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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-30-1983

Reported in : (1984)(15)ELT137TriDel

Appellant : O.E.N. (India) Ltd.

Respondent : Collector of Customs and Central

Judgement :

1. The Collector of Customs Cochin passed the impugned order on 27-3-1982. Against this order the appellant preferred an appeal before the Central Board of Excise & Customs but the same was later transferred to this Appellate Tribunal under Section 131-B(1) of the Customs Act, 1962.

2. Briefly, the case of the appellants is that the values declared by them in the invoices for the import of finished electronic products, equipments machines, spares, raw materials etc. from M/s. OAK Industries Inc Crystal Lake, USA (hereinafter referred to as OAK) are in accordance' with the provisions of Section 14(1) of the Customs Act, 1962 (hereinafter referred to as the Act). They have challenged the Collector's order with regard to the loading of invoices of the above mentioned finished articles, components and raw materials by 100% of the f.o.b. value. They have also challenged the charge of mis-declaration under Section 111(m) of the Act and the levy of penalty under Section 112 ibid.

3. The main contention of the appellants is that OAK are an independent corporate body and their dealings with them are as a principal to principal only. They do not

deny the fact that OAK, have equity participation with the appellants to the extent of 45% of the capital (as per the agreement, the OAK was to supply their equity capital in the form of machinery and equipment) but strongly refute the charge that they have any special relationship. They maintain that their dealings with OAK are strictly based on commercial considerations.

Further, both the parties have no interest in the business of each other except that OAK have financial stake in the appellants' company by virtue of being an equity holder. The appellants have maintained that the expression 'Collaborators', 'Associates' etc. used in the documents or the annual reports of the company have been loosely applied For all practical purposes they are two separate bodies, deal with each other as principal to principal and the prices charged by OAK from the appellants are correct prices within the purview of Section 14(1) of the Act.

4. They have taken strong exception to the fact that in arriving at his decision to load the appellants' invoices by 100% (with reference to f.o.b. price) the Collector has heavily relied on values shown in the invoices in a couple of stray importations effected by other parties.

Such stray imports could not be made the basis of loading the value of the goods imported by the appellants because those were special deals and conducted under peculiar circumstances Shri Kurian also laid lot of stress on the fact that independence of action in commercial matters between the appellants and the OAK was proved by the fact that in a number of cases the appellants had purchased goods from parties other than OAK or their subsidiaries when they got identical goods cheaper from other suppliers, 5. Referring to the Department's charge that the values adopted for invoicing between OAK and the appellants were inter-company prices, Shri Kurian stated that it was simply not true. In actual practice, the intercompany prices were adopted as a rough guide by the appellants and they freely negotiated the actual price in the light of the prices of the like goods available from other sources. Stress was laid on the fact that the Department had failed to produce any evidence, whatsoever, to show that the appellants had in fact remitted clandestinely any amounts over and above the ones declared in the invoices. Furthermore, being a PER A company, the

appellants were also required to comply strictly with the regulations stipulated by the Reserve Bank and other concerned authorities. The charge of 'fiddling with the invoices' levelled against them was nothing but a figment of imagination on the part of the lower authorities. Whenever imports were effected, all relevant documents were duly presented to the Customs authorities for their scrutiny.

6. It was also contended that the Department had made heavy weather of the seized files and, in particular, a file marked 'Confidential' showing intercompany prices. Likewise, the lower authorities had resorted to the process of 'pick and choose' with regard to the voluminous correspondence exchanged between the appellants and the OAK and drawn uncharitable inferences therefrom to support their case that the appellants were nothing but a subsidiary of the OAK and that inter-company prices were being charged which were much lower than the prices determined under Section 14 of the Act. The lower authorities had also failed to properly appreciate the pricing pattern with regard to electronic goods and components where technological advances are being made at a rapid pace. Being an important equity holder in the appellants' company, the OAK had been given the right to appoint one of the Directors on the appellant company's Board of Directors. A very forceful plea was also made that during the years 1974 to 1978 (which cover the present proceedings) the total f.o.b. value of imports of the appellants from the OAK amounted to Rs. 105 lakhs. Against this OAK had received by way of dividends a sum of Rs. 18,61 lakhs only. It was urged before us as to whether any prudent business company would sacrifice a sum of Rs. 105 lakhs (consequent upon the loading to the extent of 100%) to make a gain of Rs. 18.61 lakhs only. According to Shri Kurian only on this simple proposition of business management, the department's case loses all its validity and force. With regard to the charge that appellants themselves had accepted their special relationship with the OAK by virtue of declarations made on the reverse of bills of entry, it was pointed out that in many bills of entry such declarations were not made and in some they were made by the clearing agents or some lower functionaries of the company. At best, it was argued, those could be treated as 'clerical omissions'.

