

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Tax Appeal No.11723 of 2018

(Arising out of OIO-AHM-CUSTOM-000-COM-018-17-18 passed by Principle Commissioner Customs, Excise and Service Tax-AHMEDABAD)

Shri Dharmendra N Rathor

Proprietor Of M/S. Dwarkesh Recycling,
88/2094-Gujarat Housing Board Ram Eshwar Mahadev Road,
Meghaninaga, Ahmedabad,
Gujarat

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

WITH

- i. Customs Appeal No. 11724 of 2018 (Shri Ketan C Gujjar)**
- ii. Customs Appeal No. 12355 of 2018 (Shri Bharat Patel)**
- iii. Customs Appeal No. 12447 of 2018 (Sahaj Metal)**

APPEARANCE:

Sh. Hardik Modh, & Sh. Rahul Gajera Advocates for the Appellants
Sh. Vinod Lukose, Superintended (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 11114-11117 /2020

DATE OF HEARING: 30.1.2020
DATE OF DECISION: 12.06.2020

RAMESH NAIR

These appeals are directed against the common Order-In-Original No. AHM-CUSTOM-000-COM-018-17-18 dated 15.03.2018 whereby the respondent in the case of M/s. Dwarkesh Recycling (Shri Dharmendra N. Rathore) absolutely confiscated "Gudang Garam" branded cigarettes seized under Panchnama dated 08.12.2016 under Section 111(d), 111(f) and 111(l) of the Customs Act, 1962. The Respondent confiscated

aluminum scrap under section 111(m) and 119 of the act on the premise that the same had been camouflaged to cover up the smuggled cigarettes. The respondent gave an option to the appellant to redeem the same on payment of redemption fine. Similarly, the respondent imposed penalties upon the appellant on account of smuggling of cigarettes. The respondent also demanded duty on the past consignments of cigarettes by holding that the appellant imported cigarettes by concealing them with Aluminum scrap and cleared for home consumption. Since the goods were not available for confiscation, the respondent demanded duty and imposed penalty for past consignments. The respondent in the matter of KETAN C. GUJJAR, Proprietor of M/s. Shivanjali Corporation held 5,76,000 sticks of "Gudang Garam" branded cigarettes and 80,000 sticks of Black brand cigarettes were smuggled by the appellant by concealing them with aluminum scrap and cleared for home consumption by filing Bills of Entries. Since the goods were not available for confiscation under Section 111(f) and 111(l) of the act, the respondent demanded duty and imposed penalty upon the past consignments. In the matter of M/s. Sahaj Metals with respect to past consignments held 432000 stick of "Gudang Garam" cigarettes smuggled by concealing them with aluminum scrap and cleared them for home consumption under different Bill of entry are liable to confiscation under provision of section 111(f) and 111(l) of the act. As the goods are not physically available for confiscation, the redemption fine was not imposed. However, demand of custom duty to Rs. 24,47,346 were ordered to be recovered under the provision of section 28(4) & equal amount of penalty was also imposed under section 114A of the act. It was also held that the total 44210 Kg of Aluminum Scrap which was used as camouflage for concealing cigarettes are liable for confiscation under the provision of section 111(m) and 119 of the act. As the goods were not available for confiscation no redemption fine was imposed, a penalty of Rs.30,000 was also imposed under section 112A(2) of the act. A penalty was also imposed on Shri Bharat Patel, personal penalty of Rs.1 Lakh each was also imposed on Shri Dharmendra Rathor, proprietor of M/s. Dwarkesh Recycling and Shri Ketan C. Gujjar, proprietor of M/s. Shivanjali Corporation under the provision of section 117 of the act for not honouring the summons. The respondent confirmed and demanded duty and imposed penalties and redemption fine on the two counts:-

- (i) The Customs Authority found "Gudang Garam" branded cigarettes from the live consignments imported under Bill of Entry No.7720230 dated 06.12.2016 and therefore, ordered

for absolute confiscation. Secondly, the respondent imposed penalty upon M/s. Dwarkesh Recycling.

- (ii) The respondent confirmed and ordered for customs duty and imposed penalties for the past consignments imported by M/s. Dwarkesh Recycling and M/s. Shivanjali Corporation based on emails retrieved from email Id of Shri Bharat Patel, Proprietor of M/s. Sahaj Metals and inculpatory statements of Shri Dharmendra Rathore, proprietor of M/s. Dwarkesh Recycling, Shri Ketan C. Gujjar, proprietor of M/s. Shivanjali Corporation and Shri Bharat Patel, proprietor of M/s. Sahaj Metals.

The Investigating Authority found "Gudang Garam" branded cigarettes from live consignments of aluminum scrap imported by M/s. Dwarkesh Recycling under Bill of Entry No. 7720230 dated 06.12.2016 and therefore, carried out further investigation.

- 1.1) During the course of investigation, the investigating authority found one email from email ID of Shri Bharat Patel (bharatvasani@gmail.com) dated 15.08.2016 which was sent by HKM Trading Co. from the email id hkmze@gmail.com wherein the details as mentioned at page No. 15 of the impugned order was retrieved. Based on this email, statements of Shri Bharat Patel, proprietor of M/s. Sahaj Metals were recorded which were inculpatory. It has been held based on email and statements of the appellants and the co-appellants that both the appellants (M/s. Dwarkesh Recycling and M/s. Shivanjali Corporation) smuggled cigarettes along with aluminum scrap and the consignments imported in past. Being aggrieved by the impugned orders, the appellants filed the present appeal.
2. Shri Hardik Modh, Learned counsel appeared for Shri Dharmendra Rathor & Ketan C. Gujjar and Shri Rahul Gajera, Learned counsel appeared for M/s. Sahaj Metals and Shri Bharat Patel. Shri Modh submits that the respondent erred in demanding duty and imposed penalties on the past consignments for the following reasons:-
- A) The entire demand has been confirmed based on the email message dated 15.08.2016 sent by HKM Trading Co. from the email id hkmze@gmail.com to bharatvasani@gmail.com wherein details regarding one to one co-relation of transaction by transaction provided by M/s. HKM in their email vis-à-vis Bills of

