TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

16

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/478 /2007-480 /2007 - CU[DB] Date **13/09/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
1. SH Y.R.MAHAJAN, M D
2. ANURAJ MAHAJAN, DIRECTOR
3. M/S KEMTECH INTERNATIONAL PVT LTD.

505-506, RED ROSE BUILDING,
49-50 NEHRU PLACE, NEW DELHI.

ANURAJ MAHAJAN, DIRECTOR Appellant

Vs

C.C. NEW DELHI (IMPORT & GENERAL) Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/407-409/ 2011 CU[DB]** dated 09.09.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C. NEW DELHI (IMPORT & GENERAL)
NEW CUSTOM HOUSE, NEAR I.G.I.
AIRPORT, NEW DELHI 110037.

2. Adv. / Consult
MR.R.K. HANDOO & PREM RANJAN KUMAR
FLAT# E(FRONT BLOCK), SAGAR APTTS,
TILAK MARG, NEW DELHI-110001.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No. IV

Date of Hearing: 26.5.2011
Date of Pronouncement: 09-09-11

For Approval and signature:

Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Mathew John, Technical Member

---

1. Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?

3. Whether their lordships wish to see the fair copy of the order?

4. Whether order is to be circulated to the Department Authorities?

C/Appeal No.478/2007

(Arising out of order No.13/MDS/07 dated 27.4.07 passed by the Commissioner of Customs, (I&G) New Delhi

M/s Kemtech International Pvt Ltd — Appellant

Vs

CC (I&G), New Delhi — Respondent

C/Appeal No.479/2007

Shri Anuraag Mahajan, Director Kemtech — Appellant

Vs

CC (I&G), New Delhi — Respondent

C/Appeal No.480/2007

Shri Y.R. Mahajan — Appellant

Vs

CC (I&G), New Delhi — Respondent

Appeared for Kemtech: Shri R.K. Handoo, Advocate
Shri Prem Ranjan, Advocate

Appeared for the Respondent: Shri Amrish Jain, SDR

Coram: **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Mr. Mathew John, Member (Technical)

Final ORDER No.- C/407-409/11

Per Mathew John:

The case made out against the main Kemtech International Ltd (hereinafter referred to as "Kemtech") is that they undervalued certain goods manufactured by M/s Precision Engine Controls Corporation (PECC) imported by them during 2001 to 2003 under 12 Bills of Entries and supplied by Kemtech to Gas Authority of India Ltd. (GAIL) against five purchase orders. The other two Appellants are persons concerned with running of Kemtech.

2. It is stated that till 2001 PECC was selling their products to GAIL through M/s Export Management Service Group (EMSG). During 2001 PECC stopped dealing through EMSG and appointed Kemtech as their

agent in India. During 2001 to 2002, GAIL placed orders on Kemtech for supply of certain goods manufactured by PECC. After importing the goods and making payment of the same to Kemtech, GAIL developed doubts whether Kemtech had paid correct customs duty on the goods involved. Thus doubt arose from the fact that Kemtech was not willing to furnish copies of the Bill of Entries under which the goods were imported and it was found that the clause in the contract for submitting such Bills of Entries was deleted at some stage of finalization of the contract allegedly due to some collusion of the a few officers of GAIL. GAIL alerted customs authorities about their doubts. Enquires were conducted by the Customs Authorities. It was seen that Kemtech had imported goods almost at $1/5^{th}$ to $1/4^{th}$ of the prices which were initially negotiated by GAIL with PECC and EMSG and prices disclosed to GAIL by Kemtech. On the basis of evidence gathered, a SCN alleging undervaluation of the goods and proposing recovery of duties short paid and imposition of penalties was issued. The SCN was adjudicated by the impugned order.

3. The imports made by Kemtech were invoiced by SUNAG (USA). This company is owned by PECC.

4. The case made out has got somewhat confused because GAIL in its letter dated 05-05-2005, informing customs department about duty evasion by Kemtech, had raised the issue that Kemtech has charged more customs duty than was paid to the extent of Rs.2.2 crores from GAIL thus causing loss to Government of India either as customs duty or as extra price charged from a government company, i.e. GAIL, to which the goods were sold. The argument of having caused loss of customs duty to GOI is being looked into in this proceeding. The loss, if any, caused to GAIL is not a matter in the jurisdiction of this Tribunal and is not being looked into in this proceeding. But the allegation of causing loss to a Government company appears misplaced because their contract was for supply of goods on cum-duty price, irrespective of rate of conversion of foreign exchange and the rates of customs duty. Further there is no finding that Kemtech has billed any amount as customs duty though they might have given

some worksheets indicating customs duty that may have to be paid. Indicating in a quotation, rate of exchange for currency and rate of customs duty that may be prevailing after 8 to 9 months after submitting the quotation, cannot attract the provisions of section 28B of Customs Act. The provision of section 28B of the Customs Act was invoked in the SCN but no amount is confirmed under this section in the impugned adjudication order. There is no appeal by Revenue against this apart of the order.

