

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI
COURT HALL NO. III**

Customs Appeal No.40735 of 2015

(Arising out of Order-in-Original No. 33831/2015 dated 30.12.2014 passed by the Commissioner of Customs, Chennai – IV)

M/s. Mahindra Aerostructures Pvt. Ltd.

Appellant

Plot No. 251(P) 252 to 264 & 265 (P)
Narasapura Industrial Area, Kolar Taluk
Karnataka – 563 133.

Vs.

Commissioner of Customs

Respondent

Chennai – IV Commissionerate
Customs House, 60, Rajaji Salai
Chennai – 600 001.

And

Customs Appeal No.40736 of 2015

(Arising out of Order-in-Original No. 33831/2015 dated 30.12.2014 passed by the Commissioner of Customs, Chennai – IV)

M/s. Tangirala Subrahmanya Sarma, DGM

Appellant

M/s. Mahindra Aerostructures Pvt. Ltd.
Plot No. 251(P) 252 to 264 & 265 (P)
Narasapura Industrial Area, Kolar Taluk
Karnataka – 563 133.

Vs.

Commissioner of Customs

Respondent

Chennai – IV Commissionerate
Customs House, 60, Rajaji Salai
Chennai – 600 001.

APPEARANCE:

Shri Dinesh Kumar Agrawal, Chartered Accountant for the Appellants
Shri Anoop Singh, Authorized Representative for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)

Hon'ble Shri M. Ajit Kumar, Member (Technical)

FINAL ORDER NOS. 40472 & 40473/2025

Date of Hearing : 28.11.2024

Date of Decision: 24.04.2025

Per M. Ajit Kumar,

These appeals arise out of a common Order in Original
No.33831/2015 dated 30.12.2014 passed by the Commissioner of
Customs, Chennai – IV (impugned order).

2. Brief facts of the case are that the appellant-importer M/s. Mahindra Aerostructures Pvt. Ltd. (**MASPL**), part of the Mahindra & Mahindra Group, had imported a consignment of old and used machinery and equipment through Chennai Port under concessional EPCG scheme on high seas sale basis from M/s. Mahindra Aerospace Pvt. Ltd. (**MAPL**) a group company. The goods were originally supplied by M/s. The Boeing Company, Boeing Aerostructures Australia (**BAA**). The machinery and equipment were part of a sheet metal component manufacturing plant which was to be discontinued by BAA. They apparently agreed to transfer it to MAPL at no charge (free), no warranty basis. Based on intelligence, DRI, Mumbai, investigated the matter. From the investigation, it appeared that the nature, actual charges and value of the goods under import had been suppressed resulting in the misdeclaration of value in the Bill of Entry filed on first check basis by MASPL. Hence Show Cause Notice was issued and after due process of law, the Ld. Adjudicating Authority rejected the declared assessable value of Rs.18,75,82,857.34 under the provisions of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (**CVR 2007**), and redetermined the value as Rs.40,79,94,786/-. He also denied the benefit of concessional rate of duty under Notification No. 103/2009-Cus dated 11.9.2009 under the EPCG scheme. Differential duties were demanded along with interest and penalties were imposed on the appellant under sec. 114A/114AA of the Customs Act, 1962 (**CA 1962**). Penalty of Rs.2,00,000/- each was imposed on the DGM Shri T.S. Sarma under sections 112(a) and 114AA of the Act *ibid*. Hence the present appeals.

3. Shri Dinesh Kumar Agrawal, Ld. Counsel appeared for the appellant and Shri Anoop Singh, Ld. Authorized Representative appeared for the respondent.

3.1 Shri Dinesh Kumar Agrawal the Ld. Counsel for the appellant, stated that the questions involved in the dispute were:

(a) Whether value appraised under Section 46 of the CA 62 Rule 9 of the CVR 2007 on the basis of C.E. Vijaykumar's appraisal certificate can be rejected under Rule 12?

(b) Whether Ld. Commissioner is correct in saying that goods were inspected by the insurance company and value for insurance was estimated at Aus \$ 52,00,000, and said value is the actual value of equipment?

(c) Whether documents are manipulated?

(d) Whether extended period under Section 28(4) of the CA 62 can be invoked in cases of "first check"?

(e) Whether benefit of EPCG license can be denied without its cancellation by the DGFT, the issuing authority?

He made oral and written submissions which discussed the issues as framed by him and shall be taken up below. The Ld. Counsel also gave a written rejoinder dated 24.11.2014. to the written submissions made by revenue. He submitted that there was no merit in the impugned order, which was erroneous on facts as well bad in law and therefore the impugned order may set aside, and consequential relief granted to the Appellant.

3.2 The Ld. AR Shri Anoop Singh for the respondent submitted that glaring inconsistencies have been noted and admitted in respect of inspection reports dealt by Bureau Veritas India (P) Ltd. (**BVIPL**), pointing to fraud and manipulation of the value of the impugned goods.

Investigation has relied upon not just the statement of the C.E. who relied upon fabricated report but has also unravelled series of manipulation of documents by M/s BVPIL. The key point is that the actual cost of acquisition of goods and other related expenses such dismantling, storage, insurance, transportation etc. remitted to foreign service providers have been suppressed from Customs and hence re-working the assessable value cannot be faulted. Apart from their various letters/self-disclosures during investigation, the fact related to said suppression of considerations and inconsistencies in purchase order vis-à-vis Bill of Lading have also been admitted in statements recorded under Section 108 of CA 1962. Hence the findings in the impugned order merits being upheld and he prayed that the appeal be rejected.

