

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 543 OF 2007

[Arising out of Order-in-Original No: 34/2007/CAC/CC (I)/AKP/CC dated 29th March 2007 passed by the Commissioner of Customs (Import), New Custom House, Mumbai – I.]

Reliance Industries Ltd

AS Dayal & Associates

15 Burjorji Bharucha Marg, Mumbai - 400023

...Appellant

versus

Commissioner of Customs (Import)

New Customs House, Ballard Estate, Mumbai - 400001

...Respondent

APPEARANCE:

Mr J C Patel, Mr Vishal Agarwal and Mr Ashwin Dave, Advocate for the appellant

Shri Anand Kumar, Additional 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 / 85870 /2023

DATE OF HEARING:

31/10/2022

DATE OF DECISION:

27/04/2023

PER: C J MATHEW

In the course of hearing the rival contentions in this dispute, it rather forcibly struck us that in the Bible (King James Version) it is

said

‘..... And no man putteth new wine into old wine skin; else the new wine will burst the skins, and be spilled and the skins shall perish. But new wine must be put into new wine skins; and both are preserved...’

(Luke 5:36-39)

for the not inconsiderable hiatus between the passing of the order-in-original and the re-determination now impugned in these proceedings, with the dispute having been carried to the Tribunal and the Hon’ble Supreme Court in the *interregnum*, has been witness to tectonic upheaval in investment pattern triggered by paradigm shift in regulation policy. Of the three pillars – monetary policy, fiscal policy and trade policy – on which modern political economy is borne, and exerting substantial directional influence on capital deployment, the complexities of the latter two had, within the first decade of transformational tremors spanning thirty years, already been consigned, perhaps by compulsion, to the periphery of economic management even by those wise to its mechanics, let alone those who came after its unlamented passing. The sparing sanctions that characterized the import policy was flipped over as a facilitative *schema* and an industrial policy intended for micromanagement of capital flows was divested of organic sustenance. This appeal against an order emanating from *de novo* proceedings spanning this governance cataclysm cannot afford to be impervious to the context.

2. The appellant herein, M/s Reliance Industries Ltd, who had no cavil either with the first order¹ of Collector of Customs, Bombay that limited re-determination of value only to 'screw pump motors' and 'booster pump motors' and addition of 'dismantling charges' to the assessable value of the last consignment in mapping the contours for closure of provisional assessment and had been satisfied with filing of memorandum of cross-objection before the Tribunal then on appeal by Revenue, aggrieved from dropping of substantial propositions in the show cause notice, or with order² of Tribunal, substantially upholding the conclusions of the Collector with some additional directions thereon even as the grievance of Revenue was carried in appeal unsuccessfully to the Hon'ble Supreme Court, challenges the liability fastened upon them in order³ of Commissioner of Customs (I), New Custom House, Mumbai – I on conclusion of *de novo* proceedings. On behalf of the appellant, it was clarified in their submission before the adjudicating authority that, notwithstanding the observation in judgement of the Hon'ble Supreme Court in appeal of Revenue that their appeal had been separately dismissed, the finding of

'Having heard learned counsel for the appellant and seen the relevant Customs Tariff entry, we find no difficulty in saying that the interpretation placed by the Tribunal thereon is correct. The civil appeal is dismissed.'

¹[order-in-original no. S/10-32/87-JC/DC/V-Misc/58/86/CIU-INF-25/86 dated 19th January 1989]

²[final order no. C/358/95-B2 dated 29th September 1995 in appeal no. C/378/1990]

³[order-in-original no. 34/2007/CAC/CC (I), AKP/CC dated 29th March 2007]

in order⁴ purportedly disposing off appeal of M/s Reliance Industries Ltd against order of the Tribunal, pertained to another controversy in which the same two contenders were before the same bench of the Hon'ble Supreme Court. Thus, the disputation here is limited to the consequence of the additional directions of the Tribunal on the former occasion and not the earlier order of the Commissioner or even the expansion of scope by the Tribunal.

3. By the time the Tribunal had taken up the dispute for consideration then, the economic transformation was already underway and caution dictates that we allude to the genesis and course of the dispute for context in attending to the legality and propriety of the impugned order. For the nonce, it suffices to take note that the challenge is to the re-determination of assessable value of the impugned goods to ₹ 36,67,81,760 (US\$ 29.5 million) by addition of 'dismantling charge' of US\$ 3.1 million twice over to proportionate enhancement towards four machines that were allegedly not invoiced, the demand of differential duty of ₹ 11,47,70,247 thereon, the confiscation of the said imports, effected against 14 nos. bills of entry filed between 11th December 1984 and 3rd September 1985, under section 111(d) and 111(m) of Customs Act, 1962 with option to redeem on payment of ₹ 7,50,00,000 and the imposition of penalty of ₹ 1,00,00,000 under section 112 of Customs Act, 1962.