Entry filed in name of M/s. Sahaj Metals and M/s. Shivranjini Corporation. The email provides details of Bills of entry for the 6 consignments imported by M/s. Sahaj Metals and M/s. Shivranjini Corporation. It is to be mentioned that no such details were found in respect of past consignment imported by M/s. Dwarkesh Recycling through Bill of Entry No. 6920436 dated 30.09.2016. Weigh of Aluminum Scrap imported under each Bill of Entry exactly corresponds to the invoice weight mentioned by HKM in the email dated 15.08.2016. All other details found in the email were tallied with the details mentioned in the Bill of Entry. The said thereafter corroborated with the statement of the Appellant including Shri Bharat Patel.

- B) The entire demand has been confirmed based on assumption and presumption basis without any documentary evidences except the email dated 15.08.2016. The appellant imported un-shredded metal scraps. In terms of Circular No. 43/2001-Cus dated 06.08.2001 as amended from time to time, metal scraps imported in un-shredded should be accompanied by Pre-Shipment Inspection Certificate (PSIC). The said consignment is required to be examined by 25% in respect of manufacturer importers and 50% in respect of Traders. The selected container is required to be 100% examined. Relevant extracts for examination of the containers for metal scrap in un-shredded form is extracted herein below:

“11. Clearance of imported metal scrap:

11.1 In terms of the relevant provisions of the Foreign Trade Policy, the following procedure is prescribed for clearance of imported metal scrap.

(i) Import of any form of metallic waste, scrap will be subject to the condition that it will not contain hazardous, toxic waste, radioactive contaminated waste/scrap containing radioactive material, any type of arms, ammunition, mines, shells, live or used cartridge or any other explosive material in any form either used or otherwise.

(ii) ***

(iii) ***

(iv) ***

(v) In respect of metal scrap in unshredded, compressed or loose form accompanied by a pre-shipment inspection certificate, examination will be 25% of the containers in respect of

manufacturer-importers and 50% in respect of traders, for each import consignment, subject to examination of a minimum of one container. The container selected will be examined 100%. Where EDI with Risk Management Module (RMM) is operational, the percentage of examination will be determined by the RMM.

- (vi) Imported metal scrap in unshredded, compressed or loose form not accompanied by the prescribed pre-shipment inspection certificate will be subject to 100% examination apart from stringent penal action for violation of provision of FTP. The examination may be done in the presence of police authorities, if considered necessary by the Commissioner, at the risk and cost of the importer.

2.1 He further submits that the appellant imported consignments of aluminum scrap accompanied with Pre inspection certificate and the entire consignments were examined in respect of past imports in respect of Bill of entry No. 6920436 dated 30.09.2016 has been annexed to the appeal No. C/11723/2018 in the case of Shri Dharmendra N. Rathor. Similarly, the custom authority examined the goods in terms of the above circular in respect of past consignments imported by M/s. Shivranjini Corporation and issued examination orders which is annexed to the appeal filed by Shri Ketan C. Gujjar, Proprietor of M/s. Shivranjini Corporation. He submits that when the consignments were admittedly examined by the Custom Authority and did not find any mis-declaration of, action of respondent for demanding duties and imposition of penalties on the finding of smuggling of cigarettes in the guise of aluminum scrap cannot be sustained. He submits that in case of past consignments the appellant has followed the due procedure as prescribed by the law. Section 47 of the Customs Act prescribes procedure for clearance of goods for home consumption that once the goods are cleared under Section 47 there is a presumption in law that procedure under Section 47 has to be followed. Two following conditions are to be specified by the proper officer to pass the order permitting clearance of goods for home consumption:

- (i) That the goods should not be prohibited.
- (ii) If the importer has paid import duty assessed thereon;

3. In the present case, the respondent allowed clearance of goods for past imports for home consumption without any hindrance. It shows

that the procedure as required under Section 47 has been complied with. He submits that in the case of past consignment imported by M/s. Dwarkesh Recycling, there is a reference made in the email retrieved from email ID of Shri Bharat Patel and therefore, demanding duty and imposed penalty for the past consignment under Bill of Entry No. 6920436 dated 30.09.2016 cannot be sustained. In support of his submission he placed reliance on the judgment in the case of :

- (i) SYED IRFAN MOHAMMED vs. UNION OF INDIA- 2017 (349) ELT 462 (A.P.)
- (ii) C.N. SANGHVI vs. COMMISSIONER OF CUSTOMS- 2009 (237) ELT 190
- (iii) STELLA INDUSTRIES PVT. LTD. Vs COMMISSIONER OF CUSTOMS- 2017(357) ELT 1097

3.1 He further submits that the respondent relied upon email dated 15.8.2016 retrieved from the email ID of Shri Bharat Patel sent by M/s. HKM Trading Co. However, the email does not provide any information related to past consignment imported by M/s. Dwarkesh Recycling and therefore, demanding duty and imposing penalty for the past consignment is erroneous and illegal. It is his submission that computer prints outs taken from laptop and other electronic devices cannot be used as evidence without having certificate as required under section 138C(2) of the Customs Act read with section 65(B) of the Evidence Act, 1872. He submits that the investigating authority took print out from the email ID without following the due procedure of law as required to be followed under Section 138C(2). He submits that the appellant raised this issue at the time of adjudication but the respondent discarded the submissions in the terms that the email of M/s. HKM Trading Co. was retrieved from email ID of Shri Bharat Patel there is no need to get further evidence. He submits that there is no explanation of the procedure prescribed under section 138 C for retrieving any electronic data to use as evidence therefore, without following procedure laid down under section 138 C, the email cannot be used as evidence. In this regard he takes support from the judgment S.N. Agrotech Vs Commissioner of Customs-2018 361 ELT 761. He also submits that as regards the statements relied upon in the Adjudication Order in terms of Section 138 b of the Customs Act. It is an obligation upon the Adjudicating Authority to examine the witness before relying upon their statements. In the present case the respondent failed

to comply with the procedure as required to be followed under Section 138 B for relying upon the statements. Therefore, the statements recorded by the Investigating Authority has no evidentiary value. He relied upon the judgment G-TECH INDUSTRIES VS. UNION OF INDIA-2016 (339) ELT 209 (P&H).

