IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI

Appeal No. C/86898/2017

Arising out of Order-in-Original No. Commr/VRM/Adjn/04/2017-18, Dated: 02.05.2017
Passed by Commissioner of Customs (Airport), Mumbai

Date of Hearing: 22.01.2019
Date of Decision: 28.06.2019

JET AIRWAYS INDIA LTD
SIROYA CENTRE, SAHAR, AIRPORT ROAD
ANDHERI (E), MUMBAI - 400099

Vs

COMMISSIONER OF CUSTOMS (I)
MUMBAI, CSI AIRPORT, ANDHERI (E)
MUMBAI - 400099

Appellant Rep by: Ms Lakshmi Menon, Adv.
Respondent Rep by: Ms P Vinitha Sekhar, AR

CORAM: D M Misra, Member (J)
Sanjiv Srivastava, Member (T)

Cus - Assessee is engaged in business of air transportation services on domestic and international sectors - Aviation Turbine Fuel (ATF) is fuel for operating the aircrafts - Generally fuelling of aircraft is done at the airport from where the aircraft starts its journey - Assessee was paying the duty on such remnant ATF after determining its quantity ad value as per the guidelines prescribed by Air Cargo Complex, Mumbai Air Customs - However, while determining the value, they were not adding any amounts towards freight and insurance as required in terms of Rule 10(2) of Customs Valuation Rules - A SCN was issued to assessee demanding differential duty under section 28(1) of Customs Act, 1962, interest on the duty demanded under Section 28AA - SCN also proposed for confiscation under Section 111(m) and penalty under Section 114A ibid - It is the claim of assessee

that they were paying duty on remnant ATF as per the Commissioner Instruction No 06/2006 - From the perusal of instruction on the basis of which assessee have claimed to discharge the duty it is quite evident that this is an instruction issued by the Commissioner to his officers for performing their duties for determination of quantum of duty payable on the remnant ATF in the aircraft - This instruction is neither the statement of law or a circular issued by the Board clarifying the position in law - Binding value of such instructions an circulars has been finally settled by five member bench of Apex Court in case of *Ratan Melting and Wire Industries* - **2008-TIOL-194-SC-CX-CB** - It is evident that there is no dispute in respect of levy of custom duty on the remnant fuel - The dispute is in respect of determination of value for the purpose of payment of duty - Assessee have claimed that they have paid duty on the basis of IOC sale price of ATF to Indian Airlines/ Airlines for the foreign going aircraft and hence no further duty is demandable from them - Valuation of the goods for purpose of Custom Duty is done in terms of Section 14 of Custom Act, 1962.

As per the instruction issued the value of the fuel has to be the actual invoice value of the ATF purchased by the Aircraft/ Airline, and in absence or non availability of such invoice value, this invoice value shall be substituted by the sale price of IOC of ATF to Air India/ Indian Airlines, for their foreign going aircrafts - The sale price of IOC of ATF to Air India/ Indian Airlines, for the foreign going aircrafts has to be only FOB value and cannot be CIF value as claimed by assessee by terming the same as "fully loaded value" - The fallacy of argument is self evident that CIF value as determined under Section 14 of Customs Act, 1962 is inclusive of "international freight and insurance" and not the "domestic freight and insurance" - Sale price of IOC can never be inclusive of international freight insurance as these expenses are never incurred by IOC in making such sales at Indian Airports - Hence even going by the instruction of the Commissioner, sale price of IOC, will have to be further loaded with the freight and insurance charges to determine the CIF value of imported goods - Interestingly Commissioner instruction though seeks to add the insurance charges notionally is silent about the addition of freight charges - However in terms of Rule 10(2) of Customs Valuation Rules, 2007 which is pari materia with the erstwhile Rule 9(2) of CVR, 1988, value has to be

added towards insurance freight and landing charges - If actual are available on the actual basis and if actual are not available the additions will have to be made on notional basis in the manner prescribed by the said rules - Assessee have claimed that actual charges towards the freight arte ascertainable as zero in their case - Tribunal is not in agreement with the said submissions - Assessee is carrying the remnant fuel as extra baggage in the aircraft and if the freight charges are to be ascertained, then they should be equal to the actual extra baggage charged by them for carriage of equivalent amount of fuel.

The issue of addition of freight charges for determination of assessable value the order of Commissioner cannot be faulted with - However it has been brought to notice that tribunal has in cases of *Interglobe Aviation Limited* - **2017-TIOL-3169-CESTAT-DEL** and *Jet Airways (India) Ltd, Interglobe Aviation, Spicejet Ltd* - **2019-TIOL-421-CESTAT-MAD** taken the contrary view - Since the view that Tribunal is expressing goes contrary to the view earlier taken by the coordinate benches of Tribunal, the matter referred to the President for constitution of larger bench: CESTAT

Case deferred

Case laws cited:

Interglobe Aviation Limited - 2017-TIOL-3169-CESTAT-DEL... Para 4.2

National Aviation Company of India [2018 (8) TMI 1300 CESTAT]... Para 4.2

Air India Limited [2018 (4) TMI 785 CESTAT Delhi]... Para 4.2

Jet Airways (India) Ltd, Interglobe Aviation, Spicejet Ltd - 2019-TIOL-421-CESTAT-MAD... Para 4.2

Wipro Ltd - 2015-TIOL-79-SC-CUS... Para 4.3

Ratan Melting and Wire Industries - 2008-TIOL-194-SC-CX-CB... Para 5.2

Garden Silk Mills Ltd - 2002-TIOL-19-SC-CUS-LB... Para 5.3

INTERIM ORDER NO. 47/2019

Per: Sanjiv Srivastava:

This appeal is directed against the order in original No Commr/VRM/ Adjn/04/2017-18 dated 02.05.2017 of Commissioner Customs (Airport) Mumbai. By the impugned order Commissioner has held as follows:

"(i) I confirm demand of Customs duty of Rs 8,70,64,405/- (Rupees Eight Crores Seventy Lakhs Sixty Four Thousand Four Hundred and Five only) and interest thereon respectively under Section 28(1) & 28AA of the Customs Act, 1962.

