CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87726 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 … ***Appellant***

versus

Kiran Gems Pvt Ltd
FE-5011, Bharat Diamond Bourse, G Block,
Bandra Kurla Complex, Bandra (E), Mumbai 400 051. ***…Respondent***

APPEARANCE:

Shri Sydney D'Silva, Additional Commissioner (AR) for the appellant

Shri Sujay Kantawala, Advocate for the respondent

WITH

CUSTOMS APPEAL NO: 87811 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Kiran Gems Pvt Ltd
FE-5011, Bharat Diamond Bourse, G Block,
Bandra Kurla Complex, Bandra (E), Mumbai 400 051. … ***Appellant***

versus

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 87812 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Vallabhbhai S Patel
Kiran Gems Pvt Ltd
FE-5011, Bharat Diamond Bourse, G Block,
Bandra Kurla Complex, Bandra (E), Mumbai 400 051. … ***Appellant***

versus

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 87813 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Mavbjibhai S Patel
Kiran Gems Pvt Ltd
FE-5011, Bharat Diamond Bourse, G Block,
Bandra Kurla Complex, Bandra (E), Mumbai 400 051. … ***Appellant***

versus

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 ***…Respondent***

APPEARANCE:

Shri Sujay Kantawala, Advocate for the appellants

Shri Sydney D'Silva, Additional Commissioner (AR) for the respondent

WITH

CUSTOMS APPEAL NO: 87823 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Raviraj Anil Kumar
Uniface Diam DMCC, Dubai Unit No. 3596
DMCC, Business Centre, Level No. 1 Jewellery
& Gemplex 3 PO Box, Dubai, UAE 112930 … ***Appellant***

versus

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 ***…Respondent***

AND

CUSTOMS APPEAL NO: 87824 OF 2022

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15th September 2022 passed by the Commissioner of Customs (Appeals), Mumbai - III.]

Kushal Kamles Patel
Uniface Diam DMCC, Dubai Unit No. 3596
DMCC, Business Centre, Level No. 1 Jewellery
& Gemplex 3 PO Box, Dubai, UAE 112930 … ***Appellant***

versus

Commissioner of Customs
Air Special Cargo
Awas Corporate Point, Makwana Lane,
Behind SM Centre, Andheri-Kurla Road, Andheri (E)
Mumbai - 400059 ***…Respondent***

APPEARANCE:

Ms Lakshmi Menon, Advocate with Shri Akshay Deokule, Advocate for the appellants

Shri Sydney D'Silva, Additional 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 / 85978-85983 /2023

DATE OF HEARING: 27/04/2023
DATE OF DECISION: 22/06/2023

PER: C J MATHEW

The order impugned before us is significantly humungous. But then so is the order-in-original that is the fount of the grievance of M/s Kiran Gems P Ltd, S/Shri Vallabhai Patel, Mavjibhai S Patel, Raviraj Anil Kumar Vakani and Kushal Kamlesh Patel, as well as that of Commissioner of Customs (Airport Special Cargo), Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai, all of whom are disappointed by the outcome of proceedings before Commissioner of Customs (Appeals)[1], Mumbai -III and are in appeal before us. For comparison, in the Bible, an 800,000 word composition by several contributors, is the New Testament, comprising 200,000 words and, just about half of which is the word count in the order of Joint Commissioner, (Airport Special Cargo), Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai to sustain confiscating

[1] [order-in-appeal no. MUM-CUSTM-APSC-APP-1374 to 1379/2022-23 dated 15.9.2022]

‘rough diamonds’ imported against bills of entry no. 2673556/02.04.2019 and 2812593/12.04.2019. The factual matrix, therefore, cannot but be as vast and as complex enough for holding interest.

2. The two consignments of 62,837 carats and 76,195.45 carats, valued at ₹ 49,21,80,126.88 and ₹ 119,24,42,649.19 respectively, imported by M/s Kiran Gems P Ltd from M/s Unifacet Diam, DMCC, Dubai were declared to be in conformity with description corresponding to tariff item 7102 3100 in First Schedule to Customs Tariff Act, 1975 upon presentation at Precious Cargo Customs Clearance Centre (PCCCC), Bharat Diamond Bourse (BDB) but, on examination, were observed to consist of parcels, some of which were marked as ‘rejections’ from ‘Al Rosa’ mine, besides not matching the quantities declared in the bills of entry which were, of themselves, inconsistent with the details in the accompanying invoices, packing lists and Kimberley Process Certificates (KPC) and, therefore, seized under section 110 of Customs Act, 1962 on 4th April 2019 and 22nd April 2019. The adjudicating authority found the Kimberley Process Certificates (KPC) to be in order. However, the ‘rough diamonds’ were ordered to be confiscated under section 111(m) of Customs Act, 1962 on account of assessable value having been revised to ₹ 26,16,99,645.22 and ₹ 94,24,99,507.50 by recourse to rule 9 of Customs Valuation (Determination of Value of Imported Goods)