7. Shri Kurian summed up his arguments by laying special emphasis on the following points : (i) The impugned order had been passed in pursuance of an earlier order of the Board dated 28-3-1981 in which the Collector's order dated 30-10-1980 was set aside mainly on the ground that in arriving at the loading percentage the Collector had relied on a few solitary instances of exports made by OAK to B.E.L. and one or two other parties in India. However, while re-adjudicating the case the Collector had, more or less, passed an identical order thereby defeating the very purpose for which the case had been remanded to him.

(ii) Merely because some 'so-called incriminating' documents had been recovered from the premises of the appellants on the basis of 'secret information', the lower authorities had blown out of proportion any piece of evidence which could be used against the appellants. Letters and telex messages were interpreted out of context. Wherever there was some piece of evidence favourable to the appellants, the same was discarded but on the other hand anything remotely 'unfavourable' to them was given exaggerated importance.

(iii) The appellants and OAK were two independent corporate bodies and their dealings were as between principal to principal. The only interest which the OAK have in the appellant company is by virtue of OAK's 45% equity holding. The Department had treated this as a special relationship and discarded the invoice prices. Equity participation per se does not create a special relationship unless the de-dings between the two companies are conducted in a manner indicative of having a special interest in the business of each other. The Department had failed to establish that this was so and that the two parties were showing any special consideration to each other in their business transactions.

(iv) The Collector had invoked the proviso to Section 28 of the Act with regard to levy of duty on the past imports. This was totally illegal because appellants had been importing their goods regularly and producing all relevant documents for scrutiny of the customs authorities. It was not open to the Department, therefore, to say that the appellants were deliberately keeping back any material facts having bearing on valuation of these goods from it.

(v) The loading of invoices by 100% of the f.o.b. value was arrived at in an arbitrary manner in utter disregard of accepted norms of valuation and principles of natural justice. The personal penalty of Rs. 5 lakhs was not only harsh but totally unwarranted under the circumstances of the case.

8. While broadly adopting the line of reasoning of the Collector, Shri Nair, the learned representative of the respondent, has assailed the plea of the appellants that their transactions with OAK were conducted purely on principal to principal basis and they had no interest in the business of each other. He even pointed out that the word O/E/N had been derived from the name of the foreign supplier"OAK ELECTRO/NATICS CORPN., U.S.A." (emphasis supplied). He vehemently argued that the appellants' transactions with OAK did not fall within the purview of Section 14 (a) of the Act. For this purpose, he referred to the notes on Clauses leading to the insertion of the present Section 14 of the Customs Act, 1962 corresponding to Section 30 of the Sea Customs Act, 1878 He pointed out that the concept of the wholesale price had been done away with within the present valuation section i.e. Section 14 of the Act as this concept did not conform to the provisions of GATT to which India is a signatory. He further submitted that the present Section 14 (1) (b) had been specifically inserted to take care of cases where assessable value had to be determined in respect of parties having interest in the business of each other 9. Shri Nair further emphasized that a close reading of the Collector's order brings out into sharp focus the fact that the appellants and the OAK had interest in the business of each other. Their mutual dealings were governed by a number of agreements relating to technical, financial and administrative matters. The appellants were entitled to an over-riding commission of 7f% in respect of products supplied by OAK to other Indian parties. OAK were also in a position to exert sufficient influence by virtue of holding 45% of the equity capital in the appellant company. In the past several years, the appellants and OAK were having a common Chairman. Whereas Shri Kurian had stated that OAK had the right to nominate one Director on the Board of Directors of the appellant company, from the annual reports it was seen that during the relevant period there were as many as 4 Directors representing OAK (most of them had appointed alternate Directors). Shri Nair also pointed out that unless there was a special relationship between the appellants and the OAK it was unthinkable that the former would be getting inter-