4. We have perused the appeal and have heard the parties to the dispute. Recourse to valuation of the goods as per rule 9 of CVR 2007 has not been questioned by either of the parties. The rule reads as under;

9. Residual method.-

(1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, **the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;**

Provided that the value so determined shall not exceed the 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, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale or offer for sale.

(2) No value shall be determined under the provisions of this rule on the basis of -

- (i) the selling price in India of the goods produced in India;
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;

- (iii) the price of the goods on the domestic market of the country of exportation;
- (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;
- (v) the price of the goods for the export to a country other than India;
- (vi) minimum customs values; or
- (vii) arbitrary or fictitious values.

We proceed to examine the plea raised by the appellant.

4.1 The appellant has submitted two **Boards Circulars No 4/2008-customs dated 12.02.2008** and **No. 25/2015, dated 15/10/2015** which provides guidelines for valuation of imported second-hand machinery. It is a simplified method for arriving at the value of secondhand machinery for appraisalment, considering the challenges faced both by the trade and the department to value such machines. Relevant portion of the circular dated 15/10/2015 is reproduced below.

“9. Given the nature of challenges in computing the value of secondhand machinery under Rule 9, and the need to ensure that the approach applied reflects commercial reality and results in a value which is fair, and is arrived through uniform processes by all custom houses, it is felt that it is necessary to obtain inspection/appraisalment reports from qualified neutral parties.

10. For this purpose, the Board has decided that Inspection / Appraisalment Reports Issued by Chartered Engineers, or their equivalent, based in the country of sale of the secondhand machinery shall be accepted by all Custom Houses. For the purposes of uniformity, the format in which inspection/appraisalment reports shall be prepared by the Chartered Engineer is annexed to this circular. In the event that an importer does not produce an inspection / appraisalment report in the prescribed format from the country of sale, he shall be free to engage the services of inspection agencies notified as per HBoP 2015-20. In case the agencies notified in the HBoP not being at the port of import, the importers will be free to select any Chartered Engineer from those empaneled by the Custom House of the port of import.

11. No Custom House shall require any importer to have an inspection / appraisalment report of secondhand machinery from a particular Chartered Engineer. The importer shall be free to select

any chartered engineer, empaneled by the Custom House for the respective class of goods, if so required.

12. To sum up, the following guidelines shall be followed:

- a) All imports of second-hand machinery/used capital goods shall be ordinarily accompanied by an inspection / appraisal report issued by an overseas chartered engineer or equivalent, prepared upon examination of the goods at the place of sale.
- b) The report of the chartered engineer or equivalent should be as per the Form A annexed to this circular.
- c) In the event of the importer falling to procure an overseas report of Inspection / appraisal of the goods, he may have the goods inspected by any one of the agencies in India, as are notified by the DGFT under Appendix 2G of the HBoP 2015- 20 and Aayat Niryat Forms to FTP 2015-20, as amended from time to time (para 2.59 of Handbook of Procedures 2015-20 refers).
- d) At customs stations where agencies notified by DGFT are not present, importers may continue to avail of the services of locally empaneled Chartered Engineers.
- e) In cases where the report is to be prepared by the agencies in India notified by DGFT or the Chartered Engineers empaneled by Custom Houses, the same shall be in the Form & annexed to this circular.
- f) The value declared by the Importer shall be examined with respect to the report of the Chartered Engineer. Similarly, the declared value shall be examined with respect to the depreciated value of the goods determined in terms of the Circular No. 493/124/86-Cus VI dated 19/11/1987 and dated 4/1/1988. If such comparison does not create any doubt regarding the declared value of the goods, the same may be appraised under rule 3 of the CVR, 2007. If there are significant differences arising from such comparison, Rule 12 of the CVR, 2007 requires that the proper officer shall seek an explanation from the importer justifying the declared value. The proper officer may then evaluate the evidence put forth by the importer and after giving due consideration to factors such as depreciation, refurbishment or reconditioning (if any), and condition of the goods, determine whether the declared transaction value conforms to Rule 3 of CVR, 2007. Otherwise, the proper officer may proceed to determine the value of the goods, sequentially, in terms of Rule 4 to 9."

(emphasis added)

4.2 An issue which arises in the light of the circular is whether the executive is empowered to issue such circulars which help fix the value

of goods for which elaborate Valuation Rules already exist. We note that while the Act and Rules confer discretion to an officer under certain circumstances, it should not result in arbitrary power being conferred on the executive in the absence of any guidance as to how that discretion should be exercised. This is all the more important when it is exercised by a large number of officers at different Customs stations and in situations that has an effect on trade / industry and the financial and economic interest of the country. Administrative Instructions/ Circulars help in achieving uniformity, predictability, removal of ambiguity, cost saving and provides a level playing field for the trade on the one hand, while putting a check on blame worthy conduct on the other. In **Sant Ram Vs State of Rajasthan**, [AIR 1967 SC1910], a **Constitution Bench of the Supreme Court** has held that statutory rules cannot be amended by Executive instructions but "if the rules are silent" on any particular point, Government can fill up the gaps by issuing executive instructions, in conformity with the existing rules. The relevant portion is extracted below;

“We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.” (emphasis added)

4.3 Further ascertaining the value of second-hand machines after allowing for depreciation has been found acceptable by the Hon'ble Supreme Court in its judgment in **Gajra Bevel Gears Vs Collector of Customs, Bombay** [2000 (115) E.L.T. 612 (NC)].

