# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

## WEST ZONAL BENCH

## CUSTOMS APPEAL NO: 86797 OF 2023

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-500 to 504/2023-24 dated 30th June 2023 passed by Commissioner of Customs (Appeals), Mumbai - III.]

**SNJ Diam**
GW-1060, 1st Floor, Bharat Diamond Bourse, BKC
Mumbai - 400051 … ***Appellant***

*versus*

**Commissioner of Customs**
Air Cargo Complex, Awas Corporate Point
Andheri-Kurla Road, Mumbai - 40059 ***…Respondent***

**WITH**

## CUSTOMS APPEAL NO: 86798 OF 2023

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-500 to 504/2023-24 dated 30th June 2023 passed by Commissioner of Customs (Appeals), Mumbai - III.]

**Kanala Nandlal Vasurbhai**
GW-1060, 1st Floor, Bharat Diamond Bourse, BKC
Mumbai - 400051 … ***Appellant***

*versus*

**Commissioner of Customs**
Air Cargo Complex, Awas Corporate Point
Andheri-Kurla Road, Mumbai - 40059 ***…Respondent***

*APPEARANCE:*

Shri Krishna Pratap Singh, Advocate for the appellants

Shri Deepak Sharma, 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: 85473-85474/2025**

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| DATE OF HEARING: | 29/11/2024 |
| DATE OF DECISION: | 24/03/2025 |

*PER: C J MATHEW*

This appeal of M/s SNJ Diam challenges the order[1] of Commissioner of Customs (Appeals), Mumbai – III, which, upon challenge by M/s SNJ Diam and others, was, while upholding the confiscation of 'rough diamonds' imported *vide* bill of entry no. 5771239/09.10.2021 only partially successful. The declared value of impugned goods, US$ 7,35,000, which was re-determined at US$ 50,000 under rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and penalties imposed under section 112 and section 114AA of Customs Act, 1962 had, in appeal, favoured M/s BV Chinai & Co in full and partially to Shri Saurin Dayalbhai Thumar and Shri Kanala Viral Jjivabhai, did not accept their contention insofar on alleged discrepancy between the Kimberley Process Certificate (KPC) submitted along with bill of entry, and the goods themselves to uphold absolute confiscation thereof. It would appear that the original authority had taken recourse to rule 3(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 solely for the purpose of computation of

[1] [order-in-appeal no. MUM-CUSTM-AMP-500 to 504/2023-24 dated 30th June 2023]

penalty under section 112 of Customs Act, 1962 as there was no scope for levy of duty on goods that were absolutely confiscated.

2. Learned Counsel for the appellant submitted that the principles set out by the Tribunal in *Dinesh Dhola and another v. Commissioner of Customs, Air Special Cargo, Mumbai* in final order[2] disposing off appeals[3] against order of[4] Commissioner of Customs (Appeals), Mumbai – III and that of the Tribunal in *Commissioner of Customs, Mumbai v. Kiran Gems Pvt Ltd [(2023) 9 Centax 6 (Tri.-Bom)]* were not taken into consideration by the first appellate authority.

3. Learned Authorized Representative submitted that absolute confiscation of 'rough diamonds' has been upheld by the Tribunal in *Prakash Sancheti v. Commissioner of Customs, Ahmedabad [2013 (292) ELT 273 (Tri - Ahmd)]*, in *Gemco v. Commissioner of Customs, Jaipur [2001 (136) ELT 1065 (Tri - Del)]*, in *Manasarovar Pearls v. Commissioner of Customs, Mumbai [2001 (134) ELT 59 (Tri.Mum.)]* and in *Ratu Diami v. Commissioner of Customs, Ahmedabad [2006 (205) ELT 344 (Tri. - Mumbai)]*

4. From the decisions cited by Learned Counsel, it would appear that the issue under consideration before the Tribunal was scope for re-determination of value under Customs Valuation (Determination of

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2 [final order no. A / 86380-86381/2023 dated 14th September 2023]
3 [customs appeal no.85396 and 85397 of 2022]
4 [order-in-appeal no. MUM-CUSTM-APSC-APP-1060/2021-22 dated 23rd November 2021].

Value of Imported Goods) Rules, 2007 and consequential penalty under section 112 of Customs Act, 1962 even when there was no differential duty to be levied and it was, held in *re Prakash Sancheti* that

> *'22. …….. The Apex Court noted that Section 113(d) empowers the authority to confiscate any goods attempted to be exported contrary to any provision imposed by or under the Act or any other law for the time being in force. The Apex Court noted that according to Section 2(33) of Customs Act, 1962, prohibited goods are defined as "any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with." The Apex Court from the definition concluded that if the conditions prescribed for import or export of goods are not complied with, such goods would be considered to be prohibited goods. Obviously in this case, the import of rough diamonds was made without complying with the requirements of Exim Policy, relevant Act and the Rules thereunder. Therefore the rough diamonds have to be held as prohibited under the law. Once the importation is held to be prohibited, the learned Commissioner has the discretion to decide whether the goods have to be absolutely confiscated or allowed to be redeemed on payment of fine. In this case it is not only that the parties concerned have attempted to import rough diamonds at highly exaggerated value but also they attempted to manipulate the records and mislead the department that there was a mistake in preparation of invoice. The effort stopped only when the appellants came to know that department has commenced*