5. In spite of the above position, this matter of loss caused to GAIL cannot be altogether ignored in this order because the differential duty demanded in the SCN and confirmed in the impugned order is worked out on the basis of loss caused to GAIL. It is seen from the annexure to the SCN that differential duty is worked out by taking the value quoted by EMSG to Kemtech and applying the duty rates indicated in the quotation by Kemtech to GAIL and arriving at the duty payable and deducting from such amount the amount of duty actually paid. This method is faulty so long as amount was not being confirmed under section 28B of the Customs Act. The adjudicating authority should have decided the invoice value for each of the items and applied the exchange rate on the date of import and arrived at assessable value for the goods in the standard manner and then applied the rate of customs duty applicable on the actual date of import to arrive at the duty payable and from the said amount deducted the duty already paid to arrive at the differential duty to be paid. After deciding not to confirm demand under section 28B, the reason for calculating the differential duty payable as per the method adopted in the SCN is not explained in the impugned order.

6. The main evidences produced by Revenue to prove undervaluation are the following:

- (i) The prices at which goods were imported by GAIL prior to Aug 2000;
- (ii) Documents seized from the premises of Kemtech International in a search conducted on 11-02-2004. These are mainly a series of correspondence among EMCG and

GAIL, EMCG and Kemtech, Kemtech and GAIL etc. showing the negotiations among the parties and final price agreed upon;

(iii) The price at which goods were supplied by PECC to SUNAG (USA) who raised invoices for import made by Kemtech. (This evidence is defective as will be seen in later discussions);

(iv) Statement of Shri. Anurag Mahajan, Director of Kemtech company admitting undervaluation to some extent and voluntary payment of differential duty to the extent of Rs. 66.5 lakhs made by Kemtech.

7. The prices as per manufacturers offer price to Kemtech and the prices declared by Kemtech to the customs authorities are as indicated below:

Sl No.	Description of goods	Quantity	EMSG's Offer price on the basis of which quotations to GAIL were given by Kemtech (in US$)	Declared price (in US $)
1.	Fuel Control valve VG 1.5-30-200	6	106890	14700
2.	Fuel Control Monitor FC 58.6R	1	11129	1892
3.	Speed Monitor SM 26.1R	2	19540	2860
4.	Speed monitor SM 26.3R	2	19540	2860
5.	Temp. Monitor TM 24.5R	1	19175	2566
6.	Temp. Monitor TM 24.11R	1	19175	2566
7.	Fuel Control Valve VG 1.5-30-200	6	107400	14700
8.	Fuel Meter Valve VG 1.5-30-200	10	185500	24500
9.	Fuel Control Monitor FC 58.6R	1	12240	2842.5
10.	Fuel Control Monitor FC 56.3 R	4	48960	11370
11.	Sped Monitor SM 26.1R	5	48850	13440
12.	Speed Monitor SM 26.3R	2	38350	9056.4
13.	Temp. Monitor TM 24.5R	2	38525	9056.4
14.	Temp Monitor TM 24.11R	3	57525	13584.6
15.	Power Supply Modul PS 10.0	2	21500	5353.8

8. Kemtech's main submissions to justify the variation in prices are as under:

(a) No payment whatsoever in advance was to be made by M/s GAIL to the supplier company where as Kemtech had paid 50 % of the price in advance;

(b) Price settled with Kemtech by GAIL was in Indian rupees while the price quoted by foreign supplier was in dollars. The prices were frozen with Kemtech leaving the risk of currency fluctuations to the account of Kemtech.

9. Before recording the submissions of Kemtech it is necessary to record the contents of some of the letters seized from the premises of Kemtech. These are reproduced below:

9.1 Copy of letter dated **4th May, 2001** from Jay D., Chief International Sales, Export Management and Services Group, Representative for PECC 170/A-7, Changebridge, Road, Montville, NJ 07045 USA addressed to M/s Kemtech International Ltd A-125, Shivalik, Malviya Nagar, New Delhi.

"Sub: GAIL's enquiry # GAIL/C&P)/HBJ/BJP/00162/370/00-01 fir speed, fuel and temperature modules of our principal's PECC USA

Dear Mr Sumit Saha,

Finally I could get today the list prices required on above issue from PECC. Note these are year 2001 prices.

1. *Model # EC 58-6R Fuel Monitor $ 11129 each*
2. *Model # SM26-1R, Speed Monitor $ 8399 each*
3. *Model # SM26-3R, Speed Monitor $ 8399 each*
4. *Model # TM24-11R, Temp. Monitor $ 15094 each*
5. *Model # TM24-11R, Temp. Monitor $ 15094 each*

These prices are based on the few strategic 'Life-time buys" of components and hence may not be relevant with the prices of previous years. PECC has done a considerable investment on this subject to ensure that customers are comfortable with the *analogue systems and also can avoid higher investments on digital upgrade.*

All other terms as per contract. Hope you would have received fax letter dated 30th April from PECC.

PECC's shop floor is heavily booked for next five months with orders for analogue modules due to the heavy rush. So quick delivery would be a real problem on this job.

