IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

(1) CUSTOMS APPEAL No. 40240 OF 2021

(Arising out of Order-in-Appeal Seaport C.Cus.II No.136/2021 dated 19.03.2021 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai-600 001)

M/s.PPN Power Generating Co. Pvt. Ltd. .... Appellant
"Sunny Side", West Block, 1st Floor,
No.8/17, Shafee Mohammed Road,
Thousand Lights,
Chennai 600 006.

Versus

The Commissioner of Customs ...Respondent
Chennai II Commissionerate,
No.60, Rajaji Salai,
Chennai 600 001.

(2) CUSTOMS APPEAL No. 40376 OF 2021

(Arising out of Order-in-Appeal Seaport C.Cus.II No.134/2021 dated 19.03.2021 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai-600 001)

M/s.PPN Power Generating Co. Pvt. Ltd. .... Appellant
"Sunny Side", West Block 1st Floor,
No.8/17, Shafee Mohammed Road,
Thousand Lights,
Chennai 600 006.

Versus

The Commissioner of Customs ...Respondent
Chennai II Commissionerate,
No.60, Rajaj Salai,
Chennai 600 001.

(3) CUSTOMS APPEAL No. 40361 OF 2021

(Arising out of Order-in-Appeal Seaport C.Cus.II No.135/2021 dated 19.03.2021 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai-600 001)

M/s.Marubeni Corporation .... Appellant
4-2, Ohtemachi 1-chome,
Chiyoda-ku, Tokya, 100-8088,
Japan

Versus

The Commissioner of Customs ...Respondent
Chennai II Commissionerate,
No.60, Rajaj Salai,
Chennai 600 001.

APPEARANCE :

Sri Hari Radhakrishnan, Advocate (for Sl.No.1,2)
Sri R. Srinivasan, Consultant (for Sl.No.3)
For the Appellant

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 28.08.2023
DATE OF DECISION : 11.09.2023

FINAL ORDER Nos.40763-40765/2023

ORDER :

The issue involved in these appeals being same and connected, they were heard together and are disposed of by this common order. The parties are hereinafter referred to by their names / appellant and the respondent is referred to as Department.

2. Brief facts are that appellant M/s. PPN Power Generating Co. Pvt. Ltd. (hereinafter referred to M/s.PPN or the importer) have registered themselves under the Project Import Regulations, 1986 to set up a power plant at Pillaiperumalnallur, Thirukadaiyur Post, Nagapattinam District on the recommendation of "Tamil Nadu Electricity Board". The project was approved and the Essentiality Certificate was issued by the Sponsoring Authority viz., Energy Department, Government of Tamil Nadu vide letter dt. 16.03.1999. M/s.PPN submitted a proposal to the Energy Department, Government of Tamil Nadu for their power plant and the Energy Department vide their letter dated 16.03.1999 have certified the details of items of import and prescribed certain value limit against the relevant items. Thus concessional benefits of Customs duty for the import of such items were allowed. In this regard, the Energy Department's letter is addressed to Commissioner of Customs, detailing the value limit. As per the said certificate, the Sponsoring Authority has recommended 9 segments of the project totalling to JPY 8,86,24,43,836 and USD 6,41,13,986. Based on the Sponsoring Authority's approval, the project contract of M/s.PPN was registered by Custom house, Chennai on 30.03.1999. As per the norms stipulated in the Project Import Regulations, 1986, M/s.PPN had submitted a Bond for Rs.638 Crores and a Bank Guarantee for

Rs.13.77 crores in favour of the Commissioner of Customs, Seaport Chennai and a cash security deposit of Rs.84 lakhs. The Project was registered under Project Import for concessional rate of duty of goods falling under CTH 9801. The imports under the bills of entry were assessed under provisional assessment as per Project Import Regulations, 1986. The list of items to be imported as per the above letter of Government of Tamil Nadu is as below :

TABLE A

Sr.No.	Description of Goods	CIF value (Japanese Yen)	CIF value (USD)
1.	Combustion Turbine System	6,64,68,32,877	
2.	Steam Turbine System	2,21,56,10,59	
3.	Sea water System / Desalination System		1,18,62,835
4.	Balance of Plant		2,63,26,406
5.	Electricals & Control Equipments		84,52,403
6.	Fuel System		6,53,429
7.	Marine Plant & Equipment (Other than SPM)		46,92,932
8.	Single Point Mooring System		50,12,444
9.	Generator		71,13,534
	Total	8,86,24,43,836	6,41,13,986

3. M/s.PPN had imported the above mentioned goods from M/s.Marubeni Corporation, Japan (hereinafter referred to as M/s.Marubeni - the appellant in Appeal C/40361/2021). M/s.Marubeni being the executor of Erection, Procurement and Commissioning (EPC)

had placed orders with other overseas sub-contractors and the goods arrived at Chennai Port from different load ports was directly from the said overseas suppliers. M/s.Marubeni raised separate invoices to M/s.PPN. As per the contract, M/s.Marubeni had to procure the required equipments and machinery and execute the erection and commissioning. Since the project is on contract basis, the goods imported by M/s.PPN under various bills of entry were assessed provisionally. Apart from the above, in respect of few bills of entry, M/s.PPN had paid duty at merit rate due to exigency clearances as required by them. The invoices raised by M/s.Marubeni were produced by M/s.PPN to the Customs authorities along with the bill of entry documents and the duty had been collected by the customs based on value mentioned in the said invoices under provisional assessment.

4. The imports that were to be made by M/s.PPN on the basis of certificate issued by the Government of Tamil Nadu, were divided into nine segments, as shown in Table A above. The goods relating to the 1st, 2nd and 9th segments were supplied by M/s.Mitsubishi Heavy Industries, Japan. Similarly, the goods relating to 7th and 8th segments were supplied by M/s.Kier International, U.K. The goods relating to the 3rd, 4th, 5th, 6th were supplied by M/s.Stone and Webstar Engineering Corporation, USA. only.