> *investigation and the goods may not be released. The extent of over-invoicing is so high that the actual value of the goods was found to be 3.56% of the actual. In fact the learned advocate on behalf of the Hong Kong exporters submitted that the Commissioner has discussed the earlier import and export but since she has not based her conclusions on those transactions, he did not contest those findings nor made any submissions thereon. It would not be fair on our part also to consider the past activity for the purpose of deciding whether goods have to be absolutely confiscated or not. But in our opinion the extent of over-valuation which if allowed would have resulted in repatriation of foreign currency of more than Rs. 485 crores itself would show that this is a case where no lenient view is called for. Therefore the decision to absolutely confiscate the rough diamonds under seizure has to be upheld.'*

5. The only issue before the Tribunal then was the exercise of discretion by the adjudicating authority insofar as offer of redemption on payment of fine under section 125 of Customs Act, 1962 is concerned. Furthermore, the matter of certification under Kimberley Process Certificate (KPC) was not an issue adjudged by the Tribunal and it was solely on the ground of mis-declaration of value that the confiscation had been upheld. In *re Dinesh Dhola and others,* the Tribunal took note of failure to have Kimberley Process Certificate (KPC) verified on which was premised the prescription claimed to warrant absolute confiscation. In *re Jalak Exports*, the original authority had, on request of the importers, allowed re-export of 'rough diamonds' which, on appeal of jurisdictional Commissioner of

Customs, come to negated with absolute confiscation. The issue before the Tribunal then was about the consequences of re-export insofar as the offending goods were concerned. Likewise, in the present dispute, the importer had sought re-export which was denied by drawing upon instruction[5] of Central Board of Excise & Customs (CBEC) which Learned Counsel for the appellant submitted to have been incorrectly cited for refusing their request for re-export. The specific aspect of denial of re-export was addressed by the Tribunal and it was held there that

> *6. There is no doubt that the Kimberley Process Certificate (KPC), submitted for the entire consignment, did refer only to one of the invoices; however it did match the total weight of the two lots. The limited remit of the said certificate is to suppress trade in 'conflict diamonds' and, indeed, notwithstanding its utility for that purpose, deprivation of title to such goods does not appear to be contemplated by law. We also find it ironic that goods which, most certainly, should end up ceasing existence, is, by the impugned order, regularised as property of the Central Government through an appellate process and, if the confiscation does sustain, condoned despite that imperfection. We are unable to fathom the cause for such appropriation or even a proposal for securing that end. The Customs Act, 1962 does not prescribe destruction of confiscated goods which is an executive decision and confiscation does not, of itself, assure destruction. There is, thus, every possibility of 'conflict diamonds' ending up in the domestic market which is, doubtlessly, not contrary to law but that they these were*

5 [circular no. 4/2015 dated 20th January 2015]

> *transported across the border and hence carrying the taint of 'conflict diamonds' in which the Central Government would be forced as an accessory by committee constituted under section 129D of Customs Act, 1962 does not appear to have weighed with the reviewing authority. It would have been most appropriate for the goods to be repatriated to country of despatch and to be dealt with in the manner appropriate to the laws of that country than that national commitment to ban on international trade in 'conflict diamonds' be called into question by consequence of absolute confiscation.*
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> *7. In any case, the lack of match in the certificate is not a ground for absolute confiscation of the impugned goods. It would have been appropriate for checks to be carried out with the authority concerned instead of adopting such precipitate action. The absolute confiscation is, therefore, set aside.'*

in *re Jalak Exports v. Commissioner of Customs, (APSC), Mumbai* in final order[6] disposing off appeal[7] against order[8] of Commissioner of Customs (Appeals), Mumbai – III

6. As a consequence of the inappropriateness of absolute confiscation, the resolution of the dispute over on valuation would necessarily have to be examined. This, too, was considered in *re Jalak Exports* thus

> *'8. ……….. The adoption of appraised value, while relevant for invoking rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for*

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[6] [final order no. 86679-86680/2024 dated 5th November 2024]
[7] [C/85142 & 85144/2024]
[8] [order-in-appeal no. MUM-CUSTM-APSC-APP-871 to 874/2021-22 dated 29th October 2021]

> *assessment is inappropriate as '(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 Explanation below rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 does not tolerate such substitution.*
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> *9. In order that the consequence of misdeclared value is fairly, and only if due, visited on imports and importer as well as others, we set aside the impugned order for re-determination of value only to the extent permitted by rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The goods are not liable to be confiscated absolutely and even such confiscation, as is intended to be undertaken and subject to redemption on payment of fine, should limit itself to that portion of the goods that were misdeclared with the rest of the goods eligible for clearance for home consumption'*

7. In circumstances of the taint attached to handling of allegedly 'conflict diamonds' that the importer assumed responsibility to re-export, the confiscation of the goods without offer of redemption is held to be inappropriate. The manner in which the value has been determined in accordance with the provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 bears further evaluation to comply with section 2(41) of Customs Act, 1962. Such was not the requirement under section 17 of Customs Act, 1962

on every shipping filed under section 50 of Customs Act, 1962 but also wherever 'value' find reference insofar as the handling of the imported goods is concerned. In view of the deficiencies in the impugned order, the impugned order is set aside and the matter remanded back to the original authority for a fresh decision in accordance with the findings noted *supra* and the provisions for valuation of imported goods.

8. The appeals are thus allowed by way of remand.

*(Order pronounced in the open court on 24/03/2025)*

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| **(AJAY SHARMA)** | **(C J MATHEW)** |
| ***Member (Judicial)*** | ***Member (Technical)*** |

**/as*