

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 52254 OF 2019

(Arising out of Order-in-Original No. 08/2019/MKS/Pr. Commr./ICD-Import/TKD dated May 30, 2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi)

**M/S SHUBHAM CHEMICALS &
SOLVENTS LTD.**

GI-3, G.T. Karnal Road, Industrial Area
DELHI

.....APPELLANT

Versus

**PRINCIPAL COMMISSIONER
OF CUSTOMS (IMPORT),**

Inland Container Depot, TKD
NEW DELHI

.....RESPONDENT

WITH

CUSTOMS APPEAL NO. 52251 OF 2019

(Arising out of Order-in-Original No. 08/2019/MKS/Pr. Commr./ICD-Import/TKD dated May 30, 2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi)

SHRI AJAY KAPUR

R/o B-2/6, Model Town-II
NEW DELHI

.....APPELLANT

Versus

**PRINCIPAL COMMISSIONER
OF CUSTOMS (IMPORT),**

Inland Container Depot, TKD
NEW DELHI

.....RESPONDENT

AND

CUSTOMS APPEAL NO. 52252 OF 2019

(Arising out of Order-in-Original No. 08/2019/MKS/Pr. Commr./ICD-Import/TKD dated May 30, 2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi)

M/S AISHWARYA OVERSEAS

C-42, South Extension-II
NEW DELHI

.....APPELLANT

Versus

**PRINCIPAL COMMISSIONER
OF CUSTOMS (IMPORT),**

Inland Container Depot, TKD
NEW DELHI

.....RESPONDENT

AND

CUSTOMS APPEAL NO. 52253 OF 2019

((Arising out of Order-in-Original No. 08/2019/MKS/Pr. Commr./ICD-Import/TKD dated May 30, 2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi)

SHRI MANISH SINGHALC-42, South Extension-II
NEW DELHI**.....APPELLANT**

Versus

**PRINCIPAL COMMISSIONER
OF CUSTOMS (IMPORT),**Inland Container Depot, TKD
NEW DELHI**.....RESPONDENT****AND****CUSTOMS APPEAL NO. 52277 OF 2019**

(Arising out of Order-in-Original No. 08/2019/MKS/Pr. Commr./ICD-Import/TKD dated May 30, 2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad, New Delhi)

SHRI AJAY KAPURProprietor, M/s Chemical Connection
GI-3, G.T. Karnal Road, Industrial Area
DELHI**.....APPELLANT**

Versus

**PRINCIPAL COMMISSIONER
OF CUSTOMS (IMPORT),**Inland Container Depot, TKD
NEW DELHI**.....RESPONDENT****APPEARANCE:**Shri Alok Aggarwal, Shri Shubham Tyagi and Ms. Vartika Kashyap Advocates for the Appellant
Shri Sunil Kumar, Authorised Representative of the Department**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)****FINAL ORDER NO. 51642-51646/2020**

DATE OF HEARING: 09.12.2020

DATE OF DECISION: 17.12 .2020

JUSTICE DILIP GUPTA :

Customs Appeal No. 522534 of 2019 has been filed by M/s Shubham Chemicals & Solvents Ltd.¹ to assail the order dated May 30, 2019 passed by the Principal Commissioner of Customs, New Delhi².

1 the Appellant

2 the Principal Commissioner

The order seeks to reject the assessable value of the goods declared by the Appellant before the customs at the time of import in connection with the Bills of Entry and the assessable value has been redetermined under rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007³ read with section 14 of the Customs Act, 1962⁴. The Principal Commissioner has also ordered for recovery of anti-dumping duty from the Appellant by invoking the extended period of limitation under section 28(4) of the Customs Act with interest. A penalty has also been imposed upon the Appellant.

2. **Customs Appeal No. 52251 of 2019, Customs Appeal No. 52252 of 2019, Customs Appeal No. 52253 of 2019 and Customs Appeal No. 52277 of 2019** have been filed by Ajay Kapur, M/s Aishwarya Overseas, Manish Singhal and Ajay Kapur, respectively for also setting aside the aforesaid order dated May 30, 2019 passed by the Principal Commissioner.

