
(2024) 11 CESTAT CK 1288

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Customs Appeal No. 50995, 50996, 50997 of 2024

Exclusive Motors Pvt Ltd and Ors. @APPELLANT @Hash Commissioner of Customs @RESPONDENT

Date of Decision : 18-11-2024

Acts Referred:

Customs Act, 1962 — Section 14, 28, 28AA, 46, 108, 111, 111(m), 112, 114A, 114AA, 138B, 138C

Foreign Trade (Development & Regulation) Act, 1992 — Section 11

Customs Valuation (Determination of Value of Imported Goods) Rules

Citation : (2024) 11 CESTAT CK 1288

Hon'ble Judges : Dilip Gupta, President (J); C J Mathew, Member (T)

Bench : Division Bench

Advocate : Prakash Shah, Suyog Bhawe, S K Rahman

Final Decision : Allowed

Judgement

C J Mathew, J

1. M/s Exclusive Motors Pvt Ltd is before us with grievance that order, [order-in-original no. 07/Commr/VC/Exclusive Motors/ ICD-PPG/2024-25 dated 25th July 2024] of Commissioner of Customs, Inland Container Depot (ICD), Patparganj, New Delhi has fastened differential duty of ₹ 71,74,00,000 under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, for having been short-paid on import of cars between August 2018 and July 2023 besides imposing penalty of like amount under section 114A of Customs Act, 1962. Shri SP Bagla is aggrieved by imposition of penalties of ₹ 5,00,00,000 under section 112 and ₹ 4,00,00,000 under section 114AA of Customs Act, 1962 in the same order while Shri Sanket Anand, with no reason for cavil that proposal to invoke 114AA of Customs Act, 1962 did not find favour with the adjudicating authority, is aggrieved that penalty of ₹ 10,00,000 has been imposed on him under section 112 of Customs Act, 1962. Underlying their plea for relief is the claim of the appellants that these detriments have been erected on shaky foundations of fact and law which, according to them, suffices to assail insinuation that the price at 'port of loading' and price at 'port of

destination' are the same in all the impugned consignments while demonstrating incorrect appreciation of both section 14 of Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

2. M/s Exclusive Motors Pvt Ltd is authorized dealer of M/s Bentley Motors Ltd, United Kingdom (UK) in India and, in accordance with industry practice, buys cars for sale in India. However, unlike most such contractual arrangements of dealership and owing to demonstrational and aspirational aspects of consumer behaviour, these high-end cars are, largely, ordered and paid for by customers in advance of indenting by the dealer with procurement as 'stock-in-trade' for supply to potential customers of much less significance. While the norm is for transport by sea as cargo, it is not unknown for customers to insist on immediate fulfilment of order which is catered to by supplier shipping by air. And it is on this particular twist of consumer preference that the conformity, or otherwise, of 'declared value' of all imports – irrespective of mode of transport – during the period in dispute with the stipulative description of 'transaction value' in section 14 of Customs Act, 1962 has been called in question in the notice, [show cause notice no. 04/COMMR/2023-24 dated 4th August 2023] issued to appellants herein.

3. The case in the notice is that the price declared on the bills of entry filed in each instance, though claiming to be CIP/DAP, [Carriage and Insurance Paid (CIP)/Delivered at Place (DAP)] as per INCOTERMS, [International Commercial Terms (INCOTERMS) of International Chamber of Commerce], were the same as that declared to HMRC, [His Majesty's Royal Customs (HMRC)] at load point by freight forwarder of exporter, M/s Bentley Motors Ltd and, hence, warranted additions as prescribed in rule 3(1) of Customs Valuation Rules, 2007. The appellants contend that this sweeping inference is without any factual support as scrutiny of documents of M/s Exclusive Motors Pvt Ltd by investigators had not elicited any record of separate payment of freight which surely would not have been foregone in the price charged by M/s Bentley Motors Ltd and that the demand has been confirmed on flimsy findings drawn from unsubstantiated hearsay evidence transposed on persons available in India and privy only to communication received over email from individuals purportedly concerned with declarations at the overseas end.

4. The price clause in the contract as well shipping documentation have adopted INCOTERMS notified by the International Chamber of Commerce (ICC) and have been categorized as four, including CIF/FOB, [Cost Insurance Freight (CIF)/Free on Board (FOB)], corresponding to the liability rules for sea and inland waterways and as seven, including CIP/DAP, corresponding to liability rules for any mode of transport. The price terms should, therefore, be uniform throughout a transaction or across the period, as the case may be, and to suggest that it varies at either end of a transaction or contract, as the case may be, is an inaccurate interpretation of the price transacted or price contracted, as the case may be, as well as of the liability terms agreed to between buyer and seller in

order or contract, as the case may be. The acronyms deployed in the price clause reflect agreement on responsibility for risk involved in transport and delivery of goods and are universally understood. Suffice it to say, the discharge of transport charge and insurance premium by the seller is the norm and, save by contrary conditions in order or contract, included in the price charged from the buyer. Declaration of price has, more often than not, tax significance only at place of import and the law on valuation for assessment to duties of customs is designed so for the purpose.

