

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 995 OF 2012

[Arising out of Order-in-Appeal No: 400/MCH/AC/SVB/2012 dated 5th July 2012
passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

TBK India Pvt Ltd

455 Sindh Society, Aundh, Pune - 411007

... Appellant

versus

Commissioner of Customs (Imports)

New Customs House, Ballard Estate, Mumbai- 400001

...Respondent

APPEARANCE:

Shri Prakash Shah, Advocate with Shri Mihir Mehta, Advocate for the appellant

Shri Ashiwini Kumar, 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 / 86378/2023

DATE OF HEARING:

16/03/2023

DATE OF DECISION:

14/09/2023

PER: C J MATHEW

This dispute is before us for the second time after the outcome
on the former occasion was carried by M/s TBK India Pvt Ltd to the

Hon'ble High Court of Bombay on the plea that our decision, more concerned with the legality of intervention at that particular stage of customs processing rather than the merit of the consequences of the impugned order, had declined jurisdiction though, in the past, such did not impede decision on merit in similar cases; and as it appeared to be the very first time that the significance of appellate intervention being legal and proper had forced its attention upon the Tribunal despite such 'tentative' – as we would denominate it - rendering by lower authorities, the Hon'ble High Court, with prefacing observations on the ideal of harmonious consistency among coordinate benches – contemporarily and chronologically – as the foundation of functioning by the Tribunal, ventured to suggest that the rival sides had not enlightened the Tribunal on disposals in the past, directed a fresh look at the issue flagged in the earlier decision and to proceed with disposal on merits should the Tribunal be satisfied on that score. The issue, simply put and manifested as 'premature appeal', is the dismissal of challenge without examining the merit of the impugned order for not being, as yet, an appealable order despite insinuation of detriment therein that the Deputy Commissioner had not saddled the appellant with.

2. The cavil of the appellant over the sustaining of such detriment befalling them at the secondary level, on appeal filed at the instance of jurisdictional Commissioner of Customs, and unwillingness to be the 'prototype' for, and on behalf of, similarly placed importers is not

unnatural but their plea of disposal on merit in similar disputes in the past is no salve to our continued disquiet for several reasons and not the least of which is the provenance of empowerment to direct assessment that, effectively, relegates the statutory authority designated to assess imports to that of executor. It is all about valuation, that aspect of assessment most dreaded by customs authorities in India, and which, historically, has seen reluctant aligning with international consensus by a tax administration that was never subtle in display of its apprehension. Hence, in the context of the direction of the Hon'ble High Court, exposition of dilution of legislative intent keeping pace with the evolution of valuation mechanism by administrative response of anchoring discharge of that function to the intrusiveness of the past that we forbore from on the former occasion is warranted. That, then, was not without forethought as the facts and events gave us no reason to conceive the impugned order as having 'consequence' other than yielding further cause of action with unquestioned recourse to appellate remedy against palpable detriment – something, uncontestedly, absent here.

3. Again, the precedents put forth by the appellant may not merit adoption here because the prominent characteristic of this *genre* of disputes is the addition of value to compensate for value depression engendered by commercial advancement of the interests of a conglomerate even at the cost of lag at the disaggregated undertaking

level and value having, from the nature of activity and basis of recompense, to be adjusted for 'services' in a levy concerned with 'goods' which may vary on facts across cases and it appears to us that the precedent canvassed is not that of deliberated and proper assumption of jurisdiction but the merit of such cases, with their own set of facts and circumstances, in which the jurisdiction had not been touched upon at all. It is our intention to elaborate upon that in the disposal of this appeal which, to us, is about jurisdiction and which we may now, for validating assessments, have to insist that lower authorities had failed to contemplate.

4. Valuation has, to the extent that *ad valorem* levies prevail, plagued assessment under customs statutes across the world and down the ages; at the same time, with this levy occurring at mutual boundaries, the need for seamless transition has been the imperative for conceptual, and even framework, alignment of valuation systems. The earliest, known as Brussels Definition of Value (BDV), informed Customs Valuation Rules, 1963 framed under the authority of section 14 in the recently legislated Customs Act, 1962. Relative inadequacy in communication systems impeded righting of deliberate suppression of real values of goods as well as the shifting of compensation to services appended to commercial engagement in goods and the inherent inequity of unconstrained and less than specific formulation of the concept and scheme of valuation prompted negotiations under the aegis of the General Agreement on Trade and Tariffs (GATT)

effected through ‘Rounds’ corresponding to timelines coinciding with significant milestones. Hence, before the ‘Tokyo Round’ concretized the Agreement on Customs Valuation (ACV), incorporating ‘transfer pricing’ of a sort as well as absorption of value of specified services in 1980, executive units, broadly endowed with investigative jurisdiction as ‘officers of customs’, known as Special Valuation Branch (SVB) were established in the major custom houses of the time. It was with much reluctance, and even then not entirely adhering to the Agreement, that the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was notified but it did incorporate a series of alternatives for value to be applied in ‘intramural’ transactions and stipulation, that, even circumscribed, certain accompanying ‘services’ would also be subject to duties of customs.