5. As mentioned above, the goods relating to 3rd, 4th, 5th & 6th segments were supplied by M/s.Stone and Webstar on behalf of M/s.Marubeni who raised invoices on M/s.PPN. Based on these invoices, M/s.PPN filed their import documents before the Customs Department. M/s.PPN have cleared goods covered under 259 bills of entry and 12 bills of entry were supplied by M/s.Stone and Webstar invoiced through M/s.Marubeni.

6. In the 3rd segment, goods relating to "Sea water System/Desalination System", in the 4th segment, goods relating to "Balance of Plant", in the 5th segment, goods relating to "Electrical and Control Equipment" and in the 6th segment, goods relating to "Fuel System" were imported by M/s.PPN availing concessional benefits of Customs duty.

7. After the erection and commissioning of the power plant, M/s.PPN submitted a proposal to the Commissioner of Customs, Seaport Chennai requesting for finalization of provisional assessment vide their letter dated 26.12.2002. The matter was taken up for finalization of the project, based on their submissions. It was noted by the department that there was undervaluation of the goods supplied to appellant sourced by M/s.Stone & Webstar through M/s.Marubeni. On

such final assessment, the original authority vide order impugned herein held as under :

> "(a) I order finalization of all the Bills of Entry under Section 18 (3) of the Customs Act, 1962.
>
> (b) I confirm the demand of Rs. 9,54,10,789/-(*Rupees Nine Crores Fifty Four Lakhs Ten Thousand Seven Hundred and Eighty Nine only*) towards differential duty.
>
> (c) I demand Rs. 2,14,88,442/-(*Rupees Two Crores Fourteen Lakhs Eighty Eight Thousand Four Hundred and Forty Two only*) for the Single Point Mooring System towards differential duty.
>
> (d) I order appropriation of the Cash Security Deposit of Rs. 1,00,00,000/-(*Rupees One Crore only*) towards the above mentioned differential duty.
>
> (e) I levy a penalty of Rs.1,00,00,000/-(*Rupees One Crore only*) under Section 112(a) of the Customs Act, 1962 on M/s. PPN Power Generating Company Private Limited.
>
> (f) I levy a penalty of Rs. 1,00,00,000/-(*Rupees One Crore only*) under Section 112(a) of the Customs Act, 1962 on M/s. Marubeni Corporation."

8. The original authority vide Order-in-Original No.71671/2019 dt. 27.09.2019 thus confirmed differential duty demand on M/s.PPN and also imposed penalty under Section 112 (a) of the Customs Act, 1962. Aggrieved by this order, the appellant filed appeal before Commissioner (Appeals). Department also filed appeal against the same OIO before Commissioner (Appeals) against non-imposition of redemption fine by the original authority. The Commissioner (Appeals) vide Orders-in-Appeal No.134/2021 dt. 19.03.2021 upheld the order of OIO. Hence **Appeal No.40376/2021** by appellant viz. M/s.PPN.

Vide Order-in-Appeal No.136/2021 dt. 19.03.2021 allowing the prayer of the department, the Commissioner (Appeals) remanded the case back to the original authority to pass appropriate orders on levy of redemption fine. Aggrieved by this OIA, appellant M/s.PPN has filed Appeal **C/40240/2021**. M/s.Marubeni has filed Appeal **C/40361/2021** against OIA No.135/2021 dt. 19.03.2021 upholding the imposition of penalty of Rs.1 crore under Section 112(a) of the Act ibid.

9. Learned Counsel Sri Hari Radhakrishnan appeared and argued for the appellant M/s.PPN. Ld. Counsel vehemently argued with regard to the delay in finalization of the assessment. To establish that there has been huge delay in final assessment, Dates & Events have been furnished by the counsel for easy reference as follows :-

SN	DATE	EVENTS
1	16.03.1999	The Appellant received recommendation letter from the Tamil Nadu Government to the Collector of Customs, Chennai for setting up their power plant.
2	30.03.1999	The Respondents registered the project of the Appellant and issued a Project Intimation letter in F. No. S37/11/1999.The Appellant executed bank guarantees and also deposited an amount of Rs. 84 lakhs as security deposit. The goods were

		imported during the period from 10.2.2000 to 20.12.2001.
3.	26.12.2002	The appellant as per letter dated 26.12.2002 requested the Commissioner of Customs to finalize the provisional assessment.
4.	17.06.2003	The Petition's Counsel sent a letter to the Assistant Commissioner of Customs requesting him to finalise the assessments in respect of the imports made by them.
5.	10.07.2003	The Appellant's Counsel sent a letter to the Assistant Commissioner of Customs requesting to finalise the assessments in respect of the imports made by them.
6.	29.11.2003	Letter from the Appellant to the Commissioner of Customs requesting them to finalise the assessments
7.	09.02.2004	Letter from the Appellant's Counsel to the Commissioner of Customs requesting them to finalise the assessment.
8.	27.03.2004	Letter from the Appellant's Counsel to the Assistant Commissioner of Customs requesting him to finalise the assessments
9.	17.03.2004	Letter from the Appellant to the Assistant Commissioner of Customs requesting him to finalise the assessments
10.	17.05.2004	Letter from the Appellant to the Assistant Commissioner of Customs requesting him to finalise the assessments

11	27.05.2004	Letter from the Appellant's Counsel to the Commissioner of Customs requesting him to finalise the assessment.
12	28.05.2004	Appellant's Counsel Submissions in Reply to the objections raised by the Department.
13	14.07.2004	A personal hearing was conducted. The Assistant Commissioner entertained a doubt as to the admissibility of Single Point Mooring and other marine equipments for assessment at concessional rate.
14	13.08.2004	Letter from the Appellant's Counsel to the Assistant Commissioner of Customs requesting him to finalise the assessment.
15	13.08.2004	Letter from the Assistant Commissioner of Customs to the Appellant's Counsel.
16	27.09.2004	Letter from the Appellant's Counsel to the Assistant Commissioner of Customs requesting them to finalise the assessment.
17	05.10.2004	Letter from the Assistant Commissioner of Customs to the Appellant.
18	15.10.2004	Letter from the Appellant's Counsel to the Assistant Commissioner of Customs requesting him to finalise the assessment.
19	August 2006	The DRI, Chennai conducted investigation and found that the