3.2 He further submits that the documentary evidences prevail over the statements recorded under Section 108 of the Customs Act, 1962. In the present case, the Custom Authority examined the consignments and thereafter, allowed for clearances of the goods for home consumption. There is no evidence to show that there was mis-declaration on the part of the appellant for clearance of the goods. In the following cases it is held that documentary evidences prevailed over the statement recorded under Section 108 of the Customs Act

(i) PHILIP FERNANDES vs C.C. 2002 (146) ELT 180 (T);

(ii) R.P. INDUSTRIES vs. C.C.- 1996 (82) ELT 129 (Tri.);

(iii) AEROSTAR HELMETS LTD. vs. C.C.Ex 2017 (346) ELT 120 (T);

(iv) CLASSIC STRIPS LTD. vs. C.C.Ex 2016 (339) ELT 144 (T)

4. As regard the demand in respect of consignment which was absolutely confiscated he submits that 13,68,000 sticks of "Gudang Garam" branded cigarettes which were concealed to the aluminum scrap. The appellant submits that they placed an order for supply of Metal Scrap, the appellant is in the business of trading of scrap. Since the appellant filed bill of entry based on the order placed by them, mis-declaration on the part of the appellant cannot be sustained. He also submits that respondent imposed disproportionate amount of penalty and redemption fine upon the appellant. The appellant never ordered for supply of cigarettes, since the supplier supplied cigarettes along with aluminum scrap the appellant should not be punished with huge amount of penalty in a case where the appellant never placed order for supply of cigarettes nor interested to clear the goods. The appellant was also penalized for confiscation of aluminum scrap for no fault of the appellant.

5. On behalf of M/s. Sahaj Metals and Shri Bharat Kumar Patel, the learned counsel Shri Rahul Gajera submits that he adopted the submission made by Shri hardik modh learned counsel. He further submits that in respect of the past consignment only email print out was relied upon. The email print outs are not admissible in evidence, for the reasons that firstly, there were no witness before whom email

attachments has been retrieved. The said attachment was not withdrawn under panchnama proceedings. Further the statement dated 12.12.2016 of Mr. Bharat Patel does not name the person who retrieved the print of the email message or the manner in which such attachment was retrieved/printed. Secondly, such print out is not made part of the statement dated 12.12.2016 in which retrieval of the said email message is recorded. He submits that as per sub-section 4 of section 138 C for taking print out of electronic data a certificate is must. Since under statement, print of email message was not attached there is a violation of Section 138 C of the Act/ 65 b of the Evidence Act. This has been interpreted by the Hon'ble Supreme Court in the case of Anwar PV vs. VK Basheer, 2017 352 ELT 416 (SC) in a manner that such statement (email print out) must accompany the certificate referred in sub-section 4 of section 138 C. He further submits that the statement by which the retrieval of email message as recorded has been retracted by Mr. Bharat Patel and in any event the incriminating statements of the deponents cannot be relied upon in as much as the said deponents have not been examined/ cross examined in terms of Section 138 B of the Act. He also submits that there is no evidence of smuggling of cigarettes in the past consignments. As the past consignments were examined by the officer and no cigarettes were found. There is no allegation in notice that proper officer of customs wrongly allowed clearance of goods in respect of such past consignments. Therefore, there is no evidence that in the past consignment the appellant have smuggled the cigarettes. As regard the penalty imposed on Shri Bharat Patel it is his submission that since the duty demand in the impugned order itself is not sustainable. Consequently, imposition of penalty on Shri Bharat Patel is also not sustainable. He submits that in any event Shri Bharat Patel has not been held as importer in the impugned order entire duty demand has been confirmed against M/s. Dwarkesh Recycling & M/s. Shivanjali Corporation. In that view imposition of penalty upon appellant in absence of any reliable evidence to show that appellant has aided and abated importers of the goods in smuggling cigarettes is not sustainable. Without prejudice he further submits that in any event even if, it is held that Shri Bharat is liable for penalty in respect of allowed consignment of M/s. Dwarkesh Recycling penalty upon Shri Bharat Patel could have been restricted to that extent only.

5.1 He further submits that the Adjudicating Authority contended that Shri Bharat Patel is the master mind for the entire smuggling of cigarettes on the basis of statement recorded under section 108. He submits that

the statement is not admissible as no examination was done under Section 138B of the Customs Act. Moreover, except statement no documentary evidence was found to show that Shri Bharat Patel was involved as a master mind therefore, a penalty on Shri Bharat Patel is not sustainable. As regard penalty imposed under Section 117 of the Customs Act for not honouring the summons, the appellant made a submission in the appeal that for the charge of non compliance with the summons issued under Section 108 of the Customs Act a criminal complaint was filed in the ACMM Court under Section 174 of the Indian Penal Code. The appellant thereafter immediately appeared before the authority after that he was arrested under the provisions of section 104 of the Customs Act. In this background for non-honouring of the summons the appellants have already been penalized therefore for the same offence penalty under Customs Act is illegal and incorrect.