Rules, 2007 but allowed to be redeemed, under section 125 of Customs Act, 1962, on payment of fine of ₹ 2,00,00,000 and ₹ 8,00,00,000 respectively and to be re-exported subject to conforming of declarations therein in accord with the examination report in addition to acceding to drawal of representative samples from each consignment over which no claim would ever be preferred. The first appellate authority upheld all of these except the conditions prescribed for re-export for want of such authority in section 125 of Customs Act, 1962. In addition, penalty of ₹ 4,00,00,000 on M/s Kiran Gems P Ltd, of ₹ 1,00,00,000 each on S/Shri Mavjibhai S Patel and Vallabbhai S Patel, Managing Director and Chairman & Director of M/s Kiran Gems P Ltd, and ₹ 50,00,000 and ₹ 25,00,000 respectively on S/Shri Kushal Kamlesh Patel and Raviraj Anilkumar Vakani, owner of M/s Unifacet Diam Dubai and General Manager of M/s Unifacet Diam Dubai, under section 112(a) of Customs Act, 1962 were left untouched by the first appellate authority as were penalties of ₹ 50,00,000 each on S/Shri Mavjibhai S Patel and Vallabbhai S Patel, Managing Director and Chairman & Director of M/s Kiran Gems P Ltd, and ₹ 25,00,000 and ₹ 15,00,000 respectively on S/Shri Kushal Kamlesh Patel and Raviraj Anilkumar Vakani, owner of M/s Unifacet Diam Dubai and General Manager of M/s Unifacet Diam Dubai, under section 114AA of Customs Act, 1962.

3. Appeal of Commissioner of Customs (Airport Special Cargo),

Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai against discarding of proposal for confiscation under section 111(d) of Customs Act, 1962, and consequent grant of redemption on payment of fine, was rejected by the first appellate authority for not having been subject to review, the essential pre-requisite for filing of appeal against its own order, within the time stipulated in section 129DD of Customs Act, 1962. Concomitantly, the additional grounds sought to be incorporated in that appeal were, for not having been included in the determination by the competent authority in the review preceding the appeal itself, also not entertained. The appeal of Revenue, though seeking also to agitate grievance against the order-in-original, is about the rejection of their appeal by the first appellate authority. It has been brought to our attention that the sole relief granted in the impugned proceedings, *viz*., the setting aside of conditions for re-export, is not a cause of grievance at this stage.

4. It would appear that the voluminous findings of the original authority are, therefore, only about the composition of lots/parcels and the reasoning for recourse to the ‘residual method’ of valuation after rejecting the declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. It does not require restating that there is no duty liability involved in the dispute as no duty is leviable on import of ‘rough diamonds’ and it would also appear that the concern of customs authorities is ‘hawala/money

laundering', otherwise known as 'round tripping', and vulnerability of the trade in 'rough diamonds', particularly channeling of 'conflict diamonds' and as 'medium' in illicit remittance, which inevitably pass through customs jurisdictions enabling the spotlight to be turned on the perpetrators in that brief window of processing for clearance. We have no doubt that more power to the pursuit of 'larger good' does have a touch of noble ideals but it just happens that the 'larger good' is not the domain of any of the compartments in a national administration in which each performs such tasks as are assigned by the national administration in the interests of the 'larger good' which is best served by effective discharge of that assigned task. Customs law is about import-export and jurisdictionally operated within the procedure prescribed in section 47 and section 50 of Customs Act, 1962; to venture beyond is to step into the unknown and the unauthorized that may only trip up those tasked with authority to do so.

