

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

**Customs Appeal No: 86222 of 2017
and
Customs Misc. Application No. 86676 of 2018
(on behalf of appellant)**

[Arising out of 13/KVSS(13)ADG(ADJ)/DRI, MUMBAI/2016-17 dated 27th February 2017 passed by the Additional Director General (Adjudication), Mumbai.]

S Muthusamy **... Appellant**
5th Floor, Bhupati Chambers, 13 Mathew Road, Mumbai

versus

Additional Director General (Adjudication) **...Respondent**
Directorate of Revenue Intelligence
2nd Floor, Old Building, New Custom House,
Ballard Estate, Mumbai – 400 001

WITH

(i) Customs Appeal No: 86215 of 2017 (Shri NR Jayant); (ii) Customs Appeal No: 86223 of 2017 (Shri DN Matur) and (iii) Customs Appeal No: 86224 of 2017

[Arising out of 13/KVSS(13)ADG(ADJ)/DRI, MUMBAI/2016-17 dated 27th February 2017 passed by the Additional Director General (Adjudication), Mumbai.]

APPEARANCE:

Shri Vipin Jain, Shri Akshit Malhotra, Shri JC Patel, Shri Krishna Kumar and Shri Ramnath Prabhu, Advocates for the appellants

Ms PV Sekhar, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86083-86086/2019

DATE OF HEARING:	07/02/2019
DATE OF DECISION:	06/06/2019

PER: C J MATHEW

These four appellants, S/Shri NR Jayant, S Muthusamy, DN Mathur and Dhananjay Datar, all full-time employees of M/s ABG Shipyard Ltd, are before us seeking to quash the penalties imposed on them under section 112 and section 114AA of Customs Act, 1962 in proceedings that were initiated for the allegedly fraudulent import of ‘drawings’ ostensibly for modernization and expansion of their shipyard and also for construction of vessels. In disposing off the preliminaries, it was brought to our notice that, though the imported ‘drawings’ are deemed to be goods by classification in the First Schedule of Customs Tariff Act, 1975, notification no. 12/2012-Cus dated 17th March 2012 (and its predecessor notification no. 15/2005-Cus dated 1st March 2005) exempts it from duty liability and the proceedings centred around the allegation that these, being of no use for the importer, were put through the process of import, by dispatching the ones that were already in their possession to the ostensible supplier in Singapore for facilitating transfer of money out of the country. The trajectory of the investigations, and the impugned order, focuses on the doubtful provenance, the proximate superfluity, the inflated worth and the, of the ‘drawings’ to establish that the ploy was hatched solely to enable the illegal transaction in money. The primary question, therefore, is the scope afforded by Customs Act, 1962 to address this allegation.

2. On commencement of hearing, it was contended, on behalf of Revenue, that, with the importer not having resorted to the appellate remedies available under Customs Act, 1962, the confiscation of the imported goods was not amenable to dissection by the Tribunal and that the final outcome should not, if at all, extend beyond the legality of imposition of penalty which is the statutory detriment attendant on those connected with acts of omission and commission that led to confiscability of the imported goods. A miscellaneous application for introduction of fresh grounds was also opposed vehemently as these had not been agitated before the original authority. We do concur that the adjudicating authority could not have been in possession of later judicial wisdom but, being legal submissions, cannot be denied admissibility even if raised for the first time in proceedings before us. The plea of Learned Authorized Representative that disposal of the appeals would be premature as the importer is not before us, but before the Hon'ble High Court, and may well approach the Tribunal in future does not find favour with us as there is no reason to keep the appeals of these individuals pending - more particularly, for reasons disclosed in the order directing early hearing - to await the convenience, or even the contingency, of appeal by the importer. Understandably, we shall not be ruling on the confiscation itself and intend to restrict ourselves to the role of the present appellants in relation to the import of the goods that came to be confiscated in order-in-original no. 13/KVSS(13)ADG(ADJ)/DRI, MUMBAI/2016-

17 dated 27th February 2017 of Additional Director General (Adjudication), Directorate of Revenue Intelligence, Mumbai. Not unnaturally, we may, in the course of disposal of these appeals against penalties, which are inextricably linked to the confiscability of the goods, refer to the legal and procedural aspects of import that may well throw light on the manner in which the imported goods should have been dealt with.

3. A brief narration of the facts may not be out of place. It would appear that M/s ABG Shipyard Ltd had imported consignments of 'drawing for ship/yard' along with the invoices, and other documents, issued by M/s Norcrane & Winch Holdings Pte Ltd, Singapore for a value of US \$ 104.62 million claiming classification under heading no. 49119990 of the First Schedule to the Customs Tariff Act, 1975. Of these, 12 were routed through Air Cargo Complex, Chatrapati Shivaji International Airport and 64 through Jawahar Custom House, Nhava Sheva with a total value of ₹ 5,82,18,39,747 ascertained from the declarations in the bills of entry or from the invoices. In the impugned order, all the goods, whether entered for import under section 46 or not, were ordered to be revalued at 'nil' in accordance with rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and goods in 20 of these consignments, yet to be cleared for home consumption, were confiscated under section 111 (m) of Customs Act, 1962 with option to redeem on

