CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85789 OF 2022

[Arising out of Order-in-Original No:119/2021-22/CAC/CC (IMPORT-II)/MKK dated 31st December 2021 passed by the Commissioner of Customs (Import-II), Mumbai.]

Jupiter Dyechem Pvt Ltd
92-93, 9th Floor, 'A' Mittal Court,
Nariman Point, Mumbai – 400021 … ***Appellant***

versus

Commissioner of Customs (Import-II)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Vipin Jain, Advocate, Shri Aqeel Shirazi, Advocate and Shri Abhishek Kapadia, Advocate, for the applicant

Shri D S Maan, Deputy Commissioner (AR) for the respondent

WITH

CUSTOMS APPEAL NO: 85831 OF 2022

[Arising out of Order-in-Original No:119/2021-22/CAC/CC (IMPORT-II)/MKK dated 31st December 2021 passed by the Commissioner of Customs (Import-II), Mumbai.]

B K Sales Corporation
D-1/M-3, Virat Bhawan, Mukherjee Nagar Commercial Complex, New Delhi 110 001. … ***Appellant***

versus

Commissioner of Customs (Import-II)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Prithviraj Chaudhary, Advocate, for the applicant

Shri D S Maan, Deputy Commissioner (AR) for the respondent

WITH

CUSTOMS APPEAL NO: 86216 OF 2022

[Arising out of Order-in-Original No: 145/2021-22/CAC/CC (IMPORT-II)/MKK dated 11th March 2022 passed by the Commissioner of Customs, (Import-II), Mumbai.]

C J Shah & Co
10th Floor, 105 Bajaj Bhawan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai-400021 … ***Appellant***

versus

Commissioner of Customs (Import-II)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri J C Patel, Advocate and Ms Shamita Patel, Advocate for the appellant

Shri D S Maan, Deputy Commissioner (AR) for the respondent

AND

CUSTOMS APPEAL NO: 86077 OF 2022

[Arising out of Order-in-Original No: 145/2021-22/CAC/CC (IMPORT-II)/MKK dated 11th March 2022 passed by the Commissioner of Customs, (Import-II), Mumbai.]

Jupiter Dyechem Pvt Ltd
92-93, 9th Floor, 'A' Mittal Court,
Nariman Point, Mumbai – 400021 … ***Appellant***

versus

Commissioner of Customs (Import-II)
New Custom House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Vipin Jain, Advocate, Shri Aqeel Shirazi, Advocate and Shri Abhishek Kapadia, Advocate, for the applicant

Shri D S Maan, Deputy 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 / 85889-85891 /2023 &
A/ 85895 / 2023

DATE OF HEARING: 11/11/2022
DATE OF DECISION: 11/05/2023

PER: C J MATHEW

Four appeals against two adjudication orders of Commissioner of Customs (Import-II), New Custom House, Mumbai, on identical issue of addition of freight for computation of assessable value and confiscation for misdeclaration of country of origin, are disposed of by this common proceedings. The adjudicating authority proceeded on the finding that the cargo, covered by import general manifest no. 224501/23.01.2020 of MT Braveworth filed for discharge at Mumbai and purportedly taken on board at Sohar in Oman during the voyage out of Fujairah in UAE from 9th January 2020, was, in fact, loaded during clandestine call at Dayyer in Iran between 15th January 2020 and 18th January 2020, and cargo, covered by import general manifest no. 2244928/22.01.2020 of MT Chem Trader filed for discharge at Mumbai and purportedly taken on board at Jebel Ali on 16th January 2020 was, in fact, loaded during clandestine call at Bamder Imam Khomeini in Iran between 12th January 2020 and 14th January 2020, necessitating enhancement of freight component for recovery of additional duty and confiscation under section 111(m) of Customs

Act, 1962 for concealment of place of origin with option to redeem on payment of fine under section 125 of Customs Act, 1962 along with penalties under section 114AA Customs Act, 1962. The vessel, MT Braveworth, valued at ₹ 43,00,00,000, was also confiscated under section 115 (2) of Customs Act, 1962 with option to redeem on payment of fine of ₹ 10,00,000 granted to M/s Braveworth Shipping Co Ltd along with penalty of ₹ 1,50,000 under section 112 (a) of Customs Act, 1962 and ₹ 3,50,000 under section 114AA of Customs Act, 1962. Likewise penalty of ₹ 5,00,000 was imposed on Shri Mohammed Zakir Hossain, master of the vessel, under section 114AA of Customs Act, 1962. The vessel, MT Chem Trader, valued at ₹ 57,00,00,000, was also confiscated under section 115 (2) of Customs Act, 1962 with option to redeem on payment of fine of ₹ 10,00,000 granted to M/s Chem Trader Tankers Pvt Ltd along with penalty of ₹ 90,000 under section 112(a) of Customs Act, 1962 and ₹ 5,00,000 under section 114AA of Customs Act, 1962. Likewise penalty of ₹ 5,00,000 was imposed on Shri Dadi Suyadi master of the vessel, under section 114AA of Customs Act, 1962 while, interestingly and only in this matter, penalty of ₹ 90,000 under section 112(a) of Customs Act, 1962 and ₹ 3,00,000 under section 114AA of Customs Act, 1962 was imposed on M/s Atlantic Global Shipping Pvt Ltd, the agent of vessel in India. These details are narrated here, and only in passing, as the vessel owners/charterers and agents are not in appeal in this proceeding.