6. On the other hand, Shri Vinod Lukose, Learned Superintendent (Authorized Representative) appearing on behalf of revenue submits that as regard the submission of the appellant on admissibility of email as evidence in a combined reading of section 65B and section 2(t) of the Information Technology Act, 2000 it becomes evident that since electronic email was not stored in the computer and as the said computer in the DRI Office only acted as an intermediary which was used for retrieval of electronic mail. The conditions stipulated in Section 65 B(2), would not be attracted. He placed reliance on the judgment of Hon'ble Supreme Court in the case of SHAFI MOHAMMAD vs THE STATE OF HIMACHAL PRADESH (SLP Criminal No. 2302 of 2017). He further submits that electronic mail are stored on the servers of Google/In Cloud and the DRI Officer has recorded the statement who was not in possession of the said server. The requirement to produce the certificate cannot be insisted upon. Accordingly, the electronic mail relied has the evidence for establishing smuggling in respect of past consignment and it is admissible evidence. He also reiterates the finding of the impugned order.

7. We have carefully considered the submissions made by both the sides and perused the records. In the present case, the issue to be decided is that whether in the live consignment the cigarettes concealed with aluminum scrap imported by the appellant was rightly confiscated absolutely and whether the appellant have smuggled cigarettes by concealing in the consignment of aluminum scrap in the case of past consignment or otherwise. As regard past consignments the respondent has heavily relied upon on email retrieved from email ID of Shri Bharat

Patel which was sent by M/s. HKM Trading Co. As regard the past consignment it is observed that all the consignments have been physically examined by the customs officers. One copy each of examination order in respect of the three appellants are scanned below:

Indian Customs EDI System - Imports V1.5R001
ICD SABARMATI KALIGAM SABARMATI AHMEDABAD 382470

A-1

Examination Order Dated:30/04/2016

BE No 5088799, BE dt 29/04/2016, CC N, Type H

Importer : SAHAJ METALS

IEC [0813001803] CHA [ABOFS1766LCH005]

Appraising Group : 4

Officer : Mahesh Ambalal Patel

Examination order :

PLEASE INSPECT IN THE PRESENCE AND SUPERVISION OF SHED AC/DC AND AS PER THE PROCESS PRESCRIBED IN THE CBEC CIRCULAR NO. 56/2004-CUS DTD. 18.10.2004 ISSUED FROM F.NO. 450/108/2004-CUS-IV . PLEASE CHECK AND VERIFY THE DESCRIPTION, QUANTITY, WEIGHT AND ISRI GRADE WITH REFERENCE TO INVOICE, PACKING LIST, PSIC, BILL OF LADING AND DECLARATION IN BILL OF ENTRY.

PLEASE VERIFY AND ENSURE THAT NO SHELL/CARTRIDGE / ARMS AND AMMUNITION OR ANY SERVICABLE ARTICLES CONTAIN IN THE CARGO AND GOODS ARE ONLY METAL SCRAPNE OF DECLARED GRADE FOR RE-MELTING PURPOSE.
By 10010371 on 29/04/2016 at 05:13P.M.

IEC CCR Examination Instructions :

Compulsary Compliance Requirements : 1

Mandatory Compliance Requirements Examination Instructions (CTH) - 76020010
** FOR PRESCRIBED ALUMINIUM & ALUMINIUM ALLOY & MIXED NON-FERROUS METAL, HEAVY FRACTION SCRAP (BASEL NO. B1010 & B1050 OF PART D OF SCHEDULE III) EXCEPT PROHIBITED WASTES OF SCHEDULE II, VFY PSIC WITH RANDOM INSPN OR TEST REPORT, MOEF PERMISSION, MOVEMENT DOCUMENT IN FORM 9 & TEST REPORT OF ANALYSIS FROM ACCREDITED LAB OF EXPORTING COUNTRY, DRAW 3 SAMPLES FOR TEST & RETAIN REPORT FOR 2 YRS. ENSURE RE-EXPORT OF ILLEGAL HAZARDOUS WASTE AT IMPORTERS COST WITHIN 90 DAYS * CHECK VALUATION *ENSURE PORT RESTRICTION FOR UNSHREDDED/LOSS SCRAP*ON BOOKING A CASE BASED ON CCR INSTRUCTIONS, INFORM AT RMD.CCR@ICEGATE.GOV.IN [AUTHORITY]:-HAZARDOUS WASTES RULES 2008 * PARA 2.32 OF HBP * WW W.DOV.GOV.IN, CUS VALUATION BULLETIN" #Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -012/2012 338 VFY GOODS ARE ALUMINIUM SCRAP.

Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -021/2012 79B VFY GOODS ARE ALUMINIUM SCRAP

AC Remarks : Name: Braj Lal Meena

A-4

Indian Customs EDI System - Imports V1.5R001
ICD SABARMATI KALIGAM SABARMATI AHMEDABAD 382470

Examination Order

Dated:23/05/2016

BE No 5347018, BE dt 21/05/2016, CC N, Type H

Importer : SHIVANJALI CORPORATION

IEC [2416902164]

CHA [ABOFS1766LCH005]

Appraising Group : 4

Officer : Mahesh Ambalal Patel

Examination order :

PLEASE INSPECT IN THE PRESENCE AND SUPERVISION OF SHED AC/DC AND AS PER THE PROCESS PRESCRIBED IN THE CBEC CIRCULAR NO. 56/2004-CUS DTD. 18A.10.2004 ISSUED FROM F.NO. 450/108/2004-CUS-IV . PLEASE CHECK AND VERIFY THE DESCRIPTION, QUANTITY, WEIGHT AND ISANRI GRADE WITH REFERENCE TO INVOICE, PACKING LIST, PSIC, BILL OF LADING AND DECLARATION IN BILL OF ENTRY.

PLEASE VERIFY AND ENSURE THAT NO SHELL/CARTRIDGE / ARMS AND AMMUNITION OR ANY SERVICABLE ARTICLES CONTAIN IN THE CARGO AND GOODS ARE ONLY METAL SCRAP OF DECLARED GRADE FOR RE-MELTING PURPOSE.

By 10010371 on 23/05/2016 at 02:55P.M.

