CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 820 OF 2011

[Arising out of Order-in-Original No: 67/2011/CAC/CC(I)/SHH/Gr.VB dated 26th September 2011 passed by the Commissioner of Customs (Import), Mumbai.]

Bombay Launch Services Pvt Ltd
1st Floor, Office No. 116 & 117
Kashiram Jamnadas Building, P.D'Mello Road
Mumbai - 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 821 OF 2011

[Arising out of Order-in-Original No: 67/2011/CAC/CC(I)/SHH/Gr.VB dated 26th September 2011 passed by the Commissioner of Customs (Import), Mumbai.]

Sachin K Kshirsagar
Bombay Launch Services Pvt Ltd
1st Floor, Office No. 116 & 117
Kashiram Jamnadas Building, P.D'Mello Road
Mumbai - 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

AND

CUSTOMS APPEAL NO: 822 OF 2011

[Arising out of Order-in-Original No: 67/2011/CAC/CC(I)/SHH/Gr.VB dated 26th September 2011 passed by the Commissioner of Customs (Import), Mumbai.]

Nitin K Kshirsagar
Bombay Launch Services Pvt Ltd
1st Floor, Office No. 116 & 117
Kashiram Jamnadas Building, P.D'Mello Road
Mumbai - 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Mr T Viswanathan, Advocate with Ms Lakshmi Menon, Advocate for the appellants

Mr R K Dwivedy, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87291-87293/2021

DATE OF HEARING: 15/09/2021
DATE OF DECISION: 10/12/2021

PER: C J MATHEW

Under challenge in this appeal of M/s Bombay Launch Services Pvt Ltd against order-in-original no. 67/2011/CAC/CC (I)/SHH/Gr.VB dated 26th September 2011 of Commissioner of Customs (Import), Mumbai is the finding of mis-declaration of value, by non-inclusion of certain elements of cost incurred for the import of two tugs, *Nancy 3* and *Greenville 11*, and of attempt to import *Nancy 3* without declaration. The confiscation of *Nancy 3* under section 111(f) and 111(m), with option for redemption on payment of fine of

₹ 1,20,00,000, along with the holding of *Greenville 11* as liable to confiscation under section 111(m) of Customs Act, 1962, and redetermination of assessable value of *Nancy 3* and *Greenville 11* at ₹ 5,59,77,957 and ₹ 3,09,92,067 with consequent duty liability of ₹ 53,71,177 and differential duty of ₹ 4,91,352 (over and above ₹ 24,11,055 paid at the time of import) respectively under section 28 of Customs Act, 1962, besides the charging of applicable interest under section 28AB of Customs Act, 1962, and imposition of penalty of ₹ 58,62,529 under section 114A of Customs Act, 1962 are the detriments canvassed for quashing. The directors of the appellant-company, Mr Sachin Kshirsagar and Mr Nitin Kshirsagar, have also impugned the same order for wrongful imposition of penalty of ₹ 15,00,000 and ₹ 10,00,000/- under section 112 of Customs Act, 1962 consequent upon the confiscation of *Nancy 3* under section 111(f) of Customs Act, 1962.

2. It is seen from the records that the assessment of *Greenville 11* in bill of entry no. 914063/05.10.2009 was taken up for review in the course of investigation into the arrival of *Nancy 3* and the declared value of US$ 525,000, based on documents indicating delivery at Singapore, was alleged to be incorrect for not having included the bunkering cost of US$ 74,011, manning charges of ₹ 14,05,280 and insurance premium of ₹ 1,68,000 for the voyage from there to Mumbai. According to Learned Counsel for the appellant, the

proceedings in relation to *Nancy 3* for finalisation of provisional assessment under section 18 of Customs Act, 1962, exclude both recovery of duty under section 28 and the imposition of penalty under section 114A of Customs Act, 1962. In the circumstances, it may be worth the while to dwell upon the facts relating to the import of *Nancy 3* even though *Greenville 11* did precede it.

3. The bill of entry no. 922366/27.11.2009 for clearance of *Nancy 3*, filed well after the Import General Manifest (IGM) no. 33730/16.10.2009, and, that too, for provisional assessment followed the permission accorded after 18th November 2009 in response to letter dated 26th October 2009 of M/s Atlantic Shipping Pvt Ltd, agent of M/s MLC Carriers Pte Limited, Singapore, for amending the manifest to include the vessel itself as cargo. In the meanwhile, upon arrival of the vessel on 20th October 2009, investigation had commenced for non-declaration of the vessel procured by the appellant company for use in India.