5. That the ostensibly peripheral unit, which once upon a time, was designated to scrutinize relationships and prices for guarding against deliberate undervaluation on the first count and non-inclusion of the other counts and established as a support to assessing authorities at the major custom houses, continued to examine such transactions could hardly be cause for cavil. It is the presumption that directory authority over ‘proper officer’ was available then and to this day – and long after the exigency that prompted the vestment of such authority has ceased - that is of concern and, more unavoidably so, in the light of the ruling of the Hon’ble Supreme Court in *Canon (India)*

Pvt Ltd v. Commissioner of Customs [2021 (376) ELT 3 (SC)]; especially presumption on the part of the appellant that assessment has been rendered by Commissioner of Customs (Appeals), standing in for Special Valuation Branch (SVB), is apparently shared by the jurisdictional Commissioner of Customs, evident from filing appeal before the first appellate authority. We take note that Special Valuation Branch (SVB) (or GATT Valuation Cell (GVC) as it is variously known) has existed over the three distinct spans of valuation systems – from 1963 to 1988, from 1988 to 2007 and post-2007 – corresponding to major shifts in approach to customs valuation as multilateral negotiations strived towards consensus for universal application.

6. Valuation, for the purpose of customs assessment, has been fraught with risks. Risk to exchequer is neutralized by enhancement on the premise that declared value of goods, for one cause or other, would not reflect the actual. Inherent arbitrariness, from limitation of cross-verification mechanism and legal empowerment for re-determination, and lack of consistency, from differing administrative perceptions, were acknowledged as barriers to smooth trans-national commerce. By international agreement, the first attempt at some kind of uniformity yielded the Brussels Definition of Value (BDV) which was adopted in the newly minted Customs Act, 1962 as section 14 and in the operationalising Customs Valuation Rules, 1963. That, though setting in motion a process of international consultation, was found to

be insufficient, both in affirmation of concept of value for benchmarking and in the rules affording re-determination, as framework for uniformity of treatment across customs jurisdictions and even within. The Tokyo Round of negotiations for the General Agreement on Trade and Tariffs (GATT) – as it then was – was able to evolve consensus on Article VII in 1980 as a roadmap to Agreement on Customs Valuation (ACV) in the Uruguay Round. The redrawing of section 14 of Customs Act, 1962 and notification of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 coincided with India going on board with the first of the two milestones to be followed thereafter by further re-design of section 14 of Customs Act, 1962 concurrently with coming into force of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as most recent. The significance of the nomenclature adopted for the subordinate legislation, intended as machinery provision for re-appraisal of value, is not drafting preference; it is a reflection of increasing regimentation of value for mitigating risk of arbitrariness in assessment.

7. In effecting the transition from the Brussels Definition of Value (BDV) and into its final form, two hiccups came to be legislatively acknowledged of which the first was rectified in the last version and the other substantially circumscribed for further elimination of the remaining risk. Though neither is pertinent to the present dispute, we

take note of these, all the same and briefly, as mirroring the altered perception on value notwithstanding the view then that the deemed framework of ‘assessable value’ continued, in a manner, alongside ‘transaction value’ and that ‘shifting of burden’ principle should relieve tax administration from having to conclusively establish undervaluation as a pre-requisite for enhancement in accordance with the prescribed methods. Thus, between 1988 and 2007, Customs Act, 1962 enunciated the underlying principle of valuation thus

‘14. (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force 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 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 the buyer have no interest in the business of each other and the price is the sole consideration for sale.

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.....’

and ‘declared value’, subject to conformity with the parameters *supra* as the ‘gold standard’ among ‘transaction value’ in the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Rule 10A was also incorporated therein, with effect from 19th

February 1998, to enable discarding of ‘declared value’ subject to procedural stipulation and affirming ‘declared value’ as nothing more than *primus inter pares*. Rule 2(2) defined ‘related persons’ for the purpose of deciding acceptance of ‘declared value’ and rule 9 enumerated the permissible additions of costs and value of services in assessment of imported goods. The Notes appended to the Rules elaborated upon the methods of alternative valuation as well as the additions.