		procurement price by M/s.Marubeni Corporation was higher than the price at which the equipment was sold to the appellant for some of the imported equipments sourced from M/s.Stone& Webster. It was contended by DRI that the goods were undervalued. An investigation report appears to have been sent to the Commissioner of Customs as per F.No.VIII/26/194/2006-DRI dated 4.10.2007. The appellant was kept in dark as to the investigation report made by the DRI.
20	15.02.2017	Letter from the Appellant's Counsel to the Assistant Commissioner of Customs requesting him to finalise the assessment.
21	25.02.2017	Letter from the Appellant's Counsel to the Commissioner of Customs requesting them to finalise the assessment.
22	05.09.2017	Bank Guarantees executed by the Appellant were periodically renewed.
23	05.03.2018	Final Reminder sent by the Appellant's Counsel to the Commissioner of Customs.
24	22.5.2018	The appellant preferred a writ petition bearing no. 6492 and 6493 of 2018 seeking direction from the Hon'ble High Court to the Department to finalize the assessment and return the huge cash security deposit made for an amount of Rs.84 lakhs and also to release the bank guarantee executed for an amount of Rs.13.77 crores. During the pendency of the said writ petition, the subject show cause notice dated 22.5.2018 on an entirely new ground that the value for the imported

		equipment was lesser than the supplier's purchase price.
25	08.10.2018	The appellant filed writ petition bearing no. 14365 of 2018 challenging the subject show cause notice dated 22.5.2018. The main ground taken was the delay in adjudication. The Single Judge of the Hon'ble High Court of Madras disposed of the said writ petition directing the appellant to participate in the adjudication proceedings and gave a series of directions.
26	30.11.2018	A Writ Appeal was filed against the said order dated 08.10.2018 of the Learned Singe Judge. The Division Bench of the Hon'ble High Court of Madras after prima facie noting that the adjudication proceedings were belated, directed the appellant to participate in the adjudication proceedings. However, some of the directions of the Learned Single Judge were modified which enables the appellant to release the bank guarantee executed by them. The Division Bench granted liberty to raise all points before the adjudicating authority.
27	27.09.2019	The Assistant Commissioner heard the appellant on 19.2.2019 and passed the order-in-original No.71671/2019 on 27.9.2019 confirming whatever was stated in the notice dated 22.5.2018 except levy of interest.
28	23.03.2021	Aggrieved by the said order-in-original dated 27.09.2019 the appellant filed an appeal before the Commissioner of Customs (Appeals) and the Commissioner, vide the order-in-appeal Seaport C.Cus.II No.134/2021 dated 23.03.2021 has dismissed the appellant's appeal. Aggrieved by the said order-in-appeal the appellant has filed appeal no. C/40376/2021 before this Hon'ble Tribunal .
29	19.03.2021	Meanwhile, the Department had filed appeal before the

		Commissioner of Customs (Appeals) on the ground that the original adjudicating authority had not imposed fine while passing the adjudication order. The appellant filed their counter on and contested the case taking various grounds including the ground that the proposal to impose fine was not part of the original demand notice dated 22.05.2018. The Commissioner (Appeals) passed the impugned order-in-appeal Seaport C.Cus.II No.136/2021 dated 19.03.2021 and has remanded the case back to the LAA to pass appropriate orders as deemed fit. Aggrieved by the said order-in-appeal dated 19.03.2021, the appellant has filed appeal no. C/40230/2021 before this Hon'ble Tribunal.

10. On merits, the learned counsel submitted that there is no undervaluation of goods. The appellant has made the payment as per the contract to M/s.Marubeni. There is no evidence of any amount paid to M/s.Marubeni over and above the contract value. Merely because M/s.Marubeni had procured some of the items from other sources at a higher price the transaction value cannot be rejected so as to enhance the value declared by appellant and demand higher duty. The final assessment has been done by department after a huge time gap and without factual or legal basis to demand differential duty.

11. The decision in the case of *J. Sheik Parith Vs CC (Seaports-Exports), Chennai* - 2020 (374) ELT 15 (Mad.) was relied by the Ld. Counsel to argue that when there was a huge delay of 8 years for adjudication of the show cause notice, it was held to be against the

principles of natural justice. The demand was set aside by the Hon'ble Jurisdictional High Court.

12. It is submitted by the counsel that the Hon'ble Supreme Court in the case of *State of Punjab Vs Bhatinda District Co-Op. Milk P. Union Ltd.* - 2007 (217) ELT 325 (SC) held that when there is no period of limitation prescribed in the statute, the authorities must exercise its jurisdictional with a reasonable period. Though there is no period prescribed in the Customs Act, 1962 as to finalization of assessment, it is incumbent upon the officers of the department to complete the finalization within a reasonable period. In the present case, the appellant had requested for finalization of the assessment on 26.12.2002. Further, the appellant had even approached the jurisdictional High Court requesting for conclusion of the matter. No part of the delay can be attributed to the appellant and the department has passed the finalization of assessment with unexplained delay. The Hon'ble jurisdictional High Court, in the appellant's case which was filed for directing the department to finalize the assessment, observed in judgement 30.11.2018 that '*though the case may be one of investigation done by DRI, yet final assessment should be done within a reasonable time. In the opinion of the Central Board, 6 months' is reasonable time under normal circumstances. In our prima facie view, period of 15 years cannot be considered as a reasonable time. But we refrain from rendering any finding on the said*

issue. In fact, the learned Single Bench also records that the respondents have taken enormous time in completing the provisional assessment.'. there is no evidence adduced by the department that M/s.Marubeni has collected any amount from the appellant over and above, the contract value. The amount fixed in the contract is for the entire goods. M/s.Marubeni had procured some items from various other suppliers and sourced it to the appellant. For such supply, the overseas suppliers had raised invoice on M/s.Marubeni. Though goods were supplied to appellant from such overseas suppliers directly, the invoice on appellant is raised by M/s.Marubeni. The value of some goods obtained by M/s.Marubeni from other overseas suppliers (M/s.Stone & Webstar) was higher than the amount collected by M/s.Marubeni from appellant This is because the appellant has entered into contract for the entire project with M/s.Marubeni, and the appellant has to pay only such contract value to M/s.Marubeni. The transaction value declared is genuine and correct. The view taken by the department is highly erroneous.

