# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

**Customs Appeal No. 85503 of 2023**

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APP-2324 & 2325/2022-23 dated 07.02.2023 passed by Commissioner of Customs (Appeals), Mumbai-III.)

**Indepesca Overseas Private Limited** **.....Appellants**
Unit 11A, Tower-I, Commercial-II. Kohinoor City,
Kirol Road,
Mumbai – 400 070.

*VERSUS*

**Commissioner of Customs (Import)** **.....Respondent**
Mumbai – III Zone
Air Cargo Complex (ACC), Sahar
Andheri (East), Mumbai–400 059.

**WITH**

**Customs Appeal No. 87515 of 2023**

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APP-2324 & 2325/2022-23 dated 07.02.2023 passed by Commissioner of Customs (Appeals), Mumbai-III.)

**Indepesca Overseas Private Limited** **.....Appellants**
Unit 11A, Tower-I, Commercial-II. Kohinoor City,
Kirol Road,
Mumbai – 400 070.

*VERSUS*

**Commissioner of Customs (Import)** **.....Respondent**
Mumbai – III Zone
Air Cargo Complex (ACC), Sahar
Andheri (East), Mumbai–400 059.

**AND**

**Customs Appeal No. 87516 of 2023**

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APP-2324 & 2325/2022-23 dated 07.02.2023 passed by Commissioner of Customs (Appeals), Mumbai-III.)

**Indepesca Overseas Private Limited** **.....Appellants**
Unit 11A, Tower-I, Commercial-II. Kohinoor City,
Kirol Road,
Mumbai – 400 070.

*VERSUS*

**Commissioner of Customs (Import)** **.....Respondent**
Mumbai – III Zone
Air Cargo Complex (ACC), Sahar
Andheri (East), Mumbai–400 059.

**Appearance:**
Ms Sweta Vijay Upadhyay, Advocate for the Appellants
Shri D.S. Mann, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)**
**HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/87416-87417/2024 & A/85418/2024**

Date of Hearing: 20.12.2023
Date of Decision: 19.04.2024

**PER : M.M. PARTHIBAN**

These appeals have been filed by M/s Indepesca Overseas Private Limited, Mumbai (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. MUM-CUSTM-APSC-APP-2324&2325/2022-23 dated 07.02.2023 (herein after, referred to as 'the impugned order') passed by Commissioner of Customs (Appeals), Mumbai-III Zone, Mumbai.

2.1 The brief facts of the case are that the appellants had imported 'Atlantic Salmon GTD (gutted) Fresh Fish' by classifying it under Customs Tariff Item (CTI) 0302 1400 under two Bills of Entry (B/E) No. 9494358 dated 11.07.2022 and B/E No.9810944 dated 01.08.2022 and self-assessed the same declaring the value of goods as per invoices No.700699 dated 08.07.2022 and No.701958 dated 29.07.2022, respectively, in terms of Section 17(1) of the Customs Act, 1962. The proper officer of Customs in the Appraising Group had objected to the declared value of the imported goods and had raised queries seeking the reply from the appellants as to why the value of imported goods should not be enhanced to US$16.75 per Kg. on the basis of comparative value of goods imported in other cases. The appellants had replied to the above query stating that the declared prices are as per invoice value in terms of contract dated 28.04.2022 entered with their supplier abroad M/s SalMar AS, Norway for the committed quantities of supply during the period specified therein. The appellants had also uploaded the copy of such contract in the Customs EDI System - *eSanchit* (e-Storage and Computerized Handling of Indirect Tax documents) and had requested for assessment of the goods on declared transaction value, by ignoring the previous loading of value in the referred past cases of import by them as it is without merit and they had no option, since the goods is highly perishable and had to accept the same and clear the goods. Further, they also stated that they are in the process of filing appeal against such decision before the

Commissioner of Customs (Appeals). However, the proper officer of Customs did not agree with the reply and re-assessed the imported goods with enhanced value at US$16.75 per Kg. In their last reply to the query raised by the department, the appellants had stated that the proper officer may proceed with assessing the present B/Es as per values in previous B/E, as the goods are highly perishable, despite being in cold storage, they may get spoilt. Hence, the appellants pleaded to do the needful and they would be including these B/Es also in the proposed appeal to be filed against the assessment proposed by the department.

2.2 Thereafter, the appellants had sought order for re-assessment by the proper officer of Customs under Section 17(5) ibid, and failing to obtain such order within a reasonable period of time, the appellants preferred an appeal before the Commissioner of Customs (Appeals). In disposing the appeals filed for disputed two B/Es viz. B/E No. 9494358 dated 11.07.2022 and B/E No.9810944 dated 01.08.2022, the Commissioner of Customs (Appeals) vide impugned order dated 07.02.2023 has held that the imported goods were cleared from Customs by issue of 'Out of charge' on 15.07.2022 and 06.08.2022, respectively and the appeals were filed against two B/Es involving a delay of 111 days and 133 days, respectively and hence it is barred by limitation of 90 days provided under Section 128(1) ibid. Accordingly, learned Commissioner of Customs (Appeals) had rejected the appeal filed by the appellants on the ground of limitation without going into the merits of the case. Feeling aggrieved against such order, the appellants have filed these appears before the Tribunal.