5. In the impugned order, at the first level, charging of differential duty on 51 cars, imported between August 2018 and October 2022, rests on supplementary invoices purporting to add air freight cost, varying between GBP 4509.50 and GBP 9640.00, to the original price with further loading of 1.125% to the cost towards insurance resting on the declaration of 'statistical value' made to HMRC by freight forwarder at time of shipment being the same as that in the bill of entry filed on arrival. There are, thus, two elements that the finding in this bunch of imports relied upon to conclude that the price declared on import reflected merely the cost of the car at manufacture - the declaration of freight forwarder and supplementary invoices for each car identified by chassis number - to arrive at revised assessable value of ₹ 52,28,41,684 against declared value of ₹ 48,76,43,665.

6. At the next level, involving import of another 24 cars by air, chassis-wise correlation, undertaken supra, was left unfinished as investigators were in possession of only another 12 supplementary invoices. The importer was offered the option of either correlating or, in the alternative, to bear 21.125% of declared value as addition of freight and insurance for recovery of duty thereon. Thus, assessable value in this bunch of imports stemmed from the finding that declared price was only cost of the car at manufacture and rested on the declaration of 'statistical value' by freight forwarder and the non-acceptance of invitation to correlate supplementary invoices with the original invoices of 12 of the other 24 cars imported by air.

7. Lastly, for the other 95 cars, all imported by sea, the adjudicating authority loaded the declared price with the full extent of additions at 21.125% towards freight and insurance by discarding a reasonable assumption that the air freight in supplementary invoices could, by that description, only be top-up over normal freight and by reliance on the other element, viz., declaration by freight forwarder being identical to price declared in the bill of entry, as in the preceding bunch of imports. The conclusions in the impugned order were painstakingly elaborated by Learned Authorized Representative through, as he preferred to refer, 'case studies' of documentary evidence for our edification and enlightenment. This was laid out at two levels to set out the inexorable conclusion therefrom of 'deliberate suppression' of a crucial element of 'value' that enabled the adjudicating authority to work forward on available evidence for imports by air while working the implication of the same evidence backwards to

strip the declared value of any claim to be transaction value and then to pad it with the last resort afforded by Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for imports by sea and air.

8. For this, the adjudicating authority drew upon a comparison of the pro forma invoice and final invoice of such transactions pertaining to which correspondence for revision of transport mode was available – five such in the ‘case study’ of Learned Authorized Representative– to conclude that, irrespective of the mode of transport, the transaction price remained unchanged for inferring therefrom that the ‘supplementary invoices’ reflected actual freight for air mode lacking the ‘grace’ of being differential freight. From that, it was but a step further to draw upon the ‘export declaration’ of consignments and corresponding invoices to conclude that freight and insurance were not included in the latter warranting, in the absence of information on these elements from the appellant, deployment of the last resort of loading the declared price by 21.125% afforded by Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Learned Authorized Representative highlighted three such transactions in his ‘case study’ classification in defence of the adjudication order.

9. Learned Counsel for appellants submitted that the demand of differential duty and imposition of penalties does not stand test of law or sustenance on facts. According to him, there were no facts that the notice could boast of and that circular reasoning in the impugned order was arithmetically established only by obfuscation of mathematical principles. He contended that ‘statistical value’ in some unrelated return filed in the country of supplier was used to reject the declared value but the same declared value was then used to load additions towards freight and insurance when it should have fallen to the persons concerned in the country of export to have deducted the actual freight and insurance from the invoice value for any declaration at that end. He submitted that none, investigators or persons participating in the investigation, had, even passingly, explained away the deviation from the contractual terms and the supposition that invoice value did not include freight and insurance. According to him, it was the contractual responsibility of the supplier to carry risk of loss and burden of delivery till destination in India and, at no stage, was the supplier put to test on the veracity of purported declaration, made by freight forwarders purportedly on their behalf, vis-à-vis the contract terms. He averred that it suited the investigation to sanctify an unacknowledged declaration by an unconcerned entity because the complexity of cross-border trade placed many aspects in ‘non-jurisdictional limbo’ which was sought to be filled by leaps of illogic that had no basis in fact or law.

