CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH

CUSTOMS APPEAL NO. 87423 OF 2014

(Arising out of Order-in-Original No. 07/2014/CAC/CC(I)/AB/GR.VB dated 24.02.2014 passed by the Commissioner of Customs (Import), Mumbai Zone-I)

M/s. Bhambhani Shipping Ltd. **....Appellant**
Meera Niwas, Plot No. 206,
Opp. Dhanlaxmi Building,
Near Telephone Exchange,
SVP Nagar, Mhada, Andheri (W),
Mumbai- 400053

Versus

Commissioner of Customs (Import), Mumbai **....Respondent**
2nd Floor, New Customs House,
Ballard Estate, Mumbai- 400001

<u>AND</u>

CUSTOMS APPEAL NO. 87424 OF 2014

(Arising out of Order-in-Original No. 07/2014/CAC/CC(I)/AB/GR.VB dated 24.02.2014 passed by the Commissioner of Customs (Import), Mumbai Zone-I)

Shri Hari Bhambhani **....Appellant**
Managing Director,
M/s. Bhambhani Shipping Ltd.,
Meera Niwas, Plot No. 206,
Opp. Dhanlaxmi Building,
Near Telephone Exchange,
SVP Nagar, Mhada, Andheri (W),
Mumbai- 400053

Versus

Commissioner of Customs (Import), Mumbai **....Respondent**
2nd Floor, New Customs House,
Ballard Estate, Mumbai- 400001

<u>APPEARANCE:</u>

Shri Anupam Dighe, Advocate for the Appellant
Shri Ramesh Kumar, Authorized Representative for the Respondent

<u>CORAM:</u> **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: September 02, 2021
Date of Decision: January 18, 2022

FINAL ORDER NO. A/85025-85026/2022

JUSTICE DILIP GUPTA:

Customs Appeal No. 87423 of 2014 has been filed by M/s. Bhambani Shipping Ltd[1] to assail the order dated February 24, 2014 passed by the Commissioner of Customs(Import), Mumbai Zone-I[2], by which the declared 'Cost, Insurance and Freight'[3] value of the barge "Halani Star"[4], imported and sought to be cleared through a Bill of Entry dated August 25, 2011, under rule 12 of the Customs Valuation (Determination of Value Of Imported Goods)[5] has been rejected and it has been re-determined under rule 9 of the 2007 Valuation Rules. The Barge has also been confiscated under section 111(m) of the Customs Act 1962[6] with an option to the importer to redeem it under section 125 of the Customs Act on payment of redemption fine of Rs.3.5 crores. The order also seeks to confirm the demand of customs duty of Rs.5.11 crores leviable on the Barge with equipments, spare parts and accessories. The order further appropriates customs duty of Rs.5.15 crores and imposes a penalty under section 114A of the Customs Act.

2. **Customs Appeal 87424 of 2014** has been filed by Hari Bhambhani, Managing Director of M/s. Bhambhani Shipping Ltd. to assail the aforesaid order dated February 24, 2014 to the extent it

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1. **the appellant**
2. **the Commissioner**
3. **CIF**
4. **the Barge**
5. **2007 Valuation Rules**
6. **the Customs Act**

imposes a penalty of Rs.1.75 crores upon him under section 112(a) of the Customs Act.

3. The appellant is engaged in offshore activities, like providing tugs, accommodation barges and supply vessels. It purchased the second-hand non-propelled accommodation Barge with all standard equipments and accessories from M/s. Halani International Ltd., Dubai[7] for a transaction value of US Dollars 60 lakhs 'Free on Board'[8], to be paid directly to the bank account of the seller, as detailed in the Memorandum of Understanding and the Agreement signed in Mumbai on August 12, 2010[9]. The Bill of Sale was executed on July 05, 2011, and the seller issued an invoice dated July 05, 2011 wherein the FOB value was declared to be US Dollars 6,000,000.00+ Insurance US Dollars 29657.00+ Freight US Dollars 5000.00, thus totaling to US Dollars 6,034,657.00 (CIF), equivalent to Rs.26,97,49,167/-.

4. Earlier, the Barge was on charter to M/s. Afcons Gunanusa Joint Venture, who had imported it and cleared it under a Bill of Entry dated October 22, 2010. The value declared was about Rs.23.41 crores, and it was re-exported under a Shipping Bill dated May 25, 2011, before being delivered to the appellant.

5. As per the above MOU, dated August 12, 2010 the Barge was to be delivered in Mumbai, but the venue was changed to Sharjah to avoid any further delay in getting delivery, since the Barge had to be first re-exported from India by the earlier importer, M/s. Afcons Gunanusa Joint Venture. The Barge was

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7. Halani
8. FOB
9. MOU

towed into India from Sharjah by Tug "Halani III", belonging to the appellant.

6. As there was a statutory requirement, a detailed survey/ inspection of the Barge was conducted on July 21, 2011 by the Chartered Engineer of M/s. Intertek Testing Services India Pvt. Ltd., which is a Government approved Inspection and Certification Agency. The Inspection Agency issued a Certificate dated July 22, 2011 and at point 8.5 relating to Valuation certified that:

> "Taking into consideration the condition of the equipment, expected residual life and the enquiry in market, the fair and reasonable price in our opinion is US Dollar 6,000,000.00(FOB) [US Dollars Six Million only]."

