REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.4920 OF 2007

M/S GMR ENERGY LTD. …APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS,
BANGALORE
...RESPONDENT

WITH

CIVIL APPEAL NO.3594 OF 2008

J U D G M E N T

R.F. Nariman, J.

1. Two appeals have been filed against the impugned judgment dated 3.8.2007 passed by CESTAT. The appeal filed by the assessee M/s GMR Energy Ltd. concerns itself with the proper valuation of the import of parts of the Gas Turbine Hot Section of a naphtha based power plant which have to be replaced after 12,500 fired hours of use under a Long Term Assured Parts Supply Agreement (hereinafter referred to as "LTAPSA") dated 20th December, 2000 entered into with GE, USA. The appeal of revenue concerns itself with whether the assessee is entitled to avail itself of the benefit of the exemption notification No.21 of

2002 dated 1.3.2002 in respect of the goods imported under two bills of entry dated 25.6.2003.

Assessee's Appeal

2. The appellant had imported a naphtha based power plant with five gas turbines which was mounted on a barge which floated in a river at a Tanir Bavi Village near Mangalore for purposes of power generation. The capacity of the said power plant is 220 MW and the entire power generated is uploaded into the grid of the Karnataka Power Transmission Corporation Limited. The power plant had to be kept in good running condition as the contract with KPTCL is to supply power to them continuously. For this purpose, the appellant entered into an agreement for service and supply of parts with GE, USA being a Long Term Assured Parts Supply Agreement dated 12.12.2000, (hereinafter referred to as "LTAPSA"). In terms of the said agreement, the appellant was to make payments based on either fired hour charges or maintenance charges. Various parts of the Gas Turbine Hot Section of the said plant, which had to be imported under the LTAPSA were imported under two bills of entry dated 25.6.2003 after 12,500 fired hours had come to an end. The parts that were identified as having to be replaced were re-exported back to GE, USA under cover of shipping bills of the month of May, 2003

before the two bills of entry dated 25.6.2003 were presented for import of the replaced parts to the customs authorities. The appellant paid customs duty based on the value declared in the said bills of entry but did not make any payment to GE based on these invoices since their payments had already been made based on fired hour charges. The assessment of the said import was completed by the customs department after due verification of the documents produced at the time of import.

3. Subsequently, by a show cause notice dated 12.8.2004, the customs department sought the aid of Rule 4(2)(g) and Rule 9(1)(d) and 9(1)(e) as they stood at the relevant time in order that 1/3rd of the value of the imported items be added to the invoice value as that was said to represent the amount of the parts that were replaced and re-exported back to GE, USA. The show cause notice essentially based itself on statements made by one Shri Naresh Manchanda, Finance Manager of the appellant and Shri Siddharth Deb, Associate General Manager of the Company. It stated:

> "29. From the investigation conducted the following facts appear to emerge:
> (i) M/s GEL, Bangalore entered in to three agreements with M/s GE, USA which included a Long Term Assured Parts Supply Agreement(LTAPSA), for the maintenance and upkeep of the Gas Turbines of the barge mounted power plant.

(ii) This agreement envisaged a rotable exchange programme for the hot path parts, which are parts of an essential nature, requiring replacement after a scheduled period of 12,500 hours of use or earlier in case they are found not usable.

(iii) These hot path parts, after their use, are removed from the gas turbines. Under the rotable exchange programme of the agreement, once removed, the hot path parts become the property of M/s GE, USA and the Indian firm M/s GEL are required to export them to M/s GE. On receipt of these parts, M/s GE verifies their condition and accordingly they are refurbished. Such refurbished parts bear no difference to the new parts and are identical in all respects. M/s GE, USA supplies these parts to their customers. Customers like M/s GEL do not know whether the parts supplied to them are new or refurbished.

(iv) When M/s GEL exports these used parts, for the exports made, no export sale proceeds are realized and M/s GE, USA makes no payment to M/s GEL. However, when M/s GEL imports the hot path parts, the price fixed is based on the rotable exchange programme. The cost of the returned used hot path parts by M/s GEL is taken care, and an abatement is given and thereafter, the price is arrived at.

(v) Thus the invoice furnished by M/s GE, USA, to M/s GEL, Bangalore is a discounted price based on the rotable exchange programme. The prices under the rotable exchange programme though are discounted prices, the same are widely in use and are popularly called catalogue prices or published price lists.