(ii) I order that the amount of Rs 76,14,726/- (Seventy Six Lakhs Fourteen Thousand Seven Hundred and Twenty Six only) paid by the Airlines for the period 10.04.2014 to 16.10.2014 under protest be adjusted against the duty and interest thereon demanded as above.

(iii) Goods i.e. ATF valued at Rs 4,43,62,51,454/- (Four Hundred Forty Three Crores Sixty Two Lakhs Fifty One Thousand Four Hundred and Fifty Four only) cleared on short payment of duty are held liable for confiscation under Section 111(m) of the Customs Act, 1962. However since they are not physically available for confiscation, they are not being confiscated.

(iv) I impose penalty of Rs 8,70,64,405/- (Rupees Eight Crores Seventy Lakhs Sixty Four Thousand Four Hundred and Five only) under Section 114A of the Customs Act, 1962."

2.1 Appellants are engaged in the business of air transportation services on domestic and international sectors. Aviation Turbine Fuel (ATF) is fuel for operating the aircrafts. Generally fuelling of aircraft is done at the airport from where the aircraft starts its journey. (For e.g. when the aircraft flying from say Delhi, aircraft is filled with ATF which is consumed during the course of such flight outside India. Similarly, ATF is filled at the Foreign airport is to be consumed on the return journey to India.) After return of aircraft from a foreign sector the same aircraft may get deployed on domestic sector. In such case Custom duty is required to be paid on the remnant ATF in the Aircraft

at the time of its conversion from international sector to domestic sector.

2.2 Appellants were paying the duty on such remnant ATF after determining its quantity ad value as per the guidelines prescribed by Air Cargo Complex, Mumbai Air Customs. However while determining the value they were not adding any amounts towards freight and insurance as required in terms of Rule 10(2) of the Customs Valuation Rules.

2.3 Thus a show cause notice (SCN) dated 15.04.2015 was issued to the Appellants demanding differential duty amounting to Rs 8,70,64,405/- under section 28(1) of the Customs Act, 1962, interest on the duty demanded under Section 28AA. SCN also proposed for confiscation under Section 111(m) and penalty under Section 114A ibid.

2.4 The SCN has been adjudicated as per the order referred in para 1, supra. Aggrieved by the order of Commissioner, appellants are in appeal before tribunal.

3.1 In their appeal appellants have challenged the order impugned order stating that-

i. The provisions of Rule 10 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 is in applicable for determining the customs duty payable on ATF entered for import at the time of conversion from international run to domestic run.

ii. Freight and Insurance is not to be included when computing the assessable value of the remnant ATF. As no transportation/ insurance cost is involved in import of stores/ consumable/ shipping containers/ aircrafts.

iii. For the purpose of determining the correct transaction value, undue refinement is not to be made.

iv. The cost of freight and insurance is ascertainable therefore notional value could not have been applied.

v. Freight charges are not included as per Mumbai Commissionerate's Instruction No 06/2006 dated 26/10/2006.

vi. Landing Charges are not to be included in the assessable value of the goods as per the decision of Apex Court in case of Wipro Limited []

vii. The IOCL Price, on which Customs Duty has been discharged by them, is fully loaded price.

viii. They are entitled for benefit of exemption under Notification No 151/1994-Cus. Commissioner has denied the benefit under this notification stating that appellants do not fulfill the conditions prescribed by the notification and has not provided the supporting documents for claiming the benefit of notification.

ix. Extended period of limitation is not applicable in the present case as they have not suppressed any fact from the department.

x. Impugned goods are not liable for confiscation under Section 111(m) as no bill of entry has been filed by them for clearance of these goods. Also the provisions of Section 111 are not applicable to the case where the goods have been cleared.

xi. Since demand itself is not sustainable no penalty can be imposed. Further it is not the case of collusion, willful mis-statement or suppression of facts as the extended period is not invokable.

xii. Penalty is not imposable for demand of CVD.

xiii. Since the demand for duty itself is not maintainable demand for interest on the same also cannot be sustained.

xiv. Interest on penalty demanded is also not sustainable

xv. There are calculation errors in the order which are required to be corrected.

4.1 We have heard Ms Lakshmi Menon, Advocate for the appellant and Ms P Vinitha Sekhar, Additional Commissioner, Authorized Representative (AR) for the revenue.

4.2 Arguing for the Appellants, learned Counsel submitted that-

i. The issue as to whether freight and insurance is to be included in the value of ATF remaining on board of aircraft on its return from a

foreign journey stands decided in the favour of appellant in their own case and in case of other assessees as per the decisions below:

a. Interglobe Aviation Limited [2017 (9) TMI 926 CESTAT] = ***2017-TIOL-3169-CESTAT-DEL***

b. National Aviation Company of India [2018 (8) TMI 1300 CESTAT]

c. Air India Limited [2018 (4) TMI 785 CESTAT Delhi]

d. Jet Airways (India) Ltd, Interglobe Aviation, Spicejet Ltd [2018 (11) TMI 1476 CESTAT Chennai] = ***2019-TIOL-421-CESTAT-MAD***
ii. Since in the present case the transportation charges are ascertainable, and are nil as the ATF was carried in sufficient quantity for the purpose of carriage of goods and passengers onboard the aircraft, there can be no addition of notional freight @ 20% as per Rule 10(2).

iii. No procedure established for filing of Bill of Entry, and procedure as prescribed for filling bill of entry under section 46 cannot be applied in connection with the ATF in dispute.

iv. The price at which they are discharging the duty, is all inclusive price and thus no freight is required to be added.

v. Benefit of Notification No 151/94-Cus dated 13.07.1994 should have been taken into consideration at time of computing the remnant ATF while demanding the duty.

vi. Appellants were regularly filing a statement and discharging the duty in respect of remnant ATF. The fuel log book, duly certified by the flight captain and the summary sheet duly certified by the Custom Officers show that they were aware of the method of computation of duty by the appellants. When all the facts in relation to manner of assessment and determination of duty payable was in knowledge of department there can be no justification for invoking extended period of limitation for demanding the duty.

vii. Imported ATF cannot be held liable for confiscation in terms of Section 111(m) and penalty under Section 114A is not imposable in the present circumstances.