7. The appellant filed a Home Consumption Bill of Entry on August 25, 2011 under section 46 of the Customs Act seeking clearance under First Check Examination procedure, as applicable to the imported old and used second hand machinery. The value declared in the said Bill of Entry was US Dollars 6,034,657.00 (CIF), equivalent to Rs.26,97,49,167/-. This value, according to the appellant was based on the Invoice, MOU, Bill of Sale, Insurance and Chartered Engineer Certificate. The customs duty was calculated to be Rs.4,12,70,061/-.

8. The First Check Examination Order was given with an instruction to conduct an examination under the supervision of Officers of SIIB (Import), who had gathered information that the said vessel was under invoiced to evade customs duty.

9. The Barge was examined by the Dock staff in the presence of SIIB Officers, who observed that considering the number of people that could be accommodated on the Barge and the accessories,

equipments on board the vessel, the vessel appeared to be grossly under invoiced.

10. On the basis of this observation, further inquiry proceedings were launched and in the said process, statement of the Managing Director was recorded under section 108 of the Customs Act on September 30, 2011.

11. In the light of the aforesaid observations of the Officers of SIIB (Import) and the statement of Hari Bhambhani, a re-inspection of the Barge was carried out by the same Chartered Engineer along with SIIB Officers on October 06, 2011. Thereafter, a revised Chartered Engineer Certificate was issued on October 12, 2011, which amended the FOB value from US Dollars 6,000,000.00 to US Dollars 7,385,000.00, with a remark that during the re-inspection, they gathered complete vessel particulars which had not been made available during their initial inspection regarding capacities, Year of Manufacture & other technical specifications of equipments, such as cranes, generators, compressors WMP and STP.

12. The Barge, along with the equipments, accessories and spares was placed under seizure under Panchnama on October 19, 2011 under section 110 of the Customs Act on the charge that on re-survey, it came on record that the value of the equipments, amounting to US Dollars 1,385,000.00 was left out while considering the value of the Barge, and the importer had admitted to the mis-declaration of freight.

13. The appellant requested for provisional release of the Barge under section 108A of the Customs Act. The Commissioner, by

order dated October 10, 2011, allowed the provisional release of the Barge under section 110 A of the Customs Act, subject to full payment of customs duty on the ascertained value of US Dollars 7,478,657.00 CIF (Rs 33,42,95,968.00), and submission of a Bond equivalent to 100% of the Assessable Value, a Bank Guarantee of Rs.65.00 Lakhs (10% of the differential Assessable Value) and an unconditional undertaking not to dispute the identity of the goods under seizure.

14. The appellant, through a letter dated April 16, 2012, deposited the customs duty amounting to Rs 5,15,62,600/- and submitted a Bond of 100% of the freshly ascertained Assessable value of Rs. 33,76,38,928/-, a Bank Guarantee of Rs 65.00 Lakhs and an unconditional undertaking for not disputing the goods under seizure. The customs duty was deposited on April 19, 2012 and the Barge was then provisionally released.

15. A show cause notice dated December 28, 2012 was thereafter, issued to the appellant and the Managing Director under section 124 read with section 28 of the Customs Act. The allegations contained in the show cause notice were denied by the appellant and the Managing Director. An order dated February 24, 2012 was, thereafter, passed by the Commissioner redeterming the value of the Barge and the relevant observations and findings are as follows:

> "20. **The basic issue to the considered in the instant case is as to whether** the "Work accommodation Barge" named "**Halani Star**" (hereinafter referred to as the "impugned barge") **imported by M/s Bhambani Shipping Ltd.** vide Bill of Entry No. 4460906 dated August 25, 2011 **was willfully misdeclared in terms of value owing to suppression of facts. As a corollary thereof it is also to be decided as to whether the declared value is to be enhanced and duty demanded and**

confirmed on the value so enhanced. The liability to confiscation of the impugned barge on account of misdeclaration of value, if any and the consequent penal provisions to be invoked on the notices are the remaining issues which need consideration.

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24. **From the above, it is evident that the value of the equipments, which were not accessories of the barge, had not been included in the value of the impugned barge. Further, the freight component had also been mis-declared by M/s Bhambani Shipping Ltd., as admitted by Shri Hari Bhambani, Managing Director of M/s Bhambani Shipping Ltd, in his statement recorded under section 108 of the Customs Act, 1962** and detailed in para 22 above. Therefore, **I hold that the declared CIF value of Rs 26,97,49,1677-** of the Impugned Barge "Halani Star" imported and sought to be cleared vide Bill of Entry No. 4460906 dated 25/08/201 **is liable for rejection under Rule 12** of Customs Valuation (Determination of Value of Imported Goods) Rules 2007 (hereinafter referred to as 'Customs Valuation Rules, 2007').

