LEGACY ISSUES & EMERGING CHALLENGES IN INDIAN CUSTOMS FROM THE STANDPOINT OF VALUATION & ASSESSMENT

Manish Choudhary, Deputy Commissioner, Ministry of Finance, Government of India, B.Tech (GGSIPU), LLB (DU), PG Diploma (ILI), EE (ISB) and presently pursuing PG Diploma (ISIL)[1]

ABSTRACT

In international transactions, customs duty is levied on the transaction value, which is the price actually paid or payable, where the buyer and seller are not related, and price is the sole consideration. The transaction value declared by an importer can be rejected during assessment based on cogent reasons. If rejected, the transaction value is typically re-determined based on the transaction value of similar goods in contemporaneous imports. This paper aims to explore whether the definition of similar goods in a policy statement should be interpreted expansively, or else, derived from the WTO valuation agreement, which is given effect to by the policy (Foreign Trade Policy) and enacting statute (Customs Valuation Rules). During assessment, bills of entry can be modified by way of amendment or re-assessment. This paper will examine the extent of such amendment vis-à-vis re-assessment. With the advent of GST, end-to-end credit transfer has become possible, resulting in numerous cases of evasion of input tax credit (ITC) through under-invoiced imports and/or over-invoiced exports. This paper will explore how technology can be employed to tackle this menace. By analyzing relevant provisions and case laws, this paper aims to answer the above questions and similar issues.

Keywords: Transaction value, Contemporaneous imports, Similar goods, WTO Valuation Agreement, Foreign Trade Policy, Customs Valuation Rules, Bills of entry, Amendment, Re-assessment, GST, Input tax credit (ITC), Under-invoiced import, Over-invoiced export

[1] Deputy Commissioner, Ministry of Finance, Government of India, B.Tech (GGSIPU), LLB (DU), PG Diploma (ILI), EE (ISB) and presently pursuing PG Diploma (ISIL)

(I) LEGAL ISSUES

(A) NIDB

National Import Database (NIDB) captures import data of goods imported into India on a daily basis. NIDB is made available at Customs stations for reference by assessing officers.[2] For determining reasonably accurate transaction value of identical goods or similar goods of contemporaneous imports, NIDB is the go-to databank for an assessing officer. This ensures uniformity of valuation of contemporaneous imports and helps safeguard against undervaluation and overvaluation.

During assessment, value loading i.e. enhancement of declared value is usually done on the basis of data obtained from NIDB. However, it has been held that NIDB alone cannot be the basis to reject the transaction value without any cogent reasons. Let us examine in detail.

In Century Metal Recycling Pvt. Ltd. And Anr vs Union of India and Ors[3] where the declared transaction value of Aluminium scrap was in question, Supreme Court observed as follows:

"...we would observe that the aforesaid reasoning for rejection of the transaction value, would not meet the mandate of Section 14 and the Rules as elucidated in M/s Sanjivini Non- Ferrous Trading Pvt. Ltd. (supra) wherein it was held that the transaction value mentioned in the bill of entry should not be discarded unless there are contrary details of contemporaneous imports or other material indicating and serving as corroborative evidence of import at or near the time of import which would justify rejection of the declared value and enhancement of the price declared in the bill of entry…"

In M/s Eicher Tractors Ltd., Haryana vs Commissioner Of Customs, Mumbai[4], the brief facts were that the appellants, manufacturers of tractors, imported bearings at 77% discount which was rejected by the Assistant Commissioner of Customs. The Supreme Court observed as follows:

[2] NIDB manual [Internet]. Gov.in. [cited 2023 Jan 9]. Available from: https://www.dov.gov.in/nidb-manual
[3] Civil Appeal No. 5011 of 2019
[4] 2000 (122) ELT 321 (SC)

"...Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 using reasonable means consistent with the principles and general provisions of these rules and sub Section 1 of Section 14 of the Customs Act, 1962 and on the basis of data available in India…"

CETSTAT rejected the enhancement of value purely on the basis of NIDB citing that contemporaneous import value has to be picked up after establishing that the goods match in quality, quantity, country of origin and time period in Commissioner Of Customs New Delhi v. M/S. Marble Art.[5] In Om Shiv Enterprises vs Commissioner Of Customs[6], CESTAT held that past bills of entry are not binding from a valuation standpoint. Further, if the time gap is significant it would not be considered as a contemporaneous import.

Hon'ble Supreme Court in M/s Varsha Plastics Pvt. Ltd. Vs Union of India[7] observed as regards PLATT's price reports that "…*in the absence of any evidence with regard to contemporaneous import, reference to foreign journals that may indicate the correct international price for the purposes of Section 14 may not be irrelevant and relying upon such journal cannot be said to be altogether unreasonable…"*

From the above case laws, it follows that even as import data can be employed in assessment, enhancement of transaction value cannot be done on the basis of NIDB alone. First, the transaction value evidenced from the invoice must be rejected by cogent reasons e.g. on the strength of contemporaneous imports of similar goods. In other cases e.g. quotations, Collaborative Framework Agreement, flowback of funds needs to be established or such other documents available at the time of import need to be relied upon.

An assessing officer, at the time of assessment, usually does not have sufficient material aside from NIDB to reject transaction value declared by the importer. The data of contemporaneous imports is obtained from NIDB resulting in a self-contained loop of legal quagmire. In case the transaction value is rejected by way of speaking order, the same can be

[5] Commissioner Of Customs New Delhi v. M/S. marble art [Internet]. https://www.casemine.com. [cited 2023 Jan 9]. Available from: https://www.casemine.com/judgement/in/5ba0bdae60d03e57b21bb10a
[6] 2003 (160) ELT 202 Tri Chennai
[7] Civil Appeal Nos. 835-836 of 2002

challenged and set aside in view of case laws cited above. The only legally tenable recourse available then is provisional assessment. If the declared value diverges a lot from that of contemporaneous imports, the assessing officer can reject transaction value by way of speaking order and upon protest by assessee, provisionally assess goods till finalization of assessment.

