

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85822 OF 2019

[Arising out of Order-in-Original No: CAO 29/2018-19 dated 26th November 2018
passed by the Commissioner of Customs (Import –I), Mumbai.]

Sachin Kshirsagar
SS Offshore Private Ltd
4th Floor, Viraj Impex House, 47 D’Mello Road
Mumbai – 400009

... Appellant

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

...Respondent

WITH

CUSTOMS APPEAL NO: 85825 OF 2019

[Arising out of Order-in-Original No: CAO 29/2018-19 dated 26th November 2018
passed by the Commissioner of Customs (Import –I), Mumbai.]

SS Offshore Private Ltd
4th Floor, Viraj Impex House, 47 D’Mello Road
Mumbai – 400009

... Appellant

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

...Respondent

APPEARANCE:

Shri T. Viswanathan, Advocate for the appellants

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

AND

CUSTOMS APPEAL NO: 85841 OF 2019

[Arising out of Order-in-Original No: CAO 29/2018-19 dated 26th November 2018
passed by the Commissioner of Customs (Import –I), Mumbai.]

Babaji Shivgram Clearing & Carriers Pvt Ltd
407, 4th Floor Rex Chambers, Ballard Estate
Mumbai - 400001

... ***Appellant***

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

... ***Respondent***

APPEARANCE:

Shri Prashant Patankar, Advocate for the appellant

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

AND

CUSTOMS APPEAL NO: 86156 OF 2019

[Arising out of Order-in-Original No: CAO 29/2018-19 dated 26th November 2018
passed by the Commissioner of Customs (Import –I), Mumbai.]

Harish Bhatia
Harish & Company
A-2012, Willow Towers, Besant Gardens
Opp Swapna Nagri, Mulund (W), Mumbai -400080

... ***Appellant***

versus

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai 400001

... ***Respondent***

APPEARANCE:

Shri Anil Mishra, Advocate for the appellant

Shri Ramesh Kumar, 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 / 85536-85539/2022

DATE OF HEARING:	16/12/2021
DATE OF DECISION:	09/06/2022

PER: C J MATHEW

These four appeals, arising from order-in-original no. CAO/29/2018-19 dated 26th November 2018 of Commissioner of Customs (Import-I), New Customs House, Mumbai impugned therein, concern the import of 'old and used self-propelled platform supply vessel Sagar Fortune' as declared in bill of entry no. 2630993/28.07.2017 filed on behalf of M/s SS Offshore Pvt Ltd by M/s Babaji Shivram Clearing and Carriers Pvt Ltd, a licenced customs broker, in which the classification and valuation was altered for recovery of differential duty of ₹ 3,53,25,921 under section 28 (4) of Customs Act, 1962, along with applicable interest thereon, besides confiscation under section 111(m) of Customs Act, 1962 with option to redeem on payment of fine of ₹ 2,50,00,000. In addition, differential duty of ₹ 24,36,879 on 1,33,000 litres of 'high-speed diesel', 9220 litres of 'lubricating oil' and 5250 litres of 'hydraulic oil' was ordered for recovery under section 28 (4) of Customs Act, 1962, along with applicable interest thereon, besides being confiscated under section 111(l) and section 111(m) of Customs Act, 1962 with option to redeem on payment of ₹ 6,00,000 as fine. Penalties under section 112 of Customs Act, 1962 was imposed on the importer and other appellants herein in addition to penalties under section 114AA of Customs Act, 1962. Shri Sachin Kshirsagar is the Director of the

importing company and Shri Harish H Bhatia is the proprietor of M/s Harish and Company, the chartered engineer engaged by the importer for appraisal of the value of the impugned vessel.

2. The vessel, with declared value of ₹ 13,82,89,200 for assessment at the rate corresponding to tariff item 8901 9000 of the First Schedule to Customs Tariff Act, 1975, had been built by Jingijang Nanyang Shipbuilding Co, China in 2007 and assigned IMO no. 9458327 upon registration as 'Dalini Topaz' of type 'steel offshore supply vessel' owned by M/s Salvin Far East Pte Ltd, Singapore as per provisional Certificate of Singapore Registry dated 8th January 2008 issued by Marine and Port Authority Singapore. A fresh Certificate of Singapore Registry was issued on 30th April 2009, bearing the same number and type, upon renaming as 'Pacific Amethyst' under the ownership of M/s Swire Pacific Operations (Pte) Ltd, Singapore. After purchase of the vessel, now called 'Sagar Fortune', by the importer, the provisional Certificate of Indian Registry dated 30th June 2017, describing her as 'transverse, steel offshore supply vessel', was furnished to customs authorities along with memorandum of agreement (MoA) dated 12th May 2017 indicating the purchase price to be US \$ 2,100,000.