3.1 The learned Advocate for the appellant submits that in case of enhancement of value, a speaking order under Section 17(5) of the Customs Act, 1962 is required to be passed within 15 days of the assessment. Since, no speaking order was passed under Section 17(5) of the Act, the appellants never came to know the reasons for the re-assessment made by the proper officer and to enable them to file appeal seeking legal remedy. Hence, she pleaded that Bill of Entry cannot be taken as decision or order for the purpose of Section 17(5) ibid and therefore the appeal filed before the Commissioner of Customs (Appeals) cannot be treated as time-barred. On the above basis, learned Advocate prayed that the impugned order is to be set aside.

3.2. In support of their stand, the learned Advocate had relied upon the following decisions of the Tribunal and the judgement of the Hon'ble High Court of Kerala, in the respective cases mentioned below:

(i) *Shree Luxmi Steels Vs. Commissioner of Customs (Port), Kolkata* – 2018-TIOL-212-CESTAT-Kolkata-Customs

(ii) *Manavi Exim Pvt. Limited Vs. Commissioner of Customs, Ludhiana* - Final Order No.605421084/2021 dated 11.03.2021

(iii) *Woodstruck Furniture Pvt. Ltd.* Vs. *Union of India* - 2011 (269) E.L.T. 327 (Ker.)

4. On the other hand, learned Authorised Representative for Revenue supports the impugned order and submits that consent for loading of value was given by the appellants in their last reply to the query of the proper officer, and therefore, the speaking order under Section 17(5) of the Customs Act, 1962 is not required.

5. Heard both sides and perused the records of the case.

6. On careful consideration of the submissions made by both the sides, we find that the appellants have challenged the impugned order on two grounds; firstly, on the ground that a speaking order under Section 17(5) of the Customs Act, 1962 has not been passed after loading of the assessable value in respect of two B/Es; and secondly, on the ground that the appeals preferred before the Commissioner of Customs (Appeals) is not barred by limitation of time, inasmuch as there is no order under Section 17(5) ibid.

7. In order to examine, whether the provisions of Section 17(5) ibid are applicable to the facts of the case, we would like to refer the relevant legal provisions of the Customs Act, 1962:

> ***"Definitions.***
> ***2.*** *In this Act, unless the context otherwise requires,—*
> *xx xx xx xx xx*
> *(2) assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—*
> *(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;*
> *(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;*
> *(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or*

*under the Customs Tariff Act or under any other law for the time being in force;*

(d) *the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;*

(e) *the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;*

(f) *any other specific factor which affects the duty, tax, cess or any other sum payable on such goods,*

*and includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;*

*(41) "value", in relation to any goods, means the value thereof determined in accordance with the provisions of sub-section (1) or sub-section (2) of section 14;*

***Assessment of duty.***

***17.*** *(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50 shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*

*(2) The proper officer may verify the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary:*

***Provided*** *that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.*

*(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.*

*(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.*

*(5) Where any reassessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said reassessment in writing, the proper officer shall pass a speaking order on the reassessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

*Explanation.—For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.*

*xx xx xx xx xx*

> ***Appeals to Commissioner (Appeals).***
> ***128.*** *(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days] from the date of the communication to him of such decision or order:*
>
> ***Provided*** *that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."*

8.1 On careful consideration of the said provisions, we find that in case of any type of assessment, the assessable value of imported goods is required to be determined in accordance with the provisions of Section 14 of the Customs Act, 1962 and the Customs Tariff Act, 1975. In the present case, we find that the appellants had self-assessed the goods in terms of Section 17(1) ibid, by declaring the value of the imported goods as per invoice price which are based on specific contracts entered into with the foreign supplier M/s SalMar AS, Norway under certain terms and conditions specified in such contract. It is mentioned that the said contract for supply of imported goods is for a specified period stated therein, and the price is based on average air freight cost on the day of entering into the contract and the supplier has a right to increase the price of imported goods, if the airfreight cost increases. It is also on record that on the various queries raised by the proper officer of Customs in verification of such self-assessment in terms of Section 17(2) and 17(3) ibid, the appellants had replied to the department duly uploading the relevant contracts for the supply of imported goods from the supplier, and stated that comparable values based on previous imports are not acceptable to them and requested that these need to be ignored, as the loading of values in such referred previous cases were without any merit or basis. Even in the last reply to the query raised by the proper officer of Customs, the appellants had stated that the department may proceed with assessing the present B/Es as per values in previous B/E in a reluctant manner, on account of their apprehension that the imported goods which are highly perishable in nature, despite being in cold storage may get spoilt. Hence, the appellants pleaded to do the needful and they clearly stated that would be including these B/Es also in the proposed appeal to be filed against the assessment proposed by the department. These facts bring out clearly that the appellants did not confirm his acceptance of the enhancement of value proposed by the proper officer of Customs for re-assessment of goods

under Section 17(4) ibid. Thus, the exception provided for the requirement of passing of a speaking order on the re-assessment of imported goods under Section 17(5) ibid cannot be applied in the present case.