25. **Having rejected the declared, the same is required to be re-determined as per the provisions of the Customs Valuation Rules, 2007**. Once transaction value is rejected the value shall be determined by proceeding sequentially through Rule 4 to 9 of the Customs Valuation Rules, 2007. xxxxxxxxx **Accordingly the value is to be determined in terms of Rule 9 of the Customs Valuation Rules**, **2007** read with Finance Ministry (CBEC) Circular No.4/2008-Customs (F.No.467/34/2006-Cus.V) dated 19.11.1987, **on the basis of value suggested in the fresh inspection report dated 12.10.2011.** xxxxxxx I find that M/s Intertek Testing Services Pvt Ltd, in their detailed valuation report dated 12th October, 2011, estimated the FOB value of the Barge along with the equipments to USD 7385000. The value of the Equipments as per its specifications and capacity was estimated to USD 1,385,000. The Importer had already admitted the amount of freight charges to USD 64,000.00. **Hence the** actual CIF value of the Vessel alongwith the all the accessories and equipments was ascertained to USD 7,478,657.00 CIF i,e. FOB value USD 7385000+freight USD 64,000+insurance USD 29657. **Therefore, I hold that the value of the barge is re-determined as USD 7,478,657.00 CIF. (amounting to Rs 33,42,95,968/-) in terms of Rule 9 of the Customs Valuation Rules, 2007 read with Finance Ministry (CBEC) Circular No.4/2008-Customs (F.No.467/34/2006 Cus.V) dated 19.11.1987.**

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26.7. They have contended that the department has erred in rejecting the Chartered Engineer Certificate without recording his statement of cross examining him. Therefore, to pick holes in the certificate of Chartered Engineer without cross-examining him is not just and proper in law. Xxxxxxxxxx Thus, in this case the Chartered Engineer who had earlier given the valuation on the basis of the limited data made available to them had been appointed, on the request of the notice themselves, to inspect and verify the value of the equipments whose valuation had been left

> out in their report. Therefore, in the facts and circumstances of the case the case law relied upon by the notice is not applicable."
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> **(emphasis supplied)**

16. Shri Anupam Dighe, learned counsel appearing for the appellant made the following submissions:

i. The appellant had correctly declared the transaction value as the assessable value for the purpose of customs duty. It is not the case of the Department that the assessable value declared by the appellant is not the transaction value;

ii. The entire case of the Department is based on the revised Valuation Report issued by the Chartered Engineer. On comparing the two Reports dated 22.07.2011 and 12.10.11, it can be seen that the vessel particulars, which had purportedly not been made available during the first inspection, formed part of the First Report and have been verbatim reproduced in the Second Report. The appellant had always provided the true and correct facts and details about the Barge to the Chartered Engineer, which is evident from the fact that the description of the Barge and its equipment is identical in both the Valuation Reports. The Chartered Engineer had also inspected the Barge before issue of the First Report;

iii. The question of wilful suppression with intent to evade payment of duty or mis-declaration of value on part of the appellant does not arise. Even the impugned order records a finding that it was the valuer who failed to consider the value of equipment;

iv. The Chartered Engineer had altered the valuation without any sound reason. Hence, it was necessary to record his statement and grant a cross examination to the appellant. Infact, the appellant had made a specific request for cross examination of the Chartered Engineer but the respondent denied cross examination;

v. It is not the case of the Department that the appellant had influenced the Valuation Report in any way. Further, it is not the case of the Department that additional consideration was paid by the appellant to the seller of the Barge. Thus, the transaction value, as declared by the appellant, was correct;

vi. The very same Barge was imported earlier by one M/s. Afcons Gunanusa Joint Venture, Afcons House under a Bill of Entry dated 22.10.2010, and the value of the Barge was declared as Rs.23.41 crores approximately, which was accepted by the Department. The appellant had declared the value of the same Barge as Rs.26.82 crores. Therefore, the allegation that the Barge was undervalued in order to pay a lesser customs duty does not arise;

vii. The Respondent has not only failed to consider the MOU and the invoice dated 05.07.2011 submitted during investigation, but also erred in not giving any finding or reasons to reject the value declared by the appellant and the supplier in the documents. The sole basis of rejection of value declared by the appellant is the Second Report of the Chartered Engineer, which report is not free from serious doubts;

viii. When the goods are intercepted and seized prior to the clearance of goods and final assessment of Bill of Entry, the proceeding against the said goods can be initiated only under section 124 of the Custom Act and the goods can be confiscated under Section 125(1) of the Customs Act. The goods of the appellant were seized prior to assessment on 19.10.2011. The provisional assessment was made and provisional release of the Barge was granted only on 19.04.2012 when the appellant paid the customs duty of Rs.5,15,62,600 and cleared the Barge. As such, it is not a case of short payment or non-payment of customs duty. In support of this submission reliance has been placed on **Sri. Amit Rajkumar Singhania** vs. **Commissioner of Customs (ACC), Mumbai and others**[10]; and **Surendra R. Choudhary** vs. **Commissioner of Customs (Import), Nhava Sheva**[11];

ix. As there was no attempt to mis-declare the value of the Barge by the appellant, the goods cannot be liable to confiscation under section 111(m) of the Customs Act. As such, the confiscation and the consequent redemption deserve to be set aside;

