CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86045 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Usha International
16F Judges Court Road, Kolkata -700 027 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86098 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Brijesh Gala
501 New Sai Niketan Bldg, A Wing, 345 Mount Road
Opp: Sales Tax Office, Mazgaon, Mumbai - 400 010 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86125 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Kothari Cranes Pvt Ltd
Shop 2 & 3 Opp: Mohan Mills Compound
Ghodbunder Road, Thane - 400 607 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86127 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Asiatic Cranes Services
Plot No. 1788 S C Road No 23, Kalmboli Warehouse
Near Kiddikpada, Kalamboli, Navi Mumbai - 410 218 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86160 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Jindal Infrastructure Pvt Ltd
Jugal Jyoti, 3rd Floor, 176 CST Road, Kalina
Mumbai – 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86161 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Jindal Earthmovers Pvt Ltd
Jugal Jyoti, 3rd Floor, 176 CST Road, Kalina
Mumbai – 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86162 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Jindal Corporation
Jugal Jyoti, 3rd Floor, 176 CST Road, Kalina
Mumbai – 400001 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86182 OF 2014

[Arising out of Order-in-Original CAO No: 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013 passed by the Commissioner of Customs (Import), Mumbai.]

Umesh Agarwal
501 A Highland Park, Lokhandwala Complex
Andheri (W), Mumbai – 400 058 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai 400001 ***…Respondent***

APPEARANCE:

Shri Vishal Agarwal and Ms Priyasha Pawar, Advocates for the appellants

Shri AK Shrivastava, 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: 86416-86423/2025

DATE OF HEARING: 08/04/2025
DATE OF DECISION: 08/04/2025

PER: C J MATHEW

These appeals of M/s Jindal Infrastructure Pvt Ltd, M/s Jindal Earthmover Pvt Ltd and M/s Jindal Corporation, impugning confiscation of imported 'cranes', recovery of differential duty thereon and imposition of penalties under section 112 and under section 114AA of Customs Act, 1962 in order[1] of Commissioner of Customs (Import), Mumbai, bring the dispute pertaining to 25 'used cranes' of varying specifications imported between October 2006 and July 2010 by them either directly or procured, as in nine of these, on 'high sea sale' from M/s Usha International, M/s Kothari Cranes and M/s Asiatic Crane Services who were also proceeded against in notice of 19th March 2012. Shri Umesh Agarwal, concerned with the importing entities in some or other capacity, and Shri Brajesh Gala, allegedly involved in making payments to the suppliers including the 'high sea sale' transferors, are in appeal impugning penalties imposed on them. During the investigations, ₹ 99,00,000 had been voluntarily deposited towards differential duty on which turns one of the principal controversies in the appeal along with dispute on valuation arising from re-determination of

[1] [order-in-original no. CAO 147/2013/CAC/CC(I)/AB/Gr.V dated 31st December 2013]

assessable value from ₹ 2,03,60,451, ₹ 1,13,92,533 and ₹ 66,47,775 on the 14 nos. cranes imported by M/s Jindal Infrastructure Pvt Ltd, 6 nos. imported by M/s Jindal Earthmover Pvt Ltd and 5 nos. imported by M/s Jindal Corporation respectively to ₹ 4,39,99,501, ₹ 1,51,82,275 and ₹ 1,95,88,683 respectively to fasten duty liability of ₹ 65,68,591, ₹ 21,32,180 and ₹ 17,65,655 respectively for recovery under section 28 of Customs Act, 1962.

2. The appellants herein, along with others, were proceeded against after investigations claimed to establish that the values declared in the bills of entry had apparently followed the convention of applying a rate of ₹ 19 to ₹ 34 per kilogram for 2005-07 and ₹ 40 per kilogram for the period thereafter to the weight of each of the 'used cranes', as admitted by the customs house agent, instead of the actual procurement price, as admitted to by the individual-appellant in his statements and held to be in conformity with ascertained market values, and the differential value transmitted to the respective suppliers through the other individual-appellant, Shri Brijesh Gala, a facilitator of illicit movement of funds. Hence the value was proposed to be enhanced to the full extent of the alleged payment – through banking and illicit channels – by recourse to rule 4 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, as applicable, and, conceding that the sequential application of various methods prescribed

in the respective Rules was not necessary, by adopting the purported transaction value, in place of the declared price transmitted through banking channels, on evidence of the individual-appellants in their confessional statements for which the authority in decision of the Hon'ble High Court of Calcutta in *Sandip Agarwal v. Collector of Customs [1992 (62) ELT 528 (Cal)]* and the reiteration of the decision in *Eicher Tractors Ltd, Haryana v. Commissioner of Customs, Mumbai [2001 (1) SCC 315]* by the Hon'ble Supreme Court in *Motor Industries Co Ltd v. Commissioner of Customs [2009 (244) ELT 4 (SC)]* was cited. Curiously, the payment of ₹ 99,00,000, voluntarily preferred during the investigations was adjusted towards the duty liability on 2 nos. cranes of M/s Jindal Infrastructure Pvt Ltd and 1 nos. cranes imported by M/s Jindal Corporation despite submission of imports having taken place prior the 'five-year ceiling' under section 28 of Customs Act, 1962 on the finding that voluntary deposit is tantamount to delayed discharge of duty liability.