⁴[order dated 17th November 1999 in civil appeal no. 2224 of 1996]

4. The origins can be traced back to those times when the once-thriving ‘cotton textile mills’ were in metaphorical *rigor mortis* and the appellant herein, then known as M/s Reliance Textile Industries Ltd (Polyester Division), evinced their intention to set up a facility for manufacture of ‘polyester filament yarn (PFY)’ at Patalganga on the outskirts of Bombay, as it was then known, and undertook the intricate process for securing the approvals mandated by the ‘tight’ regulatory system prevailing then. On their application, Government of India, under the authority of Industries (Development & Regulation) Act, 1951 and as prescribed in the industrial policy notifications, issued ‘letter of intent (LoI)’ on 4th December 1980 for establishing a factory with annual capacity of 10,000 MTs that was converted into ‘industrial license (IL)’ on 17th August 1981 with annual capacity further permitted to be enhanced to 25,125 MTs in November 1984. The appellant sought foreign currency financing through the erstwhile Industrial Credit & Investment Corporation of India (ICICI) and, on application to the office of the Chief Controller of Imports and Exports (predecessor of Directorate General of Foreign Trade), were issued with five nos. ‘import licence’, under the Imports and Exports (Control) Act, 1947, authorizing procurement of the required plant under foreign collaboration for knowhow and engineering which, in the regulated economy of those days, were instruments of the now atypical ‘quantitative restriction (QRs)’ mode

of control. The administrative processing of pre-requisite *minutiae* – documentary and declaratory – had to be completed before any part of the plant and machinery could be landed on the shores of India. Each of these stages were in pursuance of legal mandates in different statutes enacted to authorize officialdom to closely administer the industrial, trade and fiscal governance for ensuring optimal dispersion and clustering of manufacturing facilities, enabling allocation of resources between industrial requirements and consumer aspirations, managing dependence on goods from overseas and husbanding scarce foreign exchange.

5. Three contracts were registered, under the Project Import (Registration of Contract) Regulations, 1965 prevailing then, with the jurisdictional customs authorities, again requisite for entitling the disparate articles so imported to single rate of duty specified in heading 8466 of the First Schedule to Customs Tariff Act, 1975 (replaced by the now familiar heading 9801 since 28th February 1986 by coming into force of Customs Tariff (Amendment) Act, 1985); these were for procurement of 3 nos ‘spinning machines’ (new) completed between September 1981 and July 1982, for procurement of equipment for balancing production and ‘second hand’ machines for expansion completed in 1984-85 and for procurement of 1 nos ‘spinning machine’ along with some equipment essential to second phase of initial setup. Though the notice pertained to the entirety of

the imports effected thereby, the present dispute, owing to whittling down in adjudication and reframing at appellate level, is restricted to the second of the three project imports. Significant to the outcome of the remand order of the Tribunal is that several of the documents, furnished for this regulatory compliance and issued well before the actual import or commencement of investigation, were relied upon by customs authorities that culminated in show cause notice dated 10th February 1987. Particular importance was attached to certificate dated 12th December 1983 issued by M/s Lee Consultants, the chartered engineer, as well as invoice no. FR-1003-681 dated 9th March 1984 for US\$ 13.2 million and invoice no. FR-1004-687 dated 16th March 1984 for US\$ 1.55 million and, presumably, owing to these having been referred to in remand order of the Tribunal.

6. The thrust of the notice was breach of prohibition on imports beyond that required for production of permitted capacity which was alleged to have been breached by actual capacity of more than twice that and alleged breach of licence issued for procurement of four 'second hand' spinning machines by import of twice that rendering them ineligible to rate of duty catering to project imports with consequent default in discharge of differential duty liability of ₹119,64,46,555.80 while also rendering the imported goods liable to confiscation. In the first order, the adjudicating authority had dropped the charges arising from breach of capacity prescription and of import

licence restrictions to approve assessment at rate of duty applicable to 'project contracts' and at the declared value to which 'dismantling charges' were ordered to be added while restricting the re-appraisal of value to 'screw pump motors' and 'booster pump motors' for completion of assessment by lower authority. The appeal of Collector of Customs, consequent upon review under section 129D of Customs Act, 1962, along with cross-objection filed by the importer, was disposed off by the Tribunal upholding the impugned order but including a directed remand that, in the separate orders of the constituents of the 'special bench', concurred on the terms thereof but, nonetheless, is the apple of discord before us.

7. Hon'ble Supreme Court disposed off the departmental appeal thereof in *Collector Customs v. Reliance Industries Ltd [2000 (115) ELT 15 (SC)]* by upholding the order of the Tribunal thus

'10. We have perused the order of the Collector as well as that of the CEGAT and have heard the arguments advanced on behalf of the parties. It is to be seen that before the Collector pursuant to the show cause notice issued both the parties have produced large number of documents both in the form of affidavits and correspondence which have been dealt with by the Collector in his order. After considering these materials with reference to the question that is before us for consideration, the Collector came to the conclusion that the relevant import licence allowed the import of 4 complete spinning machines in terms of Item 4 of the list attached to the licence of equipments authorised for import. Hence,

according to him, there was no misdeclaration by the respondent in regard to the import of machinery and what was imported was in accordance with the list appended to the import licence.

11. In its order, the CEGAT has also dealt with these questions independently and noticed the arguments of the Department that the machinery enumerated at serial No. 4 in the list attached to the licence, covered only spinning frame and not complete spinning machines. After noticing this argument, it took into consideration the evidence that was adduced by the Department in support of its contention and also those produced on behalf of the respondent and came to the conclusion that there is no reason whatsoever to disagree with the finding of fact arrived at by the Collector. In this background, it is for us to consider whether the Department in this appeal has made out a case which calls for interference by this Court with the orders passed by the authorities below. The question whether the machinery imported by the respondent pursuant to the import licence granted to it is in accordance with the terms of import licence granted or not, is primarily a question of fact that is for the fact-finding authorities below and the Tribunal to decide. Their decision on technical matters as to what could be imported and what was imported must prevail. The authorities below and the Tribunal, after considering the case of the Department as well as that of the respondent and taking into consideration the entire material, concurrently arrived at the conclusion that the importation in question was in conformity with the terms of import licence. The argument of the Department that an adverse inference in regard to the legality of the import should be drawn, itself based on certain inferences like the excess production by the respondent, was considered and for reasons recorded not accepted, and we

are not inclined to disagree with the same. The question as to the jurisdiction of an authority in deciding as to the legality of importation based on the description of the goods imported is well-settled. This Court in the case of Union of India v. Tara Chand Gupta & Bros. [1983 (13) ELT 1456 (SC) = 1971 (3) SCR 557 at 566] has held in this context thus :

