CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 88295 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88296 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88297 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88298 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88299 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88300 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88301 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88302 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88303 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88304 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88305 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88306 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88307 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88308 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88309 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88310 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88311 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

AND

Customs Appeal No. 88312 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

WITH

Customs Appeal No. 85334 of 2020

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-539 to 557/2019-20 dated 27.09.2019 passed by Commissioner of Customs (Appeals), Mumbai-III)

M/s. V K Impex **Appellant**
Flat No 335-A,
Janta DDA Flats, Ground Floor,
Gazipur, Near Kamal Hotel
Delhi 110096

Vs.

Commissioner of Customs (ACC Imports), **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai

Appearance:

Shri Ashok Singh, Advocate, for the Appellant
Ms. Trupti Chavan, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85745-85763 /2020**

Date of Hearing: 08.09.2020
Date of Decision: 08.09.2020

PER: SANJIV SRIVASTAVA

Appellants had imported Cut Orchid Flowers (Dendrobium Hybrid) of various varieties and colour mainly from Thailand. They filed nineteen Kutcha Bill of Entries (detailed below in Table - I) for the clearance of the same.

S No	Bill of Entry Number	Date	Date of Assessment Order
1	2994677	26.04.2019	26.04.2019
2	2876806	17.04.2019	17.04.2019
3	2895116	18.04.2019	18.04.2019
4	3518558	04.06.2019	04.06.2019
5	3747977	21.06.2019	21.06.2019
6	3747984	21.06.2019	21.06.2019
7	3680367	17.06.2019	17.06.2019
8	3730968	20.06.2019	20.06.2019
9	3699378	18.06.2019	18.06.2019

10	3665829	15.06.2019	15.06.2019
11	3665423	15.06.2019	15.06.2019
12	3648258	14.06.2019	14.06.2019
13	3632895	13.06.2019	13.06.2019
14	3992003	09.07.2019	09.07.2019
15	3910289	03.07.2019	03.07.2019
16	3573291	08.06.2019	08.06.2019
17	3617290	12,06,2019	12,06,2019
18	3555812	07,06.2019	07,06.2019
19	3895913	02.07.2019	02.07.2019

2.0 These bills of entries were system appraised on the basis of the declarations filed by the Appellants. However on the basis of the certain market enquiries conducted, the department was of the view that goods were undervalued and hence asked the appellants to pay duty on the enhanced value. Since the goods were perishable, appellants paid the duty on enhanced value and took the clearance of these goods. Subsequently they challenged the demand of duty by way of nineteen appeals filed before the Commissioner (Appeal) stating the following grounds:

I. *That the above said Bs/E were filed on various dates and the appellant* was *asked to pay additional duty which was duly paid by the appellant and the appellant has discharged differential duty before issuance of show cause notice.*

II. *That there is no computation of this duty amount, there is no indication as to which value has been adopted for this calculation. Therefore, the increase in duty is totally arbitrary and without sanction of law.*

III. *That no reason has been given to the appellant for increasing the declared value. No contemporaneous imports have been examined, no similar goods have been examined as per the Customs Valuation Rules.*

IV. *It is most abundantly clear that the goods have not been undervalued and the appellant has declared the true value of the flowers. Therefore, the duty that has been forcefully deposited by the appellant is illegal and unjust and merits to be refunded to the* *appellant.*

3.0 These appeals were decided by the Commissioner (Appeal) by the impugned order holding as follows:

"7. I have carefully gone through the facts of the case and considered the submissions. I have also considered the comments furnished by the department in respect of the differential duty levied in the impugned 19 Bs/E. I find that the appellant has challenged the less charge demand issued under section 28 of Customs Act, 1962 by the Proper Officer for payment of differential duty on account of valuation of goods. I find that section 28(1)(b)(ii) provides for payment of such short levy of duty ascertained by the proper officer and the less charge demands issued to the appellant by DC/Direct Delivery are covered under the said sub section. Needless to say the 'Notice referred under section 28(1)(a) is required to be issued only if the person fails to deposit the duty communicated under section 28(1)(b)(ii). When even after service of 'Notice under section 28(1)(a), the duty demanded is not paid, in that situation only such 'Notice' has to be followed by determination /confirmation of demand by the proper officer after providing him an opportunity of hearing and considering his representation. It appears that in the case at hand the case was at the very initial stage of communication of less charge demand under section 28(1)(b)(ii) of Customs Act, 1962 and the appellant had paid the differential duty.