5. On scrutiny of the grounds of appeal filed by Revenue, and ignoring the cavil about the findings of the original authority which, admittedly, were not considered on merit by the first appellate authority, it would appear to be limited to coverage of 'nullfication of time between 15th March 2020 and 28th February 2022' by the Hon'ble Supreme Court in *Re: Cognizance for Extension of*

Limitation[2] in order dated 10th January 2022 that, according to jurisdictional Committee of Commissioners, encompassed anything to do with appeals, and adjudication, before judicial and quasi-judicial authorities. There is no justification offered therein for the Tribunal to entertain pleas for relief that goes beyond the bounds of the order of the first appellate authority who had no jurisdiction, after rejection of appeal of Commissioner of Customs (Airport Special Cargo), Chhatrapati Shivaji Maharaj International Airport (CSMIA), to consider imposition of detriment on the importer and appellant-individuals that the adjudicating authority had not. We are, therefore, constrained to limit our consideration to subjecting the finding of the first appellate authority, that review is an administrative exercise, separate of appeal, prescribed in section 129D of Customs Act, 1962 which did not enjoy the latitude afforded by the order of the Hon'ble Supreme Court *supra*, to the test of legal and proper. Should it be found not to be so, we shall have no option but to restore that appeal back to the first appellate authority which would also require that the other appeals be deferred till the outcome of such remand be known. It is, therefore, of essence that the appeal of Revenue be decided first and within the limited scope of our remit.

6. Incidentally, the discarding of the additional ground is referred to, peripherally, in the same appeal and sought to be justified, even if

[2] [suo moto writ petition (c) no. 3of 2020 & others]

as supplementary review, by reliance on the decisions of the Hon'ble High Court of Madras in *Commissioner of Customs, Tuticorin v. Madura Coats Pvt Ltd [2013-TIOL-1208-HC-MAD-CUS]*, of the Tribunal in *Commissioner of Customs (Export), Goa v. Vinka Industries and ors [2016-TIOL-60-CESTAT-MUM]* and of the Hon'ble High Court of Delhi in *Commissioner of Service Tax v. Japan Airlines International Co Ltd [2015-TIOL-1645-HC-DEL-ST-LB]* all dealing with nature of review power and amenability to correctives.

7. The first appellate authority has examined the special law enacted for review of departmental adjudication and departmental appellate orders for mounting challenge, and not over grievance, for lack of being legal and proper. Accordingly, section 129D of Customs Act, 1962 is not just about appeal which initiates jurisdiction over a dispute for Commissioner (Appeals) or the Tribunal, as the case may be, as available to the assessee or other affected person but also precursor to appeal for ensuring that application of mind, and not knee-jerk reaction to unfavourable outcome, informs the decision to pursue appellate remedies. The statutory 'time-limit' enabled for completion of the process is three months which may, for sufficient reason, be extended by another thirty days by Central Board of Excise & Customs (CBEC) and, thereafter, another one month is available for filing of the appeal itself. Not only are these time-lines separate and distinct from that available to assessee or other affected person but, as

pointed by the first appellate authority, the segregation is ample manifest of legislative intent to treat these as two distinct contingencies; hence the claim of the jurisdictional Committee that all of that is the time facilitated for appeal and, thereby, within the ambit of the order of the Hon'ble Supreme Court does not resonate with us. The first appellate authority has concluded that the 'nullification' would apply to the time taken between conclusion of review and action thereafter for implementing the outcome of review but not to modify the time allowed for review.

8. It has been noted by the first appellate authority that the Hon'ble High Court of Bombay, in *re Vinka Industries*, had held review to be an administrative mechanism. We find no reason to disagree with that conclusion and, more so, as the decision of a Larger Bench of Hon'ble High Court of Delhi in *re Japan Airline International Co Ltd*, cited by Revenue in support of correctives made to decisions in review, has arrived at much the same conclusion. Therefore, the administrative character of the review procedure laid down in law is not a stand that Revenue can now seek to dispute. The order of the Hon'ble Supreme Court, as the apex judicial authority, is limited to its remit of supervision over appellate and adjudicatory forums, of all hues and shades in such a *suo moto* cognizance of disruption in this most unusual period in human history that, in some way or other and for an extended time, impeded external interface

with public institutions. The same cannot be said to have intruded upon internal administrative arrangements; on the contrary, while the public at large were, more or less, sequestered at their homes, officialdom were accorded exclusive access to public transport systems, even skeletal as they may have been, for keeping the administrative machinery operational. Therefore, even circumstantially, there is no claim for Revenue to propose that the special context which prompted the Hon'ble Supreme Court was no less relevant to them. In any case, the Hon'ble Supreme Court cannot, except when called upon to in the course of litigation, have intended to intervene in administrative domain of the executive. No other justification has made appearance in the grounds furnished by the jurisdictional Committee of Commissioners and, hence, we have no reason to conclude that the disposal of appeal filed by Commissioner of Customs before the first appellate authority was not legal and proper.