3. After arrival of the vessel, on receipt of intelligence pertaining to bunkers and stores, she was searched and the IMO declaration

found on board was found to be at variance with details submitted for assessment insofar as 'high speed diesel' and 'lubricating oil' was concerned besides including 'hydraulic oil' that had not been declared in the bill of entry. Allegedly, another note signed by officers of the impugned vessel and of 'Sagar Prince', in the fleet of the importing company, indicated transfer of 50 cu. m. of 'high speed diesel' on 3rd August 2017. These were relied upon for recovery of differential duty on stores and bunkers and documents, evincing payment of US\$ 92,107 for consumables, of US\$ 42,000 for brokerage charged by Ajit Arote of M/s Om Sai, of US\$ 6803.77 and US\$ 846.63 to M/s Inchape, a ship agency, and of US\$ 3000 out of US\$ 6050 due to M/s DNV-GL Surveys recovered in follow-up search at the premises of the importer, were relied upon for enhancement of assessable value of the vessel. The 'memorandum of agreement', also recovered during search, evidencing delivery of the vessel at Cape Town, South Africa was allegedly suppressed to exclude insurance and freight from place of delivery from the value declared for assessment. Other documents were relied upon to allege that the ship was not 'supply vessel' as claimed but 'support vessel' warranting assessment at rate of duty corresponding to tariff item 8905 9090 of First Schedule to Customs Tariff Act, 1975 and for appraisal of the value by chartered engineer.

4. Though the dispute comprised three elements – addition of value of stores and bunkers not declared and misdeclared, non-

inclusion of freight, insurance and other charges, incurred before arrival, in the declaration and applicable rate of duty – Learned Counsel for appellant restricted his contentions only to the latter two.

5. The contention of customs authorities is that the vessel is designed for firefighting and support which merits classification at variance with that claimed in the bill of entry. For this, reliance was placed on ‘class certificate’ issued by American Bureau of Shipping (ABS) and the corresponding portion (or A1) of the ABS Rules for Building and Classing Marine Vessels. Further reliance was placed on ‘certificate of class’ issued by Indian Register of Shipping describing the vessel as ‘SUL, “Offshore Support Vessel” IY AGNI 1 (2400 CUM/HR), DP(2)’ denoting compliance with rules for hull, appendages and equipment, compliance with standards for self-propulsion, capability of early stage firefighting and close rescue operations and of fitment with automatic controls for positioning. Furthermore, as pointed out by Learned Authorized Representative, the pre-inspection/ survey report dated 26th April 2016 of Det Norske Veritas – Germanischer Lloyd (DNV-GL) (and now styled as DNV) and that of American Bureau of Shipping (ABS) dated 18th May 2017, as well as the ‘memorandum of agreement (MoA)’ dated 12th May 2017, all specifically note its capacity for firefighting and offshore support as does the certificate of confirmation of class issued by Maritime and Port Authority Singapore (MPA). The fitment of 40

cabins, though manning requirement of the vessel is only 12, has been taken as indicative of space for expert fire-fighters and rescuers. It was, therefore, concluded that the primary function is firefighting and not supply as claimed by importer. Consequently, the exemption from basic customs duty available in notification no. 50/2017-Cus dated 30th June 2017 was denied.

6. The adjudicating authority has further concluded that the several charges paid, and payable, by the importer prior to the arrival of 'SAGAR FORTUNE' in India constitute cost of shipment to the port of destination devolving upon the appellant in addition to the sale price and, therefore, to be included in the assessable value. Learned Counsel for the appellant argued that the vessel was transacted for purchase at US \$ 2,100,000 (₹ 13,82,89,200) and the enhancement of value to US \$ 5,000,000 (₹ 40,58,64,821) was not in conformity with the scheme of valuation contained in section 14 of Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. According to him, the mandate of 'transaction value' is uniformly intended to apply notwithstanding procurement directly from manufacturer, through a trading entity or, as in the present case, from an existing user and contends that, in the absence of any valid ground for doubting the *bona fides* of the transaction itself, customs authorities are bound to adopt the declared value for assessment. Reliance was placed on the decision of the of Hon'ble Supreme Court

in *Tolin Rubbers Pvt Ltd v. Commissioner of Customs, Cochin* [2003 (11) TMI 90-SUPREME COURT], in *Motor Industries Co Ltd v. Commissioner of Customs* [2009 (244) ELT 4 (SC)], in *Eicher Tractors Ltd v. Commissioner of Customs, Mumbai* [2000 (11) TMI 139-SUPREME COURT] and in *Commissioner of Customs, Mumbai v. Bureau Veritas* [2005 (181) ELT 3 (SC)] besides relying upon the instruction of Central Board of Excise & Customs in circular no. 25/2015-Cus dated 15th October 2015 and, particularly, on