company price-lists and even confidential price-lists from OAK. If the appellants and the OAK were independent parties there was no reason as to why the appellants should base their invoices quotations with reference to inter-company prices of OAK.10. Referring to the affidavits furnished by the appellants in support of their case, Shri Nair stated that these were self-serving documents and were produced after the cause of action had arisen. Regarding the point made by Shri Kurian that no prudent businessman would part with 105 lakhs in return for Rs. 18.61 lakhs, Shri Nair's contention was that for all practical purposes, the appellants were a company virtually belonging to the OAK. This was evident from the fact that the system of invoicing was purely ad hoc in the sense that they based their quotations keeping in view not the open market conditions but the inter-company billing system of OAK. In any event, Shri Nair submitted that no firm conclusion could be drawn with reference to the prudence element argument advanced by Shri Kurian because transactions between companies are sometime a complicated affair. Shri Nair also referred to the status of the appellants as described in the annual reports of the appellants (and of OAK also) showing them to be collaborators, associates and even subsidiary of the OAK.11. Regarding the loading of the invoices, Shri Nair submitted that the Collector had arrived at the same by keeping in view the fact that there was a wide range of variation between the normal prices of the OAK and the intercompany prices which were being recovered from the appellants. He stated that the figure had been arrived at the best judgment basis and no perfection could be claimed with regard to the exact figure of 100%. Shri Nair concluded his arguments by submitting that valuation of the goods imported by appellants from OAK fell within the purview of Section 14 (1) (b) and not 14(1) (a) as claimed by the appellants. Further, the voluminous evidence including the records seized from the appellants' premises, clearly pointed out to the fact that dealings between the two parties were indicative that prices shown in the invoices of OAK did not correctly reflect the correct assessable value of the goods supplied. And, finally, the Collector was justified in ordering loading of the invoices as well as in imposing a personal penalty on the appellants who had wilfully suppressed material facts from the Custom House. Shri Nair stated that this was evident from the fact that the column showing the relationship of the importer with the foreign supplier had been incorrectly shown in most of bills

of entry.

12. In his short reply to the arguments advanced by Shri Nair, the only important point made by Shri Kurian was that the appellants had never claimed that OAK had no financial interest in the business of the appellants. This stand could not be taken because of the fact that OAK had 45% equity participation in the appellant company and they naturally tried to ensure that their interests in this behalf were well taken care of. He further emphasized the fact that such financial interest had not been reflected through any unhealthy or clandestine deals between the two parties. He reiterated the fact that the department had not given a single instance where it was proved that higher amounts were remitted to the OAK than the ones mentioned in the invoices.

13. We have given our deep thought to the various arguments advanced on behalf of the parties and have also gone through the voluminous record, including the additional evidence produced before us. We find that the most vital issue requiring our determination is about the exact nature of relationship between the appellants and OAK. The appellants' contention in this behalf is that their dealings with OAK are as principal to principal and they buy goods from them in the normal course of business on strictly commercial considerations. The case of the respondent, on the other hand, is that the appellants have special relationship with OAK and such relationship is reflected in financial and other spheres. In fact, Shri Nair went to the extent of stating that the appellants 'virtually belong to OAK'. We observe that the Collector has dealt with this issue in a very lucid manner in his order. It is seen that apart from the fact that OAK hold 45% of equity in the appellant company, there are other features which are a pointer that the two companies have interest in the business of each other.

They have been having a common Chairman for several years. The appellants by virtue of an agreement with OAK, are entitled to an over-riding commission of 7j% on imports of goods by independent buyers in India from OAK. The right to get over-riding commission is generally enjoyed by a sole selling agent. The sole selling agent, in turn, is recognised as a 'special relationship' in trade and commercial world.It is not quite clear to us as to why the appellant company was

getting from OAK their inter-company price-lists and other confidential price-lists. An ordinary equity holder is not entitled to get such type of confidential information. Another intriguing feature in our view is as to why the appellants were supplying at periodical intervals to OAK financial and administrative statements pertaining to their functioning. The only plausible explanation for such a state of affairs is that OAK were monitoring the performance of the appellants. The right of a person or a corporate body having share holding in another company does not confer a right of this type. It may be difficult to go to all along with Shri Nair's contention that the 'appellants belong to OAK'. Nevertheless, it is clear that the appellants and OAK have common commercial interests other than those arising from the OAK having a portion of the equity in the appellant company. In view of the factors stated above we concur with Collector's finding that imports made by the appellants had to be assessed under Section 14(1) (b) of the Act.