10. The critique of the impugned order by Learned Counsel ranged from factual discrepancies relied upon in arriving at conclusions to questioning the credibility of purported testimony by those claiming knowledge of transaction minutiae and contractual obligation that only seller and buyer are privy to. He pointed out that no authenticated statement of authorized representative of M/s Bentley Motors

Ltd was available to evidence the chain of logic that appealed to the mind of the adjudicating authority. Even the provenance of the supplementary invoices was, according to him, questionable because they remained to be corroborated as obligating M/s Exclusive Motors Pvt Ltd to recompense M/s Bentley Motors Ltd in the absence of being communicated to the former by the latter; that these were not available on the records of the former is abundantly clear from the scrutiny of their documentation by investigators. He submitted that, even if the amounts were claimed to have been adjusted by supplier, the liability of further payment would not devolve on the dealer in the absence of such supplementary invoices and adjustment would not have been possible in the absence of account with the supplier. He argued that there is nothing on record to establish that any payments had been made to M/s Bentley Motors Ltd either through banking channels or through 'hawala' route.

11. According to Learned Counsel, the 'transaction value' for assessment of import goods is by law, as set out in section 14 of Customs Act, 1962, the declared price, inclusive of all costs charged by seller for delivery at place of import, which was to be accepted as being that which the buyer was obligated to recompense the seller. He contended that, other than upon rejection of declared value by recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and substitution by one of the enumerated alternatives therein, the only scope for additions, permitted by rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, was for conformity with rule 10 thereof. He pointed out that such recourse required validation by evidence – either inhering from buyer having engaged with logistics providers and insurance companies or from payments made separately by buyer to seller for both or either – which was lacking in the notice.

12. He submitted that the contract did not encompass such costs being payable by them to transporters or to insurers and, hence, the sale value encompassed all of these. He argued that the notice had not evidenced any cause to suspect that the supply at CIP/DAP terms in the contract had been switched. He contended that 'statistical value' was not, by any stretch, surrogate for export value and, with no detriment attaching to declaration thus, there was no justification for acceptance of that as the sale value excluding freight and insurance. According to him, as it was not contracted for such costs to be borne by supplier, there was no reason to assume that M/s Bentley Motors Ltd would, without demur, tolerate the lack of any response to the supplementary invoices if delivered to buyer. He pointed out that, even if adjustable, there was nothing owed to buyer against which adjustment could be made.

13. Responding to defence of the impugned order by Learned Authorized Representative, Learned Counsel submitted that it was not open to any sovereign or agency of sovereign to alter the terms of a commercial contract and, barring courts of law in dispute between contracting parties, to interpret any aspect of a private transaction. Furthermore, he contented that the price agreed to between

buyer and seller need not always be amenable to vivisection for its elements to be disaggregated; that, according to him, would be as good as subordinating a commercial engagement to convenience of a tax administration whose connection with the pecuniary aspect of business is peripheral and incidental. He submitted that fiscal law may provide for acceptance or rejection thereof, with latter attended upon by alternative mode of ascertainment for that limited purpose, and may provide for additions without disputing the correctness of the sale price. Learned Counsel pointed out that lack of clarity about statutory scheme has been amply demonstrated by the colliding of several provisions of the statute and rules merely to set out a case, ipse dixit, for recovering differential duty and imposition of penalty. He drew attention to lack of evaluation that would conform to the pathway laid out by the judgement, [order dated 13th July 2015 in commercial suit no. 9 of 1999] of Hon'ble High Court of Madras in Evergreen Sea Foods Pvt Ltd v. Ruskim Sea Foods Ltd & others for distinguishment of CIF and FOB contracts.

14. He also pointed to the selective application of the 'evidence' gathered during the course of investigation – as it is, lacking credibility of their own owing to absence of any corroborative material or from not having been subjected to tests mandated in law - that puts paid to the integrity of all the findings as well. He submitted that statements, such as they are, of the 'freight forwarders' were found to be conveniently credible to hold that air freight charges had not been included in the price while rejecting their testimony on sea freight only because the optics may not have presented itself well. He also submitted that the report of the High Commission of India, on the back of which the 'supplementary invoices' were accorded legal acknowledgement, was not disclosed as the probable consequence of the observations from HMRC which, admittedly, was in communication with the mission in London may not have fitted in with the allegations in the show cause notice. Learned Counsel further argued that there was nothing on record to give credence to the statements and other communication as emanating from persons authorized by the respective companies to set the record straight on their behalf. He described the submissions of Learned Authorized Representative as legally and factually deficient for not having been able to establish that any payment beyond that in the pro forma invoice had been made, whether against supplementary invoice or otherwise, to M/s Bentley Motors Ltd or even of any credit account in the books of M/s Bentley Motors Ltd that could have been adjusted when it was M/s Exclusive Motors Pvt Ltd that was always the buyer and not the other way around. According to him, loading on account of freight and insurance to the extent prescribed as last resort was valid only when actuals were unascertainable which, ironically, could not be if the version of the investigation that they were in 'cooperative interface' with the freight forwarders and supplier held true. He asserted that it was not for the appellants to be burdened with the onus of 'created fiction' of FOB price to be declared on shipment that had so impressed the adjudicating authority; the respondent, he argued, had every means at their