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10. 2019-TIOL-2991-CESTAT-Mumbai
11. 2019 (369) ELT 1762 (Tri.-Mumbai)

x. In any event, even if it is held that the Barge was liable to confiscation on technical grounds, the redemption fine should be nominal, considering the facts and circumstances of the matter;

xi. Penalty under section 114 A should be set aside when the duty purported to be demanded under section 28 itself does not survive;

xii. The jurisdiction to impose penalty under section 114A can be assumed only if duty is confirmed under section 28 of the Customs Act and not under any other section. In this connection reliance has been placed upon **Commissioner of Customs (Import and General)** vs. **M/s. Care Foundation**[12] and **Surendra R. Choudhary** vs. **Commissioner of Customs (Import), Nhava Sheva;**

xiii. Penalty of Rs.1,75,00,000/- under section 112(a) on the Managing Director of the Appellant should be set aside as the Impugned Order is silent and does not disclose existence of any of the ingredients for imposing penalty under section 112(a). There is no finding that the Managing Director personally indulged in any commission or omission rendering the Barge liable to confiscation under section 111 of the Customs Act;

xiv. In any case, the entire case of alleged valuation has arisen due to the improper valuation done by the

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12. 2014-TIOL-537-HC-DEL-CUS

Chartered Engineer while issuing his valuation report and it is not the case of the Department that it was done under instructions of the Managing Director;

xv. There are no findings in the Order that the Managing Director was personally involved in any commission or omission rendering the Barge liable to confiscation under section 111 of the Customs Act. Hence, no penalty can be imposed on the Managing Director; and

xvi. The Managing Director is not looking after day-to-day operations of the business and as such also no penalty can be imposed on the Managing Director.

17. Shri Ramesh Kumar, learned authorised representative appearing for the Department however, supported the impugned order and made the following submissions:

i. The valuation of the Barge was done on the maximum amount of depreciation that can be claimed under the Instructions dated 19.11.1987 issued for valuation of second-hand machinery and fixation of scale of depreciation;

ii. When there is mis-declaration, the transaction value cannot be relied upon and the Department gets a right to question the correctness of the valuation. In support of this contention reliance has been placed upon the decision of the Kerala High Court in **Commissioner of Customs** vs. **P.V. Ukkru International Trade**[13]**;**

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13. 2009 (235) E.L.T. 229 (Ker.)

iii. As the Managing Director himself had made the statement under section 108 of the Customs Act, the Department was justified in adopting the value. In support of this contention, reliance has been placed on the decision of the Tribunal in **Sangeeta Metals (India)** vs. **Commr. of Customs (Import), Nhava Sheva[14];**

iv. The value of the goods mentioned in the certificate issued by the Chartered Engineer has to be relied upon, since ignoring it would amount to a mistake apparent on the record. In support of this contention, reliance has been on the decision of the Tribunal in **Alfa Traders** vs. **Commissioner of Customs, Cochin[15];**

v. The demand was raised under section 28(4) read with section 125(2) of the Customs Act and the order has also confirmed the demand under section 28(4) read with section 125(2) of the Customs Act;

vi. Penalty was correctly imposed the Managing Director. In support of this submission reliance has been placed upon the decision of the Madras High Court in **Commr. of Cus. (AIR), Chennai** vs. **A.P. Pinherio[16];** and

vii. Where it is intended to recover or demand duty from any person and also confiscate any offending goods related to such proposed demand of duty along with

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14. 2015 (315) E.L.T. 74 (Tri-Mumbai)
15. 2008 (233) E.L.T. 289 (Tri.-Bang.)
16. 2014 (306) E.L.T. 349 (Mad.)

imposition of penalties provided in Chapter XIV, a combined notice has necessarily to be issued invoking provisions of both sections 28 and 124 of the Customs Act. In support of this contention reliance has been placed upon the decision of the Tribunal in **Prince Fortified Steels Pvt. Ltd.** vs. **Commissioner of Cus., Tuticorin**[17]**.**

18. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

19. The issue that arises for consideration in these appeals is regarding the valuation of the Barge. The value declared by the appellant in the Bill of Entry filed on August 25, 2011 under section 46 of the Customs Act seeking clearance under First Check Examination procedure was US Dollars 6,034,657.00 (CIF), equivalent to Rs. 26,97,49,167/-. The appellant had mentioned this value on the basis of the invoice, MOU, Bill of Sales, Insurance and Chartered Engineer Certificate and paid customs duty to the extent of Rs. 4,12,70,061/-. The certificate issued by the Chartered Engineer mentions that the fair and reasonable price would be US Dollars 6,000,000.00 (FOB) taking into consideration the condition of the equipment, expected residual life and the market enquiry. However, the Department believed that the vessel was grossly under voiced and, therefore, re-inspection of the Barge was carried out by the same Chartered Engineer, who this time amended the value to US Dollars 7,385,500.00. A remark was

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17. 2019 (369) E.L.T. 1228 (Tri.- Chennai)

made that during the re-inspection, they gathered complete vessel particulars, which had not been made available to them during the first inspection.

20. The Barge with the equipments, accessories and spares was seized under section 110 of the Customs Act. It was, however, subsequently provisionally released on payment of customs duty of Rs. 5,15,62,600/- as per the second report of the Chartered Engineer.

