4CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPLICATION (MISC) NO: 85875 OF 2022 &
CUSTOMS APPLICATION (MISC) NO: 85317 OF 2023
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 87465 OF 2016

[Arising out of Order-in-Original No: COMMR./AKG/03/2016-17/ADJN. ACC (X) dated 15th June 2016 passed by the Commissioner of Customs – IV (Export), Air Cargo Complex, Mumbai.]

Major Brands (India) Pvt Ltd
401 Skyline Icon, Near Mittal Estate, Andheri-Kurla Road
Andheri (E), Mumbai - 400059 … ***Appellant***

versus

Commissioner of Customs – IV (Export)
Air Cargo Complex, Sahar, Andheri (E),
Mumbai 400099 ***…Respondent***

WITH

CUSTOMS APPLICATION (MISC) NO: 85872 OF 2022 &
CUSTOMS APPLICATION (MISC) NO: 85318 OF 2023
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 85370 OF 2020

[Arising out of Order-in-Original No: 59/2019-20/Commr./MS-III/CAC/JNCH dated 28th November 2019 passed by the Commissioner of Customs (NS-III), Nhava Sheva.]

Major Brands (India) Pvt Ltd
B-907 Mittal Commercia, Hasanpada Road
Off: Andheri-Kurla Road, Marol, Andheri (E),
Mumbai - 400059 … ***Appellant***

versus

Commissioner of Customs (NS-III))
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad – 400 707 ***…Respondent***

AND

CUSTOMS APPLICATION (MISC) NO: 85873 OF 2022 &
CUSTOMS APPLICATION (MISC) NO: 85319 OF 2023
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 85373 OF 2020

[Arising out of Order-in-Original No: 60/2019-20/Commr./MS-III/CAC/JNCH dated 28th November 2019 passed by the Commissioner of Customs (NS-III), Nhava Sheva.]

Major Brands (India) Pvt Ltd
B-907 Mittal Commercia, Hasanpada Road
Off: Andheri-Kurla Road, Marol, Andheri (E),
Mumbai - 400059 … ***Appellant***

versus

Commissioner of Customs (NS-III))
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad – 400 707 ***…Respondent***

APPEARANCE:

Shri B K Singh, Advocate for the appellant

Shri S K Mathur, Special Counsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85396-85398/2024

DATE OF HEARING: 18/10/2023
DATE OF DECISION: 08/04/2024

PER: C J MATHEW

These appeals of M/s Major Brands Ltd against three orders, arising from two notices issued by Commissioner of Customs (NS-III), Jawaharlal Nehru Customs House, Nhava Sheva and one by Commissioner of Customs -IV (Export), Air Cargo Complex (ACC), Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai, for addition, of certain costs incurred and of services obtained, in 'transaction value' under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, are taken up for disposal together. The appellant, now known in the name and style of Apparel Group India Pvt Ltd, is an aggregator of 'branded' fashion goods of foreign origin, and undertakes regular imports from suppliers under separate licence agreements that provide for certain fees to be paid to the overseas entities or for certain costs to be incurred by the appellant. The case of customs authorities in the impugned proceedings was that these are liable to added to the 'transaction value' for assessment of the goods to duty.

2. Several notices, covering different periods, were issued to the appellants for not having included all or some of the impugned elements of cost/expense, *viz.*, entrance fee, franchise fee, contribution to advertisement in international market, cost of local advertising and sales promotion and value of imported advertisement and sales promotion material. In the first of these, pertaining to

import of 2009 to 2014, the order[1] of Additional Director General (Adj), Mumbai directed that charges towards all the elements, save that on advertisement and sales material that had been imported as goods, was to be included in the transaction value of goods. The appeal therefrom is presently not before us.