For instance, saffron imported from Afghanistan is imported at a different price than that of Iran which is different from locally available price sourced from J&K. Practically, invoice value of saffron imported from Afghanistan is checked with import price in NIDB. However, if the value declared is lesser than that in NIDB, query is raised and assessee responds justifying the value declared. But, if the assessee refuses value loading, speaking order raising transaction value essentially hinges on NIDB.

Reliance upon NIDB as the only source of determining contemporaneous import without any further cogent reason would shift the burden of proof on the importer assessee resulting in hardship. This would take away from the contractual price negotiations between buyers and sellers[8].

What is needed is strengthening of NIDB by adding data from Valuation alerts, floor price circulars, PLATT circulars, London Metal Exchange (LME), Independent Commodity Intelligence Services (ICIS) and foreign journals while employing big data, which incorporates import and commercial invoices on a daily basis. This would immediately place required documents of identical or similar goods at the disposal of the assessing officer. This, along with, documents uploaded on Indian Customs EDI System (ICES) would provide corroborative material for justifying enhancement of transaction value.

(B) WTO Customs Valuation

WTO aims at a fair and uniform valuation of goods for customs purposes across member countries. The Committee on Customs Valuation of the Council for Trade in Goods (CGT) works in the WTO on customs valuation.

[8] Commentary on the Customs Act, 1962 T P Mukherjee, 193-221

Following 6 methods are enumerated under WTO Technical Information on Customs Valuation[9]:

Method 1 — Transaction value

Method 2 — Transaction value of identical goods

Method 3 — Transaction value of similar goods

Method 4 — Deductive method

Method 5 — Computed method

Method 6 — Fall-back method

Correspondingly, Customs Valuation Rules, 2007 (CVR) lays down following rules

Rule 3 — Transaction value

Rule 4 — Transaction value of identical goods

Rule 5 — Transaction value of similar goods

Rule 7 — Deductive value

Rule 8 — Computed method

Rule 9 — Residual method

Rule 12 — Rejection of declared value

Section 14 of Customs Act, 1962[10] reads as under:

SECTION 14. Valuation of goods. *- (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole*

[9] WTO | Customs Valuation - Technical Information [Internet]. www.wto.org. Available from: https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm

[10] Customs Act, 1962 s.14

consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf "

Second proviso to Section 14 (ibid) states:

***"Provided** further that the rules made in this behalf may provide for,-*

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :.."

Section 14 of Customs Act, 1962 *ibid.* read with Rule 3 of Customs Valuation Rules, 2007 (CVR) provides that the value of imported goods shall be the transaction value. Further, Rule 3 is subject to Rule 12. Second proviso to Section 14 *ibid.* read with Rule 12, CVR, 2007 provides a mechanism for rejection of declared transaction value in case of reasonable doubt. So, in the normal course, the transaction value should be treated as the value of imported goods and if the assessing officer has cogent reasons to reject transaction value, the same is required to be determined by proceeding sequentially from Rule 4 to Rule 9 of CVR, 2007.

Without going into the theoretical aspects of each method of valuation, let us examine the main issues that are contested in litigation.

(i) Identical goods, similar goods & like goods

Rule 2 (1) (d) of CVR, 2007 defines identical goods as imported goods which are same in all respects, including physical characteristics, quality and reputation being produced in the country in which the goods being valued were produced.

Due to this narrow definition of identical goods, it becomes challenging to make out a case on the basis of goods being identical. Therefore, in general, Rule 5 i.e. transaction value of similar goods is invoked. However, the issue which remains to be answered conclusively is whether the term 'similar goods' should be interpreted narrowly or expansively.

In a recent case viz. M/s Axiom Cordages Ltd vs Commissioner of Central Excise, Thane-II[11], the issue of similar products was contested before CESTAT. The brief facts of the case were

[11] CESTAT Final Order No. A/86338-86340/2021 dated 19.05.2021

that M/s Axiom Cordages, registered as EOU, were manufacturers and exporters of HDPE/LDPE/PP ropes and yarn and also cleared yarn and ropes in Domestic Tariff Area (DTA). During the course of audit, it was alleged that the assessees had availed concessional duties of Central excise, on goods cleared in DTA, in excess of the permitted 90% of the FOB value of the exports, in contravention of Para 6.8[a] of the Foreign Trade Policy[12] and condition [2] of the notification number 23/2003-CE dated 31-03-2003[13].