In case you need further info then kindly let me know."

9.2 Copy of letter Ref : KIL/PECC-MOD/EMSG/JUN 01/03 dated 22nd June, 2001 from Anuraag Mahajan for Kemtech International Ltd, A-125, Shivalik, PO Malviya Nagar, New Delhi addressed to Mr A. Kumar, Manager (C&), Gas Authority of India Ltd, Gail Complex, Vijaipur, Distt. Guna (MP)

"Ref: Your NIT # GAIL/CEP/11B/BJP/00162370/00-01 dated 6th April 2001 and our offer dated 8th May 2001.

Sub: Our discussions held at your office on 14th June, 2001

Supply Item: 5 different Fuel, Speed & Temperature monitor modules manufactured by our principals M/s Precision Engine Controls Corporation USA

Dear Sir,

Firstly I thank you for the kind courtesy extended to the undersigned during my above mentioned subject visit to your esteemed organization.

Further to our discussions, we have been trying in the past few days to impress upon EMSG & PECC to reconsider their offered prices in view of the steep price increase for the two particular fuel and speed monitor analogue modules specially.

We are pleased to inform you that after lot of persuation PECC & EMSG have agreed to provide some substantial/

reasonable <u>one time special discount</u> as per below for only the two below modules.

Sl No.	*Item*	*Revised Unit Price of Kemtech in Rs.*	*Revised Unit Price of EMSG/PECC in US $*
1.	*Fuel Monitor Model # FC 58-6R*	*8,27,500*	*11,129*
2.	*Speed Monitor Model # SM 26-3R*	*7,26,500*	*9,770*

However, the prices for all the other three analogue modules remains the same as per our offer Ref # KIL/PECC-MOD/EMSG/May 01/01 dated 8th May, 2001. EMSG's letter explaining above all is also enclosed herewith.

We hope you would appreciate the one time special kind gesture extended by EMSG/PECC USA in doing the above and the efforts put by Kemtech to achieve the same.

We may also clearly state that PECC/EMSG has offered this as a one time special discount and hence no 'repeat order will be acceptable by us or these two modules specifically as per these revised discount prices. Hence in case your plan to buy some additional quantities of these two particular modules later in this year itself, than we would request you kindly consider this as an one time quantity discount and place your order for additional quantities of these two modules along with this order itself.

This offer should be treated as final and best possible from our end.

We now hope of receiving your valuable order at the earliest possible so as to enable us to ensure delivers within this financial year.

Assuring you the best of our services at all times."

9.3 Copy of letter dated June 21st, 2001 from Jay D, Chief International Sales, Export Management and Services Group, Rep for PECC, 170/A7 Changebridge Road, Montville, NJ 07045 USA addressed to Kemtech International Ltd, A-125, Shivalik, Malviya Nagar, New Delhi 110017 India.

Sub: GAIL's ongoing Spare Analog modules

Inquiry # GAIL/C&P/HBJ/00162/370/00-01 dated 6th April.

Ref: Your discussion at GAIL and our telephonic discussions

We were expecting your order to be with us by this time in order to deliver these modules within this year as you are aware that these have minimum 8 months delivery, as PECC is completely booked with orders upto December 2001 as per situation today.

Reference GAIL's letter for negotiations and the query raised by them during your meeting on 14th June regarding the increase in prices of these modules between 1998 and 2001. I also discussed with PECC once again today this matter and we may clarify as under for the last time.

Apart from the slightly higher price increase in fuel monitor FC-58-6R the other modules have a price increase of only 15% approx. which is very normal keeping into consideration a price increase @ 5% per annum.

In regard to the higher price increase for FC-58-6R & SM-26-3R, it has been higher due to the fact that most of its components are today priced at levels which are 60-70% higher than the levels prevailing 3-4 years back . Also note the prices of FCV were constant for past 5 years, only it has increased by $ 900 last year. Hence PECC has only increased the prices for modules where it was unavoidable. Hope you appreciate this fact.

Also the following facts cannot be ignored.

1. *The analog modules were becoming more difficult day by day to support for past couple of years as the cost of the various components which are used for its manufacturing were available at extremely high prices due to the fact that they were rapidly becoming obsolete.*
2. *Hence due to this supply and demand gap, the prices would rise every year.*

3. *Accordingly, due to this reason, PECC was forced to steadily increase the prices of the analog modules. The PECC have still absorbed much more at their end than what has been passed on to the customers as an increase, every time it happened, PECC were affected this way.*
4. *PECC then advised their customers to upgrade to a Digital system but as lot of them were very comfortable with Analog system and were struggling to upgrade to the digital system, PECC undertook a detailed study to evaluate the efforts required to support the Analog systems further. As a result of this PECC made a strategy 'life time buys' of components that were obsolete or rapidly approaching obsolescence and the ones which go into the manufacturing of the Analog modules.*
5. *This was done in order to continue the support for Analog modules repair and replacement for years to come.*
6. *As a result of this exercise, PECC has invested considerable amount of funds in the manpower to do this, funds required to create such a big inventory and obviously the skylight costs paid for the components (in year 2001) taken into inventory for making this a success.*

Hence the prestn costs of the modules offerd reflect a bit of all above as still this is a negligible costs compared to the costs involved to explore the other alternatives in case the Analogue systems would have been completely obsolete.