(vi) The invoice produced to the Customs along with the Bill of Entry is only the rotable exchange price. The abatement given towards the cost of the exported used hot path part is not reflected in the invoice. Therefore, for the purpose of Customs assessment, the declared price requires an adjustment by way of addition equal to the cost of returned hot path part, which was discounted.

(vii) This abatement / discount is to the extent of 1/3rd of the catalogue price under the rotable exchange programme. M/s GE, USA wanted M/s GEL to declare this price at the time of export from India.

(viii) M/s GEL have not submitted the agreements entered into with M/s GE, USA to the Customs. They suppressed the vital information as regards the payments made under the rotable exchange programme and the agreements.

(ix) The removed parts become the property of M/s GE, USA and M/s GEL has no option but to export / return to M/s GE. The import of Hot Path parts by M/s GE, USA. The cost of returned parts is adjusted against the imported parts. Thus the very import is a conditional sale and the cost of returned parts accrues to the seller. This situation is covered by Rule 9(1)(d) and (e) of the Customs Valuation Rules, 1988.

(x) In view of the evidences discussed in this notice, the declared values require to be rejected; and the same cannot be accepted as representing the true transaction values under Rule 4 of the Customs Valuation Rules, 1988."

4. The customs duty was said to be evaded to the tune of approximately 4.20 crores. Goods were said to be liable to confiscation and ultimately a demand was made as follows:-

"30. Now, therefore, M/s. GMR Energy Ltd., Bangalore are hereby called upon to show cause to the Commissioner of Customs, C.R. Building, P.B. NO.5400, Queens Road, Bangalore- 560 001 as to why:

(a) the value of the imported goods, covered by 5 Bills of Entry (as listed in Annexure-II) should not be re-determined at Rs. 45,24,23,850/- (Rupees Forty Five Crores Twenty Four Lakhs Twenty Three Thousand Eight Hundred and Fifty only) under Rule 4 read with Rule 9(1)(d) & (e) of

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and in terms of Section 14 of Customs Act, 1962,

(b) the benefit of exemption under notification No. 21/2002-Cus dated 01.03.2002 should not be denied in respect of Bills of Entry Nos. 9140 dated 25.06.2003 and 598675 dated 12.04.2004,

(c) A total duty of Rs.7,36,88,521/- (Rupees Seven Crores Thirty Six Lakhs Eighty Eight Thousand Five Hundred Twenty One only) being the import duty short paid should not be demanded under proviso to Section 28(1) of the Customs Act, 1962 as detailed in the Annexure to this notice,

(d) interest at applicable rate(s) on the above mentioned duty amount should not be demanded under Section 28AB of the Customs Act, 1962,

(e) the goods indicated in (a) above should not be confiscated under Section 111(m) of Customs Act, 1962.

(f) the goods imported and cleared under Bills of Entry Nos.9140 dated 25.06.2003 and 598675 dated 12.04.2004, valued at Rs.13,20,93,674/-, forming part of goods indicated at (a) above should not be confiscated under Section 111(o) of the Customs Act, 1962, apart from their liability to confiscation under Section 111(m) of the Customs act, 1962,

(g) Penalty under Section 112(a) and/94 Section 114A of the Customs Act, 1962 should not be imposed."

5. The reply to the show cause notice sent by the assessee disputed all the allegations made and stated in particular as follows:-

"**H. <u>VALUE DECLARED FOR INSURANCE IS THE</u>**

BEST REFERENCE TO DETERMINE THE INTRINSIC VALUE OF THE GOODS IMPORTED

H.1 it is well known that the imported goods are invariably covered by a marine insurance policy or air insurance policy, as the case may be. Such insurance is necessary from the point of the view of the parties involved so that they may be able to recover the value of the goods in case the goods are lost/damaged during transportation from one country to another.

H.2 In this case, GE has a worldwide practice of insuring the goods dispatched by them under the Rotable Exchange Programme to all their customers throughout the world and therefore, GE has duly declared that the value indicated in their invoice raised on the Noticees is inclusive of insurance.

H.3 As has already been submitted elsewhere in this reply, the Noticees submit that the values declared by GE in their invoices exactly correspond to the prices indicated in GE's worldwide price-list for the Rotable Exchange Programme.