3. Proceedings initiated at Jawaharlal Nehru Customs House, Nhava Sheva, by notice dated 26th February 2016 for the period from October 2014 to March 2015, culminated in order[2] of Commissioner of Customs (NS-III), Nhava Sheva confirming differential duty of ₹ 63,80,090 upon addition of franchise fee and international advertising fee, while dropping the addition of advertisement and sales promotion material, and imposing of penalties of ₹6,38,000 and ₹ 1,50,00,000 under section 112 and section 114AA of Customs Act, 1962 respectively. A second notice of Jawaharlal Nehru Customs House, Nhava Sheva, dated 22nd February 2017 for the period from 1st April 2015 to 16th June 2015, culminated in order[3] of Commissioner of Customs (NS-III), Nhava Sheva confirming differential duty liability of ₹ 45,38,125 upon addition of franchise fee and international advertising fee, while dropping the proposal for addition of value of advertisement and sales promotion material, and imposing penalties of ₹45,38,125 and ₹ 1,00,00,000 under section

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[1] [order-in-original no. 01/KVSS(01)/ADG(ADJ)/DRI, Mumbai 2016-17 dated 28th April 2016]
[2] [order-in-original no. 59/2019-20/Commr./MS-III/CAC/JNCH dated 28th November 2019]
[3] [order-in-original no. 60/2019-20/Commr./MS-III/CAC/JNCH dated 28th November 2019]

114A and section 114AA of Customs Act, 1962 respectively.

4. The proceedings at Air Cargo Complex (ACC), initiated in notice dated 28th September 2016, culminated in confirmation of demand of duty of ₹ 27,31,885 by inclusion of all three elements, *viz*., franchise fee, international advertising fee and advertising and imported sales promotion material, for the period from October 2014 to March 2015 in order[4] of Commissioner of Customs IV (Export), Mumbai that also imposed penalty of ₹ 27,31,885 and ₹ 1,00,000 under section 1141A and section 114AA of Customs Act, 1962 respectively.

5. Thus, in the impugned orders, the addition of franchise fee and international marketing contribution are common with the addition of cost of import of advertising and sales promotion material exclusive only to one of the appeals here. It was contended by Learned Counsel for appellant that, by way of one reason or other, the controversy over the three elements are no longer *res integra*. According to him, the includibility of franchise fee and contribution to international marketing, confirmed by the Tribunal in *Giorgio Armani India (P) Ltd v. Commissioner of Customs, New Delhi [2018 (362) ELT 333 (Tri-Del)]*, had attained finality upon dismissal of appeal of Revenue before the Hon'ble Supreme Court. He submitted

[4] [order-in-original no. COMMR./AKG/03/2016-17/ADJN. ACC (X) dated 15th June 2016]

that cost of local advertisement stood excluded with order of the Tribunal in *Commissioner of Customs, ICD Patparganj v. Addidas India Marketing Pvt Ltd [2020-TIOL-604-CESTAT-DEL]* and in *Indo Rubber and Plastic Works v. Commissioner of Customs, Delhi [2020 (373) ELT 250 (Tri-Del)]* which attained finality upon dismissal of appeal of Revenue by the Hon'ble Supreme Court.

6. He further contended that the Hon'ble Supreme Court, in *GMR Energy Ltd v. Commissioner of Customs, Bangalore [2015 (325) ELT 445 (SC)]*, has held that it is for the assessing officer to seek documents required for assessment and that furnishing of all declarations, as prescribed, precluded recourse to the extended period of limitation as well as penalties under section 114A of Customs Act, 1962. For this contention, he placed reliance on the judgement of the Hon'ble Supreme Court in *Nizam Sugar Factory v. Collector of Central Excise, AP [2006-TIOL-56-SC-CX]*. Likewise, it was his contention that there was nothing in the notice which could establish that the appellant had suppressed facts or had made any willful misstatement at the time of import. He also drew attention to section 114AA of Customs Act, 1962 to argue that it was not intended to be invoked except to impose penalty on individuals and placed reliance on the decision of the Tribunal in *TR Venkatadari v. Commissioner of Service Tax -I, Mumbai [2018 (10) GSTL 483 (Tri-Mumbai)]* which, though in a dispute relating to 'service tax', did

have occasion to discuss ‘any person’ as expressed in section 114AA of Customs Act, 1962.

7. Learned Special Counsel contended that insofar as inclusion of franchise fee and international marketing contribution are concerned, the dispute has ceased to be and argued that the appellant was well aware of their obligation to include these charges, which were express contents of the licence agreements with overseas suppliers of the branded goods, in the ‘transaction value’ as set out in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The extended period was, according to him, properly invoked as also the respective penal provisions invoked against the noticees.

