CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

Customs Appeal No. 50697 of 2024

(Arising out of Order-in-Appeal No. 14/MANISH SAXENA/COMMR (ADJ.)/DELHI/NCH/202324/362 dated 15.01.2024 passed by the Commissioner of Customs (Adjudication), New Customs House, New Delhi.)

Deepak Fertilisers And Petrochemicals Corporation Ltd ....**Appellant**
Sai Hira, Survey No. 93 Mundhwa,
Pune, Maharashtra-411036

Versus

Commissioner of Customs (Adjudication) Delhi Zone, Near IGI Airport, ...**Respondent**
New Customs House, New Delhi-110037

APPEARANCE:

Mr. Dhruv Matta, Mr. Shobhit Jain and Mr. Akshay Gupta, Advocates for the Respondent
Mr. Shiv Shankar, Authorised Representatives of the Department

CORAM:

HON'BLE DR. RACHNA GUPTA, OFFICIATING PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/ DECISION: 10.07.2026

FINAL ORDER NO. 51207/2026

DR. RACHNA GUPTA

Present order disposes of an appeal arising out of order-in-original no. 14/2023-2024/362 dated 15.01.2024 vide which differential duty of Customs alongwith applicable interest with respect to 39 Bills of Entry has been confirmed. The facts which are relevant for the present adjudication are as follows:

1.1 M/s Deepak Fertilizers and Petro Chemicals Corporation Ltd[1] have imported phosphoric Acid Anhydrous ammonia, in bulk as a key raw material for manufacture of fertilizers. An agreement had been entered with the various suppliers agreeing that the price of said raw

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1 The appellant

material shall be on CIF basis i.e. in addition to value of goods to be imported raw material, the value would also include cost of rate from port of loading till the port of discharge. Department, however, got the intelligence that for the purpose of determination of assessable value, the appellants had taken into consideration the standard freight paid by them. However, in certain cases, where the appellants were paying demurrage charges/barge charges in addition to agreed CIF prices, the appellants failed to include the cost paid over and above the standard freight in the assessable value thereby resulting into undervaluation of the subject goods while importing them in India. It is alleged that the said non-inclusion of demurrage charges in the assessable value was with the sole intention to evade the customs duty to the extent of Rs. 415,99,036/-.

1.2 With these allegations that a show cause notice bearing no. 63/2016/7245 dated 29.03.2017 was served upon the appellants proposing the demand of the aforesaid amount of differential customs duty payable on the impugned goods imported through Kandla Sea Port was also proposed to be recovered alongwith the interest under the provision of Section 28AA of Customs Act, 1962 and the appropriate penalties under section 112(a) and 114A of the Customs Act. An amount of Rs. 62,37,077/- which was already paid by the appellants on 20.02.2017 was proposed to be appropriated against the above mentioned proposed demand. The said proposal has been confirmed vide the impugned order-in-original. Being aggrieved the appellants are before this Tribunal.

2. We have heard Mr. Dhruv Matta, learned counsel assisted by Mr. Shobhit Jain, and Mr. Akshay Gupta appearing for the appellants and

Mr. Shiv Shankar, learned authorised representative appearing for the department.

3. Learned counsel for the appellant has submitted that the appellant while importing the subject goods from various overseas suppliers, in bulk quantities, had entered into sales contracts. These contracts were entered into on CFR basis (cost and freight payable). It is further submitted that the contract had shipping terms pertaining to penalty/reward in terms of "lay time" and rating hours beyond the free "lay time hours". Demurrage is impressed to be paid when the lay time is exceeded and dispatch money is paid when the discharge is completed within the lay time. In the present case, the appellant had paid charges to the supplier in the form of demurrage for additional waiting time of the vessel at the port of import, due to heavy port congestion. Hence the cost of demurrage charges has wrongly been included in the assessable value. The differential duty has wrongly been confirmed.

3.1 Ld. Counsels further submitted that the impugned order has confirmed the said demand invoking the Rule 10 (2)(a) of Customs Valuation Rules, 2007 whereas the said provision was not invoked in the show cause notice. Otherwise also, the said provision has already been held ultra wires by Hon'ble High Court of Orissa in the case of **Tata Steel Ltd. vs. Union of India reported as 2019 (370) E.L.T. 100 Orissa.** The said decision has regularly been followed by this Tribunal. Ld. Counsels have relied upon the decisions as mentioned below:

> **1. Vinyl Chemicals (India) Limited v. Commissioner of Customs, New Delhi, Final Order No. 51852/2019 in Customs Appeal No. 51067 of 2019**
> **2. Commissioner of Customs, Ahmedabad v. Reliance Industries Ltd. (2024) 16 Centax 317 (Tri-Ahmedabad).**

The same is affirmed by Hon'ble Supreme Court in (2024) 16 Centax 318 (S.C.).
3. Jubilant Life Science Limited v. Additional Director General (Adj) CESTAT, New Delhi Final Order No. 51288/2019 in Customs Appeal No. 53440 of 2018-DB

3.2 Finally it is submitted that extended period has wrongly been invoked while issuing the impugned show cause notice and demand under sub-section 4 of section 28 Customs Act, 1962 has wrongly been confirmed alongwith the penalties. Interest is also not payable under section 28AA of the Customs Act for demurrage charges to not to be the part of the assessable value. With these submissions, the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

4. Learned DR on the other hand has reiterated the findings arrived at by the original adjudicating authority. It is submitted that appellant in their sale agreement have admitted their liability towards all additional charges. Impressing upon no informity in the impugned order, the appeal is prayed to be dismissed. It is, however, acknowledged that this Tribunal has been following the adjudication of Hon’ble High Court of Orissa rendered in **Tata Steel Ltd (Supra**) case.