“The result is that when the Collector examines goods imported under a licence in respect of goods covered by entry 295 what he has to ascertain is whether the goods are parts and accessories, and not whether the goods, though parts and accessories, are so comprehensive that if put together would constitute motor cycles and scooters in C.K.D. condition. Were he to adopt such an approach, he would be acting contrary to and beyond entry 295 under which he had to find out whether the goods imported were of the description in that entry. Such an approach would, in other words, be in non-compliance of entry 295.”

12. The principles laid down in the above case are fully applicable to the facts of this case also. The authorities below have taken note of this principle of law and have applied the same to the facts in the instant case. We do not find any reason to interfere with this finding of fact.’

enabling the adjudicating authority to take the *de novo* proceedings forward. Suggesting that the proposal on valuation in the show cause notice was bereft any detail, the noticee had sought some indication thereto on which, too, we find indulgence in correspondence preceding the fresh proceedings that appears to have been a foretaste of the core of the controversy before us.

8. An aspect of the impugned order that strikes us is the summary disposal of liability, arising from the first adjudication directing re-assessment of ‘screw pump motors’ and ‘booster pump motors’ and,

evidently without any further ascertainment of status of finalization thereof in the hands of the assigned authority, by issue of directions to furnish evidence of payment failing which such dues would be recoverable in consequence of the impugned order. This, doubtlessly, is appropriation of jurisdiction without due notice and could even be construed as misuse of adjudication proceedings – as original authority – to insinuate executive instructions therein. The records do not evince disposal of

‘... the value of the Screw Pump Motors and the Booster Pump Motors be appraised by the Assistant Collector of Customs in charge of the Project Import Cell and value so appraised should form the basis of the duty assessment at the Project Contract Rate under Heading 84.66 CTA 1975. Since these items are new, and as they have already been provisionally assessed and charged to duty on their import and cleared, suitable adjustment of the duty already collected shall be made while calculating the final duty liability...’

in the first order of adjudication and the order now impugned before us appears to have supplanted that by determination, as *de novo* adjudicating authority, of increase in proportion to enhancement beyond actual capacity and, after adjustment thereof with duty already discharged at the time of clearance, to be amalgamated with the enhanced liability on the spinning machines that was assumed to be the remit of the Commissioner of Customs (as the designation had since been altered to) in the order of the Tribunal. The appellant

herein had not been placed on notice of intention to undertake such re-appraisal that had been remitted to the competent authority against which appeal, if any, would have to be routed through section 128 of Customs Act, 1962. There has been a blatant breach of jurisdiction by the Commissioner of Customs in this determination. Furthermore, definitive adjudication proceedings cannot be allowed to proceed for determining total duty liability on adverse presumption of ascertainable fact. Accordingly, the determination of liability on 'screw pump motors' and 'booster pump motors' in the impugned order is set aside.

9. That acceptance by the Tribunal of plea of Revenue, on the discrepancy in *pro forma* invoice as well as on incongruity with inferences on extent of survey by the chartered engineer as meriting revisit by the adjudicating authority on valuation of the 'second hand' spinning machines, was, in effect, discarding of declared value and, thereby, conferring on Commissioner of Customs the authority for continuance thereupon to its logical conclusion, viz., recourse to Customs Valuation Rules, 1963 is one of the foundations on which the impugned order came to be passed. That acceptance by the Tribunal of plea of Revenue on entire value of 'second-hand machines' covered by the second of the contracts meriting revisit by the adjudicating authority, along with any penal detriment in consequence, in the light of certificate of chartered engineer, notwithstanding its irrelevance to

the dispute on alleged breach of permissible imports under licence, implied that the remit of the assessing officer under Customs Act, 1962 to determine importability under the licensing regime had also, thus, been authorised by the Tribunal is the other foundation upon which the impugned order was passed.

10. It is the contention of Learned Counsel for appellant that the impugned order has erred in misinterpreting the terms of remand order and has exceeded the brief accorded by the Tribunal to demand differential duty of ₹ 11,47,70,247 on finalization of provisional assessment of eight machines while reiterating the earlier order pertaining to 'booster pump motors' and 'screw pump motors' and confiscating 'spinning machines/components' valued afresh at ₹36,67,81,760 with redemption on payment of fine of ₹7,50,00,000 besides imposing penalty of ₹1,00,00,000 on appellant. Learned Counsel submitted that the sole issue before the adjudicating was the correctness of their claim that the declaration of value in the impugned bills of entry corresponded to the *pro forma* invoice covering the entirety of procurement against the second contract registered under the Project Import (Registration of Contract) Regulations, 1965 with the customs authorities. According to him, the adjudicating authority had erroneously assumed jurisdiction beyond its remit on the basis of assumptions that had nothing to do either with the prevailing scheme of valuation or with the Tribunal itself not

empowered to stray beyond the Customs Valuation Rules, 1963. Drawing attention to relevant portions of the order of the Tribunal, he contended that the impugned order was a fresh adjudication, *albeit* only in relation to the second contract, on both the value and, thereby, on breach of licence conditions. Alluding to relevant portions of the show cause notice, he contended that the specifics of proposal for re-valuation therein, and limited to ₹ 53,02,63,992, was ignored in the *de novo* proceedings that re-determined an entirely different proposition in the departmental note referred *supra* which, as pointed out time and again by the Hon'ble Supreme Court, is contrary to the principle that show cause notice is foundation of any consequence of detriment. He relied upon the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Nagpur v. Ballarpur Industries [2007 (215) ELT 489 (SC)]* which held that