8. By amendment that came into effect from 10th October 2007, the valuation mechanism in Customs Act, 1962 was set on the foundation 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, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

Provided *that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including*

commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf :

Provided further that the rules made in this behalf may provide for,-

- (i) *the circumstances in which the buyer and the seller shall be deemed to be related;*
- (ii) *the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;*
- (iii) *the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :*
- (iv) *the additional obligations of the importer in respect of any class of imported goods and the checks to be exercised, including the circumstances and manner of exercising thereof, as the Board may specify, where, the Board has reason to believe that the value of such goods may not be declared truthfully or accurately, having regard to the trend of declared value of such goods or any other relevant criteria: ’*

elevating the erstwhile ‘gold standard’ as the essence of the valuation scheme. ‘Related’ was defined in rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 that was

notified simultaneously. Rule 10 and rule 12 therein set out the framework for addition of costs and services to assessable value and for discarding of 'transaction value' in the new scheme that was aligned with Agreement on Customs Valuation (ACV). It is on this canvass that the place of Special Valuation Branch is to be emplaced for perspective.

9. The Special Valuation Branch (SVB), now under the operational supervision of Directorate of Valuation under the Central Board of Indirect Taxes & Customs (CBIC), was set up when

'14. (1) For the purposes of the Indian Tariff Act, 1934, or any other law for the time being in force hereunder 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 the buyer have no interest in the business of each other and the price is the sole consideration for sale;

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

.....'

of Customs Act, 1962 governed determination of assessable value

with recourse to Customs Valuation Rules, 1963 and rule 3 therein having permutations - of same manufacturer selling goods to other importers in India, of the same manufacturer selling goods to importers elsewhere, by other manufacturers in exporting countries to buyers in India or by the same manufacturer in its domestic market adjusted for specified factors and local taxes - with any of these acceptable only upon being transacted in 'competitive conditions' that meant

'Explanation –In this rule sale under competitive conditions means a sale in the ordinary course of trade between a seller and a buyer who have no interest in the business of each other and where price is the sole consideration.'

below rule 3 of Customs Valuation Rules, 1963.

10. Furthermore, rule 5, rule 6 and rule 7 dealt with specific transactional equation of agent/distributor and branch/subsidiary, use of trademark and sale on behalf of exporter with appropriate additions and adjustments. The final provision, though, expressed as

'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.'

in Customs Valuation Rules, 1963 not only afforded wide latitude to officers of Customs but also epitomized the broad construction that

could be placed on the several provisions in the scheme in stark contrast with the ordered and definitive engagement engendered by the later sets of rules. In an era of rudimentary communication systems with little transnational interface, mostly manual functioning and limited staffing, existence of a specialized establishment, for undertaking scrutiny of transactions among related persons or where value of services was to be determined, is attractive. Availability of information at their fingertips or ‘work desks’ eliminated that supplement but it’s continuance could only have been of assistance in assessment. We emphasize particularly on assistance because the ‘proper officer’ must reign influenced if assessment is to responsible and responsive. Though Special Valuation Branch (SVB) may advise and recommend, any direction or mandate to assess in a particular way or to issue notice for recovery is anathema to adjudication that assessment, effectively, is whether under the earliest Rules for operation of section 14 of Customs Act, 1962 or the subsequent ones.

11. Surely, there can be no misgivings that supervisory authorities in customs formations would misconstrue such advisory role of Special Valuation Branch (SVB) as oversight of ‘proper officer’ under section 17, section 18 or section 28 of Customs Act, 1962 for that would be at cross-purposes with the law. In such circumstances, there is no leeway for misapprehension among importers that the frailty of any expression deployed in the report of Special Valuation Branch

(SVB) should be perceived to their detriment except until actually employed upon some import effected by them. That would be premature reaction save in circumstances of pre-emptive action on the part of officialdom. This is the time to examine the facts and circumstances of the present appeal remanded back to the Tribunal by the Hon'ble High Court of Bombay.

12. M/s TBK India Pvt Ltd challenges order-in-appeal no. 400/MCH/AC/SVB/2012 dated 5th July 2012 of Commissioner of Customs (Appeals), Mumbai Zone – I which has included 'royalty' and 'lumpsum fees' in the assessable value of imports effected by them from a related person, M/s TDK Toshiba Limited, Japan. The original order dated 2nd February 2006, accepting the invoice value, came up for review on expiry of three years and renewal thereof, in order of continuance for a further period of three years, was sought to be quashed in appeal filed on behalf of the jurisdictional Commissioner of Customs who had proceeded in the manner permitted in section 129D (2) of Customs Act, 1962 and presumably on the supposition that the official in the Special Valuation Branch (SVB) had undertaken adjudicatory function vested in 'proper officer' intended by section 17 or section 18 of Customs Act, 1962. The finding of the first appellate authority, who ordered the addition of royalty of 3% and 5% of the selling price along with the lumpsum fees of ₹ 14,000,000, is cause of grievance to the appellant.