CESTAT vide Final Order No. A/86338-86340/2021 dated 19.05.2021 held that concessional duty was allowed primarily on the ground that HDPE/LDPE/PP Nylon Ropes and HDPE/PP/Nylon Twisted Yarn were similar products. While liberally interpreting the term similar goods, CESTAT — quoting Hon'ble SC in the case of CCE Shillong vs Woodcraft Products Ltd**[14]** — observed as under:

" *In the first place, we find that the Tribunal in the case of Meghmani Industries Ltd has addressed the very controversy in respect of the definition of similar goods for exemption under notification no. 23/2003-CE. The tribunal in the decision after referring to the judgement of the Hon'ble Supreme Court in the case of Woodcraft Products Ltd. 1995 (77) ELT 23 (SC) and the Tribunal in Telco 2000 (126) ELT 1102 (Tri) noted that the definition available in the Customs Act cannot be used in respect of notifications issued under another enactment; then in such cases common parlance or dictionary meaning is to be applied."*

In this regard, it is submitted that foreign trade policy (FTPs) of all countries including India essentially gives effect to WTO agreements (erstwhile GATT agreements). WTO Valuation Agreement**[15]** formally known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 defines similar goods under Article 15 (2) (b) as under:

(b) "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the

[12] Available at https://content.dgft.gov.in/Website/ftp-plcontent0910_0.pdf
[13] Available at https://www.cbic.gov.in/htdocs-cbec/excise/cx-act/notifications/notfns-2003/ce23-2k3
[14] 1995 (77) ELT 23 (SC)
[15] available at https://www.wto.org/english/docs_e/legal_e/20-val.pdf

existence of a trademark are among the factors to be considered in determining whether goods are similar;"

Thus, it becomes clear that the definition of *similar goods* in CVR, 1988 is the same as that laid down in WTO valuation agreement, 1994 (erstwhile GATT agreement- Tokyo Round Customs Valuation Code, 1979[16]). The meaning of the term should therefore be understood from its original agreement. Thus, it seems erroneous to state that the interpretation of a term mentioned in a policy statement cannot be confined to CVR when the intent of the legislature can be inferred from not only the statute but also the original agreement given effect to by the policy and the enacted statute.

The common parlance test is invoked only when legislative intent cannot be derived from the usage of a term in the statute. The Customs Valuation Rules (CVR) merely reproduce the definition of similar goods as originally defined in the WTO Valuation Agreement, to which India is a signatory, and it is in pursuance of WTO agreements that Foreign Trade Policies (FTPs) are promulgated. Thus, the term "similar goods" should be interpreted to mean as originally envisaged in the Agreement absent which common parlance or dictionary meaning needs to be resorted to. The matter is subjudice before the Apex court.

(ii) Contemporaneous imports

Another bone of contention in assessment is determination of contemporaneous imports. This aspect is vital since value of identical or similar goods of only contemporaneous imports can form the basis for fair assessment of transaction value. The Hon'ble Supreme Court has thrown light on what would and would not constitute contemporaneous import.

In Commissioner of Central Excise and Service Tax, NOIDA vs M/s Sanjivani Non-ferrous Trading Pvt. Ltd.**[17]** the Supreme Court opined that the initial burden of proof of establishing under-invoicing rests with the Department.

"...Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer

[16] WorldTradeLaw.net [Internet]. www.worldtradelaw.net. [cited 2023 Mar 12]. Available from: https://www.worldtradelaw.net/document.php?id=tokyoround/valuationcode.pdf
[17] CIVIL APPEAL NOS. 18300-18305 OF 2017

to establish that the invoice relied on by him is valid…"

In Century Metal Recycling Pvt. Ltd. And Anr vs Union of India and Ors[18] where the declared transaction value of Aluminium scrap was in question, Supreme Court observed as follows:

"...we would observe that the aforesaid reasoning for rejection of the transactional value, would not meet the mandate of Section 14 and the Rules as elucidated in M/s Sanjivini Non-Ferrous Trading Pvt. Ltd. (supra) wherein it was held that the transaction value mentioned in the bill of entry should not be discarded unless there are contrary details of contemporaneous imports or other material indicating and serving as corroborative evidence of import at or near the time of import which would justify rejection of the declared value and enhancement of the price declared in the bill of entry…"

In Commissioner of Customs vs. Prabhu Dayal Prem Chand[19], the facts of the case were that additional duty was demanded in case of import of brass scrap and copper scrap on the strength of London Metal Exchange (LME) data. The question that came up for consideration before the Hon'ble Supreme Court was whether the price of imported goods can be determined on the basis of LME prices. The Apex court observed as follows:

"...It is manifest from the afore-extracted order of the Tribunal that no details of any contemporaneous imports or any other material indicating the price notified by LME had either been referred to by the adjudicating officer in the adjudication order or such material was placed before the Tribunal at the time of hearing of the appeal. The learned counsel for the Revenue has not been able to controvert the said observations by the Tribunal. In that view of the matter no fault can be found with the order passed by the Tribunal setting aside the additional demand created against the assessee."

In Commissioner Of Customs, Mumbai vs M/S. J.D. Orgochem Ltd[20], Hon'ble Supreme Court observed:

"...The assessing authority as also the appellate authority have wrongly proceeded on the basis that the onus of proof was on the importer. If that conclusion is not premised on any legal

[18] Civil Appeal No. 5011 of 2019
[19] Civil Appeal No. 2559 of 2003
[20] Civil Appeal No. 5843 of 2006

principle and the revenue having not brought on records any contemporaneous evidence to the contrary, we are of the opinion that it cannot be said to have discharged its burden…"

In Commissioner Of Central Excise vs Sanabil Impex (P) Ltd.[21] the respondent had imported Brass Scrap Night and Ivory and filed Bill of Entry on 12-5-2000. The Additional Commissioner, under Order-in-Original No. 25/02 dated 28-2-2002, enhanced the value of both the types of brass scrap on the basis of Floor Price Circular dated 13-12-1999 issued by the Mumbai Customs. CESTAT held that *"the Revenue has relied upon only the Floor Price Circular of the Mumbai Customs dated 13-12-1999 whereas the Bill of Entry was filed in May 2000. This Circular cannot be regarded as contemporaneous document."*

Thus, onus of proof as regards contemporaneous imports is on the Department. The case should be built on corroborative material. As to whether previous bills of entry, floor price circulars can be considered contemporaneous import or not depends on the factual matrix of each case.