4. It is not in dispute that the vessel had, as reported in the manifest, arrived ‘in ballast’ from Colombo without a whisper of intent to retain her in India or any whiff of potential sale transaction. The arrival report of 20th October 2009 with Singapore as the next port of call was no more revealing and thus, to all intents and purposes, gave the appearance of a ‘foreign-going’ vessel passing

through the port of Mumbai. It was only on 26th October 2009 that the steamer agent sought amendment of the manifest to include the vessel itself as cargo though Memorandum of Agreement had been entered into as early as 26th September 2009 and invoices for US $ 8,00,000 and US $ 2,20,000 had been raised on 1st October 2009 by M/s MLC Carriers Pte Ltd towards purchase price (CIF) and mobilisation cost to be borne by the appellant-company.

5. The amendment sought by M/s Atlantic Shipping Pvt Ltd was not taken up for consideration till the remitting of duty liability of ₹ 45,00,000 and till the provisional release of the vessel was sought upon furnishing bank guarantee of ₹ 15,00,000 by the appellant-company and of ₹ 8,00,000 by the steamer agent. During the examination of the tug on 3rd December 2009, it was also noticed that, during her dry docking in August of that year, the vessel had been repainted and refurbished with addition of equipment and parts which was appraised at 15% of the declared value.

6. The culmination of the proceedings for redetermination of value was based on the mobilization advance paid for the conveying of *Nancy 3* and the estimated cost of painting/refurbishing as well as the additional equipment installed during drydocking which were admitted to as not included in the first invoice of sale in the statements of the appellant-director who is also before us with his appeal.

Likewise, the payment borne by the appellant-company for the voyage of *Greenville 11* from Singapore to Mumbai towards manning cost, bunkering and insurance premium are also stated to have been admitted to in the statement of appellant-director. Several submissions were made by Learned Counsel and Learned Authorized Representative during the hearing. While the judicial pronouncements cited do espouse certain situational responses, none have dealt with facts that present themselves in the contours of the present dispute before us which, as we shall elaborate upon presently, are not of common occurrence. We are, therefore, of the considered opinion that the resolution thereof lies in application of the statutory provisions to the facts of the case.

7. Before proceeding to examine the allegation pertaining to valuation of both the vessels, it would be appropriate for us to decide upon the confiscation and penalty arising from the finding that the import was in breach of statutory prescription for declaration of cargo. It is the contention of Learned Counsel for the appellant that there was no intention of not declaring the vessel for import and that the agreement with the seller provided for the change of ownership to occur at Mumbai upon fulfilment of the terms of transaction. It is seen from the records that this explanation was proffered during the investigations too for justifying the initial declaration of arrival at Mumbai from Colombo *en route* to Singapore as was the claim of the

steamer agent that instructions for transfer were received from the seller only after the vessel had arrived in Mumbai.

8. Customs Act, 1962 is the statutory framework for levy of duties of customs on goods that are permissible for import into or export from the country. Assessment of goods presented for import is a function of rate of duty, determined under the authority of section 12 of Customs Act, 1962, and of value, appraised under the authority of section 14 of Customs Act, 1962, should the rate be *ad valorem*. Imported goods are, through a regulated accountal mechanism, under the control of customs authorities till cleared for home consumption and its integrity is contingent upon control of the carrier till the goods are landed. Chapter VI of Customs Act, 1962, relating to conveyance and person-in-charge of conveyance, has been designed for this purpose. Conveyance, according to

> *'(9) … includes a vessel, an aircraft and a vehicle'*

in section 2 of Customs Act, 1962 and it is not controverted that *Nancy 3* has not been proceeded against as 'conveyance' but as 'goods', which according to

> *(22) …includes –*
>
> *(a) vessels, aircraft and vehicles;*
>
> *…'*

in section 2 of Customs Act, 1962 and, though not applicable to every voyage, it is when procured just as goods are. It is this distinction that differentiates the dual aspect of vessels, as both conveyance and goods, and the occurrence, though infrequent, provided for in the statute that has been latched on to by the adjudicating authority to render the finding of section 30 of Customs Act, 1962 having been breached for justifying confiscation under section 111(f) of Customs Act, 1962.

