CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86974 OF 2023
WITH
CROSS-OBJECTION NO: 85533 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 04/SJ(04)/PCC(ADJN.)/MUMBAI/2023-24 dated 24th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Vadinar Power Company Limited
P.O. Box No. 24, Khambhalia PO
Dist: Dev Bhumi Dwarka, Gujarat- 361 305. ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86984 OF 2023
WITH
CROSS-OBJECTION NO: 85535 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Essar Power MP Limited
Versus Prakash Deep, 10th Floor, 7th Tolstoy Marg
New Delhi – 110001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86985 OF 2023
WITH
CROSS-OBJECTION NO: 85536 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Essar Oil Limited
Khambhalia PO,Dist: Jamnagar, Gujarat- 361 305 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86989 OF 2023
WITH
CROSS-OBJECTION NO: 85534 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Matrix Fertilizer and Chemicals Limited
Panagarh Industrial Park, Panagarh, Bardhman
West Bangal- 713 148 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86983 OF 2023
WITH
CROSS-OBJECTION NO: 85532 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Essar Power Gujarat Limited
Salaya Administrative Building 44 KM, Post Box No.7,
Jamnagar-Okha Highway, Khambhalia PO,
Dist: Jamnagar, Gujarat- 361 305 ***…Respondent***

AND

CUSTOMS APPEAL NO: 87041 OF 2023
WITH
CROSS-OBJECTION NO: 85921 OF 2024
(on behalf of respondent)

[Arising out of Order-in-Original No: 04/SJ(04)/PCC(ADJN.)/MUMBAI/2023-24 dated 24th May 2023 passed by the Principal Commissioner (Adjudication), Mumba.]

Commissioner of Customs (Import-I)
New Customs House, Ballard Estate, Mumbai- 400 001. … ***Appellant***

versus

Essar Bulk Terminal Salya Limited
ESSAR House, 11,Keshav Rao Khadye Marg
Mahalaxmi Mumbai, Mumbai-400034 ***…Respondent***

APPEARANCE:

Shri Shambtoonath, Special Counsel, for the appellant

Shri Vipin Jain, Shri Vishal Agrawal, Shri Karthik Dedhia, Ms Heema Dorhi, Ms Sanjana Jain and Shri Kshitij Awarthi, Advocates for the respondents

CORAM:

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

FINAL ORDER NO: 85743-85748/2025

DATE OF HEARING: 08/10/2024
DATE OF DECISION: 03/04/2025

PER: C J MATHEW

The genesis of the dispute in these appeals, pursued at the instance of competent Committee of Chief Commissioners of Customs aggrieved by the outcome in two adjudication proceedings, is controversy over valuation and, that too, of alleged overvaluation of imported goods which, in the context of tariff, bears no consequence of deficiency in discharge of duties of customs. And the lack of cause thereto is attributable to the bundling of the impugned goods within the omnibus ‘project imports’, leviable to duties of customs at the rate corresponding to tariff items enumerated below heading 9801 of First Schedule to Customs Tariff Act, 1975, which has not been controverted and, with that, eligibility to ‘nil’ rate on refinery and thermal power projects with duty at 3% on fertilizer projects being beyond dispute. Yet, proceedings were initiated by notice issued under section 124 of Customs Act, 1962 proposing to hold the imported goods as liable to confiscation, under section 111(m) of Customs Act, 1962, as a necessary pre-requisite for the obvious intent of proposing imposition of penalties under section 112 and section 114AA of Customs Act, 1962. The consummation, empowered from justifiable cause of discrepancy between price declared and value ascertained during assessment, is now claimed to empower determination of value outside the framework of assessment to enable confiscation.

2. Mindboggling as the proposition appears to be, ready comprehension by persons less endowed with capacity for logic and reasoning, as we must confess ourselves to be, prescribes glance at the purpose and mechanics of the statute, *viz*., Customs Act, 1962 and placement of the *schema* of transactions, distilled from the elaborate narration, within that framework to adjudge the plea in the appeals before us that the adjudication orders impugned here are neither legal nor proper. The deployment of valuation framework, ensconced within the still larger one of assessment to duty before imported goods may be cleared for home consumption and normally for determination of liability - either under section 17/18 of Customs Act, 1962 for ascertaining duty or under section 28 of Customs Act for recovery of undischarged duty liability – on goods, as bedrock for invoking section 111 of Customs Act, 1962 failed to pass muster with the adjudicating authority for that very reason and, significantly so, is before us for testing the proposition that settled law which the impugned order has been founded on is distinguishable on facts relevant to this dispute. Thus, we are not tasked with adjudging the correctness of the proposition that confiscation under section 111 of Customs Act, 1962 is not merely consequence of breach of procedures stipulated elsewhere

in the statute for assessment of imported goods and export goods through customs barrier for levy of duties authorized by law, as envisaged in section 47 and section 50 of Customs Act, 1962, but may, autonomously and solely, pressed into service, and by reference to meanings assigned in section 2 of Customs Act, 1962 to words and expressions that occur in section 111 (m) of Customs Act, 1962, even in the face of irreversible finality in acts preceding clearance of goods for home consumption, *viz*., no duties remain to be collected and no prohibition in law attaches to the goods, forever obliterating existence as 'imported goods' as far as customs jurisdiction is concerned. That issue, controverted before the Tribunal in *Knowledge Infrastructure Systems Private Limited v. Additional Director General, Mumbai [2018 (6) TMI 1164-CESTAT MUMBAI]*, concluded with setting aside of confiscation and penalties.

3. The challenge to that order before the Hon'ble High Court of Bombay was dismissed for want of jurisdiction and appeal, preferred thereafter before the Hon'ble Supreme Court, having been withdrawn by Revenue, the adjudicating authority declared itself, and rightly so, bound thereto and we consider it, even in the face of express submission on behalf of appellant-Commissioner that issue of law remained undecided, no less binding on the Committee of Chief Commissioners of Customs/Principal Chief Commissioners whose statutory remit does not traverse beyond appeals before the Tribunal. Neither are we tasked

to legitimize the documents discarded by the adjudicating authority, even if pivotal to the. Case of the investigation, from the binding decision of the Tribunal in *Commissioner of Customs (Import), NS-III, Raigad v. Adani Power Maharashtra Ltd [(2023) 3 Centax 169 (Tri-Bom),* mandating acceptability for sustaining allegations only to the extent of provenance established in the manner set out in section 138C of Customs Act, 1962. Challenge to this was dismissed by the Hon'ble Supreme Court and, notwithstanding its brevity, bound the adjudicating authority who, and rightly so, followed it no less than it does the Committee of Chief Commissioners of Customs. Simply put, the Committee of Chief Commissioners/Principal Chief Commissioners is empowered to seek relief only from the Tribunal and to plead for reversal of a decision of the Tribunal that has not been set aside by the Hon'ble Supreme Court is not only demonstrative of disregard for judicial discipline but would also open the floodgates to perpetual litigation which is the bane of judicial efficiency that Tribunals were intended to achieve. To burden an assessee with the test of disproving copies of documents which are unacknowledged by, or of discountenancing disclosures by persons whose existence is unknown, to domestic law is to entrust draconian jurisdiction to agencies of delegated authority; more so, when the statute provides for certification and relevance and, especially, when the exchequer is not prejudiced in consequence. The design of 'ways and means' to the exchequer is erected on levies and not on detriments; the budgetary blueprint for mobilization of resources in the national economy places no premium on fines and penalties.