13. It is submitted by the learned counsel that the demand of differential duty and the penalty imposed on the appellant (PPN) cannot sustain both on merits as well as on the ground of violation of principles of natural justice.

14. Ld. Consultant Sri R.Srinivasan appeared and argued for the appellant viz. M/s.Marubeni. He submitted that it is the case of the department that M/s.Marubeni procured goods from other vendors and supplied the same to M/s.PPN at lower prices which resulted in payment of lesser customs duty by M/s.PPN in the following segments :

S. No.	Item of Work	Name of the sub-contractor	Amount as per contract registered with Customs	Sub-contracted amount
4.	Sea Water / Desalination System	M/s. Stone & Webster Engineering Corporation, USA	1,18,62,835	1,27,57,000
6.	Electrical & Control Equipments	M/s. Stone & Webster Engineering Corporation, USA	84,52,403	91,05,000
7.	Fuel system	M/s. Stone & Webster Engineering Corporation, USA	6,53,429	7,21,000
9.	Single point mooring system	M/s. Kier International Limited, England	50,12,444	72,23,644

15.1 It is held by the Department to be intentional mis-declaration of value for which the differential duty at merit rates is demanded from the importer viz. M/s.PPN and a penalty of Rs.1 crore has been imposed under Section 112 (a) on PPN as well as on M/s.Marubeni being the foreign supplier.

15.2 There is no dispute that when all the imports under nine segments are taken into consideration, the overall sub-contracted

amount is within the amount contracted between M/s.Marubeni and PPN.

15.3 It is relevant to note that M/s.Marubeni had concluded the EPC Contract with PPN in the month of April 1998, whereas the agreement with the sub-contractor M/s. Stone & Webster was negotiated during the month of November and December, 1998, Though the sub-contracted price was more than the EPC contract price for certain items, M/s.Marubeni agreed for the same in order to honour the contract entered with PPN and further the total sum was within the overall EPC cost.

15.4 In terms of the contract entered between PPN Corporation and M/s.Marubeni, payments were to be made on milestone basis as per the agreed terms of payment. PPN had effected the payments as per the invoices raised by M/s.Marubeni on achievement of the prescribed milestone and as per the contract. It is reiterated that the same reflects the actual transaction value in respect of the supplies made by M/s.Marubeni to PPN as per the contract

16.1 The Transaction Value has to be accepted in the present case as per the Customs Valuation Rules and hence no penalty is imposable. To support this contention the following arguments were put forward:

- As per Section 14 of the Customs Act, the value for the purposes of calculating customs duty payable shall be the transaction value i.e. price actually paid or payable for the goods exported to India. In the present case, the transaction value declared is the price actually paid by them for the subject imports
- The product imported is the very same product mentioned in the Contract. Even the specifications of the imported product are exactly the same as the specifications of the product mentioned in the Contract. In the circumstances, the value declared which is the same as the value mentioned in the Contract ought to be accepted
- Thus, what has been contracted for, is what has been imported. There is no dispute regarding this. In order to honour the contract entered, the Appellant chose to supply the goods as per the contract price, even though the price at which they bought some of the goods from the sub-contractor was slightly more.
- The payment has been made through banking channels and it is not the case of the Department that M/s. PPN had paid a higher amount than what has been declared.
- Further, in the instant case, none of the circumstances specified under Rule 3(2) of the Valuation Rules exist, and nor is it the contention of the custom department that any of

these circumstances exist, warranting rejection of transaction value.

16.2 Ld. Consultant appearing for M/s.Marubeni relied on the following case laws in support of the above proposition:

a) *Eicher Tractors Ltd. Vs. CC, Mumbai – 2000 (122) ELT 321 (SC)*
b) *Tolin Rubbers Vs. CC, Kochi – 2004 (163) ELT 289 (SC)*
c) *Commissioner Vs. Bureau Veritas – 2005 (181) ELT 3 (SC)*
d) *CC, Mumbai Vs. J.D. Orgochem Ltd. - 2008 (226) ELT 9 (SC)*
e) *CC, Vishakhapatnam Vs. Aggarwal Industries Ltd. – 2011 (272) ELT 641 (SC),*
f) *Basant Industries – 1996 (81) ELT 195 (SC)*
g) *Mirah Exports Pvt. Ltd. – 1998 (98) ELT 3 (SC)*

16.3 Further, the impugned order ignores the fact that the payment has been made on account of a signed contract and through Letter of Credit. These documents show that the price paid is a negotiated price and is the true transaction value. The same must be accepted. Without prejudice, it is submitted that the total cost of the project remained the same irrespective of the fact that certain goods were bought at a lesser rate and certain goods were bought at a higher rate under various sub-contracts.

16.4 Since all the imports were under the Project Import scheme, all the goods were classified under CTH 9801 attracting the same rate of duty. Thus, there is no revenue loss at all as projected by the Department in the impugned order.

16.5 The basic requirement for availing the benefit of Project Import Scheme is the registration of the contract prior to the importation of the goods and the goods imported are as per the contract registered with Customs authorities.

16.6 Further, Para 2 of Chapter 5 of the CBIC's Customs Manual states that, "*Project imports is an Indian innovation to facilitate setting up of and expansion of industrial projects. Normally, imported goods are classified separately under separate tariff headings and assessed to applicable Customs duty, but as a variety of goods are imported for setting up an industrial project their separate classification and* ***valuation*** *for assessment to duty becomes cumbersome. Further, the suppliers of a contracted project* ***do not value each and every item or parts of machinery which are supplied in stages.*** *Hence,* ***ascertaining values for different items delay assessment leading to demurrage and time and cost overruns of the project****. Therefore, to facilitate smooth and quick assessment by* ***a simplified process of classification and valuation****, the goods imported under Project Import Scheme are placed under a single Tariff Heading 9801 in the Customs Tariff Act, 1975."*

17. It is thus submitted by the learned consultant that the declared price is the true transaction value of the imported goods. The levy of duty should be on the transaction value declared and rejection of the value of the imported goods is per se incorrect and liable to be set aside as being contrary to the well settled legal position. Consequently, no penalty is imposable on the Appellant.