9. It is not in dispute that *Nancy 3* was declared as conveyance *en route* from Colombo to Singapore. It has been contended that the possession of *Nancy 3* was transferred only after arrival at Mumbai which, commercially, is not an improbability and there is nothing on record to discredit such an explanation. At least, the competent authority did not consider it necessary to establish the claim as untenable even when the steamer agent requested for amendment of the manifest. Instead, the fact of non-declaration as ‘goods’ upon arrival was taken as conclusive intent to smuggle the vessel by attributing the request for amendment to the imminence of discovery after investigations had commenced. For ‘goods’ that did not arrive on their own steam, this trail of inference may not have been unwarranted; for ‘conveyances’ that transform as ‘goods’, inference does not suffice to discountenance the claim of contractual closure. That lack is irreversible. However, we may subject the inference made by the adjudicating authority to the test of rationality and probability.

10. Unlike ‘goods’, as conventionally understood, deployment of ‘conveyances’ in the territory of the country of import does not erase its identity. ‘Conveyances’, by reason of their very existence, are subject to control of the State while in use, commencing with registration, and till scrapping. Indeed, it is the compulsion of the registration statutes that triggers the transformation of ‘foreign going vessel or aircraft’ from ‘conveyance’ to ‘goods’ for that very purpose. The visibility of a conveyance, requiring regular refuel and victualling, cannot be obscured as ‘goods’ may be. By no stretch can a vessel, and a tug at that, operate in Indian waters without regulatory oversight and without registration – a process that inquires into the legitimacy of acquired possession. The contracting of tugs for shipping cannot be disassociated from contracting of, and responsibility for manning crew, insurance and financial arrangements. The *Flying Dutchman* and *Mary Celeste* are stuff of legend that commercial consideration of contemporary shipping can acknowledge only at the cost of bottom line. The appellant-company stands to be deprived all commercial flows by non-declaration of intent to import and, hence, it would appear that the impugned order is in error for concluding so after withholding permission to amend the manifest. Confiscation under section 111(f) of Customs Act, 1962, as well as attendant penalty on the appellant-directors under section 112 of Customs Act, 1962, is unwarranted.

11. We now turn to the alleged undervaluation in the declaration pertaining to *Nancy 3* for which, in addition to quantification of duty liability, the vessel has been confiscated under section 111(m) of Customs Act, 1962 and, while ordering finalization of provisional assessment, has also invoked the liability to penalty under section 114A of Customs Act, 1962. Conceptual commotion is manifest in this salmagundi of statutory provisions invoked by the Commissioner of Customs; while finalizing assessment, in exercise of authority conferred under section 18 of Customs Act, 1962 on ‘the proper officer’, the duty so assessed has been ordered for recovery under section 28 of Customs Act, 1962. It is also seen from the record that, by the time the bill of entry was permitted to be filed on 27th November 2009, the appellant-company had, on 31st October 2009 deposited ₹ 45,00,000 as the estimated duty liability on the payment of US$ 1,020,000 effected to the seller against two invoices which was appended to the bill of entry. Hence, it would appear that full value of both invoices were declared in the entry, made under section 46 of Customs Act, 1962 and, thus, precluding any scope for suggesting, let alone alleging, that importer had misrepresented or suppressed any material fact that offers the ingredient for invoking section 114A of Customs Act, 1962. Sometimes, as soliloquized by the Bard of Avon, through the dying tongue of John of Gaunt in Richard II,

‘with eager feeding food doth choke the feeder’

and, in their anxiety to close any loophole that the importer could be presumed to have up the sleeve, failed to afford the appellant-company an opportunity to misrepresent the value or any relevant fact. It is only by the filing of bill of entry, as prescribed in section 46 of Customs Act, 1962, that an importer and declaration comes into existence and any thoughts, plans or inclinations in the mind of the importer before such filing is beyond the purview of section 28, and of section 114A, of Customs Act, 1962. In the absence, by intent or by fortuitousness, of any misrepresentation or suppression, the penalty imposed section 114A fails as does the confiscation under section 111(m) of Customs Act, 1962 with which the condition for redemption is also extinguished.