payment of fine of ₹ 1,00,000 besides imposing various penalties under section 112 and section 114AA of Customs Act 1962 on the importer in addition to imposing various penalties on different individuals, including the present appellants, under Customs Act, 1962. Two elements of the operative portion of the impugned order are novel and, to say the least, bizarre: on the one hand, the evidence lined up by the investigation has been collated to arrive at the conclusion that the imported goods be assessed at 'nil' value and that the shipper on record is non-existent and, yet, redemption fine has been determined on value as scrap and penalty imposed on the non-existent entity. A value, even as scrap, is ascertainable, and must, perforce, be ascertainable for assessment of any goods; the adjudicating authority was not confronted with the incorporeal and if the goods are to be redeemed, they must, in the event of exercise of option to redeem, be subject to, as per section 125 of Customs Act, 1962, liability of duty by applying the rate of duty for the revised description to the revised value. Among the multiple threads in the impugned order, it is quite conceivable that the findings on the role of the present appellants may well have been clouded by a similar lack of appreciation of the scheme of Customs Act, 1962. Indeed, as we proceed to unravel the issue before us, that does become demonstrably apparent. At this stage, it may not be out of place to reflect on a significant observation made by the Tribunal, in one of the decisions cited on behalf of the appellants and which is claimed on behalf of

Revenue, by alluding to certain portions therein, to justify the imposition of penalties, on the boundaries that are erected within the administrative structure and, at times, legislated into statute books. In the unreported decision of the Tribunal in *Knowledge Infrastructure Systems Private Limited & others v. Additional Director General, Directorate of Revenue Intelligence, Mumbai* [order no. A/86617-86619/2018 dated 31st May 2018 in appeal no. C/85234 to 85236/2017], while considering the submission on behalf of Revenue for perpetual, and overarching, authority was conferred, it was held that

‘43. Learned Special Counsel for Revenue was at pains to submit that section 111(m) of Customs Act, 1962 had been amended to overcome the impediment in the expression ‘dutiabale or prohibited’ to proceed against overvalued goods that did not entail recovery of duty and, not coincidentally, with the enactment of Foreign Exchange Regulation Act, 1973. Judicial interpretation does not support this proposition; in *Rib Tapes (India) Pvt Ltd v. Union of India & others* [1986 AIR 2014], the Hon’ble Supreme Court examined the original and amended versions of section 111 (m) of Customs Act, 1962 before holding that misdeclaration of value was not intended to be visited with the confiscation envisaged in section 111(m) prior to its amendment section. It would, therefore, appear that the sovereign legislature was sufficiently concerned with misdeclaration of value itself, and not overvaluation, *per se*, as to warrant the detriment incorporated in 1973.

and on the jurisdictional competence to pursue alleged offences

beyond that contemplated in Customs Act, 1962, and by the officers appointed thereunder, it was decided that

Therefore, section 111(m) of Customs Act, 1962 is not to be considered as a special law to deal with over-invoicing and the amendment enlarged the scope for confiscation in the event of any misdeclaration, including value, and even on goods under transshipment; the obliteration of 'dutiabale or prohibited goods' is merely an extension of that intent. That is not an angle to be pursued. In the absence of validly determined value, the breach for invoking section 111 (m) of Customs Act, 1962 is not established. In the absence of goods that are yet to be cleared for home consumption, there is no scope for invoking jurisdiction to hold the goods liable for confiscation.

before going on to elucidate that

44. *The State does not crusade. Its legislative arm enacts laws that criminalize and, to secure the State from the consequences of such crime, vests the authority to bring transgressors to book under that law in an official or agency while laying down the boundaries of such executive authority. So it is with officers of Customs. If the State has determined that the official or agency should retain perpetual jurisdiction, such express conferment of such determination cannot be called in question; a claim for such stands on a different footing and must be subject to interpretation of nexus and intent. If such jurisdiction appears to be circumscribed by the context of that law or is supplanted by another law, such unfettered wherewithal to enforce is repugnant to rule of law. Moral outrage is not the way of the law. Encroachment upon the boundaries of another agency is not the way of the law. The scope of the enactment determines*

the extent of criminality. If the law chooses not to criminalize, the tax collector can do so only at the cost of being an outlaw.'

4. All too often, misadventures are the consequence of contrived enforcement of a law, intended for a particular purpose, in situations of patent unenforceability of that law. We do not wish to tarry further on this aspect as we merely intend to caution that the superimposition of moral outrage and sanctimonious adjurements that may appeal to recipients of bundled governance over fragile logic is, nonetheless, not an embargo on exposing the situation to the proper law for testing the propriety of enforcement.

5. It would appear from this narration

'1.12.2 Facts revealed during investigation the syndicated that M/s Norcrane were neither in the business of nor are known to be offering to design Vessels, Rigs & plant machinery and supply drawings for their construction/ installation. It appeared that the impugned drawings & designs were not supplied by Norcrane group directly, but the same name sounding firm, namely NWHPL, was floated for the purpose (maybe with or without the knowledge and approval of Norcrane group) to affect those sham imports for siphoning money abroad. In order to ascertain the Association of NWHPL with Norcrane, this office mailed a letter dated 19.06.2015 to Norcrane group on their email address info@norcrane.com requesting further response with regard to their association with NWHPL. Subsequent reminders were also sent on 26.06.2015 & 14.07.2015 but they did not reply to this office mail.'

in the impugned order that the proceedings were initiated against goods that had already been cleared for home consumption as well as those for which declarations contemplated in section 46 of Customs Act, 1962 was yet to be filed, on the possible use of the ploy of import for transmitting payments to itself through a 'front' established in Singapore and has concluded that these allegations are true. In taking recourse to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the adjudicating authority appears to be guided by the relationship between the two for rejection of the value declared in the bills of entry.