3. The amount of anti-dumping duty and penalty imposed upon the five Appellants are as follows :

S.No.	Appeal No.	Appellant	Anti Dumping Duty (D)/Penalty (P)
1.	52254/2019	Shubham Chemicals & Solvents Ltd.	D-1,49,40,438/- P-1,49,40,438/-
2.	52252/2019	Aishwarya Overseas	D-24,12,024/- P-24,12,024/-
3.	52253/2019	Manish Singhal, Proprietor – Aishwarya Overseas	P-7,50,000/-
4.	52277/2019	Ajay Kapur, Director – Shubham Chemicals & Solvents Ltd.	P-40,20,000/-
5.	52251/2019	Ajay Kapur, Proprietor – Chemical Connection	D-16,27,420/- P-26,77,420/-

3 Valuation Rules

4 Customs Act

4. The issue that arises for consideration in all these appeals is whether the importers of melamine had resorted to evasion of anti-dumping duty by over valuation of the goods imported. The anti-dumping duty was leviable on the import of melamine from China in terms of a Notification dated February 19, 2010. This Notification provides that anti-dumping duty shall be imposed at a rate which is equivalent to the difference of US\$ 1681.49 per MT and the landed value of the goods. 'Landed value' has been defined to mean the assessable value as determined under the Customs Act and includes all duties of customs, except duties levied under sections 3, 8B, 9 and 9A of the Customs Tariff Act, 1975⁵. According to the Department, the Appellant had artificially increased the transaction value of melamine to over US\$ 1681.49 per MT so as to evade anti-dumping duty. Accordingly, show cause notices were issued. The Principal Commissioner has, by the impugned order, rejected the assessable value declared by the Appellant and redetermined the assessable value as a result of which anti-dumping duty has been levied on the Appellant with interest and penalty.

5. The Appellant had contended that the goods were imported under proper Bills of Entry based on High Sea Sales Contract and that all the payments had been made through bank transactions in terms of the contracts and that proper customs duty had been paid. Thus, the goods did not attract anti-dumping duty in terms of the Notification dated February 19, 2010.

6. The Principal Commissioner framed the following four issues for determination :

- (i)** Whether the demand of anti-dumping duty of Rs. 1,89,79,882/- (i.e. Rs. 1,14,93,243/- + Rs. 30,76,283/- + Rs. 16,27,420/- + Rs. 3,70,902/- + Rs. 24,12,024/-) as raised in the show cause notice, is recoverable from the Noticee-firms i.e M/s Shubham Chemicals & Solvents Ltd. (Noticee No. 1), M/s Chemical Connection (Noticee No. 2) and M/s Aishwarya Overseas (Noticee No. 4) or not?
- (ii)** Whether the above demand of anti-dumping duty is recoverable from Noticees Nos. 1,2& 4 under the extended period of limitation of 5 years or not?
- (iii)** Whether the goods imported by M/s Shubham Chemicals & Solvents Ltd. (Noticee No. 1), M/s Chemical Connection (Noticee No. 2) and M/s Aishwarya Overseas (Noticee No. 4) are liable to confiscation under Section 111(m) of the Customs Act, 1962 as proposed in the show cause notice or not?
- (iv)** Whether the Noticees are liable to penal action, as proposed in the show cause notice?

7. It needs to be noted that before dealing with the aforesaid issues, the Principal Commissioner also dealt with the submissions made on behalf of M/s Shubham Chemicals and Ajay Kapur that denial of cross-examination of the co-noticees, Manish Singhal, Sharad Verma and Kishori Saran Goel had vitiated the order. The Principal Commissioner found that no prejudice had been caused by not allowing the cross-examinations and, therefore, held that the voluntary statements that had been made had evidentiary value.

8. In regard to the first issue as to whether the demand of anti-dumping duty raised in the show cause notice was justified and recoverable, the Principal Commissioner found that the values of melamine imported and cleared by the firms declared in the 13 Bills of Entry at the time of import to India were not the correct transaction

values and, therefore, were liable to be rejected under rule 12 of the Valuation Rules read with section 14 of the Customs Act and the correct transaction was redetermined under rule 5 of the Valuation Rules read with section 14 of the Customs Act.

9. In regard to the second issue as to whether the extended period of limitation could be invoked in the facts and circumstances of the case, the Principal Commissioner found that it was a case of evasion of anti-dumping duty by mis-statement and suppression of facts and, therefore, the extended period of limitation was correctly invoked.

10. In regard to the third issue, the Principal Commissioner found that the goods had already been released and, therefore, were not available for confiscation and, therefore, refrained from imposing any redemption fine.

11. In regard to the fourth issue, as to whether any penal action could be taken, the Principal Commissioner found that since the charge of over valuation of the imported goods and evasion of anti-dumping duty had been established and the goods were liable to confiscation under section 111(m) of the Customs Act, the importers, namely, M/s Shubham Chemicals & Solvents Ltd., M/s Chemical Connection and M/s Aishwarya Overseas were liable for penal action. The Principal Commissioner also found that penalty had to be imposed upon Ajay Kapur, Manish Singhal, Sharad Verma and Kishori Saran Goel under sections 112(a) and 114AA of the Customs Act.

