

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

WEST ZONAL BENCH

**CUSTOMS APPEAL NO: 87467 OF 2013
WITH
CUSTOMS APPLICATION (MISC) NO: 85706 OF 2022**

[Arising out of Order-in-Original No: 47/2013/CAC/CC(I)/AB/Gr.VB dated 28th March 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Jayesh Shipping Pvt Ltd

Plot No. 5/33 Sewree Premises Co-op Society
Sewree Bunder Road, Sewree (East), Mumbai - 400015

... Appellant

versus

Commissioner of Customs (Import)

New Customs House, Ballard Estate, Mumbai - 400001

...Respondent

WITH

CUSTOMS APPEAL NO: 87468 OF 2013

[Arising out of Order-in-Original No: 47/2013/CAC/CC(I)/AB/Gr.VB dated 28th March 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Ashish Ingle

Jayesh Shipping Pvt Ltd
Plot No. 5/33 Sewree Premises Co-op Society
Sewree Bunder Road, Sewree (East), Mumbai - 400015

... Appellant

versus

Commissioner of Customs (Import)

New Customs House, Ballard Estate, Mumbai - 400001

...Respondent

APPEARANCE:

Shri S P Mathew, Advocate, Shri J C Patel, Advocate and Shri Stebin Mathew,
Advocate for the appellants

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

CORAM:

HON'BLE MR S K MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85410-85411 /2023

DATE OF HEARING:	22/11/2022
DATE OF DECISION:	21/03/2023

PER: C J MATHEW

M/s Jayesh Shipping Pvt Ltd, aggrieved by confirmation of duty of customs of ₹ 2,66,41,561 on re-determined value of ₹ 17,58,69,141 of 'barge' imported against bill of entry no. 3864583/22.06.2011 under section 28 of Customs Act, 1962, along with interest thereon under section 28AB of Customs Act, 1960, confiscation of 'work accommodation barge Sarku Utama' under section 111(m) of Customs Act, 1962 with option to redeem on payment of fine of ₹ 1,75,00,000, and imposition of penalty of like amount under section 114A of Customs Act, 1962, is in appeal challenging order¹ of Commissioner of Customs (Import), New Customs House, Mumbai. The cavil of the appellant is that the transaction value of US \$ 25,000,000 (approximately ₹ 11,75,78,982) in the memorandum of agreement (MoA), as well as bill of sale, with

¹ order-in-original no. 47/2013/CAC/CC(I)/AB/Gr.VB dated 28th March 2013

the seller, M/s Sarku Engineering Services SDN BHD, Malaysia had been discarded and that, in doing so, rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had been invoked for alleged lack of consistency among the values ascertained by their surveyor and the value for the purposes of 'marine hull and machinery insurance' policy of M/s Oriental Capital Assurance for resort to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 by adoption of value of US\$ 3,814,411 estimated by M/s Intertek Testing Services Pvt Ltd to which landed cost was added for assessment. The Director of the importing company, Mr Ashish Ingle, is also before us challenging the penalty imposed on him under section 112 of Customs Act, 1962.

2. The impugned 'work accommodation barge' had, initially, been imported at Mumbai by M/s Sarku Utama SDN BHD, against bill of entry no. 919728/12.11.2009, to be deployed for 'offshore oil operation' of M/s Oil & Natural Gas Corporation (ONGC) and assessed, under section 17 of Customs Act, 1962, at ₹ 5,37,27,600. About a year or so later, the operator placed the impugned vessel, while anchored at Belapur, for sale through 'competitive open tender' and the offer of the appellant herein to pay US \$ 2,500,000 culminated in 'memorandum of agreement (MoA)' dated 9th December 2010 to transfer ownership by delivery at the place of anchorage upon discharge of the bid price within 15 days thereafter. The appellant

filed the bill of entry thereupon declaring the bid price, supported by 'bill of sale' dated 7th June 2011, to be the FOB value and, with addition of freight of ₹ 10,00,000 and insurance of ₹ 12,89,833.73, taking ₹ 11,75,78,982.07 as 'transaction value' for assessment on which duty liability of ₹ 1,78,11,468.60 was duly discharged.

3. Upon the transaction being taken up for investigation, it transpired that appellant had commenced the process of transferring the registry of the vessel to bring it under the Indian flag for which no. M-7739 was assigned and certificate of class dated 18th January 2010 issued by the Mercantile Marine Department (MMD) of Director General of Shipping to 'Offshore Rani', as she was now named, besides being issued with provisional certificate dated 30th June 2011 by the Indian Register of Shipping (IRS) to replace the one issued by the Malaysian Registry on completion of construction at Singapore in 1980. Furthermore, it was ascertained that, between the offer for sale and actual transfer, the vessel had undergone 'dry docking' for refitment and that, to comply with the undertaking given at the time of earlier import, the vessel was towed to international waters before being returned to anchorage for completion of import formalities.