‘8. It follows that in cases where used capital goods cannot be appraised under Rule three, and where there may be difficulty in applying Rules 4 to 8 of the CVR, 2007, the proper officer may be required to apply the residual method under Rule 9 so as to factor condition, depreciation, refurbishment, charges of assembly & packing and any expenses incurred by way of pre-shipment inspection agency charges etc.

9. Given the nature of challenges in computing the value of second hand machinery under Rule 9, and the need to ensure that the approach applied reflexes commercial reality and results in a value which is fair, and is arrived through uniform processes by all custom houses, it is felt that it is necessary to obtain inspection/placement reports from qualified neutral parties.

10. For this purpose, the Board has decided that Inspection/Appraisement Reports issued by Chartered Engineers, or their equivalent, based in the country of sale of the second hand machinery shall be accepted by all Custom Houses.... In the event that an importer does not produce an

inspection/appraisal report in the prescribed format from the country of sale, he shall be free to engage the services of inspection agencies notified as per H The HBoP 2015-20....

11. No Custom House shall require any importer to have an inspection/appraisal report of second hand machinery from a particular Chartered Engineer...'

as reflecting legislative intent of section 14 of Customs Act, 1962.

7. He further argued that none of the circumstances predicated recourse to Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have been taken note of in the impugned order and that no payment was made either directly, or otherwise, to the seller. He contends that the key to international commercial transaction is 'sold for export to the country of importation', in Advisory Opinion 14.1 of World Customs Organisation (WCO), which fits the impugned sale.

8. He further urged that the valuation determined by the first Chartered Engineer had been rejected for inappropriate reasons inasmuch as the value itself was not doubted but the competence of the surveyor was and, merely because, instead of the proprietor himself inspecting the vessel, another person, no less qualified, had been deputed for the purpose. The report of the second Chartered Engineer is, according to him, unreliable as he was nominated by customs authorities and that the original value adopted by him, before

adjusting for present value, was not based on any documentary ascertainment but an estimate of his own. Furthermore, he urged us to discard the report as cross-examination of the surveyor, which would have controverted its foundational integrity, had been denied.

9. It was further argued that, though the sale transaction did occur at Cape Town, the vessel was delivered at Mumbai and that the contracted value incorporated the expense involved owing to which the addition of freight and insurance should be set aside. Contending that 'brokerage' and 'other expenses' nor any part thereof was payable, either directly or indirectly, to the seller, the addition was, he argued, not in consonance with rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

10. Learned Authorized Representative pointed out that it was abundantly clear that the charges for transportation of the vessel from Cape Town to Mumbai had not been paid for by the seller and that the other charges incurred by the appellant must, necessarily, be included in the assessable value to conform with section 14 of Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. He submitted that the report of the Chartered Engineer engaged by the appellant had been correctly rejected as he had admitted, in a statement, to not having inspected the vessel personally or having perused the 'memorandum of agreement (MoA)'

for ascertainment of the several conditions therein. According to him, the original value of the vessel had been ascertained by Shri Harish Bhatia, and by his own admission, in conformity with general practice which had nothing to do with his expertise. He also submitted that the misdeclaration of description of the vessel sufficed to reject the declared value as transaction value and for resort to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

11. Before proceeding to resolve the controversy over valuation, and even before examination of the rival submissions on the classification to be adopted, there are several aspects of this dispute that bear elucidation. Vessels and aircraft, not strangely, occupy sufficiently special place in the customs statute to be assigned dual character as is evident from

‘(9) “conveyance” includes a vessel, and aircraft and a vehicle’

in section 2 of Customs Act, 1962, attendant upon which certain obligations devolve on the ‘in-charge’ therein in chapter VI of Customs Act, 1962 as do certain privileges, and from

(22) “goods” includes -

(a) vessels, aircrafts and vehicles;...

which, though devoid of distinct definition therein, may, for our purposes, be placed along with

*(21) “foreign-going vessel or aircraft” means any vessel or aircraft for the time being engaged in the carriage of goods of passengers between any port or airport in India and any port or airport outside India, where the touching any intermediate port or airport in India or not, and includes-
...’*