14. The next question for our consideration is as to how to treat the values shown in the invoices relating to imports by the appellants from OAK, The appellants contend that invoices issued by OAK truly and fully reflect the assessable value of the goods and Collector has resorted to loading of these invoices merely with reference to a few stray imports by other parties. The case of the respondent is that the invoices issued by OAK are prepared on the basis of their inter-company prices which are much lower than the correct value of the imported goods. As regards the appellants' grievance that the Custom House has relied on values pertaining to a few stray imports by independent parties, the respondent's case is that in the absence of any other material, such invoices have to be taken into account for their worth- In a situation of this type the respondent had, in our view, no other option but to resort to fix the values of the goods under Section 14(1) (b) applying the best judgment formula. This is precisely what the Collector has done. We do not find any fault either in the Collector taking recourse to subjecting the appellants' goods to the provisions of Section 14(1) (b) or resorting to the best judgment formula.

15. The only point where we find ourselves unable to agree with the Collector is the basis on which the loading figure of 100% has been arrived at. In this context para 7.11 read with para 8 of the Collector's order is relevant. The Collector has,

with reference to correspondence exchanged between the appellants and OAK, taken a view that the overhead and administration cost of OAK has not been correctly reflected in the invoices of OAK. He has taken the overhead and administration cost to be 60% of the factory cost of the goods. To this he has added the royalty of 4-5% and the over-riding commission of 7 1/2%. When added up, this figure should come to approximately 70%. For the balance 30% i.e. 100%--70%, the Collector has not given any plausible basis. In this connection he has observed:"...thus the pricing policy followed in inter-company transactions make the transaction at a price approximately less by 137% of the normal prices usually quoted in the course of international trade." We are not able to appreciate the exact relevance of the above observation of the Collector in the context of the loading of invoices of OAK.16. We are also satisfied that the prices indicated by OAK in the invoices were inter-company prices or approximate thereto. This fact is established by referring to the statement which was prepared by the appellants with the cooperation of the respondent in pursuance of our orders dated 9-2-1983. From the remarks column (column 12) of the statement it is quite clear that wherever information was available, it indicated that the invoices had been prepared with reference to inter-company prices.

17. Shri Kurian while arguing the case drew our attention to the statement showing certain financial aspects of the appellants during the years 1970 to 1974. With the help of this statement he pointed out that if the loading resorted to by the Custom House is upheld, it would mean that OAK would sacrifice Rs. 105 lakhs (loading of f.o.b. value) to get a benefit of Rs. 18.61 lakhs (income by dividends). Shri Kurian posed the question whether any prudent businessman or corporate body would do so. In reply to this Shri Nair had submitted that his learned friend has resorted to over-simplification of a complex issue.

According to him, the appellants were virtually held by OAK and there were ways whereby OAK could be compensated by under-invoicing of exports by the appellants to OAK or other foreign parties. At this stage, we had asked Shri Kurian whether appellants were exporting any goods and he replied in the negative. We have devoted a good deal of thought to this argument of Shri Kurian. We agree with Shri Nair's view that the intricacies of the corporate world are sometimes too

difficult to comprehend in the manner Shri Kurian has tried to explain them. We are called upon to give our finding as to the correct assessable value of goods supplied by OAK to the appellants under the provisions of Section 14(1) (b) of the Act.

18. Coming to the quantum of loading, we hold that the Collector was justified in applying the best judgment formula because application of any other alternative rules for determination of value would not have been practicable in the circumstances of this case, We have arrived at this conclusion after appraising the entire evidence and the attending circumstances. We, however, find,that the figure of 100% adopted by the Collector is on a higher side than would be warranted by the evidence and circumstances of the case. We feel that instead of loading the invoice by 100%, the same should be loaded by 50% (on the f.o.b.

value). We have arrived at this figure of 50% loading by taking into account 5% towards royalty expenses, 7-|% as over-riding commission and 37.5% towards overhead and administration expenses, which, in our view, do not get reflected in the invoice prices. This loading figure will apply to the entire range of goods viz. finished electronic products, equipments, machines, spares, raw materials etc. imported by the appellants from OAK.19. The appellants have contended that the Collector has gone wrong in invoking the proviso under Sub-section (1) of Section 28 of the Act in respect of their past importations. It was vehemently argued that the appellants had been importing such goods for a number of years and clearing the same through the Custom House after due compliance with the various formalities and the customs authorities had never found any fault with their documentation. We have examined these arguments in the light of the respondent's stand in this behalf. According to the respondent, the customs had been passing the bills of entry, invoices etc. produced by the appellants in the previous years in good faith. It was only after receipt of secret information leading to the discovery of incriminating documents that the Custom House became aware of the fact that the appellants had been resorting to under-invoicing of their goods imported from OAK. Shri Nair has made a pointed reference to the fact that the appellants were not making true declaration with regard to their exact relationship with OAK on the reverse of the form of bill of entry. The form of bill of entry has

been prescribed by the Bill of Entry (Forms) Regulations, 1976. Clause 4 of the declaration in the prescribed form to be signed by the importer on the reverse of the bill of entry is reproduced below : (b) collaborator entitled to the use of trade mark, patent or design : and There is no escape from the fact that appellants had to clearly indicate their exact status in this behalf vis-a-vis OAK. In the course of the arguments Shri Nair had submitted that there are a large number of bills of entry in which such declaration was not filed correctly.