6. An adjudicating authority is not obliged to restrict itself to facts elicited in investigation and could, subject to unchallenged expertise and availability of wherewithal, undertake the task of filling missing gaps or for assuring itself that the tentative conclusions, inferred from available evidence, may be confidently adopted but cannot shy away from the obligation to afford opportunity for defence or counter ensure that the noticees are afforded opportunity to defend or counter for that which has not found a place in the show cause notice. Suffice it to say, that the doubts of the adjudicating authority about the existence of the source of the imports, based on his foray into investigation, which led to firming of the conclusion that the imports were a 'sham' for siphoning money outside was not on record at any time before the adjudication order was issued.

7. Continuing in this vein, the adjudicating authority has concluded that the drawings for 'jack-up rigs' imported in 41 consignments with a value of ₹ 2,02,84,76,993 could not have been put to use at the Dahej facility as the work in progress on such vessels were at an advanced stage and in accordance with design supplied by a reputed Houston-headquartered enterprise.

8. According to the impugned order, 'drawings' for vessels were imported against 14 bills of entry, declaring the value as ₹ 1,86,59,37,365, even though eight vessels were already under construction in accord with the designs imported from various other entities and at stages of development that obviated the need for more 'drawings.' Likewise, eleven imports of 'drawings' for 'ship lift & transfer systems' with the declared value of ₹1,37,69,75,389, including four consignments invoiced at ₹67,28,73,615, as yet pending clearance at Nhava Sheva were also held to be of no use to the importer. The ten consignments, pertaining to 'panel production line', invoiced at ₹55,04,50,000, yet to be claimed for clearance against bills of entry were also similarly found to be related to work that was either being undertaken or had been completed by resort to expertise provided by other entities. On these bases, it was concluded by the adjudicating authority that the imports of ₹582.18 crores

*'1.15.4.... had no commercial or functional utility for ABG.
The import of these drawings was a sham-a mere cover for*

enabling to fraudulently obtain Letters of Credit from their banks and thereby fraudulently remit forex overseas in the guise of such imports.'

9. It would thus appear that the conclusion of 'nil' commercial value was not a reflection of the utility of the 'drawings' themselves to a builder of ships but of superfluity in the present operations of the importer. This undeniably philosophical approach to valuation, however, has no place in section 14 of Customs Act, 1962 which specifies the parameters for acceptance of a declared price and the rigorous mechanics for determination of a substitute value by the assessing officer should such need arise and which, manifestly, is a reflection of commercial approach to valuation that has nought to do with the uses to which an importer may put the imported goods to.

10. It was further determined by the adjudicating authority that the imported goods had been prepared at the Dahej facility of the importer by making minor alterations in the drawings originally procured from genuine sources and already in their possession. The evidence for this appears to be the retention of certain marks of the original while making the alterations and the record of alterations within the system was found to be attributable to certain individuals deployed at the Dahej facility.

11. It would also appear that the adjudicating authority frowns with disfavour on the internal mechanism by which approval was accorded

to the purported procurement of the impugned goods for not being appropriately elaborate for such huge investments. It would also appear that the placing of the purchase orders was, in the absence of the persons who were concerned with it or their inability to offer a credible explanation, considered to be dubious. The absence of additional particulars in the declarations entered in the bills of entry was also held to be an impediment to proper valuation of the imported goods. The goods that were, as yet, pending for clearance by M/s ABG Shipyard Ltd, or any other person, were also subject to the same treatment of having the value, as yet undeclared for the purposes of section 46 of Customs Act, 1962, rejected and revised downwards.

12. It is seen that though the confiscation was restricted to the goods contained in 20 consignments that had, as yet, not been entered for clearance at Jawahar Custom House, Nhava Sheva and at the Air Cargo Complex, Chatrapati Shivaji International Airport; the penalty under section 112 is, however, related to the detriment visited upon the entirety of the goods. Invoking section 112 (a) of Customs Act, 1962, the impugned order has imposed penalty of ₹10,00,000 on S/Shri Dhananjay Datar, S Muthusamy, DN Mathur and NR Jayanth. For a clearer understanding of the justification, it may be worthwhile to recollect the other provision invoked, viz.,

13. *'114 AA Penalty for use of false and incorrect material.-If a person knowingly or intentionally makes, signs*

or uses, or causes to be made, sign or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of the goods.'

for imposition of separate penalty of ₹ 5,00,000 each on S/Shri Dhananjay Datar, S Muthusamy, DN Mathur and NR Jayanth. The latter, doubtlessly, stands on its own and is applicable to documentation utilised for the business of transacting in relation to customs law. The former, however, cannot be separated from the provisions for confiscating of imported goods.