4. Learned Counsel for respondents, whose memoranda of cross-objections to the grounds of appeal are also before us, made several submissions and not the least of which was that, with the Tribunal, having, in the several disputes *supra*, held the propositions of elasticity of jurisdiction and adequacy of evidence to be untenable, the appellants were left with little to no traction in pursuing these appeals and appeals reflected nothing but obduracy on the part of investigative agencies unwilling to be confined within statutory empowerment that the adjudicating authority was loath to transgress. However, his principal contention, and on the factual matrix in the show cause notices, was that affirmation of the grounds on which the impugned order is now sought to be set aside would be tantamount to criminalizing ‘none too extravagant’ trading margins in international transactions merely on the whims of a tax collector here and there, bereft of both expertise and experience in matters of business, to normalize ‘ethical profits’ as perceived by them. According to him, it is nobody’s case that the funds for discharge of owings to vendors, or intermediaries, did not belong to the buyers and their structuring of commercial engagement, that did not evade duty or bring in goods barred from domestic trade, was not of concern to a tax collector bound by the framework of Customs Act,

1962.

5. The cases themselves relate to import of capital goods for capacity scaling through setting up of thermal power plant at Salaya by M/s Essar Power Gujarat Ltd and at Mahan by M/s Essar Power MP Ltd, capacity enhancement for refining of crude oil at Vadinar by M/s Essar Oil Ltd and capacity building by setting up of urea fertilizer plant at Durgapur by M/s Essar Projects (India) Ltd, as ‘engineering, procurement and construction (EPC)’ contractor, for M/s Matrix Fertilizers & Chemicals Ltd, as well as setting up of marine material handling facility at Salaya by M/s Essar Bulk Terminal Salaya Ltd and setting up of co-generation power plant at Vadinar crude refining facility by M/s Vadinar Power Company Ltd. Clearances were effected against invoices issued under supply contract of each of these with M/s Global Supplies (UAE) FZE. The goods, such as ‘boiler turbine generator (BTG) and ‘balance of plant (BOP)’ among others, were sourced from several ‘original equipment manufacturers (OEM)’ in Peoples’ Republic of China mostly and elsewhere on ‘back-to-back’ transactions of M/s Global Supplies (UAE) FZE with importers on the one hand and with suppliers on the other. The clearances were permitted under section 47 of Customs Act, 1962 as having discharged appropriate levies and were not prohibited for import into India.

6. Underlying the allegation in the show cause notices that the

goods had been overvalued at time of import is a melange of investigative unveilings. The negotiations with 'original equipment manufacturers (OEM)' were alleged, from statements of several of the top management of importing, and other, companies, to have been handled by representatives of the Essar Group and that installation, in several instances, was done by the 'original equipment manufacturers (OEM)' while the goods were invariably shipped from source to destinations in India without even the pretence of bills of lading switched at intermediate ports. Scrutiny of the documents obtained from the negotiating and facilitating banks enabled inference that most of the transactions were not only connectible as 'back-to-back' contracts but also for identifying amounts transmitted by M/s Global Supplies (UAE) FZE to the corresponding 'original equipment manufacturers (OEM)' for the supplies effected to importers. Several of the invoices raised by M/s Global Supplies (UAE) FZE on the importers were suggested, and outrightly from the terms therein as 'LC' and 'TTLC' for onward transmission and retention respectively, as amenable to this disaggregation; those which did not were tested for conformity with the 'back-to-back' invoices for which M/s Global Supplies (UAE) FZE was contractually obliged to recompense corresponding 'original equipment manufacturers (OEM)' towards supply of goods.

7. From the contracts, invoices and statements, including the *catena*

of obligations for shipping from source and for installation at destination devolving on 'original equipment manufacturers (OEM)' as well as payment schedules benchmarked to specified milestones, it was determined in the show cause notices that, barring some stray and outlier procurements, M/s Global Supplies (UAE) FZE was but a supernumerary in the flow of documents and flow of payments notwithstanding the justification offered about the commercial intent in routing transactions through them. From detailed scrutiny of the ownership pattern of the importing companies and M/s Global Supplies (UAE) FZE, it was deduced that, though the stakes, direct or indirect, of the promoters of the importing entities had, since, altered, it was, during the relevant period, very much a 'related person' of the importers within the meaning of rule 2(2)(iv) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The conclusion in the show cause notice that

> *'1.25.9………Thus, it appeared that at least during the period from 10-12-2016 to 28-05-2014, GSF continued to be a subsidiary of EPL, the efforts to severe the link on paper through sham transactions notwithstanding….*
>
> *xxx*
>
> *1.27.5…..*
>
> *(xi) Last but not the least, the singular thrust of the submissions that the price negotiated with GSF was fair, objective and at arm's length, appeared to be misleading, as it was not an open competitive tendering, rather an in-house affair….'*

would, shorn of the judgmental portion that has nothing to do with, and to the extent of being beyond the competence of a creature of Customs Act, 1962 to determine let alone suggest, suffice merely to embark upon scrutiny of influence that the alleged relationship had on transacted price and not as conclusion of superfluity. The last, in particular, suggests that the adjudicating authority was being called upon to adjudge value for conformity with section 14 of Customs Act, 1962 by the standards of government procurement and in a manner not contemplated in a statute. We dare say that this is a throwback to that antiquity in time when international consensus on 'valuation' was yet to be on the agenda of trade between countries.