(C) **ACCEPTANCE OR REJECTION OF TRANSACTION VALUE**

The transaction value is accepted or rejected in terms of Section 14 of Customs Act, 1962 read with the provisions of CVR, 2007. Second proviso to Section 14 read with rule 12 provides for rejection of transaction value. Further, Section 3 states that upon rejection of transaction value under Rule 12, value needs to be determined sequentially from Rule 4-9.

Acceptance or rejection of transaction value is done on the basis of Customs Valuation Rules, 2007. But, Valuation Rules, being subordinate legislation, cannot override the provisions of Section 14 (1) and will be required to be read in the harmony of the Parent Act[22].

The Department is not required to prove undervaluation with mathematical precision. In Collector of Customs vs D. Bhoormul[23], the Supreme Court has held that the Department would be deemed to have discharged its burden if it adduces so much evidence, circumstantial or direct as is sufficient to raise a presumption in its favour with regard to the existence of the fact sought to be proved.

[21] 2005 (183) ELT 201 Tri Del
[22] Commentary on the Customs Act, 1962 T P Mukherjee, 221
[23] 1974 AIR 859

In Central Excise Valuation, transaction value was held to be liable to rejection in case of extra-commercial consideration. In CCE Mumbai vs M/s Fiat India Pvt Ltd.[24], the assessee had declared assessable value for Uno model cars substantially lower than the cost of manufacture (approx 60% lower) in order to penetrate the market, which was held by Hon'ble SC to constitute extra-commercial considerations.

Per contra, in CCE vs M/s Guru Nanak Refrigeration Corp[25] , Hon'ble SC held that in absence of additional consideration or allegation of any flowback to assessee, wholesale price would be treated as normal price within the meaning of Section 4 (1) (a) of the Central Excise Act, 1944. This judgement was discussed and not considered *per incuriam* in the SC judgement in FIAT India.

Similarly, under Customs Act in Satellite Engineering Ltd. Vs Union of India[26], it was opined by the Bombay High Court that *"it is clear that the value of the goods for the purposes of levying duty shall be fixed with reference to the price at which such goods are sold or offered for sale in the course of international trade and where the seller and the buyer had no interest in the business of each other and the price is the sole consideration. In other words, the transaction must be at arms length and not entered for extra commercial considerations."*

In Commissioner Of Customs, ... vs South India Television (P) Ltd[27] Supreme Court observed that "…*the invoice price is not sacrosanct. However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods. Under- valuation has to be proved. If the charge of under-valuation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to*

[24] 2012 (283) ELT 161 (SC)
[25] 2003 (153) ELT 249 (SC)
[26] 1984 (3) ECC 217
[27] Appeal (civil) 1137 of 2002

allege under-valuation, it must make detailed inquiries, collect material and also adequate evidence…"

In M/s Eicher Tractors Ltd., Haryana vs Commissioner Of Customs, Mumbai[28] it was held that:

"...Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 using reasonable means consistent with the principles and general provisions of these rules and sub Section 1 of Section 14 of the Customs Act, 1962 and on the basis of data available in India…"

In Ashok Magnetics Ltd. vs Commissioner Of Customs[29], it was held by CESTAT that once the goods are mis-declared, the transaction value can be rejected and the value can be determined in accordance with the Customs Valuation Rules.

It is settled law that mere quotation is not acceptable evidence for dismissal of transaction values[30]. Contrarily, CESTAT in Pan Asia Enterprises upheld the rejection of transaction values on the basis of quotation price observing that there was a large difference between the value declared by the appellants and that obtained by the foreign supplier. As a result, owing to such gross undervaluation, enhancement of transaction value by the Collector was upheld[31]. Supreme Court in the case of Sharp Business Machines Pvt Ltd vs CC[32] has held that the value in quotations could be the basis for assessable value and in certain circumstances the invoice value was ignorable.[33]

In Shehla Enterprises vs Collector Of Customs[34] the facts of the case were that diesel engines described as used spare parts for trawlers were imported which, upon examination, were found to be meant for use in motor vehicles and not for trawlers. It was held that *"Since*

[28] (2001) 1 SCC 315
[29] 2005 (188) ELT 510 Tri Chennai
[30] Hindustan Ferodo Ltd. Vs CCE [1997 (89) E.L.T. 16 (S.C.)]
[31] Commentary on the Customs Act, 1962 T P Mukherjee, 259
[32] 1990 (49) ELT 640 (SC)
[33] Commentary on the Customs Act, 1962 T P Mukherjee, 258
[34] 1995 (80) ELT 360 Tri Del

the charge of undervaluation by mis-description of the goods has been upheld by us, the Department was entitled to reject the invoice value as held by the Tribunal in the case of Poonam Plastic Industries v. Collector of Customs reported in 1989 (39) E.L.T. 634. The exceptionally low price declared in the invoice cannot form the basis of assessment as this was not the price available to the other importers at the relevant time."

In Collector Of Customs Calcutta vs Sanjay Chandiram[35] Supreme Court opined as follows:

"Under Rule 8 of the Customs Valuation Rules, 1988, the value of the imported goods may be determined 'using reasonable means consisted with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and on the basis of data available in India'. This is a residual rule to be resorted to when valuation cannot be made under any of the other foregoing rules. We arc unable to uphold the reasoning of the Tribunal that since there is no finding by the Collector of Customs that the Zip Rolls purchased form South Korea, Japan or Taiwan are identical in all respects with what has been falsely declared to be Zip Rolls of North Korean origin, Rules 3 and 4 must be applied. In our view, the Tribunal has overlooked not only Rule 8 but also Section 14 of the Act which provides that the value of the imported goods 'shall be deemed to be the price at which such or like goods are ordinarily sold.....in the course of international trade…"

From the above case laws, it follows that the the onus of proof as regards determination of transaction value is on the Department. What constitutes extra-commercial consideration is to be established on a case by case basis. Further, the flowback of funds needs to be established by the Department. The transaction value can be rejected in cases of misdeclaration as regards description of goods or its country of origin.

