

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86569 OF 2022

[Arising out of Order-in-Appeal No: 250(Gr. II C-F)/2022(JNCH)/Appeals dated 31st March 2022 passed by Commissioner of Customs (Appeals), Mumbai – II]

Henkel Adhesives Technologies India Pvt Ltd

L&T Seawoods, Grand Central, 401, B-Wing, 4th Floor,
Tower-1, Seawoods (W), Navi Mumbai – 400 706

... Appellant

versus

Commissioner of Customs

Jawaharlal Nehru Custom House, Nhava Sheva,
Tal: Uran, Dist: Raigad, Maharashtra 400 707

...Respondent

APPEARANCE:

Shri T Vishwanathan and Ms Madhura Khandekar, Advocates for the appellant

Shri Ranjan Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87519/2024

DATE OF HEARING:	14/06/2024
DATE OF DECISION:	13/12/2024

PER: C J MATHEW

Existentialism is not a contemporary school of philosophy and it
was Jean Paul Satre, one of its most prominent proponents, who said

‘everything has been figured out, except how to live’

It is, however, unusual for institutions to be stuck in an existential crisis and, when it is the Tribunal that is, it cannot be of our own making for we are required to work only because someone aggrieved takes a chance on relief. So it is that the existential crisis of some other has been tossed over to us.

2. The genesis of the grievance in the present dispute is the ‘royalty’ agreed upon in contracts of the appellant herein with M/s Henkel AG & Co, KGaA on the one hand and between the appellant herein with M/s Henkel Technologies (Korea) Ltd for production of industrial adhesives and/or technical assistance thereto. Apparently, and owing to relationship between these and the appellant, the institution designated as Special Valuation Branch (SVB) – a relic of the as yet undeveloped valuation scheme of 1963 – stepped into investigate the impact that relationship may have had on the price arising from which the bills of entry were assessed provisionally. That, of itself, was no cause of grievance either to the importer or the customs authorities. But the assessments had to be finalized some day and show cause notice, proposing additions to the declared value, was issued by the ‘proper officer’ under section 18 of Customs Act, 1962 on 24th September 2019 which set this culmination in motion. That authority, *vide* order dated 27th November 2019, directed finalization of pending provisional

assessments on the finding that ‘royalty’ was not to be included in the transaction value as that payment was not attributable to ‘condition of sale’ as set out in rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. And that set the drama in motion.

3. That ruling meant that declaration in the bills of entry were to be accepted and, therefore, was of no concern to the importer. The jurisdictional Commissioner of Customs, however, was aggrieved enough to have appeal preferred which resonated with Commissioner of Customs (Appeals), Mumbai – II whose order¹ affirming the addition of royalty is impugned before us. Strangely, this order is bereft of any reference to any bill of entry that, owing to impediment in finalizing assessment under section 17 of Customs Act, 1962, were provisionally assessed under section 18 of Customs Act, 1962 just the same as the show cause notice, culminating in order of not making additions to declared value, was and which did not deter the first appellate authority from setting finalization of assessment in motion. Effectively, and without the benefit of particulars of assessments that the jurisdictional Commissioner of Customs desired to be loaded with ‘royalty’, the first appellate authority fell in with the principle of loading espoused in the notice.

¹ [order-in-appeal no. 250(Gr. II C-F)/2022(JNCH)/Appeals dated 31st March 2022]

4. We have heard Learned Counsel for appellant and Learned Authorized Representative on the includability of 'royalty', that the agreement was about, under the authority of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. While the show cause notice, as well as the impugned order, have liberally referred to the said provisions, including an order of special valuation branch (SVB) dated 30th September 2000 which predates Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, we have cause to entertain doubts – and, not unnaturally so, in the absence of any details of import - about empowerment under the statute now invoked.

5. Learned Counsel for the appellant did produce certain bills of entry, but, in the absence of any reference to these in the show cause notice, we are unable to accept these as pertaining to the assessment in dispute. It would also appear that the entire appellate structure is now embroiled in an assessment dispute without any reference to the duty liability that finalization of bills of entry would engender. We are not certain if the Tribunal should apply itself to a proceedings that is nothing to commend for itself beyond being delightfully vague on the differential duty on dispute; that absence on record could be tolerable for having been crystallized at some time. That saving grace is grossly lacking.

6. The appeals filed before the Tribunal, from the enablement under section 129 of Customs Act, 1962, should be by a 'person' and, in one against an order of Commissioner of Customs (Appeals), under section 128A of Customs Act, 1962, should have been caused by grievance against decision or order passed under the Act by an officer of customs lower in rank than Principal Commissioner or Commissioner; in relation to assessment, it should have stemmed from final determination, either under section 17 of Customs Act, 1962 or under section 18 of Customs Act, 1962, by 'proper officer' so empowered. Normally, under section 17 of Customs Act, 1962, the 'proper officer' should either not interfere in the assessment of duty liability determined by importer or exporter on goods that have been entered for import or for export, under section 46 or under section 50 of Customs Act, 1962, as the case may be, or undertake re-assessment of duty on goods entered for import under section 46 or for export under section 50 of Customs Act, 1962, as the case may be.

7. Where, however, circumstances are such that assessment/re-assessment under section 17 of Customs Act, 1962 is not possible for particular reason, the 'proper officer may direct that duty leviable on such goods be assessed provisionally pending feasibility of final determination in terms of section 18(2) of Customs Act, 1962. In the absence of details of bills of entry filed under section 46, which, presumably, pertained to the decision of the original authority that was

cause of grievance to the jurisdictional Commissioner of Customs, we may, in the light of no disputation on that score, infer the grievance to have arisen from finalization of provisional assessment. Even so, there is no finalization inasmuch as it was the responsibility of the ‘proper officer’ to bring the ‘provisional assessment’ to final determination inclusive of differential duty; such re-determination being integral to finalization under section 18(2) of Customs Act, 1962 is not amenable to alienation either to subordinate in hierarchy – with adjudication acknowledging no superior other than appellate – or by deferring to the future. The order impugned before the first appellate authority could, in the absence of finalization of differential duties of customs, have caused grievance only by lack of having been completed; such finalization having been ordered in that decision was no decision and not appealable as long as the assessments were not finalized for each bill of entry. The first appellate authority entertained, and granted relief, beyond its jurisdiction.

8. Not having been within the jurisdiction of the first appellate authority, such premature disposal was incorrect. The lack of jurisdiction of the first appellate authority infects the decision on merits and that contagion cannot be kept alive by us and we have no option but to invalidate the order as of essence to resolve the existential crisis.

9. Accordingly, the impugned order is set aside. We also hasten to

add that this disposal is without prejudice to remedies that may lie on grievance stemming from finalization of ‘provisional assessment’ in terms of section 18(2) of Customs Act, 1962 by ‘proper officer’ that, may or may not, have been determined in the meanwhile.

(Order pronounced in the open court on 13/12/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*