14. The facts narrated *supra* are a summation of the submissions made by Mr JC Patel and Mr Vipin Kumar Jain with Mr Krishnakumar, Mr Akshit Malhotra and Mr Ramnath Prabhu, appearing for the appellants, and Ms P Vinitha Sekhar, appearing for Revenue, on various days on which the hearings were held and concluded. The observations therein are our own flagpoles to guide us through the slalom run that this adjudication order is. We have recorded only such of both as, in our opinion, are essential to the task that we set for ourselves at the very beginning.

15. In our opinion, there are two aspects that should be considered in every appeal challenging imposition of penalty: whether the pre-requisites of competence have been fulfilled and whether the penalty itself is disproportionate with the *gravitas*. As the penalty imposed

under section 112 of Customs Act, 1962 assailed in these appeals is the consequence of liability to confiscation under section 111 of Customs Act, 1962, it is but natural for the confiscation itself to be questioned on grounds of competence and circumstances. We are compelled to deal with the legal arguments posited for and against the confiscation even if the appellants before us do not have the *locus* to seek the quashing of confiscation.

16. Learned Counsel contends that the Tribunal, in *re Knowledge Infrastructure Systems Private Limited*, had occasion to deal elaborately with an adjudication order that had been assailed for confiscating imported goods, under section 111 (m) of Customs Act, 1962, and for imposing penalties under section 112 and section 114AA of Customs Act, 1962, on the premise that, even in the absence of any prejudice to duty that was leviable, resort could be had to the machinery prescribed for computing the value in circumstances envisaged by section 14 of Customs Act, 1962 and argues that the goods impugned herein, being neither prohibited nor liable to recovery of any duty that was short-paid at the time of import, could be confiscated under section 111 (d) of Customs Act, 1962 in the impugned order only by breaching the law.

17. Further contending that the genesis of section 14 of Customs Act, 1962 is Article VII of the General Agreement on Tariffs and Trade, which sets forth, and limits, the applicability of valuation in the

customs law to

‘1. The contracting parties recognise the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon a regulated in any manner by value.’

and that Article I in the Brussels Definition of Value has also similarly limited the Agreement to the levying of *ad valorem* duties of customs, reference was invited to Article 15, dealing with various expressions in the Agreement, which assigns the description

‘the value of goods for the purposes of levying ad valorem duties of customs on imported goods;’

to ‘customs value of imported goods’, for sustaining the cavil against resort to the valuation provisions for confiscating goods that are not liable to duty.

18. The competence to impose penalty when duty is not leviable is assailed by relying upon the decision of the Tribunal in *Lalitpur Power Generation Co. Ltd v. Commissioner of Customs, New Delhi [2017 (356) ELT 82 (Tri-Del)]* which discountenanced confiscation and penalty thus

‘45. We further note that admittedly the imported drawings and designs is exempted in terms of Notification No. 12/2012-

Cus., dated 17-3-2012 and no Customs duty is required to be paid on the same even if the said import is treated to be import of goods. The Tribunal in the case of Sahil Diamonds Pvt. Ltd. v. CC [2010 (250) E.L.T. 310] has held that inasmuch as the import of rough diamond were exempted from payment of duty, no penalty can be imposed upon the importer in terms of the provisions of Section 112 of the Customs Act. The said decision of the Tribunal stand confirmed by the Hon'ble Supreme Court reported as CC v. Sahil Diamonds Pvt. Ltd. [2010 (257) E.L.T. A22 (S.C.)]. Identical situation is available in the present case also when the import of design and drawings is exempted in terms of Notification No. 12/2012-Cus., dated 17-3-2012, the charge of overvaluation of the same cannot be sustained inasmuch as no valuation is required to be arrived at by the Customs. We are of the view that in such circumstances neither the goods can be confiscated nor any penalty can be imposed upon the appellants.

In view of the above, it is seen that the receipt of drawing and designs by the appellant from M/s. CIPL was admittedly part of the rendered service on which the appellant has already discharged their Service Tax liability under reverse charge basis. The said payment of Service Tax stand accepted by the Revenue. When the appellant brought the said fact to the notice of the adjudicating authority, he simply dismissed it without giving any concrete finding on the same. The appellant have already discharged the Service Tax on the said receipt of drawings, we are of the view that there was no further requirement to file Bill of Entry with the declared value. It may also be noted that while charging the Service Tax, the Revenue has nowhere disputed the value of design and drawings and have accepted the same value as correct

value of the services. In this scenario also, the Revenue stand adopted in the present proceedings cannot be adopted.

46. Apart from referring to certain irregular procedural contraventions for which the appellants have tendered a reasonable and justifiable explanation, the Revenue on the contrary, has not made any endeavour to find out the correct value of the design and drawing. There is virtually no evidence on record, to support the Revenue's finding that the drawing and designs are having no intrinsic value. Such finding of the adjudicating authority are based upon his own assumptive surmises and conjectures and not upon any legal and valid evidence on record.'