13. We have heard Learned Counsel for appellant and Learned Authorized Representative at length. It is on record that neither of them were in a position to apprise us of any consignment to which the enhancement, specified in the impugned order, had been applied. Furthermore, it is conceded by both sides that the validity of the order in dispute ceased in February 2012 with no further review thereafter and, thus, not impacting any future imports either. The order of 2009 may, at best, be invoked in future for imports effected between 2009 and 2012 and, to escape the taint of limitation, explain away the lag by reference to pending appellate proceedings. Even so, the merit of any consequential enhancement will have to stand then on the acceptability of the order of assessment for each import.

14. It is noticed that the order of acceptance of 'invoice value' as reliable enough guide to the 'proper officer' for assessing future imports under section 17 of the Customs Act, 1962 was disputed by reviewing authority. By setting aside that order, the first appellate authority has effectively exercised power of assessment and has confined the 'proper officer' to such assessment on goods that were yet to be imported. On a query, Learned Counsel admitted that the proceedings which culminated in the impugned order had been initiated without a show cause notice; apparently, the prevailing practice is for all transactions between related persons to be subjected to such scrutiny, evaluation and direction to assessing authority. Thus,

it is the appeal before the lower authority that took on the appearances of show cause notice.

15. The internal procedures for providing expert consultation to the statutorily empowered assessing officers, even if of long standing existence, do not vest the institution, established by executive fiat for such purpose, with the same statutory empowerment; notwithstanding, the arrogation of direction, one way or the other, by the Deputy Commissioner, Special Valuation Branch (SVB), its recommendatory character cannot be elevated to that of an order in the absence of statutory support. In keeping with the tentativeness of the findings of this internal advisory mechanism, assessments, guided by the findings, are retained as provisional, under section 18 of Customs Act, 1962, till finalization on a future date. It is that potential as a trigger for resort to provisional assessment that is impugned here. As on the date of the order-in-appeal imposing the guideline, no import had been subject to it. Nor is there any record of any detriment to importers thereafter and, if an irreversible detriment had been imposed, appeal would have been resorted to as surely as night follows day. Customs Act, 1962 is concerned with levy of duty, as well as the enforcement of prohibitions, under law, on import/export goods. Other consequences such as differential duty, refund, drawback, fines and penalties may arise but only in consequence. The possible detriment that may arise on a future date is not a grievance

that should be entertained unless and until it does translate as one upon occurrence of import or export of goods. We do not interfere with proceedings under section 18 of Customs Act, 1962 except if terms of such assessment is a cause of grievance. Even so, no incidence of provisional assessment is impugned before us either. We are also not vested with authority to approve or disapprove an 'advance ruling' which has yet to place burden on goods under Section 46 of Customs Act, 1962.

16. Further, for the Tribunal to render a decision on goods that are, as yet provisionally assessed, would be a premature intervention. The time of finalization that should inevitably take place is also, as yet, uncertain. It is also apparent that procedure does not deter the finalization of an assessment for want of decision by the Tribunal or, should such need arise, by the Hon'ble Supreme Court. In other words, the internal process of the customs administration that enables the proper officer, under section 17 or section 18 of the Customs Act, 1962, to be assisted in the discharge of the statutory obligation and, which, legally, may not even bind the proper officer does not merit our attention. To the extent that we accord approval or disapproval at this stage, we would be appropriating the exercise of powers under section 18 of Customs Act 1962 for finalization of the assessment to ourselves and, thereby, would also erase one level of remedial jurisdiction that would, otherwise, be available to either side. This, in

our view, is not the intent of section 129A of Customs Act, 1962. Therefore, it is not within the jurisdiction of the Tribunal to exercise the options in section 129B of Customs Act, 1962.

17. Chapter XV of Customs Act, 1962 contains the design and hierarchy of appeals and that entrusted with Commissioner of Customs (Appeals) is one of the sources of appellate jurisdiction of the Tribunal. The same hesitancy that informs our jurisdictional dilemma attaches also to the first appellate authority. The first appellate authority should also have similarly desisted from intervening before any provisional assessment had been finalised. The impact of the impugned order has been to transfigure a final assessment of the future to provisional assessment at the instance of the Commissioner of Customs. Any grievance arising from finalization does have appellate remedies commencing with the first appellate authority. It is only then that appellate jurisdiction commences existence. The first appellate authority should have dealt with the appeal, at the behest of jurisdictional Commissioner of Customs, within such circumscribing and passed such order as is legal and proper for disposal of appeal. Notwithstanding the lack of appellate recourse, that the jurisdictional Commissioner of Customs opted for review does not fall within our empowerment, or that of Commissioner of Customs (Appeals), to prevent; but it is certainly within empowerment to render appropriate disposal in terms of our

exposition on the true nature of Special Valuation Branch (SVB) *supra*.

18. Accordingly, we set aside the impugned order and restore the appeal preferred at the instance of the jurisdictional Commissioner of Customs before the first appellate authority for a fresh disposal. Appeal is, thus, allowed by way of remand.

(Order pronounced in the open court on 14/09/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*