CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 239 OF 2012

[Arising out of Order-in-Original No: CC/MAK/18/2011-12 ADJ ACC(I) dated 26th December 2011 passed by the Commissioner of Customs (Import),Air Cargo Complex, Mumbai.]

Futura Travels Ltd
Essar House, 11 KK Marg, Mahalaxmi
Mumbai - 400034 … ***Appellant***

versus

Commissioner of Customs (Import)
Air Cargo Complex, Sahar, Andheri (East),
Mumbai - 400099 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 254 OF 2012

[Arising out of Order-in-Original No: CC/MAK/18/2011-12 ADJ ACC(I) dated 26th December 2011 passed by the Commissioner of Customs (Import),Air Cargo Complex, Mumbai.]

Commissioner of Customs (Import)
Air Cargo Complex, Sahar, Andheri (East),
Mumbai - 400099 … ***Appellant***

versus

Futura Travels Ltd
Essar House, 11 KK Marg, Mahalaxmi
Mumbai - 400034 ***…Respondent***

APPEARANCE:

Shri Ramnath Prabhu, Advocate for the assessee-appellant

Shri Manoj Das, Assistant 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 / 87363-87364/2021

DATE OF HEARING: 06/09/2021
DATE OF DECISION: 21/12/2021

PER: C J MATHEW

Considering the factual matrix of the dispute leading to order-in-original no. CC/MAK/18/2011-12 ADJ ACC(I) dated 26th December 2011 of Commissioner of Customs (Import), Air Cargo Complex, Mumbai impugned before us by M/s Futura Travels Ltd as well as by Revenue, the issue to be determined is the valuation to be adopted on 'aircraft engine' expressly imported for a limited period and for 'stop gap' fitment during the overhaul of the regular engines by the provider of the imported replacement. It is common ground that the duty levied on the 'engine' at the time of import is receivable, again of an undisputed proportion, by M/s Futura Travels Ltd as drawback permissible under section 74 of Customs Act, 1962. There is also no dispute that the terms of the agreement with the supplier of the replacement engine provides for 'security deposit' as a pre-requisite for sending it to M/s Futura Travels Ltd and that US$ 147 per 'flying hour' was chargeable during its deployment on the aircraft. According to the importer, the amount actually paid to the overseas supplier at the time of import is the transaction value on which duty was to be levied while Revenue contends that the value is to be ascertained as for an engine brought into the country permanently.

2. M/s Futura Travels Ltd had procured one ‘Raytheon Beechcraft 190D PT 6A’ aircraft in May 2005 and was granted statutory permissions by the Directorate General of Civil Aviation, the regulatory authority, subject to ‘time between overhauls (TBO)’ being not more than 6000 ‘flying hours’ and, as overhaul of both engines was imminent, they had approached M/s Pratt & Whitney Canada Pte Ltd who arranged for the service to be undertaken at their Australia facility for which agreement no. FTL/EXP/S74/01-11 dated 7th April 2009 was entered into. The arrangement involved the supply of one substitute engine for use when two engines (serial no.PS-0312 and PS0310) were being overhauled in Australia. These were dispatched *vide* shipping bills no. 7393714/19.08.2009 and 755870/16.12.2009 at stated value of US $ 500,000 (₹ 2,39,00,000/- and ₹ 2,29,25,000/-) and on re-import, *vide* bill of entry no. 230291/ 13.11.2009 and bill of entry no. 468399/18.03.2010 at values of US $356,827.87 (₹ 1,72,38,514/-) and US $ 335,161.13 (₹ 1,59,69,275/-), were subjected to levy of ₹ 28,10,755/- and ₹ 29,66,766/- on the repair value in accordance with notification no. 117/61-Cus dated 13th October 1962 and 94/96-Cus dated 16th December 1990. These facts, though on record, are only of peripheral significance to the impugned good which is the ‘aircraft engine’ brought in for use in the interim.