19. Incidentally, the decision of the Tribunal in *Sahil Diamonds Pvt Ltd v. Commissioner of Customs, Ahmedabad* [2010 (250) ELT 310 (Tri-Ahmd)], relied upon in *re Lalitpur Power Generation Co Ltd* as having been approved by the Hon'ble Supreme Court, was no less strident in observing that

'26. As regards penalty, we take note of the Tribunal's decision in case of Suraj Diamonds (India) Ltd. v. CC (Airport) Mumbai, 2008 (227) ELT 471 (Tribunal) = 2008 (86) RLT 400 wherein Tribunal by taking note of the precedent decisions in case of M/s. Nalakath Spices Trading Co., 2007 (213) ELT 283 (Tribunal) = 2007 (80) RLT 797 (CESTAT-Bang.), Shree Subhadra Industries v. CCE Chennai, 2001 (137) ELT 1405 (Tri.-Chennai) and M/s. Jay AR Enterprises, 2007 (210) ELT 459 (Tribunal) = 2007 (79) RLT 291 (CESTAT-Chennai) has held that inasmuch as import of rough diamonds were exempted from payment of duty and were not dutiable, no penalty can be imposed under

the provisions of Section 112 of the Customs Act, 1962. By following the above decision of the Tribunal, we hold that no penalty is imposable upon any of the appellant. In any case, having held that the value as declared by the appellant was correct value, imposition of penalties upon them is not justified. The same is, accordingly, set aside.'

20. On behalf of the appellants, it is further contended that the rules of valuation of imported goods may not be available for invoking as a remedy for suspected overvaluation as it would appear from the declaratory element in rule 12 of Customs Valuation (Determination of Value of Imported Good) Rules, 2007 for removal of doubts making it amply clear that the 'proper officer' may invoke it in the specific circumstances enumerated therein including that of availability of imports at higher prices. Taking this line of argument further, it was posited that had it been the intent of the Parliament to confer the power to alter the values downward, express provisions as exist in Explanation (1)(iii)(b) of rule 8 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007 would have been enacted.

21. Moving on to other aspects of the impugned order, it is contended by Learned Counsel that there is no finding that the appellants had anything to do with declaration of value in the filed bills of entry and there is no evidence on record of preparation of 'drawings' or placement of purchase orders by the appellants. It is

further contended that the impugned order has misconstrued section 111 (m) of Customs Act, 1962 as a weapon against an alleged act of remittance outside the country. It is also argued that findings, based on statements that were not subjected to the rigour of section 138B of Customs Act, 1962, cannot be sustained for which reliance is placed on the decision of the Hon'ble High Court of Delhi in *Basudev Garg v. Commissioner of Customs* [2013 (294) ELT 353 (Del)]. Raising further doubts on the acceptability of the impugned order, Learned Counsel drew attention to the letter of the importer addressed to Directorate of Revenue Intelligence on 16 June 2016 seeking access to the seized documents and devices to enable submission of a proper response.

22. Besides taking us through the findings of the adjudicating authority and the evidence collected by the investigating agency, Learned Authorised Representative submitted that the case against importer was that 'drawings' in their possession were manipulated for sending outside the country to enable bringing them back with the purpose of providing a legal cover for remitting money abroad. It is her submission that the confiscation, for which the prerogative of appeal vested only in the importer, should remain intact in the absence of an appeal by the aggrieved entity. It is further contended that it may be premature for the Tribunal decide upon the confiscability when that was pending before the jurisdictional High Court. She also objected to

the fresh grounds that are being argued now before the Tribunal as the adjudicating authority did not have an opportunity to render a finding on those for which reliance is placed upon the decision of the Hon'ble Supreme Court in *Commissioner of Customs & Central Excise, Goa v. Dempo Engineering Works Ltd* [2015 (319) ELT 359 (SC)]. It is further contended that grounds that were not embodied in the appeal could also not be raised during the oral arguments and relied upon the decision in *re Dempo Engineering Works Ltd* for remand of the matter back the adjudicating authority even if confiscation was held to be untenable.

23. According to her, the decision in *re Lalitpur Power Generating Co Ltd* had placed reliance upon the decision of the Tribunal in *re Sahil Diamonds Pvt Ltd* whereas, in *Parkash Sancheti v. Commissioner of Customs, Ahmedabad* [2013 (292) ELT 273 (Tri-Ahmd)], the Tribunal, dealing with overvaluation of 'rough diamonds', upheld the confiscation and imposition of penalty. This, not having been placed before the Tribunal during the disposal of the appeal, should, she opines, exclude the application of the decision in *re Knowledge Infrastructure Systems Private Limited* as precedent binding in any other dispute. She also relies upon

'43..... We have no doubt that overvaluation is also a breach that leads to confiscation after the amendment. For the record, despite the pre-amended section 111

‘(m) any dutiable or prohibited goods which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77’

and the notes on clauses of the bill for enactment of Act 36 of 1973 explicitly referring to over-invoiced imports, their Lordships did not forbear to decide that

‘It is not in dispute that a penal provision has to be strictly construed and reading Sec. 111 (m) before the amendment it is not possible to draw an inference that any difference in material particulars may be referable to ‘value’. This argument therefore can not be accepted. The scheme of Sec. 111 (m) as it stood then nowhere referred to the difference in value as one of the ingredients which may attract this provision. In such a situation therefore if it is not the specific intention of the provision, a difference in respect of value therefore could not be said to attract this provision and on that basis no penalty could be imposed.’