9. On that conclusion, it must also be stated that the doctrine of merger has, effectively, erased the order of the original authority and only the order of the first appellate authority is available for pursuing before the Tribunal. The proposals discarded by the original authority do not survive and, as held by the Hon'ble Supreme Court in *AV Papayya Sastry v. Government of Andhra Pradesh [(2007) 4 SCC 221]*

> *'38.…… All orders passed by the courts/authorities below, therefore, merge in the judgement of this Court and after such judgment, it is not open to any party to the judgement to approach any court or authority to review, recall or reconsider the order.'*

as the essence of the doctrine that, at every stage of appellate hierarchy, applies insofar as orders of lower forums are concerned. Hence, the discarding of the proposals for confiscation under section 111(d) of Customs Act, 1962 and for denial of the option of redemption are, after the refusal of the first appellate authority to admit the appeal of Commissioner of Customs, no longer available for agitating before the Tribunal. The sole possible cavil was the dilution of the condition by sole relief obtained by appellants from the first appellate authority but even that has passed by for not having been disputed in the appeal before us.

10. The cavil against rejection of the plea for bringing in additional grounds before first appellate authority is, with reiteration of correctness of the order of dismissal of appeal of Commissioner of Customs, now academic. In any case, the decisions relied upon by the jurisdictional Committee of Commissioners have approved of the proposition that review process does not ever attain finality but not forever by allowing the limitation in section 129D to be stretched by or for accommodating such correctives before the first appellate authority vested with very limited power to condone delays in filing

appeals or applications. This proceeding is, thus, restricted to the pleas of the importer and the appellant-individuals.

11. All that remains for resolution in the dispute is that of valuation of impugned goods. Value, at the best of times, is difficult to ascertain for, ultimately, it remains a buyer-seller transaction and their mutual agreement on the price to be paid. More so, in a commodity such as 'rough diamonds' which is surrendered to Man by Mother Earth and, in the nature of all primary produce that is, generally, not used as such, 'price discovery' is a complex tangle of factors. Insofar as these goods, as presented for clearance, are concerned, its appearance is highly deceptive and contingent upon skill in cutting to reveal capability of capturing light for reflecting it back. Value of the impugned consignment was ascertained on three different occasions. The first, by a 'panel member' that took place on 2nd April 2019, certified the declared value to be 'fair' but the one undertaken by Committee of Panel Members, as certified in reports of 3rd April 2019 and 15th April 2019, elicited values, of ₹ 41.55 crores and ₹ 113.68 crores respectively, that are marginally lower than that declared at the time of import. The reliability of report, consequent upon a further examination by Mr Surajratan Agrawal, an Income Tax Department-approved valuer, undertaken on 18th September 2019 at the request of the investigators and accepted by the adjudicating authority, is at the core of the controversy. Needless to say, it is the persistence in

seeking out certifications until an acceptable one had been elicited that is a cavil of the appellants and the whole of it resting on deviation from procedure devised by customs authorities in view of the peculiarities of the trade, such as limited stylized expertise, preference for secrecy and the locii of players in the diamond industry. Thus, value, in addition to compliance with Rules notified under the prescription in section 14 of Customs Act, 1962, must also adhere to the process of ascertainment, save by 'transaction value' of 'identical' or 'similar' – effectively inapplicable to 'rough diamonds' – goods, spelt out in instructions[3] intended for Bharat Diamond Bourse (BDB). The foundation of this administrative instrument is 'identity' of consignment and 'anonymity' of the importer.

12. We find that the submission of doubts cast on the presence of Mr Prakash Vaghani, an employee of the importer, at the last examination, sought to be buttressed by requests for cross-examination of several of the persons in attendance then and demands for video footage from surveillance cameras, emanates from the first of the underlying pillars. Yet another critical aspect was the rationale adopted by the original authority for rejection of the first report, *i.e.*, disclosure of identity of importer, which the first appellate authority found to be bemusing as the mandated presence of representative of importer in such proceedings itself assures revelation. The first

[3] [public notice no. 30/2018 dated 19th December 2018]

appellate authority, referring to paragraph 14 of the said instructions, also pointed out that it is only in certain specified contingencies that customs authorities could discard report of GJEPC-approved 'panel of experts' for undertaking further ascertainment. It would also appear to us that this micro-management of assessment was caused by 'unfortunate events' of July 2018 – whatever those be – to accord credibility to this 'sub rosa', as it were, process.