8. The narration in both the notices are about determination of amount retained by M/s Global Supplies (UAE) FZE from these transactions and the analysis of shareholding pattern of the corporate entities that were dovetailed as tool, in terms of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for re-determination of value which, upon comparison with value declared in bill of entry for assessment at the time of import, was depicted as the gap between payable and paid to the 'original equipment manufacturers (OEM)' and doubling up as purported overpayment for being pegged as ceiling for penalties to be imposed as well as trigger for recourse to 'surrogate value' from the 'red flag' of relationship. And with this comparison of values, detriment intended for misdeclaration was proposed as fitting within the confines of obligations in

rule 11 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 to bring the initiated process right where it all commenced. Leaving aside the painstakingly assembled details, this is the distilled spirit of the two notices containing the proposals for imposition of penalties under section 112 and section 114AA of Customs Act, 1962.

9. Here is where the firm ground of margins payable to M/s Global Supplies (UAE) FZE and the interlocking of stakes among the companies in the Essar Group in the path to the outcome proposed in the notice group gives way to quicksand. The bridging of these islands of facts, without prejudice to their veracity, rests on the causeway of reasonableness of inference and adequacy of evidence for the simple, straightforward reason that the tool, *viz*., Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, is, of itself, purpose-designed, and purpose-driven as evident from significant re-design thrice and significant tinkering once in the last six decades or so, and accepted, for want of any other option, for deployment in ascertaining approximations to assist in, and tolerated to that extent for, assessment to duties of customs. The quantifying of valuation gap, between declared and re-determined, have been deduced from segregation of ‘LC’ and ‘TT’ invoices raised by M/s Global Supplies (UAE) FZE on the importers from the which is good only for the optics until the evidence acquires acceptability in the manner required in law and the computation of re-determined value is not in conflict with

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The validation of segregation was secured through comparison with documents obtained from facilitating, and co-operating, banks. A goodly portion, however, lacks wherewithal for this segregation and relies upon payments made to 'original equipment manufacturers (OEM)' – either of SWIFT remittances or documents retired by them - obtained from those very banks. The Tribunal, in *Commissioner of Customs (Import), NS-III, Raigad v. Adani Power Maharashtra Ltd [(2023) 3 Centax 169 (Tri-Bom)]*, had occasion to consider the evidentiary value of such offerings from dealing banks and were, in near identical circumstances, held as barred for introduction in adjudication proceedings save such as are in accord with section 138C of Customs Act, 1962.

10. Being punitive machinery in a statute, concerned solely with goods and designed to deter non-discharge of duties authorized by law, and incidentally also are, from the unique positioning of officers of customs, set out in section 3 of Customs Act, 1962, as 'proper officers' therefrom for specific enabling provisions therein at intersection of route by which goods were shipped with the geographical accesses to the territory of India, entrusted with ensuring that such goods as are interdicted domestically by municipal laws do not enter the territory, Hence, the detriment attached to breach of stipulations attended upon by the machinery provisions, designed for exercise of control over

goods on land or on conveyances in territorial waters or airspace, are to be contextually applied. The notice is not supported by law, as legislatively enacted of judicially determined, for deeming these punitive provisions as having agency of their own and not merely to afford enforcement authority to officers of customs in performing the two specific delegations of sovereignty of the State that are set out in section 47 and section 51 of Customs Act, 1962. All other facets of international commerce – money flows and document flows – are only handmaids to the primary delegations therein. The core of the investigation stems from, and is grounded in, 'value' in section 111(m) of Customs Act, 1962 – as one of the several triggers enumerated therein for confiscation; these appear to correspond, in ordinal hierarchy, with movement of goods, from on to off the conveyance, and even the extent to which the onus traverses in accordance with severity from prohibited through dutiable to all goods. The empowerment to confiscate imported goods is, therefore, contextual and not absolute and intent in the alteration of

> *'any durable or prohibited goods which do not correspond in any material particular'*

as it originally was, to

> *'any goods which do not correspond in respect of value or any other particular',*

as altered by The Customs, Gold (Control) and Central Excises and Salt

(Amendment) Act, 1973, with signification attending on 'value' and of not just 'prohibited and dutiable goods' claimed as conferring jurisdiction is not exactly supported by overt declaration in the substituting enactment or approved in judicial determination. Indeed, it is highly unlikely that policy formulation, in that era of backbreaking tariff and deterring non-tariff barriers, was prompted as much by consequence of overvaluation of goods, to which was appended double handicap of high impost and fewer goods, as with undervalued imports compensated for by undervalued exports. And this, in the regime of Customs Valuation Rules, 1963 characterized by vesting of unfettered discretion in customs authorities to counter overvaluation. We cannot, as laid down by the Tribunal in *Knowledge Infrastructure Systems Private Limited v. Additional Director General, Mumbai [2018 (6) TMI 1164-CESTAT MUMBAI]*, subscribe to the proposition that section 111 (m) of Customs Act, 1962 is, of itself, enabling provision authorizing re-determination of value to confiscation as a route to appropriate empowerment for imposing penalty under section 112 of Customs Act, 1962.

11. It cannot but be said that value, in its commonly understood meaning, is the price that the average buyer pays at retail stage for a product. International trade occurs across borders of domestic law jurisdiction and each consignment is of such magnitude that negotiated prices are the norm rather than exception. Factored in such negotiations

are aspects, and not restricted to further disposal of a particular consignment, extending over entirety of supply under contract or possibly beyond supply for mitigating risks in a project because all of these offer opportunities for gains. A cocooned existence is unlikely to sense atmosphere of business strategy that pervades business decisions. Except when statutorily prescribed, pricing is unfettered with only buyer and seller being privy to it. The cost of levies is only a component in such transactions and levying agency is only of peripheral significance where pricing is concerned; these are humbling realities that do not enter the consciousness of agencies of governance let alone tax administrators. It is for such reason that 'value' for assessment to duties is legal fiction and, therefore, in the realm of government policy for consistency and of legislative intervention for certainty thereof. Over the years, the framework legislation and enabling Rules have evolved to assure that consistency and certainty. Consistency and certainty in administering customs levies not only requires no less than strictest adherence to the confines of extent Rules but also mandates its deployment for the purpose intended. Value in the commercial world, which transcribes as price and enforceable at that, is a combination of several short-term and long-term factors that only the parties to the transaction are privy too. It is of concern only to the two parties and only of relevance to tax authorities to the extent that tax is not escaped; value is, thus, deemed – by law and by international consensus – for customs purposes and, to the extent of non-conformity of price with the template of ‘transaction value’, is mouldable again in accordance with the definitive law enacted and notified for the purpose. Neither is the transaction price subject to interventional rectification by customs authorities nor is the value amenable to determination outside the legislated scheme of valuation. It does not, therefore, surprise that, in the face of this matrix of enacted law, notified statutory instrument and judicial decisions, the adjudicating authority found itself disdaining the proposals in the notice and it only remains to evaluate the review by Chief Commissioners of Customers for having discerned some aspects in the notice that may render the impugned order, in portion or of entirety, to be other than legal and proper.