8. That franchise fee and contribution to international advertising are required to be added to the transaction value under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is no longer in the realm of doubt. That the duty liability emerging therefrom should be collected in accordance with law is not contested but it was contended that, to the extent of duty not discharged by inclusion in the assessable value of the goods concerned and subject to limitation in section 28 of Customs Act, 1962 in the absence of tenable finding of suppression of fact, misdeclaration or any of the other ingredients as spelt out therein in the impugned order, recovery for extended period was not

appropriate. This requires inquiry into the circumstances in which the respective adjudicating authorities had, in the impugned orders, concluded that ingredients warranting the period of limitation beyond the normal, than in vogue, existed for recovery of duty and for like recourse to section 114A of Customs Act, 1962.

9. This is a dispute over short-payment of duties of customs at the time of import. It is not the case of the customs authorities that the assessable value as declared then did not mirror the consideration for which goods were transferred by sale on each occasion to the appellant. However, this was not a normal transaction of autonomous, and episodal, sale and purchase between two parties known to each other commercially; not only was there an engagement for regular commercial intercourse but also a special equation considering the nature of goods, *i.e.*, identifiable by brand, which, though no different from a normal trading chain of sale and purchase, was, nonetheless, conditioned by the intangible of 'goodwill' attaching to the products. It was in acknowledgement thereof that the importer and seller entered into a 'licence agreement', encompassing responsibilities, liabilities and obligations during its tenor, which may be designated as 'franchise' model of business. Conceptually, the cost of import was not limited to the value of the goods agreed upon for each sale as the cost of 'intangibles', which would have to be spread over all of the goods

imported during the tenor of the agreement, and, from the mode of quantifying thereon, not necessarily assignable to goods at the time of import. Furthermore, the blurring of taxable event, *viz*. import of goods, in such transactions with cross-over of services, which are normally excluded from levy intended by or under a commodity tax, does not lend itself to ease of association with customs assessment, or even as covered within the machinery provision for assessment. That such inclusion be restricted only to the narrow scope of the Rules is patent in

> *'10. Cost and services.* -
>
> *(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,* -
>
> *(a) the following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:*-
>
> *(i) commissions and brokerage, except buying commissions;*
>
> *(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;*
>
> *(iii) the cost of packing whether for labour or materials;*
>
> *(b) The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced*

cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely: -

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

> *Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.*
>
> *xxxxx*
>
> *(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.*
>
> *(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule.'*

of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which is the sole repository of reference to intangibles in the scheme of levy of duties of customs on imported goods and has been invoked to justify the addition. We are not concerned with the specifics of addition in the impugned orders for the law, as judicially determined, has been settled and the merit of the inclusion or non-inclusion, as the case may be, are not pressed. Our concern here is the scope for presumption, from the factual matrix of prescriptive obligations in relation to assessment and compliance thereof, that the ingredients for invoking extended period of limitation and for imposition of penalty under section 114A of Customs Act, 1962 is palpably sustainable.

10. Businesses are about returns for those who have invested in the venture and also about securing the interests of those who are invested in its survival. It is, therefore, all about distributable profits and balanced flow of funds; much of it to do with accounting treatment and costing conventions. Most enterprises are less concerned with the intricacies of tax system and, even less so, with the valuation mechanics obtaining thereto than with reaping returns for their stakeholders. That which appears obvious to a customs authority may not be so to those dedicated to pursuit of commerce and industry even with the two happening to be entwined in the same statutory framework for tax levy. Thus it is that responsibility devolves on an adjudicating authority, drawing upon an extraordinary contingency in the statute, to be expansively justificatory in fastening upon an importer or exporter the burden of having to dip into accumulated profits of the past for discharge of a post-transactional tax liability that cannot ever be recovered, in the way that indirect tax ought to be, from the buyer of goods or recipient of service. Mere provisioning for such eventuality in a statute is not demonstrative of legislative intent that every notice for recovery should not be restricted to the normal period of limitation and that every recovery should entail penal consequences predicated upon 'collusion, wilful mis-statement or suppression of facts' as set out in section 28(1) and section 28(4) and in section 114A of Customs Act,

1962. Each recourse to this 'out of ordinary' provision will have to be elaborately dealt with on its own set of facts and in comparison with the intent inferred from the corresponding legal obligation for it to have credibility and sustainability. Mechanical repetition of the provision, concatenated with confirmation of liability to duty as proposed in the notice or even as modified, is but a poor excuse for statutory imperative.

