

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89737 OF 2013

[Arising out of Order-in-Original CAO No: 103/2013/CAC/CC(I)/AB/Gr.VB dated 30th August 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Nootan Enterprises

Khatriwad, Nr Ratiakuva Chikhli, Navasari, Gujarat

... Appellant

versus

Commissioner of Customs (Import)

New Custom House, Ballard Estate, Mumbai - 400001

...Respondent

WITH

CUSTOMS APPEAL NO: 89738 OF 2013

[Arising out of Order-in-Original CAO No: 103/2013/CAC/CC(I)/AB/Gr.VB dated 30th August 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Piyush Jayntilal Khatri

Nootan Enterprises Khatriwad, Nr Ratiakuva Chikhli,
Navasari, Gujarat

... Appellant

versus

Commissioner of Customs (Import)

New Custom House, Ballard Estate, Mumbai - 400001

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CUSTOMS APPEAL NO: 89739 OF 2013

[Arising out of Order-in-Original CAO No: 104/2013/CAC/CC(I)/AB/Gr.VB dated 30th August 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Nootan Enterprises
Khatriwad, Nr Ratiakuva Chikhli, Navasari, Gujarat *... Appellant*

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 *...Respondent*

AND

CUSTOMS APPEAL NO: 89740 OF 2013

[Arising out of Order-in-Original CAO No: 104/2013/CAC/CC(I)/AB/Gr.VB dated 30th August 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Piyush Jayntilal Khatri
Nootan Enterprises Khatriwad, Nr Ratiakuva Chikhli,
Navasari, Gujarat *... Appellant*

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate, Mumbai - 400001 *...Respondent*

APPEARANCE:

Shri Stebin Mathew, 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: 85848-85851/2025

DATE OF HEARING: 03/12/2024
DATE OF DECISION: 02/06/2025

PER: C J MATHEW

M/s Nootan Enterprises is aggrieved by the rejection of ₹

2,45,26,645, declared as price for import of 33,90,074 pieces of 'remote control devises' and 'EHT and FBT transformers', vide 22 bills of entry between 29th July 2008 and 26th February 2010, as assessable value and enhancement to ₹ 7,82,13,475 by recourse to rule 3 and rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, owing to which differential duty of ₹ 1,41,57,093 was fastened on them under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, besides imposition of penalty of like amount under section 114A of Customs Act, 1962. Shri Piyush Jayantilal Khatri is also in appeal against imposition of penalty of ₹ 25,00,000 under section 112(a) of Customs Act, 1962 following the finding that the impugned goods were liable to confiscation under section 111(d) and 111(m) of Customs Act, 1962. Likewise, duty liability of ₹ 11,61,644 in relation to imports against four bills of entry and the goods imported bill of entry no. 943214/13.04.2010 is assailed.

2. Learned Counsel for appellant submitted that the determination of 'surrogate value' under rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 was in breach of provisions thereof as the revised value was adopted by relying deposition of the second-appellant herein as also the *proforma* invoices, quotations and correspondence affirmed therefrom. It is contended that these evidences of 'under the radar' negotiations

reflecting the actual value required affirmation under section 138C of Customs Act, 1962 and, therefore, was lacking credibility for re-determination. It is also submitted that the statements recorded from the other appellant had all been retracted immediately on 21st June 2011 and that all, including the three prior ones, had been obtained by coercion. It was contended that the documents relied upon in the impugned order, such as they were, were inveigled into the narration and connecting the dots to portray 'conspiracy' to undervalue, to corroborate the contents of the statements deployed. It was contended that from lack of circumstances enumerated as envisaged by section 138B of Customs Act, 1962, precluding relevance without 'cross-examination', the enhancement therefrom did not bear any credibility. It is also contended that the 'market survey', relied upon thus

'41. A study report prepared by SIIB, New Custom House, Mumbai as a result of investigation based on market survey relating to Remote Control has been relied upon by the noticee which shows value of the remote control with populated PCB (with IC) or mounted PDB at Rs. 19/- and that of populated PCB (with COB) or mounted PCB (with COB) at Rs. 17.50. I have gone through the said study report dated 14.10.2010 and find that the values arrived therein is the result of market survey undertaken at that relevant time. Further as per endorsement on the report, the above values arrived at are probable assessable values for Customs purpose and minimum values for unbranded remote control and their parts. It has also been remarked that the values would vary with the utility of the remote control. The report is amply clear about the fact that the values reflected

therein are representational of the market survey conducted and would differ from device to device depending on their use and utility. No reliance can hence be placed on this report for deducing the values of the impugned goods since in the present case it has been proved that the noticees had indulged in undervaluation for goods for evasion of Customs duty. The investigation has unearthed evidences in this respect and redetermined the transaction values based on the price quotations, proforma invoices, quotations from the noticee's email address. Once the true transaction values of the impugned goods have been arrived upon, there is no point in referring to the study report relied upon by the department.'