'21.... It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.'

to support his contention that the proposal in the show cause notice was not only specific as to the mode of computation but also to the means afforded by section 14(1)(b) of Customs Act, 1962 which, itself, was liable to be invoked only in the specific circumstances permitted therein. According to him, the adoption of

'22. The constant refrain of the importers has been that their Invoice dated 9.3.1984 (along with its Annexure) not only lists out the 8 machines (4 in CKD form) but also provides the price of these 8 machines. This has already been rejected by CESTAT. Though the CESTAT has held that the items covered in the invoice were 8 machines the value indicated in the invoice was not for these 8 machines, in the absence of an appropriate chartered engineer's certificate. The CESTAT has already held that to value the 8 machines a chartered engineer's certificate was necessary.

23. Once it is held that the invoice price is not the correct price one has to find other reasonable means, consistent with Section 14 of the Customs Act, 1962, and the Valuation Rules of 1963, to arrive at the correct value. One such method is to find out the value of comparable goods from the same source/country of origin. In this case the value of 4 used spinning machines has been mentioned in clear terms in the foreign currency loan application dated 18.7.1984 and the application dated 7.6.1984 for the import of Capital Goods....

(iv) Attention in this context is also invited to the importers application dtd. 7.6.1984 to the Secretariat for Industrial Approvals, Ministry of Industry, Govt of India, Udyog Bhawan, New Delhi for the import of capital goods. In the said application they had intimated that they intended to import certain critical plant and equipment at a total cost of US\$ 16.83 million CIF. This includes CIF cost of US\$ 13.2 million towards 4 second hand spinning machines, dismantling cost of US\$ 1.55 million and US\$ 3.63 million towards essential balancing equipment. It is interesting to note that the said capital goods application dtd. 7.6.1984 had the proforma invoice dtd. 9.3.1984 of M/s Chemtex Fibre inc., as one of its enclosures in support of the value of

the 4 machines indicated in their application. The proforma invoice dated 16.3.1984 of M/s Chemtex Fibre inc. showing dismantling charge of US\$ 1.55 million was also enclosed with their capital goods application dt. 7.6.1984..

(v) from the above two applications, one dtd. 18.7.1984 for foreign currency loan and another dtd. 7.6.1984 for the import of capital goods, there can be no doubt now that US \$ 13.2 million was the CIF value of only 4 second hand spinning machines. Since they had imported 8 machines the value will be double this amount, i.e. US\$ 26.4 Million. This is consistent with Rule 3 of the Customs Valuation Rules, 1963, where value of comparable goods could be taken....'

in the impugned order, as the terms of remand and conclusion thereto, is contrary to settled law and contradictory to the findings recorded by the Tribunal.

11. Learned Authorized Representative contended that the arguments on behalf of appellant in the present proceedings appeared to limit itself to the extent of the remand by the Tribunal and the inappropriateness of the method of computation in the light of the proposals in the show cause notice. He submitted that the reference to 'associated equipment', in the findings leading to the remand in the order of the Tribunal, leaves no room for doubt that the Tribunal intended the valuation of the project covered by the second contract to be the subject of adjudication by the original authority. According to him, the intent of the Tribunal, by reference to the observation on the re-determination and on the inadequacy of an invoice unsupported by

certification of Chartered Engineer, was appropriately inferred by the adjudicating authority in determining the framework of the *de novo* proceedings. It was pointed out by him that the Tribunal had made specific mention of 'license debit' and, thus, broadened the consequence of valuation for determining breach of license. He further contended that the appellant, having sought departmental note on the valuation, could not, at this stage, protest lack of notice of intent. He placed reliance on certain judicial pronouncements that we intend to refer to only if the context of our findings warrants consideration of those.

12. We notice a contradiction in that the contents of the said certificate of the Chartered Engineer have been held to be inapplicable insofar as determining the quantity of machines is concerned but was found acceptable insofar as value of new machine of similar type, adjusted for passage of time and reconditioning costs, such as they are, is concerned for supporting the re-determined value; such selective culling of credibility is not found to be based either on any factual conclusion thereto, as the contemporaneity of the value is also an assumption of convenience, or with any legal authority for doing so. On the other hand, the intent of the Tribunal may be seen from

'82...In view of these factors creating an ambiguity in the matter, we are satisfied that the ends of justice require that this limited question of value of the second hand spinning

machines be decided afresh. Accordingly, we set aside the impugned order accepting the value of the second hand spinning machines for assessment of duty as well as for license debit and remand the matter to the Commissioner of Customs for de novo decision on this question.'

after dwelling at length on the apparent inadequacies in the certificate issued by Chartered Engineer and the seeming discrepancy with the *pro forma* invoice thus