But still considering GAIL's concerns/objections on the steep price rise, we can offer a one time special discount only for two particular modules and the below mentioned are our revised discounted prices:

1. *FC 58-6R, Fuel Monitor $ 11129 each*
2. *SM 26-3R, Speed Monitor $ 9770 each*

Kindly inform GAIL that they can place order for additional quantities for these two modules at this stage itself in case they want to avail this special one time discount. Any order received by us after this order for these two particular modules will be charged only as per our list prices applicable at that time. Also *no reduction of prices is possible on the other three modules of this enquiry.*

In view of the above, we once again assure you that the prices offered by us now are below our list prices and are the best we can offer at this stage due to all the above. No further reduction on these prices is possible as these are the bare minimum prices we can offer at this stage.

I hope you would understand the circumstances in depth and detail as to what forced us to increase the prices in the first place and would at last appreciate the efforts made by PECC to make all this happen finally.

Regarding your question for the FOB charges, applicable for this complete shipment - Note I have rechecked once again and these would be close to US $ 550 for all the seven modules under one shipment or more than this for shipment in parts. We hope this clarifies the matter.

Hope the customer takes a rational approach about these facts and finally issues the order on Kemtech."

9.4 Letter dated August 24th, 2001 from Jay. D, Chief International Sales, Export Management and Services Group, Representative for PECC, 170/A-7, Changebride Road, Montville, NJ 05045 USA addressed to Kemtech International, A-125, Shivalik, Malviya Nagar, New Delhi

Sub: Gail's enquiry # GAIL/C&P/HBJ/BJP/ID-20010060/2001-02/48/2187 dated 9th August, 2001 for fuel control valves of PECC

Dear Mr Sumit Saha,

As requested in context to the new enquiry from GAIL, note prices for the fuel control valve model # VGI.5-30-200 is $ 18450 list each + $ 100 fob charges +$ 18550 each (FOB port of dispatch) effective from 1st October, 2000. We may also point out that the prices have been revised marginally by PECC only after a gap of 5 *years as these remained unchanged at $ 17800 each Fob port for past five years.*

The prevailing price of FCV is inclusive of only $ 100 as Fob charges instead of $ 250 as this has been reduced drastically from May onwards this year due to some cost reduction measures undertaken by PECC. Hence decent savings are now possible on account of Fob charges.

Per Mr Anuraag's request to Annie Kinner the list of FCV orders received by us from GAIL in the past 5 years (I may have missed some orders as it's time consuming to dig all the files):

- *ND/CP/HBJ/SPARES/614/96 dated 6.3.96*
- *ND/CP/HBJ/SPARES/706/94-95/12-97 dated 2.20.98*
- *GAIL/BJP/HBJ/C7P/I-9705/816 dated 5.26.98*
- *GAIL/C&P/HBJ/C7P/I-0024/2000/130 dated 10.11.00*

We hope to have provided you with all the information requested for further submission of quote to GAIAL by Kemtech on behalf of PECC/EMSG."

10. We have heard the Counsel for the Appellants and gone through the Appeal Memorandum in each of the Appeals. The submissions of Kemtech are the following:

(i) The notice is time barred because it does not allege any collusion, fraud or connivance and in the absence of such elements extended period of five years cannot be invoked;

(ii) After the goods have been assessed and cleared the Revenue could not have made in demand unless the assessment order was appealed against.

(iii) The adjudicating authority has erred in relying on the list prices quoted by the foreign supplier to GAIL for assessing the goods imported by Kemtech because the terms of import were different. They paid 50% of the value on placing the order and 50% on shipping of the goods. Further Kemtech had to deliver goods at the door of GAIL. Kemtech were also responsible for after sales service;

(iv) The Revenue should have relied on the transaction values;

(v) As per the addendum to the SCN dated 02-01-2006 the price difference was only 20% to 25%. But the demand confirmed is based on much higher levels of under valuation;

(vi) Revenue is relying on the list price of the company. Kemtech had negotiated further and got the prices reduced;

(vii) Revenue has not unearthed any evidence of higher payments by Kemtech;

(viii) Investigation report of GAIL relied upon in the SCN has not been supplied to Kemtech;

(ix) The export declarations in the country of export was obtained by Revenue but that is not disclosed or relied upon in the SCN;

(x) As per customs Valuation Rules, the domestic sale of goods by PECC to Suntag in USA cannot be the basis of valuation of such goods imported into India;

(xi) The Commissioner erred in holding that Kemtech did not produce discount structure because it is for the Revenue to prove that the transaction price is false and not for Kemtech to prove the bonafides of the transaction value;

(xii) The deposits of duty made during investigation was due to threat of arrest and such deposits cannot prove the case.