in the impugned order, is without authority of rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

3. It was submitted that the decision of the Tribunal, in *Saregama India Ltd v. Commissioner of Customs, Airport, Mumbai [2017 (345) ELT 236 (Tri. - Mumbai)]*, holding that

'7. It should be abundantly clear from the Rules that Rule 9 is to be invoked for adjusting the declared value to reflect the components specified therein to reflect the transaction value to be adopted for assessment. Impliedly, the declared price is accepted and subjected to the adjustments when invoking Rule 9. On the contrary, with the rejection of declared price under Rule 10A, the transaction value under Rule 4 becomes irrelevant and, in accordance with Rule 3, the provisions of Rule 5 to 8 are to be applied sequentially. Therein lies the nub in the present dispute the declared price is sought to be rejected under Rule 10A without taking it to its logical conclusion as prescribed in Rule 3 and, instead, the very same rejected price is sought to be adjusted

by adding the 'royalty' component as provided in Rule 9 which applies only to the transaction value in Rule 4. On this ground alone, the entire proceedings would fail.

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11. *Considering the above factual matrix and on a perusal of the licence agreements, we note an omission in the issues framed for determinants by the adjudicating authority. The agreement are for sale of feature films (or 'motion picture' to assign it an appropriate description) in India after replication. It is not in dispute that media in the form of 'master tapes' have been imported and declared under the appropriate tariff heading for determination of rate of duty. The media also contained the 'motion picture' produced by, and belonging to, the contracting studios. Those 'motion pictures' have an identity in their own right arising from existence on multiple media without in any way compromising the product itself or its value to the intended consumer. Undoubtedly, destruction or damage to the storage media destroys or damages the 'motion picture' contained in it, the picture itself, however, is not erased out of existence. Indeed, as recorded in the impugned order, the 'motion picture' can be re-sent should the need arise. And it is the motion picture that the viewing public has in mind with reference to the product - and source of revenue to render the production venture viable. Therefore, resolution of issues framed by the adjudicating authority is not possible without determining whether 'motion pictures' is goods in its own right and independent of the media that is used for storing it. Conceptually, the impugned order is placed in jeopardy for presuming without a finding, that 'motion pictures' as consigned to the appellant-importer is dutiable within the meaning of Section 12 of Customs Act, 1962. The manner in which the Hon'ble Supreme Court arrived at the decision in re Associated Cement Companies that 'ideas*

embedded on paper or disks' are dutiable is a clear pointer to the direction that the adjudication should have taken but did not.

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13. Appellant had contended before the original authority that the import is that of a recorded storage media. They, avoiding our flight of fancy, imply that the drama emoted on screen by some of the idols of the modern world came to be confirmed within the material of the media itself and that the 'motion picture' carried on it is not subject to duty. Unlike drawings, etc., of Chapter 49 of the First Schedule of the Customs Tariff Act, 1975, there is no obvious entry therein for classification 'motion pictures.' Learned Special Counsel for Revenue has invited attention to Circular No. 86/2002-Cus., dated 12th December, 2002 in which the Central Board of Excise & Customs has referred to applicability of Rule 9(1)(c) of Customs Valuation Rules with the rescinding of exemption notification that had limited duty only to cost of print and cost of freight on imported cinematographic film; its context hardly advances the cause of deeming a 'motion picture' to be inseparable from the media which carries the 'motion picture'. That 'cinematographic films' are goods is not in doubt and, with motion pictures no longer transported in cinematographic films, that 'betacam' tapes are also goods subject to customs duty is not in doubt. The adjudicating authority has, on more than one occasion, referred to 'exploitation rights' of the material in the media. Impliedly, the transaction between the owner of the 'motion picture' and appellant-importer incorporates 'exploitation rights' and, from the contracts, it would appear that the agreement is of, and for, rights. 'Motion pictures' are protected by copyright laws that restrict, viewing, distribution and transmission to those who remit copyright fees. Normally, these are a component of the 'box office' receipts or included in the price sold in 'home viewing