2. One set of appeals, impugning order[1] of Commissioner of Customs (Import-II), New Custom House, Mumbai, pertained to cargo, totaling 13064.675 metric tons supplied by M/s Trade Unity FZE, Sharjah and remaining after discharge of 15000 metric tons at Kandla by MT Braveworth, against bills of lading no. BW/1901MUM-C12 and no. BW/1901MUM-C13, intended for delivery of 4000 metric tons to M/s Jupiter Dyechem Pvt Ltd at Mumbai, and against bills of lading no. BW/1901MUMB10-11 and no. BW/1901MUMB06-09, intended for delivery of 9064.675 metric tons to M/s BK Sales Corporation at Mumbai, all dated 19th January 2020 issued by M/s Trans Ocean Maritime Services LLC claiming to have been loaded at Sohar in Iran. M/s Jupiter filed bills of entry no. 6669516/28.01.20, no. 6669517/28.01.20, no. 6669485/28.01.20 and M/s BK Sales Corporation filed bills of entry no. 6732654/03.02.20 and no. 6732450/03.02.204 for clearance of ‘methanol’ declaring the particulars as in the documents. The goods imported by M/s BK Sales Corporation, valued at ₹ 14,55,00,640 inclusive of freight of ₹ 49,31,578, were confiscated under section 111(m) of Customs Act, 1962 with offer of option to redeem on payment of fine of ₹ 2,00,000 under section 125 of Customs Act, 1962 while imposing penalty of ₹ 12,07,743 under section 114A of Customs Act, 1962 along with

[1] [order-in-original no. 119/2021-22/CAC/CC (Import-II) MKK dated 31st December 2021]

penalty of ₹ 2,00,000 under section 114AA of Customs Act, 1962. The goods imported by M/s Jupiter Dyechem Pvt Ltd, valued at ₹ 6,39,10,272 inclusive of freight of ₹ 21,76,174, were confiscated under section 111(m) of Customs Act, 1962 with offer of option to redeem on payment of fine of ₹ 2,00,00 under section 125 of Customs Act, 1962 while imposing penalty of ₹ 5,32,946 under section 114A of Customs Act, 1962 along with penalty of ₹ 2,00,000 under section 114AA of Customs Act, 1962.

3. In the second order[2], the Commissioner of Customs (Import-II), New Custom House, Mumbai adjudicating offences related to cargo, totaling 4083.53 metric tons supplied by M/s Kriscon DMCC, Dubai against bills of lading no. CTV2001TUL-05-06, intended for delivery of 1050 metric tons of 'toulene' to M/s Jupiter Dyechem Pvt Ltd and bills of lading no. CTV2001TUL-05-06 and no. CTV2001TUL-05-06 intended for delivery of 950 metric tons of 'mixed xylene' and 2083.35 metric tons of 'toulene' to M/s CJ Shah & Co, all dated 17th January 2020 issued by M/s Atlantic Global Shipping Ltd, enhanced the assessable value for recovery of differential duty of ₹ 7,17,858 towards additional freight in bills of entry no. 7007117/25.02.20, no. 6600759/23.01.20 and no. 6608417/24.01.20 filed by M/s CJ Shah & Co for clearance of 950 metric tons of 'mixed xylene' and 2083.35 metric tons of 'toluene' and ₹ 2,47,934 towards additional freight in

[2] [order-in-original no. 145/2021-22/CAC/CC (Import-II)/MKK dated 11th March 2022]

bills of entry no. 6611107/24.01.20 and no. 6613383/24.01.20 filed by M/s Jupiter Dyechem Pvt Ltd for clearance of 2083.35 metric tons of 'toluene'. The goods imported by M/s CJ Shah, valued at ₹ 16,58,54,337.40, inclusive of freight of ₹ 33,78,952.26, were confiscated under section 111(m) of Customs Act, 1962 with offer of option to redeem on payment of fine of ₹ 3,00,000 under section 125 of Customs Act, 1962 while imposing penalty of ₹ 7,17,858 under section 114A of Customs Act, 1962 along with penalty of ₹ 3,00,000 under section 114AA of Customs Act, 1962. The goods imported by M/s Jupiter Dyechem Pvt Ltd, valued at ₹ 5,87,35,253.30, inclusive of freight of ₹ 11,67,021, were confiscated under section 111(m) of Customs Act, 1962 with offer of option to redeem on payment of fine of ₹ 3,00,000 under section 125 of Customs Act, 1962 while imposing penalty of ₹ 2,47,934 under section 114A of Customs Act, 1962 along with penalty of ₹ 3,00,000 under section 114AA of Customs Act, 1962.