Therefore, section 111(m) of Customs Act, 1962 is not to be considered as a special law to deal with over-invoicing and the amendment enlarged the scope for confiscation in the event of any misdeclaration, including value, and even on goods under transshipment; the obliteration of ‘dutiable or prohibited goods’ is merely an extension of that intent. That is not an angle to be pursued. In the absence of validly determined value, the breach for invoking section 111 (m) of Customs Act, 1962 is not established. In the absence of goods that are yet to be cleared for home consumption, there is no scope for invoking jurisdiction to hold the goods liable for confiscation.

of the Tribunal in *re Knowledge Infrastructure Systems Private*

Limited to contend that valuation could yet be re-determined in the present dispute.

24. There can be no doubt that arguments have been advanced on behalf of the appellants that were not before the adjudicating authority or did find a place in the grounds as preferred at the time of filing of the appeal. The submissions that are now put forth arise from questions of law that have been settled subsequently and which was not available when the impugned order was issued. Moreover, there is a substantial difference between raising fresh grounds of law and fresh grounds of fact at the appellate stage; as the latter must needs be verified before being accepted and such verification is not normally feasible for an appellate authority to undertake, fresh factual grounds are not admitted for settlement of disputes at the appellate stage. We, therefore, do not think that the decision *in re Dempo Engineering Works Ltd*, which was concerned with the controversy of marketability impacting classification, a question of fact, and, that too, without assigning reasons, requires us to refer any aspect of the fresh grounds, entirely on law, back to the adjudicating authority.

25. As for the contention that the decision *in re Knowledge Infrastructure Systems Private Limited* is not a binding precedent, for having been passed *per ignoratium* of the decision *in re Prakash Sancheti*, we are unable to agree. While the Tribunal, *in re Prakash Sancheti*, did differ from the earlier decision *in re Sahil Diamonds Pvt*

Ltd, it was limited to the propriety of offering the right to redeem goods that were confiscated in the light of the prescription of the Central Board of Excise & Customs on non-availability of Kimberly Process Certificates. Diamonds, being imported generally for processing and export, are not usually subject to disputes on the extent of jurisdiction to re-open assessments. Neither of these two decisions, therefore, had cause to examine the legal aspects that were before the Tribunal in *re Knowledge Infrastructure Systems Private Limited*. Probably, Learned Authorised Representative was emboldened to suggest discarding of this precedent by the citing, on behalf of the appellants, of the decision in *re Lalitpur Power Generation Co Ltd*, which relied upon the decision in *re Sahil Diamonds Pvt Ltd*, and gave an opportunity to raise the contrary decision in her arguments. We can safely assume that Learned Counsel did so because the decision in *re Sahil Diamonds Pvt Ltd* found favour with the Hon'ble Supreme Court whereas the other decision cited is, as yet, untested. We would not be prejudicing judicial consistency in overruling this suggestion of Learned Authorised Representative because a decision which did not have an opportunity of examining a legal aspect that lies at the root of exercise of jurisdiction is no precedent for contending that a subsequent decision, which did, is bad law. A case law that is built on the shifting stands of jurisdiction, accepted by consent, is not comparable with one that is erected on the foundation of jurisdictional competence which was, itself, contested and argued

upon by the rival sides.

26. As the decision in *re Knowledge Infrastructure Systems Private Limited* appears to be of consequence to both sides, it is necessary for us to devote some space to an elaboration of its applicability. In the normal course, it would be considered proper for us to extract the relevant portions of the cited decision but we may, instead, be permitted the privilege of summing those for our benefit here as one of us was a constituent of the bench which rendered that decision.

27. In that dispute, the adjudicating authority had substituted the declared transaction value, with what, according to his finding, was the original transaction value. It was not rendered in the context of rejection of declared value under rule 12 (or rule 10 A in the predecessor Rules of 1988) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 with attendant re-determination under one of the sequentially applicable methods prescribed in the Rules. The controversy pertained to the alleged attempt by the importer therein to pass off allegedly sub-standard goods as that of prime quality with alleged intent to deceive the ultimate consumer and to whisk away the unearned consideration out of the country. Therein lies the nub in the structured exposition of the scheme of valuation in *re Knowledge Infrastructure Systems Private Limited*.

28. The Tribunal, in *re Knowledge Infrastructure Systems Private Limited* placed emphasis on *nexus* as the *vitalitas* in the enforcement of tax laws. Drawing upon the dissenting judgement in *The Tata Iron & Steel Co Ltd v. The State of Bihar [1958 AIR 452]* on *nexus* that was adopted as the correct constitutional intent of levy of sales tax by the Sixth Amendment, the statutory limitation on jurisdiction was superimposed with the scheme of Customs Act, 1962 as intended to deal with ‘imported’ and ‘export’ goods having the especial meaning assigned to them in section 2 of Customs Act, 1962. On reading of section 47 of Customs Act, 1962 with the restricted window for describing goods as ‘imported’, it was held that, as the cross-over from being ‘imported’ on clearance for home consumption could be deprived only upon one of two conditions – failure to discharge of duty liability prescribed by law or goods being prohibited – such clearance erases the ‘imported goods’ out of existence except on proving that duty was short-paid or that the prohibition on the import of goods escaped the attention of the ‘proper officer’; section 28 of Customs Act, 1962, for a limited time, and section 111 of Customs Act, 1962, without limit, permit restoration of the tentative clearance for home consumption of goods to that of ‘imported.’ Accordingly, it is not open to re-visit an assessment unless short-paid duty was to be recovered or prohibition was to be enforced as the *nexus* with ‘imported goods’ is restricted to these two aspects of clearance.

