

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87396 OF 2013

[Arising out of Order-in-Appeal No: 216/MCH/ADC/SVB/2013 dated 18th March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Coco Cola India Pvt Ltd

1107-1110 Pirnagut, Tal: Mulshi, Pune

... Appellant

versus

Commissioner of Customs (Import)

New Custom House, Ballard Estate, Mumbai - 400001

...Respondent

APPEARANCE:

Shri Jitendra Motwani and Ms Diva Devarsha, Advocates for the appellant

Shri D S Maan, Joint Commissioner (AR) for the respondent

CORAM:

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

HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85859/2025

DATE OF HEARING:

04/12/2024

DATE OF DECISION:

03/06/2025

PER: C J MATHEW

M/s Coco Cola India Pvt Ltd is before us with the grievance that
the ‘purported’ direction of Additional Commissioner of Customs

(Import) for loading twenty percent on value of ‘PowerAde’, procured from M/s Coca Cola Southern Africa Pvt Ltd, South Africa, merely on ground of having been transacted with related party, and limited only to four consignments, cleared against bills of entry no. 766487/29.07.2010, no. 808236/27.08.2010, no. 804018/25.08.2010 and no. 855986/22.09.2010, was upheld in order¹ of Commissioner of Customs (Appeals), Mumbai – I without considering their submissions.

2. We have heard Learned Counsel and Learned Authorized Representative. It is common ground that the imported goods were intended for free supply during the Commonwealth Games 2010 at New Delhi and that the order impugned before the first appellate authority was direction, containing several stipulations and *caveats*, to the assessing group and in much the same manner as ‘additional duty deposit’ is prescribed, upon scrutiny by ‘special valuation branch (SVB)’, for specified period.

3. From the order impugned before the first appellate authority, it may be observed that the enhancement of 20% over the declared value was directed on the finding of alleged relationship between supplier and the importer. Two aspects militate against its acceptability: exercise of empowerment to assess under section 17 of Customs Act, 1962 and the stipulations which strip the assessment of certainty. The disposal of

¹ [order-in-appeal no. 216/MCH/ADC/SVB/2013 dated 18th March 2013]

the appeal by the first appellate authority would have been appropriate had final assessment of imported goods under section 17 Customs Act, 1962 been in dispute; the consequence of direction for enhancement is not evident either as determination of duty under section 17 of Customs Act, 1962 or as finalization of provisional assessment under section 18 of Customs Act, 1962.

4. The scope of ‘directions’ of ‘special valuation branch (SVB)’ in assessment had been dealt with by the Tribunal in *TBK India Pvt Ltd v. Commissioner of Customs (Import), Mumbai* [2023 TAXSCAN (CESTAT) 1281] and it was held that

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

‘14. (1) For the purposes of the Indian Tariff Act, 1934, or any other law for the time being in force hereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be –

(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale;

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

.....’

of Customs Act, 1962 governed determination of assessable value with recourse to Customs Valuation Rules, 1963 and rule 3 therein having permutations - of same manufacturer selling goods to other

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

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

below rule 3 of Customs Valuation Rules, 1963.

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

'8. If the value of the imported goods cannot be determined under the foregoing provisions, the proper officer shall, after taking into account all relevant material which he has gathered, determine the value to the best of his judgement.'

in Customs Valuation Rules, 1963 not only afforded wide latitude to officers of Customs but also epitomized the broad construction that could be placed on the several provisions in the scheme in stark contrast with the ordered and definitive engagement engendered by the later sets of rules. In an era of rudimentary communication systems with little transnational interface, mostly manual functioning and limited staffing, existence of a specialized establishment, for undertaking scrutiny of transactions among related persons or where value of services was to be determined, is attractive. Availability of information at their fingertips or 'work desks' eliminated that supplement but it's continuance could only have been of assistance in assessment. We emphasize particularly on assistance because the 'proper officer' must reign influenced if assessment is to responsible and responsive. Though Special

Valuation Branch (SVB) may advise and recommend, any direction or mandate to assess in a particular way or to issue notice for recovery is anathema to adjudication that assessment, effectively, is whether under the earliest Rules for operation of section 14 of Customs Act, 1962 or the subsequent ones.

11. *Surely, there can be no misgivings that supervisory authorities in customs formations would misconstrue such advisory role of Special Valuation Branch (SVB) as oversight of 'proper officer' under section 17, section 18 or section 28 of Customs Act, 1962 for that would be at cross-purposes with the law. In such circumstances, there is no leeway for misapprehension among importers that the frailty of any expression deployed in the report of Special Valuation Branch (SVB) should be perceived to their detriment except until actually employed upon some import effected by them. That would be premature reaction save in circumstances of pre-emptive action on the part of officialdom. This is the time to examine the facts and circumstances of the present appeal remanded back to the Tribunal by the Hon'ble High Court of Bombay.*