8. I also find that subsection (4) of section 17 of Customs Act, 1962 empowers the proper officer to re-assess the duty on account of valuation or for any other reason. I also observe that the counter submissions made by the Revenue suggest that the appellant had given in writing his consent about paying differential duty on account of valuation of impugned goods. It is the case of Revenue that there was information of under-valuation by importers of fresh flowers and accordingly a detailed market survey was conducted on two different dates and values of different type of fresh flowers were determined based on such market survey and following deductive value method (Rule 7 of Customs Valuation Rules, 2007) It is worth observing that the impugned bills of entries were "Kacha Bill of Entry" which are "system appraised" based on self-declaration of the importers and an *automatic duty challan is generated and printed along with the Bill of Entry without any human intervention for assessment of duty. As such, keeping in view the perishable nature of cargo, the Customs is left with the only option of issuing less charge demand 28(1)(b)(ii) and therefore the action on part of Revenue is justified. If the appellant was aggrieved, a request could have been made before the proper officer for provisional assessment of duty under section 18 of Customs Act, 1962 or for issuance of speaking order under section 17(5) ibid.*

9. I find that prima facie the appellant is not in agreement with the manner by which his declared value has been proposed to be re-determined which resulted into issuance of less charge demand. In this regard, I find that Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Amendment Rules, 2007 provides that:

12. Rejection of declared value. -

(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.- (1) For the removal of doubts, it is hereby declared that:

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the

declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9..

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers. (iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value; o the fraudulent or manipulated documents.

10. During the course of personal hearing, it was represented that for 16 cases, there is a contract for the period from 01.05.2019 to 30.04.2021 which shows further reduction in the price. The said contract purposefully mentions goods of 'c' grade quality and the length as 'small and medium". The contract is conditional to the effect that "a constant purchase cycle to be maintained for the whole period". In this regard I observe that if the declared value involves exclusive price offer or abnormal discount and / or is subject to some condition, it cannot be accepted under section 14 ibid read with CYR, 2007 and that by itself will be a sufficient reason to reject the declared value. The price should be at arm's length i.e. ordinary competitive price and should not be influenced by any considerations. I also find that being direct delivery goods under KBE (Kacha Bill of Entry) procedure for fresh flowers, the Revenue issued 'less charge demand' and / or asked the appellants to pay differential duty as per the values determined by the Revenue under deductive value method

(Rule 7 of Customs Valuation Rules, 2007) and the appellant has paid the differential duty. In the circumstances as discussed above, I do not find any merit in the submissions of the appellant to interfere in the action done by Revenue in terms of section 28(1)(b)(ii) of Customs Act, 1962 which has been culminated into deposit of differential duty The stage of issuance of 'Notice' under section 28(1)(a) and subsequent requirement under section 28(8) of Customs Act, 1962 are not attracted in the facts and circumstances of the case.

11. However, keeping in view the fundamental principles of natural justice, I observe that the appellant has the right to be heard and given an opportunity of making submissions before the proper officer to justify fairness of the declared value. At the same time the Revenue shall be at full liberty to conduct thorough inquiry for determination of fair prices, taking help of NIDB of Directorate of Valuation and / or verification of export declarations made at the country of supply by overseas sources and / or any other investigation."

4.0 This order of Commissioner (Appeal) has been challenged by way of nineteen appeals which are before us. We have heard Shri Ashok Singh, Advocate for the Appellants and Ms Trupti Chavan, Assistant Commissioner, Authorized Representative for the revenue.