29. It was further held, in *re Knowledge Infrastructure Systems Private Limited*, that the submission of Revenue of section 111 of Customs Act, 1962 being a means and an end, all on its own, could not only draw upon the definition of ‘value’ in section 2 (41) of Customs Act, 1962 for resort to section 14 (1) of Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for quantification was not tenable as the ‘valuation’ intended by the amendment, effected in 1973 to section 111(m) of Customs Act, 1962 was not with reference to ‘overvaluation’ alone, as held by the Hon’ble Supreme Court in *Rib Tapes (India) Pvt Ltd v. Union of India & others [1986 AIR 2014]* and, therefore, not a special law conferring limitless powers to authorities under Customs Act, 1962. It was thus concluded that this submission of Revenue fell within the Kelsen categorization as ‘jurisprudential interpretation’ which, without *nexus*, would not succeed as an acceptable proposition. Indeed, as pointed out in the decision, the adjudicating authority did not essay in that direction at all.

30. Therefore, the decision in *re Knowledge Infrastructure Systems Private Limited*, with its emphasis on the ineffaceable *nexus* with collection of duty and enforcement of prohibition, places a limiting framework on the invoking of the detriment contained therein only to such aspects of any show cause notice to the exclusion of all others. There is no perpetual jurisdiction to re-visit an assessment except for

the twin objectives, enshrined in Customs Act, 1962, for levy of duty and enforcement of any prohibition. It is for the State to acknowledge the threats to its existence for establishing the means to survive these. The State does not, without express intention in a statute, expect its various organs to delude themselves into believing that only one law and one agency is necessary, or can, guard the interests of the State.

31. Unlike in that dispute, the investigating agency resorted to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to justify the rejection of declared value and to infer a substitute value merely to justify the invoking of the provisions for confiscation. Indeed, at this stage, we would be serving the larger cause of the law by examining the scope for determining the nature, or the existence, of offence when goods are subject to re-valuation. Before the insertion of rule 10A in the erstwhile Customs Valuation (Determination of Valuation of Imported Goods) Rules, 1988 (rule 12 of the present Rules), the judicial decision governing rejection of transaction value was that of the Hon'ble Supreme Court in *Mirah Exports Pvt Ltd v. Collector of Customs* [civil appeal no. 1030-34/90 decided on 4 February 1998] requiring any re-valuation to be a consequence of discharge of onus by customs authorities to establish that the declared value did not reflect the transaction. In such circumstances of having evidenced flow of funds other than that declared in the bill of entry, the invoking of confiscation under section

111(m) of Customs Act, 1962 may have been justified. With the mechanism of valuation having been transfigured, by placing the importer on notice of non-acceptability of the declared price before proceeding to re-value the goods, in the absence of acceptable defence, the question of confiscation under section 111 (m) of Customs Act, 1962 brings up the spectacle of administrative overreach. Value is susceptible to many interpretations and definitions. For the purpose of levy of duties of customs, certain rules of engagement, universally acknowledged, are enacted in the statute and the governing Rules. Mere application of the Rules for enhancement of value does not carry with it the stigma of mis-declaration. To do so would be to place a premium on, and accord a finality to, the value arrived at for the limited objective of levy without in any way impinging upon the contractual obligation between buyer and seller operating in a commercial marketplace. Therefore, it will be essential for an adjudicating authority to establish that the difference between the assessed value and the declared value arises from circumstances in which there has been an attempt to conceal the real transaction in money. In the absence of such evidence, goods that are burdened with re-valuation, conceived from comparison with other imports, should not be further burdened by confiscation which was intended as a definitive consequence of the committing of an offence. We dare say that it is in these circumstances, re-valuation of imported goods, as existing then, that

the overvaluation, referred to in amending of section 111 (m) of Customs Act, 1962, was contemplated by the sovereign legislative organ of the Union for incorporation as justifying the detriment of confiscation. That this was the interpretation of Revenue too is apparent in the adjudication of the dispute, that was eventually set aside by the Tribunal in *re Knowledge Infrastructure Systems Private Limited*, by refusing to indulge in resort to the Rules though in the oral submissions such a possibility was argued at length. The penalties under section 112 of Customs Act, 1962 in this dispute, a consequence of finding of overvaluation that assigns a proximate value after resorting to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 without any record evincing that the importer was the beneficiary of any money flows except by surmises, are deficient in legal sustenance.

32. In the present dispute, we find that the discharge of onus to establish mis-declaration is only peripheral as a presumed relationship between the exporter and the importer was held to suffice for indulging in re-valuation. Though such has not been argued before us, we are of the opinion that even this relationship between the two has not been tested against the touchstone of rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and has, instead, relied upon certain presumptions derived from the enunciation in the report of the investigation agency.