3. That engine, made available to M/s Futura Travels Ltd between

19th August 2009 and 18th March 2010, was imported against bill of entry no. 175517/01.08.2009 upon discharge of duty liability of ₹2,02,755/- on declared value of US $ 25,000 (₹ 11,25,000/-). Stated to have been manufactured in August 2000 and having logged 5627.87 flying hours at the time of import with further usage by M/S Futura Travels Pvt Ltd of another 292.40 flying hours, it was sought to be exported against shipping bill no. 000648/29.04.2010 under claim for drawback (in accordance with notification no. 19/65-Cus dated 6th February 1965 as amended from time-to-time with the last being 23/2008-Cus dated 1st March 2008) when its valuation at the time of import was taken up for investigation leading to the show cause notice that was disposed off *vide* impugned order which is now before us.

4. The notice proposed rejection of the value of US$ 25,000, declared on the basis of commercial invoice no. S/22609/01.08.2009 pursuant to agreement no. R-1035/09 dated 8th July 2009 as it pertained to refundable security deposit and the lease agreement provided for payment of US$ 909,563 should the engine be destroyed, lost in transit or otherwise not returned to the supplier. During the course of investigations, the supplier did, at the instance of the importer, intimate US $ 370,000 as indicative value of such engine with 6000 flying hours as ‘time between overhaul (TBO)’ and that, if the option to purchase the engine on ‘as is where is’ condition was

exercised, payment of US$ 125,500/- would have to be effected. The adjudicating authority rejected the declared value and adopted the purchase option price to which freight (US$ 2965), insurance (1.125%) and landing charges (1%) was applied before adding the rental invoiced at US $ 18,727.80 and US $ 24,255.00 for revising the value to ₹ 82,05,112.36 on which ₹ 13,90,202 was determined as duty liability. The confiscation of goods under section 111 of Customs Act, 1962, which was permitted to be redeemed on payment of fine of ₹1,70,000, and imposition of penalty of ₹ 20,000 under section 112 of Customs Act, 1962 is also under challenge. Though classification was also sought to be altered from tariff item 8803 3300 to tariff item 8411 2100 of First Schedule to Customs Tariff Act, 1975, the benefit of notification no. 21/2002-Cus dated 1st March 2002 rendered it inconsequential.

5. Revenue, aggrieved by the assessment at the option price, seeks adoption of the replacement value of US $ 909563/- in the agreement. M/s Futura Travels Ltd contends that US$ 25,000/- paid to the overseas supplier should be the assessable value.

6. According to Learned Counsel for the appellant-importer, the transaction value must necessarily be adopted for the purpose of assessment. He contends that there is no evidence of any additional consideration and that all the other values, *viz.*, US $ 125,500/-, US $ 370,000/- and US $ 909,563/-, are notional computations in the

contract for certain contingencies and not amenable to fitment within Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. His further submission is that there has been no mis-declaration on their part to warrant recourse either to the extended period for recovery of the differential duty of ₹ 11,87,447/- or for confiscation and imposition of penalty. It was also submitted that the addition of freight, insurance and landing charges was also not permissible because all of these were covered within the invoice value of US $ 25,000/-.

7. Learned Authorised Representative contends that the goods being liable to duty enabled the adjudicating authority to take recourse to the several rules culminating in rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 and that, in the absence of identical and similar goods imported at the same time, the adoption of the replacement value of US$ 909,563/-, computed even notionally in the lease agreement, was justified. It was also contended that it was on this value that premium was paid by the importer for insuring the engine during its retention in India. It was also pointed out that the lease agreement makes it abundantly clear that US $ 25,000 is only a security deposit pursuant to condition for providing the replacement engine and to be returned upon fulfilling of the service agreement. He submits that as this could, by no stretch, be assessable value, the only alternative value in the lease agreement

must necessarily be adopted. He contends that the other values, including the purchase option price adopted in the impugned order, were not contemplated in the agreement and, as subsequent clarification, lacked reliability and validity. Drawing upon the base price of US$ 125,000, the repair value declared on re-entry of the original engines and the value declared for dispatch, Learned Authorized Representative attempted to demonstrate the approximation to the value incorporated in the agreement pertaining to deployment of replacement engine. It was, therefore, contended that not only was the declaration on entry of the replacement engine incorrect but that the adoption of the lesser value in the impugned order was also not in conformity with the law.