5.0 Arguing for the Appellants, learned Advocate submits:

(a) Though the Commissioner (Appeals) has remanded the case to the adjudicating authority for de novo decision as per paragraph No. 11 of the impugned order, but on the other hand, vide paragraph No. 10 of the same order, he has already given a finding that the department had sufficient reason to reject the declared value.

(b) He has also justified the action of the department to recover an extra amount from the Appellant without issue of any show cause notice.

(c) In effect, therefore, the Commissioner (Appeals) has already tied the hands of the adjudicating authority by giving definite findings on all the issues involved in this case.

(d) In the circumstances the directions to re-adjudicate the case becomes just an empty formality. It is clearly not an open remand so much so that the adjudicating authority will be bound to allow the decisions of the Commissioner (Appeals) both on the facts recorded therein as well as the findings on the merits of the case.

(e) Thus the findings recorded by the Commissioner (Appeal) at para 7, 8 & 10 which go contrary to the spirit of para 11, while remanding the matter for de-novo consideration, should be deleted from the order of Commissioner (Appeal) and matter be remanded in all nineteen cases back to the original authority for fresh consideration keeping all the issues open.

6.0 Arguing for the revenue learned Authorized Representative re-iterates the findings of the Commissioner (Appeal) and submits that appellants had themselves sought the clearance of the goods on payment of duty as determined by the department and have also paid the same. Only after the clearance of the goods they have filed the appeal before the Commissioner (Appeal) who has adjudicated the appeals filed and remanded the matter back to the original authority for reconsideration as the assessment orders enhancing the duty on Bill of Entries were passed without following the principles of natural justice. Since the matter has been remanded back to the original authority there appears to be no justification for these appeals filed by the appellants and they should be dismissed.

7.0 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal.

8.0 The appellants herein have submitted that they have filed the Kutcha Bill of Entry for the clearance of the consignments of the fresh flowers imported by them. For the clearance of these consignments they had paid the duty as determined by the customs. However since the duty determined by the Customs was higher than what they had determined while filing the Bill of Entry on the basis of import documents and declarations made by them, the proper officer of Custom was required to issue a speaking order giving the reasons for enhancing the duty determined as per Section 17 of the Customs Act, 1962. However since the proper officer of Customs did not issued an speaking order for enhancing the duty determined by them, they filed the appeal to Commissioner (Appeal)

9.0 The procedure of filing the Kutcha Bill of entry, its assessment and clearance of the goods against is as per the Public Notice No 48/2003 dated 08.12.2003, issued by the Commissioner of Customs (Import), Air Cargo Complex, Mumbai. The text of the said Public Notice is reproduced below:

"Subject : Processing of Kaccha B/E's under ICES

It has been decided to process the direct delivery consignments w.e.f. 15.12.2003 in the EDI System as per the Kacha Bill of Entry (KBE) procedure detailed below –

1. ***Goods to be covered under KBE procedure -***

- *i. Diplomatic mail and other diplomatic goods*
- *ii. Fresh fruits, flowers and vegetables etc.*
- *iii. Frozen food, live animals*
- *iv. Radio-active material*
- *v. Current newspapers and magazines*
- *vi. Airline stores and aircraft parts imported by Airlines*
- *vii. Life saving drugs and medical appliances requiring urgent clearance*
- *viii. Goods requiring special handling and storage conditions*
- *ix. Any other goods not listed above and for which prior permission for direct delivery has been granted by the Addl. / Joint Commissioner concerned.*

2. ***Filing of Kacha Bill of Entry (KBE)***

KBE shall be filed as a prior entry Bill of Entry in absence of IGM in the System. All other details and procedures shall be as in the case of a normal BE.'

3. ***Appraisement -***

All KBE's on submission shall be "System Appraised" on the basis of contents declared by the importer. A challan for payment of duty shall be generated automatically which shall be printed along with assessed copy of KBE.