(D) Amendment vs Re-assessment:

While dealing with provisions of refund under Section 27 of Customs Act, 1962 the courts have variously interpreted the scope of amendment and re-assessment.

[35] Appeal (civil) 5411 of 1990

In Intex & Union of India & Ors.[36] and Union of India & Ors. vs. Micromax Informatics Ltd.[37], it was held that *"There is no lis in case of self-assessment and only adversarial assessment order can be challenged. In such cases, refund applications were maintainable under Section 27 (1) (ii) even in the absence of filing appeals."*

Per contra in Escorts Ltd. v. Union of India & Ors.[38] it was held that *"signing of the bill of entry itself amounted to passing an order of assessment."* In Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)[39] it was held that *"Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding."*

The divergent views were resolved by the Supreme Court in ITC Ltd vs Commissioner of Central Excise, Kolkata IV[40]. The Apex Court opined that "*the provisions of Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made."*

Section 149 of Customs Act, 1962 provides for amendment and states:

"*Amendment of documents.—Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorize any document, after it has been presented in the customs house to be amended: Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorized to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."*

Section 149 provides for amendment till the goods are cleared - for home consumption or warehousing, or till the export goods have been exported. This implies that once the goods have been cleared and left the custom bonded area or else deposited in a warehouse under into

[36] W.P.(C) 10618 / 2016
[37] (2016) 335 ELT 446 (Del)
[38] (1994) Supp. 3 SCC 86
[39] 2004 (172) ELT 145 (SC)
[40] CIVIL APPEAL NOS. 293-294 OF 2009

bond bill of entry or exported upon filing of export general manifest (EGM) subsequent to filing of shipping bill, amendment cannot be done. Exception is provided in case of documentary existence at the time the goods were cleared, deposited or exported.

Section 128 provides for appeal against assessment order before Commissioner (Appeals) and provides for a limitation period of 60 days which can be condoned by another 30 days in case of sufficient cause. No limitation period is laid down under Section 149 in respect of anterior evidence. Following ITC Judgment, assessees who did not file appeal under Section 128 are liable to have their application for re-assessment and refund claims rejected. Recourse to Section 149 in order to circumvent bar of limitation under Section 128 would not cover aspects of re-assessment as Section 149 provides for amendment not re-assessment. The moot point is what is the extent of amendment and what constitutes re-assessment.

Amendment of a Bill of Entry under Section 149 only means alteration of any particulars therein, or addition of any particulars thereto, or deletion of any particulars therefrom.[41]

Post facto applicability of notification would amount to re-assessment as observed by the Hon'ble Supreme Court in para 19 of ITC judgment as follows:

"... It is an assessment under the Act and in case benefit of notification has not been claimed, in the absence of challenge to assessment of bills of entry by way of filing the appeal, the benefit of notification cannot be claimed."

From the above, it appears that typographical changes like name of consignor and/ or consignee, currency in commercial invoice and/ or import invoice, unit of commodity etc. would fall under amendment — subject to anterior evidence — while change in customs tariff heading (CTH), rate of duty (r.o.d.), invocation or removal of notification benefit etc. would amount to re-assessment.

However, some questions remain unanswered. For instance, if Country of origin (CoO) certificate is annexed but notification benefit is not claimed at the time of import, would amendment under Section 149 be tenable? Also, if product literature is uploaded by the

[41] Commentary on the Customs Act, 1962 T P Mukherjee, 1668

assessee at the time of import, would change in CTH after clearance amount to re-assessment or would it be covered by amendment?

(II) ADMINISTRATIVE ISSUES:

(A) Electronic data Interchange [EDI]

In 2019, India hiked Customs duty on goods imported from Pakistan to 200% vide Notification No.05/2019- Customs[42] dated 16th February, 2019. In Indian Customs EDI System (ICES) module, country of origin of overall consignment is reflected either on the basis of majority of shipment or country of shipping. The country of origin (CoO) of individual consignments, which may differ from country of shipment, can be seen upon scrolling through each entry. For large consignments comprising of thousands of articles, this becomes tedious and often gets overlooked.

For instance, if CoO of a consignment carrying 100 articles arrives from Malaysia out of which 5 items have CoO from Pakistan, ICES fails to flag such 5 items on which 200% BCD is leviable. As a result, if BCD applied on apparel of, say 10%, is imposed uniformly on 100 items, leviability of 200% BCD on 5 items from Pakistan is not detected by ICES. This may get flagged retrospectively by Directorate General of Analytics and Risk Management (DG ARM) or Goods and Services Tax Network (GSTN) or during post clearance audit (PCA) by way of random selection of bill of entry but may not detect all such cases resulting in loss of revenue.

Similar issue is faced at the end of Drawback and IGST refund in case of export where IEC-wise alerts (Import Export Code) issued against exporters for stoppage of release of drawback or refund amount is manually entered into ICES export module.

Integrated software can be developed which integrates GSTN data with Customs where ICES automatically blocks release of scroll in respect of IECs alerted against. Additionally, Fuzzy logic algorithm can be embedded in ICES to flag texts and/ or strings by inserting alerts using specific keywords.