12. Shri Alok Aggarwal, learned Counsel appearing for the Appellants, made the following submissions :

- (i) The Principal Commissioner has relied upon certain statements, with which neither the Appellants were confronted nor was cross-examination permitted, to hold that the price of the imported goods i.e melamine had been artificially manipulated to avoid anti-dumping duty. The said statements, therefore, cannot be made the basis for recording any finding. In support of this submission, reliance has been placed on the judgement of the Punjab & Haryana High Court in **Jindal Drugs Pvt. Ltd. vs Union of India**⁶;
- (ii) The High Sea Sales were made on the basis of valid documents which were duly stamped and executed between the buyer and seller. Money was also transferred through proper banking channels. In the absence of any challenge to the authenticity of the documents or the transfer of money through proper banking channel, the documents could not have been discarded;
- (iii) The transaction value cannot be redetermined by loading 2% notional commission and in support of this contention reliance has been placed upon the Circular No. 32/2004-Cus dated May 11, 2004⁷ issued on the basis of the decision of the Supreme Court in **Hyderabad Industries Ltd. vs. Union of India**⁸;
- (iv) The goods could not have been directly imported by M/s Shubham Chemicals & Solvents Ltd. because it was an authorized dealer for M/s Gujarat Fertilizers & Chemicals Ltd;

6 2016 (340) ELT 67 (P&H)
7 Circular dated May 11, 2004
8 2000 (115) ELT 593 (SC)

- (v) The transaction value of goods on High Sea Sale basis is not governed by loss of profit in business, but by the provisions of section 14 of the Customs Act; and
- (vi) The show cause notice was issued on October 27, 2017 in relation to the transactions that had taken place between September 2013 and July 2014. In the absence of any charge of collusion or wilful mis-statement or suppression of facts, the show cause notice could not have been served beyond one year.

13. Shri Sunil Kumar, learned Authorized Representative of the Department, has, however, made the following submissions:

- (i) The Principal Commissioner was justified in holding that denial of cross-examination did not cause any prejudice to the Appellants since the statements of three persons were voluntary and, therefore, reliable. In fact, the right of cross-examination is not an absolute right. In support of his submission, learned Authorized Representative placed reliance upon the following decisions –
 - (a) **Kanungo & Co. vs. Collector of Customs, Calcutta and others⁹**;
 - (b) **N.S. Mahesh vs. Commissioner of Customs, Cochin¹⁰**;
 - (c) **Sudhir Sharma vs. Commissioner of Customs¹¹**;
 - (d) **Ahmednagar Rolling Mills Pvt. Ltd. vs. Commissioner of Central Excise, Aurangabad¹²**;
 - (e) **Sharad Ramdas Sangle vs. Commissioner of Central Excise & Customs, Aurangabad¹³**; and

9 1983 (13) ELT 1486 (SC)
 10 2016 (331) ELT 402 (Ker.)
 11 2015 (319) ELT 450 (Del)
 12 2014 (300) ELT 119 (Tri.-Mumbai)

(f) **Telestar Travels Pvt. Ltd. vs. Special Director of Enforcement¹⁴;**

- (ii) The High Sea Sales agreements were only paper transactions to increase the value the goods imported with the sole purpose of evading anti-dumping duty and cannot be considered as normal business transactions;
- (iii) Customs duty amounting to Rs. 32,80,042/- towards the import of 110 MTs melamine imported by M/s Aishwarya Overseas was paid by Ajay Kapur in advance, when in the normal course of business the customs duty is discharged by the firm importing the goods; and
- (iv) The present case is not a case of tax avoidance, but of tax evasion since anti-dumping duty was evaded by using fake paper transactions.

14. The submissions advanced by the learned Counsel for the Appellants and the learned Authorized Representative of the Department have been considered.