13. The first appellate authority appears to be proficient in 'dialectics' which, as seen from the disposal of two issues raised by appellants - limited cross-examination permitted and serial resort to valuers in breach of instructions on examination procedure – before her, is not to be faulted but suitability for deployment in determination of legal and proper is in question. It was concluded that a representative of each of the institutions concerned with examination had been subjected to requirement of section 138B of Customs Act, 1962 which sufficed to overcome any threshold objection to repudiation of that which had been permitted by the predecessor 'incumbent in office' empowered to adjudicate and that, notwithstanding the impropriety of seeking third examination, the difference in value elicited by the 'proper' second examination justifies confiscation under section 111(m) of Customs Act, 1962 for, thereby, not disturbing the order itself. In our view, invoking of Customs Valuation (Determination of Value of Imported Goods)

Rules, 2007 thus in appellate jurisdiction, by confining the testing of adjudicatory determination of value not by aptness of substituted value of the impugned goods to rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 but only for validating rejection of declared value goes against the grain of

> *Explanation.- (1) For the removal of doubts, it is hereby declared that:-*
>
> *(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9…..'*

in rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The impugned order has failed to approve, modify or reject the value adopted by the adjudicating authority by recourse to the said Rules. An appellate authority steps into the shoes of the adjudicating authority in merit review and not as an external examiner evaluating the term paper of a graduate student. Hence the finding in the impugned order that

> *'In view of above discussions, though I note there are procedural violations by the AA, yet those are not having major bearings negatively on the appellant. As no duty is applicable on impugned goods, the RF under section 125 will depend upon the value re-determined of the goods. As*

> *department never relied upon the report of the 2nd Panel Members and said report will not affect impugned order except having some bearing on the quantum of the RF. I proceed further with the 3rd report as the base of the order only considering that it actually helped the appellant in getting lesser RF and they will not be aggrieved with the lesser RF imposed on them on the basis of the 3rd report relied upon by the department. Thus by saying so, I find myself in agreement with the AA as far as Order part is concerned. …' (emphasis supplied)*

is not only in breach of mandate devolving on appellate authority but is also fatal to the consequent detriments.

14. Repelling the allegation that the some prior arrangement, arising out of personal relationship between the owners of the importer and supplier entities, Mr Sujay Kantawala, Learned Counsel for importer, denied any connections and, submitting that such relationship even if evidenced would not have sufficed for discarding value unless in accordance with rule 3(2) and rule 3(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, he also drew attention to the findings in the impugned order which, with reference to economics of the purported transaction, cast doubts on 'round tripping' as the motive for the alleged overvaluation. Furthermore, he contended that, with the stringent procedures of public notice no. 30/2018 dated 19th December 2018, any attempt at 'misdeclaration' would be farthest from the minds of any entity

importing through Precious Cargo Customs Clearance Centre (PCCCC) of Bharat Diamond Bourse (BDB). Both Learned Authorized Representative and he elaborated upon Kimberly Process International Certification scheme, the internationally acknowledged system for auditing of ‘rough diamonds’ established for cleaning up the transborder trade in that prized commodity.

15. From their elucidation, we gather that the regime was established in 2003, following the Fowler Report and resolution adopted at the World Diamond Congress at Antwerp in July 2000, with contracting States agreeing to implement safeguards on shipment of ‘rough diamond’ from mines to the buyers engaged in cutting and polishing of the stones by taking responsibility for verifying provenance from country of export and certifying provenance upon export from the country for satisfaction of authorities of the next country in the chain. The threshold implementation by the contracting States envisages integrity of ‘chain of possession’ through audit of warranty declaration on sales invoice and acceptance of consignments only in sealed condition accompanied by prescribed certificate. Thus, it would appear that the efficacy of the scheme rests upon the self-interest of the authorities in the country of export to remain within the ‘trade route’ of this lucrative article. It is not in dispute that the impugned consignments were accompanied by Kimberly Process Certificates (KPC) issued by the competent authority in Dubai and

there is no evidence on record to conclude that the authorities at that end were less than diligent in administering the process; nor was any attempt made to verify any suspicion thereto from the issuing authority. It is, therefore, not surprising that the original authority rendered the crucial finding that the certification was valid for the consignments as received.