[42] available at https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-act/notifications/notfns-2019/cs-tarr2019/cs05-2019.pdf

(B) Fraudulent availment of ITC:

Prior to GST, only CENVAT credit was transferable in case of import/ export. VAT credit could not be utilized for availment and utilization of Customs duty payment. ITC paid on inputs could be claimed from VAT formation while merchant exporter could claim drawback against exports. In GST regime, ITC paid on supply of goods which are ultimately exported can be utilized towards payment of IGST on export or ITC can be claimed from CGST/ SGST formations in case of export under Bond/ LUT .

In export under bond/ LUT, ITC refund against tax paid on inputs is availed. In case of export on payment of duty, refund of drawback and IGST is availed. IGST refund is allowed only if lesser rate of drawback is applied for[43] while drawback and IGST refund is legitimately granted provided the applicant submits a certificate from CGST/ SGST formation certifying non- availment of ITC.

In GST regime, VAT and CST were subsumed in GST and ITC by way of IGST or CGST or SGST can be cross-utilized (except CGST for SGST and vice- versa). With GST, end-to-end credit transfer became possible and this led to numerous cases where fraudulent availment of ITC eventually tied up with under-invoiced import or over-invoiced export. Gross overvaluation of such goods is done with intent to claim higher amount of export incentives as well as IGST Refund[44].

Drawback claims are processed in Export Module of ICES by the officer incharge of Drawback while IGST refunds are automated and generated by way of scroll. Thus, it is often seen that a defaulter claims zero drawback and high IGST claim in order to avoid scrutiny.

Mismatch in terms of GST payable and ITC on part of the exporter and their supplier is detected post facto and in only a fraction of cases. Further, ICES refund module only flags invoice mismatch on account of typographical errors in serial nos. etc. [SB 005 error] and not on holistic invoice matching so as to prevent fraudulent availment of ITC and its utilization in export.

[43] *M/s. Amit Cotton Industries vs. Principal Commissioner of Customs [Special Civil Application No. 20126 of 2018]*

[44] Standard Operating Procedure (SOP) for Tackling Fake Invoice Cases [Internet]. [cited 2023 Mar 12]. Available from: https://gstcouncil.gov.in/sites/default/files/SOP-for-Tackling-Fake-Invoice.pdf

Integration of GSTN and ICES will result in automated pan India blockage of drawback and IGST refunds against import export code (IECs) which are mentioned in alert circular. Geo-tagging of registered premises, combined with Geographic Information System (GIS), can obviate the need for initial physical verification and help prevent fraudulent practices such as circular trading by detecting fake addresses and multiple registrations from a single premises. Govt. Of Telangana has employed blockchain technology for capturing property records and real-time change in ownership[45] thereof. In the same vein, a pan-India database of industrial and commercial properties on blockchain platform can be launched. To further prevent revenue leakage, it is imperative to introduce holistic invoice matching in GSTN. Since all transactions in GSTN leave an audit trail, forensic audit and fuzzy logic matching can also be introduced to strengthen revenue administration.

(C) Faceless assessment:

CBIC vide Circular No.40/2020-Customs[46] [47] [48], dated 4th September, 2020 launched all-India roll out of faceless assessment. The rationale was digitization, greater efficiency by way of reduced turnaround time as well as removal of interface between the tax officials and assesses. In order to bring uniformity in examinations in shed, system generated centralized examination orders for Bills of Entry was introduced vide Circular No.16/2022-Customs dated 29th of August, 2022[49].

Further, employing AI and robotics in examination along with examining officer is the way forward. All unpacking and examination can be covered under CCTV and recorded for posterity. Just like scanned copy of examination report is uploaded into the ICES module, record of examined goods can be uploaded. If this causes bandwidth overload, metadata reference can be uploaded along with examination report on ICES and the actual footage stored in jurisdictional commissionerates for posterity. Not only will this implicate conniving officials, but more importantly, it will absolve honest officials who are wrongly accused. Cue

[45] Home [Internet]. Blockchain District. [cited 2023 Mar 12]. Available from: https://blockchaindistrict.telangana.gov.in/
[46] Circulars No.28/2020-Customs, dated 05.06.2020
[47] Circular No. 34/2020-Customs, dated 30.07.2020
[48] Circular No.40/2020-Customs, dated 4 th September, 2020
[49] Available at https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-circulars/cs-circulars-2022/Circular-No-16-2022.pdf

can be taken from installation of CCTV cameras in Customs vaults which has resulted in reduction of pilferage of gold.

(III) CREDIT & REFUND ISSUES

During payment of Customs duty, due to system issues it is occasionally seen that the payment made does not get acknowledged/ validated and, as a result, the assessee has to pay Customs duty again to proceed further. This may result in double duty payment against which the assessee applies for refund.

Excess duty under Customs Act is claimed under Section 27 of Customs Act, 1962 which lays down the limitation period of 1 year from the relevant date. Similarly, the limitation period under CGST Act is 2 years from the relevant date under Section 54 of CGST Act, 2017. However, in terms of Parimal judgment[50], excess duty is not to be treated as a tax but deposit which is to be granted in line with principles of equity and good conscience.

The moot point is would limitation period of 3 years under Limitation Act, 1963 apply or that laid down under the parent statute. Contrary judgments have ruled that a Customs officer acting within the framework of Customs Act cannot go beyond the ambit of the Act i.e. 1 year.