disposal to do so despite which it was found apt to feebly clutch at the last resort after brash disregard of contractual agreement on CIP/ DAP terms between the corporate entities in India and overseas. He summed up with the contention that the conspiracy drummed up by the investigators appeared to involve only the appellants and not the other party to the contract and that, too, stemming from fortuitous circumstances of some customers desiring to be in immediate possession of cars already ordered and under procurement which apparently enabled the appellants to press the supplier not to insist on payment for the difference – this, according to him, has the ingredients of one party to a contract acting alone and from happenstance, too, which is no conspiracy at all – begging the question of non-inclusion of freight and insurance in the contracted value without active role of both sides to the transaction.

15. Learned Authorized Representative set out his arguments in the backdrop of documentation allegedly suppressed by appellants at time of import and statements of freight forwarders before the investigators in India as well as the mandate of declaration devolving on appellants under rule 11 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as he led us through a narration of the intelligence inputs and follow-up investigation that culminated in issue of notice. He submitted that revision of assessable value from ₹ 191,86,47,659, as declared, to ₹ 225,61,45,272, as re-determined by process of law, on 170 cars to recover differential duty of ₹ 71,74,43,863 was attributable to deliberate suppression of the correct assessable value by parading of invoice value, on FOB terms, as the transaction value, in CIF terms, prescribed for the entry envisaged in section 46 of Customs Act, 1962 and which, along with contravention of section 11 of Foreign Trade (Development & Regulation) Act, 1992 read with rule 11 and rule 14 of Foreign Trade (Development & Regulation) Rules, 1993, rendered the goods liable to confiscation under section 111(m) of Customs Act, 1962. He submitted that, on the evidence made available, the appellants had been afforded every opportunity to explain away the allegations but that they had chosen, instead, to obdurately remain uncooperative in setting the record straight which also pointed to their complicity. He described the business model of the impugned transactions to demonstrate fitment of the evidence relied upon for recovery of duty and imposition of penalty. He was particularly emphatic on the surmise in the impugned order on the computation of costs connected with air freight that was charged from the customer but ostensibly not used for the intended purpose. According to him, the combination of supplementary invoices, export declarations and invoices – both pro forma and final – as well as the statements recorded from employees of local sister-concerns of the freight forwarders in the country of despatch, viz., M/s Schenker (UK), M/s Kuhene + Nagel (UK) and M/s DHL (UK) together with that of one Lynsey Philips of M/s Bentley Motors Ltd established that incremental costs were not brought on record even though freight was paid to the three entities by M/s Bentley Motors Ltd additionally as discernible from the export declarations of FOB price filed on their behalf with customs authorities at load point obtained from

the invoices.

16. In the course of his response to arguments of Learned Counsel, Learned Authorized Representative pleaded that the decisions of the Hon'ble Supreme Court in *Union of India v. Mohit Minerals*, [2022 (61) GSTL 257 (SC)], in *Eicher Tractors Ltd v. Commissioner of Customs, Mumbai*, [2000 (122) ELT 321 (SC)] and in *Century Metal Recycling Pvt Ltd v. Union of India*, [2019 (367) ELT 3 (SC)] and of the Tribunal in *Jet Airways (India) Ltd v. Commissioner of Customs (I) (Airport), Mumbai*, [2021 (377) ELT 83 (Tri.-LB)] were distinguishable not only on facts but also as pertaining to either 'Goods and Service Tax (GST)' disputes, as in *re Mohit Minerals*, or to Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 and, thus, inapplicable. He also submitted that reliance on the decisions of the Hon'ble Supreme Court, in *Union of India v. Mahindra & Mahindra Ltd*, [1995 (76) ELT 481 (SC)], in *Commissioner of Customs (Imports), Mumbai v. Ganpati Overseas*, [2023 (386) ELT 802 (SC)] and in *Commissioner of Customs, Mumbai v. Bussa Overseas Properties Ltd*, [2007 (216) ELT 659 (SC)], and of the Tribunal, in *Rajasthan Prime Steel Processing Centre Pvt Ltd v. Commissioner of Customs, New Delhi*, [2019 (369) ELT 1350 (Tri.-Del)]. and in *Haji Sumer v. Commissioner of Customs, Chennai*, [2020 (371) ELT 533 (Tri.-Chennai)], were misplaced owing to factual distinctions.