IEC CCR Examination Instructions :

Compulsary Compliance Requirements : 1

Mandatory Compliance Requirements Examination Instructions (CIH) - 76020010
** FOR PRESCRIBED ALUMINIUM & ALUMINIUM ALLOY & MIXED NON-FERROUS METAL, HEAVY FRACTION SCRAP (BASEL NO. B1010 & B1050 OF PART D OF SCHEDULE III) EXCEPT PROHIBITED WASTES OF SCHEDULE II, VFY PSIC WITH RANDOM INSPN OR TEST REPORT, MOEF PERMISSION, MOVEMENT DOCUMENT IN FORM 9 & TEST REPORT OF ANALYSIS FROM ACCREDITED LAB OF EXPORTING COUNTRY, DRAW 3 SAMPLES FOR TEST & RETAIN REPORT FOR 2 YRS. ENSURE RE-EXPORT OF ILLEGAL HAZARDOUS WASTE AT IMPORTERS COST WITHIN 90 DAYS * CHECK VALUATION *ENSURE PORT RESTRICTION FOR UNSHREDDED/LOOSE SCRAP*ON BOOKING A CASE BASED ON CCR INSTRUCTIONS, INFORM AT RMD.CCR@ICEGATE.GOV.IN [AUTHORITY]:-HAZARDOUS WASTES RULES 2008 * PARA 2.32 OF HBP * WW W.DOV.GOV.IN, CUS VALUATION BULLETIN *Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -012/2012 338 VFY GOODS ARE ALUMINIUM SCRAP.

Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -021/2012 79B VFY GOODS ARE ALUMINIUM SCRAP

AC Remarks

Name:Ratan Chakravorty

A-10

BE No 6920436, BE dt 30/09/2016, CC N, Type H

Importer : DWARKESH RECYCLING

IEC [0816913455]

CHA [ABOFS1766LCH005]

Appraising Group : 4

Officer : Ram Chander Dadlani

Examination order :

PLEASE INSPECT IN THE PRESENCE AND SUPERVISION OF SHED AC/DC AND AS PER THE PROCESS PRESCRIBED UN THE CBEC CIRCULAR NO. 56/2004 -CUS DATED 18.10.2004 IS SUEDED FROM F.NO. 450/108/2004-CUS-IV.

PLEASE CHECK AND VERIFY THE DESCRIPTION, QUANTITY, WEIGHT AND ISRI GRADE WITH REFERENCE TO INVOICE, PACKING LIST, PSIC, BILL OF LADING AND DECLARATION IN BILL OF ENTRY.

PLEASE VERIFY AND ENSURE THAT NO SHELL/CARTIDGE/ARMS AND AMMUNITION OR ANY SERVICEABLE ARTICLES CONTAINED IN THE CARGO AND GOODS ARE ONLY METAL SCRAP OF DECLARED GRADE FOR RE-MELTING PURPOSE.
By 10007375 on 30/09/2016 at 05:45P.M.

IEC CCR Examination Instructions :

Compulsary Compliance Requirements : 1

Mandatory Compliance Requirements Examination Instructions (CTH) - 76020010
** FOR PRESCRIBED ALUMINIUM & ALUMINIUM ALLOY & MIXED NON-FERROUS METAL, HEAVY FRACTION SCRAP (BASEL NO. B1010 & B1050 OF PART D OF SCHEDULE III) EXCEPT PROHIBITED WASTES OF SCHEDULE II, VFY PSIC WITH RANDOM INSPN OR TEST REPORT, MOEF PERMISSION, MOVEMENT DOCUMENT IN FORM 9 & TEST REPORT OF ANALYSIS FROM ACCREDITED LAB OF EXPORTING COUNTRY, DRAW 3 SAMPLES FOR TEST & RETAIN REPORT FOR 2 YRS. ENSURE RE-EXPORT OF ILLEGAL HAZARDOUS WASTE AT IMPORTERS COST WITHIN 90 DAYS -CHECK-VALUATION-ENSURE PORT RESTRICTION FOR UNSHREDDED/LOSS SCRAP-ON BOOKING A CASE BASED ON CCR INSTRUCTIONS, INFORM AT RMD.CCR@ICEGATE.GOV.IN [AUTHORITY]:-HAZARDOUS AND OTHER WASTES (MANAGEMENT AND TRANSBOUNDARY MOVEMENT) RULES, 2016* PARA 2.32 OF HBP * WWW.DOV.GOV.IN, CUS VALUATION BULLETIN*NTF NO. 14/15-20 DTD 14.07.16.* #Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -012/2012 338 VFY GOODS ARE ALUMINIUM SCRAP.

Mandatory Compliance Requirements Examination Instructions (FOR NOTIFICATION) -021/2012 79B VFY GOODS ARE ALUMINIUM SCRAP.

AC Remarks Name: Braj Lal Meena

Inspector Report

CS Scanned with CamScanner

7.1 From the perusal of the above examination order and also in the examination order in other consignments we find that in respect of all the consignments physical examination of the container was carried out and no discrepancy was found therefore, as per the physical examination of imported aluminum scrap there is no evidence that the cigarettes were concealed under the imported aluminum scrap. The revenue's sole reliance is on email retrieved from the email ID of Shri Bharat Patel. However, even if it is accepted that email was sent to Shri Bharat Patel

but on the face of the examination order it is clear that cigarettes were not supplied along with the aluminum scrap in the past consignment.

7.2 We find that as regard import of Metal Scrap a circular No. 43/2001-Cus dated 06.08.2001 as amended from time to time was issued. In terms of such circular Metal Scraps imported in unshredded should be accompanied by pre shipment inspection certificate. The said consignment is required to be examined by 25% in respect of manufacturer importers and 50% in respect of traders. Further as per the Foreign Trade Policy the import of any form of Metal waste, Scrap will be subject to the condition that it will not contain hazardous/toxic waste, Radioactive contaminated Waste/Scrap containing radioactive material, any type of Arms, ammunition, Mines, Shells, live or used cartridges or any other explosive material in any form either used or otherwise. In compliance of the above provision, the custom officer has examined the goods as evident from the above referred examination order and during examination the officers did not find the cigarette concealed under the said scrap. After examination the goods for past imports were allowed clearances for home consumption without any hindrances. This shows that the procedure as required under Section 47 which is mandatory has been complied with.