H.4 Since the Noticees have not made any payment to GE for each invoice raised against supply undertaken under the LTSA and the Rotable Exchange Programme, the Noticees submit that the value declared by GE inclusive of freight and insurance, which in turn is as per their published price-list, should be taken to represent the intrinsic value of the Hot Path Gas Parts imported by the Noticees.

H.5 This is corroborated by the fact that GE has insured the imported Hot Path Gas Parts only to the extent of import invoice value. A copy of the letter dated 05.02.2005 of GE clarifying the position in this regard is enclosed as Annexure-9.

H.6 It is now settled law that where invoice values are doubted, the values declared for insurance could be the basis for determining assessable values under the Customs Act, 1962.

J. ASSUMPTION THAT THE PRICE FIXED UNDER THE ROTABLE EXCHANGE PROGRAMME IS DEPRESSED IS BASELESS.

J.1 The Noticees submit that the presumption in sub-paras (iv) to (vii) of para 29 of the show cause

notice that the published price lists for supply of parts by GE under the Rotable Exchange Programme reflect the prices after deducting the price of the returned part is without any basis. There is no material to support such an erroneous presumption also.

J.2 This presumption is apparently based on the statement of Shri. Naresh Manchanda recorded on 03.09.2003 who has stated that the commercial invoice for the replacement Hot Path Gas Parts is raised on the Noticees taking into consideration that the existing part will be sent back.

J.3 The Noticees submit that the above statement is not in any way implicatory as alleged in the show cause notice. The above statement, in fact, only reiterates the agreed position in terms of the Rotable Exchange Programme as per which the removed part has to be received by GE.

J.4 The Noticees further submit that the Rotable Exchange Programme clearly stipulates return of the removed part within 30 days of receipt of the replacement Hot Path Gas Parts. The Programme also states that parts not returned within 30 days would be subject to a surcharge of 10% of the catalog price.

J.5 The condition stipulated in the Programme that a surcharge of 10% of the catalog price would be charged for receipts after 30 days can only be implemented after the expiry of the period of 30 days. Therefore, the statement of Shri Naresh Manchanda is only a reiteration of the position explained in the Programme.

J.6 The Noticees, therefore, submit that no conclusion can be drawn from the statement of Shri Naresh Manchanda to the effect that the prices under the Rotable Exchange Programme have been deliberately depressed after taking into account the return of the removed part.

J.7 On the contrary, the Noticees submit that the return of the removed Hot Path Gas Parts under the Rotable Exchange Programme is as per the established international practice of GE and clearly brought out in the brochure itself.

J.8 It is not the case of the department that the Noticees have declared a price which represents the published price of GE less the price of the returned

part. The Noticees, therefore, submit that when the published price of GE has been declared as the assessable value for purposes of payment of duty, it cannot be said that the return of the Hot Path Gas Parts has influenced the price of the imported Hot Path Gas Parts.

J.9 In any case, the Noticees desire to cross-examine Shri Naresh Manchanda. The Noticees, therefore, request that Shri Naresh Manchanda may be made available for cross-examination by the Hon'ble Commissioner before adjudicating the matter."

6. By an order dated 2.5.2006 passed by the Commissioner of Customs, the learned Commissioner specifically found that as per the LTAPSA since the assessee has declared only the differential value of the returned parts and the parts imported, 1/3rd of the invoice value of the imported parts needs to be added to arrive at the correct assessable value. Thus, it confirmed the demand made in the show cause notice.

7. The appeal filed to the Tribunal was also dismissed, the Tribunal arriving at the same conclusion as the learned Commissioner. The Tribunal in addition found that there is no transaction value at all and, therefore, Rule 8 will have to be referred to and relied upon and a best judgment assessment was to be made. The Tribunal then went on to hold, quoting a clause in the LTAPSA, as follows:

"**2.8 SUPPLY OF CERTAIN REFURBISHED PARTS**

In the performance of its scope of work under this Agreement, Seller may supply Parts which have been previously installed at a power generation facility other

than the Power Barge and subsequently refurbished by the Seller. Such refurbished Parts shall be warranted by Seller in accordance with the provisions of Article 8. Seller will provide reasonable documentation for purposes of Buyer's tax calculations as to those components that are new, and those that are repaired, but Buyer remains obligated to pay all taxes, import duties, value added and all other taxes, however characterized, arising from the supply, repair, refurbishment, import, delivery to the Power Plant, and use of such Parts. **With Respect to refurbished Parts, seller shall furnish Buyer with information regarding the incremental value of each refurbished Part over the value of the comparable used Part that was exported in order to limit the assessment of customs duties to the incremental value of each such refurbished Part."**

9.8 It is clear from the Agreements that the appellant is required to export the replaced old part while receiving the refurbished part from the foreign supplier. The above mentioned para 2.8 makes it very clear that the value furnished in the Commercial Invoice is only an incremental value and also the same was provided to limit the assessment of customs duties. This is very clear evidence indicating that the value declared at the time of import is not the true value of the goods. The Revenue was right in rejecting the said value.