12. *M/s TBK India Pvt Ltd challenges order-in-appeal no. 400/MCH/AC/SVB/2012 dated 5th July 2012 of Commissioner of Customs (Appeals), Mumbai Zone – I which has included 'royalty' and 'lumpsum fees' in the assessable value of imports effected by them from a related person, M/s TDK Toshiba Limited, Japan. The original order dated 2nd February 2006, accepting the invoice value, came up for review on expiry of three years and renewal thereof, in order of continuance for a further period of three years, was sought to be quashed in appeal filed on behalf of the jurisdictional Commissioner of Customs who had proceeded in the manner permitted in section 129D (2) of Customs Act, 1962 and presumably on the supposition that the official in the Special Valuation Branch (SVB) had undertaken adjudicatory function*

vested in 'proper officer' intended by section 17 or section 18 of Customs Act, 1962. The finding of the first appellate authority, who ordered the addition of royalty of 3% and 5% of the selling price along with the lumpsum fees of ₹ 14,000,000, is cause of grievance to the appellant.

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

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

15. *The internal procedures for providing expert consultation to the statutorily empowered assessing officers, even if of long standing existence, do not vest the institution, established by executive fiat for such purpose, with the same statutory empowerment; notwithstanding, the arrogation of direction, one way or the other, by the Deputy Commissioner, Special Valuation Branch (SVB), its recommendatory character cannot be elevated to that of an order in the absence of statutory support. In keeping with the tentativeness of the findings of this internal advisory mechanism, assessments, guided by the findings, are retained as provisional, under section 18 of Customs Act, 1962, till finalization on a future date. It is that potential as a trigger for resort to provisional assessment that is impugned here. As on the date of the order-in-appeal imposing the guideline, no import had been subject to it. Nor is there any record of any detriment to importers thereafter and, if an irreversible detriment had been imposed, appeal would have been resorted to as surely as night follows day. Customs Act, 1962 is concerned with levy of duty, as well as the enforcement of prohibitions, under law, on import/export goods. Other consequences such as differential duty, refund, drawback, fines and penalties may arise but only in consequence. The possible detriment that may arise on a future date is not a grievance that should be entertained unless and until it does translate as one upon occurrence of import or export of goods. We do not interfere with proceedings under section 18 of Customs Act, 1962 except if terms of such assessment is a cause of grievance. Even so, no incidence of provisional assessment is impugned before us either. We are also not vested with authority to approve or disapprove an 'advance ruling' which has yet to place burden on goods under Section 46 of Customs Act, 1962.*

16. *Further, for the Tribunal to render a decision on goods that are, as yet provisionally assessed, would be a premature intervention. The time of finalization that should inevitably take*

place is also, as yet, uncertain. It is also apparent that procedure does not deter the finalization of an assessment for want of decision by the Tribunal or, should such need arise, by the Hon'ble Supreme Court. In other words, the internal process of the customs administration that enables the proper officer, under section 17 or section 18 of the Customs Act, 1962, to be assisted in the discharge of the statutory obligation and, which, legally, may not even bind the proper officer does not merit our attention. To the extent that we accord approval or disapproval at this stage, we would be appropriating the exercise of powers under section 18 of Customs Act 1962 for finalization of the assessment to ourselves and, thereby, would also erase one level of remedial jurisdiction that would, otherwise, be available to either side. This, in our view, is not the intent of section 129A of Customs Act, 1962. Therefore, it is not within the jurisdiction of the Tribunal to exercise the options in section 129B of Customs Act, 1962.

17. Chapter XV of Customs Act, 1962 contains the design and hierarchy of appeals and that entrusted with Commissioner of Customs (Appeals) is one of the sources of appellate jurisdiction of the Tribunal. The same hesitancy that informs our jurisdictional dilemma attaches also to the first appellate authority. The first appellate authority should also have similarly desisted from intervening before any provisional assessment had been finalised. The impact of the impugned order has been to transfigure a final assessment of the future to provisional assessment at the instance of the Commissioner of Customs. Any grievance arising from finalization does have appellate remedies commencing with the first appellate authority. It is only then that appellate jurisdiction commences existence. The first appellate authority should have dealt with the appeal, at the behest of jurisdictional Commissioner of Customs, within such circumscribing and passed such order as is legal and proper for disposal of appeal. Notwithstanding the lack of appellate recourse, that the jurisdictional Commissioner of

Customs opted for review does not fall within our empowerment, or that of Commissioner of Customs (Appeals), to prevent; but it is certainly within empowerment to render appropriate disposal in terms of our exposition on the true nature of Special Valuation Branch (SVB) supra.’

5. The order impugned before us has not considered the root issue of jurisdiction to entertain such appeal. That the Tribunal is itself lacking in jurisdiction, as set out *supra*, divests the jurisdiction of the first appellate authority. Determination of jurisdiction on facts was a necessary preliminary for moulding the outcome of appeal appropriately. The lack thereof warrants setting aside of the impugned order for remand back to the first appellate authority to enable appropriate disposal thereof on the submissions made by the appellant herein on circumstances leading to the grievance.

6. Appeal is allowed by way of remand.

(Order pronounced in the open court on 03/06/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)