12. In the notice issued in connection with 222 consignments of M/s Essar Power Gujarat Ltd proposing revision of value from ₹ 2514,52,94,423 to ₹1876,81,27,973, 226 consignments of M/s Essar Power Madhya Pradesh Ltd proposing revision of value from ₹ 2428,55,15,153 to ₹1871,61,75,614, 350 consignments of M/s Essar Oil Ltd proposing revision of value from ₹ 2854,64,92,111 to ₹ 2189,97,10,661 and 92 consignments of M/s Essar Projects India Ltd proposing revision of value from ₹ 1510,59,23,423 to ₹ 760,04,42,662, that was dropped by order[1] of Principal Commissioner of Customs (Adjudication), Mumbai, the re-determination was sought on the

[1] [order-in-original no. 02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023]

ground that

> *'1.28.5 In the Bills of Entry featured in Annexures C1 to C4 of the SCN, it had been held out by the respective importers that the value declared therein represented the Transaction Value paid or payable for the goods imported, which appeared to be not correct, legally or factually for the following reasons:-*
>
> *(i) Essar Group entities viz, EPGL, EPMPL, EOL & EPIL and GSF, the so called buyers and the seller were not different. GSF appeared to be only a front and intermediary invoicing agent, for inflating the invoice value as part of the modus-operandi This was evident from the foregoing discussions.*
>
> *(ii) Goods were directly supplied/shipped to India by respective OEMs and there was no scope for any legitimate value addition at the hands of GSF. Besides, scale of extent of value inflation (by about 100% in case of EPIL and about 30% - 35% in case of others) by the intermediary (GSF), when seen in the overall context (as discussed elsewhere), did not appear to indicate any bonafide value addition activity, nor did it appear to be commercially prudent or justified. The value inflation at the hand of the intermediary (GSF) appeared to be not related to value of imported goods, but more of a mechanism to siphon money out of India, under the guise of import remittance. The OEMs (HPECL in particular} were contractually responsible not only for design, engineering, manufacture & supply of equipments but also for commissioning of the equipments and performance test thereof, which they did at site.*

(iii) *The respective importers i.e. EPGL, EPMPL, EOL & EPIL knew who the OEM/Actual Suppliers of goods were. Not only the officers of importing entity visit them overseas, but also the engineers of OEMs (particularly HPECL) were at site to ensure installation and commissioning. Consignments were being shipped directly to India. Under the circumstances, normal commercial prudence and due. diligence would not justify payment of such inflated price of about 100% in case of EPIL and about 30% - 35% in case of others over and above the OEM invoice price, that too to by an entity with no technical competence/expertise and no wherewithal of value addition.*

(iv) *Without prejudice to the above, the so called supplier (GSF) and the importers viz. EPGL, EPMPL, EOL & EPIL (who were all Essar Group entities) were related to each other which was not declared to the Customs Authorities in India. The declared value was not acceptable as the 'Transaction Value as per the Customs Valuation (Determination of value of Imported goods) Rules,-2007 (in short the CVR' 2007')read with Section 14 of the Customs Act, 1962 inasmuch as it appeared that the relationship had influenced the Transaction Value.*

(v) *GSF appeared to be a front of the Essar Group for acting as an intermediary invoicing agent for over-valuation. It was acquired by them and they continued to control it (distancing on paper notwithstanding), there was employee mobility between GSF and other entities of the Essar Group as apparent from fact that almost all the employees assigned to work in GSF were either ex-employees of the Essar Group or con-*

currently worked for GSF while under employment for one or more Essar Group entities. AH these, not only obliterated the distinction between the Essar Group entities and GSF, but also established commonality of interest.

(vi) OEM-invoice value had been traditionally recognised as the most authentic value which was recognised in law. Rule 11 of the CVR-2007 lists manufacturer's invoice as a relevant document for determination of the value of the imported goods, particularly when goods were imported from or through a person other than the manufacturer or producer,

1.28.6 Thus, the transaction between GSF and EPGL/EPMPL/EOL/EPIL (including one by Matix) being apparently a sham transaction for reasons set out above, the same was, therefore, liable to be rejected under the provisions of Rule 12 of the CVR, 2007. Rule 11 of the Rules, prescribes various documents required for ascertaining correctness of the declared value. One of the prescribed documents was manufacturer's invoice. Rule 4 of the CVR-2007 provided that subject to the provisions of Rule 3, the value of the imported goods would be the Transaction Value of identical goods sold for export to India and imported at or about the same time as the goods being valued. In the present case, the goods in question themselves have been shown as sold to the intermediary invoicing agent i.e. GSF but have been directly shipped to India by the OEMs/ Actual Suppliers. GSF appeared to have merely acted as an intermediary invoicing agent for inflating the invoice. Thus, the invoice value of the manufacturer (OEM/Actual Supplier) appeared to be the actual value of goods. Rule 4 refers to value of identical goods being sold for export to India and imported at or about the

> *same time. The ambit of identical goods covered same goods, being identical in all respects. Therefore, the price available in. such OEM invoices appeared to be the actual Transaction Value of the same goods (Identical goods-Rule 4)-being the same set of goods, covered by two different sets of invoices it was obvious that there was no material difference of any kind in description, quantity, make, or the manufacturer. Therefore, the value was required to be re-determined under the provisions of Rule 4 of the CVR, 2007 read -with Section 14 of the Customs Act, 1962.'*

for 149 consignments, 84 consignments, 213 consignments and 79 consignments respectively on the premise that 'identical goods', notwithstanding definition in rule 2(1)(d) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, encompassed 'goods being valued' – a leap of law over a cliff. For the remaining consignments, and based on inferences from other documents and transactions in the absence of 'back-to-back' payments, recourse was had to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 consequent upon sequential elimination of the preceding ones as applicable.