9.10. It has been urged that the value indicated in the Insurance Policy for the imported goods should be accepted. That value happens to be the value under the Rotable Exchange program. The Adjudicating Authority has stated that in that case, the value should cover even the value of the returned part on the ground that the insurance amount is split between imported parts and old parts exported back to M/s. GE as both have a value of their own. Therefore, taking the insurance amount applicable only to the imported parts and arriving at the conclusion as contended by the appellant is not correct."

8. Shri Sridharan, learned counsel appearing on behalf of the assessee, argued before us that the values stated in the invoices

were values after the goods were insured and there is usually a mark-up of 10-15% of the actual value of the said goods. Therefore, even if these values are to be taken into account, they would be more than what the imported parts were actually worth in the market. According to him, the said invoices were made from a list of these parts published by GE, USA for sale worldwide under a rotable exchange programme, which programme made it clear that these are list unit prices or catalogue prices and would, therefore, by their very nature not include any adjustment made on account of the parts that were re-exported to GE, USA. He further argued that Rules 4 and 9 had no application in the present case as there was, in fact, no "sale" so as to attract the provisions of Rule 4 and consequently Rule 9. He added that the basic infirmity in the judgments below was reliance upon clause 2.8 of the LTAPSA. That clause if properly read only refers to "information" regarding the incremental value of each refurbished part over the value of the comparable used part that was exported. In fact, as has been pointed out in the reply, the invoices represented the full value of the imported parts, and not any adjusted value as was clear from the fact that prices were fixed worldwide and had no reference to any re-exported items of used parts. This being the case, according to him, the two judgments of the Commissioner

and CESTAT are wholly wrong in basing themselves on this clause of the agreement. Further, they were also wrong in basing themselves on the statements of Shri Manchanda and Shri Deb, as those statements did not in any manner incriminate the assessee, and even if they did, the assessee asked for cross-examination which was denied to it. Thus, these statements could not be relied upon at all and if these statements go, nothing really remains by way of evidence in the hands of the department. He further argued that most of the demand made would be time barred, as the show cause notice was beyond the six months' period, and findings of suppression on the assessee's part by the authorities and the Tribunal was said by him to be perverse inasmuch as the assessee did not have to disclose any agreement at the time of import and the assessee was never called upon by the customs department to furnish any agreement so that they could justifiably state that there was willful suppression on its part. He referred to Section 17(3) and Section 46(1) and (4) of the Customs Act to buttress this submission. He cited several judgments in support of the plea that there could not, in law, be suppression on his part on account of failure to produce the LTAPSA. He further submitted that identical goods had been imported by BSES, and the Assistant Commissioner of Customs,

by order dated 17.4.2002, had taken the invoice value of the imported items without any add-ons. Since this would be the value of identical goods imported at or about the same time as the goods being valued, Rule 5 of the Customs Valuation Rules would apply and, therefore, any reference to Rule 8 would be incorrect. Under Rule 5 of the said rules, as in the case of BSES, only the invoice value of the imported items could be taken into account without 1/3rd more being added.

9. Shri Radhakrishnan, learned senior counsel appearing on behalf of the revenue refuted each of these allegations and argued before us that the case was squarely covered by Rule 4(2)(g) read with Rules 9(1)(d) and 9(1)(e). In any case, according to learned counsel, even if one had to go by best judgment assessment, it is clear that 1/3rd value of the imported goods would have to be added inasmuch as clause 2.8 of the agreement clearly stated that it was only the differential value that would be the value of the import of the new parts. He also stated that it was incumbent upon the assessee to disclose the LTAPSA to the customs authorities as two very important things would emerge from a reading of such agreement. One, that used parts would have to be re-exported and that such parts would have a value, and second, that as per clause 2.8 of the agreement, only the difference between the actual value of the imported parts and the value of the used parts,