11. The Ld SDR on the other hand points out that in this case the supplier was someone other than the manufacturer. The Importer refused to produce manufacturers invoice as required under Rule 10(b) of Customs Valuation Rules, 1988. The correspondence seized from the custody of the Appellants clearly shows that the value of goods were 4 to 5 time higher than the value declared to customs. He also points out that the refusal of the Appellant to show the copy of the Bill of Entry to GAIL clearly demonstrates the malafide intention of the importers because GAIL would have detected the mis-declaration on first glance. The abnormal discounts seen during investigation is not something claimed at the time of assessment. This is a claim made when investigations were conducted. During investigation they

promised to come up with the discount structure of the supplier. No such document was ever produced. In short he argues that the prices agreed to by PEEC for supply of goods to Kemtech as disclosed from the letters seized were the actual prices and not the prices declared in the Bill of Entry.

12. The arguments of the Appellants are examined below in view of the submissions of SDR and the available records.

12.01 This is a case where the allegation is regarding mis-declaration of value as is evidenced from correspondence sized from the Appellant. Where there is such mis-declaration or suppression the extended period of five years specified in section 28 of the Customs Act is applicable.

12.02 The question whether demand can be issued without challenging the assessment is also settled by the Honourable Supreme Court in the case of UOI Vs. Jain Shudh Vanaspati Ltd.- 1996 (86) E.L.T. 460 (S.C.).

12.03 The prices taken are the prices quoted by the manufacturer to Kemtech and not just the list prices. No factor that would justify such abnormal discount when the Bill is raised by a third party is presented. Payment of 50% in advance cannot justify supply of goods at 1/4th the price. The prices quoted by Kemtech in Indian Rupees to GAIL give reasonable profit margin to Kemtech thus demonstrating that these were the correct prices. Going by the prices declared by Kemtech to customs there is abnormal profit. So it is very obvious that this is a case of mis-declaration of transaction value just to save customs duty.

12.04 Revenue has presented enough evidence to assail the truthfulness of the transaction value. Further the manufacturer's invoice as requested under rule 10(b) of the Customs Valuation Rules, 1988 was not produced. So the order rejecting transaction value is maintainable even though revenue has not been able to trace evidence of remittance of the differential value.

12.05 We have examined the contention of the appellant that the Addendum dated 21-01-2006 to Show Cause Notice talks of undervaluation to the extent of 20% to 25% only while duty is demanded based on much higher levels of undervaluation. We have found that the Appellant is misinterpreting the words and phrases "confirms undervaluation and mis-declaration of transaction value to the Customs to the extent of 20% to 25% as compared its purchase value" used in the Addendum to understand undervaluation suggested by the document is only to the extent of 20% to 25% of the actual value. The expression actually means transaction value is declared to the extent of 20% to 25% of the actual value. In a situation where goods valued at $ 100 was sold for $ 20, the above words and expressions were used to convey the meaning that the declared value was 20% the actual value and thus undervaluation is confirmed. The Appellant tries to interpret the statement to mean the declared price was $ 80. The document enclosed to the addendum to Show Cause Notice shows that the expression was used in the sense that declared value was 20% of the actual value. Since actual figures were enclosed the confusion suggested by Appellants cannot be a serious defect to the SCN itself. Further, the evidence introduced through the addendum itself is being rejected and hence this argument has got no relevance.

12.06 The argument that Revenue is relying on list prices is not seen to be correct from the correspondence between the parties. The correspondence unearthed during searches do not disclose any further negotiation as claimed. No such documents have been produced by Appellants either. So the inevitable conclusion is that the further negotiation were stealthily done and for the purpose of mis-declaration of import value through the medium of Suntag USA and this argument is to be discarded.

12.07 In the matter of undervaluation of imported goods, proof of remittance of additional consideration is a sufficient proof. But it is not that if the Revenue is not able to unearth leads of this activity done stealthily the case has to necessarily fail. The decision of the Apex Court in the case of CC Vs Shibani Engineering Systems-1996 (86) E.L.T. 453 (S.C.) illustrates this point.

12.08 We note that the SCN in paras 15 (i) (a), 15 (i) (b), 15 (i) (c), 15 (i) (d), 15 (i) (e) and 15 (ii) (a) refers to a detailed note appended to letter C. No. GAIL/ND/VIG/218/03/175 dated 05-05-2005 issued by GAIL to Customs Department. Though the letter was supplied to Kemtech the note attached has not been disclosed to Kemtech. The impugned adjudication order also refers to this note in para 11. However the adjudicating authority observes in his findings that the case is not made on the basis of the said note and discards this evidence as per the second para in the "Discussion and Finding" part of the order in page 28 of the order. If this note was not relied upon it would have been desirable not to include it in the SCN and the part of the impugned order giving "Brief Facts of the case". However Revenue has chosen to the contrary. But we take note of the findings given in the impugned order and keep references to this note totally out of mind while assessing the evidence.