15. The issue involved in all these Appeals is as to whether the importers of melamine had resorted to evasion of anti-dumping duty. It is by a Notification dated February 19, 2010 that the Central Government imposed anti-dumping duty on melamine originating from China or any other country other than China at a rate that was equivalent to difference between the amount mentioned in Column No. 9 i.e US\$ 1681.49 per MT and the landed value. It was also mentioned in the Notification that the landed value would mean the assessable value

as determined under the Customs Act and would include all duties of customs except duties levied under sections 3, 8B, 9 and 9A of the Tariff Act. The relevant portion of the said Notification dated February 19, 2010 is reproduced below :

“Now, therefore, in exercise of the powers conferred by sub-sections (1) and (5) of section 9A of the said Customs Tariff Act read with rules 18 and 23 of the said rules, the Central Government, after considering the aforesaid final findings of the designated authority, hereby imposes on the subject goods, , the description of which is specified in column (3) of the Table below, falling under sub-heading or tariff item of the First Schedule to the said Customs Tariff Act as specified in the corresponding entry in column (2), the specification of which is specified in column (4) of the said Table, originating in the country as specified in the corresponding entry in column (5), and produced by the producer as specified in the corresponding entry in column (7), when exported from the country as specified in the corresponding entry in column (6), by the exporter as specified in the corresponding entry in column (8), and imported into India, an anti-dumping duty at a rate which is equivalent to difference between the amount mentioned in the corresponding entry in column (9), in the currency as specified in the corresponding entry in column (11) and as per unit of measurement as specified in the corresponding entry in column (10), of the said Table and the landed value of imported goods in like currency as per like unit of measurement.

TABLE

Sl. No.	Tariff item	Description of goods	Specification	Country of origin	Country of export	Producer	Exporter	Amount	Unit of measurement	Currency
1.	2	3	4	5	6	7	8	9	10	11
1.	2933 61 00	Melamine	Melamine	China PR	Any	Any	Any	1681.49	Metric tonne	US Dollar
2.	2933 61 00	Melamine	Melamine	Any country other than China PR	China PR	Any	Any	1681.49	Metric tonne	US Dollar

2. The anti-dumping duty imposed under this notification shall be effective for a period of five years (unless revoked, superseded or amended earlier) from the date of publication of

this notification in the Gazette of India. The anti-dumping duty shall be paid in Indian currency.

Explanation. - For the purposes of this notification,-

(a) "landed value" means the assessable value as determined under the Customs Act, 1962 (52 of 1962) and includes all duties of customs except duties levied under sections 3, 8B, 9 and 9A of the said Customs Tariff Act; and

(b) rate of exchange applicable for the purposes of calculation of anti-dumping duty shall be the rate which is specified in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), issued from time to time, in exercise of the powers conferred by section 14 of the Customs Act, 1962 (52 of 1962) and the relevant date for determination of the rate of exchange shall be the date of presentation of the bill of entry under section 46 of the said Customs Act."

16. During the period from September 20, 2013 to January 24, 2014, there were 13 consignments of M/s Shubham Chemicals & Solvents Ltd., M/s Chemical Connection and M/s Aishwarya Overseas. The details are as follows :

Sl. No.	Bill of Entry No. & Date	Name of Importer	Qty. Of goods (MTS)	Declared Unit Price (in USD)	Landed value (in USD)	Decl. Ass. Value as per Bills of Entry (inRs.)	Anti-Dumping Duty Paid (inRs.)	Customs Duty Paid (inRs.)
1.	3323655 dt. 20.09.2013	M/s Shubham Chemicals & Solvents Ltd.	84	1534.22	1703.9	8470482	0	2189830
2.	3596650 dt. 21.10.2013		84	1541.32	1711.79	8296329	0	2144807
3.	4184440 dt. 26.12.2013		63	1550.00	1721.43	6327679	0	1635862
4.	4537990 dt. 03.02.2014		44	1649.90	1832.38	4651823	0	1202611
5.	4537995 dt. 03.02.2014		88	1649.90	1832.38	9303645	0	2405223
6.	4691492 dt. 20.02.2014		88	1675.00	1860.25	9559028	0	2471246
7.	5082362 dt. 02.04.2014		88	1552.00	1723.64	8688262	0	2246131
8.	5536738 dt. 19.05.2014		110	1498.00	1663.68	10202380	148773	2637568
9.	6029549 dt. 05.07.2014		20	1498.00	1663.68	1818602	66154	536308
10.	5117002 dt. 05.04.2014	M/s Chemical Connection	66	1555.00	1726.98	6391361	0	1652325
11.	4442617 dt. 24.01.2014	M/s Aishwarya Overseas	22	1800.00	1972.79	2537506	0	656008
12.	4442622 dt. 24.01.2014		44	1800.00	1972.79	5075012	0	1312017
13.	4442625 dt. 24.01.2014		44	1800.00	1972.79	5075012	0	1312017

17. It is seen from the aforesaid Table that anti-dumping duty was actually paid for consignment at serial numbers 8 and 9 since the landed value of the goods was less than US\$1681.49 per M.T. It also transpires from the aforesaid Table that customs duty was also paid on the value of the goods and there is no allegation that lesser customs duty was paid.