format.’ Unlike patented product whose royalty is determined by negotiation, the breadth of consumer market of ‘motion pictures’ would required a prior fixation includible in the collection fee or market price. The adjudicating authority was prepared to accept that ‘reproduction rights’ is one of the components in the contracts but was unwilling to be influenced by that acknowledgement owing to the purposeful pursuit of adding royalty to the value of the imported goods. It is not the ‘motion picture’ that is the sold in any transaction but the rights to the motion picture to a limited or larger extent. Consequently, it would not be in accordance with law to hold that a value must needs be assigned to the contents of the tape/stamper that is imported. In the absence of any cogent arguments by either side that could assist us in reading the nature of ‘motion picture’ we take note of the levy of service tax on temporary transfer of copyright in ‘motion pictures’ which has been tested for ultra vires in the Hon’ble High Court of Madras in AGS Entertainment Pvt. Ltd. v. Union of India [2013 (32) S.T.R. 129]. Being a service, it is subject to tax when rendered by an overseas provider to recipient in India under the Taxation of Services (Provided from Outside India and Received in India) Rules, 2005. Transfer of copyright in ‘motion pictures’ is, thus, a service which, though taxable only with effect from 1st July, 2010 when Section 65(105)(zzzzt) was incorporated in Finance Act, 1994, does not detract from its non-classifiability as goods for assessment under Customs Act, 1962.

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17. *In the present dispute, it is the import of ‘master tapes’ that are to be replicated for sale for which duty is assessed. The products manufactured thereafter are the subject of royalty payments to the overseas entities. The dispute in re Living Media Ltd. is about pre-recorded discs imported into the country with*

royalty payable on the sale of the imported products. The substantive difference between the two is that the 'master tapes' imported by the appellant before us is not the subject of royalty but the pre-recorded media made from these imported goods are. For this reason, the decisions sought to be relied upon by Revenue do not apply to this dispute as also the decisions in re Star Entertainment Ltd. and re Indo Overseas Films for reasons stated supra.

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19. The decision in re Essar Gujarat Ltd., therefore, does not impact upon such imports which can draw a distinction between royalty on goods imported and royalty as a post-importation condition. Of particular import are the propositions that mere existence of royalty clause in a contract which also covers import of goods does not, ipso facto, mandate adjustment of transaction value; the connection with imported goods must conform to the prescriptions in Rule 9 of Customs Valuation Rules, 1988 (or Rule 10 of Customs Valuation Rules, 2007). It is abundantly clear from the above narration that royalty is hinged upon post-importation manufacture and not on the imported goods per se. The impugned order has erred in including the royalty amounts in the valuation of the 'master tapes' that were imported.'

erases the liability on the importer that, admittedly, was to be fastened only by reference to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

4. Learned Authorized Representative drew attention to the email exchanges that had been unearthed during investigation and, in particular, the prices at which transaction was undertaken and that, in

circumstance of non-applicability of these Rules, the adjudicating authority was left with no choice but to rely upon 'best judgment' and that the adoption of lowest value demonstrated fairness in concluding that the goods had been undervalued. Reliance was placed on the decision of the Tribunal in *Krishnaram Dyeing & Finishing Works v. Commissioner of Central Excise & Customs, Surat* [2007 (209) ELT 410 (Tri.-Mumbai)] to support denial of cross-examination of departmental witnesses and further reliance was placed upon the decision of the Hon'ble Supreme Court in *Surjeet Singh Chhabra v. Union of India* [1997 (89) ELT 646 (SC)]

5. It is seen from the facts of the case that value has been sought to be enhanced from the reported appraisal in the statements of the individual-appellant which was sought to be reinforced by reference to email exchanges containing information purportedly dealing with the sale transaction of the overseas supplier. Rejection of value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 which offer broad flexibility to the proper officer, may not really be susceptible to discard. Nonetheless, it is clear from rule 3(4), read with rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, that 'surrogate value' draws authenticity from any one of rule 4 to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 applied sequentially. The 'local sale value' introduced by the appellant herein

before the adjudicating authority, does not, of itself, constitute challenge to the finding of overlooking of rule 4 and rule 5 of the said Rules. Such assailing would have merit had the bills of entry been made available. The reasons adduced for rejection of recourse to 'computed value' and 'deductive value' does not sit well with the reliance placed by the adjudicating authority on the market survey report. At best, market survey report may indicate a local price which then would have to be adjusted, in terms of rule 7 and rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for arriving at 'surrogate value' which is not the case here. Such an exercise has not been carried out and, consequently, in the absence of recourse to either of these rules, any market survey, undertaken and relied upon, does not acquire credibility as 'best judgment' of rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In any case, as the said rule now stands, 'best judgment' is a misnomer and only resides in the title.

6. It is seen that cross-examination of the departmental officers who undertook survey was also not permitted owing to which the contents of the report fail the test of credibility for adoption in the impugned proceedings.

7. From

'12. Rejection of declared value. –

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(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 itself it is very clear that the circumscribing features incorporated consequent upon amendment of section 14 in 2007 has not been born in mind by the adjudicating authority. Consequently, notwithstanding the rejection of the declared value being unopposable, the substitution of ‘surrogate value’ without conformity to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 does not permit its deployment in terms of rule 3(4) therein.

8. In view of above, we find no merit in the impugned order which is set aside to allow the appeals.

(Order pronounced in the open court on 02/06/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

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