11. In the order pertaining to imports at Air Cargo Complex, it was held that section 114A of Customs Act, 1962 is not invokable owing to the consequence of finding of goods being liable to confiscation under section 111(d) and section 111(m) of Customs Act, 1962 and, thus, to the alternate penalty. This, itself, is mystifying because goods that are prohibited for import, with liability to confiscation inhering by entering customs jurisdiction, are manumited from evaluation for conformity with declaration owing to chronology of occurrence. Indeed, the impugned order has failed to demonstrate the prohibition operating on the goods and even resort to section 111(m) of Customs Act, 1962 is not backed by any justification. All that we are permitted to discern is

> *'6.9.1 I find that the proper value has not been declared/included in the assessable value by the noticee i.e. Franchise Fee, reimbursements to franchisors and various advertisement expenses as discussed hereinabove as required under Rule 10(1)(c), Rule 10(1)(d) and Rule*

> *10(1)(e) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which resulted in undervaluation and short levy of Customs Duty. Therefore I hold that the goods in question were liable to confiscation under the provisions of Section 111(m) and 111 (d) of the Customs Act, 1962.'*

which is for too peremptory to be tenable as support for confiscation followed by penalty under section 112 of Customs Act, 1962.

12. We also take note that the same impugned order has invoked rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for rejection of 'declared value' by recourse to purported empowerment in rule 3 of the said Rules. This, to us, is symptomatic of unfamiliarity with the valuation mechanism which does not sit well with adjudicatory responsibility. With predominance of rule 3(1) of the Rules, being contingent upon not invoking of rule 12 except in the circumstances referred therein, with rule 3(4) coming into play only upon inability of importer to furnish satisfactory response and with the prescriptions in rule 10 therein to be incorporated in each and every conceivable circumstance without fail, the lack of recourse to rule 12 of the Rules except for substitution of 'transaction value' cannot be plainer. It is evident, therefore, that it is only when value cannot be determined in terms of rule 3(1), and not for reason of includibility in accordance with rule 10, that recourse may be had, and limited, to rule 4 to 9 therein. In the

Interpretative Notes relevant to rule 10(3), the circumstances in which it may be concluded that 'transaction value' cannot be determined under rule 3 has also been set out for identifying the exclusive reasons for recourse to rule 3(4) of the said Rules. There is no requirement to invoke rule 12 of the said Rules for adapting the invoice value with the inclusions in rule 10 therein which, being absolute and uncontestable imperative even if in its restricted framework, stands on its own as separate breach of provisioning intended for a different purpose by section 14 of Customs Act, 1962. The substantive difference is that the 'transaction value' does not have to be substituted which follows upon invoking of rule 12 for rejection of 'declared value' but merely adjusts 'transaction value' for arriving at 'value' referred to in section 14 of Customs Act, 1962. Yet, while relying upon available data for the adjustment, that the adjudicating authority felt obliged to take recourse to rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for addition is untenable. Therefore, the order of Commissioner of Customs (Export), Air Cargo Complex (ACC) is flawed in not having resorted to the available provision for addition and for having resorted to the provision for substitution which is not intended to reach rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. This adjudication order must, therefore, be set aside for revisit.

13. The other Commissioner of Customs had not resorted to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 but has effected adjustments as set out in rule 10 of the said Rules. That authority has, however, proceeded to impose penalties under section 112 and section 114AA of Customs Act, 1962 on the finding that