3. The dispute, being one of a series of similar disputes, elicited predictable arguments from both sides. Learned Counsel submitted that adjustment of duties deposited during investigation was not towards imports effected prior to the period permitted, even by the extended period of limitation, and, more so, as the show cause notice enumerating the impugned goods was available only subsequently for disputation. It was also argued that recourse to the rule applied by the

adjudicating authority for re-determination of value was erroneous in the absence of any evidence of additional payments having been effected. He contended that, in the light of instructions contained in circular[2] of Central Board of Excise & Customs (CBEC) following the judgement of the Hon'ble Supreme Court in *Gajra Bevel Gears v. Commissioner of Customs, Bombay [2000 (115) ELT 612 (SC)]*, proper valuation of 'used equipment' had been adhered to. It was further contended that rejection of declared value under rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 should necessarily be followed by sequential application of rule 4 to rule 9 therein and not by reverting to rule 3 itself. Furthermore, the adopted value was not tenable as 'transaction value' with cross-examination of officers concerned, as well as of Chartered Engineer who had rendered original certification, having been denied to exclude the statements relied upon from validation in terms of section 138B of Customs Act, 1962.

4. Learned Authorized Representative drew attention to specific portions of the impugned order rendering clear findings that, impliedly, and considering the framework of adjudicatory proceedings, are in line with settled law.

5. Though the operative portion of the impugned order is silent on

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[2] [no. 4/2008-Customs dated 12th February 2008]

specific appropriation, the findings do assign the duty deposit towards imports preceding five years limit of ‘extended period’, permitted in section 28 of Customs Act, 1962, with the implication that only the remaining amount would be appropriated towards recoverable liability. We do not find any such proposal in the show cause notice; indeed, there could not be as notice can only be restricted to proposals falling within the legal empowerment of the recovery provision in Customs Act, 1962. In a similar matter, the Tribunal, in *Karim Jaria and Crown Lifters Pvt Ltd v. Commissioner of Customs (Import-I), Mumbai [2022 (4) TMI 948 – CESTAT MUMBAI]*, taking note of

> *’55…….*
>
> *(iv) I accept the voluntary payment of Rs 1,50,00,000/- (Rs. One Crore Fifty Lakh only) made by Shri Karim Kamruddin Jaria during the course of investigation, as indicated in para 7 of the show cause notice towards differential duty and interest, due thereon…..*
>
> *xxxx*
>
> *53.1.1 …… The amount was paid voluntarily during investigations as per the statements given and value stated therein. In their letters dated… along with the pay orders…, it is categorically mentioned by noticee no. 3 that the payments favouring the Commissioner of Customs, Mumbai are submitted voluntarily and unconditionally towards the Customs duty evaded by them as per the details in a statement). The Pay order and cheque… Were immediately submitted by noticee no. 3 on the next day of the statement dated 19. 11. 2010 in which he confessed the undervaluation of the cranes*

> *and import. Pay orders of the total amount… were submitted over the period of 7 months from 20. 11. 2010. He had ample time at this disposal to protest over coercion/persuasion, if any, by DRI for the said payment but he did not. He had given his next statement on 19.0 7.2012 almost after one and half years. He neither during that intervened period nor during the statement dated 19.0 7.2012 has murmured any single word about the alleged coercion for payment.…'*

in the order of adjudicating authority, following remand for *de novo* proceedings by the Tribunal in *Crown Lifters v. Commissioner of Customs (Import), Mumbai [2015 (328) ELT 590 (Tri-Mumbai)]*, went on to hold that

> *'4….we find no such proposal in the show cause notice which has only taken notice of the deposit made voluntarily and its attribution to the imports under investigation covering both the extended period as well as those beyond. Therefore, the inclusion supra in the order of the adjudicating authority must be set aside for having travelled beyond the proposal in the show cause notice.*
>
> *xxxx*
>
> *5…..before going on to conclude, on the basis of circumstances therein, that the said deposit was not limited to imports effected during the period of limitation permitted by section 28 of Customs Act, 1962. The Tribunal, in the face of contention of the appellant, had directed that*
>
> > *'7…… But in the present case the deposit actually arises on persuasion. In fact the appellant has alleged coercion. In fact we agree with the reliance on the case of Photokina (supra). This judgement relied on the Honourable Court of Madras decision in the case of Pilmen Agents (Private) Limited 2000 (12 6) ELT 79 (Mad). Therefore we hold that the amount*

