

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO: C/995/2012

[Arising out of Order-in-Appeal No: 400/MCH/AC/SVB/2012 dated 5th July 2012 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

For approval and signature:

**Hon’ble Shri C J Mathew, Member (Technical)
Hon’ble Shri Ajay Sharma, Member (Judicial)**

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| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : Yes |
| 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : Yes |
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TBK India Pvt Ltd

... Appellant

versus

Commissioner of Customs (Import)
Mumbai

...Respondent

Appearance:

Shri Sanjay Singh, Advocate for appellant

Shri R Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 14/03/2019
Date of decision: 10/05/2019

ORDER NO: A/85902 / 2019

Per: C J Mathew

This appeal lies against impugned order-in-appeal no. 400/MCH/AC/SVB/2012 dated 5th July 2012 of Commissioner of Customs (Appeals), Mumbai Zone – I, which has included ‘royalty’ and ‘lumpsum fees’ in the assessable value of imports effected by them from M/s TDK Toshiba Limited, Japan, a related person of theirs. The original order dated 2nd February 2006, accepting the invoice value, came up for review on expiry of three years and the order of continuance for a further period of three years, having been renewed, was sought to be quashed in appeal. The finding of the first appellate authority, who ordered the addition of royalty of 3% and 5% of the selling price along with the lumpsum fees of ₹ 14,000,000, is challenged now by M/s TBK India Pvt Ltd.

2. We have heard Learned Counsel for appellant and Learned Authorised Representative.

3. It is noticed that an order of acceptance of invoice value as reliable guide to the 'proper officer' for assessing future imports under section 17 of the Customs Act, 1962 was disputed by reviewing authority. By setting aside that order, the first appellate authority has effectively exercised power of assessment and has confined the 'proper officer' to such assessment over goods that were yet to be imported. On a query, Learned Counsel for the appellant admitted that, while the impugned order itself did not stand in the way of imports, the continued provisional assessment of goods in compliance with the order of Commissioner (Appeals) did. Upon a specific enquiry, it was admitted that the proceedings which culminated in the impugned order had been initiated without a show cause notice; apparently, the prevailing practice is for all transactions between related persons to be subjected to such scrutiny, evaluation and direction to assessing authority.

4. The internal procedures for providing expert consultation to the statutorily empowered assessing officers, even if of long standing existence, do not vest the institution established for such purpose with statutory acknowledgement; in keeping with the tentativeness of the findings of this internal advisory mechanism, assessments, guided by the findings, are retained as provisional, under section 18 of Customs Act, 1962, till finalization on a future date. It is that potential as a trigger for resort to provisional assessment that is impugned here. As

on the date of the order-in-appeal imposing the guideline, no import had been subject to it. Nor is there any record of any detriment to importers thereafter and, if it had been an irreversible detriment, an appeal would have been resorted to as surely as night follows day. Customs Act, 1962 is concerned with levy of duty, as well as the enforcement of prohibitions, under law, on import/export goods. Other consequences such as differential duty, refund, drawback, fines and penalties may arise but only in consequence. The possible detriment that may arise on a future date is not a grievance that should be entertained unless and until it does translate as one upon occurrence of import or export of goods. We do not interfere with proceedings under section 18 of Customs Act, 1962 except if terms of such assessment is a cause of grievance. Even so, no incidence of provisional assessment is impugned before us. We are also not vested with authority to approve or disapprove an advance ruling which has yet to place on burden on goods under Section 46 of Customs Act, 1962.

5. Further, for the Tribunal to render a decision on goods that are, as yet provisionally assessed, would be a premature intervention. The time of finalization that should inevitably take place is also, as yet, uncertain. It is also apparent that procedure does not deter the finalization of an assessment for want of decision by the Tribunal or, should such need arise, by the Hon'ble Supreme Court. In other

words, the internal process of the customs administration that enables the proper officer, under section 17 or section 18 of the Customs Act, 1962, to be assisted in the discharge of the statutory obligation and, which, legally, may not even bind the proper officer does not merit our attention. To the extent that we accord approval or disapproval at this stage, we would be appropriating the exercise of powers under section 18 of Customs Act 1962 for finalization of the assessment to ourselves and, thereby, would also erase one level of remedial jurisdiction that would, otherwise, be available to either side. This, in our view, is not the intent of section 128 of Customs Act, 1962. The first appellate authority should also have similarly desisted from intervening before any provisional assessment finalised. The impact of the impugned order has been to transfigure a final assessment of the future to provisional assessment at the insistence of the Commissioner of Customs. Any grievance arising from finalization does have appellate remedies commencing with the first appellate authority.

6. Accordingly, we dismiss this appeal as premature without going into the merits of the issue.

(Pronounced in Court on 10/05/2019)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)