16. Though the declared classification has been referred to, and discussed with reference to the representative samples drawn by the expert valuers, and concluded thereto on conformity with prescriptions, nothing turns on that for any detriment under section 111 of Customs Act, 1962 directly; indeed, that was not an aspect agitated in appeal of importer before the first appellate authority. That, however, caused alarm for consequence on the value declared in the bills of entry and the impugned order has taken note of

> *'(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include –*
>
> *(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;*
>
> *(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;*
>
> *(c) the sale involves special discounts limited to exclusive agents;*

> *(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;*
>
> *(e) the non-declaration of parameters such as brand, grade, specifications that have relevance to value;*
>
> *(f) the fraudulent or manipulated document'*
>
> *(emphasis supplied in impugned order)*

in *Explanation (1)* below rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as enabling recourse to rule 12, thereby, with notice, as intended therein, having been communicated in the show cause notice leading to adjudication and culminating thereafter by the impugned order. From this, it can be clearly deduced that classification itself was not an issue with the lower authorities except insofar as it enabled invoking of rule 12 and, thereupon, rule 9, of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. We have already made our observations *supra* about the catalytical, even if pivotal as such generally are, role of rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 in valuation – not as an end in, or of, itself – of imported goods by recourse to enumerated methods. We may also add to it, at this stage, with the observation that reliance upon the text of that rule is valid only within the context of the rubric in the *Explanation*.

17. These appeals, thus, are concerned only with the validity of

resort to rule 9, as the only available option, and resort, for want of any other option, to rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Our concern is more with a legal conundrum that transcends procedural closure and deserves no little attention. Before doing so, and indeed for ascertaining conformity of adopted valuation, such as it is in the light of reservations in the impugned order noted *supra*, with rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, we turn to the rival submissions.

18. Learned Counsel for the appellants submitted that the reasonable belief that impelled more than routine intrusion into the import was the stated belief of overvaluation and not on account of any doubts about compliance with Kimberley Process Certification (KPC) which, he implied, was an afterthought pursuant to the scrutiny by the expert valuers. He pointed out that the lower authorities had, themselves, admitted to the instructions in the public notice having been compromised by revelation of identity of the importer and alluded to the possibility of prejudiced reporting of contents as valuers were also in the trade. He placed particular emphasis on appreciation of the statement of Mr Surajratan Agrawal of 6th September 2019 alongside the record of his cross-examination before the adjudicating authority within the prescription of section 114 of Indian Evidence Act, 1872, Learned Counsel also urged us to take note of the

discrepancies in the panchanama of 18th September 2019 that would unravel the truth or lack in the contention of the investigators that representative of the importer was present during the proceedings. We were also taken through several portions of the order of the original authority that, according to him, manifested motivated action against the importer borne by unwarranted presumption of wrong-doing.

19. Reliance was placed on the decision of the Tribunal in *ST Enterprises* and M*/s Ayush Business Overseas v. Commissioner of Customs (Chennai VII) [2021 (378) ELT 514 (Tri-Chennai)]* to sustain the contention that classification incorporated in documents of foreign supplier are not binding on the importer, in *Sirthai Superware India Ltd v. Commissioner of Customs, Nhava Sheva-III [2020 (371) ELT 324 (Tri-Mum)]* to contend that claim for a particular classification would not absolve the assessing officer of primary responsibility to ascertain the appropriate classification and in *Advanced Spectra Tek Private Limited v. Commissioner of Customs (ACC & I), Mumbai [2019 (369) ELT 871 (Tri. Mumbai)]* on the limitations of section 111 of Customs Act, 1962.

20. Ms Lakshmi Menon, Learned Counsel for the appellants from outside India, pointed out to us that the charge of having abetted in acts that rendered the goods liable for confiscation is extra jurisdictional overreach as any offence committed in the country,

insofar as clearance of imported goods are concerned, would, by default, be invoked against suppliers and expressed concern that such was not the intent of law. She emphasized that the only document that formed the basis of the adjudication, *viz*. the Kimberley Process Certificates (KPC), had been found to be in order by the original authority. She contended that the decision of the Tribunal in *Sahil Diamonds Pvt Ltd v. Commissioner of Customs, Ahmedabad [2010 (250) ELT 310 (Tri-Ahmd)]* holding that

> *'9. It stand contended before us that there is no evidence produced by the department to show that invoices issued by the foreign supplier was either fabricated or fake or that any relationship existed between foreign supplier and the appellant. The Commissioner has only relied upon the report of the third panel and the retracted statements of the Director of the appellant-company. Relying upon the decision in the case of M/s. Mahalaxmi Gems v. CC, Mumbai, 2002 (144) ELT 548 (Tri-Mum) as confirmed by the Hon'ble Supreme Court in 2008 (231) ELT 198 (S.C.), he submits that the transaction value cannot be rejected merely on the basis of report given by the trade panel constituted by the department in the absence of any evidence to show the violations of Rule 4(2) of the Customs Valuation Rules, 1988. The Hon'ble Supreme Court while upholding the Tribunal's judgment has observed that where the department failed to show any contemporaneous evidence and has failed to show that the invoices are fabricated/fake or any relationship existed between the importer and exporter, the transaction value cannot be rejected based upon the (sic) any expert panel report.'*

applies squarely in their matter too.