12. Any vessel spends her entire life in waters - domestic or international - and, similar to aircraft, are remunerative to the extent that they are on the move. Though every arrival at the harbour or airport involves, technically, import from outside the country, the personality of the vessel/aircraft as ‘conveyance’ entitles separate treatment; the alternative would generate inconvenience bordering on chaos in international travel and traffic. Nonetheless, for certain statutory requirements attendant upon ownership, and appendant privileges, vessel/aircraft may have to be imported as ‘goods’ requiring compliance with attendant customs procedures. That, however, does not derogate from its functionality as ‘conveyance’ which is the purpose of, and defines, its very existence as vessel/aircraft. Except for the one purpose of obliterating its existence as ‘conveyance’, and most often by ‘breaking’, import of vessels is generally for reverting to use as ‘conveyance’ for transportation of goods and persons. Such transformation, being momentary, converts vessel/aircraft into ‘goods’ within the window for compliance with statutory requirements before reverting to its natural character of

‘conveyance’ for carriage of persons and goods upon clearance for home consumption in accordance with section 47 of Customs Act, 1962 – even if, paradoxically, it may be ‘foreign going vessel’ immediately thereafter. It is, therefore, of utmost essence that assessing authorities tread that tightrope with extreme caution lest the universally acknowledged freedom of the seas and freedom of the skies be compromised at the altar of revenue harvest beyond the intent of law.

13. With this caveat, we approach the issue of valuation. Valuation, by its very nature, is susceptible to multifarious understanding and not the least of which is the commonality of intent in a seller-buyer transaction. The insinuation of governmental mechanism into what is essentially a commercial transaction is justified only by the sovereign power of the State to impose levies and is, therefore, to be construed as limited to that purpose alone. The universally acknowledged convention on valuation is intended to ensure that commercial engagement between two entities operating from distinct national jurisdictions is not distorted by discriminatory treatment and revenue maximization. Section 14 of Customs Act, 1962 and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, framed thereunder, are enacted to assure that uniformity of approach not only reflects international consensus but also is a restriction on the bounds of assessment vested in customs authorities.

14. In the extant valuation regime, the concept of ‘transaction value’ and the sanctity of ‘declared price’ as the ‘gold standard’ converge; in the erstwhile regime, such convergence was merely deemed with ‘transaction value’ was conceptually articulated in section 14 of Customs Act, 1962 and the ‘gold standard’, to be normally donned by the ‘declared price’, ensconced in the Rules prevailing then. This transformation was of such recent origin that the legacy of an entirely different paradigm had yet not been fully burned out of operational memory, and practice, of assessing authorities; notwithstanding reiterations, in different contexts, under the policy formulation authority of Central Board of Excise & Customs (CBEC). The valuation dispute, initiated in the show cause notice leading to the impugned order, has every appearance of the chasm that separates conformity with international convention from its disposition at the administering level.

15. The extant scheme of valuation for assessment is predicated upon acceptance of the declaration in the bill of entry except in circumstances of deviation from the specific parameters that comprise the totality of section 14 of Customs Act, 1962 and, thereby, empowering customs authorities to invoke rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

16. Bearing in mind that the scheme of valuation is intended for

general application to ‘goods’, and not to ‘conveyances’ that, for a time and for the purpose, are statutorily transformed into ‘goods’, the parameters of section 14 of Customs Act, 1962 remain, indiscriminatingly, applicable. It is only in application of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, and, more particularly, in the *minutiae* for fastening of full extent of transaction value that the parody is played out. Just as no vehicle may venture into public space without some form of registration, no vessel may put out to sea save with some territorial mooring of its existence with right to bear the national flag after import; every vessel arriving at the shores of India for import is ‘used’ and, therefore, may not find fitment within the orthodoxy of purchase from manufacturer which, for assessing officers ingrained in the traditions of ‘real value’ in Sea Customs Act, 1878, suffices for embarking upon the last of the options for valuation available under the Rules. Nevertheless, there is no reason, except from contrary evidence, to deny acknowledgement of the ‘declared value’ of the vessel as the ‘gold standard’ of ‘transaction value’ for assessment and for resorting to Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 only upon presentation of circumstances that do so permit.

17. The Rules, though for the most part pertains to re-determination from non-acceptance of declared value, contemplate three different contingencies: the situational alternatives consequent upon rejection

of the declared price under the authority of rule 12, the reiteration of the 'gold standard' in rule 3 and the empowerment of additions without, in any way, faulting the declaration itself for lacking conformity with section 14 of Customs Act, 1962.