4.3 Arguing for the revenue learned AR while reiterating the findings in the impugned order submitted that-

i. The appellants have heavily relied on the decision of tribunal in case of Interglobe Aviation Ltd and subsequent decisions following Interglobe. However these decisions have been passed without appreciating the law laid down by the Apex Court in case of *Wipro Ltd [2015 (319) ELT 177 (SC)]* = ***2015-TIOL-79-SC-CUS***.

ii. From the Rule 1092) of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007, it is quite evident that there cannot be any situation wherein there is no freight element. The rule lays down if the freight is ascertainable then ascertained freight shall be added for determining the assessable value, and in case where it cannot be ascertained it shall be 20% of FOB value.

iii. Appellants have to claim the benefit of exemption Notification No 151/94-Cus by producing the required documents They have to produce the document showing the quantity of excise duty paid fuel in the tank of the aircraft just before departure (known as Techlog – which is a document as per DGCA Regulations containing these details and duly signed by the captain of aircraft, the declaration regarding non availment of drawback. As the benefit was not claimed till August 2014, these documents were not produced and are not part of records. Appellants have submitted a letter dated 28.11.2014 for grant of the benefit prospectively. Since the necessary documents for claiming the benefit of this notification have not been produced benefit of exemption cannot be extended.

iv. The airlines were determining the duty payable on the basis of self declaration/ assessment as per Ministry of Finance Letter F No 40/2/63-Cus-IV dated 24.04.1977. As there was no assessment and duty payment was as per self declaration, it was incumbent upon the appellants to ensure that they declared correct value (inclusive of all costs as per the Rules) and pay duty. Further there is nothing on record to show that appellants had ever brought to the knowledge of department the fact of non addition of the freight element to determine the assessable value of ATF, to the notice of department. Thus it is clearly a case of suppression where appellants deliberately

did not add the value of freight to the value of goods and hence extended period of limitation is rightly invokable.

5.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments. The issue for consideration in the present appeal can be listed as follows:

i. Whether the insurance, freight and landing charges required to be added to the IOC price (the basis for payment of duty) for determination of assessable value of remnant ATF in the aircraft at time of conversion from international to domestic run.

ii. Scope of Rule 10(2) of the Custom Valuation (Determination of Price of Imported Goods) Rules, 2007.

iii. Whether benefit of exemption under Notification No 151/94-Cus admissible to the appellants.

iv. Whether extended period of limitation as provided by Section28 of Customs Act, 1962 can be invoked in the present case.

v. Whether interest under Section 28AA ibid and penalty under section 114A justified in the present case.

vi. Whether the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.

5.2 It is the claim of the appellants that they were paying duty on the remnant ATF as per the Commissioner Instruction No 06/2006 dated 20.10.2006. The said instruction is reproduced below:

"F No AirCus /24-92/2004. Admn Techl 20.10.2006

COMMISSIONER INSTRUCTION NO 06/2006

Subject – Leviability of Custom Duty on Fuel and other stores consumed on board during extension flights in Domestic Sector and in the tanks of the Aircrafts when imported into India - Reg

Attention is invited to Commissioner's Instruction No 04/2006 dated 18.05.2006 regarding leviability of Customs Duty on fuel an d other stores on aircraft/ airlines arriving into India and flying into domestic sectors.

The field security office of the batches are hereby directed to charge duty on ATF/ Stores at the prevalent rate of duty as on the date of arrival into India. ATF fuel falls under Tariff Heading Number 2710 19 20 and as on the date of issue of these instruction the duty structure on ATF is as follows:

1. Basic Custom Duty @ 10%

2. CVD @ 8%

3. SP CVD @ 4%

4. Education Cess @ 2%
(sample calculation sheet is enclosed for the reference)

The value of fuel (ATF)/ Supply of stores is to be based on the invoice value of ATF/ Stores purchased by the subject Aircraft/ Airlines arriving into India and the same should be provided to customs on its arrival. The final value should also include the Insurance and Landing charges i.e. at the rate of 1.125% and 1% respectively). In the absence of each invoice with regard to ATF, the price at which Indian Airlines/ Air India purchase the ATF at CSI Airport for their international flight should be taken into consideration. In case the invoice value is declared in Foreign Currency the exchange rate will be as per the CBEC notification on exchange rate for imports being issued every month. The field security officer must ensure that all the duties through bill of entry by representative of the aircraft/ airlines and duty discharged accordingly."

From the perusal of the above instruction on the basis of which appellants have claimed to discharge the duty it is quite evident that this is an instruction issued by the Commissioner to his officers for performing their duties for determination of quantum of duty payable on the remnant ATF in the aircraft. This instruction is neither the statement of law or a circular issued by the Board clarifying the position in law. Binding value of such instructions an circulars has been finally settled by the five member bench of Apex Court in case of *Ratan Melting and Wire Industries [2008 (231) ELT 22 (SC)]* = ***2008-TIOL-194-SC-CX-CB***, wherein Hon'ble Apex Court has categorically stated-

"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

5.3 From the undisputed facts of case, it is evident that there is no dispute in respect of levy of custom duty on the remnant fuel. The dispute is in respect of determination of value for the purpose of payment of duty. Appellants have claimed that they have paid duty on the basis of IOC sale price of ATF to Indian Airlines/ Airlines for the foreign going aircraft and hence no further duty is demandable from them. Valuation of the goods for the purpose of Custom Duty is done in terms of Section 14 of the Custom Act, 1962 which is reproduced below:

"14. Valuation of goods for purposes of assessment.