18. The SCN proposing to confiscate goods and impose penalty was also barred by limitation of time.

18.1 Though no time limit has been prescribed for issuance of SCN Under Section 124 of the Act., the courts in various cases have time and again held that SCN under Section 124 of the Act cannot be issued beyond five years from the date of import.

18.2 Further, the fact that the goods were provisionally assessed under Section 18 of the Customs Act, 1962, which are not finalised so far is not relevant for the purposes of initiating penal proceedings. Further, the Appellant, being a foreign supplier is not a party to the provisional assessment and they have not executed any bond with the authorities.

18.3 Reliance is placed on the following judgements:

a) *Parekh Shipping Corporation v. ACC., Bombay, 1995 (80) E.L.T. 781 (Bom.).*
b) *State of Punjab v. Bhatinda District Co-Op. Milk P. Union Ltd., 2007 (217) E.L.T. 325 (S.C.),*
c) *Neeldhara Weav. Factory v. DGFT, New Delhi, 2007 (5) S.T.R. 404 (P & H)*
d) *CCE., Chandigarh-I V. Malwa Iron & Steel Co., 2015 (320) E.L.T. 533 (P & H)*
e) *CCE, Chandigarh v. Hari Concast (P) Ltd., 2009 (242) E.L.T. 12 (P & H)*
f) *Usha Stud & Agricultural Farms (P) Ltd. v. CC., New Delhi, 2011 (274) E.L.T. 365 (Tri. - Del.)*

19. Ld. Consultant submitted that, in the present case, the Bills of Entry were filed, duty was paid, and the good were cleared way back during the period 1998 to 2002 itself. Thus, any SCN proposing to levy penalty should have been issued latest by 2007. Therefore, the present SCN issued on 22/05/2018, more than 15 years after the date of import, is beyond the reasonable period of time, and thus, is

barred by limitation. The impugned order merits to be dropped on this ground itself.

20. The letter dated 22/05/2018 is seeking to demand differential duty and impose penalty in respect of goods imported during the period 1998 to 2002. The sole basis on which the proceedings are initiated is the purported investigation undertaken by the DRI in the year 2006 and a communication dated 04/10/2007 received from the DRI.

21. It is not that in all these years the department was investigating the matter or came across any new piece of evidence for rejecting the transaction value. No new material has been referred to or relied upon in the impugned letter, for valuation purposes.

22. It is submitted, that the finalization, issuance of show cause notice and adjudication of the show cause notice ought to have been concluded within a 'reasonable period' of time. Apparently, the finalization of assessments after the lapse of more than 15 years from the date of the provisional assessment cannot be considered as a reasonable period by any yardstick. The Appellant has been incapacitated and are not in a position to defend the case in view of the passage of time.

23. Thus, the finalization of assessment now proposed to be undertaken after inordinate delay is bad in law and the proceedings

initiated vide the SCN is liable to be quashed. Reliance for the same is also placed on the following cases -

a) *Universal Generics Private Limited vs. UOI reported in 1993 (68) ELT 27 (Bom)*
b) *Shree Vallab Glass Works Ltd. Vs. CCE reported in 1999 (112) ELT 619 (T)*
c) *Government of India v. Citadel Fine Pharmaceuticals - 1989 (42) E.L.T. 515 (S.C.)*
d) *E.C. Bose Co. Pvt. Ltd. v. Union of India - 1992 (58) E.L.T. 432 (Cal)*
e) *Wilco Company v. Union of India - 2003 (151) E.L.T. 49 (Mad).*
f) *Milton Plastics Ltd. - 2007 (216) E.L.T. 210.*

Customs Act has no extra-territorial jurisdiction.

24. The Customs Act, 1962 has no extra-terrotorial jurisdiction. No penalty can be imposed on foreign entities under the Customs Act.

25. It is submitted that as per Section 1(2) of the Customs Act, 1962 as it stood during the relevant time, the provisions of the Customs Act, 1962 extend only to the whole of India and not beyond India. Further, the authorities in India have no jurisdiction under law to try a person in respect of something which was done beyond India and in a foreign country which will not come within the mischief of the provisions of the Customs Act, 1962.

26. Accordingly, the provisions of the Customs Act, 1962 cannot be invoked and no penalty can be imposed on them under the provisions of the Customs Act.

27. In this regard, the Appellant relies on the decision of the Hon'ble Tribunal in the following cases:

a) *Shri Kunhahammed v. Collector of Customs, Cochin, 1992 (62) E.L.T. 146 (Tribunal)*

b) *Guru Electronics Singapore Pvt. Ltd. - 2009 (240) E.L.T. 56 (T)*
c) *Vishwajyoti Impex Vs. CC(Adjn.), Mumbai, 2009 (238) E.L.T. 257 (Tri. - Mumbai)*
d) *Patel Engineering Ltd. CC (Exports), Nhava Sheva, 2014 (301) E.L.T. 370 (Tri. - Mumbai)*
e) *Ankit Gopal Agarwal Vs. CC, Cochin, 2009 (234) E.L.T. 646 (T)*
f) *Advance Exports vs. CC, Kandla, 2007 (218) E.L.T. 39 (T)*
g) *Relax Safety Industries Vs. CC, Mumbai, 2002 (144) E.L.T. 652 (T)*
h) *Shafeeq P.K. Vs. CC, Cochin, 2015 (325) E.L.T. 199 (Tri. - Bang.)*
i) *Narendra Raval Vs. CC, Ahmedabad, 2017 (347) E.L.T. 565 (Tri. - Ahmd.)*

The issue is one of bonafide interpretation. Hence, no penalty is imposable.

28. No penalty is imposable on the Appellant under Section 112(a) of the Customs Act, 1962 as the issue is one of interpretation and the Appellant was acting on bonafides.

29. Penalty under Section 112 of the Customs Act, 1962 is linked to confiscation under Section 111 of the Customs Act, 1962 i.e., where the goods are liable to confiscation under Section 111, only then penalty can be imposed under Section 112 ibid.