12. It has been argued by Learned Counsel that section 18 of Customs Act, 1962 for provisional assessment is a self-contained scheme that excludes section 28 of Customs Act, 1962 from being invoked for recovery of duty even as the assessment has not been finalized. The reliance placed by Learned Authorized Representative on the decision of a Larger Bench of the Tribunal in *LD Textile Industries v. Commissioner of Customs, Ahmedabad [2005 (190) ELT 174 (Tri-LB)]* is of only peripheral significance to the issue before us; there, the goods imported free of duty and subject to restrictions on transfer was found in possession of others which called for

confiscation and recovery of duty for breach of condition while here, it is the simultaneous resort to the finalization provision and the provision for recovery of duty not levied/ not paid/short paid/short levied that is resisted. We find ourselves unable to discard the proposition of jurisdiction that, until the duty liability is crystalized by assessment or by contingency, section 28 of Customs Act, 1962 cannot be invoked. Section 28 has been incorporated to confer authority to recover duty not levied/short-levied from, not paid or short paid by, or of refund wrongly paid to, noticee and is attended by prescription of limitation which is signified by 'relevant date' which is intended, *inter alia,* to operate from the date of finalization of provisional assessment under section 18 of Customs Act, 1962. The final recourse cannot be the first option. Hence, the recovery of duty of ₹ 53,71,177 cannot be held to be sustainable as demand under section 28; we are constrained to examine this aspect as duty liability discharged on value declared in the invoices is short by ₹ 8,71,177 attributable to the assessment on the additional 15% by which the value was ordered to be enhanced.

13. We find that the enhancement of declared assessable value is based on examination of the vessel and the reported improvements and additions during dry docking in August 2009. There is nothing on record to suggest that this work was undertaken at the instance of the appellant-company or that the cost, even if accurately estimated, was

borne by, or on behalf of, the appellant to justify inclusion in assessable value. In the statement relied upon in the impugned order, and in which it has been the admitted that US$ 1,020,000 was paid, there is no reference to the cost of drydocking having been charged from them. Furthermore, a casually determined loading as proportion of declared value is not sustainable unless permitted by Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It is not open to the customs authorities to resort to the Rules for re-determination of the value afresh without discarding the declared value. Any differential duty based on additions to declared value is permissible only within the framework of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In the absence of any finding on that aspect, the ‘mix and match’ of topping the transaction value with computed value cannot be sustained within the scheme of rules of valuation. It may not be out of place to draw the attention of customs officers to the empowerment under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, to be invoked to discard the value declared in the bill of entry, does extend to rejection of value in the invoice which is a commercial engagement between a buyer and seller under the law of contract. Uninformed approach to the provisions of law, manifest in inappropriate phraseology, does not reflect well on the professional credibility of the tax administration. Suffice it to say that the enhancement of 15% in the assessable value is arbitrary and not tenable.

14. In so far as the valuation of *Greenville 11* is concerned, it has been claimed, and without being controverted, that the purchase was completed in Singapore. No evidence is on record that the any payment over and above the contracted, and declared, price was made to the seller. The allegation hinges on the said transaction price being on Free on Board (FOB) terms while duties of customs are to be computed on value appraised on Cost Insurance Freight (CIF) terms. The authority for adoption of the base arises from rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which is not a consequence of rejection of declared value attended upon by re-determination through rule 4 to rule 9 of the said Rules. Recourse to confiscation under section 111(m) of Customs Act, 1962 is, therefore, not tenable in law. The findings in the impugned order do not evidence misrepresentation or suppression in the declaration of value to warrant invoking of section 114A of Customs Act, 1962. The appellant-company did volunteer to discharge the duty liability of ₹4,91,352, arising from this addition to cost, and was complied with on 19th July 2010 before issue of notice on 6th May 2011.

15. For the reasons adduced above, we allow the appeal to the extent of setting aside the duty liability on *Nancy 3* beyond that

leviable on the value of the two invoices. We also set aside the confiscation of both vessels and the penalty imposed under section 114A of Customs Act, 1962 on the appellant-company. Appeal of Mr Nitin Kshirsagar and Mr Sachin Kshirsagar are allowed.

(Order pronounced in the open court on 10/12/2021)

(AJAY SHARMA)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*