4.4 It is the appellants view that there is no provision in the valuation rules to reject the value determined by the Customs under Rule 9 of CVR 2007 as Rule 12 ibid provides for rejection of the declared value and not the value assessed under Rule 9. Under Section 46(4) of the Customs Act, 1962, an importer presenting a bill of entry must make and subscribe to a declaration at the foot of the bill, affirming the truthfulness of its contents, which includes the value of the goods. In the present case, as no value was declared by MASPL, question of rejection of declared value does not arise. This argument appears to us to be flawed on two counts. Firstly, what the Valuation Rules sets out to do, in the absence of the actual transaction value, is to determine the best approximate value to the transaction value. With effect from 08.04.2011 Self-Assessment has become the norm of assessment of Customs duty in respect of imported / export goods. Thus the discovery of this value is facilitated by Boards circular and happens as a collaborative process by the importer giving all the factual information available with him and facilitating inspection of the goods and the Chartered Engineer appraising the goods based on recognised methods of appraisal with the help of information provided by the importer. This appraised value can then along with other inclusions like freight, insurance etc. be declared by the importer in the Bill of Entry, if he finds the same to be truthful and representing the value in line with the Rules. The proper officer would then evaluate the evidence put forth by the importer and after giving due consideration to factors

such as depreciation, refurbishment or reconditioning (if any), and condition of the goods, determine whether the declared value conforms to the provisions in the Act and Rules. If this process on scrutiny at any stage, is found to be factually flawed due to fraud or any other reason, the value declared cannot survive as it would result in a short payment and the correct duty has to be redetermined by issue of notice to the importer under section 28 of CA 1962. Hence there is no merit in the appellants stand that rejection of the value assessed under Rule 9 of CVR 2007 is not possible.

4.5 Even otherwise, we note that in **Mohinder Singh Gill and another Vs. Chief Election Commissioner, New Delhi and Others** [(1978) 1 SCC 405 / 1978 AIR 851] a 5 Judge Bench of the Supreme Court has examined a situation where there was no express statutory grant of power for an authority to perform its duties and held as under;

"Black's Law Dictionary explains the proposition thus "Implied powers" are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant. (p. 1334 Black's Legal Dictionary 4th Edn.) This understanding accords with justice and reason and has the support of Sutherland. The learned Additional Solicitor General also cited the case in *Metajog Dobey v. H. C. Bhari* [1955] 2 SCR 925 at p. 937 and *Commissioner of Commercial taxes, & Ors v. R. S. Jhaver & ors. etc.* [1968] 1 SCR 148 at p. 154/155 to substantiate his thesis that the doctrine of implied powers clothes the Commissioner with vast incidental powers. He illustrated his point by quoting from Sutherland (Frank E. Horack Jr., Vol. 3)

"Necessary implications. Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Thus it has been stated,

"An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty..... That which is clearly implied is as much a part of a law as that which is expressed."

The reason behind the rule is to be found in the fact that legislation is enacted to establish broad or general standards. Matters of minor detail are frequently omitted from legislative enactments, and "if

these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the legislature likely to be defeated. The rule whereby a statute, is by necessary implication extended has been most frequently applied in the construction of laws relegating powers to public officers and administrative agencies. The powers thus granted involve a multitude of functions that are discoverable only through practical experience."

(emphasis added)

However, in this case, there is no requirement to draw on the 'implied powers' of an authority, since section 28 of CA 1962 can be pressed into action in such a situation as has been done in this case. Hence we do not find any merit in the appellants contention of non-mention of the rejection of appraised value in the Rules.

4.6 Revenue has challenged the value declared by the appellant on two grounds;

- i) Investigation has unravelled manipulation of documents by BVPIL leading to the issue of a false valuation certificate by the C.E.
- i) The Importer has suppressed the correct payments made towards various expenses incurred in Australia etc. which should have formed a part of the declared value.

We shall take up the issues sequentially.

4.7 As per the Hon'ble Hyderabad High Court in **Institute of Chartered Accountants of India Vs Mukesh Gang** [2016 SCC OnLine Hyd 327];

"Certification is a formal procedure by which an accredited or authorized person or agency assesses and verifies the attributes characteristics, quality, qualification or status of individuals or organisations, goods or services, procedures or processes, or events or situations, in accordance with established requirements or standards. Certification refers to the confirmation of certain characteristics of an object, person, or organisation. This confirmation is often, but not always, provided by some form of external review, education, assessment, or audit. Certification means authenticity of a particular fact on verification, and is not a mere statement."

(emphasis added)

4.8 The appellant has stated that the rejection of the appraisement report is unsubstantiated, and records of cross-examination have been mis-quoted. They have stated that the secondhand machines were inspected by BVIPL through their Australian office. That Mr. Pani of BVIPL had during the cross-examination stated that he had conducted inspection in Australia of the said machines before and after the dismantling of the machine. That absence of the personal knowledge of place of inspection on his part or mentioning the wrong place of inspection in the report cannot trivialize the inspection or the report. Further Mr. Vijaykumar has during the cross-examination stated that he used the Bureau Veritas report only as a reference and has carried out his inspection and valuation independently as per Customs Circular.