'17.2.2 So far as the reconditioned machines are concerned, the invoice value is shown as Rs 20,71,24,981/- which obviously, is the negotiated price, and is said to be the price for 4 complete machines, and the components figuring in the invoice is. It is now an admitted position that these components are sufficient to bring out 4 nearby complete machines and for that, though from ITC angle, there does not appear any contravention of the policy provisions, it does call for examination as to whether the valuation put is correct. Except the contention that the price is the negotiated price, and affidavit of Mr Julio Martiniz, President of Chemtax Fibres Inc., the supplier company that the price is the negotiated one, for 4 complete machines, and other components sufficient to assemble 4 additional machines, there is no other evidence on record to substantiate that the negotiated price is the proper price for the purpose of valuation. Ordinarily such negotiated price should be, in absence of any evidence to the contrary, accepted, but here, same circumstances exist, which appear to have been requiring same consideration, but have not been properly examined, necessitating some further probe. The customs authorities have put the value as double the negotiated price principally basing their claim on the capacity aspect. That

part of their contention, however, has already stood negatived. All the same, it remains established that components imported are not merely “associated equipments” of the 4 machines sought to be imported vide entry No 4A but are by themselves sufficient to bring out, 4 nearly complete machines. The certificate given by M/s Lee Consultants, the Chartered Engineers, dt. 12.12.84, only mentions price of the new machines and does not mention the price of the machines inspected by him. His examination is also, a visual examination, and the components lying there are taken by them as “associated components”. Though the validity of the said certificates cannot be doubted by the customs authority so far as issue of licence, based on such certificate, is concerned, the same could be looked into for the purpose of ascertaining, and here the same does not provide any assistance....The approach of the Id adjudicating authority, to place reliance merely on the contract price thus does not appear proper. With no specific data available, it is not possible to work out the correctness of value, and it would therefore be proper, if the said point is remanded back to the adjudicating authority for re-examination in view of the fact that the components are not merely “associated components” but are by themselves sufficient to bring out nearly complete machines....’

in the respective conclusions of the two constituents of the bench which do not, by any stretch, affirm the assertion of the adjudicating authority in the impugned order, and of Learned Authorized Representative in his submissions, that the Tribunal had concluded the declared price to be acceptable for assessment of the assembled ‘spinning machines’ only. The Tribunal had spelt out the possibility

that clarificatory attestation of the circumstances of December 1983 preceding the certification, and more especially by remedy of the deficiency therein on estimate of current value, by the Chartered Engineer may elicit some inference of coverage of the *pro forma* invoice. No other conclusion can be arrived at from the careful crafting of the doubts entertained about the certificate and in framing the limited issue for fresh decision. It needs noting that it was not the value, of the whole or a part, that was set aside but the acceptance of the value that was set aside and, in referring to the value so accepted, chose to describe the accepted value in terms of its dual deployment by the adjudicating authority. Such description by the Tribunal was compelled by discarding of the competence of customs authorities to delve into the contents of the 'industrial licence' and 'import licences' both of which also included the value, as accepted in the first adjudication order, for those purposes too. To infer a broad swathe for *de novo* jurisdiction by selective exclusion of, and misplaced emphasis on, words and phrases therein is to attribute blemish in usage of grammar and composition to those of a generation that, by and large, is more distinguished for its familiarity with it.

13. The scheme of valuation in section 14 of Customs Act, 1962, even in its varied avatars during six decades of existence, is founded on the prompting, and consummation, of jurisdiction, to reject declaration and for adoption of alternative, from the same set of facts

and circumstances. That applies to the Tribunal, in exercise of appellate jurisdiction under section 129A of Customs Act, 1962, as much as it does to departmental investigation and to quasi-judicial proceeding in exercise of authority conferred by section 28 of Customs Act, 1962; both stand in the shoes of 'proper officer' in section 17 of Customs Act, 1962 for deciding on applicability of section 14 of Customs Act, 1962 and, if inapplicable, to resort to Rules framed thereunder and that function of assessment is not intended to be carved out for disaggregated performance by different authorities. The appellate authority, in exercise of statutory enactment, could not, in the absence of factual wherewithal to re-assess the value, have taken up the task of assessment only, by reason of surmise and speculations alone, to leave it undone for lower authorities to conclude. To attribute such procedural solecism to the Tribunal or to suggest that syntactical befuddlement in those with not inconsiderable proficiency of diction does permit such disambiguation is unacceptable assault on the verbal felicity and the legal competence of the Tribunal. The original authority was directed merely to take up the necessary enquiry in the remand proceedings for ascertainment of correctness of declaration and, on only upon finding to the contrary, to re-determine the assessable value for application within the authority conferred by Customs Act, 1962.

14. There is one other reason for us to deduce so. The Tribunal had,

unarguably, approved of the alienation of jurisdiction on the part of customs authorities to determine adherence to the 'industrial licence' and 'import licence' issued to the appellant, and being instruments of policy designed for erecting quantitative barriers to investment and imports having nothing to do with escapement, conditionally or otherwise, from duties of customs, for invoking the penal provision in Customs Act, 1962; to the extent of jurisdiction afforded to enforce prohibitions imposed on imports under any other law for the time being in force, the Tribunal had upheld the finding of the adjudicating authority that the 'import licence' did, in fact, enumerate the entirety of consignment imported under the second of the registered contracts. There was, thus, no latitude available to the adjudicating Commissioner for construing the remand order as extending to regulate compliance with 'import licence' regime which conforms to our observation *supra* on the semantic liberty arrogated in the impugned order.