- (1) For the purposes of Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force where under a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be :

(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale :

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date of which a bill of entry is

presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50.

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf."

This section has been under consideration of the Apex Court on number of occasions. Explaining the provisions of this section Hon'ble Apex Court has in case of *Garden Silk Mills Ltd [1999 (113) ELT 358 (SC)]* = ***2002-TIOL-19-SC-CUS-LB*** stated as follows:

"8. On a careful analysis it is evident that the principles of valuation incorporated in Section 14(1)(a) of the Act therein show that :

a) the price is a deemed price;

b) at which such or like goods are ordinarily sold or offered for sale;

c) for delivery at the time and the place of importation or exportation;

d) in the course of international trade;

e) where the seller and the buyer have no interest in the business of each other and

f) the price is the sole consideration for the sale or offer for sale.

9. This Section clearly indicates that it is not the price stated in the CIF contract which alone is to be accepted as being the value of such goods for the purpose of Section 14 of the Act. The said Section requires determination of the value of the imported goods. The appellants are right in contending that this is a deeming provision. The value of such goods is to be deemed to be the price at which such goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. The price of the imported goods, in other words, has to be determined in respect of import of those goods for delivery at the time and place of importation. It appears to us that the word "delivery" must necessarily mean the point of time when the goods can be physically

delivered to the importer. In other words, "delivery" and "discharge" are not synonymous. As we shall presently see, merely by the shipper discharging the goods at the port of import does not ipso facto give the importer a right to take the delivery thereof.

14. Section 14 is a deeming provision. The legislative intent is clear that the actual price of the imported goods, namely the landing cost, cannot alone be regarded as the value for the purpose of calculating the duty. If the submission of the learned Counsel for the appellants is correct namely that the C.I.F. price represents the value of the imported goods, then the Section 14 would have been differently worded. It could, for instance, have easily been stated that the value of the imported goods would be the transaction value of the goods. The language of Section 14 clearly indicates that though the transaction value may be a relevant consideration, the value for the purpose of Customs duty will have to be determined by the Customs Authorities which value can be more, and at times even less, than what is indicated in the documents of purchase or sale.

15. The question as to whether the import is completed when the goods entered the territorial waters and it is the value at that point of time which is to be taken into consideration is no longer res integra. This contention was raised in Union of India v. Apar Industries Limited - 1999 (112) E.L.T. 3 (S.C.) = 1999 (5) J.T. 160 = ***2002-TIOL-366-SC-CUS-LB*** *. In that case the day when the goods entered the territorial waters, the rate of duty was nil but when they were removed from the warehouse, the duty had become leviable. The contention which was sought to be raised was that what is material is the day when the goods had entered the territorial waters because by virtue of Section 2(23) read with Section 2(27) the import into India had taken place when the goods entered the territorial waters. Following the decision of this Court in Bharat Surfactants (M/s) (Private) Ltd. and Another v. Union of India and Another, 1989 (43) E.L.T. 189 (S.C.) = 1989(4) SCC 21 =* ***2002-TIOL-367-SC-CUS-CB*** *and Dhiraj Lal H. Vohra and Others v. Union of India and Others 1993 (66) E.L.T. 551 (S.C.) = 1993 (Supp. 3) SCC 453 =* ***2002-TIOL-368-SC-CUS-LB*** *, this Court came to the conclusion in Apar's*

Private Limited case that the duty has to be paid with reference to the relevant date as mentioned in Section 15 of the Act.

18. It is also submitted on behalf of the appellants that onus of proving that the transaction value does not represent the value for the purposes of Section 14 of the Act and that it has to be loaded with any other elements such as landing charges, is on the Department. We are unable to agree with the submission. The value at which the goods are to be assessed is indicated by the importer when he makes a declaration while submitting a bill of entry under Section 46 of the Act. Once, we come to the conclusion that the landing charges would be included in the determining of the value of the goods imported then the onus has to be on the importer to show that the price indicated in the CIF contract includes therein this element of landing charges. If such an element is included in the CIF contract, that would be within the knowledge of the importer and the Department cannot be asked to prove the negative, namely that the CIF contract does not include therein the element of landing charges.

19. It was contended that legal fictions are created only for some definite purposes and here the purpose is to take the transaction value in international trade as the basis for valuation. Therefore, whichever view is taken of Section 14(1)(a) of the Act, it should be limited to the purpose the legislation makers had in view when they incorporated it. It was further submitted that in the present case the fiction was clearly limited to the parameters provided in Section 14(1)(a) (ordinary price in international trade at the time and place of importation) and cannot be extended further to be settled with elements like landing charges. Once that is done, the whole purpose of legal fiction stands defeated and, therefore, landing charges cannot form part of the value of goods for assessment.