which according to the assessee itself is 1/3rd of the value of the imported parts, would be the invoice value of the imported items. He added that Mr. Manchanda's statement was clear and would have to be given effect to and that the authorities and the Commissioner of Customs had clearly stated that as Shri Manchanda was abroad, he could not be cross-examined, and that this would be enough reason under Section 138 B of the Customs Act to accept his statement. It was also argued by Shri Radhakrishnan that as the importer in the present case was required to furnish a declaration disclosing full and accurate details relating to the value of imported goods, he should in the first place have disclosed the entire LTAPSA agreement to the customs authorities which was not done.

10. Since reliance has been placed on a number of Rules, we deem it appropriate to set out the Customs Valuation Rules, 1988 which would apply to the imports in question. Rule 4 reads as follows:-

> "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, in accordance with the provisions of Rule 9 of these rules.
>
> (2) The transaction value of imported goods under sub-rule (1) above shall be accepted:
>
> Provided that:

(g) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules;"

5. Transaction value of identical goods. – (1)(a) Subject to the provisions of Rule 3 of these rules, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about same time as the goods being valued."

8. Residual method. – (1)Subject to the provisions of rule 3 of these rules, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 14 of the customs Act, 1962 (52 of 1962) and on the basis of data available in India.

9. Cost and services – (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -
(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.
10. Declaration by the importer. - (1) The importer or his agent shall furnish –

(a) a declaration disclosing full and accurate details relating to the value of imported goods; and

(b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person other than the manufacturer or producer as considered necessary by the proper officer for

> determination of the value of imported goods under these rules."

11. It will be noticed that Rules 4 and 9 would only apply in case imported goods are "sold" for export to India. The expression "shall be the price actually paid or payable for the goods when sold for export to India" would necessarily postulate that transaction value would be based upon goods that are sold in the course of export from a foreign country to India. It is clear on the facts that there is no sale in the present case, a fact that has been accepted by the revenue as well. All that happens under the LTAPSA is that parts are replaced without any further charge after a certain number of hours of the running of the power plant. This being the case, counsel for the assessee is correct in his submission that neither Rules 4 nor Rule 9 would apply, as Rule 4 itself, if applicable, makes Rule 9 also apply. Further, it is clear that Rule 4(2)(g) and Rule 9(1)(d) refer only to the very goods that are imported and not to goods which may have been imported much earlier to the imported goods. Therefore, what is necessary is that there should be proceeds which arise from re-sale, disposal, or use of the very imported goods by the buyer. The case of the department is that these sub-rules are attracted only because there was an earlier sale at the time when the entire plant was imported and that subsequently there would be a disposal of

goods imported much after the plant was set up by the buyer. As it is clear that there is no subsequent re-sale, disposal or use of the very imported goods – that is the parts imported under the two bills of entry dated 25.6.2003, the assessee is right in his contention that in any case neither of these sub-rules would apply to the facts of the present case.

Equally, Rule 9(1)(e) would have no application for the reason that there is no other payment actually made or to be made as a condition of sale of the imported goods by the buyer to the seller. This being the case, we have now to see whether Rule 5 of the Rules would apply as contended by learned counsel for the assessee.

12. We have gone through the order dated 17.4.2002, passed by the Assistant Commissioner of Customs, Cochin, in the case of another assessee, namely, BSES. The entire discussion in that order proceeds only on whether various other charges should be added on to the invoice price and it was held that all such charges should be so added on. We do not find any reference to any argument or finding to the effect that a certain portion of the invoice price should be added on because of re-export of used parts. This case would therefore be distinguishable, as has rightly been held by the Tribunal. Further, we find that the bill of entry in the present case is dated 25.6.2003, long after the imports

effected in the BSES case. The imports made in that case were of the year 1998, which was four years before the present import, and would not, therefore, be identical goods imported at or about the same time as the goods being valued. It is, therefore, correct to say that Rule 5 would have no application in the facts of the present case.

13. We will, therefore, have to proceed on the footing that Rule 8 alone applies, and that the best judgment assessment made by the Commissioner would have to be reasonable and not arbitrary.