12.09 The export declarations are not relied upon in the Show cause Notice. Further when PEEC itself is involved in bringing in a third entity to raise invoice to Kemtech, the export declaration in US also show the mis-declared value and such documents by itself cannot prove that the goods were not under-valued.

12.10 Since the evidence produced showing prices for sale of the impugned goods by the manufacturer to Suntag is not authenticated and the source from which it is obtained is not disclosed, this piece of evidence is to bediscarded.

12.11 In view of the evidence unearthed and presented before the Appellants the burden to prove that the abnormally high discounts were genuine, had shifted to the Appellants and the Appellants did not discharge this burden.

12.12 We are not considering the deposit of duty made by the Appellants as evidence to prove undervaluation.

13. The Counsel for Appellants during argument on 26-05-11, quoted 14 decisions of different judicial forums in support of their case. We have examined them and found them to be on different set

of facts. For the sake of brevity we are not dealing with all the decisions cited. We propose to record our observations on the facts of the cases decided by Supreme Court which are four in number and also the first of the decisions of the Tribunal given in the list of cases submitted.

13.1 **CC Vs. East Punjab Traders- 1997 (89) ELT 11 (SC).**

The Appellants rely on this decision to contest the point that documents showing sale price of PEEC to Suntag cannot be relied upon as evidence because these were not signed invoices. In this context para 5 of the judgement is reproduced below:

> "**5.** The single Technical Member, who wrote the minority judgment, however, held the view that it was not essential on the part of the Customs Officer to strictly prove the documents as required by the Evidence Act and that the authenticity of the documents, though copies, could not be doubted as they had been collected by the Collector from foreign sources and could be admitted in evidence by virtue of Section 139(ii) of the Customs Act, 1962 which permits the raising of a presumption in respect of documents received from any place outside Indian in the course of investigation of any offence alleged to have been committed by any person under the Act. The majority points out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs Officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents is suspect and it is not possible to presume that the originals are duly signed. It is for this reason that the majority did not consider it safe to place reliance on photocopies of copies of the documents recovered by the Customs Officer not from the Customs Department in Japan but from the agencies which are stated to have exported the material in question. It is also found that one of these copies of the alleged declarations bears the seal of the Customs at Kobe and the name of the vessel is shown to be `Raya Fortune' but the itinerary of that vessel collected at the instance of the Indian Customs shows that the said vessel had never touched Kobe which raises a serious doubt as to how far this document is authentic."

In the present case also the documents are not authenticated by anyone except for a seal of Consulate General of India New York. The source from which these documents are obtained is not disclosed. So we agree with the argument that these documents cannot be accepted as evidence. However this is not the main evidence in this case. The correspondence retrieved from the office of the Appellants is the main evidence.

13.2 **CC Vs. Uttam Mohanlal Jain- 2001 (130) ELT 599 SC confirming decision in Uttam Mohanlal Vs. CC -2000 (124) ELT 661 (Tri).**

This decision is relied upon for arguing two points, (i) that unsigned documents obtained from abroad without disclosing how the documents were obtained cannot be relied upon; (ii) that a quotation recovered from the records of the importer cannot be relied upon to assess the value of goods imported. The first issue is already dealt with in the case law examined at item (i) above. No fresh point arises. Para 7 and para 11 of the order shows why the quotation recovered from the party concerned was discarded In that case two quotations were recovered. Extracts of para 7 and 11 of the order are relevant which are reproduced below:

> "7. ---------------- The contract for the supply of the goods is dated 20-6-1995. The goods were shipped on 22nd July from Hong Kong. Jain's statement that the fax dated 3rd August, 1995 contain the price list for the goods which were sent to him is, therefore, clearly wrong. He says "the fax indicating the prices was sent to us dated August 3rd, 1995 which had a serial No. 7073 which I had torn and has been reconstructed and has been taken over under panchanama as described under serial No. 25 and is now shown to me and I have signed on it as having seen it. As shall be seen from the packing list of the consignment the entire material I have purchased at the rate of J Yen 1100 i.e. approximately US $ 10.68 per metre." [The price for the goods cannot be sent after the contract is completed and the goods are despatched."
>
> "**11.** The goods imported by appellant were assorted rolls of different colours and of odd lengths ranging from 24.1 metres to 21.8 metres. The presence of such odd lengths indicate that the goods were not part of a regular standard lot. The quotation in the fax dated 3rd August, 1995 is for length expressed in integers. As against this the other fax of 18th August, 1995 offers goods at Yen 800 per metre. Fractional lengths are shown for such goods in lengths of metres, e.g. 273.3, 255.8 etc. This lends credence to the contention that the goods imported by the appellant were sold at a lower price because they were all odd lot."

13.3 **CC Vs. South India Television (P) Ltd.-2007 (214) ELT 3 SC.**

Extracts from paras 2 and 3 are reproduced to show that the facts of this case re different from the facts of the case at hand.