21. Narrating the factual backdrop, Learned Authorized Representative submitted that the two bills of entry were filed for consignments of ‘rough diamonds’ said to be leviable to ‘nil’ duty corresponding to tariff item 7102 3100 of First Schedule to Customs Tariff Act, 1975 and comprising 23 nos and 70 nos parcels that, on examination, were found to be mixed with ‘industrial diamonds’ which would render tariff item 7102 1000 of First Schedule to Customs Tariff Act, 1975, corresponding to ‘unsorted’ diamonds to be more appropriate that, even admittedly without duty liability, would, nevertheless, be reason enough to discard the declared value. According to him, immediately after India contracted with other participating States for ‘policing’ of ‘rough diamonds’, circular no. 53/2003-Cus dated 23rd June 2003, issued by Central Board of Excise and Customs (CBEC), imposed stipulations to align customs procedures for clearance of ‘rough diamonds’ with paragraph 2.2 of the Export Import Policy (EXIM) prevailing then and he drew attention to paragraph no. 3, 6 and 7 therein to emphasize that absolute confiscation must follow in such circumstances. Learned Authorized Representative highlighted the inconsistency in documents in support of his proposition that goods should have been absolutely confiscated. He also pointed out that it was insistence on the part of the importer that the diamonds were of ‘gem’ quality which

necessitated the ‘panchanama’ that is now sought to be discredited. It was argued by him that due weightage should be accorded to the format of certificate issued by the Gem and Jewelery Export Promotion Council (GJEPC) before adjudging the acceptability of certificate produced by the importer.

22. We have no doubt about the intention of circular no. 53/2003-Cus dated 23rd June 2003 of Central Board of Excise and Customs (CBEC) in aligning customs procedure to conform to the global crusade against ‘conflict diamonds’ but such a peremptory direction which deprives an adjudicating authority of inherent latitude in exercising powers conferred statutorily is certainly poor, even if well-intentioned, execution of such intent. After all, statutory exercise of power, in adjudication process, is also an acknowledged check on policy formulation that transcends legislative intent which should have been reasonably overcome, in overriding circumstances for conformity with the comity of nations, only by amendments in statute. A circular of an attached office of the Central Government to its subordinate formations is not to be presumed as articulation even of policy intent let alone legislative intent when it circumscribes statutory conferment. In the light of failure to contest the easing of restrictions on re-export, the argument of Learned Authorized Representative for absolute confiscation is unacceptable.

23. Considering the attention paid to resort to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, we must tarry awhile on that even if, to us, that is of peripheral relevance. From a plain reading of

> '……
>
> *(2) No value shall be determined under the provisions of this rule on the basis of -*
>
> *(i) the selling price in India of the goods produced in India;*
>
> *(ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;*
>
> *(iii) the price of the goods on the domestic market of the country of exportation;*
>
> *(iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 8;*
>
> *(v) the price of the goods for the export to a country other than India;*
>
> *(vi) minimum customs values; or*
>
> *(vii) arbitrary or fictitious values.'*

in rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, it cannot but escape our attention that it is not a free flowing empowerment but one designed to be consistent with rule 3 of Customs Valuation (Determination of Value of Imported Goods)

Rules, 2007 and, in addition, to be irrefutably in conformity with stipulations *supra*. From the reports of the expert valuers, we are unable to ascertain that conformity; indeed, we note that in cross-examination at the adjudication stage, Mr Surajratan Agrawal was disinclined to disclose the manner in which the suggested value could be justified lest it compromise his professional and commercial interest. The lack of credibility of such reports cannot be overstated ever.