15. Furthermore, debit of licence is a process appurtenant to 'duty foregone' on imports that are subject to condition of, *inter alia*, fulfillment of obligation prescribed; that *quid pro quo*, a facet of liberalized trade regime willing to offset levy for the cushion of foreign exchange earnings, was not contemplated in the control system that preceded the facilitative intent of trade laws prevailing when the *de novo* proceedings was undertaken. The approving tick for

customs intervention in monitoring of licences issued under the Foreign Trade Policy (FTP) in *Sheshank Sea Foods Pvt Ltd v. Union of India* [1996 (88) ELT 626 (SC)] which held that, merely by conferment of jurisdiction on licencing authority and the contextual clarification issued in May 1969 by Central Board of Excise & Customs (CBEC) precluding, in circumstances prevailing then, invoking of authority to confiscate upon breach of licence,

‘...in that sense, a breach of the terms of the said Exemption Notification is also a breach of the terms of the license, entitling the licensing authority to investigate. But the breach is not only of the terms of the license; it is also a breach of the condition in the Exemption Notification upon which the appellants obtained exemption from payment of Custom duty ’

may not afford authority to intervene in relation to imports preceding the schemes entitling licenced imports to exemptions from duty, operated through notifications issued under section 25 of Customs Act, 1962, that could be denied subsequently for non-fulfillment of export obligation. The presumption of authority by the adjudicating Commissioner for such monitorial oversight prevalent at the time of *de novo* adjudication to expand the scope of remand of any antecedent system of licencing, intended to regulate ‘quantitative restriction’, is erroneous.

16. Thus, the proceedings against the appellant, initiated on four

specific counts with consequences appendant thereto, was reduced to a couple of disparate and negligible elements to which the Tribunal, upon consideration of appeal of Revenue, added one more aspect for verification in the limited sphere *supra*. For ascertaining the restricted sphere of remand, we turn to the elements in the notice that was adjudicated upon. The first of these was confiscation of the installation, comprising the entirety of imports effected against all the contracts registered by them under the Project Import (Registration of Contract) Regulations, 1965, for having exceeded the permitted 'installed capacity' under the Industrial (Development & Regulation) Act, 1950 for attaining the proposed production. The second proposed confiscation of goods imported in excess of the 'spinning machines' permitted in 'import licence' issued under Imports & Exports (Control) Act, 1947. The third proposed denial of benefit of rate of duty corresponding to heading 8466 of First Schedule to Customs Tariff Act, 1975 for assessment at the tariff rate applicable to such equipment owing to imports in excess of that permitted. The fourth proposed enhancement of value as set out in the show cause notice. The adjudication order dropped the first two proposals after determination of conformity of imports with capacity permitted in the 'industrial licence' and with the enumeration in the 'import licence' without having to go into the support documents for interpretation of the terms of the two licences which, in any case, was held as being

beyond the scope of scrutiny by customs authorities as determined by settled law. That reasoning was upheld in the order of the Tribunal and in the disposal of appeal of Revenue before the Hon'ble Supreme Court. The conformity thereof, which prompted the finding of eligibility to rate of duty contemplated for goods falling under heading 8466 of First Schedule to Customs Tariff Act, 1975, was also not disapproved by the Tribunal owing to the finding of adherence to import licence *supra*. Therefore, it does not appear out of kilter that the Tribunal should have deployed 'licence debit' merely for describing the value that was adopted in the first adjudication and not as the directive sought to be justified by, and on behalf of, the respondent herein.

17. There is nothing on record to suggest that any part of the proceedings thus far, and till issue of the impugned order, devoted attention to rejection envisaged in section 14 of Customs Act, 1962 (as it stood prior to 16th August 1988) for recourse to Customs Valuation Rules, 1963, and, considering the factual matrix, leaves no possibility other than invoking

'8. If the value of the imported goods cannot be determined under the foregoing provisions, the proper officer shall, after taking into account all relevant material which he has gathered, determine the value to the best of his judgement.'

of Customs Valuation Rules, 1963. However, not only did the

adjudicating Commissioner presume such rejection to have been determined by the Tribunal but also contrived to reinforce acceptability of the computation proposed during *de novo* proceedings as conforming to rule 3 of Customs Valuation Rules, 1963 which survives on value of 'such goods' or 'comparable goods' produced or manufactured by the same person or other persons in country of export for sale to other buyers in India or outside India and, in absence thereof, to buyers in country of production. The permutation and combinations of these few variables in rule 3 of Customs Valuation Rules, 1963 would have to be identified specifically, and sequentially, with ascertainment of such prices before adoption in the present proceedings. There is conspicuous silence in the impugned order on the price emanating from a transaction intended by one among the four combinations and the price in the *pro forma* invoice does not conform to any of the alternatives in rule 3 of Customs Valuation Rules, 1963.

18. Instead, the impugned order has adopted a unit value, on the unsupported assumption of price in the *pro forma* invoice to be that of the four assembled spinning machines in the consignment, and described them as 'comparable goods' produced by the same manufacturer without pausing to consider the format of rule 3 of Customs Valuation Rules, 1963 which intends such or comparable goods to not include supplies to the importers which is an inescapable

impediment to resort to rule 3 of Customs Valuation Rules, 1963. There is also no pretence to 'best judgment', founded on relevant material gathered by the 'proper officer', having been resorted to and which, in any case, may not have passed muster in circumstances of not having gathered any, let alone all, relevant material. A conclusion erected on the foundation of misdirected premise and unadorned by trappings of legal sanction is in breach of section 14 of Customs Act, 1962.