30. When the demand of duty is found to be non-sustainable, the question of levy of penalty does not arise. In this regard, the decisions of the Hon'ble Apex Court in the following cases were relied:

a) *Collector of Central Excise vs. H.M.M. Limited, 1995 (76) ELT 497 (SC)*
b) *Commissioner of Central Excise, Aurangabad vs. Balakrishna Industries, 2006 (201) ELT 325 (SC)*

31. Further, even in the event there has been any infraction of law, the same is completely unintended and bona fide and without any intent to evade duty. It is settled law, *inter alia*, by the judgment of this Hon'ble Court in *Akbar Badruddin Jiwani vs. Collector of Customs,*

1990 (47) ELT 161 (SC), that any technical or venial breach of the law without intention to evade duty does not invite the levy of penalty. Reliance is also placed on *Hindustan Steel Ltd. vs. State of Orissa,* 1978 (2) E.L.T. (J 159) (SC).

32. Moreover, the case involves interpretation of the provisions of the Customs Act. As already submitted, the Appellant acted in bonafide belief. It has been held by the Hon'ble Tribunal in a large number of cases that no penalty is imposable in cases involving interpretation of the statutory provisions. Some of these cases are as under:

a) *Auro Textile vs. Commissioner of Central Excise, Chandigarh 2010 (253) ELT 35 (Tri.-Del.);*
b) *Hindustan Lever Ltd. vs. Commissioner of Central Excise, Lucknow 2010 (250) ELT 251 (Tri.-Del.);*
c) *Prem Fabricators vs. Commissioner of Central Excise, Ahmedabad-II 2010 (250) ELT 260 (Tri.-Ahmd.);*
d) *Whiteline Chemicals vs. Commissioner of Central Excise, Surat 2009 (229) ELT 95 (Tri.-Ahmd.);*
e) *Delphi Automotive Systems vs. Commissioner of Central Excise, Noida 2004 (163) ELT 47 (Tri.-Del.).*

The proceedings are ultra vires the powers and jurisdiction of the Asst. Commissioner.

33. Moreover, the impugned proceedings are Ultra Vires being beyond the jurisdiction of the Assistant / Deputy Commissioner of Customs. It is submitted that in terms of Section 122 of the Customs Act, read with Notification issued thereunder, the Ld. Assistant Commissioner is empowered to adjudicate matters in which anything

is liable to confiscation or any person is liable to a penalty, where duty amount involved is up to Rs. 5 lakhs. The present SCN is clearly beyond his jurisdiction as the duty amount involved is over Rs. 9 Crores.

34. However, with regard to these submissions, the Ld. Adjudicating Authority has held that under Section 18(2) of the Customs Act, 1962, Assistant Commissioner is the proper officer to finalise the provisional assessment and therefore, the proceedings are within jurisdiction.

35. Though it is true that the Assistant Commissioner of Customs is the proper officer to finalise the provisional assessment, the same will hold good only in case of mere assessments. When the issue of confiscation, imposition of penalty etc. are also combined invoking other provisions of the Customs Act, 1962 such as Section 28 (Demand of duty), Section 111 (Confiscation of goods), Section 112 (Imposition of Penalty), Section 124 (Issuance of Notice for confiscation), etc., then the Notice ought to be issued and the case adjudicated only by the officer empowered to adjudging confiscation and penalty.

36. Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the department. The findings in the impugned order were reiterated.

37. Heard both sides.

38. The issue to be decided is whether the differential duty demand and the penalties imposed are legally sustainable or not. According to department for the goods sourced from the overseas supplier M/s.Stone & Webstar, the transaction value declared by appellant is not genuine and cannot be accepted for which reason the transaction value has been rejected and value enhanced. The reason for such enhancement is that from investigation conducted by DRI, it was revealed that the goods were procured by M/s.Marubeni from M/s.Stone & Webstar at a higher price than that shown in the invoice raised by M/s.Marubeni on the appellant. The allegation thus raised in the SCN is that M/s.PPN has deliberately undervalued the goods to evade customs duty and M/s.Marubeni has abetted the case.

39. On perusal of Project import Contract it is seen that the amount fixed by the parties to the contract (M/s.PPN and M/s.Marubeni) is for the entire contract which includes goods which have ben sourced from vendors other than M/s.Stone & Webstar. The appellant has to pay in total the contract value. It is this value that has been split into various segments. M/s.PPN has to pay only this contract value and need not pay any amount higher even if M/s.Marubeni has procured some goods at a higher price. This is clear from the agreements which reads as under :

> **“Scope of Work**
>
> The scope of work under this Agreement (**the “Foreign Supply**") shall cover the supply and delivery of all equipment and materials of non-Indian origin as

contemplated by the General Terms and Conditions. The detailed scope of Foreign Supply is set forth in the Project Contract.

Payment Obligations of Owner

The **"Contract Amount"** shall be One Hundred Forty-Eight Million, Three Hundred Ninety-Three Thousand U.S. Dollars (US$ 148,393,000), as such amount may be adjusted pursuant to the provisions of the Project Contract.

Owner shall pay:

(a) the Contract Amount

(b) all Indian Taxes as may be applicable to the Foreign Supply; and

(c) such other sums as shall become due and payable to Contractor from time to time. In each case, in accordance with the General Terms and Conditions.

In view of the transfer of title to equipment, materials and other Work under this Agreement on an FOB port-of-shipment basis, no sales tax shall be applicable in transactions s contemplated by this Agreement."

40. The total value of the contract is USD 1,48,39,000. As per Table A as above. The amount payable in Japanese Yen is 8,86,2443,836 and USD is 6,41,13,986. The total of both these would be equivalent the contract value. The department has vivisected the contract into goods sourced from different suppliers and held that the value of goods supplied by M/s.Stone & Webstar to M/s.Marubeni is higher than the invoice value issued by M/s.Marubeni to M/s. PPN. The other items does not have such dispute. The value which is stipulated in the contract has been paid to M/s>Marubeni. There is no allegation that there is some hidden payments made by M/s.PPN to M/s.Marubeni. The documents of payment show that appellant has paid only the amount as per contract. The ground put forward by the department to reject the transaction value declared for some items cannot be accepted when the amount fixed is for the entire project import.