4.9 We find that Boards Circular No. 25/2015, dated 15.10.2015, states that second-hand machinery/ used capital goods **shall be ordinarily accompanied by an inspection / appraisement report issued by an overseas chartered engineer or equivalent**, its only in the event of the importer falling to procure an overseas report of Inspection / appraisement of the goods, that **he may have the goods inspected by any one of the agencies in India**. It is the appellants case that Bureau Veritas Australia was involved in the inspection of the goods pre and post dismantling. They have however not disclosed why the said agency did not issue an inspection / appraisement report on their own. The belief, knowledge and intention of the parties involved are a part of evidence. These are known to the appellant and should have been disclosed before the Original Authority. Voluntary statements, if clearly proved and found acceptable are the most effective proof of law and can't be ignored. The Chartered Engineer

Shri K. P. Vijaykumar, in his statement admitted being handed over a draft inspection report prepared by BVIPL along with a few photographs of the equipment in question. After going through the draft inspection report prepared by BVIPL which already contained value for the old and used equipment and machinery as worked out BVIPL he simply double-check correctness of the figures provided in the Inspection Report with reference to various figures provided therein. He admitted that since he was not in a position to physically inspect the machinery in question, there was no way in which it would have been possible to work out/certify value thereof, that he was not aware and had no way to independently confirm whether the old and used machinery was physically inspected by Mr. Tony Boskovic, Surveyor. Bureau Veritas, Australia, as claimed in the draft inspection report. The whole certification process adopted becomes mysterious and not dependable when it was found that there is no inspection report prepared and signed by Mr Tony Boskovic under his signature and seal. In fact the C. E. Shri K. P. Vijaykumar concluded in his statement that the certificate given by him was fabricated and baseless. It was hence a false certificate. Shri Ashish Kumar Upendra Pani of BVIPL in his statements dated on 18.2.2013 and 19 2.2013, admitted that he had issued a certificate for and on behalf of BVIPL in respect of secondhand equipment and accessories supplied by BAA, Australia to MAPL. He had not verified the machines and their condition but had given an imaginary value in respect of the value of refurbishment. He has however resiled from this position during the cross examination.

4.10 Section 58 of the Indian Evidence Act, as it then stood, lays down that facts admitted need not be proved. The principle on which this section is based is that a court sits to decide only disputed facts.

However as per section 58 of the said Act, even where a fact is admitted, the court has a discretion to require proof of that fact. The Hon'ble Supreme Court in **United India Insurance Co. Ltd. and Anr. Vs Samir Chandra Chaudhary**, [(2005) 5 SCC 784] has held to the following effect:

As was observed by this Court in **Avadh Kishore Das v. Ram Gopal and Ors.**, AIR (1979) SC 861 in the backdrop of Section 31 of Indian Evidence Act, 1872 (in short the 'Evidence Act') it is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof placing it on the person making the admission or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. As observed by Phipson in his Law of Evidence (1963 Edition, Para 678) as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. The effect of admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of matter, unless successfully withdrawn or proved erroneous. [See **Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and Ors.**, AIR (1960) SC 100].
(emphasis added)

The Hon'ble Madras High Court, in its decision in **Commissioner Of Income Tax vs M/S. Mac Public Charitable Trust** [TCA No. 303 of 2021 etc., batch, Dated: 31.10.2022] held as under;

"62. It is settled position of law that the admission though important is not conclusive. It is open to the assessee who made the admission to show that it is incorrect as held by the Hon'ble Supreme Court in **Pullangode Rubber Produce Company Ltd. v. State of Kerala & Another** [91 ITR 0018 (SC)]. The onus falls on the person who had earlier admitted to prove it wrong. Therefore, the statements could form the basis of assessment."

We hence find that although the statements recorded by the officers can be relied upon, mere resiling from the stated position by the statement giver will not affect the evidentiary value of the statement, since it has not been proved wrong.

4.11 The credibility of a professional Chartered Engineer while examining and certifying something hinges on his expertise, adherence to ethical standards, and the rigor of his assessment methods, all of which builds trust and assurance in his findings. But where the CE's opinion suffers from shortcomings, ambiguities, human frailties etc due to which the above requirements are not met or the quality of his certification is suspect, due to his negligence or is fraudulent, it would be unsafe to rely on his certification. When this happens as in the present case the facility of a simple method of determining the value by appraisal extended to the importer by Boards Circular, for his secondhand goods is no longer feasible. Hence the decision in the impugned order discarding the certificate cannot be said to be arbitrary, vague or fanciful. We hence find that the rejection of value declared as appraised by C.E. Vijaykumar's cannot be faulted.

5. Hence the appellant has forfeited his chance to have the goods valued as per the Boards Circulars discussed above. We shall next examine the allegation of the appellant having suppressed information.