17. Per contra, he contended that the niceties of procedure – both of evidencing as well as jurisdictional limitation – was not required to be extended in the light of decisions of the Hon'ble Supreme Court in *SP Chengalvaraya Naidu v. Jagannath*, [1994 (1) SCC 1], in *Commissioner of Customs v. Candid Enterprises*, [2001 (130) ELT 404 (SC)], in *Commissioner of Customs, Kandla v. Essar Oil Ltd*, [2004 (172) ELT 433 (SC)] and in *Union of India v. Jain Shudh Vanaspati Ltd*, [1996 (86) ELT 460 (SC)] on nullifying effect of fraud on everything, solemn act included. Likewise, he contended that disruption of the norms of privilege, normally accorded to noticees, by reason of fraud had been approved by the Hon'ble Supreme Court in *Ashok Leyland v. State of Tamil Nadu* and another, [AIR 224 SC 2836]. According to him, statements before customs officials were conferred with sanctity by the Hon'ble Supreme Court in *KI Pavunny v. Asst Collector (HQ), Central Excise Collectorate, Cochin*, [1997 (90) ELT 241(SC)]. He also placed reliance on the decision of the Tribunal in *Arjun Sah v. Commissioner of Customs (Prev), Patna*, [2021 (375) ELT 241 (Tri-Kolkata)] that placed the principles espoused by the Hon'ble Supreme Court in *Collector v. D Bhoormull*, [1983 (13) ELT 1546 (SC)] in contemporary context.

18. He submitted that the invoice price, on which duty liability had been discharged, was identical to 'statistical value' declared to HMRC by freight forwarder in the export documents and, hence, did not include freight and insurance for shipment of the 170 cars. He further submitted that email communication of aforesaid employee of the supplier with investigators established that supplementary invoices had been issued and the denial thereof, qualified by 'best of his knowledge' existence, in statements of Shri SP Bagla,

sufficed as evidence of freight payable. The clear linkage of 51 supplementary invoices obtained through HMRC with corresponding invoices and orders available with the importer, according to him, established the non-inclusion in the declaration made at the time of import. Likewise, he argued, 24 other imports by air, or at least half, had not been loaded with actual freight only owing to refusal by the importer to correlate with the invoices. As far as 95 cars transported by sea was concerned, he fell back on the logic of supplementary invoices reflecting actual air freight as also from disclosure of invoice price as FOB value to HMRC at the time of export, and remaining unchanged for cars transported by sea, to support the conclusion in the impugned order that invoices, across the board, did not include the freight and insurance prescribed for conformity with transaction value.

19. Doubtlessly, we are at one with the Hon'ble Supreme Court, and with Learned Authorized Representative too, that fraud vitiates everything, including solemn acts. There is, however, much danger in the Tribunal adopting that sentiment expressed by the highest court of the land without ruminating on applicability to the context; the Hon'ble Supreme Court has jurisdiction over all laws while the Tribunal is restricted to commodity tax and service tax. This distinction is of particular significance as 'fraud' is ensconced within section 28 and section 114A of Customs Act, 1962 which emplaces a particular jurisdiction of limitation upon a finding on facts that 'fraud' was an ingredient in the alleged evasion of duty. In *re Chengalrayya Naidu*, the Hon'ble Supreme dealt with a dispute under civil law and was anguished by the suppression of relevant document before the courts. In *re Candid Enterprises*, the Hon'ble Supreme Court was concerned, not about the tax recovery which was remanded for determination by the Tribunal but, with the finding that a decision of the Hon'ble Supreme Court was applied to alienate discretion in condoning delay for denying Revenue opportunity to plead the merit of its case for recovery of duty. In *re Essar Oil Ltd*, the Hon'ble Supreme Court had before it a matter which, on uncontested facts, was about two mutually exclusive determinations of duty liability - each undeniable on its own set of facts and law - that was decided on applicable 'date of determination of duty' without touching upon the factual circumstances that guided the adjudication order. These clearly were not about recovery of tax but about jurisdictional limitation having been decided on technicality. The fraud that was remarked upon in these decisions is not only contextual but also begs the question of scope for invoking of fraud, in a larger context, by creations of a statute that does incorporate fraud as ingredient to justify invoking of extended period of limitation for recovery of duties of customs. Simply put, and not just rhetorically, the correctness in deploying documents and statements that are, of themselves, in challenge for lack of provenance as evidence of fraud having been committed and reliance on commission of fraud as the brush to sweep away the challenge is in issue; if this submission of Learned Authorized Representative were to find favour, the cart and the horse are locked in this circle of motion for all time to come. Thus, though fraud is toxic, as both

venom and poison are, the distinguishment, in the words of Dr Ronald Jenner, thus 'if it bites you and you die, it is venom but if you bite it and you die, it is poison' renders fraud to be more akin to poison that has to be spewed out, and not neutralized with anti-venom, for the charge to hold fast.