Supreme Court in the case of Collector of Central Excise, Chandigarh vs Doaba Cooperative Sugar Mills[51] has held that *"the authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the Department, the provisions of limitation, prescribed in the Act will prevail."*

In Miles India Ltd. Vs Assistant Collector[52], the Supreme Court held that the Customs authorities acting under the provisions of the Customs Act, 1962 are justified in disallowing the claim for refund as they were bound by the period of limitation under Section 27 (1) of Customs Act, 1962.

[50] Parimal Ray & Anr vs The Commissioner Of Customs (W.P. No. 1288 of 2013)
[51] 1988 AIR 2052
[52] Miles India Limited v. Assistant Collector Of Customs, Supreme Court Of India, Judgment, Law, casemine.com [Internet]. https://www.casemine.com. [cited 2023 Jan 12]. Available from: https://www.casemine.com/judgement/in/56b48d67607dba348fff2bf8

In Union of India vs Kirloskar Pneumatic[53] , Hon'ble Supreme Court held as under:

"the Customs authorities who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are."

Electronic Cash Ledger (ECL) was introduced by CBIC on 01.06.2022 by way of Customs (Electronic Cash Ledger) Regulations, 2022 issued vide Notification No. 20/2022-CUSTOMS (N.T.) dated 30th March, 2022. While the Regulation is silent as regards limitation for application of refund, Circular No. 166/22/2021-GST dated 17th Nov, 2021[54] clarifies that limitation under section 54 of the CGST Act would not be applicable in cases of refund of excess balance in electronic cash ledger.

With the introduction of electronic cash ledger (ECL), the technology aspect of payment of refund seems to have been streamlined. To fortify it further, blockchain technology can be employed in cases of refund, processing of ITC claims, debit of bond etc. for seamless, immutable record-keeping.

However, the question of law remains ambiguous as regards the following:

a) Is the treatment of excess duty paid to be treated the same in pending litigation i.e. would the Circular apply retrospectively?

b) It is a settled law that circular cannot go beyond the ambit of law and limitation laid down cannot be extended or overridden.[55] Even if a clarification as regards different treatment is being given to excess credit, the fact remains that the refund would still be applied for under section 27 of Customs Act, 1962. As to whether excess credit in electronic cash ledger (ECL) is tax or not is a question of fact while refund claim under relevant section and limitation prescribed therein is a question of law. Should the act not be amended to add a sub-section or proviso for such excess duty or amount not to be treated as tax in which case doctrine of limitation would not operate?

[53] 1996 SCC (4) 453
[54] Available at https://www.cbic.gov.in/resources//htdocs-cbec/gst/Circular-166-22-2021-GST.pdf
[55] Interpretation of Statutes by Justice A.K. Patnaik

(IV) Country of Origin (CoO)

In view of various free trade agreements (FTAs) like India - ASEAN FTA (AIFTA)[56], numerous instances of treaty shopping/ round tripping came to light where Chinese companies acquired defunct companies in Vietnam, Malaysia, Singapore etc. and routed their goods to India to avail lesser or no import duty.

To guard against misuse of rules of origin, CAROTAR, 2020 was promulgated vide Notification No. 81/2020 - Customs (N.T.).[57] which, *inter alia,* laid down provisions for regional value content, supporting documents and provided for verification on grounds of mismatch of seals & signature or accuracy of information regarding origin.

CBIC Circular Circular No. 18/2020 - Customs[58] dated 11th April, 2020 states that *"where a preferential treatment of goods under a Free Trade Agreement has been claimed but the original hard copy of CoO has not been submitted or only digitally signed copy or unsigned copy of CoO is submitted, may be assessed and cleared provisionally in terms of section 18 of the Customs Act, 1962. The final assessment may be done subsequently on submission of the original COO certificate by the importer."*

The above circular is silent in cases where FTA benefit is not claimed and CoO certificate is not available at the time of import. Following scenarios emerge:

Scenario 1: RMS processes B.O.E. and generates OOC

Scenario 2: RMS sends B.O.E. for assessment

Scenario 3: Non- RMS B.O.E. comes for assessment

In scenarios 2 & 3 where the bill of entry is either sent by RMS for assessment or in case of non- RMS bill of entry where the bill of entry comes up in assessing officer's queue, the assessing officer can call for supporting documents required for assessment or modification

[56] [Internet]. asean.org. [cited 2023 Jan 12]. Available from: https://asean.org/framework-agreement-on-comprehensive-economic-cooperation-between-the-republic-of-india-and-the-association-of-southeast-asian-nations-bali/

[57] Notification No. 81/2020 - Customs (N.T.) availabale at https://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-act/notifications/notfns-2020/cs-nt2020/csnt81-2020revised.pdf

[58] Circular No. 18/2020 - Customs dated 11th April, 2020 available at https://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-circulars/cs-circulars-2020/Circular-No-18-2020.pdf

thereof. Further, in case CoO benefit is claimed but CoO certificate is not uploaded, the bill of entry may be assessed provisionally in terms of Circular No. 18/2020 - Customs (*supra).* If no benefit is claimed at the time of assessment, any change by way of applicability of notification thereafter would amount to re-assessment.

However, in case of RMS bills of entry, any alteration can be made possible only by way of extraction of Bill of entry from RMS queue into the assessing officers' queue and change in notification thereafter. The moot point is whether addition of Notification amounts to re-assessment or merely amendment.