8. That the replacement engine was not imported for permanent deployment in India is not in dispute. Doubtlessly, it is the usage for a time that is of commercial import in the transaction; nonetheless, the usage arises from deployment of goods which are imported. The central provisions for assessment - determination of rate of duty, under section 12 of Customs Act, 1962, and of valuation, under section 14 of Customs Act, 1962 - read in conjunction, and separately, do not acknowledge duration of use as relevant and the mechanism for any adjustment on that score lies elsewhere, *viz*., against claim for drawback under section 74 of Customs Act, 1962 upon re-export or by recourse to abatement afforded by notification no. 27/2002-Cus dated

1st March 2002 issued under section 25 of Customs Act, 1962. The rate of duty is not in dispute here and, hence, the present proceeding is limited to the differential duty arising from the finding on the valuation to be adopted and the penal consequences of misdeclaration. The amounts paid to the supplier of replacement engines is US$ 25,000 against invoice raised towards security deposit for supply (on which duty liability was discharged) and U$ 42 ,982.80 against invoices raised after the import towards usage charge based on actual flying. The adjudicating authority included the latter while discarding the former in favour of purchase option price as the 'free on board' value and which is the grievance of both litigants before – one for not being the actual payment and the other not sufficing as true appraisal.

9. On perusal of

> ***'14. Valuation of goods. —***
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> *(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:*

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further

xxxx

Provided also

xxxxx

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

xxx

Explanation. —For the purposes of this section—'

of Customs Act, 1962 in the context of the contractual engagement between the importer and the overseas entity, the claim preferred on behalf of the appellant that US$ 25,000, paid against invoice raised towards security deposit provided for in the agreement, is the sole consideration for procurement and is the transaction value contemplated for assessment does not find favour with us. Such ‘transaction value’ intended to be accepted without question must pertain to ‘sale’ which the impugned transaction is not. Therefore, in any transaction of importation for a while, the commercial terms of payment are not ‘transaction value’ for assessment. Assessable value will have to be determined in accordance with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

10. The Rules provide for substitution by ‘transaction value’ declared in comparable situations, computation of costs and, as a last resort, to best judgement. This is no carte blanche; the guiderails of ‘transaction value’, the ‘gold standard’ for valuation in the 1988 version of the Rules and the concept in the version extant since 2007, are not to be crossed over. The value adopted by the adjudicating authority and the value pressed for in the appeal of Revenue must be aligned within; as the residuary rule cited for validating appropriateness is not in question, it is the one most in conformity that should prevail.

11. The replacement value denominated in the agreement is contingent upon occurrence of certain circumstances which are farthest from the intent of the two contracting parties; this is evident from the prompt dispatch of the ‘replacement engine’ in terms of the agreement. For that to crystallize within the purview of ‘transaction value’, the contingent circumstances must arise. Furthermore, the computation of that value is not the outcome of determination by the competent authority but abdication in favour of another and to satisfy the supplier that cost of failure to return possession will compensate

for being prevented from servicing other customers; the distortion in that value is thus apparent. Owing to non-conformity with any method of valuing the transaction *per se*, the plea of Revenue for adoption as assessable value fails for lack of conformity with the scheme of valuation. The methodology of customs authorities in United States of America for valuing leased goods in terms of rental charges will not be consistent with the assessment under Customs Act, 1962 as elaborated *supra* with proportionate attribution afforded by notification no. 27/2002-Cus dated 1st March 2002 amended by 27/2008 dated 1st March 2008.