40A. In the case of *Agarwal Industries Vs CC Vizag* - 2006 (193) ELT 421 (Tri.-Bang.) the Tribunal held that the transaction value arrived at purely on commercial considerations based on contracts, transaction value not to be rejected unless established with reason. The relevant para reads as under :

> **"2.** In the above cases, the importers entered into contract with foreign suppliers for delivery of goods within a specified period at a contracted price. However, due to certain circumstances, the foreign supplier was not in a position to supply the goods before the due date as per contract. Hence, the contract was extended. Ultimately, the goods were supplied at the contracted rate. However, on the same date of importation, the same ship also carried the same goods meant for other parties. In those cases, the prices were different. For example, in a particular case, the contracted price is 450 USD per MT but on the same date, for the same goods, there is another consignment where the price is 500 USD. The case of the Revenue is that that the correct value for purposes of assessment would be only 500 USD as it represents the correct contemporaneous value. Hence, the transaction value declared by the importer was rejected. The lower authority demanded differential duty. The Commissioner (Appeals) upheld the order of the lower authority. This Bench had an occasion to deal with similar issues. In the case of *Andhra Sugars Ltd*. v. *CC, Vizag*, by Final Order No. 976/2005, dated. 22-6-2005 [2006 (193) E.L.T. 68 (Tribunal)], a majority view was taken that transaction value can be rejected only if any of the situations mentioned in Rule 4(2) of the Customs Valuation Rules, 1988 warrant the same. While taking such a decision, the Bench followed the decision of the Apex Court in the case of *Eicher Tractors Ltd*. v. *CC, Mumbai* - 2000 (122) E.L.T. 321 (S.C.). In the above mentioned case, the Supreme Court has held that in the absence of 'special circumstances', price of imported goods is to be determined under Section 14(1)(A) in accordance with the Customs Valuation Rules, 1988. The 'special circumstances' have been statutorily particularised in Rule 4(2) and in the absence of these exceptions, it is mandatory for Customs to accept the price actually paid or payable for the goods in the particular transaction. In all the cases, we find that the transaction value has been arrived at purely on commercial considerations based on contracts. The supplier, in order to honour the contracts, supplied the goods at the contracted price. There is also no allegation that the appellants paid to the supplier more than the contracted value. Under these circumstances, there are actually no grounds to reject the transaction value. The reliance on *Rajkumar Knitting Mills* case - 1998 (98) E.L.T. 292 (S.C.) does not appear to be correct as the same was rendered in the context of the old law. In view of the above observations, we allow all the appeals with consequential relief, if any."

The said decision was affirmed by the Hon'ble Apex Court as reported in *CC Vs Vishakatpatnam Vs Aggarwal Industries Ltd*. - 2011 (272) ELT 641 (SC). The relevant para reads as under :

> **"12.** In *Eicher Tractors Ltd.* (supra), relied upon by the Tribunal, this Court had held that the principle for valuation of imported goods is found in Section 14(1) of the Act which provides for the determination of the assessable value on the basis of the international sale price. Under the said Act, customs duty is chargeable on goods. According to Section 14(1), the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed it has to be decided under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place and importation in the course of international trade. The word "ordinarily" implies the exclusion of special circumstances. This position is clarified by the last sentence in Section 14(1) which describes an "ordinary" sale as one where the seller or the buyer have no interest in the business of each other and price is the sole consideration for the sale or offer for sale. Therefore, when the above conditions regarding time, place and absence of special circumstances stand fulfilled, the price of imported goods shall be decided under Section 14(1A) read with the Rules framed thereunder. The said Rules are CVR, 1988. It was further held that in cases where the circumstances mentioned in Rules 4(2)(c) to (h) are not applicable, the Department is bound to assess the duty under transaction value. Therefore, unless the price actually paid for a particular transaction falls within the exceptions mentioned in Rules 4(2)(c) to (h), the Department is bound to assess the duty on the transaction value. It was further held that Rule 4 is directly relatable to Section 14(1) of the Act. Section 14(1) read with Rule 4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in Section 14(1). Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in Rule 4(2). [Also See : *Rabindra Chandra Paul* v. *Commissioner of Customs (Preventive), Shillong*, (2007) 3 SCC 93 = 2007 (209) E.L.T. 326 (S.C.)]
>
> **13.** Applying the above principles to the facts in hand, we are of the opinion that the revenue erred in rejecting the invoice price. As stated above, in the present case the whole controversy arose on account of difference in price of the same commodity, contracted to be supplied under different contracts entered into at different points in time. As aforesaid, in the instant case, admittedly the contract for supply of crude sunflower seed oil @ US $ 435 CIF/PMT was entered into on 26th June 2001. It could not be performed on time because of which extension of time for shipment was agreed to between the contracting parties. It is true that the commodity involved had volatile

fluctuations in its price in the international market but having delayed the shipment, the supplier did not increase the price of the commodity even after the increase in its price in the international market. This fact is also proved by the actual amount paid to the supplier. There is no allegation of the supplier and importer being in collusion. It is also not the case of the revenue that the transaction entered into by the respondent was not genuine or undervalued. Nor was there a misdescription of the goods imported. It is also not the case of the revenue that the subject imports fell within any of the situations enumerated in Rule 4(2) of CVR, 1988. It is manifest from the show cause notice, extracted in para 3 supra, that the contract value was not acceptable to the Adjudicating Authority in terms of Section 14(1) of the Act read with Rule 4 of CVR, 1988 merely because by the time actual shipment took place in August 2001, international price of the oil had increased drastically. No other reason has been ascribed to reject the transaction value under Rule 4(1) except the drastic increase in price of the commodity in the international market and the difference in price in the invoices in relation to the goods imported under contracts entered by the respondents in the month of August 2001. In our opinion, the import instances relied upon by the revenue could not be treated as instances indicating contemporaneous value of the goods because contracts for supply of the goods in those cases were entered into almost after a month from the date of contract in the present cases, more so, when admittedly there were drastic fluctuations in the international price of the commodity involved. We are, therefore, of the opinion that the revenue was not justified in rejecting the transaction value declared by the respondents in the invoices submitted by them.