18. Section 14 of the Customs Act deals with valuation of goods. It was amended in 2007. Section 14 as it stood prior to its amendment is reproduced below:

"Section - 14 Valuation of goods —

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where -

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

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

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), if the Board is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

19. Section 14 of the Customs Act, as amended on 10 October 2007 is as follows:

"Section 14.Valuation of goods. – (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time

being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

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

20. The Supreme Court in **Wipro Ltd. vs Assistant Collector of Customs**¹⁵ examined the provisions of section 14 of the Customs Act as it stood prior to 2007 and also as it stood after the amendment in 2007. It noticed that under the unamended provision, the principle was to find out the valuation of goods "by reference to the value" and it introduced a determining / fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are "ordinarily sold". However, under the amended provisions, the valuation is based on the 'transaction' price namely, the price "actually paid or payable for the goods". This change in the principle brought about in section 14(1) of the Act was noticed by the Supreme Court in paragraphs 22 and 23 of the judgement and they are reproduced as follows:

"22The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated

15 2015 (319)ELT 177 (SC)

as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. **This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.**

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

(emphasis supplied)

21. Thus, what has to be seen under section 14(1) of the Customs Act, as amended in 2007, is the transaction value of the goods imported or exported for the purpose of customs duty and transaction value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of section 14 of the Customs Act also makes it clear that the price actually paid or payable for the goods will not be treated as 'transaction value' where the buyer and the seller are related to each other. As per the first proviso to the amended section 14 (1), certain charges are to be added to the transaction value of the imported goods. It is, therefore, clear that while there was scope for addition of notional charges in the assessable value under the un-amended section 14 of the Customs Act, but after the actual sale price concept was introduced in the year 2007 on the basis of GATT guidelines and section 14 of the Customs Act was amended in 2007, any inclusion of notional charges seems to have lost its relevance and only actual cost incurred by the buyer is required to be considered.

22. The Principal Commissioner, however, held that the values of melamine imported and cleared by the firms declared by them in 13 Bills of Entry at the time of import into India were not the correct transaction values and, therefore, rejected them under rule 12 of the 2007 Rules read with section 14 of the Customs Act, 1962 and thereafter redetermined the transaction value under rule 5 of the 2007 Rules read with section 14 of the Customs Act on the basis contemporaneous imports.

23. The details of the 13 consignments of M/s Shubham Chemicals & Solvents Ltd., M/s Chemical Connection and M/s Aishwarya Overseas have been provided in the Table contained in paragraph 16 of this order. It shows that for two consignments anti-dumping duty was paid. The Principal Commissioner found that the values of melamine imported and cleared by the said firms at the time of import to India were not the correct transaction values since the importers of melamine had resorted to evasion of anti-dumping duty by over valuation of the goods imported. In this connection, the Principal Commissioner placed reliance on the statements of co-noticees, Manish Singhal, Sharad Verma and Kishori Saran Goel. As noticed above, anti-dumping duty was leviable on the import of melamine from China in terms of the Notification dated February 19, 2010. This Notification provides that anti-dumping duty shall be imposed at the rate which is equivalent to the difference of US\$ 1681.49 per MT and the landed value of the goods.

24. It has been submitted on behalf of the 3 firms that denial of cross-examination of these 3 co-noticees had vitiated the order. This contention was not accepted by the Principal Commissioner for the reason that no prejudice had been caused by not allowing the cross-

examination of the 3 co-noticees. The relevant portion of the order on this aspect is reproduced below:-

“Find that the above Co-Noticees had tendered their statements voluntarily and they had not retracted their said statements. I further find that the present case show cause notice is based on facts and the documentary evidences are also available, therefore, in such a scenario, cross-examination of the above Co-Noticees, is not acceptable, especially when the above Co-Noticees had categorically admitted that the High Seas sales transactions were made on the instructions of Shri Ajay Kapur, Director of Noticee No. 1, at inflated/manipulated value to avoid the Anti-Dumping duty and that the imported goods were ultimately sold to the Noticee No. 1.

Therefore, I hold that no prejudice has been caused to the Noticees Nos. 1 to 3 by not allowing the cross-examination of the above Co-Noticees and hence I hold that the voluntary statements, as relied upon in the show cause notice, have evidentiary value in view of the above settled dictums of law.”