5.1 As per revenue the appellant has suppressed the correct considerations in respect of freight (including inland freight and local clearing charges in Australia). Expenses incurred in Australia towards decommissioning, dismantling, packing, insurance and inspection of the equipment. Payments made to Aerostaff Australia towards assistance in dismantling and packing of impugned goods. Similarly, payments made to Niche Solutions towards consultancy for relocation, refurbishment etc of said goods. Further, Importer also suppressed the amount payable by MAPL to BAA towards ownership transfer of Scrap and provision for storage space. Payment to Aerostaff Australia Pvt Ltd.

towards assistance in dismantling and packing of the goods and payment to M/s. Niche Solutions towards consultancy for relocation, refurbishment & re-commissioning of the equipment. They also not disclosed the correct amounts paid to M/s Ativo and M/s BOXCO. The total amount of such expenses was estimated to be Rs 7,39,79,180/-. MASPL on their own worked out the Customs duty liability on the said amount and paid a total amount of Rs 2.64 Crores. As per revenue, the undeniable fact remains that these figures have been reworked by Importer themselves and have been communicated to DRI vide several of their letters over the period of time and are also part of RUDs to the SCN. The assessable value re-worked out in the impugned order in a tabular form and given at para 39 is reproduced below;

	Amount declared in Bill of Entry	Actual amount suppressed and required to be considered / added in Assessable Value
Value of the goods (ex-works)	US\$ 30,55,700 converted to INR @ 55.55 - Rs.16,97,44,135/-	AUS\$ 52,00,000 converted to INR @ 55.55 - Rs.28,88,60,000/-
Ocean Freight (including inland freight and local clearing charges in Australia)	Rs.98,17,500/-	Rs.1,31,16,501/-
Expenses incurred in Australia towards decommissioning, dismantling, packing, making good the Boeing premises, transporting and storing, insurance and inspection of the equipment (paid to Ativo Skilled Group Ltd. Austbuilt Constructions, L. Arthur Pty. Ltd. Hold Fast Insurance Brokers Pty. Ltd. @ BVIPL less GST refund	Nil	Rs.7,40,51,476.60
Payments made to Aerostaff Australia towards assistance in dismantling and packing of the equipment	Nil	Rs.30,90,000/-
Payments made to Niche Solutions towards consultancy for	Nil	Rs.1,29,81,000/-

relocation, refurbishment and re-commissioning of the equipment (the proportionate amount paid for post-importation activities has not been specified)		
Amount payable by MAPL to BAA towards ownership transfer of scrap and provision for storage space	Nil	AUS\$ 1,57,300 converted to INR @ 55.32 - Rs.87,01,836/-
Insurance		Rs.1,54,420/-
High Sea Sales Commission		Rs.30,00,000/-
Total CIF value		Rs.40,39,55,234/) rounded off)
Add 1% landing charges		Rs.40,39,552/-
Total Assessable Value		Rs.40,79,94,786/-

5.2 The appellant has stated that the insured value as shown in the table above is neither assessed or supported by any surveyor nor accepted by the insurance company as being the true or fair value of the equipment. It is also not based on any invoice as there was no transaction value. Hence the Commissioner grossly erred in holding the insured value as the intrinsic value of the impugned goods. We find that there is no allegation that the insurance document is a manipulated one. In fact the documents were submitted by the appellants themselves during the course of inquiry to the Custom authorities.

5.3 Section 2(h) of the Indian Contract Act, 1872, as it then stood, states that 'An agreement enforceable by law is a contract.' Insurance contracts are special contracts. The principle of *uberrimae fidei*, meaning "utmost good faith," operates in insurance contracts. This is a fundamental legal doctrine, requiring both parties to act with complete honesty and transparency. They are based on the general principles of full disclosure. Thus, a proposer is under a duty to

truthfully disclose to the insurer all material facts as are within his knowledge.

5.4 Further, the obligation to declare the transaction value is on the importer, who in this case has statedly got the goods free of cost, and the basic facts are within his special knowledge. When this value is challenged by revenue the burden of proof in establishing the allegations is on revenue. Once revenue has been able to create a high degree of probability discrediting the assessment certificate the onus of proof shifts onto the appellant. It is then for the appellant to discharge his onus. Thus while the burden of proof never shifts the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. The C.E. Certificate produced by the appellant was found to be not reliable and has been discredited by revenue in such a situation the onus of proof shifts back to the appellant to defend the value declared in the Bill of Entry and refute the alternate value sought to be adopted by revenue. In the absence of the same revenue is understood to have discharged its burden of proof, in terms of the value alleged in the SCN, especially in a scenario when all the facts are in the special knowledge of the importer. Hence the value of the impugned goods declared by the appellant in an insurance contract can be accepted as the value of the goods ex-works, for Customs purposes in the peculiar circumstances of this case.

5.5 The question then arises as to what other elements would have to be added to this value to arrive at the transaction value in terms of CA 62. In this connection the following provisions of the said Act are relevant:

"Section 2. Definitions :

.....

(41) 'value' in relation to any goods, means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14.

***** . ***** . *****

Section 14. Valuation of goods for purposes of assessment:

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:

.

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

Rule 10. Cost and services. -

(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

.

e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

. . .

(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.

(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 addition 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.

(emphasis added)

From a plain reading of the legal provisions, it is clear that any value that is ascertained as per the Customs Act and Rules framed there under must include in addition to the price, all costs incurred towards the transport of the imported goods to the place of importation. Loading, unloading and handling charges associated with the delivery

of the imported goods at the place of importation and the cost of insurance.