21. The order passed by the Commissioner rejects the value declared by the appellant under rule 12 of the 2007 Valuation Rules and has re-determined the value.

22. Section 14 of the Customs Act deals with valuation of goods. It was amended in 2007. Section 14, as it stood prior to its amendment, is reproduced below:

> **"Section - 14 Valuation of goods —**
> **(1)** For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where -
>
> (a) where the seller and buyer have no interest in the business of each other; or
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> (b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale
>
> Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.
>
> **(1A)** Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.
>
> **(2)** Notwithstanding anything contained in sub-section (1) or subsection (1A), if the Board is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods,

having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

*******"

23. Section 14 of the Customs Act, as amended on 10 October 2007, is as follows:

"**Section 14.Valuation of goods.** – (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:"

24. The Supreme Court in **Wipro Ltd.** vs. **Assistant Collector of Customs**[18] examined the provisions of section 14 of the Customs Act as it stood prior to 2007 and also as it stood after the amendment in 2007. It noticed that under the unamended provision, the principle was to find out the valuation of goods "by reference to the value" and it introduced a determining / fictional provision by stipulating that the value of all the goods would be the price at which such or like goods are "ordinarily sold". However, under the amended provisions, the valuation is based on the 'transaction' price namely, the price "actually paid or payable for the goods". This change in the principle brought about in section 14(1) of the Act was noticed by the Supreme Court in

18. 2015 (319) E.L.T. 177 (S.C.)

paragraphs 22 and 23 of the judgment and they are reproduced below:

> "**22. The underlying principle contained in amended sub-section (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of customs duty.** Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. **Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this sub-section (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other.** In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. **This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.**
> 23. As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of 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 which can be prescribed in the rules. Sub-section (2) of Section 14, which remains the same, is an overriding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case."
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> **(emphasis supplied)**

25. Thus, what has to be seen under section 14(1) of the Customs Act, as amended in 2007, is the transaction value of the goods imported or exported for the purpose of customs duty and transaction value is stated to be the price actually paid or payable for the goods when sold for export to India for delivery at that time and place of importation. Sub-section (1) of section 14 of the Customs Act also makes it clear that the price actually paid or payable for the goods will not be treated as 'transaction value' where the buyer and the seller are related to each other. As per the first proviso to the amended section 14 (1), certain charges

are to be added to the transaction value of the imported goods. It is, therefore, clear that while there was scope for addition of notional charges in the assessable value under the un-amended section 14 of the Customs Act, but after the actual sale price concept was introduced in the year 2007 on the basis of GATT guidelines and section 14 of the Customs Act was amended in 2007, any inclusion of notional charges seems to have lost its relevance and only actual cost incurred by the buyer is required to be considered.

26. In the present case, as noticed above, the Barge was earlier on charter to M/s. Afcons Gunanusa Joint Venture who had imported it under a Bill of Entry dated October 22, 2010 with the declared value of Rs. 23.41 crores, which value was accepted by the Department. The declared value of the Barge in the Bill of Entry dated August 25, 2011 is US Dollars 6,000,000.00, freight US Dollars 5,000 and insurance US Dollars 29,657.00 totaling US Dollars 6,034,657.000 (CIF) equivalent to Rs. 26,97,49,167/-. It needs to be noted that the appellant had purchased the said second hand Barge with all standard accessories for a transaction value of US Dollars 6,000,000.00 (FOB) to be paid directly to the bank account of the seller and the Bill of Sale was executed on July 05, 2011. Earlier M/s. Afcons Gunanusa Joint Venture had imported the said Barge under a Bill of Entry dated October 22, 2010, wherein the declared value was only Rs. 23.41 crores.

27. An inspection was carried out by Chartered Engineer of a Government Approved Inspection and Certification Agency, who opined that the fair and reasonable price of the Barge would be US

Dollars 6,000,000.00 (FOB). Later on, at the instance of the Department, the Barge was again re-examined by the same Chartered Engineer, who this time issued a revised certificate and amended the FOB value from the Barge from US Dollars 6,000,000.00 (FOB) to US Dollars 7,385,500.

28. In paragraph 23 of the order, the Commissioner has noted why there was a change in the CIF value of the Barge and the said paragraph is reproduced below:

> "23. It is evident from the Para 9.6 of the Chartered Engineer's [M/s. Intertek Services] certificate dated 22.07.2011 submitted by the importer for the clearance of the impugned barge, that the list of items for which the CIF valuation had been considered were "Old and Used Non Propelled Accommodation Barge "Halani Star", spares, consumables, and Provisions on board". **Further, it appeared that the valuer had not considered the value of the equipments such as the Crane of "American" brand AMHOIST with a capacity of 225 Tones, three Power Generators of Caterpillar Make with capacity of 1030 Kilowatt, 4 Winches with 8 drums (one set was non functional and under repair), Water Maker with capacity under Reverse Osmosis process for making 25 tons per day.** The value of the these equipments installed on the barge was required to be included to arrive at the assessable value of the barge under import. On being asked to state the value of the said equipments, Shri Hari Bhambani, Managing Director of M/s Bhambani Shipping Ltd requested that the said equipments may be resurveyed by the same Chartered Engineers as they would verify whether the value of some equipments had been left out and that if the value was enhanced after the survey he would pay the differential duty. Accordingly, as per the request of the importer, the inspection of the impugned barge was carried out by the Chartered Engineers, M/S Intertek Services, on 06.10.2011 in the presence of the importer. M/s Intertek Testing Services Pvt Ltd gave their valuation report vide their Ref No SSA/CEC/VALUE/HALANI GROUP/HALANI STAR/REV-352/2011 2012 dated 12TH October, 2011. M/s Intertek Testing Services Pvt. Ltd, in their detailed report on the barge estimated the FOB value of the Barge along with the equipments to USD 7385000. The value of the Equipments as per its specifications and capacity was estimated to USD 1,385,000."
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> **(emphasis supplied)**