(emphasis supplied)

25. It is, therefore, necessary to examine whether denial of cross-examination has vitiated the impugned order because it is these statements that were relied upon by the Principal Commissioner to hold that the price of the imported goods had been artificially increased to avoid anti-dumping duty.

26. The Allahabad High Court in **Commissioner of Central Excise v/s Kurele Pan Products Pvt. Ltd.**¹⁶, while dealing with an excise matter, held that if the authority wants to rely upon the statement of any witness, it is necessary to provide an opportunity to cross-examine the witness and failure to provide such an opportunity results in denial of the principles of natural justice. Cross-examination was held to be a valuable right of the noticee. The relevant portion of the judgment is reproduced below:-

“6. It is a settled principle of law that if the authority wants to rely upon the statement of any witness, the opportunity of cross-examination ought to have been given to enable the party to

prove its case. Non-providing of the opportunity of cross-examination amounts to violation of the natural justice and in absence of denial of natural justice, such documents cannot be relied upon. In the case of Basudev Gard v. Commissioner of Customs [2013 (294) E.L.T. 353 (Del.)], the Division Bench of the Delhi High Court has held that the statement against the assessee cannot be used without giving them opportunity of cross-examination. **Cross-examination is valuable right of the accused/noticee** in quasi-judicial proceeding which can have adverse consequences for them."

(emphasis supplied)

27. The Delhi High Court in **Commissioner of Central Excise, Delhi II v/s Balajee Perfumes¹⁷**, while dealing with a Central Excise matter, also observed that unless the makers of the statements are not available, there is no justification to deny the right of cross-examination.

28. The Punjab and Haryana High Court in **Jindal Drugs** also observed that reliance can be placed on the statements made only if the persons who made the statements had been subjected to cross-examination. The relevant portion of the judgement is reproduced below:-

"25. (iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, **it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements**, should it choose to do so. **In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements.** If at all authority is required for this proposition, reference may be made to the decision of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I. 2002(143) ELT 25(SC) and Swadeshi Polytex v. Collector, 2000(122)ELT 641 (SC)."

(emphasis supplied)

172017 (358) E.L.T. 87 (Del.)

29. The Principal Commissioner simply stated that no prejudice has been caused by not allowing cross examination. It is not understood as to how 'prejudice' would not be caused to the Appellant if cross-examination is denied, for it is on the basis of the statements made by the co-noticees that the Principal Commissioner concluded that the value of the imported goods had been inflated so as to avoid anti-dumping duty.

30. It is also seen from the order that much emphasis has been placed by the Principal Commissioner on the statements made by the three co-noticees. The Commissioner has not accepted the request made by the Appellant for cross examination of the three noticees for the reason that they had voluntarily made the statements which were not retracted. This approach of the Principal Commissioner regarding the issue as to whether cross-examination was to be permitted or not cannot be said to be a correct approach, for an opportunity should have been given to the appellant to ascertain by cross-examination whether the statements were voluntary or not. It is also necessary to note that the sale transactions were made through banking channels on the basis of agreements between the parties.

31. Learned Authorized Representative of the Department has, however, contended that the right of cross-examination is not an absolute right and the Principal Commissioner was justified in concluding that no prejudice had been caused to the Appellant. In this connection reliance has been placed on the decision of the Supreme Court in **Kanungo & Co.**

32. The principles of natural justice cannot be put in a straight jacket and they vary from case to case depending on the facts of each case. In

the present case, it was imperative for the authorities to have not only confronted the Appellant with the said statements but also permit cross-examination of these three persons who had given statements regarding the valuation of the imported goods, for it is these statements that formed the basis for holding that the value of the imported goods had been inflated. These statements could not have been taken into consideration for determination of the transaction value since the Appellant was not confronted with these statements and permission to cross-examine them was rejected. The decisions relied upon by the learned Authorized Representative of the Department are on their own facts and would not advance the submissions of the Representative.

33. Thus, if the statements cannot be relied upon, and the only reason given by the Principal Commissioner to deny cross-examination was absence of 'prejudice', the finding recorded by the Principal Commissioner that the value of the imported goods had been inflated on the basis of these statements cannot be accepted.

34. What needs to be noticed is that all the imports were made on the basis of High Sea Sales agreements which were executed and payments were made through proper banking channels. 'High Sea Sales' is a common trade practice whereby the original importer sells the goods to a third person before the goods are entered for customs clearance. It is after the 'High Sea Sales' of the goods that the Bill of Entry is filed by the person who buys the goods from the original importer during the said sale. The Principal Commissioner has not doubted the agreements or the payments made and it is only the basis of the statements made by the three co-noticees, that the transaction value has been rejected. The Appellant has also stated that the goods could not have been

directly imported. The transaction value, in view of the provision of section 14(1) of the Customs Act and aforesaid discussion could not have been rejected.

