certification of compliance with standards mandated by Electronics and Information Technology (Requirements for Compulsory Registration) Order, 2012. However, it is also on record that the said certification had been obtained while the goods were under seizure to enable release of goods pending further proceedings. It is not in dispute that each piece in the imported consignments, as presented, was below the threshold for compliance with the standards and that it was only upon assembly of the pieces in accordance with requirements of Indian

Premier League (IPL) that the display equipment traversed that threshold. It is on record that the issue had been raised prior to clearance of the unassembled pieces and the 'proper officer' had granted 'out of charge' under section 47 of Customs Act, 1962 only after satisfaction that certification was not mandated. Subsequent alteration of the size of the goods, such as it is, by assembly for installation takes it out of the pale of 'imported goods' to which alone are the circumstances of confiscation envisaged in section 111 of Customs Act, 1962 applicable. As the certification was indeed obtained, albeit subsequently, compliance of the goods in assembled form with the standards is no longer in question; and it is the substantive compliance that is crucial as the goods, but for the non-furnishing of certification, were not prohibited for import. The impugned order has held otherwise only on the technical finding of non-availability of certification at the time of import which, from the facts and circumstances *supra*, would have been required if the pieces were not equipped to function independently and could be operational as display only by assembling. There is nothing on record to indicate that, as presented, each piece was not a display model that was, solely for contractual requirement, assembled. Consequently, the finding that certification for standards was mandated is not tenable and the confiscation under section 111(d) of Customs Act, 1962 is not sustainable.

9. On the valuation of goods imported against 16 bills of entry, the show cause notice had proposed that the stream of fixed returns incorporated in the 'Collaborative Framework Agreement (CFA)' be adopted as the assessable value. Even if the submission on behalf of the appellant that the said agreement had been voided by inability of the overseas entity to supply the goods specified therein were to be ignored, the scheme of valuation under section 14 of Customs Act,1962 cannot be for it is the transaction value, and the transaction value alone, as declared in the bill of entry that is assured of acceptance for assessment except for varying from the qualifying circumstances therein as well as in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. There is no finding, either of additional payments having been made as consideration or of the value not being in conformity with the parameters therein, for rejection of rule 12 of the Rules to warrant resort to the sequential

application of the several methods in the Rules. Most significantly, the 'Collaborative Framework Agreement (CFA)' intended temporary transfer of possession almost akin to 'lease' and, thereby, not a 'sale' which is a necessary qualification for conformity with rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to which all alternative methods of valuation are subject.

10. The Tribunal, having in *Futura Travels Ltd v. CC (Import), Mumbai [final order no. A/87363-87364/2021 dated 21st December 2021 disposing off customs appeal no. 239 of 2012 arising out of order-in-original no. CC/MAK/18/2011-12 ADJ ACC (I) dated 26th December 2011 of Commissioner of Customs (Import), Air Cargo Complex, Mumbai]* occasion to examine the law on acceptability of 'lease value' for assessment, had held that

> *'9. On perusal of*
>
> > *'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:*
> >
> > *Provided further*
> >
> > *xxxx*
> >
> > *Provided also*
> >
> > *xxxxx*
> >
> > *(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;*
> >
> > *xxx*
> >
> > *Explanation. —For the purposes of this section—'*
>
> *of Customs Act, 1962 in the context of the contractual engagement between the importer and the overseas entity, the claim preferred on*

> *behalf of the appellant that US$ 25,000, paid against invoice raised towards security deposit provided for in the agreement, is the sole consideration for procurement and is the transaction value contemplated for assessment does not find favour with us. Such 'transaction value' intended to be accepted without question must pertain to 'sale' which the impugned transaction is not. Therefore, in any transaction of importation for a while, the commercial terms of payment are not 'transaction value' for assessment. Assessable value will have to be determined in accordance with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.*
>
> *10. The Rules provide for substitution by 'transaction value' declared in comparable situations, computation of costs and, as a last resort, to best judgement. This is no carte blanche; the guiderails of 'transaction value', the 'gold standard' for valuation in the 1988 version of the Rules and the concept in the version extant since 2007, are not to be crossed over. The value adopted by the adjudicating authority and the value pressed for in the appeal of Revenue must be aligned within; as the residuary rule cited for validating appropriateness is not in question, it is the one most in conformity that should prevail.'*

and, in the light of that exposition, we cannot but find that the proposal in the show cause notice for adoption of the fixed income stream does not conform to section 14 of Customs Act, 1962 and the Rules framed thereunder. The re-determination in the impugned order can be set aside and the appeal of Revenue dismissed for that reason alone.