29. What has been noticed in the above paragraph of the Order is that earlier the valuer had not considered the value of the equipments such as crane, three power generators and water

maker and the value of these equipments installed on the Barge was required to be included to arrive at the assessable value of the Barge.

30. The contention of the appellant is that it had correctly declared the transaction value as the assessable value for the purposes of customs duty and it is also not the case of the Department that the assessable value declared by the appellant is not the transaction value since the entire case of the Department is based on the valuation report submitted by the Chartered Engineer. The second report submitted by the Chartered Engineer states that during their re-inspection, they had gathered complete vessel particulars regarding capacities and other technical specifications, which were not made available during the initial inspection.

31. It is, therefore, necessary to reproduce the relevant portion of the two reports. The relevant portion of the first report dated July 21, 2011 is reproduced below:

"DATED: July 22, 2011

CHARTERED ENGINEER CERTIFICATE

With respect to the request for Halani Group, Mumbai, we carried out detailed survey/inspection of the One Old, Used & Secondhand Non – Propelled Accommodation Barge **"HALANI STAR"** while she lay afloat at **"V-3, Anchorage, Mumbai Port"** on **21.07.2011.** In regards we now report as under:

1.	**Purpose and Object of Inspection**	: : : :	Whether the items/components are new or used ones and re-conditioned or not, Whether the items/components put together will form a complete unit, To ascertain Year of Built/Make/Model/Price in Year of Built, To appraise the value of items/components in the 'as is where is basis'

6.	**Details of Items Inspected**		
6.1	**Technical Specifications**	:	One Old, Used & Secondhand Non-Propelled Accommodation Barge **"HALANI STAR"** with related spares, accessories, consumables & provisions on-board.
6.2	**Vessel Particulars**	:	
	Name of Vessel	:	**"HALANO STAR"**
	Type	:	Non-Propelled Accommodation Barge
	IMO no.	:	8646616
	Official No.	:	10674
	Port of Registry	:	Kingstown,
	Builder	:	Chuan HUP Marine Ltd.,
	Place of built	:	Singapore
	Owner	:	Halani Industries Ltd. Trust House, 1 12 Bandic Street, Kingstown Saint Vincent ABS – A1, Barge
	Current Class	:	IRS – SU, Pontoon
	Length	:	91.440 Meters
	Breadth	:	27.430 Meters
	Depth	:	05.486 Meters
	GRT	:	5,608 Tons
	NRT	:	1,683 Tons
	Summer Draft	:	3.81 Meters
	Dead Weight	:	5,942.85 Tons
	Light Ship	:	3,141.52 Tons
	Main Generator	:	3 × 1,030 kw – Make Caterpillar Model CAT – D – 399
	Emergency Generator	:	1 × 320 kw – Make Caterpillar Model CAT – D – 34112
	Compressors	:	1 × Sullair 680 cfm & 1 × Ingersoll 350 cfm
	Water Maker		Reserve Osmosis S-64B-436 [1 × 25 tons/per day – 1 × 20 tons/per day]
	Accommodation Capacity	:	222 persons including 21 crew member
b.	**Vessel Particulars**		
	Tank Capacities		
	Fuel Oil	:	2 × 324 Cubic meters
	Fresh Water	:	2 × 642.56 Cubic meters 2 × 514.07 Cubic meters
	Water Ballast	:	3,018 Cubic meters
	Clear Desk Space	:	1,400 Square meters
	Crane – 1 no. – Cap – 225 tons	:	AMHOOIST 11750, Pedestal Crane 94 H Tubular Boom – Boom length – 45 mtrs. Engine: Cummins VT 1710 – C524, 515 HP
c.	**Year & Place of Built**	:	1982, Singapore
d.	**Price of New Vessel in (YOM)**	:	USD 20,000,000.00 Approx.

Detailed Specifications, Certificate of Ownership attached herewith for **"HALANI STAR".**

7.	**Nature of inspection**		
7.1	**Whether Inspected in Working Condition (Yes/No)**	:	Yes
7.2	**Technical Details of Tests Carried Out**	:	All equipments were found to be working in good condition and as per their respective stated capacity.