14. We find that the basis of the Commissioner's order as well as the Tribunal's order is clause 2.8 of the LTAPSA. We are in agreement with the learned counsel for the assessee when he has argued that the seller is only to furnish the buyer with "information" regarding the incremental value of each refurbished part so that customs duty may be limited to the incremental value of each such refurbished part. On the facts we have found that the assessee has, in its reply to the show cause notice, made it more than clear that the price of the imported goods was a rotable exchange programme price which was a common uniform price at which such parts were supplied worldwide by GE, USA. This is clear from a document that was relied upon by the show cause notice itself, which dealt with GE's rotable exchange programme. The

said document states:-

> "**Effectivity**
> These prices supersede all previously published prices for the same service. The prices of additional or newly established service will be available on a quotation basis and may be subject to revision until such time as they are incorporated into the next issue of this price sheet. The prices indicated are list unit prices and are subject to change without notice.
> **Return of Removed Assembly**
> Unless an alternate schedule is agreed to in advance, the customer must return removed assembly to GE within 30 days of receipt of the rotable asset. Assemblies not returned within 30 days are subject to a surcharge of 10% of the catalog price. Removed assemblies become the property of GE. Removed assemblies are to be in a repairable condition."

15. From this document what becomes clear is that the prices stated in the invoices accompanying the bills of entry in the present case are list unit prices or catalogue prices. By no stretch of imagination can they said to be prices after re-exported items' value has been taken into account. This being the case, on facts in the present case, both the Commissioner and the learned Tribunal were wrong in arriving at a conclusion that the invoice price in the present case is only an incremental value price and not the price of the articles supplied by GE, USA. This being the case on facts, we are afraid that both the Commissioner's order and the Tribunal's order would have to be set aside on this ground alone.

16. Relying upon Shri Manchanda's statement and Shri Deb's

statement would, therefore, not carry the matter much further as it is found that on facts, the commercial invoices do not take into consideration the fact that existing used parts are to be sent back to GE, USA, which parts would have a value – that is 1/3rd of the invoice price of the imported items.

17. Shri Radhakrishnan has argued that it was incumbent upon the assessee to submit a declaration disclosing full and accurate details relating to the value of imported goods under Rule 10 of the Customs Valuation Rules, 1988. He has also argued that under sub-clause (b) of Rule 10(1), it was incumbent upon the assessee to have handed over the entire LTAPSA to the Customs authorities and as the assessee has breached the aforesaid rule, there has been a mis-declaration by the assessee of the value of the goods consequent to which the assessee is liable to additional duty and penalty.

18. Rule 10(1) which has been set out earlier in this judgment consists of two sub-clauses. Under sub-clause (a), the assessee/importer has to submit a declaration disclosing full and accurate details relating to the value of the imported goods. This sub-clause obviously has reference to Section 46(4) of the Act which states as follows:

> "(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the

invoice, if any, relating to the imported goods."

19. A conjoint reading of Section 46(4) and Rule 10(1)(a), thus makes it incumbent on the importer while presenting a bill of entry to subscribe to a declaration as to the truth of its contents and in addition to produce to the proper officer the invoice relating to the imported goods. There is no doubt that the assessee has fulfilled this condition. What is sought to be argued by Shri Radhakrishnan is that the assessee should also have disclosed the LTAPSA entered into with M/s. GE, USA which would have disclosed the true value of the imported goods and other details to the proper officer who could then have made an informed assessment.

20. The LTAPSA would be a document which would fall within Rule 10(1)(b) read with Section 17(3) of the Act as it then stood. Section 17(3) reads as follows:

> "17(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information."

21. A conjoint reading of Section 17(3) and Rule 10(1)(b) would make it clear that the proper officer may require the importer to

produce any contract with reference to the imported goods consequent upon which the importer shall produce such contract. On the facts of the present case, the proper officer has not called upon the assessee to produce any contract in relation to the imported goods. This being the case, it is clear that there is no infraction of Rule 10 as contended by Shri Radhakrishnan.

22. As the assessee succeeds on merits, it is unnecessary to go into the point of limitation. The assessee's appeal is, therefore, allowed and the judgment of the Tribunal is set aside.