18. The declared price may be discarded in favour of the actual 'transaction value', subject to availability of evidence of direct or indirect flow of additional consideration to the seller, for conformity with the concept enshrined in section 14 of Customs Act, 1962 without recourse to any provision other than rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Any other substitution of declared value as 'transaction value' must conform to one of the situations envisaged in rule 4 to rule 9, taken sequentially, for validation of assessment for determination of duty of customs after recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It must be borne in mind that the substituted values are approximations permissible solely on the ground that rule 12 of the said Rules has been properly invoked. The third component, or rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, interferes with the declared value solely for fairness and non-discriminatory treatment without in any way questioning the credibility of the contractual value determined between the buyer and the seller in normal commercial engagement. That inclusion may

comprise value of specified services which, otherwise, is not permissible in valuation of goods, payments to the benefit of the seller that are conditions of sale or freight and insurance which adds value to the goods at the time of import. In the present dispute, we are concerned with recourse to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for adoption of the value estimated by the Chartered Engineer appointed by customs authorities and the last of the specifics in rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for evaluation of the enhancement upheld in the impugned order.

19. The appellant had furnished bill of sale for US \$ 21,000,000 purporting to be the 'transaction value' for assessment of the vessel. The Chartered Engineer appointed by the appellant had estimated value approximating that declaration which, apparently, was not acceptable to customs authorities, who designated yet another Chartered Engineer to undertake survey afresh, and preferred to accept the value of ₹ 40,58,64,821 estimated by him over the equivalent, ₹ 13,82,89,200, in the bill of sale. The justification offered in the impugned order is the admission of several flaws in the survey undertaken by Shri Harish Bhatia. Notwithstanding the inadequacies, customs authorities were in breach of the instructions pertaining to estimation by Chartered Engineer contained in circular no. 25/2015-Cus dated 15th October 2015 of Central Board of Excise

& Customs. The admitted facts also bear out investigative overreach in the recording the statement of a professional and in relying upon the 'admission' therein of deficiency in survey undertaken by that professional. It is not necessary that a Chartered Engineer undertakes the survey on his own and the extant instructions do not bar entrusting of such technical evaluation to appropriate experts. As far as the computation, commencing with value at the time of construction of the vessel, is concerned, the sole counter is a much higher estimation by the Chartered Engineer designated by customs authorities - that both are estimations. and any justification offered for the preferment of one over the other is fraught with bias and prejudice, is unarguable. In such circumstances of estimation by the second Chartered Engineer and in not having acceded to the request for cross-examination, the reliance placed upon the report of Shri Rajendra S Tambe is not tenable as to be sufficiently in conformity with rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

20. The justification offered for invoking rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, *i.e.*, alleged misdeclaration of tariff item in First Schedule to Customs Tariff Act, 1975, does not logically pan out without evidence that such technical distinction, even if uncontested, impacts value of the vessel. The impugned order has not allotted any space for such scrutiny. Recourse to sequential application of rule 4 to rule 9 of

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is, thus, without authority of law. The concatenated invoking of rule 9 and rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 does not appear to have taken into account that in

‘3. Determination of the method of valuation - (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with the provisions of rule 10;

xxx’

additions are permissible only to ‘transaction value’ and, to the extent that the ‘residual method’ is not ‘transaction value’ at all, there is no scope for further addition to the determined value of the impugned goods. Even otherwise, it is only the specifics intended by rule 10 of Customs Valuation (Determination of Value of Imported Goods), 2007, and in the circumstances elaborated therein, that validate such additions. The payment of ‘buying commissions’ is not to be included. There is no scope for addition of ‘pre-shipment inspection’ charges save in circumstances of incorporation as a condition of sale between buyer and seller. There is no evidence of such and, indeed, no examination of such in the impugned order.

21. As we have premised *supra*, import of a vessel arriving under its own steam does not lend itself to the processing that awaits normal

import of 'goods'; such vessels are 'conveyances' saddled with obligations prescribed in chapter VI of Customs Act, 1962. Additionally, to comply with registration requirements that go hand-in-hand with ownership, the vessel ceases to be 'conveyance' for a time and is, statutorily, deemed to be 'goods' for subjecting to assessment under section 17 of Customs Act, 1962. The inclusion of 'freight' and 'insurance' in the assessable value under the authority of rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 stems from the requirement in section 14 of Customs Act, 1962 for 'transaction value' to be the price at the place of import and which, in commercial parlance, is designated as 'CIF' in transactions. These payments are made for transportation from the place of shipment and, being paid either to the seller or, on advice of the seller, to the provider of such service, add to the value of 'imported goods' when deployed for further processing or in the pricing for subsequent sale as such. The vessel, ever coursing the seas and oceans, does not take on additional insurance merely for the purposes of movement to a destination for registration and the cost of self-propulsion does not add to the value of the vessel. Furthermore, between the event of 'conveyance' and transformation as 'goods' before reverting to its former form, it cannot be conjectured that any transportation occurs for invoking the *proviso* in rule 10(2) of Customs Valuation (Determination of Value of Imported Goods)

Rules, 2007. Consequently, the enhancement of ‘assessable value’ beyond the declared value fails on every count.