> *'5.69 I have gone through, the allegations in the SCN and the reply of the Noticee and find that as-discussed above, the goods were correctly held liable to confiscation and hence the Notices is liable to penalty under Section 112(a) of the Customs Act, 1962. Further, M/s. MBIPL have subscribed to a declaration as to the truthfulness of the contents of the Bills of Entry in terms of Section 46(4) of the Customs Act, 1962 in respect of all their import declarations (including Bills of Entry) filed with the Customs. However, they have not declared the correct value of the imported goods, even though the CFO of the company Shri Naveen Golchha (Chartered Accountant by profession) accepted in his statement that Franchisee Fees payments should have been included in the assessable value of the imported goods for the purpose of payment of Customs Duty. Therefore, on count of these omissions and commission on their behalf, the importing firm M/s. MBIPL rendered themselves; liable to penalty under Section 114AA of the Customs Act, 1962.'*

while invoking the extended period of limitation thus

> *'5.66. Demand of Differential Customs Duty. The Investigating Agency is proposed to demand and recover differential duty under the provisions of the proviso to the erstwhile. Section 28 (1) and present Section 28(4) of the*

> *Customs Act, 1982 along with applicable interest u/s. 28AA of the Customs Act, 1962, The proposed differential duty is re-quantified, as detailed in table at Para 5.53 above, totally amounting to Rs. 63,80,090/- (Rupees Sixty Three Lakhs Eighty Thousand. Ninety only). In this regard, I find that in spite of being Chartered Accountant by profession, Shri Navin Golchha, CFO of M/s. MBIPL deliberately mis-stated value of the imported goods by riot declaring Franchisee Fee/Franchisee Entrance Bee/Advertising Expenses to evade applicable Customs Duty, therefore, it appeared that the importer wilfully mis-declared the value and suppressed the facts while filing Bills of Entry in Customs Department, and hence, the proviso to the erstwhile Section 28 (1) and present Section 28(4) of the Customs Act, 1962 is invocable in present case and duty on goods are required to be demanded along with applicable Interest u/s. 28AA of the Customs Act 1962.'*

Invoking of section 111 of Customs Act, 1962 in order of Commissioner of Customs, Air Cargo Complex (ACC) has occurred in similar circumstances set out thus

> *'5.63. I find that as per Rule 11 of the Foreign Trade (Regulation) Rules, 1993, owner of the imported goods shall in the Bill of Entry or any other documents prescribed under the Customs Act, 1962 state the value quality and description of such goods to the best of his knowledge and belief and certify to its truthfulness. In the instant case, importer have failed to declare the correct values of the product imported and have thus, contravened the provisions of Rule 11 and Rule 14 of the Foreign Trade. (Regulation) Rules, 1993 as also provisions of Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992, in as much they knew that the*

> *declarations made by them were incorrect with regard to value of products imported. The contravention of the provisions of the Foreign Trade (Regulation) Rules, 1993, is a prohibition of the nature as described under the Section 11 of the Foreign Trade (Development and Regulation) Act, 1992. Now, in terms of Section 3(3) of the Act ibid the provisions are deemed to be a prohibition under Section 11 of the Customs Act 1962. In terms of the Section 111 (d) of the CA, 1962, any goods which are imported or brought within Indian waters / brought within the limits of any Customs area for purpose of being imported contrary to any prohibition imposed by or under this Act or any other law for the time being in force are liable to confiscation. Further, as the assessable values have been mis-declared, in as much as the additions required to be made to the assessable values on account of payment made on account of Franchise Entrance Fee, Franchise Fee, and Advertisement expenses as discussed above/have not been made, the goods in question are liable to confiscation under the provisions of Section 111 (m) of the Customs Act, 1962.'*

warranting re-visit of the empowerment to confiscate and impose penalty. Oddly enough, it was in proceedings initiated in notice subsequent to one in which the extended period was invoked, that the adjudicating Commissioner has chosen to invoke section 114A of Customs Act, 1962 and about a year after the first notice was issued for the earlier period. This is contrary to the decision of the Hon'ble Supreme Court in *re Nizam Sugar Factory* and must, therefore, meet the fate of the other two for re-visit.

14. All the impugned orders have resorted to section 114AA of

Customs Act, 1962. As held by the Tribunal in *re TR Venkatadiri*, the penalty intended to be imposed on 'any person' in the referred circumstances does not extend to an artificial person. Even as it is, the near identical finding that

> *'5.37.1. I have gone through the allegations in the SCN and the reply of the Noticee and find that the Notiffee firm have not declared the correct value of the imported goods, even though the CFO of the company Shri Naveen Golchha (Chartered Accountant by profession) accepted in his statement that Franchisee Fees payments should have been included in the assessable value of the imported goods for the purpose of payment of Customs Duty. Therefore, on count of these omissions and commission on their behalf, the importing firm M/s. MBIPL rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962.'*

does not suffice to be, let alone adequate, finding for invoking of section 114AA of Customs Act, 1962.