4. ***Payment of Duty -***

After the challan for payment of duty has been generated, the duty shall be paid at the designated Bank namely, the State Bank of India, *IACC branch, Sahar Mumbai, as usual, during the banking hours. Out-of-charge against B/E KBE would not be possible till duty has been paid in the Bank and Bank's message has reached the Customs EDI System.*

5. ***Examination of Consignment -***

IFO has been designated to carry out examination of the cargo in respect of KBE. Before entry of "Examination Report" in the System, the IFO shall enter the IGM number, date and year along with the Inward date (Flight date) in the KBE, as provided by the importer. The following documents are to be presented to the IFO -

a. *Airway bill*
b. *Invoice and Packing list*
c. *Delivery Order, clearly mentioning the IGM no., Flight No. and date*
d. *Other required documents such as Certificate / NOC from the Port Health Officer / Assistant Drug Controller / Plant Quarantine Officer, etc. wherever required.*

The IFO shall check the AWB No. and Date, HAWB No. and Date from the hard copy of the IGM presented by the Carrier. He shall scrutinize the documents submitted by the importer / CHA and if the details are correct, shall update the field of IGM No. / Year and Inward Date (Flight Date) in the KBE on screen and enter the examination report.

6. ***Out-of-charge -***

Superintendent in charge of the DD Shed has been designated as the Officer for giving 'Out-of-Charge' of the KBE. Before giving Out-of-Charge' he shall check the correctness of declaration and the fact that the goods imported fall under the category of goods allowed to be cleared against a KBE. He will verify the permission given by the Addl. / Joint Commissioner in respect of the goods covered under para 1 (ix) above. He shall also ensure that all other requirements relating to clearance of the goods have been complied with and all necessary documents alike Original Invoice, Copy of AWB, Copy of delivery order, Certificates, NOC from Port Health Officer / Assistant Drug Controller / Quarantine Officer, have been attached with the print-out of the assessed KBE.

After satisfying all requirement the KBE shall be given Out-of-charge in *the System. Upon out-of-charge, print of KBE in respect of Importer's Copy and Exchange Control copy shall be taken along with the order of clearance. The Suptd. Shall put his signature on the same and hand over those two copies of KBE of out-of-charge order to the Importer and retain the original assessed copy of the KBE presented by the importer along with all original documents of declarations presented for obtaining clearance of goods along with Customs copy of order of clearance. All these original documents shall be sent to the designated auditor in the Internal Audit Department.*

7. ***Delivery of the goods***

All direct delivery goods under KBE procedure will be delivered from respective Direct Delivery Sheds of Air India and Airport Authority of India

8. ***Entry of Gate pass-***

The entry of Custodians Pass details shall be entered as usual.

9. ***Audit of KBE -***

Audit of all such KBEs shall be carried out after clearance, on the basis of hard copies of the documents received from the Superintendent /DD Shed on daily basis. All KBE filed are to be audited within three days. The Importer will have to pay the duty, if short levied or not levied, immediately upon the same being communicated to him, failing which not only the action under law will be initiated for recovery of duty not paid/short paid, but the facility of direct delivery will also be liable to be withdrawn. After completion of audit the disposal of the KBE shall be in the same manner as in case of a normal B.E.

10. ***Round the clock Delivery-***

KBEs would be accepted and processed round the clock, excepting for about two hours i.e. between 2300 to 0100 hours, when the system would not be available for operational reasons.

11. Difficulties, if any, in the implementation of KBE procedure, may be brought to the notice of the System Manager /EDI."

10.0 From the above public notice it is quite evident that the procedure of Kaccha Bill of Entry is a special procedure for facilitating the immediate clearance of consignments of certain categories of goods. Public notice makes it clear that Kaccha Bill of Entry shall be filed as a prior bill of entry and processed accordingly. It also prescribes that these Bill of Entries shall be system appraised on the basis of the declarations made by the importer and the duty payment challan shall be system generated. In case the department finds that any duty has been short levied or short paid against a Kacha Bill of Entry, then it will communicate to the importer about short payment of duty, and also initiate the legal action as per law. Importer has to pay the duty immediately or this facility of allowing clearance on the basis of Kaccha Bill of Entry shall be withdrawn.