20. We do not agree with the aforesaid submission because what has to be arrived at is a deemed price in the manner indicated in the said Section. In determining this deemed price in international trade the element of port charges which have to be borne by the importer, in addition to the CIF value, before the goods can be cleared for human consumption must necessarily form a part or an element of the value. The said Section does not accept as final the price fixed by the

purchaser and the seller in the course of international trade as reflected in the CIF contract but it requires determination of value by the customs authorities in the manner indicated therein. What has to be seen is the value or cost of the imported articles at the time of importation i.e. at the time when they reach the customs barrier. Landing charges which have to be paid to the Port Trust must therefore, be taken into consideration while determining the value of the imported goods for the purpose of assessment of duty. It is only if the importer establishes that the obligation to pay the landing charges is on the seller and not on the importer and that the seller or his agent has, in fact, paid the said landing charges to the Port Trust Authorities, that the importer can claim that the landing charges should not be again added to the price. In none of the cases before us has it been found by any fact finding authority, even in cases of CIF contracts, that the Port Trust Authorities did receive the landing charges from the shipper or the foreign seller and that the said charges were included in the CIF contract. 21. We notice that various High Courts in India since 1982 have held that for the purpose of arriving at the value at which goods are delivered to the buyer at the time and place of importation into India, the concept of value as understood in Section 14 of the Act necessarily requires the landing charges to be included in the value. These decisions are :

(a) 1982 (10) E.L.T. 203 (Gujarat High Court) Prabhat Cotton and Silk Mills v. Union of India = ***2003-TIOL-820-HC-AHM-CUS*** *judgment dated 9-3- 1982.*

(b) 1983 (12) E.L.T. 258 (Delhi High Court) Super Traders and Anr. v. Union of India and Others = ***2003-TIOL-822-HC-DEL-CUS*** *judgment dated 23-9-1982, followed by another judgment in 1983 (12) E.L.T. 661 (Delhi High Court) in Bhartiya Plastic Udyog v. Union of India =* ***2003-TIOL-812-HC-DEL-CUS*** *judgment dated 7-1-1983.*

(c) 1984 (18) E.L.T. 235 (Punjab and Haryana High Court) Oswal Woollen Mills Ltd. v. Union of India = ***2003-TIOL-819-HC-P&H-CUS*** *judgment dated 22-2-1983.*

*(d) 1988 (35) E.L.T. 280 (Calcutta High Court) Govind Ram Agarwal v. Collector of Customs, Calcutta = **2003-TIOL-815-HC-KOL-CUS** judgment dated 21-1-1985.*

*(e) 1986 (24) E.L.T. 456 (Karnataka High Court) B.S. Kamath & Co. v. Union of India = **2003-TIOL-825-HC-KAR-CUS** judgment dated 12-3- 1986.*

*(f) 1987 (32) E.L.T. 262 (Bombay High Court) Ashok Traders v. Union of India =**2003-TIOL-810-HC-MUM-CUS** judgment dated 9-10-1987 followed by another judgment in 1992 (57) E.L.T. 221 (Bombay High Court) in Ceat Tyres v. Union of India = **2003-TIOL-826-HC-MUM-CUS***

*(g) 1988 (37) E.L.T. 327 (Andhra Pradesh High Court) Barium Chemicals Ltd. v. Union of India = **2003-TIOL-811-HC-AP-CUS** judgment dated 4-12-1987.*

*(h) 1994 (69) E.L.T. 4 (Madras High Court) Shri Ram Fibres Ltd. v. Union of India =**2003-TIOL-821-HC-MAD-CUS**, judgment dated 5-8-1993.*
In our opinion these decisions have correctly interpreted the relevant provisions of the Customs Act and the submissions on behalf of appellants cannot be accepted.
5.4 Issue of determination of value under Section 14 of Customs Act, 1962 was again under consideration of the Apex Court in case of WIPRO Ltd [], and Hon'ble Apex Court has in this decision held as follows:

"4. At this juncture, instead of proceeding further with the factual narration, we would like to deviate a bit and take note of the relevant valuation rules and the amendments made therein from time to time. These rules are made in exercise of powers conferred under Section 156 of the Customs Act, 1962, read with Section 22 of the General Clauses Act, 1897. The purpose of these rules is to arrive at the valuation of the imported goods to enable the Customs Authorities to levy duty thereupon, on the basis of the value so arrived at. Rule 2 is the "definition" clause whereunder certain terms are defined. Rule 2(f) defines "transaction value" to mean the value determined in accordance with Rule 4 of these Rules. This is to be read along with

Rule 3. We, therefore, reproduce Rule 3 and relevant portion of Rule 4 hereunder :

"3. Determination of the method of valuation. - For the purpose of these rules, -

(i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of Clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.
4. Transaction Value. - (1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under subrule (1) above shall be accepted.

Provided that ....."
5. A conjoint reading of the aforesaid two provisions would make it clear that the value of the imported goods has to be the transaction value and in those cases where transaction value cannot be determined, such a value is to be determined by resorting to Rules 5 to 8 thereof in a sequential order. Therefore, first attempt has to ascertain the transaction value. As per the formula contained in sub-rule (1) of Rule 4, the authorities are to find out the price actually paid or payable for the goods when sold for exports to India, to arrive at the value of the goods. Once this value is arrived at, it is to be adjusted in accordance with the provisions of Rule 9 of the said Rules. The final outcome, after such an adjustment made, is to be treated as transaction value to attract the import duty thereupon. As per sub-rule (2) of Rule 4, the transaction value of the imported goods under sub-rule (1) is to be accepted, except in certain circumstances mentioned in proviso to sub-rule (2). If any of those circumstances exists, then the value is to be determined as per sub-rule (3) of Rule 4. However, we are not concerned with such a situation in the present case.