15. At this stage, we may do well to ascertain the design of the valuation mechanism. Value is required for assessment of goods liable to duty on *ad valorem* rates. In the extant version of section 14 of Customs Act, 1962, between 'transaction value' and the *proviso* therein, as set out in section 14, is the mandate for inclusions in the price, agreed upon for the particular shipment and which is not in doubt, to render the 'transaction value' compatible with 'value' intended for assessment in section 14 of Customs Act, 1962. It also empowers

framing of rules to that end besides resort to rules for attending upon circumstances in which ‘transaction value’ is not available. The valuation provision itself thus distinguishes ‘transaction value’ and ‘transaction value not being determined’ which calls for recourse to the Rules framed under that empowerment. The Rules provide for substitution when ‘transaction value’ of imported goods are not available, for inclusion in ‘transaction value’ for adjustment to conform to ‘value’ and for empowering the deeming of ‘transaction value’ as not being available. Merely owing to the remedies for these contingencies being collated in one statutory instrument, every recourse is not to be attended by taint on ‘transaction value’ meriting rejection. And it is also a further misconception that every rejection of ‘transaction value’ for replacement with ‘surrogate’ ‘transaction value’ is a penalizable taint. Hence, the facts and circumstances of each recovery under section 28 of Customs Act, 1962, arising from re-valuation, must inform the invoking of penal provisions in Customs Act, 1962 connected thereto.

16. Furthermore, a tax on goods can extend to include cost of services, entailed on the goods, only in the limited framework offered by rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and this is explicitly expressed in rule 10(4) therein. The restricted context and the evolving ‘franchise model’ of doing business elaborated *supra* are not entirely freed from doubts

about the scope and extent of adjustments permitted by law. This is evident from the disputes in *re Giorgio Armani India (P) Ltd,* in *re Addidas India Marketing Pvt Ltd [2020-TIOL-604-CESTAT-DEL]* and in *re Indo Rubber and Plastic Works* pertaining to similarly placed businesses in similar circumstances that came up subsequently. As the controversy plagued the imports across the industry, it cannot be concluded that the certainty perceived by adjudicating authorities prevailed among importers too.

17. All that can be concluded with certainty is that 'franchise fee' and 'international marketing charges' are to be included in the 'transaction value' for conformity with section 14 of Customs Act, 1962. To that extent, and in the context of not being pressed on behalf of the appellants, the includibility attains finality. On the issue of inclusion of third element in order of Commissioner of Customs, Air Cargo Complex (ACC), it has been submitted that the dispute for subsequent period has been remanded to the original authority. We note, however, that dropping of that element in the adjudication orders has not been appealed against by Revenue. It must be presumed to have attained finality in favour of appellant herein.

18. As far as penalty under section 114AA of Customs Act, 1962 is concerned, the decision in *re TR Venkatadiri,* combined with the lack of any evidence of roles played by any individual, suffices to set aside

that detriment. The imposition of penalty under section 114A of Customs Act, 1962 in one of the orders of Commissioner of Customs, Nhava Sheva is contrary to law and must be set aside.

19. The confiscation ordered in all three orders and penalty ordered under section 112 of Customs Act, 1962 in two of the orders are without sufficient examination of law and fact. Likewise, the invoking of extended period in all the orders has been undertaken without proper examination of factual circumstances that enable such demand. These require re-ascertainment in accordance with our observations *supra* including quantification of demand legally recoverable. For these reasons, all the orders are set aside and restored to the original authority for fresh proceedings that shall be limited to justification, if any, for invoking extended period and consequent quantification of tenable demand and to evaluate the grounds on which liability to confiscation are supported by law and facts with penalty under section 112 to follow only in the event of validation of confiscation.

20. Appeals are disposed off on above terms.

(Order pronounced in the open court on 08/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*