8. In view of the examination of the goods, it is important to note that examining officers have not been questioned about the manner of examination of the past consignment. If this be so, the examination report cannot be discarded. If at all there is any lapse on the examination officer, some action should have been taken by the department. In this fact in one hand department accepted the examination of goods and on the other hand solely relying on an email held that appellants have smuggled cigarettes concealing under Aluminum scrap in past consignment, which cannot be accepted

9. The respondent also heavily relied upon the statements given by various persons related to importer firms, we find that the statements were not examined in terms of provision of Section 138B of the Customs Act. It is incumbent on the Adjudicating Authority for use the statement as evidence, it is necessary to examine/cross-examine the witnesses before relying upon their statements which the Adjudicating Authority has failed to do so. This issue has come up time and again in numerous cases. In the case of G-TECH INDUSTRIES (supra) the Hon'ble Punjab & Haryana High Court held as under:

“16. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

18. It is only, therefore,-

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.”

10. In view of the above judgment it was necessary on the part of the Adjudicating Authority to conduct the examination/cross examination of witnesses for relying upon their statements. Moreover, in the present case as discussed above since the goods were physically examined and Custom officer did not find the cigarettes concealed with the consignment of aluminum scrap. Hence the statements given by the witnesses found to be incorrect. In these circumstances, the documentary evidences i.e. Examination Order will be the prevailing evidence over the statements recorded under Section 108 of the Customs Act. Therefore, as per the facts of the present case, the statements have no evidentiary value therefore, on that basis it cannot be concluded that the appellants have smuggled cigarettes concealed under the past consignment of aluminum scrap. It is further noticed that as regard the past import by M/s. Dwarkesh Recycling there is no reference made in the email retrieved from email ID of Shri Bharat Patel. Therefore, in any case in respect of past import made by M/s. Dwarkesh Recycling it cannot be disputed particularly on the basis of email.

11. The appellant submitted that on the issue that the documentary evidence prevail over the oral evidence, various judgments were passed.

In the case of PHILIP FERNANDES vs COMMISSIONER OF CUSTOMS, AIRPORT, MUMBAI- 2002 (146) ELT 180 (Tri. Mumbai) it was held as under :-

"12.*The Revenue urges us to discard the bank statement produced by Shri Philip Fernandes as proof of substantial withdrawals and the certificate of the money changer on the ground that the same were not forwarded with the covering letter confirming the contents thereof and further for the reason that the same were not received in response to the department's letter. These two reasons are no ground for us to doubt the veracity and authenticity of the moneychanger's certificate, all the more when the adjudicating authority caused enquiries to be made and has accepted the certificates only after satisfying himself on verification. We also note that Philip Fernandes had retracted his statement on 16-3-1998 itself i.e., immediately after his statement was recorded under Section 108 of the Customs Act, 1962 on 15-3-1998 and that he had written a letter to the department on 24-4-1998 explaining that he was a man of means being an engineer with the National Drilling Company, Abu Dhabi since 1980 and drawing a salary of more than Rs. 1.50 lakh per month; that he had lend 8 lakhs UAE Dirhams to one Mr. Jimmy Johnson for purchase of water well drilling rig from USA; that Mr. Johnson returned 8,30,000/- Dirhams (capital with interest); that he used a sum of 7,17,202/- Dirhams to buy assorted foreign currency from Thomas Cook and that he brought foreign currencies to India on 11-2-1998 in order to make payment of Rs. 74,65,000/- to purchase ground floor and basement of a commercial complex at Mumbai as his wife had entered into an agreement on 6-2-1998 with Laxmi Builders and Developers for purchase of the said premises; that the builder subsequently cancelled the agreement and therefore he was to take the money back to Dubai and he was in fact taking it back on 15-3-1998 when it was seized. Shri Philip Fernandes has produced before the Commissioner a certificate dated 30-6-1995 from National Drilling Company, Abu Dhabi showing his employment with the Company for over 15 years, copies of bank's statements showing substantial withdrawals, the foreign exchange receipt and certificates issued by the moneychanger; copy of agreement for purchase of the commercial premises and correspondence between the builder and Mrs. Fernandes showing cancellation of the agreement as enclosures to the letter dated 29-4-1998. Although the Revenue disputes receipt of this letter on 27-4-1998 which Shri Fernandes claims was the date of its receipt we find from the original shown to us shows the date of receipt as 27-4-1998. Further copy of this letter was sent to the department again in July, 1998 and on 21-8-1998 prior to the issue of the show cause notice in September, 1998. No arguments are put forth by the learned DR to dislodge the findings of the Commissioner on the basis of the above documentary evidence. The plea of the learned DR is based upon the detailed statement of Shri Philip Fernandes and statements of Shri Nilesh Popat and Shri Praveenbhai Kheni. We find that in addition to the retraction of Shri Philip Fernandes on 16-3-1998, there is one more reason to doubt the inculpatory statement of Shri Fernandes and that the statement of Shri Nilesh Popat which was recorded on 16-3-1998 is stated to have been shown to Shri Philip Fernandes at the time of recording his initial statement on 15-3-1998, which is an*