12. In the context of declared value not being the 'transaction value' envisaged in Customs Act, 1962 and the 'replacement value', sought to be validated in the appeal of Revenue, not being in conformity with the Rules, an assessable value is necessary. The impugned order has adopted a base value to which additions have been made and, in the process, utilized a notional price in the agreement that is neither price paid nor price payable which is a necessary qualification for 'transaction value' of 'imported goods', 'identical goods' or 'similar goods' in rule 3, 4 and 5 of Customs Valuation (Determination of Value of Imported Goods Rules), 2007. Likewise rule 7 and 8 of the said Rules specify the circumstances that validate appraisal. Thereafter, the only option that remains is

'9. Residual Method. –

> *(1) Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India;…….'*

and in terms of which the combination referred above cannot, by any stretch, claim to be consistent with the principles and general provisions of the said Rules. Furthermore, the additions include payment related to use in India which lacks sanctity except under the circumstances enumerated in rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Most importantly, value computed in accordance with residual method must necessarily be on the basis of data available in India and that does not appear to have been considered in the impugned order. Thus, with none of the three values presented before us, *viz.*, that declared by importer, that proposed by Revenue and that adopted by the adjudicating authority, being consistent with section 14 of Customs Act, 1962 and our lack of wherewithal to adjudicate an 'assessable value', the determination of assessable value will have to be entrusted back to the original authority.

13. The appellant has also contended, both before us and in adjudication proceedings, that the demand is barred by limitation of time prescribed in section 28 of Customs Act, 1962. That plea was not accepted by the original authority and, not surprisingly, as

ascertainment of jurisdictional competence on that score is rarely ventured upon by adjudicating authorities who are inclined to regard limitation as a superfluous fetter of rule of law deserving no more than a cursory dismissal.

14. The show cause notice, issued on 4th November 2010 in relation to goods imported on 1st August 2009 and beyond the normal period of limitation in section 28 of Customs Act, 1962, vests jurisdictional competence only by recourse to extended period of upto five years from the relevant date. The demand has been crystallized by discarding the 'declared value' and re-determination of 'assessable value' by recourse to rules framed under the authority of section 14 of Customs Act, 1962. Such recourse may be, but is not always, consequent to one the taints enumerated in section 28 for invoking the extended period having been established. That distinction with difference, if so pleaded, is not easily discarded. Where one of the qualifications for conforming to 'transaction value' is patently non-existent, the 'declared value', whether purporting to be the price paid/payable or otherwise, is not acceptable as the 'transaction value' within the meaning of section 14 of Customs Act, 1962; recourse to ascertainment under the relevant Rules is inescapable and the declaration of value, mandated by section 46 of Customs Act, 1962, is of no relevance to assessment. Customs authorities cannot, in such circumstances, claim to have been hoodwinked by misrepresentation

or suppression of facts as there is a statutory obligation on their part to determine the value in accordance with the Rules. Intention to retain goods only for a limited period on lease was not suppressed from customs authorities at the time of import and the invoice submitted along with the bill of entry made this abundantly clear. Furthermore, it was only at the time of export of the ‘leased’ engine that customs authorities nudged themselves awake even though the two engines of the aircraft had been entered for export and import on separate occasions and assessment of the imports on ‘repair value’ would have been permitted, and indeed tolerated, only upon production of the said agreement which incorporated the provision for temporary allocation of the impugned engine. The adjudicating authority has ignored these vital facts in deciding upon the validity of the demand traversing beyond the normal period of limitation.

15. Delegation of that statutory responsibility upwards will only encourage irresponsible adjudication. As appellate authority, it devolves upon the Tribunal to enforce respect for the law and the restrictions that the law places upon executive authority. Such evaluated decision making is not a luxury appropriated by ‘magnanimous’ appellate authorities but is the obligation to be internalized by adjudicating authorities without exception. It would, therefore, be appropriate to direct the original authority to arrive at its conclusion afresh by application of these facts to the law on

empowerment in section 28 of Customs Act, 1962 for invoking the extended period of limitation.

16. To enable this exercise, we set aside the impugned order and remand the matter back to the original authority.

(Order pronounced in the open court on 21/12/2021)

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

**/as*