33. In these circumstances, it does not behove us to dwell at length on the logic applied by the adjudicating authority. We, instead, reiterate that the decision *re Knowledge Infrastructure Systems Private Limited* on lack of jurisdiction to take recourse for re-valuing of goods after clearance without any duty implication is one that binds. The argument of Revenue in defence of the order herein was that detrimental consequence of overvaluation and creation of a purported cross-border transaction could be visited upon importers with the penal provisions in section 112 of Customs Act, 1962 and section 114AA of Customs Act, 1962. It was posited that section 111(m) of Customs Act, 1962 was specifically endowed with the provision pertaining to value in order to check overvaluation. We have no doubt that this was so. However, the Tribunal did not find it justifiable for that provision to be invoked when the allegation of overvaluation flows from a fictional assumption of incorrect declaration incorporated in the valuation mechanism for the limited purpose of levy of duty. Undoubtedly, overvaluation, when established with sufficient evidence of money flow to beneficiaries, other than the seller, would justify the invoking of section 111 (m) of Customs Act, 1962 as enacted by the sovereign legislature of the Union. Any other circumstantial evidence which may justify the invoking of the Rules flowing from section 14 of Customs Act, 1962 will not suffice for the purpose.

34. In the present dispute, it is not necessary for us to examine the question of jurisdiction and to assess the extent of conformity of the evidence with the rigours prescribed in the statute, and of the principles of natural justice, as has been argued, supported by judicial decisions, on behalf of the appellants. In addition to the inexplicability of resort to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 discussed *supra*, we find that the penalties have been imposed under section 114AA of Customs Act, 1962 with reference to the value adopted for the purposes of redemption of the confiscated goods and that penalty under section 112 of Customs Act, 1962 has stemmed from confiscation for alleged misdeclaration of value. It is only logical and rational to expect the equal application of value, assuming that adoption of such value is sanctified by law, for all purposes under the Act; we find here that while the value has been determined as 'nil' for assessment of the bills of entry, a different value has been insinuated for redemption with the ostensible justification of the goods being 'scrap' in which we find a fundamental contradiction. If the goods are redeemable, for being 'scrap', the nature of the 'scrap' should have been determined with reference to the heading in the First Schedule to the Customs Tariff Act, 1975 as duty liability should inevitably be discharged even on 'scrap'. This leap of 'unreason' is neither consistent with section 12 of Customs Act, 1962 mandating levy of duty on goods nor with section 125 of Customs Act, 1962 mandating discharge of duty liability on

redeemed goods. The adoption of 'nil' value for assessment is also discardable as based on 'unreason' for having been determined in terms of utility to the importer which is conceptually repugnant to section 14 of Customs Act, 1962. The quantification of the penalties is, therefore, not sustainable in law. It is also noticed that section 114AA of Customs Act, 1962 has been invoked for the role of the appellants in allegedly fabricating the 'purchase order.' This document was, apparently, not furnished, nor required to be furnished, with the bills of entry. These were first called for, as per the adjudication order, during the investigations. The existence of, and the contents in, that document does not have any significance to, or nexus with, the situation referred to in section 114AA of Customs Act, 1962. It certainly could not have had anything to do with the uncleared consignments as no declaration under section 46 of Customs Act, 1962 is on record.

35. The allegation that the 'drawings' were manufactured in India and exported is based on certain premises and inferences; while we forbear from venturing into the legality and propriety of such conclusion in the absence of an appeal with appropriate *locus*, the legal consequences of such an assumption cannot go unnoticed. Under section 20 of Customs Act, 1962, goods that have originated in India are, on subsequent import, to be given the same treatment as any other imported goods. There is a privilege that flows from such origin and

that privilege is the abatement of certain duties to be claimed by the importer with reference to the exemption notification issued under section 25 of Customs Act, 1962. There is no doubt that this privilege has not been sought for and the declining of this privilege cannot be construed as an offence or be held against any person. In the absence of a claim for such privilege, the appropriate rule in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 must needs to be invoked for ascertaining the assessable value. That has not been carried out in the impugned order.

36. There can be no offence in re-import of validly exported goods. Though facts have been collated to consider the impugned goods as re-imported, there is no evidence on record of exports having taken place. It would be reasonable to presume that re-import must be evidenced by the *factum* of export or, in the absence of such, by allegation of wrongful export. In the clear absence of record of export, no credence can be given to this assumption, without invoking the consequence of illicit export, and which has then gone on to attribute responsibility for such to the appellants herein. The penalties must fail on that flimsiness too.

37. If the 'proper officer' was not in doubt about the origin of the impugned 'drawings' and intended that the consequence of that origin, whether favourable or detrimental to the importer, be visited on the goods, it was incumbent upon that authority to proceed under that

provision of the law. We see no manifestation of such application. Whether on a claim for exemption under notification no. 12/2012-Cus dated 17 March 2012 (or the predecessor exemption) or the exemption governing goods of Indian origin, there is no duty implication. The declaration, acceptable or otherwise, in the bill of entry is, therefore, of no consequence. In these circumstances, the scope for imposition of penalty under section 112 of Customs Act, 1962 does not arise.

38. For the above reasons, we have no hesitation in setting aside the impugned order and allowing the appeals.

(Order pronounced in the open court on 06/06/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)