impossibility. It is in the statement of Shri Nilesh Popat that Shri Pravinbhai Kheni comes into picture. Shri Popat has retracted his statement on 3-5-1998 where he has specifically mentioned about Shri Fernandes's claim of licit acquisition of the foreign currencies seized from him on 15-3-1998. In the present case documentary evidence in the form of certificate of Thomas Cook Al Rostamani, Dubai certifying purchase of foreign currencies in Dubai by Shri Fernandes runs contrary to the oral evidence in the form of statements of Shri Fernandes, Shri Nilesh Popat and Shri Praveenbhai Kheni. It is well settled that when the statements recorded under the provisions of Section 108 of the Customs Act, 1962, (which are retracted), are inconsistent with the documentary evidence, the documentary evidence is to be preferred. This is the view expressed by the Tribunal in the case of *R.P. Industries v. Collector of Customs - 1996 (82) E.L.T. 129*. Although in that case the documentary evidence was seized during the search that would not alter the position in this case since the documentary evidence in the form of moneychanger's certificate submitted to the department before the issue of the show cause notice has been verified and found to be genuine and correct. The same view has been taken in final Order Nos. CI/2874 & 2875/WZB/2001, dated 19-9-2001 [*2002 (140) E.L.T. 225 (T)*] in the case of *Kishin Shewaram Loungani & Another v. CC, Mumbai*."

In case of R.P. INDUSTRIES vs COLLECTOR OF CUSTOMS, AHMEDABAD-1996 (82) ELT 129 (Tri.) it was held as under:-

11. Considering the submissions made, and going through the documents made available, M/s. R.P. Industries have been granted Import licence No. P/S/1894102, dated 6-12-1984 to import raw material components/consumables for manufacture of their end product Draw Texturising Machinery. Five Bills of Entries alongwith the respective invoices produced show that under each of them, certain items, duly identified by their specific names, many of them in 10 numbers, have been imported. That these items are the components for Draw Texturising machines is not doubted. No evidence is led by the department to show that these items by themselves, could on assembly, bring into existence ten complete Draw Texturising Machines. Textile Machinery Experts does not appear to have been consulted for his expert opinion. On the other hand, R.P. Industries have produced two invoices dated 10-2-1986 and 12-2-1986, of Lunia Exports (P) Ltd. and one invoice dated 24-10-1985, from SMG Associates (P) Ltd. to show local purchases of some items which also go for manufacture of Draw Texturising Machines. All these local purchases of components are either after or during the period, when subject items were being imported. The transport receipts issued by M/s. Suresh Transport Co., for transport of material purchased from Lumia Export (P) Ltd. to M/s. R.P. Industries at Daman Industrial Estate near Vapi are also produced. Significantly all these documents are recovered from the office of M/s. R.P. Industries, when search was carried out and they form part of the documents referred to in the show cause notice. Subsequent fabrication of these documents therefore cannot be suspected. The investigation does not seem to have been extended upto those suppliers so as to delink them from the subject import or from the seized machines. The documentary evidence, thus provides a positive indication to probabalise the stand taken by the appellants. Though this positively goes contrary to what has been stated by Mr. R.P. Mehta, and Mr. M.M. Manglic but when a glaring evidence in the form of documents, the genuineness of which is difficult to be doubted, as they appear to

have been existing since before the investigations commenced and investigations do not appear to have been directed towards further verification, such documentary evidence has to be preferred for acceptance as against some oral version given before the officers investigating. The statements have been recorded vide Section 108 of the Customs Act, 1962 and such statements would under ordinary circumstance, deserve credibility for the purpose of drawing a conclusion. Here however they are inconsistent with the documentary evidence, leading to raise a doubt as to their admissibility and in any case, with the factual position as brought out on record, the allegation of the appellant M/s. R.P. Industries having imported complete machines in the form of components, cannot be held as duly established and order of confiscation of the machines under Section 111(d) of the Act does not appear justified. That part of the order-in-original is therefore, held as not sustainable and is set aside.

11.1 In view of the above judgments it is a settled law that documentary evidence must prevail over the oral evidence i.e. statement recorded under section 108. In the present case the undisputed documentary evidences are the examination order in respect of past consignments therefore, the examination orders should be given preference over the overall statements.

12. The identical issue has been considered by the Hon'ble Andhra Pradesh High Court in the case of SYED IRFAN MOHAMMED vs UNION OF INDIA (supra) wherein on the basis of the live consignment in respect of past consignment also demand of duty and penalty was made. In the live consignment. Custom Authority found cigarettes and on the basis of the *Modus-Operandi* in respect of live consignment the demands were raised on the premise that similar *Modus-operandi* was adopted in the past consignment. The Hon'ble High Court held that when the goods were examined by the Custom officer and did not find any mis-declaration it cannot be held that what was found in the live container was carried out in the past container specifically when all the statutory formalities were carried and goods were cleared for home consumption. The relevant paras of the order passed by the Hon'ble High Court reproduced below:

"17. No one can find out as to what was smuggled in a container, once a container is cleared after all the statutory formalities are carried out and the cargo disappears into the market. At least if the clearance of goods, in the past containers had taken place without following any of the procedures, there could be some logic to contend that the smuggled goods escaped the clutches of law. But today there are no allegations that the procedure prescribed by law was not followed while clearing the past containers.

18. Even as per the Orders-in-Original, the goods in the past containers were cleared under Section 47, after carrying out examination of random cargo. The 2nd respondent has extracted in Paragraph 135 of the impugned order, the

examination order and the examination report. Paragraph 135 reads as follows :

“.....I have perused the examination orders and examination reports relating to the past containers. The examination order in general is as under.

Open and inspect 5% of cargo or more packgs. Verify desc wrt org import documents/bank attested documents verify the brand verify RSP declaration’

The examination report in general is as under

“opened and inspected selected pkgs. Verified desc wrt org import documents and found in order, verified the brand ‘good baby’ verified rsp declaration dated 7-1-2014 placed in file.....”