> "**2.** The facts giving rise to this civil appeal are as follows. The respondent had imported six consignments of ceramic capacitors and one consignment of diodes from Hong Kong during the above period. The goods were shipped from Hong Kong by M/s. Compo Export of Hong Kong and M/s. Pearl Industrial Company of Hong Kong. The price of ceramic capacitors was declared by the respondent in its Bill of Entry @ HK $ 6.00 per 1000 pcs. whereas the price of diodes was declared @ HK $ 29406 CIF as reflected in the invoices. On 27-4-1998 a show cause notice was issued by the Assistant Commissioner of Customs, Calcutta alleging *inter alia* that as per the overseas investigation report of the Hong Kong Customs and Excise Department the declared price did not represent the transaction value under Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 ("Customs Valuation Rules") as the price actually paid appeared to be different than the declared price and that the importer had under-invoiced the value of the goods to evade huge amount of the Government's revenue. At this stage, it may be pointed out that in the show cause notice the Assistant Commissioner had specifically invoked Rule 8 of the Customs Valuation Rules, 1988, which was subsequently given up by the Department. Be that as it may, the importer was asked to show cause as to why the value of the consignments in question should not be enhanced based on the export declaration under Rule 8 of the Customs Valuation Rules made by the Foreign Supplier. Accordingly, *vide* the afore stated show cause notice, the Assistant Commissioner raised a demand for the differential duty of Rs. 28,04,831.40 and fine in lieu of confiscation. In reply, the importer denied the above allegations. In reply, it was submitted that the show cause notice was based solely upon the purported investigation report of Hong Kong Customs and Excise duty; that the said report was accompanied by xerox copies of the export declarations; that the xerox copies did not bear the seal or signature of the customs officials in Hong Kong; that the authenticity of the declaration was doubtful; that the declarations were not the correct reproduction of the original and that there were endorsements to the effect that the documents shall not be used against any third party or in any legal proceedings. In other words, the importer contended that the charge of under-valuation cannot be based on xerox copies of the declarations which were not even certified by the competent authority in Hong Kong. According to the importer, such declarations had no bearing upon the actual sale price of the goods in the hands of Hong Kong exporters. According to the

importer, there was no allegation in the show cause notice that it had paid higher value to the supplier than that declared by it in the Bill of Entry. Before the Assistant Commissioner, the importer supported the declared price mentioned in the Bill of Entry by relying upon various contemporaneous imports made during the above period by other importers whereas the price declared for identical goods was the same as the price declared by the importer in the present case in its Bill of Entry. It was further submitted by the importer that it was not open for the Assistant Commissioner to adjudicate the value under Rule 8 without going sequentially from Rule 5 to Rule 6 and Rule 6 to Rule 7 onwards. The importer further contended that, in the present case, the value of the goods could have been determined in terms of Rule 5 and, therefore, there was no question of invoking Rule 8. In this connection reliance was placed on the judgment of this Court in the case of *Eicher Tractors Ltd.* v. *Commissioner of Customs, Mumbai* reported in 2000 (122) E.L.T. 321.

"3. ----------Further, according to the Tribunal, in the present case, the importer has relied upon instances of import of identical goods at identical rates by other importers from the same supplier (namely, M/s. Pearl Industrial Company, Hong Kong) during the aforesaid period. The Department had accepted those rates. This evidence led by the importer herein has not been rebutted. It had not been discussed by the adjudicating authority. In the circumstances, the Tribunal allowed the appeal filed by the importer. Hence, this civil appeal has been filed by the Department."

Thus in that case the goods imported were items which were being imported by many other importers and for those importers the department had accepted the price as declared by the litigant in that case. This is not the situation being dealt with in the case at hand.

13.4 **Mirah Exports Pvt. Ltd Vs. CC 1998 (98) ELT 3 SC**

Para 4 and 5 of the judgement illustrates the difference between the case decided by Apex Court and the case at hand. These are reproduced below:

4. Replies to the said show cause notice were submitted by Mirah Exports as well as Skefko. Mirah Exports, in their reply to the said show cause notice, stated that they were not aware of any price list in use by Skefko; since the quantity being imported was about 5 lakh pieces of each type reduced prices had been given by the supplier; the imports by M/s. Crompton Greaves, Mahindra & Mahindra and Jay Engineering Works, who had been importing quantities from 10,000 to 50,000 pieces, had been at similar prices and that even the Government undertakings like BHEL, Hindustan Tele-Printers and other public limited companies had been offered discounts ranging from 50% to 70%; and the invoice prices were favourably comparable with similar bearings from other countries like USSR, Romania, Czechoslavakia and Japan. Skefko, in their reply to the show cause notice, submitted that Mirah Exports were not required to pay any amount over and above the invoice prices; the prices charged in the invoice were in consonance with the pricing policy of the company; the exchange rate difference had caused variation of approx. 27% over their prices in 1981-82 for US Dollar when compared with the exchange rate applicable to DM; and the local agent have a discount up to 20% and for any higher discount, prices had to be accepted for each import by the supplier.