6. Thus, normally, the value of imported goods has to be the transactional value which means the price "actually paid" or "payable" for the goods imported. Moreover, the value as specified in sub-rule (1) is to be generally accepted with the exception of certain contingencies stipulated in proviso to sub-rule (2) of Rule 4. Only when such a value cannot be determined, one has to resort to Rules 5 to 8, in a sequential manner which would mean that the authorities would first refer to Rule 5 and in case it is inapplicable, then Rule 6 and so on. As per Rule 5, in those cases where the transaction value is indeterminable, transaction value of "identical goods" is to be taken into consideration. Rule 6 mentions about transaction value of "similar goods". If this also inapplicable then "deductive value" is to be arrived at in terms of formula contained in Rule 7. If that is also inapplicable, residual method is provided in Rule 8 which prescribes that the value shall be determined using "reasonable means" consistent with the principles of general provisions of these Rules and subsection (1) of Section 14 of the Customs Act and on the basis of data available in India. At the same time, sub-rule (2) of Rule 8 excludes certain methods which are not to be applied to determine the value under these Rules. Precise language of sub-rule (2) of Rule 8 is reproduce as under :

"(2) No value shall be determined under the provisions of these rules on the basis of –

(i) the selling price in India of the goods produced in India;

(ii) a system which provides for the acceptance for Customs purposes of the highest of the two alternative values;

(iii) the price of the goods on the domestic market of the country of exportation;

(iv) the price of the goods for the export to a country other than India;

(v) minimum Customs values; or

(vi) arbitrary or fictitious values."
7. Once the transaction value is arrived at by applying the formula applicable in a given case in terms of aforesaid provision, exercise is

still incomplete. Adjustments to this value are still to be made in accordance with the provision of Rule 9. Only thereafter, exact "transaction value" gets determined on which Customs duty is to be paid. It is so stated in Rule 4 itself. So, at this stage, Rule 9 comes into play, with which we are concerned in the present case. It deals with "cost of services". It lays down that in determining the transactional value, cost of certain services is to be added to the price actually paid or payable for the imported goods, as mentioned in clauses (a) to (e) of sub-rule (1) of Rule 9. We would like to reproduce this Rule, as it originally stood, in its entirety :

"9. Cost of services. - (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

(a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely -
(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for Customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable, namely:
(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

(d) the value of any part of the proceeds of any subsequent resale, disposal, or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.
(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :
Provided that in the case of goods imported by air, the cost and charges referred to in clauses (a), (b) and (c) above, -

(i) where such cost and charges are ascertainable, shall not exceed twenty per cent of the free on board value of such goods,

(ii) where such cost and charges are not ascertainable such cost and charges shall be twenty per cent of the free on board value of such goods;
Provided further that in the case of goods imported other than by air and the actual cost and charges referred to in clauses (a), (b) and (c) above are not ascertainable, such cost and charges shall be twenty-five per cent of the free on board value of such goods.

(3) Additions to the price actually paid or payable shall be made under this rule on the basis of objective and quantifiable data.

(4) No addition shall be made to the price actually paid or payable in determining the value of the imported goods except as provided for in this rule."

8. Rule 9 was amended in the year 1989 vide Notification dated 19-12-1989. With this amendment, the provisos appearing below sub-rule (2) of Rule 9 were substituted with the following proviso :

"Provided that -

(i) Where the cost mentioned in clause (a) are not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) Where the charges mentioned at clause (b) are not ascertainable, such charges shall be one per cent of the free on board value of the goods;

(iii) Where the cost mentioned at clause (c) are not ascertainable, such cost shall be 1.125% of free on board value of the goods.
Provided further that in the case of goods imported by air, where the cost mentioned in clause (a) are ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods."
9. In the year 1990, i.e., vide amendment Notification dated 5-7-1990, the said provisos underwent further modification with the substitution of following provisos :

"Provided that -

(i) Where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) Where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;
Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods;

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above."

10. Clause (ii) of first proviso, as is clear from reading thereof, mandated addition of one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c).

11. Reverting to the facts of the present case, it is on the strength of this proviso, even when the actual handling charges were shown as Rs. 69.98 paisa, that too as fixed by the International Airport Authority, the Customs Authorities added further sum of Rs. 15,214.69 paisa to the value of goods of handling charges, being one per cent free on board value of the goods. Obviously, the appellant was aggrieved by this addition and handling charges on notional basis pursuant to the aforesaid proviso whereby the charges for loading, unloading and handling associated with the delivery of imported goods at the place of importation had been fixed at one per cent free on board value of the goods plus the cost of the transport of the imported goods to the place of importation plus cost of insurance.

19. In order to arrive at the answer to the issue raised, we shall have to go through the scheme of customs duties as payable under the Act. Chapter V is the relevant chapter which deals with "Levy of, and Exemption from, Customs Duties". It contains the provisions from Section 12 to Section 28BA. Section 12 which talks of "dutiable goods", provides that duties of Customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from, India. Thus, the rates at which the Customs duties is to be imposed are specified in the Customs Tariff Act, 1975. That rate is on the value of goods imported or exported, as the case may be. Therefore, there is a need to determine the value of the goods imported and exported. The yardsticks for arriving at this value are contained in Section 14

of the Act. This provision as originally stood and was prevalent at the relevant time with which we are concerned, reads as under :

"14. Valuation of goods for purposes of assessment. - (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of Customs is chargeable on any goods by reference to their value, the value of such goods 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 of importation or exportation, as the case may be, in the course of international trade, where -

(a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other, and the price is the sole consideration for the sale or offer for sale :
Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a Bill of Entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50;

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A) if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section -

(a) "rate of exchange" means the rate of exchange -

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;
(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."
20. This provision was amended in the year 2007. Though, we are not concerned with this amended provision, we are taking note of the same in order to examine as to whether any change, in principle, is brought about or not. The amended provision reads as follows :

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

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf :
Provided further that the rules made in this behalf may provide for, -

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer

has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :
Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a Bill of Entry is presented under Section 46, or a shipping bill of export, as the case may be, is presented under Section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value."