24. It is quite possible that purposeful misdeclaration of value by importers of articles, such as ‘rough diamonds’, may warrant recourse to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 but the peculiarities of a trade upon which customs officials may be entirely dependent for expertise and whose activities may, even validly, be veiled under layers of secrecy may not be found by assessing officers to be of concern but the law cannot be ignored. That supervisory level of customs officialdom may have found it necessary to bypass impediments to proper resort to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 does not make up for that want of credibility. It is the remit of the administration to find a solution but the solution, whatever that may be, should conform to the law – a law of valuation that was devised by them to be congruent with multilateral engagement. We cannot carve out exceptions to the law and, if at all,

such opinion is to be relied upon, the valuer must, unequivocally, be prepared to narrate, and stand by, the justifications for such value. Absent that, substituted value will fail the test of law, as it does in the present dispute, and will have to be held as untenable even at the cost of declaring such instructions, if any, as not implementable.

25. Even as we hold so, another aspect, alluded by us *supra*, is of overwhelming concern. The orders of the lower authority appear to show concern about compliance with section 46 of Customs Act, 1962, as rightly should be, for, in matters of clearance of goods by an importer, that is the 'starter's pistol, so to speak, which brings the importer in contact with customs law. In relation to such imported goods, that initiates the implementation of Customs Act, 1962 and, hence, of consequence, it is the conclusion of the process by

> *'47. Clearance of goods for home consumption.*
>
> *(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:*

that renders a finality to the filing of bill of entry and it is, thereby, that the 'proper officer' therein is vested with authority to grant clearance, upon which the goods cease to be 'imported' for purposes of Customs Act, 1962; such 'proper officer' is permitted to interfere

with clearance only if the appropriate duty has not been paid and/or the goods are subject to some prohibition.

26. It is not the case of the lower authorities that any prohibition, ‘under Customs Act, 1962 or any other law for the time being in force’, stood in the way of clearance for home consumption upon assessment of bill of entry; a subsequent proceeding under Customs Act, 1962 cannot rest upon a prohibition that, at the time of clearance, was not in existence for resort to section 124 of Customs Act, 1962 proposing confiscation of goods under section 111 of Customs Act, 1962. Nor is it the case of the lower authorities that duty was to be collected or was short-collected on clearance for invoking section 28 of Customs Act, 1962. There is, thus, no scope for barring clearance for home consumption. The sole bar, as we can garner, is the finding that the goods were subjected to re-determination of value, arising from rejection of declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, even if for no purpose other than as a puzzle to be solved for it has been held that no duty liability arises either. To postulate that empowerment to confiscate, under section 111(m) of Customs Act, 1962, on the ground that misdeclaration of value empowers resort to valuation provisions of the statute, intended for specific purpose, is to put the cart before the horse and effect before cause.

27. The process that commenced with filing of bill of entry, under section 46 of Customs Act, 1962, acknowledges the importer in relation to the imported goods for further action thereto and requires section 17 of Customs Act, 1962, as the mechanism, to enable closure under section 47 of Customs Act, 1962. The determination of duty liability calls for application of the charging provision in

> *'(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.'*

of section 12 of Customs Act, 1962 that, necessarily and save for exception therein which is not an issue here, has, in the first instance to proceed to First Schedule to Customs Tariff Act, 1975 for ascertainment of rate of duty liability - *ad valorem* or specific - as Customs Tariff Act, 1975 authorizes. The next step of

> ***'14. Valuation of goods.*** *(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods'*

arises only if, for the purposes of Customs Tariff Act, 1975, duty is to be determined on basis of value, with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to be resorted to in accordance therewith, and not in any other

circumstances.

28. The orders of the lower authorities leave no room for doubt that there is no difference in rate of ‘nil’ duty, corresponding to either of the tariff items – declared or substituted – in dispute, with the implication that the Customs Tariff Act, 1975 is not germane to the impugned goods. It is also not the case of the lower authorities that any other law, requiring declaration of ‘value’ in bill of entry for any purpose other than assessment to duty, has been breached insofar as the present dispute in concerned. In such circumstances, section 14 of Customs Act, 1962, or any Rules framed thereunder, is not of relevance to the impugned goods. Consequently, the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 cannot be brought to bear on the impugned goods. The valuation is purely academic and we, thus, reiterate our earlier observation that agencies of the State must restrict their statutory intervention only within the intent of the statute. Any excess of that will not only imperil their action but also have consequences in law.

29. For the present, we stop with the consequence of action being imperiled to set aside the impugned order and allow the appeals of importer and the individual-appellants with consequential relief. The importer may, if it chooses to, exercise right to re-export without any restraint on the goods subject to compliance with section 50 of

Customs Act, 1962. Upon seeking of re-export, the goods shall be released to them within a period of one month. The appeal of Revenue, devoid of merit and substance, is dismissed.

(Order pronounced in the open court on 22/06/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*