According to him this was done wilfully and consciously so that the Custom House should remain in the dark with regard to the under-invoicing of imports by the appellants. Shri Kurian had stated in reply that if correct declarations were not filed in some of the bills of entry, this could be due to 'clerical omissions'.

20. We are not at all impressed with Shri Kurian's explanation in this behalf. To make incomplete or incorrect declarations in a statutory form having a direct bearing on the question of valuation cannot, by any stretch of imagination, be described as a 'clerical omission'. The customs authorities, in our view, were well within their right to treat these so-called 'clerical omissions' as a deliberate suppression of material evidence. We have, therefore, no hesitation in holding that the Collector was justified in invoking the proviso under Sub-section (1) of Section 28 to enable him to recover duties short-levied for the past period within the limitation stipulated under the said proviso.

21. The Collector has levied a penalty of Rs. 5 lakhs under Section 112 of the Act in addition to confiscation of the goods under Section 11 l(m) ibid. We have considered whether confiscation of the goods and imposition of penalty are justifiable in the circumstances of the case.

As the goods cleared in the past were not available for confiscation, it appears to us that the Collector had imposed the personal penalty of Rs. 5 lakhs also keeping in view the fine in lieu of confiscation, were the goods available for confiscation. We also observe that the appellants tried to keep back from us some facts which were not favourable to them. Shri Kurian had stated that OAK had the right to nominate only one Director on the Board of Directors of the appellants.

But from the agreement dated 8-11-1967 we find that OAK had the right to appoint four Directors on the Board of Directors of the appellant company. We also observe that when a pointed question was put to Shri Kurian whether the appellants were exporting any of the products of OAK or other parties, he had given a reply in the negative. While going through the case records, we have come across a letter No. 4(9)/67/DS, dated 11-9-1968 sent by the Deputy Secretary, Ministry of Defence, Department of Defence Supplies, New Delhi to the appellants where vide condition (vii) thereof, it is provided, "the entire production of Quartz Crystals, Quartz Crystal Filters and Quartz Crystals Oscillators will be exported". Whether this condition of export obligation was later on modified or done away with is not borne out by the record.

22. In view of our observations on this issue, we hold that the Collector was correct in ordering confiscation of the goods under Section 11 Km) and imposing a penalty under Section 112 of the Act.

However, having regard to all the facts and circumstances of the case we think that the ends of justice would be met if the penalty amount of Rs. 5 lakhs is reduced to Rs. one lakh only.

23. In the light of the discussion of the case above, we uphold the order passed by the Collector of Customs and Central Excise, Cochin with the above modification. The appeal is disposed of in these terms.

24. I agree with the conclusions of the Hon'ble President and my learned brother Lal.

25. On the question of construction of Section 14 of the Customs Act, 1962, and a determination of their true scope and effect, however, it may be observed that- (a) it envisages a determination of the deemed value of goods where duty is to be levied ad valorem and not their actual value, invoice value, or the price at which they are capable of being sold. Significantly it does not specify the deemed value to be- (i) the invoice price, provided that the buyer and seller have no interest in the business of each other and the price is the sole consideration ; or (ii) the price at which such or like goods are ordinarily sold or offered for sale at the time and