22. The claim of the appellant that the imported vessel merits classification against tariff item 8901 9000 corresponding to

‘other vessels for the transport of both persons and goods’

is based on the intended use between the base and offshore platforms and the interchangeability of description in the ‘certificate of class’ issued by several authorities between ‘supply’ and ‘support’ vessel. Reliance is placed by Learned Counsel on Rules and Regulations for the Construction and Classification of Steel Ships of Indian Registry of Shipping (IRS) as well as Rules for Building and Classing Marine Vessels of American Bureau of Shipping (ABS). On the other hand, Learned Authorized Representative has placed emphasis on ‘fire-fighting vessel class I’ in the several certificates to demonstrate that the impugned vessel has been designed for such specialised purpose. On behalf of the appellant, it is contended that capability of fire-fighting is intrinsic to every vessel at sea and that the particular attention devoted to this aspect in certificates does not derogate from its design, and use, as ‘supply’ vessel. The settled law on classification imposing the burden of establishing the aptness of the alternative tariff item on the customs authorities relegates the comparison between the rival discussions to secondary importance

and solely for determining, under the authority of the General Rules for the Interpretation of Import Tariff, the more appropriate of two equally applicable tariff items. Therefore, it is necessary to take note of

‘other vessels the navigability of which is a subsidiary to their main function’

corresponding to tariff item 8905 9090 in the First Schedule to Customs Tariff Act, 1975 within which the adjudicating authority has placed the impugned vessel. We are not inclined to accept inordinate reliance on the certification of different authorities for, if that were the intent of the Convention and/or the supreme legislature, there would have been no hesitation in referring to the institutional arrangements for registration and classing. In the scheme of the headings and sub-headings, no scope is offered for determination based on end-use. The classification will have to be sustained on the descriptions corresponding to the two rival items and, acknowledging the exercise of preference between the two to be preceded by discharge of the burden imposed upon assessing authorities by the decisions of the Hon’ble Supreme Court in *Hindustan Ferodo Ltd v. Collector of Central Excise, Bombay* [1997 (89) ELT 16 (SC)] and in *HPL Chemicals Limited v. Commissioner of Central Excise, Chandigarh* (2006 (197) ELT 324 (SC)], as more appropriate.

23. It is seen from the record of proceedings in the impugned order

that the appellant had also claimed re-classification against tariff item 8906 9000 of First Schedule to Customs Tariff Act, 1975 from which the adjudicating authority concluded that the appellants were, themselves, uncertain of classification claimed by them initially. We are not inclined to appreciate the logic of that proposition as also the detailed analysis of the design of the vessel which led to the conclusion that tariff item 8905 9090 of First Schedule to Customs Tariff Act, 1975 is an appropriate description that conforms to the classification of the impugned vessel thus

‘12. As per evidence/documents available on record that the Provisional Certificate of Singapore Registry for the Vessel "Dalini Topaz" dated 08.01.2008, the Certificate of Singapore Registry for the vessel "Pacific Amethyst", issued on dated 30.04.2009, the Provisional Certificate of Indian Registry dt. 30.06.2017 for the vessel "Sagar Fortune", the final certificate of Indian registry dt. 05.10.2017 issued for the vessel "Sagar Fortune", all describe the said vessel as "Steel Offshore Supply Vessel". It is also clear from the statements of Shri K. K. Sanjeev, Head of the Department (classification and certification) Indian Registry of Shipping, and Capt. Bijoy Kumar Sharma, Senior! Surveyor, Indian Registry of Shipping, that all these above documents give only generic description of the said vessel and that it is the class certificate which provides the exact class notation and description of a vessel. It can therefore be seen that the description "Offshore Supply Vessel" is merely a general description of the vessel Sagar Fortune and that the exact description and class of the said vessel would be as per the description and class mentioned in the class certificate of the