13. The notice, which culminated in the order[2] of Principal Commissioner of Customs (Adjudication), Mumbai dropping proceedings against M/s Essar Power Gujarat Ltd, M/s Essar Power MP Ltd, M/s Essar Oil Ltd and M/s Essar Projects (India) Ltd, had proposed

[2] [order-in-original no.02/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023]

that 890 consignments, declared to be valued at ₹ 9299,32,25,110, with a mark up of 38.83% over the actual of value of ₹ 6698,44,56,910 were liable to confiscation under section 111(d) and section 111(m) of Customs Act, 1962, in addition to liability for penalties under section 112 and section 114AA of Customs Act, 1962 by substitution with surrogate value in accordance with rule 4 and rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 upon rejection of declared value by recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

14. In the notice culminating in the order[3] of Principal Commissioner of Customs (Adjudication), Mumbai dropping proceedings against orders M/s Essar Bulk Terminal Salaya Ltd and M/s Vadinar Power Company Ltd, the same *modus operandi,* with the same M/s Global Supplies (UAE) FZE in the thick of the transactions, was alleged to for similar consequences to, and in relation to confiscation of, consignments, declared to be valued at ₹ 588,39,88,850 with a markup of 77% over the actual of value of ₹ 332,04,41,583. The contributions of imports by M/s Vadinar Power Company Ltd to this consolidated computation stood at 95.29% over the actual value of ₹ 239,1530,578 in 29 bills and of M/s Essar Bulk Terminal Salaya Ltd at 30.64 % over the actual value of ₹ 92,89,21,005 in 8 bills. The imported goods,

[3] [order-in-original no.04/SJ(02)/PCC(ADJN.)/MUMBAI/2023-24 dated 18th May 2023]

declared to be valued at ₹ 239,15,20,578 and ₹ 92,89,21,005 respectively were proposed to be confiscated under section 111(d) and section 111(m) of Customs Act, 1962, in addition to liability for penalties under section 112 and section 114AA of Customs Act, 1962, after placing them on notice of intent to reject the declared values by substitution with surrogate value in accordance with rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

15. Three employees of noticees concerned were also called upon to dispute liability to be imposed with penalties under different provisions for their role in the imports effected by the six entities that were under the sword of adjudicatory proceedings. Though proceedings were dropped against them, too, there are no challenges to those by Commissioner of Customs. In the light of similarity of issues, and suggestion of identical *modus operandi*, the appeals before us are taken up for disposal together. Several objections were raised by the respondent-importers to alleged transgressions in the review that led to these appeals. These are, for the moment, parked on the sidelines while the grounds of appeal are dealt with and to be delved into should the respondents be faced with detriments in the course of adjudging the appeals.

16. The adjudicating authority, concluding that relationship between importers and M/s Global Supplies (UAE) FZE was common ground

except for contention that a specificity of relationship from among those in rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had not been brought on record, held the notice to have failed to establish relationship as influencing the selling price which was essential pre-requisite to ascertainment of outcome by recourse, and as alternative to ascertainment triggered by rejection under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, to 'surrogate value' from rule 4 to rule 9 therein. It was also noted that M/s Global Supplies (UAE) FZE had been active enough in business well before the transactions with the importers had commenced as to preclude their irrelevance in the actual transactions and, particularly so, with the contracts themselves remaining unquestionably authentic as far as the notice was concerned as also that, while the 'mark-up' did came under scanner, the extent of obligations devolving on M/s Global Supplies (UAE) FZE having, in the absence of any allegations thereto, passed muster, the lack of acknowledgement thereto jeopardized the grounds noted in review leading to the appeal. It was further held, and upon examination of the terms and conditions, that responsibility, critical to execution of the projects, assigned to M/s Global Supplies (UAE) FZE was entailed with liquidated damages for deviations therefrom. Noticing average 'markup' of 34% in the aggregate value of supplies to M/s Essar Power Gujarat Ltd, 29.75% in that of supplies to M/s Essar Power Madhya

Pradesh Ltd and 29.94% in that of supplies to M/s Essar Oil Ltd, which was held as not suggestive of abnormality or deviation and that, if so by any stretch, the onus devolving on customs authorities to derive monetary value from the appropriate method set out in Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 had not been discharged. It was also noted that, with several instances of lower values for comparison, and that, with the documents received from sources not having been certified for provenance and consequential inadmissibility as evidence, in conformity with the decision of the Tribunal in *re Adani Power Maharashtra Ltd*, the proposed revisions had no basis in law; and, especially so, with the notices having disaggregated individual consignments for different methods of valuation in the face of the entirety of contracts having to be taken together from the absence of any controversy over clustering as ‘project imports’ for determining rate of duty. The adjudicating authority resisted the proposition of recourse to rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for non-conformity with the comparison intended therein. Factoring in the benchmark cost per megawatt adopted by the Central Electricity Regulatory Commission (CERC), it was concluded that there was no inflation of costs in the power projects in question here and, by comparison with TATA-TCE report, was held also below that of others in the fertilizer plant project.

17. Casting aside the technical issues, such as non-furnishing of all relied upon documents and concluding of adjudications while under the category of disputes to be kept in abeyance, that had been at the forefront in the prelude to issue of the impugned order and now rendered infructuous in the light of appeal against the adjudication on merit instead of validity, the principal ground for appeal pertains to the finding that the relationship of buyer and seller, undisputed as it was, had been held as not having influenced the consideration for sale. Details of the contract, drawn from the show cause notice, have been cited as evidence of erroneous finding in the impugned order. There are two aspects of disputation that should, for the nonce, be taken up. The first is an inherent contradiction in insisting that the purported relationship, as buyer and seller, is the key for recourse to 'surrogate value' but, at the same time, overlooking determination of influence that buyer-seller relationship had had on price. Likewise, the erasing of the ostensible seller from the transaction while proposing acceptance of price paid by ostensible seller to the 'original equipment manufacturers (OEM)' as 'surrogate value' extinguishes conformity with the buyer-seller engagement acknowledged for acceptance as 'value' in section 14 of Customs Act, 1962. This ground of appeal, in continuing to press for 'surrogate value' without postulating significant influence that relationship had on the price and by adoption of the consideration paid by intermediary to supplier as 'surrogate value' without such

provisioning in the valuation scheme. Consequently, the question of appropriateness of the finding that price has not been influenced by the relationship is not of consequence thereof as, again, the recourse to ‘surrogate value’ has been misapplied. It should also be noted that the proposal for re-determination in the notices themselves is premised on rejection of declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which, for the purposes rule 3 therein, are mutually exclusive but enabling same ‘surrogate values’ with the same outcome but without pre-requisite of rejection of declared

18. Besides reiterating the proposal for rejection of declared value, as set out in the notices, along with that, notwithstanding the absence of refuting the reasons adduced in the impugned order before arriving at its conclusions for dropping the proceedings, proposing ‘surrogate value’ to substitute for declared price in the notices, the reviewing authority has also forayed into the financials of M/s Global Supplies (UAE) FZE which is neither a party in the proceedings nor its financials of any relevance insofar as the section 14 of Customs Act, 1962. Our cautionary caveat on the expertise of tax administrators over business domain and business strategy as well as relevance to the objectives and purposes of Customs Act, 1962 is relevant to deal with this ground of appeal. To look at a transaction, or even a set of transactions, outside the framework of Customs Act, 1962 while authorized only to work

within it, poses the hazard of missing the wood for the trees. Commitment to public interest, such as it is, grants neither the jurisdiction nor the capacity for sufficient comprehension of business strategizing to pontificate on the sensibility of a business decision. The taxing statute, with its limited and oft repeated objectives, does not confer that either.