Revenue's appeal

23. The impugned judgment has held that exemption notification No.21/2002 dated 1.3.2002 would apply to the assessee's case. The relevant portion of the said notification is reproduced below:-

S. No.	Chapter Heading No. or sub-heading No.	Description of goods	Standard Rate	Additional Duty rate	Condition No.
236.	84 or any Chapter	All goods for renovation or modernization of a power generation plant (other than captive power generation plant)	5%	16%	45
45.	If,-				

(i) in the case of a power (except a nuclear power plant),-

(a) in the case of Central Power Sector Undertakings, the Chairman of the concerned Undertaking or an officer authorized by him certifies that the scheme for renovation or modernization as the case may be, of such power plant, has been approved

and an officer not below the rank of Deputy Secretary to the Government of India in the Ministry of Power recommends, in each case, the grant of the aforesaid exemption to the goods for such scheme;

(b) in other cases, an officer not below the rank of the Chief Engineer of the concerned State Electricity Board or State Power Utility certifies that the scheme for renovation or modernization, as the case may be, of such power plant, has been approved and an officer not below the rank of a power or electricity recommends, in each case, the grant of the aforesaid exemption of the goods for such scheme;

(ii) in the case of nuclear power plant, an officer not below the rank of a Deputy Secretary to the Government of India in the Department of Atomic Energy certifies the scheme for renovation or modernization as the case may be, of such power plant, has been approved and recommends the grant of the aforesaid exemption to the goods for such scheme; and

(iii) in all cases, the importer furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that the said goods shall be used for the purpose specified above and in the event of his failure to use the goods for the renovation or modernization of the said power generation plant, he shall pay an amount equal to the difference between the duty leviable on the said imported goods but for the exemption under this notification and that already paid at the time of importation."

24. On this aspect of the matter, the Tribunal has held as follows:-

"10.3. The case of the Revenue is that at the time of importation the required Certificate was not produced. It is also the case of the Revenue that the appellants misrepresented the facts to the concerned authorities for obtaining the Certificate. The objection of the Revenue that at the time of import, the Certificate was not produced is not a very strong ground for denying the benefit of Notification. There is a plethora of decisions in which various Courts and Tribunals have

accepted the production of Certificate even after the importation for granting benefits. The appellant, after representing to the concerned authorities, obtained a Certificate dated 23.01.2004 to the effect that the scheme of renovation has been examined thoroughly and approval accorded for the same. The Principal Secretary, Government of Karnataka has also recommended the exemption under the said Notification. The list of spares recommended have also been mentioned. The General Manager of the Karnataka Power Transmission Corporation Ltd. has certified that the spares listed in the letter of the appellant dated 29.09.2003 are essential for the proper upkeep of the generating units. The Revenue contends that the impugned goods are not for renovation but only for upkeep. In our view, one cannot take such a narrow view. What is the meaning of renovation? To renovate means to make new. We talk of renovating a house or building etc. In the present case it is the renovation of the Power Plant. In their letter addressed to the Government of Karnataka, the appellants have stated that they have been undertaking the renovation of the Gas Turbines at their plant. On going through that letter, we do not find that there is any misrepresentation. They have emphasized the point that after 12,500 fixed hours, renovation is necessary. We also find that the old parts are exported and the re-furbished parts are imported for replacement. In a way, this can be understood to be a sort of renovation. In any case, the State Government has accepted the proposal of the appellants and the Certificate has been issued by the Principal Secretary, Government of Karnataka, Energy Department. Once the competent authority is satisfied that the impugned goods are required for renovation, the Customs Department need not go deep into hair splitting and semantic niceties to deny the benefit of Notification. The DRI had taken up the matter with the State Government who have confirmed the approval of the Scheme. Once the scheme is approved by the State Government for the Power Project, in our view, the benefit of exemption Notification cannot be denied. Therefore, we set aside the Commissioner's order denying the benefit of the Notification. In our view, the

appellants have fulfilled the conditions of the said Notification and are rightly entitled for its benefit."

25. We find that both the requisite certificate as well as the recommendation of the Principal Secretary, Government of Karnataka, have been dealt with in the proper perspective. The Tribunal is quite correct in stating that once these authorities are satisfied that the impugned goods are required for renovation, the customs department does not need to go deep into the matter and by hairsplitting and semantic niceties deny the benefit of the exemption notification. The finding of the Commissioner has been correctly set aside by the Tribunal and hence we dismiss revenue's appeal. In sum therefore, paragraph 11 of the CESTAT's order is set aside save and except sub-clauses (ii) and (vi) thereof.

……J.
(A.K. Sikri)

……J.
(R.F. Nariman)

New Delhi;
October 27, 2015.