4. The estimate of value in the certificate issued by M/s MR Shenvi & Associates, commissioned by the appellant in accordance with circular no. 04/2008-Cus dated 21st February 2008 of Central

Board of Excise & Customs (CBEC) and attached to the bill of entry, was considered by the investigating authorities to be unacceptable as the specifications prescribed in the said circular, such as value of machinery in the year of manufacture and subsequent cost of repair/reconditioning, were missing. It was also ascertained that the bank, M/s Saraswat Cooperative Bank, had had the vessel surveyed by M/s Dheeraj Offshore Surveyors and Adjusters P Ltd and their estimate of US \$15,00,00,000 was found to be higher than the declared value as also the value of US\$ 4,000,000 for which 'marine hull insurance policy' had been purchased by the seller. The investigators also had survey undertaken by M/s Intertek Testing Services India P Ltd and their estimate of US\$ 3,814,411 was considered to be the most reliable and, more particularly so, in the light of statement given by the appellant-Director during the course of investigations. Hence show cause notice was issued on 8th February 2012 which culminated in the order leading to these appeals.

5. Learned Counsel for the appellants submits that the entire process of re-assessment is not in consonance with the valuation provisions in Customs Act, 1962 as, according to him, there is no allegation that the price declared, and corresponding to the sale value in the agreement as well as bill of sale, was not the 'transaction value' and, hence, not liable to be rejected at all. It was also contended that the earlier import of the impugned vessel, albeit for temporary

deployment, was allowed on much lower declared value even though the very same requirements under section 14 of Customs Act, 1962 was to be adhered to. He drew attention to the proceedings before the adjudicating authority during which the glaring flaws in the estimate afforded by the surveyor appointed by the investigators had been brought out which, however, did not appear to impress itself on the adjudicating authority. He pointed out that, during the investigation itself, the Director-appellant had furnished valid explanation for the price at which they had managed to secure the impugned vessel. It was further contended that, in the circumstances in which the predetermined value was adopted for assessment, there was no scope for alleging any misdeclaration or suppression of fact by them to bring down the force of penalties upon the appellants.

6. Learned the Authorized Representative asserted that the discarding of the estimate provided by the surveyor of the appellant could not be faulted owing to deficiencies in the report. It was also argued that the circumstances of import and, more particularly, the manner of the transaction of sale left the adjudicating authority with no option but to invoke rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The rejection of declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for non-conformity with the estimate of the surveyor appointed by the banker and the value at which policy for

‘hull and marine insurance’ had been taken by the previous owner, was supported by Learned Authorized Representative for its unassailable logic. According to him, the price declared in the bill of entry as ‘transaction value’ was liable to be rejected for want of conformity with the several elements of section 14 of Customs Act, 1962 necessary for acceptance without question.

7. At this stage, it would be appropriate to take note of miscellaneous application filed by the appellant for inclusion of additional grounds in the challenge to the impugned order. It is contended by Learned Counsel that the adjudicating authority had, without placing notice of intent to do so, adduced the proposition that the impugned vessel, upon arrival for import by the appellant, was already in their ownership and, thereby, the condition of ‘at the time and place of importation’ would not be fulfilled. It was also contended that the same assertion was invoked to extend the period of limitation in section 28 of Customs Act, 1962. The insinuation of justification for enhancing the value further, on account of the class certification as well as the refurbishment of the vessel, was also undertaken without placing them on notice is also contended.

8. Reliance was placed by him on the decision of Hon’ble Supreme Court in *Commissioner of Central Excise v. Gas Authority of India Ltd* [2008 (232) ELT 7 (SC)], in *Commissioner of Customs,*

Mumbai v. Toyo Engineering India Ltd [2007 (201) ELT 513 (SC)], in *Commissioner of Central Excise, Nagpur v. Bellapur Industries Ltd [2007 (215) ELT 489 (SC)]* and in *Commissioner of Central Excise, Bhubaneswar v. Champadaya Ind Ltd [2009 (241) ELT 481 (SC)]*. A further submission pressed by Learned Counsel is the incorrectness of imposing penalty under section 114A of Customs Act, 1962 on the entire duty liability instead of restricting it, as should have been, to the amount allegedly short-levied. Considering the submission made, it would be inappropriate to decline pleading of the additional grounds and, hence, the miscellaneous application is allowed.

9. On the basis of the additional grounds, we do find that the adjudicating authority has incorporated facts, not suitably tested by offering opportunity to challenge, which is anathema to just and fair adjudication. The deficiency in not placing the appellants on notice of these allegations would need to be remedied and it is only by a fresh adjudicating process that the factual position may be established. As pointed out by Learned Council, the restricted framework of section 28 and section 114A of Customs Act, 1962 would have to be adhered to in the fresh proceedings. The adjudicating authority is also obliged to explain the different positions adopted for valuation of the same vessel which, but for a brief while, was within Indian territorial waters and, yet, was found to be valued with substantial difference on the two occasions; this could have a significant bearing on the manner

in which the residual method is used for conformity with the scheme of valuation espoused in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

10. We would also like to point out that the determination of the value in the certification of the Chartered Engineer retained by the investigators would have to be elaborated upon by the adjudicating authority for it to have credibility acceptable to the appellate process.

11. In view of the above, it would be appropriate to set-aside the impugned order and remanded the matter back to the adjudicating authority for fresh determination of all issues that the appellants have raised the proceedings before us. The miscellaneous application is disposed off and the appeals are allowed by way of remand.

(Order pronounced in the open court on 21/03/2023)

(S K MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)