> *deposited cannot be appropriated as being duty and interest payable for the period beyond 5 years. It has to be proved that the amount deposited by the appellant during the investigation and before the issue of show cause notice is not the amount of duty which pertains to cranes imported within 5 years of the date of SCN.'*

from which it can be deduced that the impugned order, with its elaboration, is not in breach of that direction. We have held supra that the 'acceptance' of the voluntary payment is beyond the framework of the proceedings as determined by the proposals in the show cause notice and, with that having been set aside, the Tribunal lacks jurisdiction to address retention of such amount for any purpose, including as restitution towards duty that has been short-paid. Nonetheless, the finding in the impugned order that this payment of duty was voluntary, and even despite being beyond the period of limitation and in the absence of any threat or coercion from customs authorities, does throw some light on the bona fides of the importer who, indeed, was not under legal obligation to do so. The prevailing practice of assessment on the basis of weight which has seemingly been followed by M/s Crown Lifters is also on record. There has been no ascertainment of the actual purchase price of each of the nine 'used cranes', which surely must be available considering that these were sourced at auctions, by the adjudicating authority. The initiation of proceedings for confiscation under section 111(m) of Customs Act, 1962 and penalties under section 112 and section 114AA of Customs Act, 1962 must be viewed through that prism.'

6. The case of the noticees for cross-examinations was disposed off thus

'47.1 The advocate of the Noticee Jindal Infrastructure Pvt. Ltd, (Noticee No 1) M/s Jindal Earthmovers Pvt. Ltd (Noticee

No 2),M/s. Jindal Corporation, (Noticee No 3)and Shri. Umesh Agarwal, (Noticee No 4) have asked for the cross examination of the officers who examined and assessed the consignments. He further requested for cross examination of the independent Chartered Engineer whose opinion was relied upon by the department for valuation of the subject cranes. He further requested for the Cross Examination of 9 witnesses whose evidence has been relied upon in support of the charges .

47.2. I find that it is not a case that the investigations revealed that goods were found to be different than those reported by the examination officers. Also, while allowing the goods for home consumption, assessments were made on the limited data available and not detailed investigation were carried out at the material time. It was the detailed investigation carried out by the DRI, on the basis of the intelligence received, which revealed the manipulation of the import documents by the importer to grossly undervalue the impugned goods in order to evade payment of appropriate Customs duty. This is also evident from voluntary statements of Shri Umesh Chhabildas Agarwal and Shri. Madan Lalwani recorded under section 108 of the Customs Act 1962, during the course of investigation wherein they admitted the fact of under-valuation and the clearance of the subject cranes from Customs on the strength of manipulated invoices showing highly understated value of the cranes with the motive to evade appropriate customs duty. Now this is the admitted position. I also find that the Chartered Engineer Shri. K. Vijayan had ascertained the fair market value of the subject cranes after taking into consideration various relevant factors governing the market value of the cranes. All the facts discussed above, established that the value of the imported cranes had been suppressed with intent to evade duty.

47.3 As regard to affording opportunity for cross examination, I find that it is not necessary to allow cross-examination in each and every case, as it all depends upon the merits of the case., In view of the facts of the case and the findings in para 47.2 above, I do not find any merit for allowing for cross-examination of the officers who examined and assessed the cranes on the basis of the limited data available. I also do not see any reason why the independent Chartered Engineers report should be biased against the Noticee. Therefore, I do not find any compelling reason for offering the cross examination. I rely on the following judgements:-'

in the impugned order.

7. The adjudicating authority found

'9.5.3 In respect of other imports, no documentary evidence in form of overseas invoice or private record are available. However, during the recording of statement under Section 108 of Customs Act, 1962, Umesh Agarwal has disclosed the actual transaction value, which are corroborated by others who are parties to these transactions. The value of these cranes are accordingly proposed to be determined under Rule 3 and Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, and Rule 3 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 as the case may be, read with the provisions of Section 14 of the Customs Act, 1962, for imports prior to 10.10.2007 and on or after 10.10.2007, respectively. Since the importer himself has disclosed the higher transaction value than what was initially declared to the Indian customs during the clearance, the above admitted higher value is proposed to be taken as the actual transaction value in terms of Rule 3 and Rule 4 of the Customs Valuation (Determination of Price of

> *Imported Goods) Rules, 1988, and Rule 3 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 as the case may be, read with the provisions of Section 14 of the Customs Act, 1962.'*

to be sufficient for assigning a 'transaction value' above the 'declared value' by reliance on statements recorded under section 138B of Customs Act, 1962.