4. Though the core of the allegation is that all four shipments were effected from Iran even as the bills of lading for 'methanol' were issued from Oman backed by invoice from UAE while bills of lading and invoice were issued from UAE for 'toluene' and 'mixed xylene' with Taiwan as place of origin, no attempt was made to question the declared value by recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Learned

Authorised Representative made a valiant effort by placing before us the pricing of these goods in the international market and the mode of computation in the industry to urge us, as the final fact-finding authority, to cause the appellants to explain the entirety of transactions with the plea that the investigation had, from inadvertence, not done so. It would appear that Learned Authorised Representative has not been able to appreciate the difference between quasi-judicial adjudication and admissibility of additional grounds in appellate proceedings. Categorisation among ‘fact-finding authorities’ does not admit to equation with adjudication arising from section 28 of Customs Act, 1962 or section 124 of Customs Act, 1962 equally; all it implies is that facts, as admitted by and ascertained in, proceedings before ‘fact-finding authorities’ are not, normally, subject to re-ascertainment in the constitutional courts that offer appellate recourse under the taxing statute. Customs Act, 1962 envisages the Tribunal to be an appellate authority without jurisdiction to consider matters other than that in appeal; as far as the present proceedings are concerned, there is no appeal by the Revenue against the order impugned by the four importers and it does not stand to reason that an appeal of aggrieved importers can provide an appropriately judicial means for visiting a detriment that they had not been placed on notice at any stage so far. Doubtlessly, the persistence and diligence of Learned Authorised Representative in urging, with substantive grounds, for redetermination of assessable value is worthy of a competent adjudicating authority but, we are afraid, that his pleadings must go in vain before the Tribunal.

5. Before us are the two issues of non-inclusion of actual freight from Iran to Mumbai as prescribed in rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and confiscability of goods under section 111(m) of Customs Act, 1962 with attendant penalties on importers, shipowners and master of the vessels under section 114/114AA of Customs Act, 1962 that is cause of grievance to the appellants and to which the outcome of these proceedings shall be restricted.

6. Learned Counsel for the appellants submits that their transactions were with the suppliers in Dubai/Sharjah and who have issued invoices that reflect the transaction value of the impugned goods. According to him, they are neither concerned with the logistics of transportation which is the sole responsibility of the suppliers nor with any foray undertaken by the vessel on which the goods are carried to any other place that has no bearing on the commercial engagement with the seller. It was contended that the origin of the goods was of no concern in the agreement arrived at with the suppliers and, as a trading concern, endowed with liberty to procure the goods from any market subject to restrictions of any kind imposed by the

sovereign authorities of their place of operation. Furthermore, according to him, there is no evidence of any payment made by the appellants to carrier towards freight and that it was inconceivable, especially in circumstances of absence of any allegation of additional payments having been made to the supplier, that the prices in the invoices did not include the freight element. It was submitted that freight could be added to the assessable value under rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 only when it is evident that the prices were not inclusive of the elements, though required to be so, for assessment and that the show cause notice was bereft of any such conclusion. According to Learned Counsel, the adjudicating authority had not been able to establish that the last port of call of the two vessels carrying the impugned goods was other than Sohar in Oman and Jebel Ali in UAE as indicated in the documents filed with the bill of entry; there was, according to him, no ground for charging them with submission of documentation intended to suppress material particular or misdirect the assessment process.

7. In addition to the elaborate pleading on the enhancement of assessable value owing to non-acceptability of the invoice for misdeclaring the origin and the adoption of the appropriate option in the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, it was argued by Learned Authorised Representative that

the declaration of place of origin of the impugned goods was incorrect and that the freight element for fulfilment of the contractual engagement with the suppliers had not been properly reflected in the invoice. According to him, as the goods were sourced from Iran, a country with which most nations do not have trade relations, the terms of the trade must necessarily comprise suppressed elements which includes freight that, not amenable to costing, requires to be added in computation of the assessable value.