35. It needs to be noted that though Ajay Kapur is a Director of M/s Shubham Chemical and proprietor of M/s Chemical Connection, but both of them are two separate legal entities and transactions were done through a contract and through banking channels. It also needs to be noticed that the statement of Ajay Kapur was taken on March 21, 2017 after two years of his last statement.

36. The price of melamine which was imported is driven by market forces and when transactions between the two separate legal entities in the course of business was done on the basis of valid documents and through proper banking channel and appropriate customs duty was paid, it was not open to the Principal Commissioner to redetermine the transaction value on a lower value so as to impose anti-dumping duty on the Appellant.

37. The contention of the learned Authorized Representative of the Department that Ajay Kapur had paid customs duty towards the import by M/s Aishwarya Overseas in advance, though in the normal course of business customs duty is discharged by the firm importing the goods cannot also be accepted. The Principal Commissioner overlooked the reason stated by the appellant. The appellant clearly stated that since Ajay Kapur owed Rs. 3,56,36,500/-, the payment was made by Ajay Kapur to M/s Aishwarya Overseas in the normal course of business transaction.

38. What is also important to note is that for two consignments, where the landing value was less than US\$ 1681.49 per MT, anti-dumping duty was paid. In other cases, anti-dumping duty was not paid since the landed value was more than US\$ 1681.49 per MT. It appears that the department made an attempt to reduce the transaction value so that anti-dumping duty could be imposed because of the mode provided in the Notification for charging anti-dumping duty.

39. It is seen that in terms of Notification dated February 19, 2010, anti-dumping duty was imposed on goods originating from China at a rate that was equivalent to difference between US\$ 1681.49 per MT and the landed value. Thus, if the landed value was more than US\$ 1681.49 per MT, no anti-dumping duty was required to be paid. The Central Government took cognisance of this lacuna and by a subsequent Notification dated January 28, 2016 provided that anti-dumping duty would be levied at the rate equal to a specified fixed amount. Thus, w.e.f. February 19, 2020 anti-dumping duty is not dependent on the difference between US\$ 1681.49 per MT and the landed value.

40. Learned Counsel for the Appellant has also submitted that the extended period of limitation contemplated under sub-section (4) of section 28 of the Customs Act could not have been invoked in the facts and circumstances of the case as there was no wilful mis-statement or suppression of facts with intent to evade payment of anti-dumping duty.

41. To examine this issue it would be necessary to examine the relevant provision. Sub-section (1) of section 28 provides that where any duty has not been levied for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts, the proper officer shall, **within one year** from the relevant date, serve notice on

the person chargeable with the duty which has not been so levied, requiring him to show cause why he should not pay the amount specified in the notice. Sub-section (4) of the section 28, however, provides that where any duty has not been levied by reason of collusion or any wilful mis-statement or suppression of facts by the importer or exporter, the proper officer shall, **within five years** from the relevant date, serve notice on the person chargeable with duty which has not been levied, requiring him to show cause why he should not pay the amount specified in the notice.

42. The show cause notice dated October 27,2017 is in respect of the goods imported in 2014 and only a general statement has been made that there was suppression of actual value of the goods.No reason has been indicated as to why the provisions of sub-section (4) of section 28 of the Customs Act, which permits notice to be issued within five years from the relevant date, was being invoked since the normal period contemplated under sub-section (1) of section 28 of the Customs Act for issuance of the notice is only one year.

43. The reply submitted by the Appellant in regard to the said limitation for issuing the show cause notice is as follows:-

“(xx) That in the instant case, the noticees had been served the Show Cause Notice in the year 2017 for the Bill of Entries relating to year 2014 which itself is time barred. Section 28 of the Customs Act,1962, provides where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of fact, the proper officer shall within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has notbeen so levied or which has been short-levied or short-paid or to whom the refund had erroneously been made, requiring him to show cause why he should not pay the amount