20. *But the conclusion drawn by the 2nd respondent, which we have extracted above, is in the realm of speculation. The same cannot be permitted in view of the fact that different officers had examined the past containers at different points of time. Therefore, the theory of conspiracy floated by the 2nd respondent, unless it takes into account the role played by the examining officers of the department also, cannot hold water.*

21. *It is seen from Paragraphs 136 to 138 of the Orders-in-Original that the 2nd respondent has come to the conclusion that the past containers should have also contained cigarettes, solely on the basis of the statements of the person who transported material. Though none of the witnesses stated that they transported cigarettes, the 2nd respondent has drawn an inference on the ground that if those containers contained only Baby Diapers, there was no need to transport those goods to safe places and that there was no need to engage a 3rd person to get the goods cleared. These presumptions are also completely unknown to law.”*

12.1. In view of the undisputed fact in respect of past consignment that the goods were physically examined and allowed for clearance for home consumption and also by taking support of the Hon’ble Andhra Pradesh High Court judgment, we are of the view that merely on the basis of an email it cannot be presumed that in the past consignments also the appellants have smuggled cigarettes concealing under the consignment of aluminum scrap. Therefore, we set aside the demand of duty and penalties in respect of past consignment.

12.2. As regard the live consignment which was confiscated we find that the appellant have pleaded that they have declared the goods as per the documents of the supplier therefore, the allegation of mis-declaration by the appellant is not correct. We find that there is no dispute that the cigarettes were found concealed under the consignment of aluminum scrap therefore, the goods are liable for confiscation. For the purpose of confiscation of goods *mens rea* is not required. There is clearly a mis-declaration as per the physical examination of the goods, therefore, we agree with the Adjudicating Authority that the cigarettes concealed with aluminum scrap were rightly confiscated absolutely. The appellant also argued that the amount of penalty and redemption fine were imposed disproportionately on the fact that the appellant had not ordered for

supply of cigarettes and therefore they were not interested to clear the said cigarettes. The penalty was also imposed towards confiscation of aluminum scrap for which there was no fault of the appellant as there was no mis-declaration. As regard the aluminum scrap the import documents are also for import of aluminum scrap therefore, penalty with respect to aluminum scrap should not have been imposed. We find some force in this argument of the appellant. Accordingly, the appellants deserve for some reduction in redemption fine and penalty.

13. Shri Bharat Patel in his appeal submits that in view of the examination order case of department in respect of past consignment does not sustain and in live consignment of M/s. Dwarkesh Recycling there is no any mention in the email. It is the submission that except email there is no documentary evidence to show that Shri Bharat Patel was a master mind in the entire smuggling of cigarettes. We find that we have already taken and decided that the demand of duty and penalties in respect of past consignments are not sustainable as a result the email stand discarded. It is also found that the live consignment of M/s. Dwarkesh Recycling has no link with Shri Bharat Patel therefore, penalty imposed on Shri Bharat Patel is not sustainable hence the same is set aside. The Adjudicating Authority also imposed penalty of Rs. 1 Lac each upon Shri Dharmendra N Rathore, Proprietor of M/s. Dwarkesh Recycling and Shri Ketan C. Gujjar, Proprietor of M/s. Shivanjali Corporation under the provisions of Section 117 of the act. We find that firstly, for non honouring the summons, the appellants were already penalized under IPC in the ACMM Court. Secondly, both these persons are proprietor of M/s. Dwarkesh Recycling and M/s. Shivanjali Corporation. The cases were made out against the Proprietorship concerned wherein demand and penalties were proposed in such case a separate penalty cannot be imposed on the Proprietor of proprietorship concerns. On this observation the penalties of Rs. 1 Lac. each imposed under Section 117 upon Shri Dharmendra N. Rathore and Shri Ketan C. Gujjar is set aside.

14. It is pertinent to note that in respect of past consignments we have decided the matter on the basis of examination order and invoking section 138B. Therefore, we are not inclined to deal with the issue heavily raised by the appellant on section 138C that whether the Investigating officers have followed the proper procedure for retrieving the email from the computer hence, this issue is kept open.

15. The respondent also imposed penalty under Section 114AA upon M/s. Dwarkesh Recycling, M/s. Shivanjali Corporation (Ketan C Gujjar) and Bharat Kumar Patel, we find that the penalty under Section 114AA was imposed upon M/s. Shivanjali Corporation and Shri Bharat Patel is relating to past consignments and as we held that in the past consignment there is no case of smuggling of cigarettes, the penalty under Section 114 AA will not sustain. In case of M/s. Dwarkesh Recycling also the penalty under section 114AA was imposed. Keeping in view the smuggling of cigarettes in the past as well as live consignment since the demand of past consignment was set aside and in the live consignment the penalty was imposed under section 114A as well as Section 112a(i) there should not be further penalty under Section 114AA.

16. As per our above finding, we pass following orders:-

1) Appeal No. C/11723/2018 filed by Shri Dharmendra N Rathor

(i) Absolute Confiscation of 13,68,000 sticks of "Gudang Garam" brand cigarettes is upheld.

(ii) Confiscation of 28340 Kgs of Aluminum Scrap valued Rs. 50,91,208/- is upheld, however redemption fine is reduced from Rs.20 Lacs to Rs. 5 Lacs

(iii)Penalty under Section 112a(i) relating to absolute confiscation of 13,68,000 cigarettes is reduced from Rs. 25 Lacs to Rs. 10 Lacs.

(iv) Penalty of Rs. 10,000/- imposed under Section 112(a)(ii) is set aside.

(v)Demand of custom duty of Rs. 8,06,640/- ,interest and equal penalty of Rs.8,06,640/- is set aside

(vi)Penalty of Rs. 25 Lacs imposed under Section 114AA is set aside.

(vii)Appeal is partly allowed in the above terms with consequential relief, if any arise, in accordance with law.

(2) Appeal Nos. C/11724/2018 (Ketan C. Gujjar), C/12355/2018 (Shri Bharat Patel) and C/12447/2018 (Sahaj Metal) are allowed with consequential relief.

(Dictated & Pronounced in the open court on 12.6.2020)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Mehul