8. In *re Karim Jaria & ors*, the Tribunal noted that

> *'8. However, as recovery of differential duty has been proposed for the subsequent imports, M/s Crown Lifters Pvt Ltd is not immune to consequence of evasion of duty liability in the event of undervaluation being established. The sole evidence of misdeclaration of value appears to be the admission in the statement of Shri Karim Jaria and the confessional statement of the illicit fund mover, Shri Brijesh Gala. As in the case of the earlier imports, the actual price of each of the five 'used cranes' has not been ascertained. Reliance on statements alone is too fragile a foundation to build a case of undervaluation; such depositions are reliable only with corroborative support. In the absence of corroboration, test of cross-examination is of essence, as mandated by section 138B of Customs Act, 1962, for relevancy. This was the crux of the direction*
>
> > *'7.1 We find that the whole case of undervaluation is essentially based on statements are certain people and the confessional statement of Shri Karim Jaria. However, the statements to not corroborate with each other… We are unable to appreciate these gaps in the proceedings.*
> >
> > *7.2 The Counsel contended that cross-examination of persons whose evidence was relied upon such as Shri Brijesh Gala, was not allowed. In his findings the Commissioner simply brushes aside the request by stating that he does not*

> *find any compelling reasons for offering the cross-examination. The Commissioner relies on various judgements to state that cross-examination is not a matter of right. We find that the reliance placed on these judgements is misplaced and misunderstood.… The Commissioner cannot rely on the judgements without first recording specific reasons for not allowing the cross-examination. In our view Shri Brijesh Gala is a crucial link in illegal transfer of money abroad and therefore deny the cross-examination without recording any reasons is violative of the principles of natural justice and must be right.…'*

in the remand order of the Tribunal.

xxxx

10. The remand order is unambiguous in placing the onus on the adjudicating authority to justify denial of any request for cross-examination. The adjudicating authority appears to have turned this decision on its head with his observation that

> *'49. During the hearing proceedings, the noticee no. 1, 2 & 3 submitted for the cross examination of noticee no. 4, Shri Brijesh Gala and Sr. Intelligence Officer of DRI (name not mentioned) and noticee no. 4 has made submissions for the cross examination of noticee no. 3, Shri Vikram Janghiani, partner in M/s Dharamdas & Co (CHA 11/100) and the assessing officers.*
>
> *49.1 I have examined the submissions of noticees no. 1, 2 & 3 for the cross examination. The said submissions are tendered without specifying any grounds/reasons under which the cross examination of the persons as requested by them would be helpful to prove their innocence.…'*

before going on to reject all the requests.

11. It was after going through the re-determination of value, the confiscation and the imposition of penalty that the Tribunal found it fit to reject all the conclusions in the order impugned therein for want of credibility of the statements relied upon in the absence of cross-examination. That order of remand, and its contents, had not been challenged by Revenue in appeal. In such circumstances, it was gross impropriety on the part of the adjudicating authority, and subordinate to the Tribunal, to allege failings in the remand order - the exclusive *privilege of the constitutional courts - and reflects his determined obduracy to stand by the first adjudication order. Furthermore, the order now impugned has not relied upon any evidence to corroborate the statements upon which the first adjudication was based. Neither has there been any attempt at ascertainment of the actual transaction value other than by way of the 'confessional statements' of the noticees purportedly being corroborated by the operator of 'illicit fund transfer' and whose cross-examination, sought for specifically in the de novo proceedings, was peremptorily discarded with the specious contention that the deposition merely supplemented the confession of the noticees. A more blatant case of violation of the principles of natural justice may yet have to surface and is, thereby, clear contravention of a specific direction in the remand order.*

12. While we find no reason to disapprove the rejection of request for cross-examination of some investigating officials and of persons whose statements had not been relied upon for initiation of proceedings, the finding of the adjudicating authority that the statement of Shri Brijesh Gala, despite being corroborative of the confessions in the statements of the noticees, was not of such relevance as to warrant cross-examination is unacceptable. More so, in the absence of any other evidence to support the allegation of undervaluation and which has not relied upon the authority of the several methods prescribed in the Rules framed under section 14 of Customs Act, 1962. We, therefore, are constrained to hold that the re-determination of assessable value by resort to rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 is not in accordance with law. The re-assessment, recovery of differential duty and confiscation of 'used cranes' imported by M/s Crown Lifters Pvt Ltd in the impugned order fails.'

9. None of the arguments advanced in the impugned order or in the submission of Learned Authorized Representative persuades us that the above position requires revisit. Accordingly, we set aside the impugned order and remand the matter back to the original authority for fresh adjudication inclusive of allowing cross-examination of persons sought by the appellants herein.

(operative part of the order pronounced in the open court on 8th April 2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*