specified in the notice. Hence, the time limit for serving the show cause notice had been already barred. Further section 28 of the Customs Act, 1962 also provides for demanding the duty within 5 year if any duty has not been levied/short levied or has not been paid/ short paid by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the agent or employer of the importer. In the instant case the show cause notice does not contain any allegation whatsoever of any facts constituting any collusion or mis-statement or suppression of facts against the noticee for the purpose of invoking the extended period of limitation under the provisions of section 28 of the Customs Act, 1962 and in this regard, attention is drawn on the Apex Court judgement in the case of Collector of Customs vs. H.M.M. Limited [reported in 1995 (76) ELT 497 (S.C.)], wherein Hon'ble Supreme Court held that limitation for extended period was not invocable unless the show cause put the assessee to notice specifically as to which of various commissions or omissions stated in the proviso to section 11-A(1) of the Central Excise and Salt Act had been committed; that the proviso to section 11-A(1) of the CESA being pari material with the proviso of section 28 of the Customs Act, the ruling of the Apex Court is squarely applicable to the instant case."

44. There is no consideration of the reply submitted by the Appellant regarding limitation in the order passed by the Principal Commissioner, since all that has been stated is that noticees No. 1,2 and 4 in collusion with each other had fraudulently succeeded in evading the anti-dumping duty on the melamine imported by them, which required to be recovered from them under the provisions of sub-section (4) of section 28 of the Customs Act. In this connection the Principal Commissioner had observed that the transaction based on fraud continues to be tainted and the person committing fraud is precluded from deriving any benefit. The Principal Commissioner also observed that fraud and collusion vitiate even the most solemn proceedings. The relevant findings are reproduced below:

"I find that in the present case the Noticees Nos. 1, 2 and 4 in collusion with each other by adopting the modus-operandi of High Seas Sales, had fraudulently succeeded to evade total Anti-Dumping duty amounting to Rs. 1,89,79,882/- on the melamine imported by them during the material period of demand, which is required to be recovered from them under the provisions of section 28(4) of the Customs Act, 1962 alongwith the interest as applicable under section 28AA of the Act ibid and section 9A of the Customs Tariff Act, 1975."

45. Section 28(1) of the Customs Act requires that if any duty has not been levied for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts, the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with duty. It was, therefore, imperative for the officer to have mentioned in the show cause notice why the provisions of sub-section (4) of section 28, which permits notice to be issued within five years, were being invoked. No reason has been assigned in the show cause notice and even when the Appellant raised this issue in reply to the show cause notice, the Principal Commissioner failed to advert to this issue and only a bald statement has been made that noticees 1, 2 and 4, in collusion with each other by adopting the modus-operandi of High Seas Sales, had fraudulently succeeded in evading payment of anti-dumping duty.

46. In this connection it would be appropriate to refer to certain decisions regarding invocation of the extended period of limitation, though in the context of the provisions of section 11(A) of the Excise Act.

47. In **Pushpam Pharmaceuticals Co. vs. Commissioner of Central Excise, Bombay**¹⁸, the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the

18. 1995(78)ELT 401 (SC)

expiry of the normal period of six months by invoking the proviso to section 11A of the Excise Act. The proviso to section 11A of the Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of which was suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" had been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. **But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts.** The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

48. This decision was referred to by the Supreme Court in **Anand**

Nishikawa Company Ltd. vs. Commissioner of Central Excise¹⁹

and the observations are as follows:

"26..... This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly. It does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held:-

"In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act."

49. These two decisions in **Pushpam Pharmaceuticals Co.** and **Anand Nishikawa Company Ltd.** were followed by the Supreme

19. 2005 (188) ELT 149 (SC)

Court in a subsequent decision of the Supreme Court in **Uniworth Textile Limited vs. Commissioner of Central Excise, Raipur**²⁰ and the observations are:

"18. We are in complete agreement with the principal enunciated in the above decisions, in light of the proviso to section 11A of the Central Excise Act, 1944."

50. The Supreme Court in **Continental Foundation Joint Venture Holding vs. Commissioner of Central Excise, Chandigarh-I**²¹ also held:

"10. The expression 'suppression' has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

51. In the absence of any charge in the show cause notice and finding in the order passed by the Principal Commissioner, the confirmation of the demand cannot also be sustained.

52. Thus, for all the reasons stated above, it is not possible to sustain the order dated May 30, 2019 passed by the Principal

20. 2013 (288) ELT 161(SC)

21. 2007 (216) ELT 177 (SC)

Commissioner. It is this order dated May 30, 2019 that has also been assailed in the four connected customs appeals.

53. The order dated May 30, 2019 passed by the Principal Commissioner is, accordingly, set aside and all the five Customs Appeals bearing Nos. 52254/2019, 52251/2019, 52252/2019 52253/2019 and 52277/2019 are allowed.

(Pronounced on **December 17, 2020**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Rekha