said vessel. Now it can be seen that the Interim certificate of class No. BOM17F016 dt 04.07.2017 issued by Indian Register of Ships (IRS) and the final certificate of class No. 17472 dt 28.09.2017 issued by class IRS for the vessel Sagar Fortune give the description and class of the said vessel as "SUL, Offshore Support Vessel, IY, Agni 1(2400 Cum/hr), DP (2)". Further the survey status report dt. 07.07.2017 of IRS also gives the description and class of the subject vessel as "SUL, Offshore Support Vessel, IY, Agni 1(2400 Cum/hr), DP (2)". It also be seen that the class certificate dt. 02.10.2013 issued by the American Bureau of Survey (ABS) and its survey status report (print date 23.01.2017) have also given the description and class of the vessel "Pacific Amethyst" (Now known as "Sagar Fortune") as "*AI, Fire Fighting Vessel Class 1, Offshore Support Vessel, Circle E, AMS, *DPS-2". The DNV-GL vide their inspection report certificate No. 20817008 dated 26.04.2017 for the Vessel Pacific Amethyst (now known as 'Sagar Fortune3) have mentioned the Class of the subject vessel as "ABS *AI, Fire Fighting Vessel Class 1, Offshore Support Vessel, Circle E, AMS, *DPS-2". It is therefore evident that the vessel "Sagar Fortune" is an Offshore support vessel having additional features like firefighting capability of Class 1 and DPS-2 (or DP-2). These two features which are found to be available in the subject offshore support vessel are generally not found on offshore support vessels and this vessel has been built with these feature with specific purpose. This vessel is equipped, since its manufacture, with advanced firefighting capabilities of class 1, with the help of which it is capable of dousing fires on other vessels/oil rigs/platforms efficiently. This capacity gives this vessel a major edge over the other vessels falling in the category of Offshore support vessels. Besides this advanced firefighting capacity this vessel is also equipped, since its manufacture, with an advance dynamic positioning

system (DPS-2) which provides it with a capability to maintain its position in close proximity to other vessels/oil rigs/platforms even in monsoons. This means that the vessel is meant for being in very close proximity to the oil rigs/platforms to provide support to such oil rigs/platforms including the support in the form of firefighting and that is why the importer has imported it. It is to be employed. This vessel is also equipped with 40 cabins onboard. Capt. Shri Bijoy Kumar Sharma, Surveyor of IRS, who has surveyed the said vessel, has deposed in his statement these cabins are meant to provide accommodation to specialized persons (SPS persons) like Technicians, Surveyors, Engineers, Divers, Ship's crew, etc and that these cabins can also be used for rescuing the staff of Rigs/Platforms in case of an emergency. It therefore is evident that the importer, has imported this vessel so that it can be kept in very close proximity to oil rigs such as of M/s ONGC to provide support in various forms and if need be it can douse the fire on such rigs and also accommodate its technicians in the cabins available onboard this vessel. It is, therefore, evident from all these features available; on [this vessel that these functions and purposes are its main functions and that the navigability of this vessel is subsidiary to these functions because if navigability and supply is to be considered its primary functions then these special and features/functions like firefighting, DPS and large number of cabins, which are otherwise not available on other supply/support vessels, become redundant and ineffective. In this context deposition of Capt. Shri Bijoy Kumar Sharma, expert Surveyor of IRS, who has personally surveyed the said vessel, is also very important. Capt. Shri Bijoy Kumar Sharma, who is an. expert in this field, in his said deposition has said that as Agni I and DP-2 require the vessel to remain stationary and that it can be said that the navigability of this vessel becomes subsidiary to these two functions. He has

*further stated that navigability of this vessel has become subsidiary to two main functions of this vessel namely Agni 1 and DP-2, i.e. Fire Fighting and Dynamic Positioning System. He is an expert in surveying vessels and classifying them as per shipping parlance and as such is technically qualified to determine the class notation which he has agreed remains the same as that given by ABS i.e. American Bureau of Shipping. In that sense the opinion of Capt. Shri Bijoy Kumar Sharma regarding classification under the Customs Tariff can definitely be considered an expert's opinion. It can be seen from the Chapter heading 8905 of Customs Tariff that it covers those vessels the function of navigability of which are subsidiary to their main function. According to Rule 3 of the same Principles of general rules of interpretation - the heading which provides the most specific description shall be preferred to headings providing a more general description. In the instant case it is seen that, the term Offshore Support Vessel is generic term as evidenced by the statements of experts, whereas the ABS class notation "ABS, *A1, Fire Fighting Vessel Class 1, Offshore Support Vessel, Circle E *AMS. *DPS-2" which has remained unchanged (lack of evidence of any modification having been carried out in the subject vessel), makes the subject vessel appropriately classifiable under Chapter 8905 9090. However, even if it is assumed by the Importer that there are two CTHs that merit equal consideration, the subject vessel is to be classified under the heading which occurs last in numerical order among those which equally merit consideration as per Rule 3 of the above rules. It therefore is clear from the above that the vessel 'Sagar Fortune' which had been classified by the importer under CTH 89019000 is rightly classifiable under CTH 89059090, which attracts Basic Customs Duty @5%. Therefore, it is evident that the importer had deliberately mis-declared the OTH of the subject vessel as 89019000 with an*