5. Having heard both the parties, perusing the entire record since it is an admitted fact that the appellant was importing the chemical in bulk, as raw materials for manufacturing fertilizers, against the written agreements, one of such agreement with Phosagro Asia PTE Ltd, being on record, is hereby perused. It is observed that overtime and all extra expenses with respect to the imports were agreed to be paid by the buyer/the appellant herein. However, under Cluase P of said agreement is specific towards the demurrage or discharge charges and the clause recites as follows:

"Settlements for demurrage or dispatch are to be made between buyers and sellers outside the terms of the letter of credit payment required for the goods under this contract. Settlement for demurrage or dispatch are required in US dollars and are to be settled within 30 days from the date of the claim."

5.1 This particular perusal sufficiently reflects that the demurrage charges were never agreed to be the part of the transaction value. The valuation is otherwise has to be in terms of Section 14 of Customs Act which subsequent to the year 2007 reads as follows:

> **"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:
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> 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:
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> Provided further that the rules made in this behalf may provide for. -
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> (i) the circumstances in which the buyer and the seller shall be deemed to be related:
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> (ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

> (ii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:
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> 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.
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> (2) Notwithstanding anything contained in sub-section (1), 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."

5.2 The principle of unamended provision was to find the valuation of goods "by reference to their value. It introduced a deeming/fictional provision by stipulating that the value of the goods would be the price at which such or like goods are "ordinarily sold, or offered for sale". Under the new provision, however the valuation is based on the transaction price namely, the price "actually paid or payable for the goods". Even when the old provision provided the formula of the price at which the goods are ordinarily sold or offered for sale, at that time also if the goods in question were sold for a particular price, that could be taken into consideration for arriving at the valuation of goods. In fact, this fundamental concept is retained even now while introducing the concept of "transaction value" under the amended provision. More importantly, the rules viz. Valuation Rules, 1988 had incorporated this very principle of "transaction value" even under the old provision. No doubt, as per this provision existing today generally the price mentioned is to be accepted as it is the transaction value. However, this very provision stipulates the circumstances under which that price can be discarded. In any case, having regard to the question with which we are concerned in the present appeals, such a change in the provision may not have much effect. 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.

6. When the above discussed position of law is read with the above clause of the aforementioned agreement, the cost of demurrage paid doesn’t seem to be the part of transaction value, it not being the true reflection of the value of goods am dot being subject to settlement between buyer & seller outside the terms of the letter of credit payment under the contract.

7. The original adjudicating authority has still confirmed the demand by invoking Rule 10(2) of Customs Valuation (determination of value of imported goods) Rules 2007. However, as brought to the notice by the appellant and acknowledged by the department, the said provision has been struck down as ultra wirus constitution by Hon’ble High Court of Orissa, the Hon’ble Court has followed the decision of larger bench of this Tribunal in the case of **Indian Oil Corporation vs. Commissioner of Customs, Calcutta reported in 2000 (122) E.L.T. 615** wherein it was held as follows:

> “**4.** ……that if demurrage charges would form a part of the assessable value, the goods covered by the same contract would be assessed to duty at different assessable values and such a situation is not envisaged in the provisions of Section 14 of the Act. The Union of India, Opposite Party No. 1 challenged the aforesaid decision of the Tribunal in appeal before the Hon'ble Supreme Court and the appeal was dismissed as reported in 2004 (165) E.L.T. 257 (S.C.) and the decision of the Tribunal, as above, was upheld.”

8. Since the show cause notice has not invoked the said provision, the findings based on said provision for confirming the demand of differential duty are definitely beyond show cause notice and are liabe to be set aside for this reason also. We draw our support from the decision of Hon'ble Supreme Court in the case of **Commissioner of Customs, Mumbai vs. Toyo Engineering India Ltd reported as 2006 (201) E.L.T. 513 S.C.**

9. Finally coming to the plea of invocation of extended period of limitation, we observe that except the oral allegations of suppression on part of the appellant, there is no evidence produced by the department to sustain the said oral allegations. Law, on this point, is absolutely clear that the burden lies upon the department to prove the positive act of the appellant proving the intention to evade the customs duty. There is no such evidence on record. We draw our support from the decision of Hon'ble Supreme Court in **Cosmic Dye Chemical v. Collector of Central Excise, Bombay reported in (1995) 6 SCC 117 = 1995 (75) 721 (S.C.)** the Supreme Court held :

> "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" is again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful."

And in another case in **Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut, reported in (2005) 7 SCC 749 = 2005 (188) E.L.T. 149 (S.C.)**, the Supreme Court held:

> "...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."

10. In the light of the said decisions, the impugned show cause notice issued in March 2017 with respect to several Bills of Entry filed during the period April 2012 to July 2016 is held to be barred by limitation.

11. In totality of entire above discussion, the order under challenge is hereby set aside consequent thereto, the appeal is allowed.

(RACHNA GUPTA)
OFFICIATING PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER TECHNICAL

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