11. In the circumstances, we need not dilate on the Solomonic wisdom of the adjudicating authority in mathematically apportioning value of goods, said to be 'similar' though of different dimension and for want of goods of the same physical specification, imported on an earlier occasion to the extent of fitment with the smaller pieces in the impugned bills of entry and which, unlike the renowned adjudgement that venerable monarch, failed both to please either of the disputants and in impressing the Queen of Sheba, if we may permit ourselves the conceit of denominating ourselves thus. Doubtlessly, arithmetic and geometry are among the 'seven liberal arts' but logic is no less so. The lack of conformity of the 'benchmark' imports with the impugned goods excludes it from the qualifications in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to which all the prescribed methods of valuation are subject and, thereby, negates its comparability for arriving at the assessable value.

12. Turning to the single item that comprised the other impugned consignment covered by bill of entry no. 579691/28.06.2018, the dispute is about the enhancement, under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, of value to include 'cost of services' for which a second invoice was issued by overseas supplier but was held to have been deliberately contrived for evasion of duties of customs and on the basis of *pro forma* invoice recovered during investigation which, in addition to the price of US$ 1208 for goods, itemized several services. There is no doubt that assessing authority is empowered to include value of specific services, and in specific circumstances, in the assessable value but must, inevitably, be conscious of the constricted latitude therein to avoid overreach under a law that is intended to tax goods, and not services, sourced from outside the country. Hence it is that the rendering of service as 'condition of purchase' must be satisfied to avoid constitutional impropriety of taxing 'services' under Customs Act, 1962.

13. The Tribunal, in *Arcil Catalyst Pvt Ltd v. Commissioner of Customs (Import), Mumbai [final order no. 87371-87372/2021 dated 22nd December 2021 disposing off customs appeal no. 119 of 2009 arising out of order-in-original no.163/2008/CAC/CC(I)/SR/Gr.VA dated 28th November 2018 of Commissioner of Customs (Import), Mumbai-1]*, had examined the law relating to taxability of services imported with goods and held that

> *'13. Beyond the enumeration of definitions, the Rules comprise three parts: the standard in rule 3 and 4 reflecting the primacy of the 'transaction value' of imports, the 'substitute values' of rule 5 to 8 – ranged as 'transaction value' of 'identical' and 'similar' goods, the deductive or computed value, and the ascertained value - and the invisibles, or cost of services, in rule 9 with the first two being mutually exclusive as is evident from rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The interpretative notes, appended as Schedule to the Rules, are integral to appraisal of value for assessment.*
>
> *14. There is no whiff of suggestion in the proceedings thus far that there is any dispute on the contracted value of the goods requiring resort to one of the 'substitute value' by sequential elimination. Hence, it is the cost of services that are liable to be subjected to duties of customs in accordance with*

> *'4. Transaction value. - (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules....'*

of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 which is of concern to us. Again, from rule 4, it is apparent that rule 9 of the said Rules is intended only for addition to the price actually paid or payable. This is a natural corollary of the 'substitute values' under rule 5 to 8 having to be on the same, or almost the same, terms as the imported goods to qualify as acceptable approximations and, therefore, inclusive of the cost of services, to the extent applicable, required to be added. The show cause notice has not disputed the insurance, freight and landing charges, mandated by rule 9(2) of the Rules, as not included in the assessable value declared in the bill of entry. The impugned order has narrowed down the proposed inclusions within the empowerment of rule 9(1)(c) and 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

15. These deal with separate and independent payments made to overseas entities, viz., royalty and licence fees related to the imported goods as a condition of sale of the goods being valued, and any other payments contracted as a condition for the sale of imported goods respectively. Of the five contingencies enumerated, for subjecting cost of services to duties of customs, payments contracted as 'condition of sale' is restricted to only these two and the distinction between the two, other than the specific description of the purpose in the former, is that the 'condition of sale' as far as 'royalties and licence fees' is concerned is related to 'the goods being valued' while, for 'other payments', it is to 'imported goods' which does not appear to have been crafted for aesthetic variation or as relief from the tedium of repetition.