20. The cited decisions pertain to civil law procedure and the attending presumption that rival litigants be before the court with clean hands. Though there is a large body of judicial authority that considers tax proceedings to be operation of quasi-criminal law but, as not being in the nature of criminal liability which arises from offence against the State in its 'protector' role and not excluded from the civil jurisdiction which arises from grievance between persons over disputed interests, convention, such as in England, of such disputes being taken up in the Chancery Division of the Kings Bench, notwithstanding, immunity from the mandate of civil law presumption in tax litigation, which arises from the 'treasury' role of the State, is not available to either side. In two of the cited cases, the interests of the State were under siege in one at the threshold by drawing upon a judgement that should have influenced disposal on merits and in the other by contrived directing to one of the two tax outcomes. Hence, the Hon'ble Supreme Court held the procedures and mechanics to be of lesser significance than already determined revenue.

21. By both considerations above, it is inevitable that the evidence garnered by the agencies of the State to fasten tax consequences must serve the purpose of the law. In this dispute, the core is 'valuation' – which, along with 'rate of duty', is one of the two pillars on which assessment in accordance with law is erected – and, like classification, is incorporated in the taxing statute as evolving, dynamic tools emerging from trans-national deliberations. Not only, thereby, is there similarity across customs administrations but also the compulsion of process consistency at exporter and importer ends. In the light of challenges to the essence of the foundation of the case of assessment to differential duty that is before us, those judgements do not assist the defence of the impugned order. We take up both the statements relied upon in, and the documents that were sought to sustain, the impugned order for evaluation of evidentiary value.

22. The statements are relevant to the extent that they purport to evidence the nature of fiscal transactions relating to the goods before shipment from the country of production. In particular, that of the officials of the freight forwarders are said to adduce the charging of freight from the supplier, the submission of value in the export declarations and the advice that importer would be privy to the freight charges. Learned Authorized Representative has relied on the decision in re KI Pavunny to urge adoption of the testimony therein. Learned Counsel contended that these were not put to the test of section 138B of Customs Act, 1962. We find that reliance has been placed on content of emails between the officials of freight forwarders in the United Kingdom (UK) and investigators in response to queries of the latter; these, certainly cannot purport to have been testifying under the authority of section 108 of Customs Act, 1962 before a

'Gazetted Officer of customs' which is contingent on personal appearance. The confirmation of contents by the employees of the corresponding entities in India are neither from their personal association with or knowledge of the impugned transactions nor from any role that the Indian entities themselves have had in the impugned transactions. Notwithstanding the ownership linkage of the Indian and overseas entities, the statements of persons in India are claimed, and vicariously, to accord evidentiary value to the 'information' furnished in the statements relied upon. Indeed, there is no record of the employees of Indian entities having been authorized by M/s Schenker (UK), M/s Kuhene + Nagel (UK) and M/s DHL (UK) to respond to any summons under section 108 of Customs Act, 1962. This is tantamount to stretching of limits of section 108 of Customs Act, 1962 to frontiers unknown to law and poses severe hazard to credibility of investigation if approved as legal. Any facts and inferences drawn from these statements are, therefore, not relevant to the proceedings.

23. The communication from an employee of M/s Bentley Motors Ltd has been cited as evidence of instructions on air freighting to suit customer preference as well as attesting to supplementary invoices having been raised besides intimating manner of settlement of the differential amount thereon. We find nothing on record to demonstrate that this was a statement recorded in person under section 108 of Customs Act, 1962 nor that any summons issued to M/s Bentley Motors Ltd was responded to with offer of the said person as authorized representative for the purpose. The role of the individual in the said transactions or of responsibly assuring validated information of such transactions does not emerge from either the show cause notice or in the impugned order. And yet his observations have been raised to oracular acceptability by a process unknown to law. Statements are accorded credence by the apprehension of legal consequences of proved misreporting as well as of any consequent culpability for the authorizing entity. It would be interesting to evaluate the testatory consistence of the person as authorized representative of M/s Bentley Motors Ltd and assuming all consequences – legal, contractual and fiscal – of information so provided in proceedings under section 108 of Customs Act, 1962. If the transaction was tainted by wrong-doing, as it must be if the supplementary invoices were not left unpaid, either from inappropriate practices in the operations of M/s Bentley Motors Ltd or from the turpitude of any of its employees acting on their own at the instance of the importer, the bitter fruit of retribution is unavoidable. That risk of consequences of incorrect testimony is more of a path-straightener in ascertainment of truth, as near as possible, than an unconvincing belief that it is human morality which lends credence to statements recorded under section 108 of Customs Act, 1962. As things stand, the evidentiary value of the 'statements' relied upon are jeopardized except in the face of admission by the appellants herein or to the extent that facts support the averments.