14. For the foregoing reasons, we do not find any merit in these appeals. All the appeals are dismissed accordingly, with no order as to costs."

41. The appellants, M/s.PPN as well as M/s.Marubeni have argued on the ground of delay in passing the assessment. As per CBICs Custom Manual- Chapter 5 – deals with Classification / Assessment of Project Imports, Baggage and Postal Imports. Para 5 lays down instructions for Finalization of assessments which reads as under :

"5. Finalisation of contract:

5.1 Under Regulation 7 of the PIR, 1986 the importer is required to submit, within three months from the date of clearance of the last consignment or within such extended time as the proper officer may allow, the following documents for the purpose of finalization of the assessment:

(i) A reconciliation statement i.e. a statement showing the description, quantity and value of goods imported along with a certificate from a registered Chartered Engineer

certifying the installation of each of the imported items of machinery;

(ii) Copies of the Bills of Entry, invoices, and the final payment certificate is insisted upon only in cases where the contract provides that the amount of the transaction will be finally settled after completion of the supplies.

5.2 To ensure that the imported goods have actually been used for the projects for which these were imported, plant site verification may be done in cases where value of the project contract exceeds Rs.1 crore. In other cases, plant site verification is normally done selectively.

5.3 In the normal course, after submission of the reconciliation statement and other documents by the importers, the provisional assessments are finalized within a period of three months where plant site verification S tor required and within six months where plant site verification is required. In cases where a demand has been 1ssued and confirmed on such finalization and importer has not paid the duty demanded, steps are taken as per law to realise the amount."

42. The date and event chart noticed above will show that there has been inordinate delay in finalizing the assessment. Though it was a matter under investigation by DRI, the report of DRI was filed in 2006. In spite of this, there was no steps on the part of the department to finalize the assessment. The appellant M/s.PPN has been continuously requesting for finalizing the assessment by issuing letters to the department on 27.09.2004, 05.10.2004, 01.05.2004, 15.02.2017 etc. On 27.05.2018, the appellant preferred a writ petition in W.P.No.6492-6493/2018 seeking direction from the High Cort for finalizing the assessment. During the pendency of the W.P., the present SCN was issued dt. 22.5.2018 alleging this present allegation that for some segments the invoice value is lesser than the value at which M/s.Marubeni procured it . Only after then in the OIO finalizing the assessment was passed on 27.09.2019 which confirmed the proposals in the SCN. We do note that there is considerable delay of more than 13 years after the date of report of DRI (8/2006) till the order of finalization

(27.09.2019). The department has not been able to explain this delay. The higher forums have held that in such situations, in unreasonable delay in adjudication / finalization of assessment the show cause notice itself is liable to be quashed.

43. The Hon'ble High Court in the judgement dt. 30.11.2018 in Writ Appeal No.2611/2018 filed by M/s.PPN observed as under :

> "7. In our considered opinion, though the case may be one of investigation done by the DRI, yet final assessment should be done within a reasonable time. In the opinion of the Central Board, 6 months' is reasonable time under normal circumstances. In our prima facie view, period of 15 years cannot be considered as a reasonable time. But we refrain from rendering any finding on the said issue. In fact, the learned Single Bench also records that the respondents have taken enormous time in completing the provisional assessment. In such circumstances, we are of the view that some relief should be granted to the appellant especially when they have effected cash deposit of Rs.84 lakhs, when they have imported the products and furnished Bank Guarantee of Rs.13.77 Crores. The Bank Guarantee has been kept renewed since then and according to the learned counsel for the appellant, bank charges itself is more than Rs.2.35 crores. Assuming without admitting upon adjudication of the show cause notice, the proposal therein is confirmed, the entire liability may be around Rs.11 crores and assuming the assessee files appeal, the minimum pre-deposit required to be made would be Rs.7.5% of the disputed demand.
>
> 8. Thus, taking into consideration the peculiar facts and Circumstances of the case, we are of the view that partial relief can be granted to the appellant so as to enable them to tide over the financial crisis, which they are stated to be undergoing at present. However, we are convinced that the other directions issued by the learned Single Bench directing the appellant to participate in the adjudication process would not require interference.
>
> 9. Accordingly, we partly allow this appeal to the extent indicated below:
>
> a) The order and direction issued by the learned Single Bench in Paragraph 15 (a) (b) & (c) are confirmed.
>
> b) The directions ordered in Paragraph 15 (d), (e) & () stands modified as follows:
>
> The appellant is directed to remit a sum of Rs.16 lakhs as cash deposit so that the cash deposit to be retained by the department will be rounded off to Rs.1 Crore as already Rs.84 lakhs has been remitted by the appellant. The appellant need not renew the Bank Guarantee "and the department is directed to intimate the petitioner's bankers about the above direction within a period of two weeks from the date on which the appellant remits the sum of Rs.16 lakhs, on compliance of which, the Bank Guarantee shall stand revoked.

c) We direct the adjudicating authority to complete the adjudication process as expeditiously as possible and in any event not later than three months from the date of receipt of the copy of this judgement subject to the assessee extending full co-operation in the adjudication process. closed.

No costs. Consequently, the connected miscellaneous petition is closed."

44. The finalization has happened after 15 years of provisional assessment which, in our view, is extremely inordinate delay, and also against the instructions issued by CBIC as to finalization of Project Import Assessments The department has not been able to put forward cogent evidence to reject the transaction value. For these reasons, we find that the demand of differential duty the order for confiscation of goods, imposition of Redemption Fine and penalties imposed on M/s.PPN cannot sustain and requires to be set aside. For the same reasons, we set aside the penalty imposed on M/s.Marubeni also.

45. In the result, the impugned orders are set aside. Appeals are allowed with consequential reliefs, if any.

(pronounced in court on 11.09.2023)

sd/-
(VASA SESHAGIRI RAO)
Member (Technical)

sd/-
(SULEKHA BEEVI C.S.)
Member (Judicial)

gs