7.3	**National/International Standards Followed for Inspection**	:	There is no specific National/International Standard for the inspection of these equipments. This type of machinery is well known and proven internationally for various applications.
8.5	**Comments on Valuation** Taking into consideration the condition of the equipment, expected residual life and the enquiry in market, the fair and reasonable price in our opinion is USD 6,000,000.00[FOB] [US Dollars Six Million Only].		
9.6	**CIF valuation of Non – Propelled Accommodation Barge "HALANI STAR" as per Invoice:**		
	One Old, Used & Secondhand Non – Propelled Accommodation Barge **"HALANI STAR"** with related spares, accessories, consumables & provisions on-board	USD	6,000,000.00
Add.	Freight	USD	5,000.00
Add.	Insurance	USD	29,657,00
CIF valuation of Accommodation Barge "HALANI STAR"		**USD**	**6,034,657.00**

32. In the second report dated October 12, 2011, the following changes appear:

> "During our re-inspection on board vessel along with Customs Officials, we have gathered complete vessel particulars which were not made available during our initial inspection/documentation regarding capacities, YOM & other technical specifications of equipments such as cranes, generators, compressors WMP, STP etc. and against the following commercial details, we now amend our earlier certificate as under:
>
> ********

9.5	**CIF valuation of Non – Propelled Accommodation Barge "HALANI STAR" as under:**		
	One Old, Used & Secondhand Non – Propelled Accommodation Barge **"HALANI STAR".**	USD [FOB]	6,000,000.00
Add.	On account of cost of on board spares, consumables, accessories, provisions & Equipment on board with their respective capacities, YOM & other technical specifications of equipments such as cranes, generators, compressors WMP, STP etc.	USD [FOB]	1,385,000.00
Add.	Freight	USD	5,000.00
Add.	Insurance	USD	29,657,00
CIF valuation of Accommodation Barge "HALANI STAR"		**USD**	**7,419,657.00**

33. A comparative study of the two certificates dated July 22, 2011 and October 12, 2011 issued by the Chartered Engineer is reproduced below:

COMPARATIVE STUDY TABLE

CERTIFICATE DATED 22.07.2011	CERTIFICATE DATED 12.10.2011
1. In column 6.2 b of Certificate: **Crane - 1 no. -Cap-225 tons**: AMHOOIST 11750, Pedestal Crane 94 H Tubular Boom-Boom length-45 mtrs. Engine: Cummins VT 1710 - C524, 515 HP	1. In column 6.2 b of Certificate: **Crane - 1 no. -Cap - 225 tons:** AMHOOISST 11750, Pedestal Crane 94 H Tubular Boom-Boom length - 48 mtrs. Engine: Cummins VT 1710 - C524, 515 HP
2. In column 6.2 of Certificate: **Main Generator:** 3 x 1,030 kw - Make Caterpillar Model CAT - D – 399 **Emergency Generator:** 1 x 320 kw - Make Caterpillar Model CAT-D-34112	2. In column 6.2 of Certificate: **Main Generator:** 3 x 1,3030 kw - Make Caterpillar Model CAT-D - 399 **Emergency Generator:** 1x 320 kw - Make Caterpillar Model CAT - D - 34112
3. In column 6.2 of Certificate: **Compressors:** 1 x Sullair 680 cfm & 1 x Ingersoll 350 cfm	3. In column 6.2 of Certificate: **Compressors:** 1 x Sullair 680 cfm & 1 x Ingersoll 350 cfm
4. In column 6.2 of Certificate: **Water Maker:** Reverse Osmosis S-64B-436 [1 x 25 tons / per day- 1 x 20 tons/ per day)	4. In column 6.2 of Certificate: **Water Maker:** Reverse Osmosis S-64B-436 [1 x 25 tons / per day – 1 x 20 tons / per day]
5. In column 9.6 of Certificate: **CIF Valuation** One Old, Used & Secondhand Non-propelled Accommodation Barge "HALANI STAR" with related spares, accessories, consumables & provisions on board **Value as per Invoice** US D 6,000,000.00 Freight USD 5,000.00 Insurance US D 29,657.00 -------------------- **CIF value US D 6,034,657.00**	5. In column 9.6 of Certificate: **FOB Valuation** One Old, Used & Secondhand Non-propelled Accommodation Barge "HALANI STAR" with related spares, accessories, consumables & provisions on board Invoice Value: 6,000,000.00 **Present Assessed Value US D 7,385,000.00**
6. In column 8.5 of Certificate: **Comments on Valuation** Taking into consideration the condition of the equipment,	6. In column 8.5 of Certificate **Comments on Valuation** Taking into consideration the condition of the equipment,

expected residual life and the enquiry in market, the fair and reasonable price in our opinion is USD 6,000,000.00 [FOB] [US Dollars Six Million Only).	expected residual life and the enquiry in market, the fair and reasonable price in our opinion is USD 7,385,000.00 [FOB] [US Dollars Seven Million Three Hundred Eighty Five Thousand Only]
7. <u>In column 9.4 of Certificate:</u> Deck Machinery, compressors, Workshop Equipments, Winches, Discharge Pumps, Radio & Navigational & Safety Equipments was Inspected**.....(This is missing in Cert. dt. 12.10.11, but shown as "Add:" Valued at USD 1,385,000.00 (FOB]**	7. <u>In column 9.4 of Certificate</u> Add: On account of cost of on board spares, consumables, accessories, provisions & Equipment on board with their respective capacities, YOM & other technical specifications of equipments such as cranes generators, compressors WMP. STP etc. **[FOB] US D 1,385,000.00**

34. It is clear from a comparison of the two reports that the vessel particulars, which purportedly had not been made available during the first inspection report, form part of the first report and have also been reproduced in the second report. The description of the Barge and its equipment is same in both the valuation reports and the Chartered Engineer had also inspected the Barge before the first report was submitted.