19. The reviewing authority has saddled the importers with the onus that the adjudicating authority, rightly, had placed on the investigation to compute the monetary significance, or lack thereof, of contractual obligations devolving on M/s Global Suppliers (UAE) by reiterating the same facts and inferences therefrom as in the notice. There was no requirement either for the adjudicating authority to fill the gaps in a notice owing to which the reviewing authority was restricted inferences drawn upon from facts in the notice that had been erroneously dealt with in the impugned finding; there is no reference to facts in this ground of appeal.

20. In what amounts to testing of judicial tolerance, as set out by the Hon'ble Supreme Court in *Union of India v. Kamalakshi Finance Corporation Ltd*, the reviewing authority has challenged the reliance placed by the adjudicating authority on decisions of the Tribunal with virtually a 'war cry: of resistance thus

'6.8 The Adjudicating Authority has relied in para 5.7.1 and 5.7.2 of the OIO, on the Hon'ble CESTAT, Mumbai's Order in Customs Appeal No. 87758/2017 in case of Commr of Customs, Import Vs. M/s Adani Power Maharashtra Ltd And Ors. And Order in Customs Appeal No. 85473 of 2018 in Commr of Customs (Import) V/s Maharashtra Eastern Grid Power Transmission Company Ltd. (MEGPTCL) and Ors.

It is seen that as per judicial jurisprudence, the cases mentioned above can be relied upon only If they are or similar to the matter at hand. Though both are overvaluation cases, it is not necessary that they are identical or similar to each other in respect to the same legal and factual background, The Adjudicating Authority has nowhere mentioned this aspect or adduced evidence to show that both the above cases are identical or similar to the impugned case at hand. It is seen that the contract awarded in both the cases viz. M/s. Adani Power Maharashtra Ltd. and M/s. Maharashtra Eastern Grid Power Transmission Company Ltd. were after following the International Competitive Bidding process and the lowest bidder was awarded the contract. Further, in case of Maharashtra Eastern Grid Power Transmission Company Ltd., it was seen that it was a Special Purpose Vehicle formed through a joint venture between Adani Enterprises Ltd. (AEL) holding 74% of the share-holding and Maharashtra State Electricity Transmission Company Ltd. (a Govt. of Maharashtra of Maharashtra Enterprise) holding the balance 26%. In case of the Essar group and the supplier GSF, they were all private entities and were also related to each other. There is no dispute on this fact which has also been confirmed by the Adjudicating Authority in the Order-in-original. Further, as explained in para 20 of the SCN, many similarities and commonalities have been mentioned in contracts between GSF with various OEMs and GSF with the importers (Essar

Group companies) in India, which has been ignored by the Adjudicating Authority.

It is pertinent to mention here that in case of Uttam Galva Steels Ltd. Hon'ble High Court (Appeal No. E/85253/14-Mum-Order No A/3339-3344/15/EB dated 06.10.2015) had passed an Order wherein it had refused to blindly follow the Hon'ble Supreme Court judgement in case of Super Synotex (CCE Vs. Super Synotex (India) Ltd. 2014 (301) ELT 273(SC)) and had given due regards to the facts of the case and provisions of law, and thereafter given a contrary-decision. Hon'ble High Court in this Order held that- "We therefore agree with the submissions of the learned senior counsel Shri V.S. Nankani as also all other counsels and do not find substance in the submission made by the learned Commissioner (AR) that issue is already decided by Hon'ble Supreme Court in the case of Super Synotex,"

Further, in case of Ashwani Kumar Singh Vs. U.P. Public Service Commission (AIR 2003 SC 2661), the Hon'ble Supreme Court held that reliance on a decision cannot be placed without discussing whether it was rendered in the same factual and legal background. Similarly, Hon'ble Supreme Court in Megh Singh vs State of Punjab (AIR 2003 SC 3184) has held, "Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect."

Thus, in view of the above, it appears that the Adjudicating Authority has erred in relying on the Hon'ble CESTAT, Mumbai's Order in Customs Appeal No. 87758/2017 in case of Commr of Customs, Import Vs. M/s. Adani Power

> *Maharashtra Ltd. And Ors. and Order in Customs Appeal No. 85473 of 2018 in Commr of Customs (Import) V/s Maharashtra Eastern Grid Power Transmission Company Ltd. (MEGPTCL) and Ors to decide this SCN without adducing evidence to show that both the cases are similar or identical.'*

and we do not propose to dilate further on the citations therein solely for dignifying a perverse suggestion.

21. The Tribunal, in *Knowledge Infrastructure Systems Private Limited v. Additional Director General, Mumbai [2018 (6) TMI 1164-CESTAT MUMBAI],* did rule on one aspect of the present proceedings while another was dealt with in *Commissioner of Customs (Import), NS-III, Raigad v. Adani Power Maharashtra Ltd [(2023) 3 Centax 169 (Tri-Bom)]* and the proposition of distinguishment on the basis of manner of award of contract or commonalities of 'back-to-back' contracts of the intermediary with have no bearing on the principle of law settled therein. These submissions do not advance the cause pressed in the review for discarding judicial precedent that did influence the adjudicating authority. More so, in the light of its binding nature, despite efforts to have these overturned or revisited, thus

> *'117. Another important issue that arises for consideration in this appeal is as to whether the goods can be held liable for confiscation under section 111 (d) and (m) of the Customs Act when there is no case of short levy of duty and assertion that the goods were prohibited in nature. The respondents have relied upon the decision of the Tribunal in Knowledge Infrastructure*

Systems Private Limited v. Additional Director General, DRI 2019 (366) ELT A95 (Tri.- Mumbai), wherein Tribunal held as follows:

> *"Confiscation under section 111 of Customs Act is not an end in itself but has to be in respect of dutiable or prohibited goods barring a few exceptions. Even in case of exception to prohibited/dutiable goods, it is breach of Customs Act which attract confiscation. For confiscation under section 111(m) ibid there is no judicial approval of proposition that goods be held liable for confiscation without nexus with collection of duty and enforcement of prohibitions or without breach of the machinery provisions for safeguard of revenue and prevention of smuggling."*

118. Learned special counsel for the appellant submitted that the decision of the Tribunal in Knowledge Infrastructure was delivered without considering the past decisions and properly appreciating the provisions of the Customs Act and this decision is also under challenge before the Supreme Court. It needs to be noted that in early hearing application, the department opposed the prayer for an early hearing for the reason the decision of the Tribunal in Knowledge Infrastructure is applicable to the facts of this case.'

and, though undeliberated therein owing to

'119. However, as the allegation of over-valuation has not been established, it is not necessary to examine this aspect.'

the changed circumstances, occasioned by

'It is pointed out before us that Civil Appeal Diary No.21189/2021 already stands dismissed as withdrawn on 27.09.2021.