11.0 In the present case nineteen commercial consignments of fresh flower have been cleared by the appellants against the Kacha Bill of Entry. Though the Kacha Bill of Entries should have been filed as prior Bill of Entry in the EDI system, much before the arrival of the consignments, it is evident from the table in para 1, that in all the cases the Kacha Bill of Entries were filed only after the arrival of the consignment. It is the submission of the learned advocate for the appellant that in all the cases the Kacha Bill of Entry was filed by the appellant, in the night after the arrival of goods (approximately at about 0200 Hrs) and these goods being perishable in nature were allowed clearance by 0500 Hrs on the same day after payment of the duty as determined by the department. Learned Counsel submits that he was left with no option but to pay the enhanced duty as determined by the department, otherwise those consignments would have not been cleared. Subsequent to the clearance of the goods on payment of the duty as determined by the Customs they had filed the appeal to the Commissioner (Appeal).

12.0 In their submission and arguments appellants submit that they have no grievance with the order of the Commissioner (Appeal) as he has remanded the matter back to the original authority to pass a fresh order (refer para 11), following the principles of natural justice. Their grievance is against the observations made by the Commissioner (Appeal) in para 7, 8 & 10 (reproduced above in para 3 of this order). The learned counsel submits that as per the observations made in para 10, Commissioner (Appeal) has decided the issue himself upholding the assessment orders enhancing the duty. By doing so he has seriously constrained the original authority from examining the issue afresh and passing the speaking order following the principles of natural justice.

13. In terms of the public notice referred above, it is quite evident that allowing clearance against Kacha Bill of Entry, is a special dispensation made by the revenue for allowing speedy clearance of consignments of certain category of goods. Hence by availing this special dispensation, appellants are bound by the requirements laid down by that public notice, specifically in respect of the payment of duty as per the assessment made. Hence we do not find any merits in the submissions of the appellants that they were coerced and forced to pay the enhanced duty. Further we find that appellants had avoided the procedure as prescribed by not filing the prior bill of entry and getting it appraised beforehand as prescribed. The grievance of the appellants against the suo moto enhancement of the duty by the Customs would not have been there if they had filed the Kacha Bill of Entry as Prior Bill of Entry as prescribed and had got it system appraised. It is also not very clear why Customs had allowed filing of these Kacha Bill of Entry in manner contrary to that prescribed by the Public Notice. Both the sides were not in position to explain in this regard during the hearing before us.

14. Public Notice 48/2003, very clearly stipulates that the demand for any duty short paid, revenue should communicate the same to the appellant, who shall pay the same immediately, or else legal action for recovery of the duty short paid will be initiated and the facility of clearance against Kacha Bill of Entry will be withdrawn. It appears that as appellants were aware of the fact that they were getting the same/ similar consignments in near future, and in order to avail the facility of Kacha Bill of Entry they paid the duty as demanded by the Customs.

15. Section 17(5) of the Customs Act, 1962, specifically provides that in case where the Customs Officer amends any assessment made by the importer, then Custom Officer will issue a speaking order giving the reasons for making the amendments in the assessment as made by the importer. In the present case Customs has not issued any such order under Section 17(5). In absence of any order under Section 17(5) of the Customs Act, 1962, Commissioner (Appeal) was justified in remanding the matter to the original authority for passing

the order under Section 17(5).

16. In para 10 the observations made by the Commissioner (Appeal) in respect of the manner of determining the value and applicability of Customs Valuation (Determination of Price of Imported Goods), 2007, were uncalled for. When original authority has not assigned any reasons for enhancing the value, then how can appellate authority supplement the same though his order. On one hand he remands the matter on the ground of natural justice, on the other hand he justifies the enhancement of the value as per Customs Valuation Rules, 2007. We are in agreement with the submissions made by the learned counsel that para 10 is contrary to the remand order in para 11. Therefore in our view para 10, needs to be obliterated from the impugned order.

17.1 In view of the discussions as above, we dispose of all the nineteen appeals, by obliterating the para 10 from the impugned order. In remand proceedings, original authority should adjudicate the matter without any reference to this para of impugned order.

(Order pronounced in the open court)

S K Mohanty
Member (Judicial)

Sanjiv Srivastava
Member (Technical)