8.2. Plain reading of legal provisions clearly brings out that in re-assessment of goods done under Section 17(4) ibid, except wherein the re-assessment has been accepted by the assesse importer, the proper officer shall pass a speaking order on the reassessment within 15 days on the date of re-assessment of the bills of entry. Admittedly, in this case, no speaking order under Section 17(5) of the Customs Act, 1962 has been passed till date. Therefore, we are of the considered view that the legal requirement of re-assessment of imported goods under Section 17(5) ibid, in enhancing the value of imported goods, in compliance with the legal provisions of Section 14 ibid and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have not been duly followed in this case by the proper officer of Customs.

9. It is also revealed from the factual matrix of the case that the appellants expressed their intent to file an appeal against the re-assessment by the proper officer of Customs and waited for the issue of an order under Section 17(5) ibid for a reasonable period. Later on, when their request was not adhered to, they preferred an appeal before the Commissioner of Customs (Appeals) and in the absence of a speaking order, they did not refer to any specific decision or order to which they had appealed against, and had mentioned it as 'arising out of re-assessment of the impugned Bills of Entry'. In these circumstance, particularly when no order has been passed under Section 17(5) of the Customs Act, 1962, which is mandate in law, and the merits of the case has not been discussed by the first appellant authority, the delay in filing of the appeals before the learned Commissioner of Customs (Appeals), by taking into consideration the date of clearance of goods as per impugned order, is condonable and therefore in order to meet the ends of justice, we condone the delay.

10. Further, we find that the re-assessment order required to be passed by the assessing officer under Section 17(5) ibid is not a discretion for the proper officer of Customs to take the reply of the appellants as confirmation of such re-assessment, so as to claim the benefit of exception provided therein. It is an essential legal requirement, when the appellants-importer had not accepted the re-assessment proposed by proper officer of Customs,

in this case the enhancement of assessable value on the basis of earlier imports. In these circumstances, in the absence of the order under Section 17(5) of the Customs Act, 1962, we are of the considered view that the case of re-assessment should go back to the original authority to pass a speaking order for re-assessment and to communicate the same to the appellants in writing.

11.1 We are also of the considered view that the authorities below in re-assessment of impugned goods under Section 17(5) ibid, are required to pass a reasonable order, which is of a speaking nature, conforming to the requirements of the legal provisions of Section 14 ibid and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Further such issue of a 'speaking order' shall also fulfill the basic requirement of quasi-judicial process that is to provide reasonable opportunity to present the case by the appellants including opportunity for personal hearing and to record the reasons for arriving at an order, which obviously has not been fulfilled by the authorities below. In this regard, we also find that the Hon'ble Supreme Court in the case of *Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan* 2011 (273) E.L.T. 345 (S.C.) had elaborated in detail the various aspects of the speaking order that is required to be followed by a quasi-judicial authority or even an administrative authority. The relevant paragraphs of the above judgement are extracted and given below:

**"18.** This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the 'inscrutable face of a Sphinx'.

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**51.** Summarizing the above discussion, this Court holds :

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the Life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the *sine qua non* of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and *Anya* v. *University of Oxford*, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process"."

Since these pre-requisites have not been followed by the authorities below in adjudication of the cases, we consider it appropriate to set-aside the impugned order and remand the case back to the original authority for passing a reasoned order in the light of the observations made above.

12. In view of the foregoing discussions and analysis, we are of the considered view that the impugned order passed by the learned Commissioner of Customs (Appeals) cannot be sustained. However, we are also of the considered view that in order to examine the various issues of re-assessment of impugned goods covered under the two Bills of Entry i.e., B/E No. 9494358 dated 11.07.2022 and B/E No.9810944 dated 01.08.2022, for deciding upon the proper determination of the assessable value of imported goods, the matter needs to be decided afresh in *de novo* proceedings by the original authority.

13. Therefore, the impugned order is set aside and the appeals are allowed in favour of the appellants by remanding the matter for a fresh decision by Original Authority after duly taking into consideration the various submissions to be made by the appellants. The appellants are also directed to cooperate with the departmental authorities by submitting the various grounds made out in the appeal before us and are at liberty to submit any additional points in the dispute during the *de novo* proceedings. Needless to say that the Original adjudicating authority should take into account such additional submissions given by the appellants and provide reasonable opportunity for personal hearing, before ordering for re-assessment the impugned goods.

14. In the result, the appeals are allowed by way of remand for fresh *de novo* proceedings in the above terms.

(Order pronounced in open court on 19.04.2024)

**(S.K. Mohanty)**
**Member (Judicial)**

**(M.M. Parthiban)**
**Member (Technical)**

Sinha