5. The Additional Collector of Customs by his order dated April 16, 1985, discharged the notice since the charges set out in the show cause notice failed and directed that the consignments in question be assessed on their invoice value. The Addl. Collector of Customs has found that the appellants herein, particularly during the personal hearing, had led substantial evidence to chronologically show that despite the said price list there was a development of a new sales and pricing policy for not only India but the world over, after exchange of numerous correspondences and personal discussions during visits of representatives of the seller and that this policy distinguished between following categories of buyers on logical commercial grounds :-

(i) Replacement users who order small lots at infrequent intervals;

(ii) Original Equipment Manufacturers (OEMs) who import for fitment in their manufactured products and for this build up inventories with sizeable orders after securing favourable prices between various competitors and in view of their sizeable orders and the competition involved, the sales policy allowed up to 20% discounts (on quantity) upon the prices of the said price list;

(iii) Canvassers and Skefko, who import in even greater bulk for the purposes of only trading, and may secure even lower price, particularly if they generated additional volumes of sales.

This policy was aimed at a more aggressive marketing objective and envisaged discounts even over 20% (but on the approval of the sellers on a case-by-case basis, on reference to them).

13.5 **Overseas International Vs. CCE -2001 (12&) ELT 599(Tri-Chennai)**

Extracts from para 1 and para 7 are reproduced below:

> "The short question that arises for consideration in this appeal is as to whether the Customs authorities can reject the transaction value and the invoices which reflected the value of the imported goods namely "toys". The customs authorities through their DRI unit obtained a quotation from the supplier and on that basis enhanced the value."
>
> "7. -------- In this case, the DRI obtained unauthenticated quotation from the supplier and based on that the valuation has been enhanced. Such an exercise has not accepted by the Apex Court and held to be contrary to the provision of law as held in the case of *C.C.* v. *East Punjab Traders* (supra).-----".

13.6 The exercise of recording the facts in each of the case quoted can be continued to cover all the 14 cases. We do not find it necessary. The short point relevant is that the question whether undervaluation is proved is to be decided on the basis of the facts of each case. The commodity involved and the parties involved also are relevant. In this case the Commodity involved is sophisticated mechanical equipment and measuring instruments which are not sold in bulk. Extensive price negotiation between GAIL and PECC and GAIL and Kemtech is on record. Detailed justification why the manufacturer cannot give further discount is on record. So suddenly the prices can not come down to 1/4th. In the facts and circumstances of the case we agree with the finding of the Commissioner that the transaction Value declared are liable to be rejected.

14. This is a case where abnormal discount of prices is seen compared to the prices at which goods were sold up to the year 2000 to GAIL and also from the prices initially negotiated for sale to Kemtech by PECC as is evident from correspondence seized from the Appellant. Prima Facie this case involves gross undervaluation. The Appellants have not given any justifiable reason for the abnormal discounts. As per Rule 10 (1) (b) of the Customs Valuation Rules, 1988 the department was authorized to call for manufacturers invoice

in such circumstances and invoices were so called for. However the Appellants chose not to submit such invoices. The correspondence seized from the Appellant, indicated undervaluation. The Appellant has not submitted any reason for such abnormal discounts. The Honourable Apex Court had occasion to consider such abnormally discounted price in the case of Collector of Customs, Bombay v. Shibani Engineering Systems, Bombay reported in 1996 (86) E.L.T. 453 (S.C.) wherein the Apex Court held that such abnormally discounted prices cannot be accepted. Therefore, we agree with the finding in the impugned order that the prices declared in the Bill of Entry merits rejection and goods should be assessed on the basis of prices at which goods were offered by EMSG to Kemtech in the records seized.

15. However we are not in agreement with the amount worked out for short levy of duty for the reason explained in para 5 above. So the matter is being remitted back to the adjudicating authority for re-quantification of short levy on the basis of prices quoted by EMSG to Kemtech in the manner indicated in para 5 above. The penalties also need to be decided afresh in view of the likely reduction in duty liability.

Appeal No.Customs-479/2007 filed by Shri. Anurag Mahajan

16. This Appellant was the Director of Kemtech

17. The Appeal Memorandum raises just the issues raised in the appeal filed by Kemtech and examined in the first part of the order. There are no specific submissions on the role played by the Appellant.

Since we have already held that the case of undervaluation is proved consequent penalty is impossible on this Appellant. However as already stated we find a need for deciding such quantum of penalty afresh for reasons already explained.

Appeal No. Customs-480/2007

18. This Appellant is the Managing Director of Kemtech.

19. The Appeal Memorandum raises just the issues raised in the appeal filed by Kemtech and examined in the first part of the order. There are no specific submissions on the role played by the Appellant. Since we have already held that the case of undervaluation is proved, consequent penalty is impossible on this Appellant. However as already stated we find a need for deciding such quantum of penalty afresh for reasons already explained.

20. Thus the Appellants' plea that there is no undervaluation is rejected. But the order is set aside and the matter is remitted to the adjudicating authority for re-quantification of duty liability and fresh decision on penalties. Thus the Appeals are partially allowed.

(Pronounced on 9/9/11 ------------------------------)

(Archana Wadhwa)
Member(Judicial)

MPS*

(Mathew John)
Member(Technical)