intention to. evade duty. Now that the subject vessel is liable to be properly classifiable under CTH 89059090, the basic customs duty @ 5% now is leviable on the subject vessel by virtue of it getting classified under CTH 89059090. Therefore, the total differential duty on the subject vessel on 'account of its re-classification and re-determination of value amounts to Rs.3,53,25,921/-, as detailed in para 3.4 above. The said differential duty therefore needs to be demanded and recovered from the Importers M/s S. S. Offshore Pvt. Ltd. in terms of the provisions of Section 28(4) of the Customs Act, 1962, along with the applicable interest thereon under section 28AA ibid.'

to counter which no arguments have been offered on behalf of the appellant except to submit that the carrying capacity and its intended use render it classifiable against tariff item 8901 9000 of First Schedule to Customs Tariff Act, 1975. On the other hand, the disposal of the alternative proposition thus

'13. I find that the importer in their written submission dated 06.03.2018/07.03.2018 have now claimed that the subject vessel is classifiable under the chapter heading 89.06, which in other words and by their own admission means that it was never classifiable under the chapter heading 89.01. It would therefore be in order for me to examine their claim that the said vessel is properly classifiable under 89.06. I find that the chapter heading 89.06 reads as follows:

89.06 *OTHER VESSELS, INCLUDING WARSHIPS
AND LIFEBOATS OTHER THAN ROWING
BOATS*

8906 10 00 - *Warships*

8906 90 00 - *Other*

It is therefore evident from the chapter heading 89.06 and the explanatory notes thereto that the subject vessel cannot, by any stretch of imagination, be classified under that heading. On the other hand I find, from the evidence on record and the discussions above, that the subject vessel is a firefighting vessel of class I having very advance dynamic positioning system in the form of DPS-2. The subject vessel is capable of playing multiple roles by remaining alongside other vessels or rigs for a very long period. These capabilities, which were inbuilt in the vessel and have increased its cost and value exponentially. Thus has clearly made its navigation subsidiary to these specialised roles. Further, the importers in their written submission have also admitted that the vessel is not classifiable under the chapter heading 89.01 and that it is instead classifiable under 89.06. Therefore, it is evident that they knew from the beginning that the subject vessel is not classifiable under 89,01 and they have deliberately misclassified the same for the purpose of evasion of duty and that the vessel is correctly classifiable under 89.05. This attempt at alternate classification is nothing but an afterthought to escape from the legitimate duty that becomes due on account of the subject vessel's correct classification under chapter heading 89.05. I therefore hold that the subject vessel "Old & Used self-propelled Platform supply Vessel Sagar Fortune, earlier known as Pacific Amethyst" imported vide bill of entry no. 2630993 dated 28.07.2017 is correctly classifiable under CTH 89059090 and that the importer M/s S. S. Offshore Pvt. Ltd. had mis-declared its classification only with an intention to evade duty thereon.'

renders the finding to be incomplete.

24. In the light of this inadequacy, we are unable to firm up on the

applicable classification for want of determination in the impugned order between heading 8905 and heading 8906 of the First Schedule to Customs Tariff Act, 1975. That gap must be bridged to enable which we set aside the impugned order and remand the matter back to the original authority for a fresh decision on the claim of the appellant for fitment within heading 8906 of First Schedule to Customs Tariff Act, 1975. As this remand is intended to arrive at the appropriate classification, the appellant may also make its submissions for fitment within the original classification, in addition, should they choose to do so.

25. The enhancement of value of the impugned vessel is set aside in accordance with our findings *supra*. The sole issue that remains is the choice of the appropriate classification. The controversy is contentious and the alternative classification proposed by customs authorities is based upon reliance on technical features to distinguish it from a capability inherent in all vessels that put out to sea in terms of subordination to its principal function. With that complexity to be resolved, there is no scope for indicting the individuals in these proceedings for deliberate misdeclaration. That the benefit of an exemption has been sought to be availed does not, of itself, render such claim to be with intent to evade duty. Furthermore, the role of these individuals in the misdeclaration of stores and bunkers is not evident in the impugned order. The penalties imposed on the

individuals are, accordingly, set aside to allow their appeals.

26. With this limited remit of decision on classification in remand proceedings, the four appeals are disposed off.

(Order pronounced in the open court on 09/06/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*