16. Hence, the two are intended to apply to mutually exclusive situations. The expression 'goods being valued' is not defined in Customs Act, 1962 while 'imported goods' is as goods brought into India and yet to be cleared for home consumption; the implication is that the addition envisaged in rule 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 is restricted to consideration that is paid or payable to overseas entity for rendering of services that add value to the goods before clearance for home consumption. 'Royalties and licence fees', on the other hand, are not so restricted though the terms of contract linking the payment to value of 'imported goods', which are undoubtedly valued, would require to be added while those paid after clearance would need to be linked to the goods supplied as a specific condition of sale.

17. Customs Act, 1962 is legislatively erected on the constitutional empowerment at serial no. 83 of List I of the Seventh Schedule to the Constitution. The Rules framed under section 14 of Customs Act, 1962 provide transcending the goods to include value of services, though in the restricted context elaborated supra. This contrived subjecting of *specified, and unspecified, services to duties of customs predates the assumption of legislative jurisdiction to tax services - both domestic and overseas – and survives even after Finance Act, 1994 did impose levy on services. Therefore, neither can there be a claim that the unfilled gap was taxable without bounds before 1994 nor that tax levied on services provided from outside the country from 2006 blurs the bounds to such extent as to erase any restriction in the inclusion envisaged in rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Clearly, the services leviable to tax by the inclusion thereof are not services rendered by an overseas provider that are liable to tax within the meaning of section 66A of Finance Act, 1994 and, as the provisions under Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and the successor Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 did not vary owing to unveiling of tax on services, we can gauge the extent to which services offered by the overseas entity is liable to tax upon assessment of imported goods. This, then, is the pole star for clearing a swathe through the conceptual commotion in the proposition of customs authorities.*

18. Furthermore, in rule 9 of the said Rules, the caveat of

> ‘ *xxxx*
>
> *(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.*
>
> *(4) No additions shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.’*

limits the extent to which the assessing officer may subject ‘services’ procured by the importer to duties of customs. It is also abundantly clear from

> *’11. Settlement of dispute. - In case of dispute between the importer and the proper officer of customs valuing the goods, the same shall be resolved consistent with the provisions contained in sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962).’*

that the context, and no less significance than the text, is restricted to the utility derived to the importer before the ‘time and place of importation’ within the customs jurisdiction even if the contract provides for payment of consideration for such after arrival in the country. That is the test which all proposals for adding value of services to ‘transaction value’ of the goods under import must pass and it is only the ‘transaction value’, accepted as declared, that may be subjected to the test.

xxxxxxxx

21. Though these decisions pertained to the chargeability of duty on ‘design and engineering drawings’, the principle therein that rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules,

> *1988 cannot be accorded such latitude as to permit all service transactions relating to imported goods to be includible in assessable value of the goods has now been well and truly settled. A service rendered in India after import, even if directly related to imported goods, cannot justifiably enhance the assessable value and 'condition of sale' has to be construed as that which is inseparable from the contract of import.'*

Though the decision was handed down in the context of the substituted Rules, the provisions relating to addition of 'cost of services' remain unaltered in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and, hence, no less applicable to the present dispute.

14. The impugned order has relied upon a *pro forma* invoice as rationale for the enhancement. That may have sufficed for re-determination of transaction value after rejecting declared value. However, the provisions for inclusion of 'cost of services' are a special law within the Rules which require ascertainment *per* the circumstances in rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. There is no such determination in the impugned order and the enhancement of assessable value is, thereby, tainted.

15. The impugned goods are not in breach of certification standards and the onus for disturbing the transaction value in 16 bills of entry as well as the value of goods in the other consignment has not been duly discharged. The confiscation is set aside along with confirmation of demand of differential duty. The several penalties consequently fail. In view of our findings, appeal of Revenue is dismissed and the appeals of the appellant-importer and the individuals are allowed.

(Operative part of order pronounced in open court on **02/03/2022.**)

(ASHOK JINDAL)
JUDICIAL MEMBER

(C J MATHEW)
TECHNICAL MEMBER

rv...