5.6 In the current scenario the 'Memorandum of Understanding' dated 22.06.2010, sets out the general understanding of the conditions under which the equipment is being transferred by BAA to Mahindra Aerospace (MAPL) for purpose of export to India. This is summarised in letter dated 27.04.2010 by Boeing Defense, Space & Security addressed to Mahindra & Mahindra, which also outlines the actions required by both organizations in order to complete transfer. It includes, both the parties jointly approaching Indian Authorities and make efforts to obtain offset credit for the transfer for Boeing towards its existing offset obligations for a project being executed for the Indian Navy, although the actual grant of the credit by government is not a pre-condition to the transfer of the equipment. The fourth para of the letter sets out the responsibilities of Mahindra as under;

Upon assumption of title, Mahindra will at its own cost and risk be solely responsible for:

- Decommissioning and packing of the equipment at BAA
- Moving the equipment out of BAA's facility, which has been identified as building 43 of BAA's facility in Melbourne, Australia
- Storing the equipment until such time as Mahindra is ready to ship to its facilities in India
- All export and import concerns, as related to this transfer
- All taxes and taxation provisions as related to this transfer
- Providing relevant export documentation to Boeing BDS and BAA
- Shipping the equipment to its facility in India
- Unpacking and assembling the equipment in its final location
- Any losses, damages and claims that may arise in relation to any of the activities to be performed by Mahindra as above."

5.7 Hence all the above payments made to third parties to satisfy an obligation of the seller needs to be added to the ex-works price of the goods after the appellant assumes title for the goods, as per the

proviso to section 14(1) and the Rules made there under. In fact the same legal basis is reflected in the sale value as per the 'High Sea Sale Agreement' agreed by the seller (MAPL) and the buyer (MASPL) of the impugned goods, which at para 10 states as under;

Payment of documents – Sellers agree to sell the goods to the buyer at Rs.1,59,96,500/- as per the breakup given below:-

Particulars	Amount (Rupees)
Value of equipment (Ex works Boeing, Australia)	Nil
Inland Freight in Australia upto Melbourne Port	21,91,750
Clearing charges at Melbourne Port, Australia	9,87,250
Ocean Freight from Melbourne Port to Chennai Port	98,17,500
High Sea Sale Commission	30,00,000
Total	1,59,96,500

5.8 We find that as per the documents provided by the appellant the actual payments to third parties were as reflected in the chart given at para 39 of the OIO and reproduced at para 6.1 above. Shri Tangirala Subrahmanya Sarma (T. S. Sarma) DGM (Finance) MAPL, admitted in his statement dated 04.03.2013 that the High Sea Sale Agreement did not include an amount of approximately Rs 6.70 crores towards dismantling, warehousing, insurance etc. incurred abroad and it did not represent the actual cost incurred by the high seas seller. The relevant portion of the impugned order recording the gist of the statement as given by Shri T. S. Sarma is reproduced below;

“31. Regarding the role of M/s BOXCO Logistics Pvt. Ltd., Mumbai, he clarified that the said company was entrusted with the responsibility of moving of equipment and machinery from Larthur's warehouse in Australia to factory in India. He confirmed that there was no amendment in the purchase order raised on M/s BOXCO Logistics India Pvt. Ltd. by MASPL before arrival of the cargo at Chennai Port. When confronted with the purchase order no. 3400058975 dated 02.04.2012 issued by MASPL on M/s BOXCO Logistics India Pvt. Ltd. and bill of lading no. S00020462 dated 7th May 2012 issued by M/s ASEAN Cargo Pty. Limited on instructions M/s BOXCO Logistics India Pvt. Ltd. and his admission that there was no amendment to the purchase order, he was unable to answer as to why and how name of the consignee was changed to MAPL and the shipment effected in the name of MAPL. He was also unable

to clarify as to how and why the freight amount was paid by MAPL on 14.06.2012 without any amendment to the Purchase Order No. 3400058975 dated 02.04.2012 or any document/instructions to that effect.

32. Shri T. S. Sarma in his further statement on 07.03.2013, inter-alia, stated that MAPL had not remitted any amount to BAA towards refurbishment/re-conditioning of the scrap equipment nor had BAA informed MAPL regarding the extent/quantum and value of refurbishment/reconditioning; that he admitted that there had been discussions between him as well as his colleagues in MAPL with BVIPL, oral as well as by emails, regarding fixation of the estimated value of refurbishment/re-conditioning of the 'scrap' machinery to be taken into account for valuation purposes in the Chartered Engineer's inspection report; that he could not confirm whether Tony Boskovic, Surveyor, M/s. Bureau Veritas Australia, actually visited the factory of BAA on 05.11.2010 and 06.11.2010 as the machinery was already in a packed condition prior to these dates in or around September 2010 itself. In his further statement recorded on 20.2.2014, Shri T.S. Sarma, inter alia stated that he himself had prepared the High Seas Sale Invoice No. MASPL004/12-13 dated 14.8.2012 in his capacity as authorized Signatory of MAPL, though being an employee of MASPL and had also signed the HSS Agreement on behalf of MAPL and that the said agreement was countersigned by Mr. Tyagarajan, Director of MASPL. Regarding the two different invoices showing different values, he stated that the invoice for Rs.1,59,96,5000 was the value accounted in their books of accounts which included freight, clearing charges & high seas sale commission and the same was reflected in the Bill of Lading and that the invoice for Rs.21,00,00,004/- was prepared as a 'Proforma Invoice' to be submitted to DGFT authorities while applying for EPCG license to project an indicative value for all items of machinery, though received free of cost, along with freight and insurance. The value of machinery as considered as per BVIPL's inspection and valuation report, whereas the freight was taken on approximate basis. An amount of Rs.1,59,96,500/- was paid by MASPL to MAPL and there was no transaction for Rs.21,00,00,004. He further clarified that expenses amounting to Rs.6,72,72,100/- were incurred in relation to acquisition of the goods but the same were not included in the HSS agreement. This amount was charged by MAPL to MASPL vide a separate debit note No. MASPL/002/12-13 dated 25.9.2012 and paid by MASPL by cheque. This amount was also not included in the value of goods while applying for the EPCG license. As regards value of the goods for the purposes of insurance, he clarified that the goods were inspected by the representative of the insurance company and the value for insurance was worked out after consultation with him and the value of the goods was estimated to be Australian \$ 52,00,000.