21. A reading of the unamended provision would show that the earlier/old principle was to find the valuation of goods "by reference to their value". It introduced a deeming/fictional provision by stipulating that the value of the goods would be the price at which such or like goods are "ordinarily sold, or offered for sale". Under the new provision, however, the valuation is based on the transaction price namely, the price "actually paid or payable for the goods". Even when the old provision provided the formula of the price at which the goods are ordinarily sold or offered for sale, at that time also if the goods in question were sold for a particular price, that could be taken into consideration for arriving at the valuation of goods. The very expression "ordinarily sold, or offered for sale" would indicate that the price at which these goods are actually sold would be the price at which they are ordinarily sold or offered for sale. Of course, under the old provision, under certain circumstances, the authorities could discard the price mentioned in the invoice. However, that is only when it is found that the price mentioned in the invoice is not the reflection of the price at which these are ordinarily sold or offered for sale. To put it otherwise, the reason for discarding the price mentioned in the invoice could be only when the said price appeared to be suppressed one. In such a case, the authorities could say that generally such goods are ordinarily sold or offered for sale at a different price and take that price into consideration for the purpose of levying the duty. It could, however, be done only if there was

evidence to show that ordinarily the price at which these goods are ordinarily sold or offered for sale is higher than the price mentioned in the invoice. In fact, this fundamental concept is retained even now while introducing the concept of "transaction value" under the amended provision. More importantly, the rules viz. Valuation Rules, 1988 had incorporated this very principle of "transaction value" even under the old provision. No doubt, as per this provision existing today generally the price mentioned is to be accepted as it is the transaction value. However, this very provision stipulates the circumstances under which that price can be discarded. In any case, having regard to the question with which we are concerned in the present appeals, such a change in the provision may not have much effect.

22. The underlying principle contained in amended subsection (1) of Section 14 is to consider transaction value of the goods imported or exported for the purpose of Customs duty. Transaction value is stated to be a price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Therefore, it is the price which is actually paid or payable for delivery at the time and place of importation, which is to be treated as transaction value. However, this subsection (1) further makes it clear that the price actually paid or payable for the goods will not be treated as transaction value where the buyer and the seller are related with each other. In such cases, there can be a presumption that the actual price which is paid or payable for such goods is not the true reflection of the value of the goods. This Section also provides that normal price would be the sole consideration for the sale. However, this may be subject to such other conditions which can be specified in the form of Rules made in this behalf.

23. As per the first proviso of the amended Section 14(1), in the transaction value of the imported goods, certain charges are to be added which are in the form of amount paid or payable for costs and services including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner which can be prescribed in the rules.

Sub-section (2) of Section 14, which remains the same, is an over-riding provision which empowers the Board to fix tariff values for any class of imported goods or export goods under certain circumstances. We are not concerned with this aspect in the instant case.

24. In contrast, in the unamended Section 14, we had provision like sub-section (1A) which stipulated that the price referred to in sub-section (1) in respect of imported goods shall be determined in accordance with rules made in this behalf. Therefore, rules can be made in determining the price. However, these rules have to be subject to the provisions of sub-section (1), the underline principle whereof, as stated above, is to take into consideration actual price of the goods unless it is impermissible because of certain circumstances stipulated therein. Keeping in mind this fundamental aspect, we have to examine the scheme of the Valuation Rules, 1988.

25. It can very well be seen from the Valuation Rules, 1988 that these Rules are made to facilitate arriving at the valuation of goods in all the contingencies provided in subsection (1) of Section 14. We have already reproduced the relevant Rules and indicated the scheme thereof. To recapitulate in brief, Rule 3 echoes the principle enshrined in sub-section (1) of Section 14 by mentioning that value of the imported goods would be the transaction value. Likewise, Rule 4 again reproduces the concept behind subsection (1) of Section 14 by stipulating in no uncertain terms, that the transaction value shall be the price actually paid or payable for the goods when sold for exports to India. The adjustments which are made in accordance with the provisions of Rule 9 are nothing but the costs and services, as specified in first proviso to Section 14(1) of the Act. It is only in those cases where value of the imported goods, i.e., transaction value cannot be determined, that we have to resort to Rules 5 to 8 of the said Rules. The purpose of these Rules is to fix the transaction value of the goods notionally. However, even when the fiction is applied, the scheme and spirit behind Rules 5 to 8 would amply demonstrate that the endeavour is to have closest proximity with the actual price. That is why Rules 5 to 8 are to be applied in a sequential manner, meaning thereby we have to first resort to Rule 5 and if that is not

applicable only then we have to go to Rule 6 and in the case of inapplicability of Rule 6, we have to resort to Rule 7 and even if that is not applicable, then Rule 8 comes into play. In order to find out as to what would be the closest real value of the goods, Rule 5 mentions that transaction value of "identical goods" is to be taken into consideration. Thus, wherever the value of identical goods is available, one can safely rely upon the said value in the event transaction value of the goods in question is indeterminable. Value of the identical goods is most proximate. If that is also not available, next proximate value is provided in Rule 6 which talks of value of "similar goods". In the absence thereof, we come to the formula of applying the "deductive value" as contained in Rule 7. In those cases, where even deductive value cannot be arrived at, one has to resort to residual method provided in Rule 8 which prescribes that the value shall be determined using "reasonable means". This would indicate adopting "Best Judgment Assessment" principle. However, even while having best judgment assessments, Rule 8 reminds the authorities that such reasonable means or best judgment assessments has to be in consonance with the principles of general provisions contained in the Rules as well as sub-section (1) of Section 14 of the Act and also on the basis of data available in India.

26. On the aforesaid examination of the scheme contained in the Act as well as in the Rules to arrive at the valuation of the goods, it becomes clear that wherever actual cost of the goods or the services is available, that would be the determinative factor. Only in the absence of actual cost, fictionalised cost is to be adopted. Here again, the scheme gives an ample message that an attempt is to arrive at value of goods or services as well as costs and services which bear almost near resemblance to the actual price of the goods or actual price of costs and services. That is why the sequence goes from the price of identical goods to similar goods and then to deductive value and the best judgment assessment, as a last resort.