Out of two connected matters, one of them is not on Board before us today which is mentioned in the Office Report i.e. Civil Appeal Diary No.21188/2021. Civil Appeal Diary No.2188/2021 is taken on Board.

The current matter and Civil Appeal Diary No.21188/2021 are dismissed as withdrawn leaving the question of law open.

We appreciate the stand taken by the Government in not entering into futile litigation. The appeals are dismissed as withdrawn accordingly.'

in order[4] of the Hon'ble Supreme Court, in *Additional Director General, Mumbai v. Knowledge Infrastructure Systems Private Limited*, precludes such stand on behalf of appellant-Commissioner here.

22. Learned Special Counsel intimated that, even as the impugned order found no quarrel with the proposition of 'relationship' between 'vendor on record', M/s Global Supplies (UAE), FZE and the several respondents in the two sets of appeals, the conclusion of the adjudicating authority on conformity of declared value with the template in section 14 of Customs Act, 1962 fails the test of logic. He implied, thereby, that the relationship, as established, when concatenated with 'markup' over the price charged on the related supplier by the original manufacturer sufficed for affirmation of proposal to invoke rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as prelude to discard of declared price with consequences, as set out therein, to follow in the manner proposed in the notices. He contended that the adjudicating authority

[4] [order dated 24th January 2023 in civil appeal no. 1666/2020]

had, wrongly, lent credence to the objection of the noticees that lack of specific identification from among the enumerations of ‘questionable relationship’ in the Rules sufficed to ignore the consequences of the established relationship inasmuch as the notice did highlight (iv), (vi) and (viii) of rule 2 therein.

23. It was further contended by him that the condoning of error, upon claim of the respondents during adjudication, in not notifying customs authorities of the relationship, as set out in the notice, was improper as the consequence of non-disruption of declared value was prejudicial to the interests of the State. He submitted that the adjudication order had failed to take note of the criticality of this deficiency which, in the light of circular[5] of Central Board of Excise & Customs (CBEC), had precluded reference to ‘special valuation branch (SVB)’ that would have enabled customs authorities to prevent the consummation which benefitted the importers. He argued that the adjudicating authority had, in repetition of a pattern, wrongly inferred that the notice failed to establish that the relationship, not overtly disowned, had influenced the price of the transaction inasmuch as the notices could not be any more clear on such cause and consequence. To buttress this contention, he highlighted the contents of ‘back-to-back’ contracts, *viz*., between manufacturers and M/s Global Supplies (UAE), FZE as well as between the latter and the respondents, for demonstrating the chronological, as

---

[5] [circular no. 5/2016-Cus dated 9th February 2016]

well as substantive, similitude of contractual emendations thereto across the imports.

24. According to Learned Special Counsel, the prices, both as factually uncontested and in magnitude of inflation, on the two legs of ‘back-to-back’ contracts, cannot be ignored and he contended that the intermediary was insinuated with *mala fide* intent. He pointed out that the show cause notice, reflecting the painstaking and meticulous investigation covering a set of documents obtained from banks of the intermediary and correlation of the two – that filed for customs assessment in India and that recording the transaction of ‘original equipment manufacturers (OEM)’ with common vendor on record – for each of the importers through bills of lading issued by the shipping company for contracted direct delivery in India, could only have had one consummation, *viz*., resounding approval of the several proposals therein. For our benefit, he surveyed the several documents that had been relied upon and the scheme of valuation that accorded legitimacy to the charge of commission of offence, *i.e.*, misdeclaration of value, owing to which the goods were liable to confiscation under section 111(d) and section 111(m) of Customs Act, 1962.

25. Learned Counsel for respondents set out the context for the several grounds of appeal to contend that these had no bearing on the principal issue in dispute: that the buyer and seller were related and that

this relationship had influenced the price in the transaction which, in terms of rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, was of essence to discard the value in the bills of entry before proceeding to determine the appropriate 'surrogate value', albeit sequentially, from among the options in the Rules. He pointed out that impugned order was unambiguous in holding that the determination of relationship was vague inasmuch as conformity with the specific of 'questionable' permutation was not apparent in the notice. He submitted that the adjudicating authority had also, with reference to the evidence marshalled in the notice, concluded that the all too inalienable essentiality for discard of declared value, *viz*., of price having been influenced by the relationship, was not established. He argued that the appeal, at the instance of the Chief Commissioners of Customs, does not venture to suggest either specifics of relationship from among those enumerated or the existence of evidence of price having been influenced thereupon. He even went on to suggest that the absence of reference to any judicial decisions or of deliberations at the 'high table' made manifest in directives to the several customs houses should even point to the intent of the said framework in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for ensuring that appropriate duties of customs were not withheld from the exchequer by masking the 'true value' of imported goods through dubious device of related intermediary with no fiscal detriment of consequence to the importer.

26. He contended that the notice, and the grounds of appeal, were founded on an exercise that was of no consequence to the exchequer, as evident from the absence of recourse to section 28 of Customs Act, 1962, and that any other purpose, unarticulated and, more so, from that very deficit, is foray into jurisdiction beyond Customs Act, 1962. He further argued that, on behalf of Revenue, this aspect was brought up before the Tribunal, in *re Knowledge Infrastructure Systems Private Limited*, and the portrayal of the insertion of 'value', by amendment[6] in section 111(m) of Customs Act, 1962 as intended to confer jurisdiction, independent of assessment under section 17 of Customs Act, 1962, for 'appraisal of value' as weapon to confiscate under section 111 of Customs Act, 1962 did not, for reason of any authentic provenance for such submission being unavailable, find favour. According to him, that discard of the sole ground for appropriation of jurisdiction – other than the two, of collecting duties on imported goods and of preventing goods that were under prohibition from being imported - raised questions about the scope for turning machinery provisions for assessment into an instrument for deprivation of ownership permitted, by law, only as consequence of the machinery provisions being deployed for ensuring that duties as prescribed in law are not withheld from the exchequer.