19. We are constrained to note so as the Tribunal had directed ascertainment of the correctness of the value in the *pro forma* invoice, furnished in support of the declaration of value in the bill of entry, to relieve the handicap of deficiency in the certificate of Chartered Engineer paired with it. In doing so, the Tribunal intended the remand proceedings to consider a fresh certificate that could emerge only from a fresh inspection/survey. Without going into the feasibility of obtaining such report on inspection of a plant that had been in operation for almost a quarter of century after installation and upon *de novo* proceedings taken up after the remand order, the absence of such fresh, and clarificatory, certification expected by the Tribunal to be the basis for subjecting the *pro forma* invoice to the test of acceptability does, by itself, limit the scope of the remand even if the inference of the adjudicating authority on expanded scope of remand is considered. The correctness of the value in the *pro forma* invoice

will need to be tested only in terms of section 14 of Customs Act, 1962.

20. The installation of new capacity to manufacture 'polyester filament yarn (PFY)' at Patalganga was contemplated during the days of 'licence raj' with no aspect of such investment beyond the 'nightmarish tentacles' of the *minutiae* and agencies established for micromanaging the economy. Therefore, even if the 'import licence' did carry both quantitative and value limits, the value therein was intended as ceiling of 'foreign currency' outflow for approved projects and conformity thereof to be observed in remittance made towards such import. Valuation under Customs Act, 1962 had no bearing then on enforcement of licencing conditions as it may have in the altogether different context of a liberalized regime focused on export promotion and grafting of customs valuation, acceptable in 'licence' parented by export promotion schemes, to licences intended to restrict consumption is open invitation for rejection. Even the classificatory exercise, contingent upon conformity with description corresponding to heading 8466 of First Schedule to Customs Tariff Act, 1975 (later placed at heading 9801 therein), and monitoring through Project Import (Registration of Contract) Regulations, 1965, was intended for oversight of post-importation conditions. Therefore, the 'import licence' of that era was not intended to be debited with value and the decision of the Tribunal had, by no stretch, countermanded that finding in the first order of adjudication.

21. That imports of 8 nos. of ‘second hand spinning machines’ had been effected against the said license, entitling such import, is not in question. That the licensing regime – ‘industrial’ for setting up the manufacturing facility and ‘import’ for procurement of plant and machinery – was culmination of evaluation of need and extent thereto based on terms of supply in agreements with seller, on negotiated contract price in *pro forma* invoice and on estimate of value of imported goods, other than from manufacturer, through certification by Chartered Engineer is not in doubt. That the contents of these documents were not to be subjected to scrutiny by customs authorities for monitorial oversight of licenses issued by other statutory authorities is the conclusive finding in the first order of the adjudicating authority which the orders of the Tribunal and the Hon’ble Supreme Court, by relying on the decisions of the Hon’ble Supreme Court in *Union of India v. Tara Chand Gupta & Bros* [1983 (13) ELT 1456 (SC)], of the Hon’ble High Court of Bombay in *Lokash Chemical Works v. Collector* [1981 (8) ELT 235 (Bom)] and of the Tribunal in *Overseas Cycle Co v. Collector of Customs* [1992 (68) ELT 248 (T)], affirmed. That the impugned goods comprising 8 nos. ‘second hand spinning machines’- half in completely built-up form and half in completely knocked down form – were not in breach of license for imports is the finding in the sequence of appellate decisions leading to the impugned proceedings. However, the plea by

Revenue before the Tribunal of doubts on inclusion of goods, apparently not surveyed by the Chartered Engineer who issued the certificate, in the price indicated as consideration for sale in the *pro forma* invoice was found fit for remand to the original authority who, in accordance with statutory empowerment, was to re-determine the assessable value. This direction was not qualified by, or subject to, any finding on facts that would justify direct recourse to the alternatives afforded by Rules framed for specific contingency in section 14(1)(b) of Customs Act, 1962. We have held *supra* that recourse to the Rules does not offer legality to the enhancement posited by the adjudicating Commissioner.

22. Certification by chartered engineer has not been shown to be essential to appraisal of value in accordance with the system prevailing then; invoice price is, and has been, the basis for valuation subject to the framework of section 14 of Customs Act, 1962. Understandably, in a transaction of sale of existing plant and machinery, on 'as is where is' basis, 'invoice', as generally conceived, is not issued and *pro forma* invoice serves the same purpose. Of itself, the Tribunal had no cause to discard the said invoice and it was the articulation of apprehension of Revenue on the contents of the certificate issued by Chartered Engineer, and on the usual presumption of having been furnished along with invoice in support of declaration in bill of entry, that the Tribunal did not find discomfort in

directing that the exhaustiveness of the invoice be scrutinized. At no stage did the Tribunal subject the *pro forma* invoice to the rigours of section 14 of Customs Act, 1962 which was left to the diligent expertise of the adjudicating authority. The assumption of the adjudicating authority that the Tribunal discarded the price in the *pro forma* invoice, and thereby of the value declared in the bill of entry, is overreach for which the records offer no excuse. The consequent re-determination of value in the impugned order suffers from lack of adherence to pre-requisite of non-acceptability of declared value in accordance with section 14(1) of Customs Act, 1962. There is no reason to speculate that the Tribunal had, in its order, substituted such finding for that essential pre-requisite required to emanate from application of mind by the adjudicating authority or that the Tribunal had ventured to suggest bypassing the statutory obligation to do so. We would, however, consider our appellate responsibility to be unfulfilled if we stopped at this point without ascertaining the acceptability of value re-determined in the impugned order.