27. In the present case, we are concerned with the amount payable for costs and services. Rule 9 which is incorporated in the Valuation Rules and pertains to costs and services also contains the underlying principle which runs though in the length and breadth of the scheme

so eloquently. It categorically mentions the exact nature of those costs and services which have to be included like commission and brokerage, costs of containers, cost of packing for labour or material, etc. Significantly, Clause (a) of sub-rule (1) of Rule 9 which specifies the aforesaid heads, cost whereof is to be added to the price, again mandates that it is to be "to the extent they are incurred by the buyer". That would clearly mean the actual cost incurred. Likewise, Clause (e) of sub-rule (1) of Rule 9 which deals with other payments again uses the expression "all other payments actually made or to be made as the condition of the sale of imported goods".

28. Keeping in mind this perspective, we need to look into clause (b) of sub-rule (2) of Rule 9 which deals with loading, unloading and handling charges associated with the delivery of imported goods at the place of importation, which are to be included to arrive at the value of such imported goods. It is these charges with which we are directly concerned with in the instant case.

29. The provision of sub-rule (2) of Rule 9, as originally stood, made it clear that wherever loading, unloading and handling charges are ascertainable, i.e., actually paid or payable, it is those charges that would be added. Proviso to the said Rule contained the provision that only in the event the same are not ascertainable, it shall be 25% of the free on board value of such goods. In fact, sub-rule (3) of Rule 9 leave no manner of doubt when it mentions that additions are to be made on the basis of objective and quantifiable data.

34. In the present case before us, the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges is that it would help Customs authorities to apply the aforesaid rate uniformly. This can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick. We, therefore, are not impressed with the reason given by the authorities to have such a provision and are of the opinion that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act. It cannot be ignored that this provision as well as Valuation Rules are enacted on the lines of GATT guidelines and the golden

thread which runs through is the actual cost principle. Further, the loading, unloading and handling charges are fixed by International Airport Authority.

36. We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 5-7-1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."

5.5 From the reading of the above referred decisions of the Apex Court along with Section 14 of Customs Act, 1962 and Custom Valuation (Determination of Price of Imported Goods) Rules, 2007, it is quite evident that assessable value for the purpose of determination of Custom Duty has to be the sum of

- transaction value, either actual transaction value between the parties to transaction in course of international trade or determined in accordance with the provisions of Rules 3 to 8 of the Custom Valuation (Determination of Price of Imported Goods) Rules, 2007; and

- value of various costs and services as provided by Rule 9 of the Custom Valuation (Determination of Price of Imported Goods) Rules, 2007.

5.6 As per the settled law by the above mentioned decisions of Apex Court the first attempt in determination of the value under Section 14, should be to determine transaction value and value of various costs and services on the actual basis, and if these can be determined on the actual basis then that should form the basis of assessment. In cases where some of these components of value under section 14 cannot be determined on the actual basis, then only those components which could not be determined on the actual basis, the proxies for such components will be the notional values as provided by the Customs Valuation Rules, 2007.

5.7 In light of the law as above we examine the content of the instruction issued by the Commissioner. As per the instruction issued the value of the fuel has to be the actual invoice value of the ATF purchased by the Aircraft/ Airline, and in absence or non availability

of such invoice value, this invoice value shall be substituted by the sale price of IOC of ATF to Air India/ Indian Airlines, for their foreign going aircrafts. In our view the sale price of IOC of ATF to Air India/ Indian Airlines, for the foreign going aircrafts has to be only FOB value and cannot be CIF value as claimed by the Appellants by terming the same as "fully loaded value". The fallacy of the argument is self evident that CIF value as determined under Section 14 of Customs Act, 1962 is inclusive of "international freight and insurance" and not the "domestic freight and insurance". Sale price of IOC can never be inclusive of international freight insurance as these expenses are never incurred by IOC in making such sales at Indian Airports. Hence even going by the instruction of the Commissioner we are of the view that sale price of IOC, will have to be further loaded with the freight and insurance charges to determine the CIF value of the imported goods. Interestingly Commissioner instruction though seeks to add the insurance charges notionally is silent about the addition of freight charges. However in terms of Rule 10(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 which is pari materia with the erstwhile Rule 9(2) of Custom Valuation Rules, 1988, value has to be added towards insurance freight and landing charges. If actual are available on the actual basis and if actual are not available the additions will have to be made on notional basis in the manner prescribed by the said rules.

5.8 Appellant have claimed that actual charges towards the freight arte ascertainable as zero in their case. We are not in agreement with the said submissions. Appellants are carrying the remnant fuel as extra baggage in the aircraft and if the freight charges are to be ascertained, then they should be equal to the actual extra baggage charged by them for carriage of equivalent amount of fuel.

5.9 In our view on the issue of addition of freight charges for determination of assessable value the order of Commissioner cannot be faulted with. However it has been brought to our notice that tribunal has in following cases taken the contrary view:

- Interglobe Aviation Limited [2017 (9) TMI 926 CESTAT] = ***2017-TIOL-3169-CESTAT-DEL***

- National Aviation Company of India [2018 (8) TMI 1300 CESTAT]

- Air India Limited [2018 (4) TMI 785 CESTAT Delhi]

- Jet Airways (India) Ltd, Interglobe Aviation, Spicejet Ltd [2018 (11) TMI 1476 CESTAT Chennai] = ***2019-TIOL-421-CESTAT-MAD***

5.10 Since the view that we are expressing goes contrary to the view earlier taken by the coordinate benches of tribunal, we refer the matter to the President for constitution of larger bench to determine the following question of law:

"i. Whether the value of cost and services as specified in rule 10(2) of the Customs Valuation (Determination of Price of Imported Goods) Rule, 2007, specifically the value towards freight charges is required to be added to the value of ATF determined on the basis of sale price of IOC of ATF to Air India/Indian Airlines for their foreign going aircrafts?"

5.11 As we have referred the matter to President for placing the above question before a larger bench, we are not taking up other questions as specified in para 5.2, supra for consideration. They will be taken up by the bench after decision of the larger bench on the issues referred.

(Order pronounced in the open court on 28.06.2019)