[6] [Act no. 36 of 1973]

27. The scheme of valuation, as set out in the extant Rules, is for the price to be the transaction value and, thereby, the value for assessment where duties of customs are to be charged on the basis of value. The optimal description of acceptable price, in rule 3 of Customs Valuation (Determination of Value of Imported Goods Rules), 2007, is also considered to be the default, save for any additions pertaining to costs and services related to the imported goods warranted by rule 10 of Customs Valuation (Determination of Value of Imported Goods Rules), 2007, except in two specified and mutually exclusive circumstances, *viz*., transaction between related parties with the relationship having influenced price or upon discard by recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, permitting substitution with ‘surrogate value’ by sequential application of rule 4 to rule 9 therein, as the ‘gold standard’ of ‘transaction value’, as the governing concept, had been elevated to the substance itself in, with amendment of 2007 to, section 14 of Customs Act, 1962. Therefore, just as additional consideration transmitted to seller permits recast of ‘price’ as enhanced substitute so would the amount, to the extent of evidenced flowback yielding returns to the buyer directly and surreptitiously or as indirect benefit, depress the assessable value clearly within the ambit of rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Beyond that, recourse to rule 3 therein is not tenable.

28. The impugned notice has made no suggestion, let alone offered evidence, of flowback to the importers to warrant reduction in declared value. Nor is there a suggestion in the grounds of appeal that crucial evidence of such flowback has been overlooked by the adjudicating authority. Recourse to rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in the absence of evidence suggesting flowback, to depress the price is not sustainable. The adjudicating authority has posited conversely, *viz*, recourse, as mandated in rule 3(4) and upon discard of declared price in circumstances envisaged in rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, was not had to 'transaction value' of 'identical' or 'similar' goods of which there is no whisper in the show cause notice let alone of 'computed' value or 'deductive' value set out in rule 7 and rule 8 therein. The finding in the impugned order that the failure, thereby, to carry through the consequence of discard under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 discredits the discard cannot be faulted.

29. *Per contra*, the re-determination, by adoption of price, truncated to the extent of 'unacceptable value addition' in the 'document chain', is tantamount to freezing the 'consideration chain' at a stage prior to the last in the billing for the very goods under assessment; it is neither in accord with 'surrogate value' drawn from other legitimate

transactions permitted to be appropriated for re-assessment by recourse to rule 4 to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 nor ‘depressed’/ ‘enhanced’ consideration for the goods under assessment permitted by rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The ‘transaction value’ in rule 4 therein is intended to be drawn from consignment of ‘identical goods’ which ‘goods under assessment’ is not and the ‘price’ of ‘goods under assessment’ is alterable only in the manner permitted in rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Synthesis of the two has neither approval in law nor precedent of judicial determination. Arbitrary curtailment of ‘price’ of ‘goods under assessment’ has no place in the contemporary scheme of valuation and is, for that very reason, cause for the *precis* of the findings in the impugned order adumbrated *supra*; that, with valuation scheme, having evolved as an international distillation of national experiences in assessment over the years, it is not be allowed to regress to those days of unfettered discretion that held sway.

30. That the present exercise in the show cause notices was, indeed, such throwback to the ‘neanderthal’ prototype preceding the General Agreement in Trade and Tariffs (GATT) valuation, and even the Brussels Definition of Value (BDV), is evident from

> *'14(1) For the purposes of the Indian Tariff Act, 1934, 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-*
>
> *(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 buyer and seller have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale;*
>
> *(b) where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with rules made in this behalf*
>
> *XXXXXXX'*

in section 14, as at the time of enactment of Customs Act, 1962, and before some form of semblance to the extant scheme of valuation was brought about by Customs (Amendment) Act, 1988 with substitution by

> *'14(1) For the purposes of the Indian Tariff Act, 1934, 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 buyer and seller have no interest in the business of each other and the price is the sole consideration for the sale or offer 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.*

XXXXXXX'

under which authority the detailed, and comprehensive, Customs Valuation (Determination of Price of Imported Goods) Ruled, 1988 came to be notified for the beginning of structured valuation regime that eventually evolved into what we have today.

31. In those tentative days and to give effect to original concept of 'value', Customs Valuation Rules, 1963 were notified and it was in

> *'……*
>
> *(b) If the value cannot be determined under Cl. (b), it may be based on the value at which such goods or comparable goods produced or manufactured by the person who has produced or manufactured the goods to be assessed are ordinarily sold or offered for sale under competitive conditions to buyers in countries outside India… '*

of rule 3 therein that authority for methodology adopted in the notice and espoused in the grounds of appeal may be found to exist. Not too regretfully, that has been consigned to the archives only to be occasionally recalled, and though maybe nostalgically by customs authorities of an ilk, by others for reflecting on what once was to measure advances in seamless international trade made since then. Be that as it may, such enlarged authority does not exist anymore and that the said Rules have been overhauled, not once but twice, during the last six or so decades should be caution enough to preclude such adventurism of regressive time travel. Moreover, that most elastic of prescriptions for 'surrogate value' does, with the express bar of

> *'(2) No value shall be determined under the provisions of this rule on the basis of*
>
> *……*
>
> *(v) the price of the goods for export to a country other than India;*
> *…….'*

in rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 precludes resort to the price payable or paid by M/s Global Supplies (UAE), FZE to 'original equipment manufacturers (OEM)' and, who being based in another country, renders that price to be for export to them.

32. The grounds of appeal, to the extent concerned with justifying non-applicability of the leading judgements on disputes about overvaluation before the Tribunal, are not to be dignified by being even taken into consideration. To do so would be at the cost of judicial discipline and to the detriment of the responsibility assigned, especially on valuation and classification, to the Tribunal in the appellate hierarchy of national jurisdiction. The attempt by a subordinate executive authority to have the findings therein re-considered, after the Central Government withdrew its appeal in one and lost its appeal in the other, is not in keeping with the finality attributable to judicial determination. Both in the normative of business operations as well as in interpretation of laws, individuals may have, and are entitled to, their

own opinion but to graft that viewpoint as institutional thinking is disservice to the institution of which they are custodians for a time as well as unacceptable from a tax administrator created by, and bound within, a taxing statute.

33. The scheme of valuation does not stand in support of the manner in which the value has been sought to be substituted in the notice. The facts evinced are not sufficient to tear down the weave of commercial engagement and for recourse, thereby, to discard of declared value. The mark-up is not of such unreasonable magnitude as to suggest that transaction should be penalized for obfuscation. Even without pressing into service the law, as judicially determined, on jurisdictional competence and on evidentiary value of documents for visiting penalties on the respondents under Customs Act, 1962, and as found in the impugned order too, the facts alone suffice to erase the proposals in the notice.

34. In the facts and circumstances, as set out *supra*, we find no merit in this appeal, seeking the impugned order to be set aside, and is, accordingly, dismissed.

(Order pronounced in the open court on 03/04/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*