33. In his statement dated 07.03.2013 Shri Sunil Raghu Shetty, President of M/s BOXCO inter-alia, stated that the Purchase Order No. 3400058975 dated 02.04.2012 was raised by MASPL on BOXCO Logistics India Pvt. Ltd. towards transportation of equipment from Australia to India, that he was not aware of any amendment made to the said purchase order nor was any amended purchase order forwarded to them by MASPL that the shipment was necessarily required to be done in the name of the firm/entity that was raising the purchase order, viz. MASPL. On being pointed out that in the absence of any amendment to the purchase order the bill of lading no, S00020462 dated 7th May 2012 for the said shipment should have been issued in the name of MASPL, he confirmed the

same. However, he admitted that the name of the consignee in the bill of lading was changed to MAPL, in deviation from normal practice in the shipping industry on the plain instructions received by email from Shri T. Subrahmanya Sarma, an employee of MAPL and raised the bill of lading in the name of MAPL, as consignee. He has stated that the consignor was M/s, THE BOEING Company, Boeing Aerostructures. Melbourne, Australia. However, he did not have any document to substantiate that the same."

Considering the factual position, the value of the goods based on the documents submitted by the appellant themselves has been correctly determined in the impugned order, as per the facts of the case.

6. The next issue is whether extended period under Section 28(4) of the Customs Act can be invoked in cases of "first check"?

6.1 "First check" assessments, involve a preliminary assessment of goods based on the information provided in the Bill of Entry and related documents provided by the importer when called for by the department or otherwise. As per section 46(4) of the Customs Act 1962, the importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry. If even after a "first check" assessment, it's discovered that the importer made a willful misstatement or suppressed facts to obtain a lower duty or other benefits, Section 28(4) of the Customs Act can be invoked to issue a show cause notice for the extended period. When facts are concealed and not fully disclosed it amounts to suppression. Deliberate concealment or willful nondisclosure, amounts to suppression of information.

6.2 Apart from the false C. E. Certificate produced for valuing the goods, Shri T. S. Sarma in his statement, a summary of which is extracted in the para above, was not able to explain, when there was no change in the purchase order dated 02.04.2012 raised on M/s Boxco

logistics India private limited by M/s MASPL how the consignee was changed to MAPL and the shipment effected in the name of MAPL when the shipment was necessarily to be done in the name of the entity raising the purchase order, or why the freight amount was paid by MAPL. Why he himself had prepared the high sea sales invoice dated 14.05.2012 in his capacity as authorised signatory of MAPL though being an employee of MASPL and had also signed the high sea sales agreement on behalf of MAPL and that the agreement was countersigned by Mr Thyagarajan Director of MASPL. Having not discharged the onus of proof of not having committed a blame worthy conduct, revenue has succeeded in over all establishing fraud and thus have rightly invoked section 28(4) of the Customs Act 1962 for demanding duty. In the circumstances the penalty imposed on Shri T. S. Sarma under section 112(a) of CA 1962 also cannot be faulted. The amount is also not shocking to the conscience so as to interfere with the quantum imposed. As stated by the Hon'ble Supreme Court in **S.P. Changalvaraya Naidu Vs Jagannath** [1994 (1) SCC 1], a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. In this case the parties involved attempted to cheat the exchequer of its rightful tax revenues and for the company to illegally gain from it.

7. The question then arises as to whether benefit of EPCG license can be denied without its cancellation by the DGFT, the issuing authority?

7.1 Relevant portion of Notification No. 103/2009-CUSTOMS New Delhi, the 11 September, 2009. G.S.R. 669 (E), the benefit of which was claimed by the appellant, is reproduced below;

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table

(i) so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as is in excess of the amount calculated at the rate of three percent ad-valorem, and

(ii) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, when specifically claimed by the importer.

2. The exemption under this notification shall be subject to the following conditions, namely :-

(1) that the goods imported are covered by a valid authorization issued under the Export Promotion Capital Goods (EPCG) Scheme in terms of Chapter 5 of the Foreign Trade Policy permitting import of goods at the rate of three percent duty and the said authorization is produced for debit by the proper officer of customs at the time of clearance :

Provided that

(emphasis added)

7.2 It is seen that the exemption is conditional to the fact that the goods imported are covered by a valid authorization issued under the EPCG Scheme. The purport of the exemption notification is to advance the objectives of the EXIM Policy.