place of importation ; or (iii) the price at which the imported goods themselves are capable of being sold at the time and place of importation, (b) on the contrary, the deemed value is the price at which such goods are ordinarily sold or offered for sale at the time and place of importation and where it is not ascertainable, its nearest equivalent determined in accordance with the Customs Valuation Rules, 1963 (hereinafter referred to as the Rules). Rules 3(a)-(d) of the Rules again speak of the price at which such goods or comparable goods are ordinarily sold or offered for sale under "competitive conditions" ; (c) the provision thus recalls to mind the concept of market price ruling on the date of breach at the place of performance in the law of contracts. Indeed, Rule 7 speaks of the market price in so many words. To adopt the language of Lord Blanesburg in Vacuum Oil Company v. Secretary of State [reported in Excise and Customs Reporter Compilation in the context of construing "wholesale cash price, less trade discount, for which goods of a like kind and quality are sold" in S. 30 of the Sea Customs Act, 1878, it is "the price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles" ; (d) once the deemed value is the market price, and not the landing price or invoice price or the price at which the imported goods are themselves capable of being sold, it appears a little odd and incongruous that it is further made conditional upon - (i) the absence of mutual business interest between the buyer and seller, and The price at which goods are ordinarily sold or offered for sale, or the market price even conceptually excludes any price agreed upon on account of mutual business interests and necessarily implies that the price is the sole consideration. It cannot be market price otherwise ; (e) (i) the corresponding provision in Sec. 30 of the Sea Customs Act, is a study in contrast. It did not make the price at which "goods of the like kind or quality are sold or are capable of being sold" conditional upon an absence of mutual business interests and the price being the sole consideration ; (ii) again, while Sec. 30 (of the Sea Customs Act, 1878) requires a mandatory deduction of the amount of duties payable on importation from out of the price ascertained in terms thereof, Sec. 14 (a) of the Act is altogether silent on the exclusion of the duty element' if any, from the ascertained price ; ' (iii) while, therefore, Sec. 14 (a) requires the fulfilment of certain conditions already implicit in the concept of a price at which goods are

"ordinarily sold or offered for sale", it omits to provide for an essential deduction from such price of the duties, if any payable on importation ; (iv) similarly, the Rules in terms of Sec. 14 (b) for the determination of the nearest equivalent of the market price provide for the conditions relating to the absence of mutual business interest and price being the sole consideration in a sale under "competitive conditions" although such requirements are inherent conceptually in the said expression and omit all reference to a deduction from such price of the duty element except in a case where goods are imported for being sold on behalf of a foreign seller.

(Rule 7 of the Rules) ; (v) further, on a construction of Sec. 30 of the said Act, the Privy Council, in Ford Motor Company (India) Ltd, v. Secretary of State 1978 E.L.T. (J 265) held that,- "the language of the Section...'or are capable of being sold' does not exclude all possibility of arriving at the price defined by Cl.

(a) upon the basis of an actual price." (Para 6 of the Judgment).

and hence the prices fixed for sale of the cars, under assessment, in India afforded a reasonable basis for determination of their value, even though there was, in fact, no perfect market in the place and at the time of importation, and consequently, the price for which the goods of the like kind and quality are sold" may not be ascertainable with precision. The omission of the said expression in Sec. 14 (a) of the Act and the Rules, on the contrary would lead to the inevitable conclusion that the price at which the imported goods themselves may be sold in India (i.e. the price at which they are capable of being sold) is irrelevant ; (f) the concept of market price in Sec. 14 (a) and the Rules postulate a plurality of actual transactions of sale or quotations of prices in the usual course of business either on enquiry or otherwise for supply in India or abroad as the case may be at the time of import for identical goods or their nearest equivalent ; (g) in this view of the matter, it may appear that a discussion of the inter-relationship between the Appellant and OAK their Suppliers of the imported goods in question or their mutual business interests that may discredit the invoice prices may appear to be superfluous, if not inapposite ; (h) even so, it may become relevant for a best judgment assessment in terms of Rule 8 when the deemed value cannot be

ascertained under any of the other provisions.

26. Unless, therefore, it is impossible to ascertain the market price ruling on the date of importation in accordance with Sec. 14 (a) of the Act, or Rules 3(a)-(d) of the Rules, (the other rules except Rule 8 not being relevant in the facts and circumstances of the case), a best judgment assessment of the value of the goods imported cannot be resorted to. The various grounds taken in the Appeal urging acceptance of the invoice prices as the value for assessment in terms of Sec. 14 (a) of the Act are totally misconceived since they cannot in any view reflect the market price- the price at which the goods are ordinarily sold or offered for sale at the time and place of import-the price at which the imported goods are capable of being sold being irrelevant.

27. I agree, in the context of all the facts and circumstances of the case, that- (i) it is not possible to assess the deemed value of the goods either in terms of Section 14 (a) of the Act or Rules 3 (a)-(d) of the Rules. The assessment can only be a best judgment assessment under Rule 8 ; (ii) on the weight of evidence, there can be no doubt that the Appellant and OAK are mutually interested in the business of each other in the sense that they promote each other's business.

28. Accordingly, if in a best judgment assessment, the invoice price is loaded as proposed by my learned brethren, I see no objection to it.