23. There is no evidence of any payment, in excess of the contract amount, having been made as consideration for sale to the supplier of the impugned goods. Prior to 16th August 1988,

‘...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

- (a) *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 the seller and buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale:*

Provided that such a 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 or bill of export, as the case may be, is presented under Section 50;

- (b) *where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf.....'*

in section 14 of Customs Act, 1962 provided the means for testing invoice price for conformity with the norms therein to qualify as assessable value and permitted re-determination of value, in accordance with Customs Valuation Rules, 1963, for assessment only upon the price at which the goods are 'ordinarily sold or offered for sale', not being ascertainable by adoption of the nearest ascertainable equivalent to be determined.

24. The scheme of section 14 of Customs Act, 1962, prior to alteration by Customs (Amendment) Act, 1988 effective from 16th August 1988 with price to be determined under the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988

subject to the rubric of value stated therein, provided that price, that was not ascertainable in terms of section 14(1)(a) of Customs Act, 1962, was required to be in accordance with rule 3 to rule 8 of Customs Valuation Rules, 1963.

25. The direction of the Tribunal did not include adjudgement by discarding all the statutory provisions as well as principles of natural justice. It was incumbent on the adjudicating authority to comply with the terms of remand strictly within the framework of a show cause notice carried all the way to the highest court of the land. The proposal on the show cause notice that

‘20..... As M/s. RIL did not disclose the value of the additional 4 spinning machines, it appears to be reasonable to value these 4 additional spinning machines on the basis of the admitted value of one machine as aforesaid, and accordingly it is proposed to value these 4 machines at Rs 530263992/- under the provisions of Section 14 (1) (b) of the Customs Act, 1962...’

serves but as an inadequate proposition for redetermination of value. As pointed out by Learned Counsel for the appellant, the decision in *re Janta Traders, Bombay* requires that the proposal in the show cause notice govern the outlines of conclusions in the adjudication order and that decision of the Hon’ble Supreme Court in *re Motor Industries Co Ltd*, reiterating adherence to the decision in *Eicher Tractors Ltd v. Commissioner [2000 (122) ELT 321 (SC)]* to brook no deviation from

acceptance of declared value, in the context of Customs Valuation (Determination of Price of Imported Goods), 1988 before insertion of rule 10A therein, as 'transaction value' except in circumstances of extraordinary or special reasons, appears to have been overlooked by the adjudicating authority. Except for the discomfort adumbrated in the observations of the Tribunal in remanding the question of valuation back to the original authority, there is no trace therein of any finding that could have influenced the adjudicating authority to conclude that he was obliged merely to carry out a re-calculation to enable confirmation of the duty liability sought to be fastened by the show cause notice. The inadequacy of the conclusion on re-determination of value jeopardizes duty liability sought to be fastened in the impugned order.

26. The adjudicating authority, considering the period which the dispute pertains, was not privileged to fall back on rule 10A of Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 which was found to be necessary enough to be inserted therein only by notification dated 19th February 1998 and, *sans* that, as was held by the Hon'ble Supreme Court in *re Eicher Tractors Ltd*, to impose acceptance of the declared price as the 'transaction value' thus

'Reading Rule 3(i) and Rule 4(2) together, it is clear that the mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods

under assessment as the transaction value. But the mandate is not invariable and is subject to certain exceptions specified in Rule 4(2)... These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the customs authorities are bound to assess the duty on the transaction value....

It is true that the Rules framed under Section 14(1A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section 14(1). Both Sections 14(1) and Rule 4 provide that the price paid by the importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in rule 4(2). Rule 4(1) speaks of the transaction value. Utilization of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). Payable in the context of the language of Rule 4(1) must, therefore, be read as referring to the particular transaction and payability in respect of the transaction and envisages a situation where payment of price may be deferred...'

which was diluted by the newly incorporated weaponry for resort by customs authorities. Even so, and notwithstanding the observation therein that

'... The Assistant Collector appears to have proceeded on the law as it was prior to the 1988 Rules when special

considerations on the basis of which a transaction was held not to be an ordinary sale in the course of international trade within the meaning of Section 14(1), had not been statutorily particularized...'

which may afford a latitude in resorting to rule 8 of Customs Valuation Rules, 1963 that was, in the judgement of the Hon'ble Supreme Court, excluded in the successor Rules of 1988, the design of section 14 prior to 16th August 1988 afforded recourse to the extant Rules only in circumstances of, and contingent only upon, lack of ascertainment of price under section 14(i)(a) of Customs Act, 1962 with the consequent changes, after rephrasing and incorporation as section 14(1A), transferring the ascertainment entirely to the successor Rules of 1988.

27. Mere *factum* of goods being 'second hand' does not, in terms of section 14(1) of Customs Act, 1962 as prevailing then, rob consideration of acceptability for adoption in assessment. There is no evidence, or cogently argued conclusion therefrom, that the *pro forma* invoice did not include the 4 nos. dismantled 'spinning machines' and the deficiencies in the certificate of the Chartered Engineer, intended only for approval of licences under other statutes and cause of unease to the Tribunal on the suspicion of having been limited to the goods inspected by the author, has no bearing on the *pro forma* invoice. Even so, there is no evidence whatsoever to discard the declared, and contracted, value of the consignment as a whole.

28. In these circumstances, the re-determination of value of the 4 nos. 'completely knocked down' spinning machines fails the test of law leaving the invoice price, by default, as the assessable value. Consequently, the impugned order is without merit and is set aside to allow the appeal.

(Order pronounced in the open court on 27/04/2023)

(S K MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*