7.3 It is an undisputed fact that the Customs Act 1962 and the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act) operate in their own spheres. Customs Duty is payable, on imported goods, as per the relevant notification issued under the Customs Act, 1962. Whereas the FTDR Act and the Rules etc framed there under, regulate the import or export of goods.

7.4 The EPCG scheme is administered by DGFT with regard to issuance of authorizations to its redemption and issue of EODC to 'authorisation holder's', while the registration of authorisation at Customs ports for allowing exemption from levy of Customs duty on imported capital goods as well as accounting of exports against the authorizations are administered by the Customs Department.

7.5 When looking at conditional notifications, especially related to EXIM schemes having concurrent jurisdiction, one has to examine the activity owner of the conditions set out there under. Hence when the benefit of Notification No. 103/2009-CUSTOMS is sought to be denied on the grounds of fraudulent valuation made by the importer to Custom authorities, it should be examined for specific condition violations of the notification. In this case the condition is not whether the value declared for Customs purposes was fraudulent but whether the goods are covered under a valid authorization issued under the EPCG Scheme. If so the benefit of the notification cannot be denied, so long as the authorisation is valid, on the score that the value of the goods declared to Customs authorities at the time of import was fraudulent. That would be beyond the scope of the notification.

7.6 The EPCG scheme does not adopt the valuation of goods done as per section 14 of the Customs Act 1962, for issue of authorisation under the EPCG scheme. The option available to the Customs authorities was to take up the issue of the fraudulent value noticed by them with the DGFT for cancellation of authorisation issued under the EPCG scheme and if the recommendation was accepted and the cancellation was done, the notification benefit could have been denied. This is not to say that the importer is absolved of his blame worthy

conduct as far as the Customs Act is concerned. Action for all statutory violations of the Customs Act, 1962 cannot be faulted. Further, the licensing authority is at liberty to examine the issue on merits and take appropriate action against the appellant in accordance with the law, if necessary.

7.7 As held by the Apex Court in **Commissioner of Customs, Hyderabad Vs Pennar Industries Limited and Another** [(2015) 10 SCC 581], the judgments of **Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi** [(2003) 9 SCC 133] which favoured the appellant and that of **Sheshank Sea Foods Pvt. Ltd. Vs UOI** [1996 (88) E.L.T. 626 (S.C.)], which favoured revenue, have to be examined in the light of facts. Each judgment is thus an authority in the setting of its own facts. There is no one shoe fits all formula available and the conditions of the policy and each exemption notification has to be examined on their own merits. If the EPCG licence was issued based on the value certified by Customs, as in the case of certain export schemes, the situation would perhaps be different.

8. The appellant has stated that confiscation of the goods under section 111(m) has no application in this case since the appellant has not mis-declared the material particulars of the imported goods. We find that the mis-declaration and suppression of facts in respect of value has been established. The impugned goods are hence liable for confiscation under the Customs Act, 1962. However, for confiscation of goods both liability and availability of the goods are necessary.

8.1 As a principle, goods which are liable for confiscation but not available cannot be redeemed, unless the importer has undertaken to produce the goods as per the condition of the bond executed by him.

Hence with regard to the confiscation and redemption of the goods on payment of a fine, we find that although the goods were cleared on execution of a bond, it was executed in terms of notification No. 103/2009-Cus dated 11.9.2009, for binding the importer to comply with all the conditions of the notification as well as to fulfill export obligation on FOB basis equivalent to eight times the duty saved on the goods imported as may be specified on the authorization, or for such higher sum as may be fixed or endorsed by the Licensing. Not for any blameworthy conduct under the Customs Act. None of these reasons are mentioned in the SCN and are not relevant in the present case. We have earlier found the impugned goods eligible for exemption under notification No. 103/2009-Cus, and hence the goods are not liable for confiscation in terms of the bond.

8.2 The Hon'ble Supreme court in the case of **Commissioner of Customs (Import), Mumbai Vs M/s. Finesse Creation Inc.** (2010 (255) E.L.T. A120 (SC)) while examining the said legal issue, had dismissed the Revenue Appeal and upheld the decision of the Hon'ble Bombay High Court Order with the same title, reported in 2009 (248) E.L.T. 122 (Bom.) which *inter-alia* held that;

“5. In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed.”

(emphasis added)

9. In the light of the discussions above the impugned order is upheld except for the following modifications. The duty needs to be reworked out and demanded by allowing the benefit of Notification No. 103/2009-Cus dated 11.9.2009. Accordingly interest and statutory penalty imposed under section 114A on M/s Mahindra Aerostructures Pvt Ltd also may be reworked out and informed to the appellant for payment. Confiscation of the impugned goods and imposition of redemption fine is also set aside. Since a penalty has been imposed under section 114AA on M/s Mahindra Aerostructures Pvt Ltd, we feel that a penalty under the same section 114AA on Shri T. S. Sarma needs to be deleted, considering that he was an employee of the company that has already been penalised on the said count. However since the goods were liable for confiscation under section 111(m) the penalty on him under section 112(a) sustains. Any leniency shown in varying the penalties imposed on M/s Mahindra Aerostructures Pvt Ltd under section 114AA, would lack a deterrent effect and encourage others to violate statutory regulations with impunity which may have serious consequence's affecting revenue. The appellants are eligible for consequential relief if any, as per law. The appeals are disposed of accordingly.

(Order pronounced in open court on 24.04.2025)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)