24. The documents relied upon are two: 63 'supplementary invoices' and the 'export declarations', as the impugned order has chosen to designate them. The

supplementary invoices purportedly issued by M/s Bentley Motors Ltd were held by the adjudicating authority to evince the air freight payable by importer and, owing to the invoices being on FOB terms, to be included in assessable value in terms of rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. On behalf of appellant, it was contended that these are inadmissible owing to lack of authentication while Learned Authorized Representative urged its evidentiary significance from the certification prescribed in section 138C of Customs Act, 1962. Doubtlessly, these are certified but such certification, attesting to the source, cannot extend to the contents. On record is merely a communication from an official of M/s Bentley Motors Ltd that supplementary invoices had been raised; that does not suffice for veracity as the competence of the said individual to represent M/s Bentley Motors Ltd is not evinced and the communication lacks even the prima facie legality that an untested statement recorded under section 108 of Customs Act, 1962 has. Furthermore, an invoice – original or supplementary – is mere paper unless there is an acknowledgement of debt by payment or by appropriate debit as outstanding dues. The adjudicating authority has referred to adjustment of the amounts in credit balance held by M/s Bentley Motors Ltd but neither is any authentication of such account available nor its source established. It is also improbable that such purported outstandings are adjusted against an account which is not of M/s Exclusive Motors Pvt Ltd and, more so, in a contractual engagement bedrocked on prior payment. There is no record of any payment made through banking channels to the supplier either towards dues arising from the supplementary invoices or as transfers to the alleged adjustment account. There is also no evidence of such dues having been made through unofficial route, commonly known as hawala, to M/s Bentley Motors Ltd. The illegality of these would surely have precluded M/s Bentley Motors Ltd from indulging in such transfers; the lack of any proceedings against them is sure evidence of the contrary. It appears improbable that invoices are raised and recorded without any payment insisted upon.

25. The certification in terms of section 138C of Customs Act, 1962 would also make it appear that the documents were sourced from the electronic records of M/s Bentley Motors Ltd and, though said to have been raised on M/s Exclusive Motors Pvt Ltd, was absent in the electronic records of the buyer. The contention of Learned Counsel for appellants that intensive scrutiny of physical and electronic records of M/s Exclusive Motors Pvt Ltd had not yielded such invoices has not been disputed. It is also surprising that such supplementary invoices, on which, along with the finding that the original invoices are on FOB terms, has the enhancement of value of 51 cars despatched as air freight been justified, are not available for cars despatched by sea transport which were also held to be liable for enhancement owing to the original invoices being on FOB terms. This is quite a leap of logic that may reasonably cast doubts on adjudicatory acknowledgement of the supplementary invoices. Moreover, it is no less surprising that the correlation of 51 of the 63 supplementary invoices was

rendered possible but not so for the remaining 12 and that there were another 12 cars despatched by air for which supplementary invoices were not available with the same source. That does not speak much about the record keeping by M/s Bentley Motors Ltd which the adjudicating authority has set such store by as to accept these documents without question merely owing to certification prescribed in section 138C of Customs Act, 1962. In the light of these discrepancies, we cannot permit ourselves the luxury that the adjudicating authority has of venturing to speculate on the cause and consequence of these supplementary invoices.