8. The first issue that comes up relates to the place of origin. There is no contention on the part of customs authorities that appellants had insisted upon sourcing from Iran or that they had any commercial engagements with suppliers in Iran that was sought to be obfuscated by a paper trail through Dubai/Sharjah. On the contrary, the entire proceedings have been carried through on the presumption that there is no engagement other than with the contracted suppliers. The sole evidence of goods not being of Taiwanese/Omani origin, as contained in the bills of lading, are the records of passage by MT Braveworth from Fujairah to Sohar *en route* to India having been interrupted by allegedly calling at Dayyer in Iran and of MT Chem Trader having called at Bander Imam Khamenei in Iran before arrival at Jebel Ali for the next voyage to Mumbai. There is no evidence on record, elicited through official channels, of the facts relating to the movement of the vessels. The impugned orders have placed emphasis

on the statements recorded from the master of the respective vessels but, in the absence of official confirmation from authorities at Oman/UAE about the port clearance submitted for entry at Sohar/Jebel Ali where, acknowledgedly, the two vessels departed for arrival in Kandla/Mumbai, it cannot be concluded that such evidence can be relied upon to visit detriment upon importers who had no commercial engagement with the vessels or her masters.

9. In the light of such tenuous evidence of movement of the vessels, let alone the cargo contained therein during the alleged voyage to the last port of call before arrival in India, it must only be assumed that the price in the invoices reflect the qualifications embodied in section 14 of Customs Act, 1962 for acceptance as transaction value. In terms of rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value of imported goods is, subject to rule 12 therein, the transaction value adjusted in accordance with the provisions of rule 10 therein. Rule 10 provides for addition of specified costs and services subject to the conditions prescribed therein and, *inter alia,* mandates cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation as well as the cost of insurance to place of importation. There is no prescription as to the circumstances in which such addition shall be made except by reference to the contracted value being ‘free on board (FOB)’ and

that the mandatory loading is contingent upon the cost of such services not being ascertainable.

10. The assessments had been taken up on the value corresponding to that in the invoice with addition of purported freight from Iran to Mumbai. The invoices had been issued by M/s Trade Unity FZE on ‘cost insurance freight (CIF) terms and by M/s Kriscon DMCC, Dubai on ‘cost and freight (CFR)’ terms and having freight cost separately therein do not, of themselves, warrant invoking of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 except on finding that the freight was payable by the importer to the carrier or that the freight had been absorbed by the seller. These are the only circumstances in which the payment terms of the invoice, insofar as the inclusions mandated by rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, may be suspected to be non-compliant for recourse to the addition prescribed therein. Furthermore, the mechanism for additions thereto provides that the ascertained actual cost or, in absence thereof, the enhancement by prescribed percentage be added.

11. The freight that has been ascertained does not even pretend to be representative of the actual payment made, either by exporter or by importer, to the carrier. It is clear from the records that the adjudicating authority had arrived at a mathematical computation that

had nothing to do with any payment made to the carrier. This is not the intent of adjustment necessitated by rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. For this reason, the enhancement, for the purposes of determining differential duty, in the impugned orders must be set aside.

12. It is also of importance to note that, insofar as the cargo on MT Chem Trader is concerned, the last port of call before arrival in India was Jebel Ali in UAE and, with the invoices being issued subsequent to her arrival at the purported load port, there is no ground for inferring that the invoice value did not reflect the freight paid for any part of the voyage, along with cargo if any, preceding the arrival. Insofar as MT Braveworth is concerned, the sailing from Sohar, the last port of call before arrival at Kandla, was not interrupted by calling at any other port for loading of cargo and the allegation is limited to loading having occurred before the last port of call where bill of lading was issued by the carrier. It is, therefore, inconceivable that the cost of transportation for any voyage, carrying cargo, preceding thereto was not included in the freight incorporated in the invoice value. As we have noted *supra*, there is no finding that any additional payment was made by either importer or exporter to the carrier. On the set of facts too, the enhancement order in the impugned orders merit setting aside.

13. We have deliberately not touched upon any of the decisions cited by both sides in support of their legal submissions. We have relied entirely upon the factual matrix of the case, in the records as well as submissions, and the law as set out in Customs Act, 1962 to render the finding here. We did so, with deliberate intent, for demonstrating that it is obligatory on the part of adjudicating authority to evaluate the proposals put forth in the show cause notice on the basis of available facts and law and that any detriment, of duty or fine/penalties, visited upon an importer without examination of the role of the noticee on the circumstances leading to the conclusion of having breached Customs Act, 1962 is not only inappropriate but tantamount to executive overreach that rule of law abhors.

14. For the above reasons, we set aside the impugned orders and allow the appeals.

(Order pronounced in the open court on 11/05/2023)

(S.K. MOHANTY)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*