In ITC Ltd vs Commissioner of Central Excise, Kolkata IV[59], Hon'ble Supreme Court observed as under:

"...Reliance has been placed on Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC). In the instant case, the bills of entry were filed and they were selfassessed. It is an assessment under the Act and in case benefit of notification has not been claimed, in the absence of challenge to assessment of bills of entry by way of filing the appeal, the benefit of notification cannot be claimed. An application for refund is not maintainable in view of the law laid down by this Court in Flock (India) Pvt. Ltd. (supra) and Priya Blue Industries (supra)…"

Thus, when a Bill of Entry has been processed by RMS and OOC generated, if FTA benefit was not claimed and CoO certificate was not available at the time of clearance of goods for home consumption, warehousing or export, claiming notification benefit afterwards would amount to re-assessment. Therefore, it would require an appeal before Commissioner (Appeals) under Section 128 of Customs Act, 1962.

(V) JURISDICTION

The order of CESTAT is challenged before High Court or Supreme Court in terms of Section 130 or Section 130E of Customs Act, 1962 respectively. Civil appeal against CESTAT order before Supreme Court is warranted in cases involving classification and/ or valuation relating to rate of duty. In other cases, appeal lies before High Court which, in turn, can be

[59] Civil Appeal Nos. 293-294 of 2009

appealed before Supreme Court by way of special leave petition (SLP) under Article 136 of the Constitution.

The limitation prescribed under the Supreme Court Rules, 1966 for filing Civil Appeal before the Supreme Court against the order of the Tribunal is 60 days from the date of receipt of the order. The limitation period for filing of SLP is 90 days from the date of the High Court's order.

A contentious issue is the maintainability of appeal against CESTAT order before High Court under Section 130, or before Supreme Court under Section 130E of Customs Act, 1962. This aspect of maintainability has been variously interpreted by the courts. In umpteen cases, the order of CESTAT is contested in High Court which eventually rules it as non-maintainable. Non-maintainability often results in a bar of limitation, as the time invested in an appeal before the High Court may or may not be excluded from the limitation period of 60 days in the case of civil appeals. This can result in the dismissal of the appeal. Thus, a call regarding forum of appeal needs to be taken at the end of Commissionerate itself.

The Karnataka High Court in Motorola judgment[60] contra-distinguished applicability of notification and fulfilment of conditions in notification. In case of applicability of notification involving rate of duty, appeal lies before Supreme Court while in case of non-fulfilment of condition, appeal lies before High Court.

The Supreme Court in Commissioner Of Customs, Bangalore v. Motorola India Ltd.[61] set aside the HC judgment and remitted the matter to HC for reconsideration of appeals, while observing as under:

"*the only question that is involved is whether the assessee had violated the conditions of the exemption notification by not utilizing the imported materials for manufacturing of the declared final product and was, therefore, liable for payment of duty, interest and penalty. Neither any question with regard to determination of rate of duty arises nor a question relating to valuation of goods for the purposes of assessment arises in the present case. The appeals*

[60] Commissioner Of Customs, Bangalore v. Motorola India Ltd., Karnataka High Court, Judgment, Law, casemine.com [Internet]. https://www.casemine.com. [cited 2023 Jan 14]. Available from: https://www.casemine.com/judgement/in/5609452ce4b0149711250b74

[61] CIVIL APPEAL NO. 10083 OF 2011

also do not involve determination of any question relating to the classification of goods, nor do they involve the question as to whether they are covered by the exemption notification or not. Undisputedly, the goods are covered by the said notification. The only question is as to whether the assessee has breached the conditions which are imposed by the notification for getting exemption from payment of the customs duty or not. The appeals do not involve any question of law of general public importance which would be applicable to a class or category of assessees as a whole. The question is purely inter-se between the parties and is required to be adjudicated upon the facts available.

18. In that view of the matter, we find that the High Court was not justified in holding that the appeals are not maintainable under Section 130 of the Customs Act but are tenable before this Court under Section 130E of the Customs Act…

In Commissioner of Central Excise Customs and Service Tax, Mysore vs M/s Such Silk International Ltd.[62] the Apex Court opined as follows:

"In the present case, the dispute also is with respect to breach of condition of notification which may ultimately lead to subsequent demand of duty or imposition, but that itself cannot be said to be a dispute with respect to valuation. Therefore, the High Court is wrong in not entertaining the appeal on the ground that the same was not maintainable. The impugned order passed by the High Court is just contrary to the decisions of this Court in Motorola (India) Ltd. (supra) as well as Asean Cableship Pvt. Ltd. (supra) and the same deserves to be quashed and set aside."

In Asean Cableship Pvt. Ltd. vs Commissioner of Customs[63] the Supreme Court opined that if the principle question is rate of duty, appeal is maintainable before Supreme Court. It observed:

"...the principal question/issue is the exemption claimed under Section 87 of the Act. Whether the assessee is entitled to exemption as claimed or not, such an issue cannot be said to be an issue relating, amongst other things, to the determination of any question having relation to the rate of duty…the High Court is right in observing that the principal question in the present case is not in relation to the rate of duty but determining whether vessel AE is a foreigngoing

[62] CIVIL APPEAL NO. 7796 OF 2022
[63] SPECIAL LEAVE PETITION (C) NO.2208 OF 2022

vessel or not, and if the vessel AE is a foreign going vessel, Section 87 of the Act will be applicable or not. Therefore, with respect to such an issue, against the order passed by the CESTAT, the appeal would be maintainable before the High Court under Section 130 of the Act. ”

The moot point is, in case of Notification listing out customs tariff heading (CTHs) to which the Notification benefit would apply, and a case wherein the applicability of CTH is contested, would the issue be treated as one of applicability of the notification, fulfilment/ non-fulfilment of conditions in the notification, or one of classification ? Can the jurisdictional Commissionerate decide the principle question of law? Standard Operating Procedure (SOP) in this regard may be issued by CBIC and/ or further points of law may be laid down by the Hon’ble Supreme Court when dealing with such cases.

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