26. Much of the outcomes in the impugned order rest on interpretation of the contractual arrangement between buyer and seller as being on FOB terms and this mutation from CIP/ DAP terms stems from the purported export declaration filed with HMRC. These, undisputably, have been executed by the freight forwarders but there is scarcely a whisper about the representation rights of these entities to declare price of goods exported by M/s Bentley Motors Ltd. A perusal of these declarations make it abundantly clear that these are not export declarations but a document intended for data amassing. Though Learned Authorized Representative did fall back on the information pertaining to such documentation from the website of HMRC, it appears that undeserving sanctity has been accorded to them. These are not export declarations but reporting for statistical purposes; a role played by that wing of HMRC akin to that of the Directorate General of Commercial Intelligence and Statistics (DGCIS) for the Government of India. In the absence of authority under the customs statute of the exporting country to such agency for acting as customs authorities designated to assess export documents, these declaration lack the rigour that export declarations possess. It has not been evidenced that misdeclaration of 'statistical value' has fiscal and penalty consequences which may, justifiably, be ground for sanctifying the contents of these reports. That these mirror the value in the original invoice may well be attributable to casual filing of commercially inconsequential information drawn from a conveniently available record. To clothe these with undeserved rigour stretches preponderance of probability to breaking point; neither can these suffice to represent mathematical approximation which, according to Learned Authorized Representative, has been approved by the Hon'ble Supreme Court in re D Bhoormull and adopted by the Tribunal in re Arjun Sah. Both these decisions were rendered in cases of gold smuggling and not in demand for recovery of duties of customs based on documents; even if mathematical exactitude is not de riguer in adjudication proceedings, it cannot be allowed to rest on documents that fail the test of legal mandate.

27. It now remains for us to apply known law to established facts for evaluating the correctness of the outcomes in the impugned order stemming from alleged non-inclusion of freight and insurance in the declared value which was allegedly only on FOB terms. It is clear that the contract for payment on CIP/DAP terms between M/s Bentley Motors Ltd and M/s Exclusive Motors Pvt Ltd squarely

placed the risk liability till import into India on the former. No evidence is available that these terms of contract underwent change. There is no provision in the contract for price revision or issue of supplementary invoices; indeed, it could not be as the contract mandates payment in advance. The payment terms would alter to FOB only upon shifting of risk liability to M/s Exclusive Motors Pvt Ltd which would be attended upon by the importer engaging transport and procuring insurance which, uncontestedly, has not happened. The only feasible alternative is for the buyer to place reliance on seller's arrangement which not only varies the contract terms but brings in collusion between the two which is not the substance of the allegation in the notice or the findings in the impugned order. Mere declaration, and inconsequential too, in document meant for statistical reporting without risk of penal consequence does not suffice to hold that contract terms were altered to transfer the liability. The fiscal consequences of such far-reaching alteration in contract for supply of high-end motor vehicles would be enough of disincentive to suggest that risk liability stood altered and unless risk liability was altered, the reading down of invoice as excluding freight and insurance on the basis of unreliable statements does not stand the test for recourse to rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Nor do they discharge the onus of customs authorities, not having recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, to establish that freight and insurance were not only excluded but also, as in large portion of this dispute, not ascertainable.

28. To affirm that, on tenuous suggestion of wrong-doing, the onus stands shifted to the importer would be tantamount to transplanting the valuation scheme in the Customs Valuation Rules, 1963 to the present day. Thus, the finding for concluding that the declared price should be loaded by 21.125% to render it to be 'transaction value' in 119 imports by sea or air is without any basis in law.

29. As far as supplementary invoices are concerned, there is nothing on record to suggest that these were issued to the buyers before or after the despatch of 51 cars by air. The scrutiny of records of importer-appellant had not yielded those. To conjecture so, and lend credence to documents reflecting transactions not envisaged in the contract, payment would have to be evidenced. Other than an inference of adjustment in some account purportedly held by M/s Bentley Motors Ltd, which, as set out supra, has only unreliable statements in support, no evidence has been led in the show cause notice. There is no evidence of remittance either through banking channels or, as Learned Counsel put it, through 'hawala' route. Indeed, it would surprise that two corporate entities operating in jurisdictions that criminalize such payments that could also carry loss of liability cover would opt for such compensatory payments. Furthermore, that it could be brought to fruition by one of the parties to the contract does not sit well logically or commercially. That such supplementary payments, insinuated in the finding on shipment by sea, were held as having occurred even without the supplementary invoices brings the available documentation, too, within the

penumbra of non-acceptability.

30. The declared price is, by default, not only the transaction value but also, unless established to the contrary, the price for delivery at the time and place of importation. With the law thus enacted, the onus for establishing the contrary rests with the adjudicating authority. On the evidence available and reliably acceptable, that onus has not been discharged. The declared price remains unimpeached to negate the enhancement and recovery of differential duty. In the absence of recourse to section 28 of Customs Act, 1962, ingredients for invoking section 114A against the importer do not exist. There being no misdeclaration of value, confiscation under section 111 of Customs Act, 1962 does not survive and with it the penalties under section 112 of Customs Act, 1962 lack sustenance. In the factual circumstances of this dispute, the impugned order is set aside to allow the appeals.

(Order pronounced in the open court on 18/11/2024)