35. What also needs to be noted is that the appellant had purchased the Barge at US Dollars 6,000,000.00 (FOB) and earlier the same Barge was imported by M/s. Afcons Gunanusa Joint Venture under a Bill of Entry dated October 22, 2010 for Rs. 23.41 crores, which value was accepted by the Department. The value of the Barge was mentioned as Rs. 26.82 crores in the Bill of Entry dated August 25, 2011 submitted by the appellant.

36. Learned counsel for the appellant also submitted that since the Chartered Engineer had changed the valuation, the appellant had made a request for cross examination of the Chartered Engineer but this request was rejected by the Commissioner for

the sole reason that it was the Managing Director of the appellant who had stated that the same Chartered Engineer should re-inspect the Barge. The relevant portion of the order of the Commissioner is reproduced below:

> "26.7 They have contended that the department has erred in rejecting the Chartered Engineer Certificate without recording his statement or cross examining him. Therefore, to pick holes in the certificate of Chartered Engineer without cross-examining him is not just and proper in law. They have cited the case law of the Big Apple Manufacturing Vs. Commissioner of Cus. & C. Ex. (A), Hyderabad, Mumbai [2009 (237) E.L.T. (Tri. Bang.)]
>
> *******
> Thus, in this case the Chartered Engineer who had earlier given the valuation on the basis of the limited data made available to them had been appointed, on the request of the noticee themselves, to inspect and verify the value of the equipments whose valuation had been left out in their earlier report. Therefore, in the facts and circumstances of the case the case law relied upon by the noticee is not applicable."

37. It may be that the Managing Director of the appellant had made a request for re-inspection of the Barge by the same Chartered Engineer, but this cannot be made a ground to reject the cross examination claimed by the appellant, more particularly when a specific averment had been made by the appellant that all the vessel particulars had been made available to the Chartered Engineer earlier and the first report had been submitted on that basis after inspection of the Barge and that the description of the Barge and the equipments mentioned in both the valuation reports is the same. It was, therefore, necessary on the part of the Department to have examined the Chartered Engineer and also to have permitted the appellant to cross examine him.

38. Such a requirement is necessary is clear from the observations made by the Allahabad High Court in **Commissioner**

of Central Excise vs. **Kurele Pan Products Pvt. Ltd.**[19]**,** wherein, it was held that documents cannot be relied upon if permission to cross examine the author of the documents has not been provided. The relevant portion of the judgment is reproduced below:

> "6. **It is a settled principle of law that if the authority wants to rely upon the statement of any witness, the opportunity of cross-examination ought to have been given to enable the party to prove its case. Non-providing of the opportunity of cross-examination amounts to violation of the natural justice and in absence of denial of natural justice, such documents cannot be relied upon.** In the case of Basudev Gard v. Commissioner of Customs [2013 (294) E.L.T. 353 (Del.), the Division Bench of the Delhi High Court has held that the statement against the assessee cannot be used without giving them opportunity of cross-examination. **Cross-examination is valuable right of the accused/noticee** in quasi-judicial proceeding which can have adverse consequences for them."
>
> **(emphasis supplied)**

39. Thus, cross examination is a valuable right available to an assessee and it cannot be denied in an arbitrary manner. In the present case, as noticed above, the Commissioner has rejected the request made by the appellant for cross examination of the Chartered Engineer only for the reason that the appellant had stated that the Barge may be re-inspected by the same Chartered Engineer. If the report was found to be faulty by the appellant, the Department should have recorded the statement of the Chartered Engineer and also permitted the appellant to cross examine him, so as to determine the correct facts.

40. In such circumstances, when neither the Chartered Engineer was examined nor the appellant was not permitted to cross examine the Chartered Engineer, the second report submitted by the Chartered Engineer cannot be relied upon.

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19. 2014 (307) E.L.T. 42 (All.)

41. Thus, the value declared by the appellant should have been treated as a transaction value and no reliance could have been placed on the second report of the Chartered Engineer for enhancing the value of the Barge. It is also not the case of the Department that any additional consideration was paid by the appellant to the seller of the Barge.

42. In this view of the matter it is not necessary to examine the other contentions raised by learned counsel for the appellant regarding the infirmities committed by the Commissioner while passing the order.

43. Thus, for all the reasons stated above, the order passed by the Commissioner cannot be sustained and is set aside. The declared value of the Barge cleared through the Bill of Entry dated August 25, 2011, therefore, deserves to be accepted. The appeals are, accordingly, allowed.

(Order Pronounced on **18.01.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.ANJANI KUMAR
MEMBER (TECHNICAL)

Archana/JB/Shreya